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SUMMARY

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Judicial Review and the National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA) is one of the most frequently litigated federal environmental statutes. NEPA is also one of the most broadly applicable federal environmental statutes, with over 100,000 actions taken by the federal government each year subject to NEPA. Enacted in 1969, NEPA generally requires federal agencies to integrate environmental considerations into their decisionmaking processes. Under NEPA, agencies evaluate the significance of environmental effects of major federal actions that are discretionary in nature. Actions subject to NEPA include federal permits and licenses.

Federal courts have long allowed plaintiffs to challenge an agency's compliance with NEPA under the Administrative Procedure Act (APA). NEPA claims are commonly reviewed under the APA's arbitrary-and-capricious standard based on allegations that the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Some of the more frequently litigated issues include allegations that an agency failed to prepare NEPA documentation, mischaracterized the significance of an action's environmental impact, and failed to adequately consider relevant information or comments about a proposed action. If an agency's NEPA review is challenged under the arbitrary-and-capricious standard under the APA, courts generally review the agency's administrative record and determine whether the agency was unreasonable or unsupported in its analysis or otherwise violated the law. While most NEPA-related litigation falls under the APA, NEPA itself allows a project sponsor to seek judicial review of an agency's alleged failure to comply with statutory deadlines for completing NEPA documentation. Other environmental statutes may include judicial review provisions that broadly allow a court to review agency actions, including NEPA-related decisions.

A court typically has broad latitude to order a spectrum of remedies when it finds an agency violated the law with respect to NEPA. Courts typically tailor any relief ordered to fact-specific circumstances particular to the case in question. In cases involving NEPA, such relief may include declaring an agency action unlawful, remanding the disputed action to the agency, vacating (i.e., nullifying) all or part of an agency decision, and issuing an injunction. While courts can typically choose which remedy to issue, courts have recognized that vacatur is the "ordinary" remedy for an APA violation. For example, courts typically vacate an action if an agency fails to conduct a NEPA review prior to acting, or violates a procedural obligation that casts "serious doubt" over an agency's decision. In other instances, courts may remand a NEPA matter without vacatur. Injunctions are a less common remedy for NEPA violations and must satisfy criteria—including the significance of harm, balance of equities, and the public interest—in the event a judge were to consider granting injunctive relief.

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Introduction

The National Environmental Policy Act (NEPA), enacted in 1969, generally requires federal agencies to integrate environmental considerations into their decisionmaking processes.[1] NEPA directs agencies to use interdisciplinary approaches in considering environmental effects and, for specified actions, requires a "detailed statement" about an action's significant effects on the human environment.[2] Agencies must take a "hard look" at a covered action, consider alternative options, and issue a detailed description of effects (environmental impact statement or EIS) when a "reasonably foreseeable" impact may significantly affect the quality of the human environment.[3] Because this requirement applies to a wide range of federal actions—including both the government's own activities and its decisions to allow or to fund other parties' activities—NEPA plays a significant role in the administration of many federal programs.[4]

Over the past five decades, the federal courts have been instrumental in guiding agency compliance with NEPA. The courts review NEPA-related claims amid an evolving statutory and regulatory landscape. The statute historically operated at more of a framework level and has seen considerable engagement from all branches of government in recent years. Congress amended the statute in 2023 and 2025.[5] During that same time period, federal courts issued a number of prominent opinions on NEPA, including the first Supreme Court case in two decades to address the scope of NEPA reviews.[6] In 2025, the Council on Environmental Quality (CEQ)—tasked by Congress with oversight of NEPA's implementation—rescinded implementing regulations governing how agencies implement NEPA, deferring to individual agencies on how to implement NEPA.[7] To date, federal agencies have responded in varying degrees with updates to their approaches to NEPA implementation.[8] Agencies' changes to NEPA procedures are themselves

[1] Pub. L. No. 91–161, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347). For a general overview of NEPA, see CRS In Focus IF11549, *The Legal Framework of the National Environmental Policy Act* (2021).

[2] 42 U.S.C. § 4332.

[3] *Id.*; *id.* §§ 4336(b)(1), 4336e(6).

[4] *See id.* § 4336e(10) (defining *major Federal action* as one that an agency determines is "subject to substantial Federal control and responsibility," subject to certain exclusions).

[5] Pub. L. No. 118–5, 137 Stat. 38 (2023); Pub. L. No. 119–21, 139 Stat. 157 (2025).

[6] In November 2024, the U.S. Court of Appeals for the D.C. Circuit declared that President Carter's 1977 executive order mandating the Council on Environmental Quality (CEQ) to issue regulations binding on all federal agencies exceeded the President's statutory authority. Marin Audubon Soc'y v. Fed. Aviation Admin., 121 F.4th 902 (D.C. Cir. 2024). However, a subsequent majority concurring en banc declined to extend that reasoning, Marin Audubon Soc'y. v. Fed. Aviation Admin., No. 23-1067, 2025 WL 374897, at *1 (D.C. Cir. Jan. 31, 2025) (Srinivasan, J., concurring). In 2025, the Supreme Court issued an opinion clarifying that agencies have substantial discretion in defining the scope of impacts analyzed during a NEPA review and did not address the authority of CEQ to issue regulations, Seven Cnty. Infrastructure Coal. v. Eagle County, 145 S. Ct. 1497 (2025). For a general discussion of the *Seven County* ruling, see CRS Legal Sidebar LSB11333, *"Deference Squared": Supreme Court Limits NEPA's Scope and Courts' Reach in Seven County Infrastructure Coalition*, by Kristen Hite (2025).

[7] *Id.* § 4344(3) (establishing CEQ's duty to review and appraise federal programs and activities in the context of NEPA and make recommendations to the President thereto); NEPA Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442 (May 1, 2024); Removal of NEPA Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025) (amending subchapter A of chapter V in title 40 of the Code of Federal Regulations by removing and reserving parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508); Memorandum from Katherine Scarlet, Chief of Staff, CEQ, to Heads of Fed. Dep'ts & Agencies 1 (Feb. 19, 2025) [hereinafter CEQ Memo], https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf [https://perma.cc/HU63-R9LA]. *See also* CRS In Focus IF12960, *Council on Environmental Quality Rescinds NEPA Regulations: Legal and Policy Considerations*, by Heather McPherron and Kristen Hite (2025).

[8] *See, e.g.*, National Environmental Policy Act, 90 Fed. Reg. 29632 (July 3, 2025) (Dep't of Agriculture); National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 29498 (July 3, 2025) (Dep't of the Interior).

typically subject to judicial review, including recission of regulations and other changes that may potentially limit or otherwise affect judicial review of NEPA determinations.

Most NEPA-related legal complaints are brought under the Administrative Procedure Act (APA), as NEPA does not contain a broad judicial review provision addressing challenges to agencies' actions under the statute. The APA provides broad authority for plaintiffs to challenge final agency actions, including administrative reviews and permitting decisions.[9] A narrower provision in NEPA itself allows a project sponsor to seek judicial review of an agency's alleged failure to comply with certain statutory deadlines.[10] Additionally, some statutes have general judicial review provisions that broadly allow a court to review agency actions, including environmental reviews under NEPA. For example, the Natural Gas Act vests the federal appellate courts with exclusive jurisdiction to review an agency order covered by the Natural Gas Act, which may include a NEPA review.[11]

This report focuses on the role of the federal courts in reviewing agency compliance with NEPA. First, the report provides an overview of the relevant statutory and regulatory framework. Next, it discusses how judicial review works in the NEPA context. Finally, the report provides an overview of select issues that arise during litigation or tend to generate controversy about NEPA.

Statutory and Regulatory Background

Administrative Framework[12]

NEPA establishes a procedural framework for federal agencies to consider environmental impacts when undertaking major federal actions. It requires agencies to evaluate whether a proposed action is likely to have significant environmental effects and, if so, to document those effects and consider reasonable alternatives.[13] NEPA does not mandate which decisions agencies must make or require them to select the most environmentally protective alternative. Rather, NEPA requires agencies to conduct thorough analyses before making final decisions. In the words of the Supreme Court, NEPA "merely prohibits uninformed—rather than unwise—agency action."[14] NEPA also created CEQ in the Executive Office of the President to provide oversight of NEPA's implementation, among other duties.[15]

In 1978, CEQ issued its first NEPA-implementing regulations and also directed federal agencies to establish their own agency-specific procedures consistent with CEQ regulations while reflecting agency-specific statutory requirements, regulations, and guidance.[16] While CEQ has historically provided regulations intended to standardize federal agencies' approaches to implementing NEPA, courts have recently questioned CEQ's authority to issue binding

[9] 5 U.S.C. §§ 701–706.

[10] 42 U.S.C. § 4336a(g)(3). An agency that determines that it is unable to meet a statutory deadline may extend it for "only so much additional time as is necessary," in consultation with any applicant, if applicable. *Id.* § 4336a(g)(2).

[11] 15 U.S.C. § 717r.

[12] CRS Analysts Heather McPherron and Omar Hammad contributed to portions of this section.

[13] 42 U.S.C. § 4332(C).

[14] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989).

[15] 42 U.S.C. § 4344(3) states that "it shall be the duty and function of the Council . . . to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of [NEPA] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto."

[16] National Environmental Policy Act—Regulations, 43 Fed. Reg. 55978, 56002–03 (Nov. 29, 1978).

regulations.[17] In January 2025, President Trump issued an executive order instructing CEQ to propose rescinding its NEPA regulations and provide new guidance for NEPA implementation.[18] On February 25, 2025, CEQ published an interim final rule to remove all of its NEPA-implementing regulations effective April 11, 2025.[19] CEQ also directed federal agencies to revise or establish their own NEPA procedures in consultation with CEQ within twelve months to align with the 2023 NEPA amendments adopted in the Fiscal Responsibility Act (Pub. L. No. 118-5).[20] CEQ further advised agencies to continue adhering to their existing NEPA practices and procedures while adjusting for consistency with the amended statute.[21] In July 2025, a number of federal agencies rescinded or updated their NEPA regulations and issued new directives for implementing NEPA.[22]

Environmental Review Under NEPA

NEPA requires that federal policies, regulations, and public laws must be interpreted and administered in accordance with the statute "to the fullest extent possible."[23] To determine whether NEPA applies to a proposed action, an agency must assess whether the action qualifies as a major federal action and, if so, whether its environmental impacts

NEPA and Federal Permitting

NEPA establishes procedural requirements for federal decisionmaking. It mandates that federal agencies evaluate a proposed action's potential significant environmental impacts. NEPA provides *inputs* to federal decisions. While completion of a NEPA review does not automatically grant or deny project approval, it may be a prerequisite for an agency to finalize a federal decision to issue a permit.

Federal permitting, by comparison, typically regulates nonfederal actors by requiring that they obtain specific authorizations from regulatory agencies to proceed with project activities. An agency decision to approve or authorize a proposed course of action (e.g., issuing permits, licensing, or granting rights-of-way across federal lands) is often subject to NEPA. Even after an agency approves an authorization, a federal permit alone may not be sufficient for a project to proceed. For example, permits may also be required at the state or local level before a project may proceed.

