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Substantive NEPA Amendments in the Debt Ceiling Bill



President Joe Biden signed into law the Fiscal Responsibility Act of 2023 (FRA), colloquially referred to as the Debt Ceiling Bill, on June 3, 2023.^[1] The legislation completes a bipartisan agreement to suspend the public debt limit until 2025 and includes the most substantive amendments to the National Environmental Policy Act (NEPA) since the enactment of the statute in 1970. The FRA effectively codifies many of the regulations that the Council on Environmental Quality (CEQ) promulgated in 2020 during the Trump administration. This Update provides a brief summary of the key NEPA amendments in the FRA and offers some context within which to assess the likely impact of the changes.

Major Amendments to NEPA

The FRA amends NEPA in the following key ways:

1. **NEPA's mandate.** The law amends the basic requirements for an environmental impact statement (EIS) in Section 102(2)(C) (42 U.S.C. § 4332(2)(C)). It provides that an EIS must consider the "*reasonably foreseeable* environmental effects of the proposed agency action" and analysis of a "reasonable range" of alternatives that are "technically and economically feasible" and meet the purpose and need of the proposed action. These amendments are consistent with CEQ's [2022 amendment](#) to the definition of "effects," which the council revised to include direct, indirect, and cumulative effects, and also track the U.S. Supreme Court's focus on NEPA's inherent "rule of reason." *See DOT v. Public Citizen*, 541 U.S. 741, 767 (2004). As part of the alternatives analysis, the agency is also now required to consider "any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative," which effectively emphasizes the benefits of the agency action by focusing on the negative

effects of not implementing the proposed action.

2. **Deadlines.** The time limits provided in the [2020 CEQ regulations](#) are mostly codified but without the provision for exceptions subject to senior agency official oversight and a written schedule. An agency must now complete an EIS no later than two years after determining that an EIS is required and an environmental assessment (EA) no later than one year after determining that an EA is required. These deadlines may be subject to judicial enforcement.
3. **NEPA applicability.** The amendments also include a new Section 106, which provides guidelines for agencies to make threshold determinations of NEPA applicability. It also delineates exemptions for actions that are not final, categorically excluded under the new Section 109, conflict with other provisions of law, or are nondiscretionary actions in which the agency does not have the authority to consider environmental consequences. Section 109 provides that an agency may adopt categorical exclusions listed by another agency in its NEPA procedures.
4. **Agency hierarchy.** A new Section 107 creates a strong lead agency role with provisions for joint lead agencies and authority to coordinate the preparation of an environmental document and related permits and authorizations. By replacing the "responsible Federal official" with the "head of the lead agency," the amendment signals its intention to hold lead agency leadership accountable for the management of the NEPA processes that they lead. It codifies the "One Federal Decision" requirement that both lead and cooperating agencies evaluate the proposal in a single environmental document and provisions for appealing denials of cooperating agency status.
5. **Applicant-prepared EISs and EAs.** The Section 107 amendments also require that lead agencies prescribe procedures for project sponsors to prepare an EA or EIS under agency supervision. The legislation requires the lead agency to independently evaluate the document and take responsibility for its contents.
6. **Defining a "Major Federal Action."** In a new definitions section, Section 111, "Major Federal Action" is defined as "an action that the agency carrying out such action determines is subject to **substantial** Federal control and responsibility." This is a significant departure from the NEPA status quo, which previously relied on agencies to interpret the subordinate terms "major," "federal," and "action" and the courts to act as arbiters of the reasonableness of that interpretation. The addition of the word "substantial" narrows the scope of NEPA applicability. The definition explicitly excludes projects "with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project," loans or loan guarantees where the agency "does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action," and SBA loan guarantees and other financial instruments. By applying to the use or effect of the financial assistance, this broadens the kinds of actions excluded from the definition of "Major Federal Action" in the 2020 regulations at 40 CFR 1508.1(q)(1)(vii).

Next Steps

CEQ and other NEPA-implementing agencies will need to engage in significant rulemaking following this legislative activity to interpret and clarify the new legislative terms. For example, the phrase "substantial Federal control and responsibility" in the legislation's definition of "major Federal action" needs further clarification, either in forthcoming CEQ NEPA Phase 2 rulemaking pursuant to Executive Order 13990 or through each agency's implementing rules for NEPA. Interested stakeholders should be prepared to comment.

It is an open question whether the NEPA amendments will facilitate or detract from efforts in Congress to enact legislation to change federal permitting requirements for electric transmission, pipelines, or other infrastructure. The actual impact of the NEPA amendments on the experience of project sponsors in the permitting process will

take years to become clear and is not guaranteed to be significantly different from current circumstances. For example, new deadlines may cause agencies to delay the start of reviews until factual or legal uncertainties are minimized. New page limits may simply shift text into appendices.

As is nearly always the case, project sponsors will retain considerable latitude to influence the timing and outcome of NEPA reviews by the quality of planning undertaken prior to seeking federal decisions. Robust analysis of and credible plans to address project externalities and stakeholder interests can be far more effective than procedural limits in securing timely final decisions that survive judicial scrutiny. Looking ahead, creative and disciplined use of generative artificial intelligence (AI) tools by sponsors and consultants may greatly reduce the time and cost tied to the preparation of EIS and other documents and facilitate agency deliberations.

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Endnote

[1] Pub.L. 118-5

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