**NEPA Phase 2: The New Rule's "Significant Effects" on Federal Environmental Reviews**

Brandon Tuck, Vinson & Elkins

On May 1, 2024, the Council on Environmental Quality ("CEQ") published the final version of Phase 2 of its National Environmental Policy Act ("NEPA") rulemaking ("Phase 2 Rule").[1] The Phase 2 Rule is the culmination of the Biden administration's two-step rulemaking to unwind many of the Trump administration's changes to the NEPA regulations and to apply the current administration's approach to "simplify and modernize" the NEPA review process. The Phase 2 Rule also implements amendments to NEPA introduced as part of the Fiscal Responsibility Act of 2023, which included page and time limits for the preparation of environmental impact statements ("EISs") and environmental assessments ("EAs"), a narrowing of the definition of the term "major Federal action," and the option for applicants (rather than agencies) to draft some of the required environmental documents.

The final Phase 2 Rule largely mirrors its proposed version, and despite concerns raised by commentors, it continues to include provisions that could increase regulatory burdens for projects of all sorts, including the green energy and transmission projects the current administration has expressed strong preferences for advancing. These burdens appear in myriad ways, including expanded analyses of climate change and environmental justice; increased agency scrutiny for both EAs and findings of no significant impact ("FONSIs"); and requirements that mitigation measures be enforceable and subject to monitoring and compliance plans. And while the final Phase 2 Rule is more neutral in its application than the proposed version, it nevertheless continues to signal CEQ's prevailing view that NEPA is more than a purely procedural statute; it is a tool that CEQ is wielding to ensure that agencies "facilitate better environmental outcomes."[2]

This paper highlights select ways in which the Phase 2 Rule is likely to have a significant impact on NEPA reviews and project development going forward, as well as areas where CEQ departed from the proposed version or provided clarification in its explanatory preamble.

## I. When Does This Rule Apply?

The Phase 2 Rule went into effect on July 1, 2024, and its provisions will apply to any NEPA review begun after that effective date.[3] While that date may seem to provide clarity, many project proponents are likely to face some near-term uncertainty about which NEPA requirements govern their particular permit or project. This is because CEQ does not itself grant permits or other authorizations, and its regulations must be implemented and applied by other federal agencies. Those federal agencies maintain the discretion to apply the revised regulations to environmental

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[1] National Environmental Policy Act Implementing Regulations Revisions Phase 2: Final Rule, 89 Fed. Reg. 35,442 (May 1, 2024) (to be codified at 40 C.F.R. pts. 1500–1508). CEQ's website also provides additional documents related to the final rulemaking, including a "Response to Comments" document and "Final Rule Redline of Regulations," which shows the changes to the previously effective NEPA regulations in a redline format. *See* https://ceq.doe.gov/laws-regulations/regulations.html.

[2] 89 Fed. Reg. at 35,450.

[3] *See* 89 Fed. Reg. at 35,442, 35,573 (to be codified at 40 C.F.R. § 1506.12).

reviews pending on the effective date,[4] although CEQ notes that those provisions of the Phase 2 Rule implementing the Fiscal Responsibility Act, which itself became effective upon enactment, are applicable even to ongoing environmental reviews.[5]

In addition, the individual federal agencies granting authorizations are directed to revise their own NEPA regulations to incorporate any necessary changes in the light of the Phase 2 Rule by July 1, 2025.[6] Until revised, a federal agency's current NEPA procedures will remain in effect, although CEQ urges agencies to read their existing procedures in concert with the Phase 2 Rule to ensure they are meeting the requisite requirements of both wherever possible. Though not stated in the regulations themselves, CEQ states in the explanatory preamble that if there is a conflict between an agency's procedures and the Phase 2 Rule, generally, the latter will prevail.[7]

Although CEQ states that federal agencies do not need to redo or supplement a completed NEPA review — for instance, where a categorical exclusion, FONSI, or record of decision ("ROD") has been issued — in light of the Phase 2 Rule,[8] NEPA processes that have already advanced past the draft EA or draft EIS stage could be significantly delayed if agencies decide they needed to prepare supplemental draft NEPA documents to provide new analyses under the Phase 2 Rule.