[17] In November 2024, the U.S. Court of Appeals for the D.C. Circuit declared that President Carter's 1977 executive order mandating CEQ to issue regulations binding on all federal agencies exceeded the President's statutory authority. Marin Audubon Soc'y v. Fed. Aviation Admin., 121 F.4th 902 (D.C. Cir. 2024). In February 2025, the U.S. District Court for the District of North Dakota invalidated CEQ's 2024 regulations based in part on the fact that they exceeded statutory authority. Iowa v. CEQ, 765 F. Supp. 3d 859 (D.N.D. 2025), *vacated and appeal dismissed by*, No. 25-1641, 2025 WL 2205808 (8th Cir. July 29, 2025); *see also* CRS Legal Sidebar LSB11260, *Marin Audubon Society v. Federal Aviation Administration: D.C. Circuit Challenges CEQ's Authority to Issue NEPA Regulations*, by Kristen Hite and Abigail A. Graber (2025).

[18] Exec. Order No. 14,154, 90 Fed. Reg. 8353, 8353–55 (Jan. 29, 2025).

[19] Removal of NEPA Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025). *See also* CRS In Focus IF12960, *Council on Environmental Quality Rescinds NEPA Regulations: Legal and Policy Considerations*, by Heather McPherron and Kristen Hite (2025).

[20] On February 19, 2025, CEQ issued guidance on the implementation of the interim final rule and Executive Order No. 14,154. CEQ Memo, *supra* note 7. The passage of the Fiscal Responsibility Act (FRA) (Pub. L. No. 118-5) in 2023 introduced statutory amendments to NEPA, codifying several procedural elements previously established only through CEQ regulations. For further information on the amendments to NEPA as a result of the FRA, see CRS In Focus IF12417, *Environmental Reviews and the 118th Congress*, by Kristen Hite (2023).

[21] CEQ Memo, *supra* note 7, at 1.

[22] *See, e.g.*, Removal of Environmental Impact Analysis Process (EIAP) Regulation, 90 Fed. Reg. 28021 (July 1, 2025) (to be codified in 32 C.F.R. pt. 989).

[23] 42 U.S.C. § 4332. NEPA, Pub. L. No. 91–190, 83 Stat. 852 (1970).

will be significant.[24] The steps an agency takes to identify and document a proposed action's environmental impacts, as well as to consider alternatives to the action and their anticipated environmental impacts, are commonly referred to as *environmental review*. Agencies may also incorporate other environmental laws into their environmental review processes. Environmental review is typically one step in the federal permitting process. NEPA can also apply to other agency actions beyond permitting. Additionally, other federal laws may independently impose procedural or substantive requirements and require authorizations or permits particular to a given resource.[25]

NEPA does not apply to actions that are exempted by statute or involve non-discretionary agency functions, or where the preparation of an environmental document would conflict with another provision of federal law.[26]

If a proposed agency action is subject to NEPA and qualifies as a major federal action, the agency must evaluate its potential environmental impacts to determine the level of environmental review required.[27] The statutory text of NEPA generally dictates the contours of the environmental review, informed by CEQ guidance, agency procedures, and court decisions.[28] Depending on whether the potential effects are or are not significant, agencies proceed in one of three ways:[29]

- **Environmental impact statement (EIS)**. An EIS is required if a proposed agency action would have a "reasonably foreseeable significant effect on the quality of the human environment."[30] An EIS is generally limited to 150–300 pages in length; generally has a two-year deadline; and includes a detailed analysis of potential environmental impacts, reasonable alternatives to the proposed action, inter-agency consultation, and public input.[31]
- **Environmental assessment (EA)**. An EA sets forth the basis of the agency's decision to issue a finding of no significant impact (FONSI) or a determination that significant impacts are likely, in which case the agency prepares an EIS.[32]An EA is required when a proposed agency action not covered by a categorical exclusion is not expected to have a

[24] 42 U.S.C. § 4332(C).

[25] *E.g.*, Endangered Species Act, 16 U.S.C. §§ 1531–1544; National Historic Preservation Act, 54 U.S.C. §§ 300101–307108.

[26] 42 U.S.C. § 4336(a). Further, a discretionary action refers to an action where a federal agency has the authority to choose among different courses of action or decide whether or not to take the action at all, as opposed to an action where the agency's decisions are guided by a statutory or regulatory mandate. CEQ, A CITIZEN'S GUIDE TO NEPA: HAVING YOUR VOICE HEARD 4 (2021), https://ceq.doe.gov/docs/get-involved/citizens-guide-to-nepa-2021.pdf [https://perma.cc/DTA2-FCK4].

[27] 42 U.S.C. § 4336(b).

[28] For a general overview of NEPA's environmental review process, see CRS In Focus IF12560, *National Environmental Policy Act: An Overview*, by Kristen Hite and Heather McPherron (2025).

[29] 42 U.S.C. § 4336; *id.* § 4336(b)(1).

[30] *Id.* § 4332(C).

[31] *Id.* § 4336a. Page limits do not include citations or appendices; as necessary, timelines may be extended in consultation with the applicant. *Id.* CEQ recently reported that the median time for EISs completed in 2024 was 2.2 years. CEQ, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010−2024), at 1 (2025), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2025-1-13.pdf [https://perma.cc/2DXL-G4PG]. Agencies are required to consult with other federal agencies that have "jurisdiction by law or special expertise" and must further share inputs from federal, state, and local agencies with the public, see 42 U.S.C. §§ 4332, 4336a. Additionally, while agency procedures vary with respect to public input, every notice of intent to prepare an EIS must include an opportunity for public comment on alternatives, impacts, and relevant information. *Id.* § 4336a(c).

[32] 42 U.S.C. § 4336a. Page limits are exclusive of citations and appendices; as necessary, timelines may be extended in consultation with the applicant. *Id.*

"reasonably foreseeable significant effect on the quality of the human environment, or if the significance of such effects is unknown."[33] An EA is generally limited to seventy-five pages in length and generally has a one-year deadline.[34]

- **Categorical exclusion (CE)**. CEs are categories of actions that a federal agency has determined normally do not significantly affect the quality of the human environment.[35] Agencies maintain lists of available CEs and in some cases may adopt another agency's CE.[36] When a federal agency determines that a proposed action falls within the scope of an identified CE, it typically does not prepare an EA or EIS absent extraordinary circumstances.[37] Congress may also establish CEs.[38]

Historically, an estimated 95% or more of actions that are subject to NEPA result in CEs, approximately 4% in EAs, and 1% or less in EISs.[39]

Judicial Review Authorities

Under certain circumstances, federal agency environmental reviews may be challenged in federal court. Historically, fewer than 1% of federal actions subject to NEPA have been litigated.[40] While some have expressed concern that litigation increases the risk of project delays due to the

[33] 42 U.S.C. § 4336(b)(2).

[34] *Id.* § 4336a. Page limits are exclusive of citations and appendices; as necessary, timelines may be extended in consultation with the applicant. *Id.*

[35] *Id.* § 4336e(1).

[36] *Id.* § 4336c; CEQ, *Categorical Exclusions: List of Federal Agency Categorical Exclusions (CE List)*, NEPA.GOV, https://ceq.doe.gov/nepa-practice/categorical-exclusions.html [https://perma.cc/KK5P-NP3B] (last visited Aug. 12, 2025).

[37] Many agencies maintain criteria or lists of conditions known as *extraordinary circumstances* that warrant special consideration of impacts for proposed actions otherwise anticipated to have insignificant impacts. *See, e.g.*, DEP'T OF ENERGY, NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING PROCEDURES 23 (2025).

[38] *See, e.g.*, 16 U.S.C. § 6591e (directing the Forest Service to establish a categorical exclusion for mule deer and sage grouse vegetation enhancement). Congress sometimes provides direction to agencies on CEs *See, e.g.*, 42 U.S.C. § 15492 (creating a "rebuttable presumption" allowing the agency to apply a CE); 16 U.S.C. § 6592b (establishing a CE for wildfire management subject to specific conditions); 49 U.S.C. § 304 (detailing conditions for applying a CE for multimodal projects, including that extraordinary circumstances do not apply)*; see also* CRS Report R48595, *Legislative Categorical Exclusions Under the National Environmental Policy Act* (2025).

[39] Update to the Regulations Implementing NEPA Procedural Provisions, 85 Fed. Reg. 43304, 43305 (July 16, 2020) (estimating that agencies applied at least 100,000 CEs compared to several hundred EISs undertaken each year); U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 7 (2014), https://www.gao.gov/assets/gao-14-370.pdf [https://perma.cc/BU4A-Q36B] (citing CEQ statistics). CEQ has reported that out of 192,707 NEPA reviews associated with activities and projects funded between 2009 and 2011 by the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 184,733 were completed using CEs, 7,133 were completed using EAs, and 841 required EISs. CEQ, THE ELEVENTH AND FINAL REPORT ON THE NEPA STATUS AND PROGRESS FOR AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 ACTIVITIES AND PROJECTS 4 (2011).

[40] CEQ, NEPA LITIGATION SURVEYS 2001–2013, https://ceq.doe.gov/docs/ceq-reports/nepa-litigation-surveys-2001-2013.pdf [https://perma.cc/G58E-BTFZ] (identifying an average of 145 cases/year subject to litigation); 85 Fed. Reg. at 43305, 43309 & n.5, n.40 (July 16, 2020) (identifying over 100,000 NEPA actions annually). An analysis of the CEQ NEPA Litigation data set found that roughly 1 in 450 NEPA decisions were litigated. *See* John Ruple & Kayla Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 ENV'T L. 479 (2020). For context, NEPA has been the most litigated of all environmental laws, see CEQ, FACT SHEET: MODERNIZING CEQ'S NEPA REGULATIONS (2020), https://ceq.doe.gov/docs/laws-regulations/ceq-final-rule-fact-sheet-2020-07-15.pdf [https://perma.cc/UG5R-8W5F].

potential for a judge to order a project halted (a form of *injunctive relief*), others have suggested that NEPA-related litigation delay concerns are "overblown."[41]

Plaintiffs seeking to challenge agency NEPA reviews (or failures therein) can bring their challenges in federal court. Many of these challenges are brought pursuant to the APA, which provides a cause of action for challenges to final agency actions.[42] The APA is a default statute that applies in the absence of another statute providing judicial review for a particular agency action. NEPA's provision allowing a project sponsor to sue to enforce an agency deadline for completing an EA or EIS is one such example.[43] Other examples of more specific statutes providing for review include the Natural Gas Act and the Air Tour Management Act of 2000.[44] Unless a statute provides otherwise, a plaintiff filing a claim to challenge a federal agency's NEPA review (or lack thereof) typically files suit in federal district court, with cases decided by a presiding judge as opposed to a jury.[45]

Administrative Procedure Act

Except where a more specific statute controls, the APA permits agency actions to be challenged in federal district court. The APA generally establishes how courts review agency actions, including the appropriate standards of review.[46] Most commonly for NEPA, a plaintiff may ask a court to "set aside" an agency action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[47] In such a situation, a court considers whether the agency action was reasonable and reasonably explained.[48] Additional bases for setting aside an agency action include when an agency violates a statutory right or fails to follow a procedure required by law, among others.[49] By statute, an action may not be reviewed until it is final, so documents such as a

[41] For more discussion of permitting litigation considerations, compare Michael Bennon & David Wilson, *NEPA Litigation over Large Energy and Transport Infrastructure Projects*, 53 ENV'T L. REP. 10836 (2023) (identifying litigation arising in 28% of select major transportation infrastructure projects requiring an EIS, of which 89% involved a NEPA claim) with David E. Adelman et al., *Dispelling the Myths of Permitting Reform and Identifying Effective Pathways Forward*, 55 ENV'T L. REP. 10038, 10041–42 (2025) (characterizing as a "myth" the notion that federal permitting is the cause for most project delays and noting a 90% decline in the number of EISs prepared annually from the 1970s to 2020s).

