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Changing implementation of NEPA: transforming the future of Impact Assessment

MAY 21, 2026

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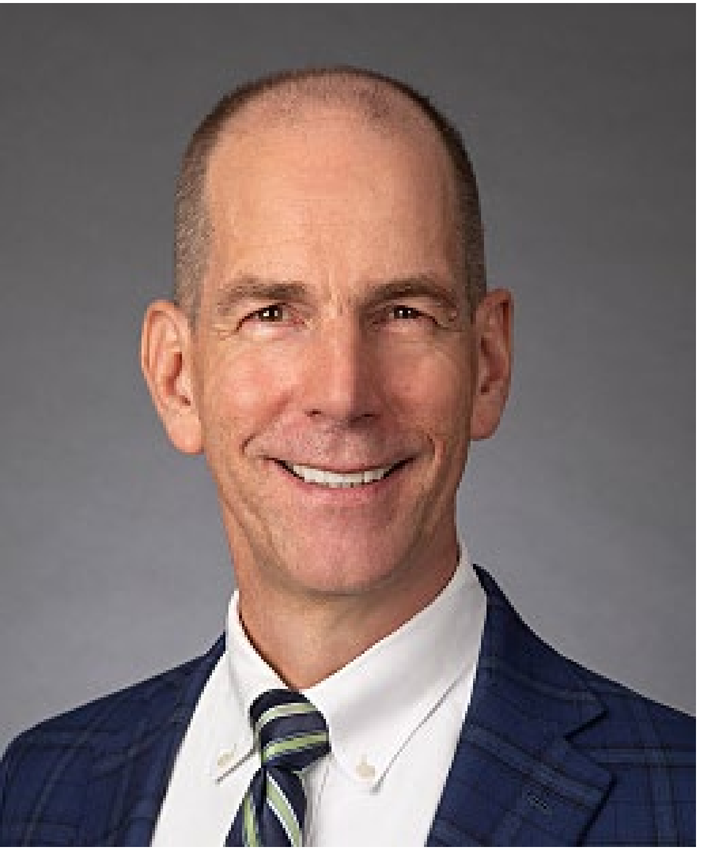

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Edward (Ted) Boling advises clients on the development of renewable energy generation and transmission, resource development, transportation, and infrastructure drawing on over 30 years of high-level public service. Ted served in the Council on Environmental Quality (CEQ), U.S. Department of the Interior (DOI), and the U.S. Department of Justice (DOJ) in both Democratic and Republican administrations.

As General Counsel and in counsel and associate director positions at CEQ, Ted led development of updates to CEQ NEPA regulations and guidance on mitigation and monitoring, environmental conflict resolution, and the development categorical exclusions from detailed NEPA documentation. Ted advised on ocean policy and the establishment of numerous national monuments, including the first marine national monuments in the United States and the largest marine protected areas in the world.

An Era of Change in NEPA Practice

- **Legislation** -- Congress codifies 2020 regulatory updates with 2023 amendments to NEPA ; more on the way?

- **Regulations** change and CEQ provides guidance
  - Administration **Executive Orders**
  - **Updated agency guidance** in Trump 2.0

- The **Supreme Court** sets the stage for dramatic changes in 2025

Is There a “Major Federal Action”? FRA NEPA Amendments

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SEC. 106 PROCEDURE FOR DETERMINATION OF LEVEL OF REVIEW, 42 U.S.C. § 4336

(a) THRESHOLD DETERMINATIONS. -- An agency is not required to prepare an environmental document with respect to a proposed agency action if --

(1) the proposed agency action is not a final agency action within the meaning of the term in chapter 5 of title 5, United States Code;

(2) the proposed agency action is excluded pursuant to one of the agency’s categorical exclusions, another agency’s categorical exclusions consistent with section 109 of this Act, or another provision of law;

(3) the preparation of such a document would clearly and fundamentally conflict with the requirements of another provision of law; or

(4) the proposed agency action is a nondiscretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action.

FRA Amendments, "Major Federal Action" (cont'd)

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SEC. 111. MAJOR FEDERAL ACTION DEFINITION

(A) IN GENERAL.—The term 'major Federal action' means an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility.