## II. What Does the Phase 2 Rule Require on Climate Change and Environmental Justice?

The Phase 2 Rule contemplates an expanded review of environmental effects, most notably by requiring agencies to specifically analyze reasonably foreseeable effects related to climate change and environmental justice — considerations that previously were primarily the subject of guidance documents and executive orders. The Phase 2 Rule also establishes Indigenous Knowledge as a type of high-quality information agencies should use. CEQ's incorporation of climate change, environmental justice, and Indigenous Knowledge into its NEPA regulations signals an intent for federal agencies to undertake more robust (and potentially more costly, time-consuming, and speculative) effects analyses.

Concerningly, while reiterating that agencies should only consider those effects that are "reasonably foreseeable," CEQ otherwise declined to incorporate — as many commenters recommended — key principles of causation espoused in *Department of Transportation v. Public Citizen*,[9] which limit agencies' effects analyses to those effects that have a sufficiently close causal connection to the proposed action. This omission could encourage agencies to analyze increasingly speculative or remote effects that lack any sort of direct causal chain between the proposed action and potential climate change-related effects or effects on communities with environmental justice concerns. Project opponents could similarly argue that agencies failed to consider effects that, when properly considered, lack that causal relationship. In the near term, this will mean uncertainty

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[4] 89 Fed. Reg. at 35,573 (to be codified at 40 C.F.R. § 1506.12).

[5] 89 Fed. Reg. at 35,530.

[6] 89 Fed. Reg. at 35,573 (to be codified at 40 C.F.R. § 1507.3).

[7] 89 Fed. Reg. at 35,530.

[8] 89 Fed. Reg. at 35,530.

[9] 541 U.S. 752 (2004).

for agencies and project proponents alike about how much analysis is enough to satisfy the regulations and could increase litigation risks.

Climate Change and Additional Backtracking from *Public Citizen*

The Phase 2 Rule directs federal agencies, where applicable, to analyze possible conflicts between a proposed action and the objectives of federal, regional, state, Tribal, and local plans related to climate change;[10] climate change-related effects, including quantifying greenhouse gas ("GHG") emissions and the potential effects of climate change on a proposed action and its alternatives; and risk reduction, resiliency, or adaptation measures. However, the Phase 2 Rule does not confront the fact that quantifying GHG emissions says nothing about real-world effects, and that there is no ability to correlate project-level GHG emissions with any physical changes in the environment. Of particular interest to the Texas energy sector, CEQ did not repeat language it had included in the preamble of its proposed rule that suggested that leases for oil and gas extraction and natural gas pipelines have, as a categorical matter, reasonably foreseeable global indirect and cumulative effects related to GHG emissions.[11] In CEQ's separate response to comments document, CEQ backtracked and explained that identifying whether particular upstream or downstream effects related to GHG emissions are "indirect" or "cumulative" for purposes of NEPA requires a case-specific analysis, which aligns with prevailing case law.[12]

CEQ repeatedly points to climate change-related effects as an example of reasonably foreseeable effects that agencies should consider, but CEQ almost entirely ignores causation, even though the definitions for direct and indirect effects each include a specific element of causation.[13] For two decades, the Supreme Court's NEPA effects analysis in *Public Citizen* has provided sideboards on the proper scope of an agency's effects analysis, limited to reasonably foreseeable effects that are proximately caused by the agency action, and thus requiring "reasonably close causal relationship akin to proximate cause in tort law."[14] The causation element ensures that agencies focus their NEPA analysis on effects closely related to the proposed action, and preclude discussion of effects too attenuated.[15] CEQ removed the Trump-era codification of *Public Citizen* principles in the NEPA regulation in Phase 1 of its rulemaking, explaining that causation is "adequately addressed" by the principle of reasonable foreseeability; and that focusing on causation is "unnecessary" and "unhelpful."[16] Although reasonable foreseeability and causation are similar and intertwined in NEPA analysis, they are distinct legal principles. Reasonable foreseeability provides a framework for agencies to contemplate potential environmental impacts, even those attenuated from the proposed action. Causation, however, fastens a scope upon the effects analysis, requiring a

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[10] With respect to possible conflicts, CEQ explains that while agencies should discuss conflicts, they are not required to resolve any such conflicts. *See* 89 Fed. Reg. at 35,508.

[11] National Environmental Policy Act Implementing Regulations Revisions Phase 2: Notice of Proposed Rulemaking, 88 Fed. Reg. 49,924, 49,935 (July 31, 2023).

[12] CEQ, National Environmental Policy Act Implementing Regulations Revision, Phase 2 Final Response to Comments, Docket ID CEQ-2023-0003, at 231-32 (April 2024).