[42] 5 U.S.C. § 704.

[43] *See id*. § 706; 42 U.S.C. § 4336a(g)(3).

[44] 15 U.S.C. § 717r; 49 U.S.C. § 40128(b)(5).

[45] *See* 5 U.S.C. § 703; 28 U.S.C. § 1331. Some statutes specifically provide for direct review of an agency action in the federal courts of appeals, bypassing district courts with further appeal available only directly to the United States Supreme Court. *E.g.*, 15 U.S.C. § 717r(d). Others expressly exempt an agency from NEPA compliance or otherwise limit NEPA's application. *See, e.g.*, Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11 (D.D.C. 2020) (declining to require NEPA compliance where a statute allowed the Department of Homeland Security to waive NEPA requirements for border wall construction).

[46] 5 U.S.C. § 704. For more information on judicial review under the APA, see CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney (2024); CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole (2016).

[47] 5 U.S.C. § 706; *see also* Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378 (1989) (explaining that an arbitrary-and-capricious review is a "searching and careful" factual inquiry based on a "narrow" standard of "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971))). As a part of the judicial review process under the APA, federal courts "decide all relevant questions of law, interpret constitutional and statutory provisions; and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

[48] *See* Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 (1983); Seven Cnty. Infrastructure Coal. v. Eagle County, 145 S. Ct. 1497, 1511 (2025).

[49] 5 U.S.C. § 706.

draft EIS typically cannot be challenged as violating the APA.[50] When evaluating the action, a judge reviews the whole applicable portion of the agency's record, typically accepting the facts as the agency has found them barring certain exceptions.[51]

Enforcing NEPA Deadlines to Prepare an EA or EIS

As amended in 2023, NEPA contains one provision that directly allows for judicial review, available only to a project sponsor seeking to enforce statutory time limits for an agency to prepare an EIS or EA.[52] One of the first cases to consider this provision is *Signal Peak Energy v. Haaland*, which concerned a proposed expansion of the Bull Mountain Mine in Montana.[53] In February 2024, Signal Peak Energy petitioned the U.S. District Court for the District of Columbia to enforce NEPA's two-year timeline for agencies to complete an EIS.[54] In August 2024, the court determined that the claim was "prudentially unripe."[55] The court reasoned that the government could plausibly still make or extend the deadline, so it was premature to find a violation, and further that the project sponsor was unlikely to suffer substantial immediate economic harm from the delay.[56] The agency subsequently issued an EIS in June 2025, resulting in the case being dismissed.[57] Prior to dismissal, conservation groups tried unsuccessfully to intervene in the lawsuit. In rejecting their attempt, the court reasoned that NEPA's provision allowing a court to review EIS deadlines "does not appear to have been designed with conservation groups in mind."[58] If other courts take the same approach, both environmental interests and project sponsors may be unsuccessful in seeking to *prospectively* enforce NEPA's deadlines for agencies to complete an EIS (two years) or EA (one year). In other words, a project sponsor could seek judicial review only once an agency has failed to meet that deadline.

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[50] *Id.* § 704; Bennett v. Spear, 520 U.S. 154, 178 (1997) (explaining that a "final" action is the consummation of an agency's decisionmaking affecting rights and obligations or other legal consequences). Examples of situations where finality issues affected plaintiffs' NEPA claims include *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997 (9th Cir. 2021) (affirming that lack of instructions on how to implement NEPA in an agency handbook did not rise to a final agency action); Cnty. Comm'rs of Cnty. of Sierra v. U.S. Dep't of the Interior, 614 F. Supp. 3d 944, 947, 953 (D.N.M. 2022) (dismissing a claim challenging a decision to transfer two individual wolves); *see also* Driftless Area Land Conservancy v. Rural Utils. Serv., 74 F.4th 489, 495 (7th Cir. 2023) (finding that adoption of an EIS without issuing a record of decision was insufficient to constitute final agency action for the purpose of challenging the underlying decision).

[51] 5 U.S.C. § 706; *see also Citizens to Preserve Overton Park*, 401 U.S. at 415 (discussing *de novo* review of facts when an adjudication involves inadequate factfinding resulting in an "unwarranted" agency decision as one of two specific circumstances).

[52] 42 U.S.C. § 4336a(g)(3).

[53] Signal Peak Energy, LLC v. Haaland, No. 24-cv-00366, 2024 WL 3887386 (D.D.C. Aug. 21, 2024).

[54] *Id.* 42 U.S.C. § 4336a(g) provides that agencies generally complete an EIS within two years, which may be extended if necessary to allow completion, "in consultation with the applicant." 42 U.S.C. § 4336a(g)(3) allows a project sponsor to petition a court to review an agency's alleged failure to meet the deadline and to order a schedule for EIS completion.

[55] The court partially dismissed the claim and denied as moot Signal Peak Energy's petition for a preliminary injunction to enforce the two-year EIS deadline on the basis. *Signal Peak Energy*, 2024 WL 3887386, at *9. The doctrine of prudential ripeness encourages courts to not prematurely decide abstract disagreements that are not yet fit for a judicial decision where the parties will not suffer hardship if the court withholds consideration until an agency's action is sufficiently final. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967); Nat'l Treasury Emps. Union v. United States, 101 F.3d 1423, 1431 (D.C. Cir. 1996).

[56] *Signal Peak Energy*, 2024 WL 3887386, at *9–10.

[57] Minute Order, Signal Peak Energy, LLC v. Haaland, No. 24-cv-00366 (D.D.C. July 3, 2025).

[58] *Signal Peak Energy*, 2024 WL 3887386, at *6–7. The court allowed conservation groups to submit an amicus brief. *Id.* at *7.

Deputizing Federal Actors: Waiver of Sovereign Immunity

Certain statutes allow states or local authorities to assume responsibility for NEPA compliance in limited circumstances.[59] In those cases, federal law generally requires that any such nonfederal authority expressly waive sovereign immunity and accept jurisdiction of the federal courts to consider allegations of noncompliance.[60] For example, the Federal Highway Administration and the Department of Transportation have procedures available to sign a memorandum of understanding allowing a state or local agency to assume responsibility for NEPA or broader environmental review authority generally reserved to federal agencies.[61] As of July 2025, seven states had entered into such an agreement.[62] In those cases, the nonfederal implementing authority is required to accept jurisdiction in federal court for suits alleging violations of NEPA, and the federal government may be immune from lawsuits.[63] In such circumstances, the assigned nonfederal implementing authority is held to the same standards of review under NEPA as if it were a federal agency.[64]

Considerations for Judicial Review of NEPA Litigation

A number of questions frequently arise with respect to how courts resolve NEPA disputes. Many of these questions relate to principles that limit the availability of judicial review of agency action.[65] Some limitations are constitutional, while others are rooted in statute. In the context of challenges to federal agencies' NEPA reviews, some of the more commonly cited limitations for permitting-related challenges are briefly discussed below. Other limitations include mootness and statutory preclusion.[66] As discussed above, Congress may further limit review of NEPA claims.

[59] *E.g.*, 23 U.S.C. §§ 326, 327 (allowing the Federal Highway Administration to assign states oversight of environmental reviews including NEPA or CE decisions, respectively).

[60] *E.g.*, *id.* at § 327(c) (requiring a written agreement from a state consenting to federal court jurisdiction over "compliance, discharge, and enforcement of any responsibility of the Secretary assumed by the State").

[61] *Id.*; 23 C.F.R. §§ 773.101–117 (2025); FED. HWY. ADMIN., ENVIRONMENTAL REVIEW TOOLKIT – NEPA ASSIGNMENT, https://www.environment.fhwa.dot.gov/nepa/program_assignment.aspx [https://perma.cc/48Y6-TLP6] (last visited Aug. 5, 2025).

[62] FED. HWY. ADMIN., *supra* note 61. The seven states are Alaska, Arizona, California, Florida, Ohio, Utah, and Texas. Nebraska was listed as "under consideration." *Id.* Under a pilot program, the Federal Highway Administration may elect to enter into a further agreement with two states that have a signed a memorandum of understanding to allow substitution of state procedures for NEPA. *See* 23 U.S.C. § 330; Program for Eliminating Duplication of Environmental Review, 85 Fed. Reg. 84213 (Dec. 28, 2020) (to be codified at 23 C.F.R. pts. 773, 778).

[63] *See, e.g.*, Bitters v. Fed. Hwy. Admin., No. 1:14-cv-01646-KJM-SMS, 2016 WL 159216, at *18 (E.D. Cal. Jan. 13, 2016) (reviewing California Department of Transportation's compliance with NEPA); Salt Lake City Corp. v. Shepherd, No. 2:23-CV-786, 2024 WL 2158128, at *3 (D. Utah May 14, 2024) (finding the federal government to be shielded from suit by sovereign immunity).

[64] *See, e.g.*, Fath v. Tex. Dep't of Transp., 924 F.3d 132 (5th Cir. 2018) (upholding Texas Department of Transportation's NEPA review based on Federal Highway Administration NEPA regulations and federal case law).

[65] For an overview of judicial review of agency action and a discussion of limitations on the availability of judicial review, see CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole (2016).

[66] A case is moot if the controversy initially existing at the time the lawsuit was filed is no longer "live." *See, e.g.*, Native Village of Nuiqsut v. Bureau of Land Mgmt., 9 F.4th 1201 (9th Cir. 2021) (denying NEPA claim as moot where oil and gas producer had completed a project following agency approval of winter drilling exploration activities after all equipment had been demobilized, weather had warmed, and wells were capped). Statutory preclusion refers to a provision in the APA specifying that the judicial review provisions do not apply if "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). While a modest set of statutes exclude specific actions or types of actions from judicial review (continued...)

Courts have also addressed what level of deference is appropriate when applying the arbitrary-and-capricious standard of review to agency actions taken pursuant to NEPA.

Agency Discretion and Deference in Arbitrary-and-Capricious Cases

The Supreme Court has observed that on matters of agency policymaking and factfinding (including as applies to NEPA), the APA imposes a deferential standard of review; no similar deference exists with respect to matters of statutory interpretation.[67] In *Seven County Infrastructure Coalition v. Eagle County*, the Supreme Court reiterated that the role of courts is deferential and limited when evaluating agency NEPA reviews under the APA's arbitrary-and-capricious standard.[68] Particularly on factual matters such as evaluation of significant impacts, courts have held that they should not substitute their judgment for that of the agency. Instead, a court typically considers whether the agency action was reasonable and reasonably explained.[69]

Applying NEPA's inherent "rule of reason," courts have identified various factors for determining whether an agency's NEPA review may be found arbitrary and capricious.[70] Many courts have applied long-standing Supreme Court precedent in a NEPA-specific context, such as when an agency has relied on factors Congress did not intend it to consider, "entirely failed" to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before it, or is implausible beyond a mere difference in view or the product of agency expertise.[71] A court may also find an agency's NEPA review was arbitrary and capricious if it "failed to base its decision on consideration of the relevant factors" or made a "clear error in judgment."[72]

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under NEPA, the exception is relatively uncommon and generally requires a "persuasive reason" to believe that Congress intended to exclude a claim from judicial review. Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986); *see also* Mass. Coal. for Immig. Reform v. U.S. Dep't of Homeland Sec., 621 F. Supp. 3d 84, 98 (D.D.C. 2022) (finding review of alleged failure to conduct a NEPA review prior to instituting administrative closure in immigration courts was not barred by a provision in the Immigration and Nationality Act excluding review of immigration removal decisions themselves).