(B) EXCLUSION.—The term 'major Federal action' does not include—

(i) a non-Federal action—

(I) with no or minimal Federal funding; or

(II) with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project;

(ii) funding assistance solely in the form of general revenue sharing funds which do not provide Federal agency compliance or enforcement responsibility over the subsequent use of such funds;

(iii) loans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action;

(iv) business loan guarantees provided by the Small Business Administration pursuant to section 7(a) or (b) and of the Small Business Act (U.S.C. 636(a)), or title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 et seq.);

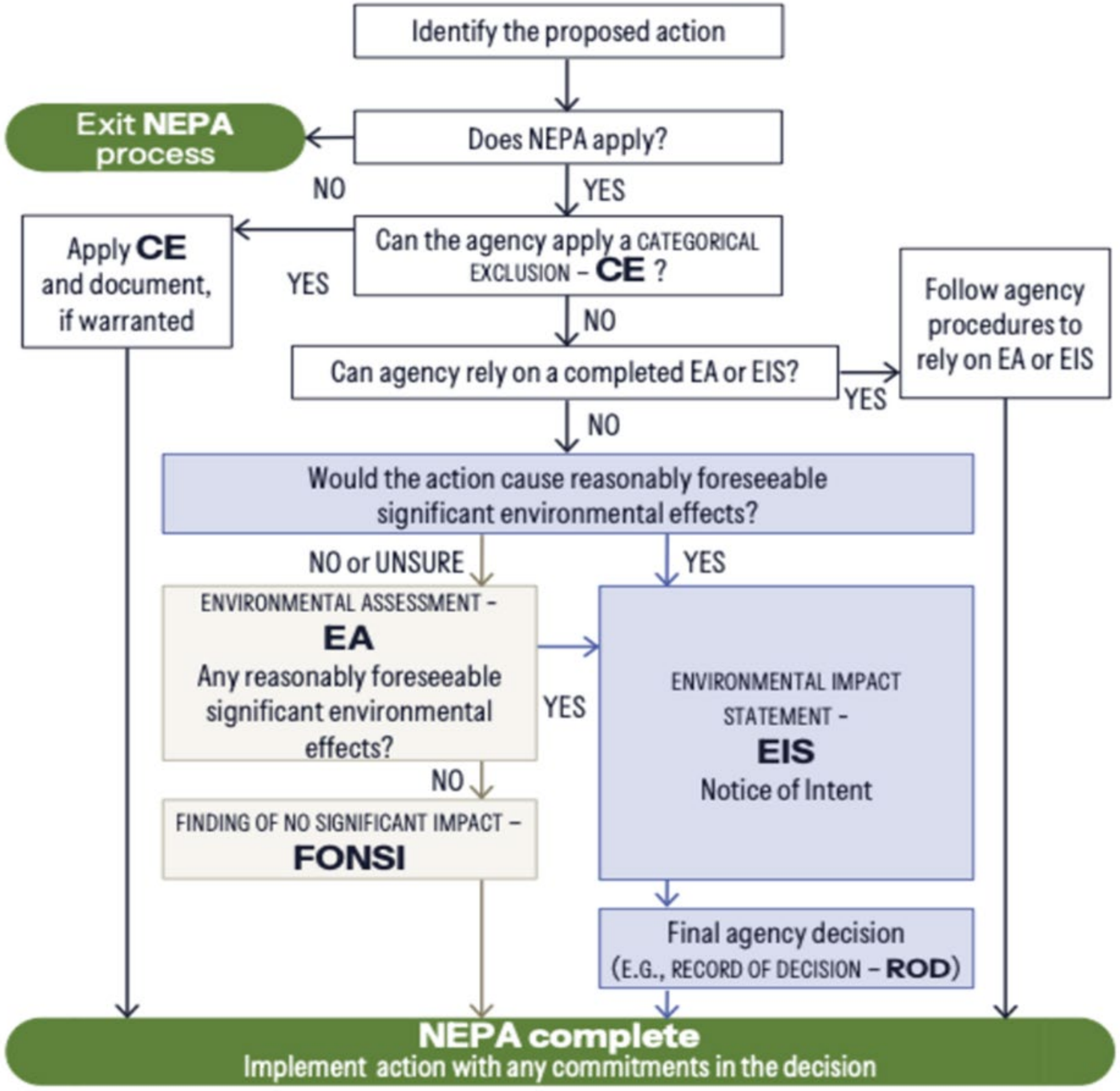
(v) bringing judicial or administrative civil or criminal enforcement actions;

(vi) extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States; or

(vii) activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority.