[13] 40 C.F.R. § 1508.1(i)(1) and (2) (in each case, referring to effects "which are caused by the action").

[14] *Public Citizen*, 541 U.S. at 754.

[15] *See Metro. Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 776 (1983).

[16] CEQ, National Environmental Policy Act Implementing Regulations Revision, Phase 1 Final Response to Comments, Docket ID CEQ-2021-0002, at 122-24 (April 2022).

"reasonably close causal relationship" with a "manageable line" or "chain" between the proposed action and the effects.[17]

For the Phase 2 Rule, CEQ further justifies its gloss over causation by saying that *Public Citizen* pertained to questions of agency action and not NEPA's effects analysis.[18] True, as demonstrated in *Public Citizen*, NEPA's effects analysis often requires the analysis of the scope of agency action in order to determine the relevant effects, but the distinction is irrelevant. This backtracking from the sideboard of causation helps defeat NEPA's goal of informed decision-making, since it will be increasingly difficult for an agency to isolate the variables and analyze only the effects of its action. Analysis will instead risk being obscured by effects too attenuated from the proposed action.

The Phase 2 Rule also directs agencies, again where appropriate, to use projections or models to evaluate reasonably foreseeable climate change-related effects, provided that the agency discloses relevant assumptions or limitations.[19] CEQ does not identify any particular projections or models that agencies could or should use, but CEQ affirms that this provision does not *require* the use of social cost of greenhouse gas values.[20] With respect to categorical exclusions, the Phase 2 Rule provides that "potential substantial effects associated with climate change" could be an "extraordinary circumstance," indicating that a normally categorically excluded action may have significant effects.[21]

After taking comment, CEQ declined to codify its January 2023 "National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change" ("2023 GHG Guidance") except with respect to the quantification of GHG emissions. CEQ, however, states that it will consider the comments it received on the codification issue as it finalizes the 2023 GHG Guidance and that it "may consider codification of the 2023 GHG guidance in a future rulemaking."[22]

Environmental Justice

The Phase 2 Rule directs agencies to consider "disproportionate and adverse effects on communities with environmental justice concerns," such as when determining the necessary level of NEPA review, identifying the environmentally preferable alternative, analyzing a proposed action's environmental consequences, considering the need for mitigation measures, and determining whether a normally applicable categorical exclusion should apply to a proposed action.[23] CEQ explains that environmental justice-related considerations can be pertinent to a

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[17] *Public Citizen*, 541 U.S. at 767; CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act: Final Rule, 85 Fed. Reg. 43,304, 43,344 (July 16, 2020).

[18] CEQ, National Environmental Policy Act Implementing Regulations Revision, Phase 2 Final Response to Comments, Docket ID CEQ-2023-0003, at 824-25 (April 2024).

[19] 89 Fed. Reg. at 35,571 (to be codified at 40 C.F.R. § 1506.6(d)).

[20] 89 Fed. Reg. at 35,527.

[21] 89 Fed. Reg. at 35,575 (to be codified at 40 C.F.R. § 1508.1(o)).

[22] 89 Fed. Reg. at 35,494.

[23] *See, e.g.*, 89 Fed. Reg. at 35,575, 35,565-66 (to be codified at 40 C.F.R. §§ 1502.14(f), 1502.16(a)(13), 1508.1(o)).

NEPA analysis if they are "important" or "substantial," even if not necessarily "significant," as the term is used in NEPA.

The Phase 2 Rule finalizes a vague definition of "environmental justice," which includes consideration of "the cumulative impacts of environmental and other burdens."[24] CEQ explains that the term "cumulative impacts" in this context is distinct from the category of "cumulative effects" that was reintroduced in CEQ's Phase 1 rulemaking, and instead relates to "the aggregate effect of multiple stressors and exposures on a person, community, or population."[25] Agencies can rely on presently available environmental justice screening tools (for example, EJScreen, Climate and Economic Justice Screening Tool) to help identify communities with environmental justice concerns, although agencies may also develop their own procedures and tools.[26]

Indigenous Knowledge

CEQ identified "Indigenous Knowledge" as a potentially relevant source of information related to environmental justice, furthering the Biden Administration's policy of elevating Indigenous Knowledge in federal scientific processes by placing it on equal footing with the scientific methodologies that agencies have historically relied on to complete the NEPA review process.[27] The Phase 2 Rule incorporates Indigenous Knowledge in two ways. First, it adds Indigenous Knowledge to the forms of "high-quality" information that agencies may use to describe reasonably foreseeable environmental trends in NEPA reviews.[28] The previous language directed agencies to "make use of any reliable data sources" but did not identify Indigenous Knowledge as a reliable data source.[29] Second, the Phase 2 Rule classifies Indigenous Knowledge as a special expertise that can support an entity being designated as a cooperating agency.[30]