[67] *Seven Cnty. Infrastructure Coal*., 145 S. Ct. 1497; Loper Bright Enters. v. Raimondo, 603 U.S. 369, 371, 392 (2024) (citing 5 U.S.C. § 706(2)).

[68] *Seven Cnty. Infrastructure Coal*., 145 S. Ct. 1497.

[69] *Id.* at 1511 (citing Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 (1983)).

[70] *Seven Cnty. Infrastructure Coal*., 145 S. Ct. at 1513; Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004); *see also* Diné Citizens Against Ruining Our Env't v. Haaland, 59 F.4th 1016, 1029 (10th Cir. 2023) (specifying four ways in which an agency's NEPA review may be arbitrary and capricious). Courts may further apply a "substantial evidence" standard to NEPA reviews, setting aside agency action under the APA only where it is supported by substantial evidence. *See, e.g.*, WildEarth Guardians v. U.S. Army Corps of Eng'rs, 429 F. Supp. 3d 1224, 1263 (D.N.M. 2019) (citing Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 704 (10th Cir. 2010)).

[71] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. For example, an agency "entirely failed" to consider an important element of the analysis when it failed to consider greenhouse gas impacts or at least explain its reason for not doing so when there were methods available for such a calculation. *See* Gulf v. Burgum, 775 F. Supp. 3d 455, 481 (D.D.C. 2025). Another example is an "unexplained inconsistency" in analysis, see Montana Wildlife Fed'n v. Haaland, 127 F.4th 1, 36 (9th Cir. 2025). Courts may, however, uphold an agency's review where it explained its choice of methodology for calculating climate impacts. *See Diné Citizens*, 59 F.4th at 1043. *But see* Citizens Action Coal. of Indiana, Inc. v. FERC, 125 F.4th 229, 241 (D.C. Cir. 2025) (upholding an agency's choice of climate methodology).

[72] For examples of how courts consider relevant factors in NEPA cases, see Am. Wild Horse Campaign v. Raby, No. 24-8055, 2025 WL 1933473, at *4 (10th Cir. July 15, 2025) (quoting New Mexico *ex rel*. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 704 (10th Cir. 2009); Utah Env't Cong. v. Troyer, 479 F.3d 1269, 1280 (10th Cir. 2007)). (continued...)

Standing

Article III of the Constitution limits the federal courts' jurisdiction to adjudicating "cases" and "controversies."[73] As part of this requirement, a litigant must have standing in order to invoke the jurisdiction of a federal court. To establish standing, a plaintiff must demonstrate (1) an injury in fact (2) that is fairly traceable to the challenged action (e.g., caused by an alleged statutory violation) and (3) that can be remedied by a court.[74] To meet the Article III injury threshold, a plaintiff must allege that the agency's action has harmed or will harm the plaintiff's concrete interest.[75] Standing principles also prohibit courts from addressing alleged injuries that are "generalized grievances," as these do not present "cases" or "controversies" as required by Article III.[76]

The Supreme Court has long recognized that a plaintiff alleging a procedural injury—including a NEPA violation—may be subject to a modified standing requirement of demonstrating a concrete interest in a legally recognized procedure.[77] For example, in considering whether an alleged injury falls within the "zone of interests" of NEPA,[78] the Supreme Court has held that NEPA protects a broad range of harms, including recreational or aesthetic enjoyment of the environment.[79] While NEPA does not reach purely economic injuries, plaintiffs who allege both environmental and economic injuries may satisfy the "zone of interests" test.[80] Additionally,

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An example of an error in judgment is City of Los Angeles v. Fed. Aviation Admin., 63 F.4th 835, 851–52 (9th Cir. 2023) (finding a "fundamental error" where the agency failed to consider combined noise impacts from multiple pieces of construction running simultaneously and had instead analyzed conditions as if only one machine were operating at any given time).

[73] U.S. CONST. art. III, § 2.

[74] Friends of the Earth v. Laidlaw, 528 US 167, 180–81 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[75] *Defs. of Wildlife*, 504 U.S. at 560 (applying imminent and concrete injury to a protected right as the general standard for a plaintiff to establish standing).

[76] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014).

[77] *Id.* at 572 & n.7 (recognizing procedural rights as "special" and applying a modified standing requirement applies to a plaintiff with a concrete interest in a legally recognized procedural right "without meeting all the normal standards for redressability and immediacy," such as could be the case for a claim arising under NEPA if a plaintiff alleges an EIS failed to consider future impacts to a nearby property in a pending permitting decision).

[78] Ondrusek v. U.S. Army Corps of Eng'rs, 123 F.4th 720, 734 (5th Cir. 2024) (noting the redressability standard is "not demanding" (citing Sierra Club v. FERC, 827 F.3d 59, 67 (D.C. Cir. 2016) and *Defs. of Wildlife*, 504 U.S. at 572 n.7). The Supreme Court previously described this requirement as part of its "prudential standing" doctrine, but in *Lexmark*, recharacterized the requirement as a question of statutory interpretation. *Lexmark Int'l.*, 572 U.S. at 127–28.

[79] Lujan v Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

[80] *See, e.g.*, Maiden Creek Assoc. LP v. U.S. Dep't of Transp., 823 F.3d 184, 195 (3d Cir. 2016) ("To accept NEPA litigants whose interests accidentally overlap with the statute's intended purpose would not only create a class of plaintiffs far larger than Congress originally intended, it also would serve to distort the effect of NEPA itself."); Solar Energy Indus. Ass'n v. FERC, 80 F.4th 956, 991 (9th Cir. 2023) (allowing a NEPA suit even if a plaintiff's interest is primarily economic so long as there as the economic injuries are "causally related to an act within NEPA's embrace" or if there is a separate environmental interest (quoting Port of Astoria. v. Hodel, 595 F.2d 467, 476 (9th Cir. 1979))). Plaintiffs who assert environmental injuries, but whose primary motive for bringing suit is economic interest, also "routinely satisfy" this test; however, plaintiffs who assert purely economic injuries do not. *Compare* Mass. Coal. for Immig. Reform v. U.S. Dep't of Homeland Sec., 621 F. Supp. 3d 84, 94 (D.D.C. 2022) (finding sufficient connection to an environmental interest to meet a relaxed zone of interest test due to NEPA being a procedural statute) *with* Louisiana v. Dep't of Homeland Sec., 726 F. Supp. 3d 653, 688 (E.D. La. 2024) (dismissing case due to lack of standing after plaintiffs failed the "zone of interest" test under NEPA where injuries were "purely economic").

courts have found that a NEPA violation could be remedied if the agency could conceivably change its position on whether or how to proceed with the underlying action.[81]

Organizations often bring cases on behalf of their members, including NEPA-based challenges. They may satisfy the standing requirements if (1) at least one of the members has standing, (2) the interests that the organization seeks to protect are germane to its purposes, and (3) neither the claim nor the type of relief sought would require the individual members to actively participate in the litigation.[82]

Exhaustion

Some statutes have explicit requirements that bar a claim if a plaintiff has not first exhausted administrative options, such as by participating in an agency's administrative process for raising objections to a permitting matter.[83] The Supreme Court has determined the APA has no express exhaustion requirement.[84] Even where a statute is silent, courts generally expect a plaintiff to provide notice to and raise their issues with the relevant agency during the appropriate comment period for the proposed agency action, and if a plaintiffs does not do so, a judge has some degree of discretion to bar a later claim involving those issues.[85] In other situations, a court may follow the Supreme Court's suggestion that flaws in an EA or EIS "might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."[86]

Statute of Limitations

A statute of limitations is a provision in law specifying a time by which a plaintiff must file a lawsuit. If the specific statute at issue is silent, courts have generally defaulted to a six-year limit for a plaintiff who challenges a permitting action under the APA.[87] Some permitting-related statutes include limitations affecting timelines for review on certain NEPA claims. For example, judicial review of some transportation projects is limited to 150 days after notice that the permit,

[81] *Ondrusek*, 123 F.4th at 734.

[82] Sierra Club v. Morton, 405 U.S. 727, 739–40 (1972); Sierra Club v. FERC, 827 F.3d 59, 65 (D.C. Cir. 2016) (citing Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977)); Mountain Cmtys. for Fire Safety v. Elliott, 25 F.4th 649, 6554 & n.6 (9th Cir. 2022) (citing Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 169 (2000).

[83] *See, e.g.*, 16 U.S.C. § 6515(c).

[84] Darby v. Cisneros, 509 U.S. 137, 146–47 (1993).

[85] *See, e.g.*, Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 764−765 (2004); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 553 (1978). *But see* Mulgrew v. U.S. Dep't of Transp., 750 F. Supp. 3d 171, 215 (S.D.N.Y. 2024) ("[A]n issue is exhausted if it was included in a comment on the EA—regardless of who submitted the comment.").

[86] *Pub. Citizen*, 541 U.S. at 765. *See also, e.g*, Friends of Tims Ford v. Tenn. Valley Auth., 585 F.3d 955, 964 (6th Cir. 2009) (allowing a NEPA challenge to proceed because the agency had not shown why the "deficient" EIS "was not so obvious that [plaintiffs] needed to comment to preserve its right to appeal"); *Mulgrew*, 750 F. Supp. 3d at 215 (permitting a claim to proceed based on constructive notice of a matter raised by a third party).

[87] 28 U.S.C. § 2401(a) states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The Supreme Court held in 2024 that, for the purposes of facial challenges to agency actions, a claim accrues when an injury to the plaintiff occurs, rather than at the time the agency action becomes final. Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 603 U.S. 799 (2024); *see also* CRS Legal Sidebar LSB11197, *Corner Post and the Statute of Limitations for Administrative Procedure Act Claims*, by Benjamin M. Barczewski and Jonathan M. Gaffney (2024).

license, or approval is final.[88] For large infrastructure and other projects covered under FAST-41, Congress has imposed a maximum two-year statute of limitations on authorizations.[89]

Common Issues in NEPA Litigation

NEPA litigation involves a wide range of agencies and raises issues involving agency choices and determinations. This section provides an overview of selected issues raised in NEPA litigation that may be of interest to Congress.

Is a NEPA Review Required?

Is the Action Reviewable as a Final *Major Federal Action*?

NEPA applies if an agency's proposed activity is a *major federal action*.[90] To qualify, the proposed action must be "subject to substantial Federal control and responsibility" and not subject to any statutory exceptions.[91] For example, NEPA excludes actions with no or minimal federal funding and those with no or minimal federal involvement where the agency cannot control the outcome of the project.[92]

If an agency fails to initiate any environmental review for an action covered by NEPA, plaintiffs may challenge that in court, provided they can show the proposed action qualifies as a final agency action subject to the requirements of NEPA. For example, there may be questions about to what extent NEPA is triggered in discrete agency actions associated with a project implemented in multiple phases that require assorted federal approvals over the course of the project.[93] In deciding whether any particular agency action for such a project requires NEPA review, courts may consider whether the agency action would irreversibly commit federal resources in furtherance of the proposed action as a standard to determine whether the agency activity is a qualifying action under NEPA.[94] Even where an action qualifies as a major federal action under NEPA, there may be disputes over whether a proposed action is reviewable in court as a final agency action under the APA. To have a cause of action under the APA, the challenged action must also be considered a final agency action.[95]

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[88] *E.g.*, 23 U.S.C. § 139(*l*).