THE NEPA PROCESS

NATIONAL ENVIRONMENTAL POLICY ACT, *as amended through July 22, 2025*



This flowchart is a supplemental tool providing a visual overview of the NEPA process. For more details, visit NEPA.gov

JANUARY 2026

NEPA as amended by the Fiscal Responsibility Act (June 3, 2023)

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SEC. 102(2)(C) CONSISTENT WITH THE PROVISIONS OF THIS ACT AND EXCEPT WHERE COMPLIANCE WOULD BE INCONSISTENT WITH OTHER STATUTORY REQUIREMENTS, . . . [INCLUDE A DETAILED STATEMENT] ON –

(i) reasonably foreseeable environmental effects of the proposed agency action;

(ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;

(iv) the relationship between local and short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.

Fiscal Responsibility Act of 2023 (cont'd)

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SECTION 102(2)(D)-(L) AMENDMENTS

(D) ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document;

(E) make use of reliable data and resources in carrying out this Act;

(F) consistent with the provisions of this Act, study, develop, and describe technically and economically feasible alternatives;

. . . .

(I) consistent with the provisions of this Act recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

Fiscal Responsibility Act of 2023 (cont'd)

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SEC. 106 LEVELS OF REVIEW

(b) Levels of review

(1) ENVIRONMENTAL IMPACT STATEMENT -- An agency shall issue an environmental impact statement with respect to a proposed agency action requiring an environmental document that has a reasonably foreseeable significant effect on the quality of the human environment.

(2) ENVIRONMENTAL ASSESSMENT.—An agency shall prepare an environmental assessment with respect to a proposed agency action that does not have a reasonably foreseeable significant effect on the quality of the human environment, or if the significance of such effect is unknown, unless the agency finds that the proposed agency action is excluded pursuant to one of the agency's categorical exclusions, another agency's categorical exclusions consistent with section 109 of this Act, or another provision of law. Such environmental assessment shall be a concise public document prepared by a Federal agency to set forth the basis of such agency's finding of no significant impact or determination that an environmental impact statement is necessary.

Fiscal Responsibility Act of 2023 (cont’d)

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SEC. 107. TIMELY AND UNIFIED FEDERAL REVIEWS.

§4336a.

(a)(1) LEAD AGENCY DESIGNATION.—

(A) IN GENERAL.—If there are two or more participating Federal agencies, such agencies shall determine, by letter or memorandum, which agency shall be the lead agency based on consideration of the—

(i) magnitude of agency’s involvement;

(ii) project approval or disapproval authority;

(iii) expertise concerning the action’s environmental effects;

(iv) duration of agency’s involvement; and

(v) sequence of agency’s involvement.

(B) JOINT LEAD AGENCIES.—In making a determination under subparagraph (A), the participating Federal agencies may appoint such State, Tribal, or local agencies as joint lead agencies as the involved Federal agencies shall determine appropriate. Joint lead agencies shall jointly fulfill the role described in paragraph (2).

Fiscal Responsibility Act of 2023 (cont'd)

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SEC. 107. TIMELY AND UNIFIED FEDERAL REVIEWS.

(2) ROLE.—A lead agency shall, with respect to a proposed agency action—

(A) supervise the preparation of an environmental document if, with respect to such proposed agency action, there is more than one participating Federal agency;

(B) request the participation of each cooperating agency at the earliest practicable time;

(C) in preparing an environmental document, give consideration to any analysis or proposal created by a cooperating agency;

(D) develop a schedule, in consultation with each cooperating agency, the applicant, and such other entities as the lead agency determines appropriate, for completion of any environmental review, permit, or authorization required to carry out the proposed agency action;

(E) if the lead agency determines that a review, permit, or authorization will not be completed in accordance with the schedule developed under subparagraph (D), notify the agency responsible for issuing such review, permit, or authorization of the discrepancy and request that such agency take such measures as such agency determines appropriate to comply with such schedule; and

(F) meet with a cooperating agency that requests such a meeting.