CEQ expressly declined to provide a definition for Indigenous Knowledge in the Phase 2 Rule because it could not reach a consensus on a definition during Tribal consultations and because CEQ determined a single definition would be unworkable across all contexts and as applied to all Tribal Nations.[31] Instead, CEQ advises agencies to consider how some specific agencies have approached Indigenous Knowledge and refers to a 2022 guidance manual on Indigenous Knowledge that it jointly published with the Office of Science and Technology Policy.[32] That guidance manual describes Indigenous Knowledge as "a body of observations, oral and written knowledge, innovations, practices, and beliefs developed by Tribes and Indigenous Peoples through interaction and experience with the environment" that is "based in ethical foundations

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[24] 89 Fed. Reg. at 35,757 (to be codified at 40 C.F.R. § 1508.1(m))

[25] 89 Fed. Reg. at 35,540.

[26] 89 Fed. Reg. at 35,575 (to be codified at 40 C.F.R. § 1508.1(f)).

[27] 89 Fed. Reg. at 35,559, 35,565, 35,571; Press Release, The White House, White House Commits to Elevating Indigenous Knowledge in Federal Policy Decisions (Nov. 15, 2021), https://www.whitehouse.gov/ostp/news-updates/2021/11/15/white-house-commits-to-elevating-indigenous-knowledge-in-federal-policy-decisions/.

[28] 89 Fed. Reg. at 35,565, 35,571 (to be codified at 40 C.F.R. § 1506.6(b)).

[29] 40 C.F.R. § 1502.23 (2023).

[30] 89 Fed. Reg. at 35,559 (to be codified at § 1501.8(a)).

[31] 89 Fed. Reg. at 35,481-82.

[32] 89 Fed. Reg. at 35,481-82 nn.73–74.

often grounded in social, spiritual, cultural, and natural systems."[33] The manual also says that Indigenous Knowledge does not depend on other forms of knowledge for validation, but neither it nor the Phase 2 Rule explain how agencies should ensure the reliability requirements that apply in NEPA reviews should be met. Nor does the Phase 2 Rule grapple with transparency and disclosure issues, given the importance many Tribal Nations place on safeguarding their traditional knowledge and the overall context of past exploitation.

## III. How Does the Rule Mandate Enforceable Mitigation?

NEPA analyses have always taken into account ways in which the environmental impacts of a project would be avoided or lessened through mitigation measures that an agency may require or that a project proponent may implement voluntarily on its own or pursuant to requirements of other non-federal agencies that are not directly involved in the NEPA process. The Phase 2 Rule, however, imposes new and potentially troublesome requirements regarding mitigation.

Now, when an agency incorporates mitigation measures into its ROD or mitigated FONSI (or similar decision document), and its analysis of reasonably foreseeable effects is based on implementation of those mitigation measures, the mitigation measures must be enforceable, and the agency must identify the authority for enforceability (for example, permit conditions, agreements).[34] This could result in an odd and unhelpful circumstance where it is reasonably foreseeable that an applicant will implement certain mitigation measures, but the agency lacks jurisdiction to mandate those measures — the agency's ROD or FONSI would then need to ignore reality on the ground and instead discuss environmental effects that are not reasonably foreseeable. CEQ also encourages agencies, "where relevant and appropriate," to incorporate mitigation measures to address or ameliorate significant effects that disproportionately and adversely affect communities with environmental justice concerns.[35]

In addition, agencies relying on enforceable mitigation will be required to prepare and publish a monitoring and compliance plan to ensure those measures are implemented.[36] These plans must identify the parties responsible for monitoring and implementing the mitigation, how monitoring information will be made publicly available, the anticipated timeframe for implementation and completion, the standards for determining compliance, the consequences for non-compliance, and how the mitigation will be funded.[37]

In a nod to the comments its received, CEQ clarified that NEPA itself does not provide agencies with authority to impose mitigation measures, and that agencies must instead look to (and are thus constrained by) their organic statutes and authorities.[38] Moreover, CEQ clarifies that its revised regulations do not prohibit agencies from approving proposals that include unenforceable

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[33] Office of Science and Technology Policy and CEQ, Guidance for Federal Departments and Agencies on Indigenous Knowledge, at 4 (Nov. 30, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf.