[89] 42 U.S.C. § 4370m-6; *id*. § 4370m(6) (defining "covered project"); *see also* 42 U.S.C. § 4370m (3) defining authorization as "any license, permit, approval, finding, determination, or other administrative decision issued by an agency and any interagency consultation that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of a covered project administered by a Federal agency or, in the case of a State that chooses to participate in the environmental review and authorization process in accordance with section 4370m–2(c)(3)(A) of this title, a State agency." "Authorization" includes both permits and federal actions related to the permitting process). The two-year time limit for FAST-41's statute of limitations begins upon publication in the *Federal Register*, and the time period may be shorter if so specified in federal law. *Id.* at § 4370m-6(1).

[90] *Id*. §§ 4332(c), 4336e(10).

[91] *Id*. § 4336e(10).

[92] *See id*. § 4336e(10)(B).

[93] *See, e.g*., N. Alaska Env't Ctr. v. U.S. Dep't of the Interior, 983 F.3d 1077 (9th Cir. 2020).

[94] *Id.* at 1086 (discussing circumstances under which a federal lease could trigger NEPA based on whether it would allow or preclude surface-disturbing activity); Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466, 480 (D.C. Cir. 2009).

[95] 5 U.S.C. § 704; Bennett v. Spear, 520 U.S. 154, 178 (1997) (explaining that a "final" action is the consummation of an agency's decisionmaking affecting rights and obligations or other legal consequences). Examples of situations (continued...)

Is the Action Exempt from NEPA Due to Competing Authority?

Courts must occasionally address what happens when an agency is faced with a potential conflict or overlap between NEPA and other statutory mandates. As the Supreme Court has held, NEPA was not intended to repeal any other statute by implication.[96] Thus, when "a clear and unavoidable conflict in statutory authority exists, NEPA must give way."[97] Such a conflict may exist, for example, if the period for implementing a statutory mandate is too short for an agency to complete environmental review under NEPA.[98] Some courts have also held that NEPA does not apply when an agency's actions to comply with other statutes are "functional[ly] equivalent" to NEPA.[99] This analysis requires courts to assess, on a case-by-case basis, what an agency must take into account when complying with other statutes, especially with respect to environmental effects or considerations.[100]

Does New Activity Warrant Additional Analysis?

When considering new activity related to a prior action that already has documented analysis of environmental impacts or when supplementing earlier NEPA analysis, an agency may refer back to the existing analysis and incorporate it by reference or take a multiphased approach such as starting with a broader strategic level review and then supplementing on a project-specific basis with analysis limited to new conditions or information (*tiering*).[101] Sometimes this analysis is undertaken as a supplemental EA or EIS. Other times, an agency incorporates earlier NEPA analysis by reference. In some cases, an agency may issue supplemental analysis when a court remands environmental review to an agency to correct a deficiency in its initial analysis.[102]

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where finality issues affected plaintiffs' NEPA claims include *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997 (9th Cir. 2021) (affirming that lack of instructions on how to implement NEPA in an agency handbook did not rise to a final agency action); Cnty. Comm'rs of Cnty. of Sierra v. U.S. Dep't of the Interior, 614 F. Supp. 3d 944, 947, 953 (D.N.M. 2022) (dismissing a claim challenging a decision to transfer two individual wolves); *see also* Driftless Area Land Conservancy v. Rural Utils. Serv., 74 F.4th 489, 495 (7th Cir. 2023) (finding that adoption of an EIS without issuing a record of decision was insufficient to constitute final agency action for the purpose of challenging the underlying decision); Citizens for Clean Energy v. U.S. Dep't of the Interior, 384 F. Supp. 3d 1264, 1281 (D. Mont. 2019) (clarifying that a decision to not prepare a NEPA document is reviewable as a final agency action).

[96] United States v. SCRAP, 412 U.S. 669, 694 (1973); *see also* 42 U.S.C. § 4332(C) (stating that environmental review is not required "where compliance would be inconsistent with other statutory requirements").

[97] Flint Ridge Dev. Corp. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 788 (1976).

[98] *Id.* at 788–89 (finding it "inconceivable" that an agency could comply with NEPA within the thirty-day deadline for issuance of statement of record under Disclosure Act).

[99] Prutehi Litekyan: Save Ritidian v. U.S. Dep't of Airforce, 128 F.4th 1089, 1117 (9th Cir. 2025) (quoting Alabama *ex rel.* Siegelman v. EPA, 911 F.2d 499, 504 (11th Cir. 1990)).

[100] *See, e.g.*, Env't Def. Fund, Inc. v. EPA, 489 F.2d 1247 (D.C. Cir. 1973) (holding the Federal Insecticide, Fungicide, and Rodenticide Act to be the functional equivalent of NEPA because the statute required the agency to take environmental effects into account and consider public comments about such effects); *see also* Pac. Legal Found. v. Andrus, 657 F.2d 829, 834 (6th Cir. 1981) (discussing lower court practice applying the "functional equivalent" test).

[101] *See, e.g.*, Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 512 (D.C. Cir. 2010) (noting that projects implemented over the course of several decades could understandably be subject to a change of conditions, but tiering enables agencies to refer back to older analysis so long as the effects are reasonably considered, even if methodologies have improved); *see also* 42 U.S.C. § 4336b (authorizing reliance on prior programmatic analysis within five years of publication barring new circumstances or information or later so long as the agency reevaluates the analysis and underlying assumptions to verify the earlier analysis "remains valid").

[102] *See, e.g.*, Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 141 F.4th 976, 990–91 (9th Cir. 2025) (addressing the adequacy of an agency's supplemental EIS prepared in response to *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739, 770, 805 (D. Alaska 2021) (invalidating the agency's initial NEPA analysis concerning the Willow Project)).

Additionally, a plaintiff may claim that an agency failed to conduct an appropriate supplemental environmental review. These disputes tend to center on situations where existing NEPA analysis exists and new information or circumstances arise.[103] For example, supplemental analysis could be warranted for proposed changes to agency salvage logging operations following a wildfire unless the agency's environmental review already factored in post-fire conditions.[104] Alternatively, if additional action is contemplated where an existing NEPA analysis has already been completed and there has been no material change in circumstances or information, even a one-paragraph explanation may be sufficient to defend an agency's decision to reference back to existing analysis (*tiering*) so long as the agency has documented that it determined that no new information or circumstances warranted further consideration.[105]

Did the Agency Properly Apply a Categorical Exclusion?

When an agency applies a CE to a specific action, it does not prepare an EA or EIS. Where an agency determines that site-specific conditions (extraordinary circumstances) exist that could result in more significant impacts from an action that would otherwise qualify for a CE, the agency may decline to apply a CE to the action. The presence of an extraordinary circumstance does not automatically restrict application of the CE, but it can lead an agency to evaluate whether impacts are anticipated to be significant such that it would be appropriate to prepare an EA or EIS.[106] Agency CE procedures generally require the agency to consider extraordinary circumstances, but the same may not always be true of congressionally created CEs. At least one court has ruled that the Forest Service was not required to consider extraordinary circumstances before applying a congressionally created CE where the statute did not mandate such consideration.[107]

When an agency relies on a CE to determine that further NEPA analysis is not required, plaintiffs may argue that the agency improperly used a CE for a specific action or may challenge the creation of the CE itself. Whether an agency's decision to create or apply a CE was arbitrary or capricious is a fact-specific determination where courts consider whether an agency acted rationally and followed the appropriate procedures to do so.[108]

In disputes involving challenges to specific uses of CEs, plaintiffs have raised different theories. For example, some plaintiffs have alleged that an agency failed to follow its own procedures to

[103] *See, e.g.*, No Mid-Currituck Bridge-Concerned Citizens v. N.C. Dep't of Transp., 60 F.4th 794, 805 (4th Cir. 2023) (upholding agency's decision not to supplement in part because the agency determined that new information reinforced a previous analysis).

[104] *See, e.g.*, Earth Island Inst. v. Elliott, 318 F. Supp. 3d 1155, 1184 (E.D. Cal. 2018) (differentiating an obligation to supplement following new conditions potentially present following a forest fire from a supplemental review that relied on existing post-fire NEPA analysis).

[105] Gulf v. Burgum, 775 F. Supp. 3d 455, at 488–90 (D.D.C. 2025).

[106] *See, e.g.*, Los Padres ForestWatch v. U.S. Forest Serv., No. 23-55801, 2024 WL 4750504, at *1 (9th Cir. Nov. 12, 2024) (upholding the agency's NEPA review because the agency followed applicable NEPA procedures in considering whether any extraordinary circumstances pertaining to the proposed action would result in significant impacts for the proposed action prior to applying the CE); Int'l Soc'y for Prot. of Mustangs & Burros v. U.S. Dep't of Agric., No. CV-22-08114-PHX-SPL, 2022 WL 3588223, at *12 (D. Ariz. July 28, 2022) (upholding the agency's decision to apply a CE notwithstanding the extraordinary circumstance of endangered species present because the agency showed its proposed action would be beneficial to the endangered species present).

[107] Wild Watershed v. Hurlocker, 961 F.3d 1119, 1127 (10th Cir. 2020).

[108] *See, e.g.*, San Luis Obispo Mothers for Peace v. U.S. Nuclear Reg. Comm'n, 100 F.4th 1039, 1058 (9th Cir. 2024) (determining agency followed its own procedures and reasonably applied its CE).

use a CE.[109] In other cases, plaintiffs have argued that an agency improperly relied on multiple CEs to avoid preparing an EIS.[110] While many plaintiffs have alleged that an agency improperly relied on a CE and should have instead prepared an EIS, at least one plaintiff unsuccessfully sued an agency for opting to prepare an EIS when it allegedly could have opted to apply a CE.[111]

Courts may consider whether an agency validly created a CE (sometimes referred to as "adopting" a CE) or appropriately adopted another agency's CE. For example, in *Sierra Club v. Bosworth*, the plaintiffs alleged that the Forest Service violated the APA by categorically excluding all fuel reduction projects of up to 1,000 acres and burn projects of up to 4,500 acres.[112] The U.S. Court of Appeals for the Ninth Circuit concluded that the Forest Service's CE violated the APA because the Service (1) collected data only to justify, rather than assess, the appropriateness of a CE; (2) failed to explain why the cumulative effect of each project would not have significant environmental effects; and (3) failed to specify criteria for each type of project that would ensure a project had no significant environmental effects.[113] Additionally, as amended in 2023, NEPA has also allowed agencies to apply another agency's CE provided they follow the appropriate procedures and consults with the "host" agency about the appropriateness of applying the exclusion in question.[114] Some plaintiffs have challenged these applications in court.[115]

Did the Agency Adequately Analyze Environmental Impacts?