Fiscal Responsibility Act of 2023 (cont'd)

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SEC. 107. TIMELY AND UNIFIED FEDERAL REVIEWS.

(b) ONE DOCUMENT.—To the extent practicable, if a proposed agency action will require action by more than one Federal agency and the lead agency has determined that it requires preparation of an environmental document, the lead and cooperating agencies shall evaluate the proposal in a single environmental document.

(c) REQUEST FOR PUBLIC COMMENT.—Each notice of intent to prepare an environmental impact statement under section 102 shall include a request for public comment on alternatives or impacts and on relevant information, studies, or analyses with respect to the proposed agency action.

(d) STATEMENT OF PURPOSE AND NEED.—Each environmental document shall include a statement of purpose and need that briefly summarizes the underlying purpose and need for the proposed agency action.

Fiscal Responsibility Act of 2023 (cont'd)

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SEC. 107(g) DEADLINES. ---

(1) IN GENERAL.—Except as provided in paragraph (2), with respect to a proposed agency action, a lead agency shall complete, as applicable—

(A) the environmental impact statement not later than the date that is 2 years after the sooner of, as applicable—

(i) the date on which such agency determines that section 102(2)(C) requires the issuance of an environmental impact statement with respect to such action;

(ii) the date on which such agency notifies the applicant that the application to establish a right-of-way for such action is complete; and

(iii) the date on which such agency issues a notice of intent to prepare the environmental impact statement for such action; and

(B) the environmental assessment not later than the date that is 1 year after the sooner of, as applicable—

(i) the date on which such agency determines that section 106(b)(2) requires the preparation of an environmental assessment with respect to such action;

(ii) the date on which such agency notifies the applicant that the application to establish a right-of-way for such action is complete; and

(iii) the date on which such agency issues a notice of intent to prepare the environmental assessment for such action.

Fiscal Responsibility Act of 2023 (cont'd)

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SEC. 107(g) DEADLINES. ---

(2) DELAY.—A lead agency that determines it is not able to meet the deadline described in paragraph (1) may extend such deadline, in consultation with the applicant, to establish a new deadline that provides only so much additional time as is necessary to complete such environmental impact statement or environmental assessment.

(3) PETITION TO COURT.—

(A) RIGHT TO PETITION.—A project sponsor may obtain a review of an alleged failure by an agency to act in accordance with an applicable deadline under this section by filing a written petition with a court of competent jurisdiction seeking an order under subparagraph (B).

(B) COURT ORDER.—If a court of competent jurisdiction finds that an agency has failed to act in accordance with an applicable deadline, the court shall set a schedule and deadline for the agency to act as soon as practicable, which shall not exceed 90 days from the date on which the order of the court is issued, unless the court determines a longer time period is necessary to comply with applicable law.

* Tested in *Signal Peak Energy v. Haaland*, No. 24-CV-366, 2024 WL 3887386 (D.D.C. Aug. 21, 2024)– lawsuit filed to enforce deadlines – found prudentially unripe

Fiscal Responsibility Act of 2023 (cont’d)

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SEC. 111. DEFINITIONS

(1) CATEGORICAL EXCLUSION.—The term ‘categorical exclusion’ means a category of actions that a Federal agency has determined normally does not significantly affect the quality of the human environment within the meaning of section 102(2)(C).

(2) COOPERATING AGENCY.—The term ‘cooperating agency’ means any Federal, State, Tribal, or local agency that has been designated as a cooperating agency under section 107(a)(3).

(8) PARTICIPATING FEDERAL AGENCY.—The term ‘participating Federal agency’ means a Federal agency participating in an environmental review or authorization of an action.

(9) LEAD AGENCY.—The term ‘lead agency’ means, with respect to a proposed agency action—

> (A) the agency that proposed such action; or
>
> (B) if there are 2 or more involved Federal agencies with respect to such action, the agency designated under section 107(a)(1).

Pending Legislation on Permitting Reform

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A24 THE WASHINGTON POST · SU

OPINION

The Washington Post

AN INDEPENDENT NEWSPAPER

Don't let environmentalism sabotage green energy

EDITORIAL

TWO MILES remain to be built of the 102-mile Cardinal-Hickory Creek high-voltage transmission line between Iowa and Wisconsin, expected to connect more than 160 renewable-energy facilities, producing nearly 25 gigawatts of green power, to the Midwestern grid. And yet this crucial project for the climate might not get finished — because of U.S. environmental laws.