[34] 89 Fed. Reg. at 35,558, 35,569 (to be codified at 40 C.F.R. §§ 1501.6(d), 1505.2(c)).

[35] 89 Fed. Reg. at 35,569 (to be codified at 40 C.F.R. § 1505.3(b)).

[36] 89 Fed. Reg. at 35,558, 35,569 (to be codified at 40 C.F.R. §§ 1501.6(d), 1505.3(c), (d)).

[37] 89 Fed. Reg. at 35,569 (to be codified at 40 C.F.R. §§ 1505.3(d)).

[38] 89 Fed. Reg. at 35,516–17.

mitigation measures, so long as the agency does not rely on the effective implementation of those measures to determine the potential reasonably foreseeable effects of the action.[39]

## IV. What about the Streamlining Measures in the Fiscal Responsibility Act?

The Phase 2 Rule facially implements many of the reforms introduced by the Fiscal Responsibility Act but largely leaves it to the individual federal agencies to fill in the details. For instance, the Phase 2 Rule limits EAs to 75 pages and EISs to 150 pages or, for projects of "extraordinary complexity," 300 pages.[40] But CEQ declines to define "extraordinary complexity" or provide guardrails on the extent to which agencies could shift their narrative or technical analyses to appendices that are excluded from the page limits. Similarly, the Phase 2 Rule implements the one- and two-year deadlines for the preparation of EAs and EISs, respectively, and requires agencies to create and publish schedules and milestones for meeting those deadlines.[41] But CEQ largely declines to provide criteria for agencies to determine when the "clock starts" on those deadlines or place limits on the frequency with which an agency can extend schedules.

The Phase 2 Rule also implements the Fiscal Responsibility Act's direction that applicants be permitted to prepare environmental documents by requiring agencies to include procedures for applicants to prepare environmental documents in their own implementing regulations.[42] But in a slight departure from the rule as proposed, CEQ has imposed "minimum" requirements for agencies to include in those procedures: (1) the agency must review and approve the statement of purpose and need, and the reasonable alternatives; (2) the agency must have procedures for evaluating (and documenting the evaluation of) an applicant-prepared EA or EIS and shall ultimately take responsibility for the document's accuracy, scope, and contents; and (3) applicants cannot prepare FONSIs or RODs.[43]

## V. What Other Streamlining Measures Are Included, like Categorical Exclusions and Programmatic Reviews?

The Phase 2 Rule includes new mechanisms intended to promote the adoption and use of categorical exclusions and programmatic reviews, which, in theory, could help expedite the NEPA process for certain types of actions. Federal agencies will now be expressly permitted to establish a categorical exclusion through a land use plan, a decision document supported by a programmatic EIS or programmatic EA, or other equivalent planning or programmatic decision for which an environmental document has been prepared.[44] An agency can also establish a categorical exclusion jointly with other agencies.[45]

Agencies will now also be permitted to adopt and apply a categorical exclusion listed in another agency's NEPA procedures. CEQ, though, has imposed procedural requirements before an agency

[39] 89 Fed. Reg. at 35,516.

[40] 89 Fed. Reg. at 35,564 (to be codified at 40 C.F.R. § 1502.7).

[41] 89 Fed. Reg. at 35,560 (to be codified at 40 C.F.R. § 1501.10(b)-(c)).

[42] 89 Fed. Reg. at 35,574 (to be codified at 40 C.F.R. § 1507.3(c)(12)).

[43] 89 Fed. Reg. at 35,574 (to be codified at 40 C.F.R. § 1507.3(c)(12)(i)-(iii)).

[44] 89 Fed. Reg. at 35,557 (to be codified at 40 C.F.R. § 1501.4(c)).