A court may evaluate whether an agency's NEPA review was arbitrary or capricious based on an alleged failure to consider certain impacts or to fully consider the weight of the impacts reviewed. As discussed in more detail below, if an agency makes a decision to move forward with an action without preparing an EIS—whether by applying a CE, issuing a FONSI, or failing to prepare any document—plaintiffs can challenge the agency's decision, asserting that the action would result in significant impacts and therefore requires preparation of an EIS. In other instances, an agency may prepare an EIS where plaintiffs allege the analysis failed to consider a key element of the analysis or an alternative. In these cases, courts generally review the agency's analysis under the APA to determine whether the agency's decision to limit or exclude consideration of particular effects was arbitrary or capricious. In *Seven County Infrastructure Coalition*, the Supreme Court underscored that courts must afford agencies substantial deference in determining whether an agency reasonably exercised its discretion in determining the appropriate scope and contents of an EIS.[116] In particular, the Court clarified that under this standard, the "only role" for courts is to

[109] *See, e.g.*, Oak Ridge Env't Peace All. v. Perry, 412 F. Supp. 3d 786, 845 (E.D. Tenn. 2019) (invalidating multiple decisions to apply CEs due to agency's failure to follow its own regulations in considering extraordinary circumstances); U.S. Citrus Sci. Council v. U.S. Dep't of Agric., 312 F. Supp. 3d 884, 915 (E.D. Cal. 2018) (resolving a disputed application of an agency regulation in favor of the agency's decision to apply a CE).

[110] *Compare, e.g.*, *Los Padres*, No. CV 22-2781-JFW (SKX), 2023 WL 5667533, at *11 (C.D. Cal. July 19, 2023), *aff'd*, 2024 WL 4750504 (9th Cir. Nov. 12, 2024) (upholding the Forest Service's use of multiple CEs in a single proposed action where each was separately considered to apply to the overall proposed action and discussing how other courts have allowed this practice) *with* Friends of the Inyo v. U.S. Forest Serv., 103 F.4th 543, 556 (9th Cir. 2024) (invalidating agency action that impermissibly combined CEs in a manner that failed to take a hard look at how each individual CE applied to the proposed action).

[111] *See* Town of Ogden Dunes v. U.S. Dep't of the Interior, No. 2:20-CV-34-TLS-JEM, 2022 WL 715549, at *11 (N.D. Ind. Mar. 10, 2022).

[112] 510 F.3d 1016 (9th Cir. 2007).

[113] *Id.* at 1026–33.

[114] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, sec. 321(b), § 109, 137 Stat. 10, 43–44.

[115] *See, e.g.*, Plaintiffs' Motion for Summary Judgement, Sierra Club, v. U.S. Dep't of the Interior, No. 4:24-cv-04651-JST (N.D. Cal. Apr. 28, 2025), Dkt. No. 37.

[116] Seven Cnty. Infrastructure Coal. v. Eagle County, 145 S. Ct. 1497, 1512 (2025).

"confirm that the agency has addressed environmental consequences and feasible alternatives as to the relevant project."[117]

Did the Agency Reasonably Determine the Appropriate Scope of Impacts?

Disputes regarding the appropriate scope of analysis can arise, including whether anticipated effects are too attenuated from a proposed action to include in an EIS or EA. As the Supreme Court explained in *Seven County Infrastructure Coalition*, an agency should follow a "rule of reason" rooted in its statutory authority to determine the appropriate scope of a NEPA analysis.[118] This analysis built on *Department of Transportation v. Public Citizen*, in which the Court ruled that the Federal Motor Carrier Safety Administration did not violate NEPA by not considering the environmental effects related to a decision beyond the agency's (and NEPA's) purview: increased entry of trucks from Mexico into the United States, which had been authorized by the President (who is not subject to NEPA) as an outcome of a trade dispute.[119] Additionally, the Court has clarified that a NEPA analysis should focus on the "project at hand" as opposed to broader effects associated with separate future projects.[120]

Another set of cases involves allegations that an agency failed to consider all relevant *indirect effects* arising from a proposed action. The Supreme Court has acknowledged that the extent to which an agency must include indirect effects in its NEPA analysis is a matter of agency discretion.[121] In *Seven County Infrastructure Coalition*, the Court overturned a D.C. Circuit decision that had relied in part on a series of cases ruling that indirect effects, such as greenhouse gas impacts, must be considered where relevant to the underlying authority.[122] While the Court acknowledged that environmental effects that "might extend outside the geographic territory of the project or might materialize later in time"—"so-called indirect effects"—"may fall within NEPA," the Court asserted that "courts should defer to agencies' decisions about where to draw the line" as to "how far to go in considering indirect environmental effects from the project at hand."[123] Ultimately, the Court in *Seven County* upheld the agency's decision to include some degree of greenhouse gas impacts in its NEPA analysis in part due to its determination that many of the effects concerned pertained to separate projects, and further, the APA's arbitrary-and-capricious standard mandates that courts defer to an agency's determination on what effects to include or exclude.[124]

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[117] *Id*. at 1511 (quoting Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980)).

[118] *Id.* at 1513.

[119] Dep't of Transp. v. Pub. Citizen, 541 U.S. 762, 767–68 (2004); *see* Ala. Wilderness League v. Jewell, 788 F.3d 1212, 1225–26 (9th Cir. 2015).

[120] *Seven Cnty. Infrastructure Coal.*, 145 S. Ct. at 1515–16.

[121] *Id.* at 1512–13.

[122] *Id*. at 1518; Eagle County v. Surface Transp. Bd., 82 F.4th 1152, 1178 (D.C. Cir. 2023) (citing, e.g., Sierra Club v. FERC, 867 F.3d 1357, 1374 (D.C. Cir. 2017) ("[G]reenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate.")).

[123] *Seven Cnty. Infrastructure Coalition*, 145 S. Ct. at 1513, 1515.

[124] *Id*. at 1520 (Sotomayor, J., concurring) (explaining how the agency included consideration of greenhouse gas impacts in its environmental analysis); *id.* at 1516 (specifying that the agency was not required to ask another agency to consider climate impacts to Gulf Coast communities associated with a separate project); *id.*, at 1517 ("[E]ven if the reviewing court in such a case might think that NEPA would support drawing a different line, a court should defer to an agency so long as the agency drew a reasonable and 'manageable line.'" (quoting Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004)).

Can the Agency Substantiate Its Determination of Whether Impacts Are Significant?

Agencies and plaintiffs sometimes disagree about whether an agency should have prepared an EIS in instances when an agency applied a CE or prepared an EA and then issued a FONSI documenting the determination that a proposed action would not have significant effects. Courts consistently require that an agency must take a "hard look" at a proposed action's potential effects in order to determine whether impacts are significant, though the specific details are often fact- and case-specific.[125] For example, some plaintiffs have argued an agency improperly segmented a project by dividing it into discrete, separate actions to "avoid a more thorough consideration of the impacts of the entire project" or parsed a proposal into subcomponents that could be completed via some combination of EAs and/or CEs in order to stay below the "significance" threshold.[126] Others have alleged (to varying degrees of success) that an agency lacked enough data to make a reasoned decision about whether effects were significant.[127] Other disputes involve questions about an agency's reliance on certain types of information, such as whether an agency inappropriately relied on outdated information or circumstances substantially changed before the agency finalized its decision (and failed to update its analysis).[128]

In some situations, an agency may face litigation over its decision to prepare an EA and issue a FONSI where impacts could have been significant but for *mitigation measures* intended to address anticipated impacts.[129] This is sometimes known as a mitigated FONSI.[130] Agencies may also include mitigation measures as a condition for proceeding with a proposed action when issuing an EIS or authorizing use of a CE. Such mitigation measures may be enforceable in court.[131]

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[125] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); *see also* Friends of the Floridas v. U.S. Bureau of Land Mgmt., 746 F. Supp. 3d 1039, 1151 & n.48 (D.N.M. 2024) (discussing how courts apply a "hard look" requirement for NEPA and the APA).

[126] Tinian Women Ass'n v. U.S. Dep't of the Navy, 976 F.3d 832, 838 (9th Cir. 2020); *see, e.g.*, Sierra Club v. U.S. Army Corps of Eng'rs, No. 2:20-CV-396-LEW, 2025 WL 961432, at *22 (D. Me. Mar. 31, 2025).

[127] *Compare Sierra Club*, 2025 WL 961432, at *22 (declining to hold agency to standard of "perfection" in considering best available evidence and upholding a NEPA review where agency adequately considered information available to it) *with* Cascadia Wildlands v. Adcock, No. 6:22-CV-01344-MTK, 2025 WL 1194191, at *8 (D. Or. Apr. 24, 2025) (finding it was unreasonable for an agency to knowingly undertake field surveys only after the NEPA review had been completed unless it was for a landscape-level analysis where subsequent field-level analysis was planned as a part of a separate NEPA review).

[128] *See, e.g.*, Gulf v. Burgum, 775 F. Supp. 3d 455, 483 (D.D.C. 2025) (finding it was unreasonable for agency to refuse to consider new information resulting from changed conditions resulting from enactment of new legislation affecting the proposed action). Whether an agency relied on outdated information for its current analysis is different than analysis of whether an agency violated the law by declining to supplement existing NEPA analysis where new information has become available. *See, e.g.*, WildEarth Guardians v. Bernhardt, 423 F. Supp. 3d 1083, 1102 (D. Colo. 2019) (upholding agency decision not to supplement notwithstanding new information).

[129] *See, e.g.*, O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 234 (5th Cir. 2007) (invalidating a mitigated FONSI following preparation of an EA that provided "only cursory detail" in describing the extent of the mitigation measures and how they would reduce the significance of impacts).

[130] Previously, CEQ regulations in 40 C.F.R. § 1501.6 set forth conditions under which agencies could issue a mitigated FONSI. Some agencies adopted their own procedures, which may still be in effect although CEQ regulations have since been revoked, *see* Removal of NEPA Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025). NEPA itself is silent on the use of a mitigated FONSI.

[131] *See, e.g.*, Mulgrew v. U.S. Dep't of Transp., 750 F. Supp. 3d 171, 217 (S.D.N.Y. 2024) (upholding agency FONSI based on application mitigation measures for congestion pricing); Protect Our Cmtys. Found. v. LaCounte, 939 F.3d 1029 (9th Cir. 2019) (addressing mitigation measures intended to protect golden eagles as conditions in an EIS pertaining to construction and operation of wind turbines).

Did the Agency Consider a Reasonable Set of Alternatives?

NEPA requires agencies to consider alternatives to their proposed actions as part of the environmental review process.[132] Courts and CEQ have referred to this requirement as the "heart" of the environmental review.[133] Agencies need not analyze every possible option; rather, "the concept of alternatives must be bounded by some notion of feasibility."[134] Thus, agencies must exercise "common sense" when determining which proposals to include in an EIS; courts will not find an EIS insufficient "simply because the agency failed to include every alternative device and thought conceivable by the mind of man."[135] While some specific authorities limit consideration of alternatives, agencies typically have broad latitude under NEPA to decide what alternatives to include or exclude in a NEPA analysis. For example, courts have found it reasonable for an agency to limit alternatives analysis to a preferred option and a no-action option.[136] Additionally, if there was opportunity for public comment in preparation of a NEPA document, courts typically dismiss claims alleging the agency failed to consider an alternative if that argument was not raised during the comment period.[137]

Challenges to an agency's consideration of alternatives to the proposed action arise in a variety of ways. Under the APA's arbitrary-and-capricious standard, agencies are typically judged by whether they considered a reasonable range of alternatives and explained their reasoning for accepting or rejecting specific options.[138] For example, in a decision that presaged *Seven County Infrastructure Coalition*, the U.S. Court of Appeals for the First Circuit refused to find that the Bureau of Land Management was arbitrary or capricious in its rejection of alternatives outside the geographic area for a proposed lease, reasoning that activity beyond the planned area could be considered as a separate project at a later date.[139] Similarly, the D.C. Circuit has refused to require the Federal Energy Regulatory Commission to consider the type of energy used in its alternatives analysis where a state controlled the selection of energy sources.[140] A court may, however, find

[132] 42 U.S.C. § 4332.

