

# National Environmental Policy Act/Phase II Final Rule: Arkansas and 19 Attorneys General File Judicial Challenge



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

05/28/2024

Twenty Attorneys General (including Arkansas) filed a judicial challenge on May 21st in the United States District Court for the District of North Dakota to the Council on Environmental Quality (“CEQ”) rule styled:

*National Environmental Policy Act Implementing Regulations Revisions Phase 2 (“Phase 2 Rule”)*

See 89 Fed. Reg. 35442 (May 1, 2024).

The State Attorneys General challenging the Phase 2 Rule include:

- STATE OF IOWA
- STATE OF NORTH DAKOTA
- STATE OF ALASKA
- STATE OF ARKANSAS
- STATE OF FLORIDA
- STATE OF GEORGIA
- STATE OF IDAHO
- STATE OF KANSAS
- COMMONWEALTH OF KENTUCKY
- STATE OF LOUISIANA
- STATE OF MISSOURI
- STATE OF MONTANA
- STATE OF NEBRASKA
- STATE OF SOUTH CAROLINA
- STATE OF SOUTH DAKOTA
- STATE OF TENNESSEE
- STATE OF TEXAS
- STATE OF UTAH
- STATE OF WEST VIRGINIA
- STATE OF WYOMING

(Collectively, “State AGs”)

NEPA requires federal agencies to include values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions

and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed Environmental Impact Statement (“EIS”). However, the requirement to prepare this document is only triggered in the event of a major federal action that will significantly affect the human environment.

NEPA differs from action forcing environmental statutory programs such as the Clean Air Act and Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EIS or an Environmental Assessment. As a result, NEPA does not require a certain alternative or meet a particular standard.

The White House CEQ duties include oversight of the federal implementation of NEPA. Regulations issued by CEQ are intended to guide the federal agencies in interpreting NEPA’s procedural requirement. However, the federal agencies themselves typically have in place regulations that address NEPA requirements applicable to its activities.

The Phase 2 Rule made a number of changes to the CEQ NEPA regulations. For example, they codified revisions made by the bipartisan Fiscal Responsibility of 2023. In addition, a stated objective of CEQ was to streamline the NEPA process. Such revisions addressed expansion of categorical exclusions and limits on pages and timing that are subject to judicial review.

The State AGs express concern regarding revisions such as changes to mitigation measures and consideration of environmental justice and climate change. Further, they oppose the elimination of what they have described as “common-sense reforms” to the CEQ NEPA rules during the Trump Administration. They argue such changes will unnecessarily both lengthen litigation and make more costly the NEPA process.

The Complaint argues that the Phase 2 rule:

. . . illegally seeks to transform NEPA’s well-developed and carefully delineated procedures for environmental reviews of proposed federal actions into a substantive set of requirements to achieve broad and vague policy goals.

Examples of what the Complaint characterizes as “problematic changes” include:

- New limitations on the use of categorical exclusions
- Elevation of atextual environmental justice and climate change considerations
- Politically motivated fast-tracking favored projects
- Creation of new mitigation obligations
- Removal of clarify for public involvement

A copy of the Complaint can be downloaded [here](#).