[45] 89 Fed. Reg. at 35,557 (to be codified at 40 C.F.R. § 1501.4(a)).

can do so, including required consultation between the two agencies; public notification describing the categorical exclusion that the agency intends to adopt, the proposed action (or category of proposed actions) to which the agency intends to apply the categorical exclusion, the process which the agency will use to evaluate whether "extraordinary circumstances" indicate the categorical exclusion is inapplicable, and the consultation between the agencies; and evaluation of whether "extraordinary circumstances" in fact indicate that the categorical exclusion is inapplicable to the proposed action (or category of proposed actions).[46]

Relatedly, the Phase 2 Rule expands agency authority to conduct programmatic environmental reviews, which can be used for actions such as programs, policies, or plans, including land use or resource management plans; regulations; national or regional actions; actions that have multiple stages or phases, and are part of an overall plan or program; or a group of projects or related types of projects.[47] CEQ especially encourages agencies to use programmatic reviews to facilitate more efficient environmental reviews and project approvals for actions that share geographical, thematic, or technologic similarities.[48]

## V. What Else Is Interesting in the Phase 2 Rule?

The Phase 2 Rule introduces a host of other changes and new provisions:

- Scoping and EAs: CEQ encourages agencies to use the scoping process (that is, determining what the review needs to cover) as part of the EA process,[49] which could add an extra additional public comment process and increase the time needed to complete the NEPA review.

- Context and Intensity and Beneficial Effects: The Phase 2 Rule reinstates the "context" and "intensity" factors used to determine whether a particular effect is "significant" for purposes of NEPA.[50] But while CEQ observes that agencies should consider whether a particular effect may be "adverse at some points in time and beneficial in others," it nevertheless stresses that agencies should not "offset an action's adverse effects with other beneficial effects to determine significance."[51]

- Environmentally Preferable Alternative: The Phase 2 Rule requires agencies to identify the "environmentally preferable alternative" — meaning the alternative that "best promote[s] the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits," and which could be the proposed action, the no-

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[46] 89 Fed. Reg. at 35,558 (to be codified at 40 C.F.R. § 1501.4(e)).
[47] 89 Fed. Reg. at 35,561 (to be codified at 40 C.F.R. § 1501.11).
[48] 89 Fed. Reg. at 35,561 (to be codified at 40 C.F.R. § 1501.11(a)(1)).
[49] 89 Fed. Reg. at 35,560 (to be codified at 40 C.F.R. § 1501.9(b)).
[50] 89 Fed. Reg. at 35,557 (to be codified at 40 C.F.R. § 1501.3(d)).
[51] 89 Fed. Reg. at 35,557 (to be codified at 40 C.F.R. § 1501.3(d)).

action alternative, or a reasonable alternative — earlier in the EIS process, and not only in the ROD.[52]

- Removing "Innovative Approaches": CEQ had proposed an "innovative approaches to NEPA reviews" framework whereby agencies would have been permitted to propose alternative approaches to complying with particular provisions of the NEPA regulations in order to address "extreme environmental challenges."[53] CEQ, however, declined to finalize this framework, citing general opposition to the proposal, potential legal vulnerabilities, and the lack of any concrete examples where it appeared feasible.[54]

- Exhaustion: Related to public participation, the Phase 2 Rule eliminates a provision from the Trump administration's NEPA regulations that codified certain legal precedents from federal courts that required a claimant to have first raised its concerns with a NEPA review directly with the agency during the public comment periods before suing the agency[55] — in other words, to first exhaust its administrative remedies. CEQ questioned its own authority to impose such a requirement, but explained that agencies are still permitted to raise similar arguments on a case-by-case basis.[56]

**Conclusion**

The Phase 2 Rule introduces a host of new requirements that put more teeth into NEPA's procedural framework, and which could increase the time, costs, and litigation risks for new permits and agency authorizations needed for infrastructure projects going forward. While the proposed version tried to put a thumb on the scale for green projects, the final version returns to a more neutral application, meaning that traditional and transitional energy projects will share many of these challenges as the agencies and project proponents navigate the new requirements.

The Phase 2 Rule, while scheduled to go into effect on July 1, 2024, is already subject to judicial challenge. On May 21, 2024, a group of twenty states filed suit in the U.S. District Court for the District of North Dakota, seeking (among other forms of relief) to vacate and remand the Phase 2 Rule back to CEQ and to enjoin enforcement of the rule. This challenge, and others that may follow, could delay the Phase 2 Rule's effective date and, in turn, delay individual agencies' implementation.

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[52] 89 Fed. Reg. at 35,565 (to be codified at 40 C.F.R. § 1502.14(f)).

[53] National Environmental Policy Act Implementing Regulations Revisions Phase 2: Notice of Proposed Rulemaking, 88 Fed. Reg. 49,924, 49,957-58 (July 31, 2023).

[54] 89 Fed. Reg. at 35,530.

[55] 40 C.F.R. § 1500.3(b) (2023).

[56] 89 Fed. Reg. at 35,454.