[133] *See, e.g.*, CEQ, A CITIZEN'S GUIDE TO THE NEPA 16 (2007), https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf [https://perma.cc/UW2Y-2CJG]; Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1243 (10th Cir. 2011); City of Carmel-By-The-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 194 (D.C. Cir. 1991).

[134] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 551 (1978).

[135] *Id.*

[136] Earth Island Inst. v. U.S. Forest Serv., 87 F.4th 1054, 1065 (9th Cir. 2023) (citing N. Idaho Cmty. Action Network v. U.S. Dep't of Transp., 545 F.3d 1147, 1154 (9th Cir. 2008)); *see also* 16 U.S.C. § 6514 (allowing consideration of only one alternative for covered hazardous fuels reduction projects); Friends of the Floridas v. U.S. Bureau of Land Mgmt., 746 F. Supp. 3d 1039, 1175–76 (D.N.M. 2024) (accepting agency's reasoned rejection of two alternatives beyond the preferred action/no-action alternatives where the project proposal was "straightforward" and the proposed alternatives met the stated purpose and need of the proposed action).

[137] *See, e.g.*, *Earth Island Inst.*, 87 F.4th at 1063 (noting an exception for commenting on alternatives where an agency has independent information available, but that was not the case here and plaintiffs made no effort to raise the matter during the applicable comment period). For additional discussion of limitations based on failure to first raise a concern directly with the agency, see discussion *supra* "Exhaustion."

[138] *See, e.g.*, Hualapai Indian Tribe v. Haaland, 755 F. Supp. 3d 1165, 1193 (D. Ariz. 2024) (finding a NEPA violation for failure of agency to at least consider including reasonable alternatives identified by plaintiff in public comments).

[139] Seafreeze Shoreside, Inc. v. U.S. Dept. of the Int., 123 F.4th 1, 22 (1st Cir. 2024), *cert. denied sub nom.*, Responsible Offshore Dev. v. Dep't of the Interior, No. 24-966, 2025 WL 1287066 (U.S. May 5, 2025), *and cert. denied sub nom.*, Seafreeze Shoreside Inc. v. Dep't of the Interior, No. 24-971, 2025 WL 1287076 (U.S. May 5, 2025).

[140] Citizens Action Coal. of Ind., Inc. v. FERC, 125 F.4th 229, 239 (D.C. Cir. 2025).

that the agency is arbitrary and capricious where it ignores consideration of any alternatives and fails to explain why options submitted during public comment were not viable.[141]

Did the Agency Follow Appropriate Procedures for Consultation?

NEPA's goals encourage informed agency decisionmaking and include certain public disclosure and participation requirements.[142] Since 2023, NEPA has required that an agency publicly circulate a notice of intent to prepare an EIS.[143] Additionally, an agency drafting an EIS must obtain comments from federal agencies with "jurisdiction by law or special expertise with respect to any environmental impact involved."[144] These comments—as well as any additional comments and views of federal, state, and local agencies—must accompany the proposal through any agency review processes, and are also made available to the President, CEQ, and the public.[145] Agencies also engage with relevant tribal authorities and may also receive public comments during this time.[146] Whether or not an agency followed these procedures is generally reviewable as a matter of law.[147]

Remedies in NEPA Litigation

A court typically has broad latitude to order a spectrum of remedies when it finds an agency violated the law with respect to NEPA. In cases considering the validity of a permit or related authorization, such relief could include declaring an agency's NEPA or permitting action illegal, remanding the disputed NEPA analysis to the agency for further consideration, vacating all or part of a permitting decision, or further enjoining project activity.[148]

[141] *See, e.g.*, Hualapai Indian Tribe v. Haaland, 755 F. Supp. 3d 1165, 1193 (D. Ariz. 2024) (finding tribe's proposed alternatives for alternate oil well design options to be not "infeasible, ineffective, or inconsistent" with policy) (citing Headwaters, Inc. v. Bureau of Land Mgt., Medford Dist., 914 F.2d 1174, 1181 (9th Cir. 1990)).

[142] *See* 42 U.S.C. § 4332; Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 (1989) (noting NEPA's EIS requirement and other procedures implement "sweeping policy goals by ensuring that agencies will take a 'hard look' at environmental consequences and by guaranteeing broad public dissemination of relevant information").

[143] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, sec. 321(b), § 107(c), 137 Stat. 10, 41. Until April 2025, CEQ regulations required agencies to circulate a draft EIS for public comment. *See* Exec. Order No. 14,154, 90 Fed. Reg. 8353 (Jan. 20, 2025); CEQ Memo, *supra* note 7; Removal of NEPA Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025).

[144] 42 U.S.C. § 4332(C)(v). Federal, state, tribal, and local cooperating agencies may contribute to the development of the EIS, potentially including analysis or proposals such as mitigation measures related to the proposed action. *Id*.

[145] *Id*.

[146] Aside from scoping inputs (42 U.S.C. § 4336a(c)), NEPA itself does not explicitly require public comment on a draft EIS. For decades, CEQ regulations required public input with a public comment period that typically lasted at least forty-five days between the draft and final EIS across all iterations of their NEPA implementing regulations. *See, e.g.*, NEPA Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35567, 33572 (May 1, 2024); Update to the Regulations Implementing NEPA Procedural Provisions, 85 Fed. Reg. 43304, 43365, 43372 (July 16, 2020); NEPA Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55978, 55997–98 (Nov. 29, 1978)). Following recission of the CEQ guidance, some agencies provide for public comment on a draft EIS, while others do not.

[147] *See., e.g.*, Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095, 1102–04 (9th Cir. 2019) (describing NEPA's "expansive" consultation requirements).

[148] For an example of a NEPA claim that included remand, vacatur, and an injunction, see CRS Legal Sidebar LSB10943, *The Willow Project: History and Litigation*, by Adam Vann (2023).

Declaratory Relief

Declaratory relief refers to the court's formal determination of whether there was any violation of the law.[149] Permitting cases that are decided on the merits typically include a determination of whether an agency violated the law. If no further remedy is ordered by the court, a prevailing party would receive only declaratory relief. Declaratory relief alone is not a common remedy in permitting actions, although the APA does expressly allow a claim for declaratory judgments.[150]

Remand

If a court determines an agency's NEPA process requires reconsideration or a potential change, it may order a lower court or agency to revisit a decision in order to cure a violation.[151] For example, remand may be ordered for an agency to consider certain information that was initially excluded from its analysis, or to explain its reasoning for why it made a certain decision.[152] A court generally remands an issue to an agency where a judge decides an agency is best suited to exercise its discretion on a NEPA matter and may order additional measures to bring that agency into compliance with statutory obligations.[153]

Vacatur

When a court finds that an agency violated the APA, the statute directs the court to "set aside the agency's action," which may result in vacatur.[154] In NEPA cases, courts have recognized that vacatur is the "ordinary" remedy.[155] For example, a court may vacate a NEPA review or the underlying action if an agency neglected to analyze a key impact or if the agency violated notice and comment requirements or other procedural obligations that cast "serious doubt" over an agency's decision.[156] Courts may vacate an agency's environmental document or could potentially

[149] *See generally* 28 U.S.C. § 2201(a) ("any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."); MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) (allowing the possibility of relief solely on declaratory grounds, subject to judicial discretion); *see also* Kunkel v. Cont'l. Cas. Co., 866 F.2d 1269, 1274 (10th Cir. 1989) (citing Aetna Life, 300 U.S. 227, 241 (1937) ("The declaration of rights, however, need not include injunctive or monetary relief.")).

[150] 5 U.S.C. § 703; *see also* 28 U.S.C. § 2201 (allowing for declaratory judgment "whether or not further relief is or could be sought").

[151] *See generally* Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."). Additionally, an appellate court may remand a matter to a lower court if there is additional action needed in order to proceed with a case.

[152] *See, e.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 282 F. Supp. 3d 91, 109 (D.D.C. 2017); WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 75 (D.D.C. 2019).

[153] *See, e.g.*, Mont. Wildlife Fed'n. v. Haaland, 127 F.4th 1, 52 (9th Cir. 2025).

[154] 5 U.S.C. § 706(2); *see also* Diné Citizens Against Ruining Our Env't v. Haaland, 59 F.4th 1016, 1048 (10th Cir. 2023) (noting vacatur is a "common" and "appropriate" form of injunctive relief for a NEPA claim); Harmon v. Thornburgh, 878 F.2d 484, 495 & n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

[155] *See* Sierra Club v. U.S. Dep't of Transp., 125 F.4th 1170, 1186 (D.C. Cir. 2025) (citing United Steel v. Mine Safety & Health Admin., 925 F.3d 1279, 1287 (D.C. Cir. 2019)); Black Warrior Riverkeeper v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1290 (11th Cir. 2015) (discussing history of remand without vacatur).

[156] *See, e.g.*, Vecinos para el Bienestar de la Comunidad Costera v. FERC, 6 F.4th 1321, 1332 (D.C. Cir. 2021)
(continued...)

vacate the underlying decision that is the subject of the NEPA analysis.[157] Courts may also vacate a rule implementing NEPA promulgated by an agency.[158]

Notwithstanding the statutory requirement for a court to "set aside" agency action that violates the APA, there are situations in NEPA cases where a court can remand a NEPA matter to an agency without vacatur.[159] *Seven County Infrastructure Coalition* clarified that a NEPA deficiency may not be sufficient to warrant vacatur of an underlying project approval "absent reason to believe that the agency might disapprove the project if it added more" to the NEPA analysis.[160] Courts sometimes order remand without vacatur when finding "harmless error," or if vacatur would prove particularly disruptive.[161] The D.C. Circuit and some other courts apply two primary factors in considering vacatur*:* (1) the seriousness of the order's deficiencies and (2) any disruptive consequences of vacatur.[162] For example, the D.C. Circuit has declined to vacate an agency's environmental review based on a conclusion that the agency was likely to remedy deficiencies on remand, whereas vacating would have imperiled project funding.[163] By contrast, a court may be more likely to vacate if, for example, an agency's actions on remand could change a

(declining to vacate FERC's environmental review on the ground that the agency would likely remedy deficiencies on remand, while vacating would imperil needed financing to ensure timely project completion); *see generally* Charles H. Koch, Jr. & Richard Murphy, *Types of Remedies in Review*, 3 ADMINISTRATIVE LAW & PRACTICE § 8:31 (3d ed. 2020) (describing the meaning of "set aside" under the APA) (citing, e.g., Nat. Res. Def. Council v. Wheeler, 955 F.3d 68, 85 (D.C. Cir. 2020); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032 (D.C. Cir. 2021); Env't Def. Fund v. FERC, 2 F.4th 953, 976 (D.C. Cir. 2021)).

[157] 5 U.S.C. § 706(2) generally identifies the circumstances for courts to "set aside" an agency action.

[158] *See, e.g.*, Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020), https://www.gwlr.org/wp-content/uploads/2020/09/88-Geo.-Wash.-L.-Rev.-1121.pdf [https://perma.cc/J68H-XYHJ]; Jameson M. Payne & GianCarlo Canaparo, Is Vacatur Unconstitutional? (July 1, 2025) (draft manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5333468 [https://perma.cc/E6QM-S8AT]. *See also* Harmon v. Thornburgh, 878 F.2d 484, 495 & n.21 (D.C. Cir. 1989) (contemplating the possibility of vacating a rule under the APA at a level that applies nationally).