At issue is the Upper Mississippi River National Wildlife and Fish Refuge, a habitat for bald eagles and other migratory birds, through which the power line would run. On March 21, three environmental groups persuaded a federal judge to stop construction temporarily. They hope to stop it for good.

The Cardinal-Hickory Creek line episode is just one conflict pitting the environment against, well, the environment. Solar plants and wind farms, transmission lines and carbon-capture projects face opposition from conservationists and other environmental groups asking courts to stop new infrastructure from encroaching on wetlands, forests and other ecosystems.

Such trade-offs are not new. Unfortunately, neither is the system by which this country evaluates the costs and benefits of protecting the eagles against those of stringing up new power lines. Established by laws such as the 1970 National Environmental Policy Act (NEPA), the rules generally lean against developers, written in an era before those developers included promoters of the green power that humanity needs to stave off climate change. "There are a couple of trillion dollars available to develop the clean-energy economy," noted Ted Nordhaus, who runs the Breakthrough Institute, a nonprofit supporting technological solutions to environmental challenges. "Except we can't build anything."

Environmental groups, including the Sierra Club, have joined a roughly six-year effort to stop transmission lines that would bring hydropower from Quebec to New England. They have opposed the development of solar energy facilities in the Mojave Desert. Opposition to offshore wind power facilities off the Northeast coast involves a peculiar assortment of bedfellows, including local environmental groups, fisheries and seafood producers, a hotel association and former president Donald Trump.

Opposition is largely local, usually not from large nonprofits such as the Natural Resources Defense Council or the Environmental Defense Fund, which focus on climate change mitigation, but from groups vested in preserving local ecosystems. Others, motivated by less high-minded causes, exploit the environmental review process to preserve views, prevent bothersome construction or stop the character of their areas from changing. Their main tool is NEPA, which not only requires environmental impact studies but also allows pretty much anybody to challenge in court a federal agency's decision to greenlight projects on a virtually limitless set of environmental grounds.

Researchers at Stanford University studied 171 large energy infrastructure projects that completed federal environmental impact studies between 2010 and 2018. Nearly two-thirds of solar energy projects were litigated, they found, as were 31 percent of transmission lines and 38 percent of wind energy projects.

The Cardinal-Hickory Creek line episode is just one conflict pitting the environment against, well, the environment.

Court challenges often fail. Nikki Chiappa from the Breakthrough Institute noted that by 2020 federal agencies were winning some 80 percent of their cases. Attorneys for the Cardinal-Hickory Creek project seem confident that the injunction against the power line will be lifted. But litigation causes massive delays, raising the costs of multibillion-dollar energy projects. (Even before a project is challenged in court, the required environmental impact assessments can take as long as 14 years.) Delays cost big money — money that would be better spent fighting climate change, not court battles.

Sen. Joe Manchin III (D-W.Va.) tried and failed t
reform permitting in 2022, right after the passage
the Inflation Reduction Act, which rained subsidi
and other incentives on new energy infrastructu
Efforts since then to speed permitting for gr
energy have largely stalled.

The stakes are high. An analysis by research
MIT and research firm the Rhodium Group
that the clean-power expansion is way
schedule to attain the 50 to 52 percent red
emissions by 2030 that the United State
under the Paris agreement. Princeton
researchers reckon that the nation
green energy policies will fall well
goals if transmission wire co
ramped up considerably.

To be sure, big energy pr
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remain that way. But the p
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Legislative response to permitting delays

"Standardizing Permitting and Expediting Economic Development Act'' or the "SPEED Act'' H. R. 4776:

To amend the National Environmental Policy Act of 1969 to clarify ambiguous provisions and facilitate a more efficient, effective, and timely environmental review process.

Create Expedited Reviews to Transform American Infrastructure Now Act or the "CERTAIN Act" H.R. 8308:

To establish requirements for the termination of authorizations, the completion and coordination of reviews for authorizations, and judicial review of actions relating to authorizations, and for other purposes.

Questions, si vous plais?

Ted Boling

PARTNER, WASHINGTON, DC

Perkins Coie LLP