[159] *Black Warrior Riverkeeper*, 781 F.3d at 1290; STEPHANIE J. TATHAM, ADMIN. CONF. OF THE UNITED STATES, THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR 30–36 (2014), https://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20Final%20Report.pdf [https://perma.cc/F6EL-4KAA] (finding a trend of remanding without vacatur in the D.C. Circuit, in particular with respect to the Clean Air Act); *cf*. United States v. Texas, 599 U.S. 670, 686–703 (2023) (Gorsuch, J., concurring) (discussing the meaning of "set aside" under the APA in the context of vacatur and other options for relief).

[160] Seven Cnty. Infrastructure Coal. v. Eagle County, 145 S. Ct. 1497, 1514 (2025).

[161] *See, e.g*., Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy, 860 F.3d 1244, 1252 (9th Cir. 2017) (examining "whether the error materially impeded NEPA's goals" such as by "precluding informed decisionmaking and public participation" and not being "fully aware of the environmental consequences of the proposed action); WildEarth Guardians v. U.S. Bureau of Land Mgmt., 870 F.3d 1222, 1240 (10th Cir. 2017) (remanding to lower court to consider a narrower form of injunctive relief aside from vacatur); *see generally* Allied-Signal, Inc. v. Nuclear Reg. Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (establishing factors for vacatur to include the seriousness of an agency's deficiencies and the "disruptive consequences" of potential ensuing changes); Diné Citizens Against Ruining Our Env't v. Haaland, 59 F.4th 1016, 1025 (10th Cir. 2023) (adopting the *Allied-Signal* approach).

[162] *Allied-Signal*, 988 F.2d at 150–51. NEPA-specific opinions applying the *Allied Signal* test include *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1332 (D. C. Cir. 2021), *Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1, 52 (9th Cir. 2025) (finding the disruptive consequences of lease vacatur significantly outweighed the seriousness of the agency's procedural error and further remanding to the agency for NEPA compliance while enjoining (prohibiting) surface-disturbing activities "in the interim"), *WildEarth Guardians v. U.S. Forest Serv*., 137 F.4th 1068, 1092 (10th Cir. 2025) (directing trial court consideration of *Allied Signal* factors in consideration of the remedy), *Black Warrior Riverkeeper*, 781 F.3d at 1290 ("In circumstances like these, where it is not at all clear that the agency's error incurably tainted the agency's decisionmaking process, the remedy of remand without vacatur is surely appropriate."), and *Ackerman Bros. Farms, LLC v. U.S. Dep't of Agric.*, No. 1:17-CV-11779, 2021 WL 6133910, at *7 (E.D. Mich. Dec. 29, 2021) (finding the disruptive consequences of vacatur to outweigh the seriousness of the violation that otherwise slightly weighed in favor of vacatur).

[163] *Vecinos para el Bienestar de la Comunidad Costera*, 6 F.4th at 1332.

project's design based on a revised NEPA analysis or if the agency has a history of violating the APA and NEPA.[164]

Injunctive Relief

A plaintiff may ask a court to impose *injunctive relief* in the form of requiring an agency to undertake or refrain from undertaking a specific activity.[165] When a court determines injunctive relief is appropriate, that relief could be *complete*, in the sense of entirely halting an agency action or project, or *partial*, such as by ordering that a project component proceed (or not) in a specific manner without affecting the underlying action more broadly than the specific issue of concern. The Supreme Court has stressed there is no "thumb on the scales" in favor of an injunction as compared to ordering relief in the form of vacatur.[166] A court could, for example, decline to vacate an action and instead remand to correct a NEPA violation while ordering an interim injunction, such as temporarily delaying project-level activity until the NEPA matter is cured.[167]

Sometimes in NEPA-related legal challenges, a plaintiff asks a court to impose a *preliminary injunction* early in litigation before the matter can receive a full ruling on the merits or a *temporary restraining order* to prevent imminent harm while the court considers whether to enter a preliminary injunction.[168] The Supreme Court has explained that a preliminary injunction is an "extraordinary remedy" that is "never awarded as of right."[169] To obtain a preliminary injunction, a plaintiff must show (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of the equities tips in the plaintiff's favor, and (4) that an injunction is in the public interest.[170] While these four factors are generally universal in application, courts vary in interpreting how they apply.[171] For example, the Ninth Circuit has explained that one way in which this four-part test could be met is where the plaintiff has adequately raised "serious questions" on the merits, the balance of hardships sharply tilts in a plaintiff's favor, and the other two factors are also satisfied.[172]

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[164] *See, e.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032, 1050–53 (D.C. Cir. 2021).

[165] *See generally Types of Remedies in Review*, 3 ADMINISTRATIVE LAW & PRACTICE § 8:31 (3d ed. 2024) (discussing the scope of injunctive relief) (citing Sampson v. Murray, 415 U.S. 61, 78, 88 (1974)). Note that vacatur is sometimes characterized as a specific form of injunctive relief. *See, e.g.*, *Diné Citizens*, 59 F.4th at 1048.

[166] Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157 (2010).

[167] *See, e.g.*, *Mont. Wildlife Fed'n*, 127 F.4th at 52 (reversing a lower court's decision to vacate while temporarily enjoining "surface-disturbing activity" until the agency complied with NEPA).

[168] FED. R. CIV. P. 65. Temporary restraining orders typically expire within fourteen days or less and may be issued without notice to the opposing party; preliminary injunctions typically last until judgment is rendered on the merits and may be of longer duration than a temporary restraining order and typically require notice to the opposing party. *Id.*

[169] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2009).

[170] *Id.* These four findings are sometimes referred to as the *Winter* factors. When a plaintiff seeks an injunction against the government, the balance of equities and public interest factors merge. *See* Nken v. Holder, 556 U.S. 418, 435 (2009).

[171] *Compare* Sierra Club, Inc. v. Bostick, 539 Fed. Appx. 885, 889 (10th Cir. 2013) (describing various opinions interpreting *Winter*'s four factors, including several to support the proposition that failure to prove any one of the four factors could result in a denial of a request for injunctive relief) *with* All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (joining the Second and Seventh Circuits in adopting a "sliding scale" approach for satisfying the four *Winter* factors).

[172] *See, e.g.*, Earth Island Inst. v. Muldoon, 82 F.4th 624, 640 (9th Cir. 2023) (denying a request for a preliminary injunction in a NEPA where plaintiff's failure to raise serious questions on the merits was dispositive and quoting Env't Prot. Info. Ctr. v. Carlson, 968 F.3d 985, 989 (9th Cir. 2020) ("Likelihood of success on the merits is a threshold inquiry and is the most important factor.")).

A plaintiff seeking a permanent injunction must demonstrate (1) irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[173] The burden is on a plaintiff to prove why the test is satisfied and the injunction should be granted; such relief is not presumed.[174] For example, the Supreme Court has said that where a less "drastic" remedy, such as partial or complete vacatur of an underlying action, is adequate to address a plaintiff's injury, a court should not order additional extraordinary relief in the form of an injunction.[175] When a court orders an injunction in a NEPA case, it may be lifted once the underlying violation is cured.[176] In this context, even a "permanent" injunction for a NEPA matter may be time limited, as the goal of any remedied NEPA analysis is to inform the underlying agency decision on whether and how to proceed with a proposed action.

Considerations for Congress

Congress has numerous options to address judicial review of agency NEPA actions. While NEPA itself has been amended a handful of times since its inception, Congress typically considers hundreds of bills each congressional term with provisions addressing NEPA.[177] Some of those bills would affect how courts consider NEPA cases, while others would affect reviewability by amending requirements in NEPA or individual agencies' environmental review processes. Introduced bills have offered changes to how courts would review an agency's NEPA documents in the context of a proposed action and to potential remedies a court may order if an agency's NEPA review has violated the law. Bills have also included approaches to clarify the scope of environmental effects an agency considers in its decisionmaking.

Congress has considerable latitude to specify when and under what circumstances courts would review an agency's NEPA analysis. Congress could limit judicial review of NEPA claims by restricting the scope of agency NEPA review or modifying the availability judicial review itself. For example, some bills introduced in the 118th Congress, such as Senate Amendment 1911 to H.R. 3935 or House Amendment 272 to H.R. 3935, would have limited consideration to effects the agency has the authority to directly regulate (as opposed to effects of actions an agency has the authority to take).[178] Additionally, some Members have introduced bills that would affect the

[173] Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010) (quoting eBay Inc. v. MercExchange L.L.C., 547 U.S. 388, 391 (2006) and citing *Winter*, 555 U.S. at 31–33).

[174] *Id.* at 158 ("It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should not issue; rather, a court must determine that an injunction should issue under the traditional four-factor test set out above.").

[175] *Id.* at 165–66.

[176] Where a court finds a NEPA violation and orders an underlying action vacated without additional injunctive relief, the Supreme Court has clarified that plaintiffs concerned that an agency's underlying action in response to vacatur could subsequently violate NEPA would still have the right to bring a new legal challenge based on any ensuring violations. *Monsanto*, 561 U.S. at 162. The practical distinction between this outcome and additional equitable relief in the form of an injunction pending cure of a NEPA violation is not always clear, as both situations could result in a temporary pause in an agency's action in order to address the NEPA violation.

[177] CONGRESS.GOV, "National Environmental Policy Act," 1574 results (Aug. 27, 2025) (filtered by "Legislation", "1973–2026"), https://perma.cc/BDK7-ZHW9.

[178] *E.g.*, S.Amdt. 1911 to H.R. 3935, 118th Cong. (2024); H.Amdt. 272 to H.R. 3935, 118th Cong. (2024); *see* CRS In Focus IF12417, *Environmental Reviews and the 118th Congress*, by Kristen Hite (2023).

availability of judicial review of an agency's NEPA analysis.[179] Congress may also specify a more or less deferential standard of review of the merits of an agency's NEPA analysis.

Congress could also affect judicial review of NEPA analysis by amending the scope of which agency actions are subject to NEPA and what agencies are required to consider when analyzing environmental effects. Such changes could affect judicial review by expanding or contracting the universe of actions for which NEPA analysis is required and therefore what a court could review. Such amendments could also potentially affect NEPA litigation by imposing statutory guardrails that courts would consider when evaluating whether an agency's NEPA analysis was lawful.

Congress could consider enacting legislation in response to NEPA's evolving regulatory landscape.[180] Recission of NEPA regulations and the *Seven County* opinion have shifted the onus more squarely onto individual agencies to navigate NEPA implementation. Codifying some or all of the elements of the NEPA process that were previously found only in CEQ regulations would limit agency discretion in implementing NEPA and thus would somewhat limit the deference that courts would otherwise afford to agencies. For example, incorporating specific procedural requirements into statute would provide federal agencies, stakeholders, and courts with clarity on the environmental review requirements Congress intends for agencies to apply. Alternatively, if Congress believes NEPA is best implemented via a less standardized approach, Congress could consider directing agencies to promulgate or update regulations detailing their NEPA procedures based on any additional parameters that Congress believes to be warranted.

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[179] *E.g.*, H.R. 471, § 121(c), 119th Cong. (2025); S. 4753, 118th Cong. (2024).

[180] In 2025, after CEQ rescinded all government-wide regulations implementing NEPA, a number of agencies subsequently rescinded all or part of their NEPA regulations. *See, e.g.*, 90 Fed. Reg. 29393, 29393–29715 (July 3, 2025) (containing multiple agencies' recissions or amendments to NEPA rules).