



National Environmental Policy Act Recent Trends and Changes

*Spring 2024 Regional Tribal Operations Committee
May 30, 2024*

Desean Garnett; garnett.deasean@epa.gov
Laney Gordon; gordon.laney@epa.gov
Connell Dunning; dunning.connell@epa.gov
Francisco Donez; donez.francisco@epa.gov



National Environmental Policy Act

Recent Trends and Changes

- **NEPA 101**
- Fiscal Responsibility Act
- Phase II Council on Environmental Quality
NEPA Implementing Regulations
- EPA Role
- Tribal Engagement



National Environmental Policy Act

- NEPA is among the first laws ever written to establish a broad national framework for addressing the environmental impacts of federal agency decisions
- Established the Council on Environmental Quality to oversee national environmental policy
- Source 42 U.S.C. § 4321 et seq. (1969).



NEPA 101

- Prior to NEPA, there was not a consistent standard for:
 1. documenting decision-making process of federal agencies;
 2. considering a project's environmental effects; or
 3. public inclusion in the agency's decision.



NEPA 101

- Requires Federal agencies to assess the environmental effects of proposed major Federal actions *prior* to making decisions.
- The heart of NEPA is its procedural requirements
 - NEPA does not mandate that an agency make a decision a specific a particular way, only that the decision is fully informed in regards to its environmental effects



NEPA 101 – Specific Requirements

- For any proposed major Federal actions significantly affecting the quality of the human environment, federal agencies are required to prepare:
 - (1) the environmental impact of the proposed action;
 - (2) any adverse effects that cannot be avoided;
 - (3) alternatives to the proposed action;
 - (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
 - (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action.
- Source 42 U.S.C. §4332(2)(C).



NEPA - Exclusions

- Not all major federal actions trigger NEPA:
 - Exclusions, ex. civil judicial and administrative enforcement actions, non-federal projects with minimum federal funding and control over outcome of the project, etc.
 - Source: 40 C.F.R. § 1508.1



NEPA – Judicial Review

- Doesn't have its own provision for judicial review
- Litigants must use the Administrative Procedures Act, which governs final federal agency decisions
 - Standard for judicial review is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - Source: 5 U.S. Code § 706(2)(A).



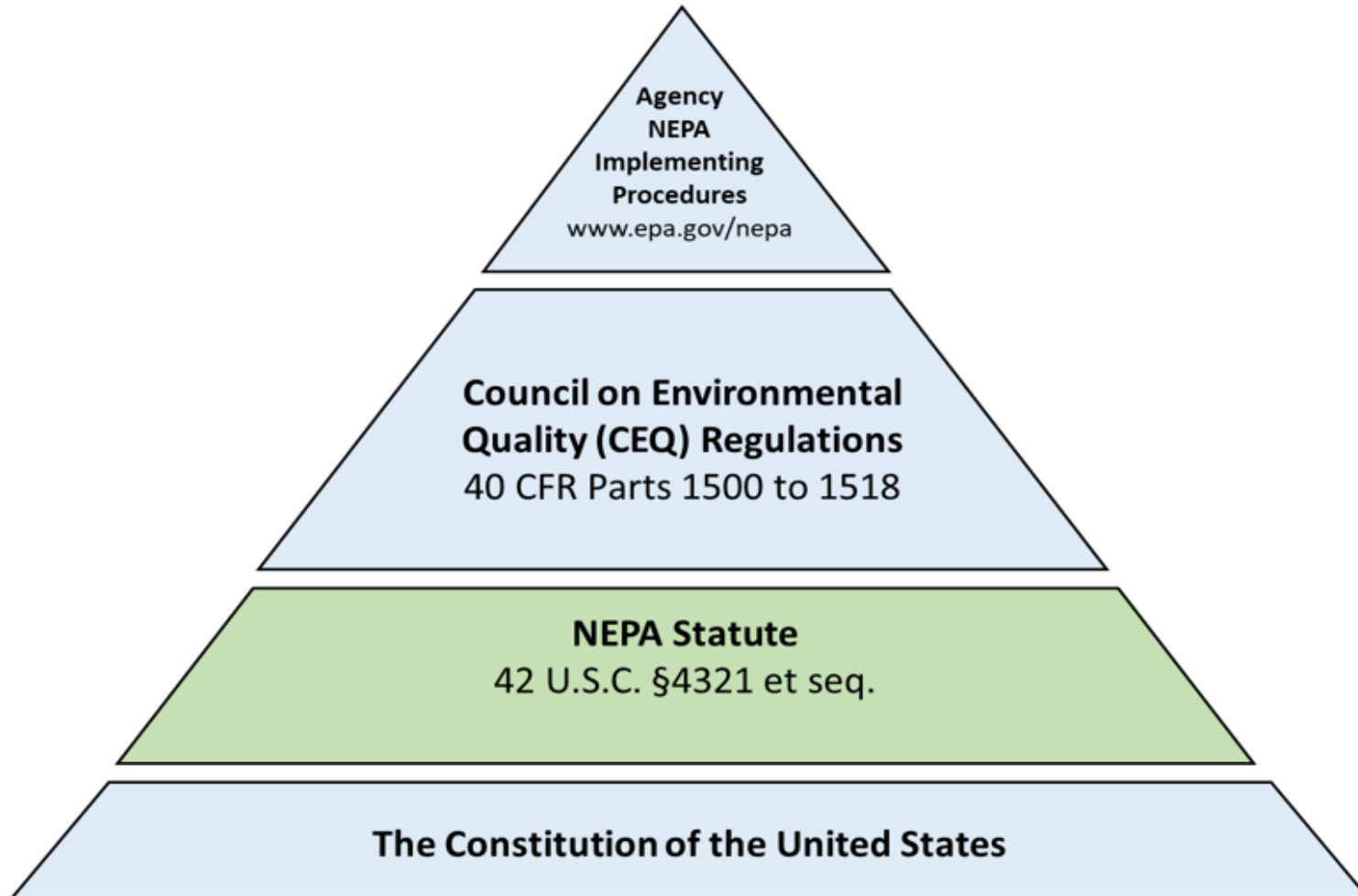
National Environmental Policy Act

Recent Trends and Changes

- NEPA 101
- **Fiscal Responsibility Act**
- Phase II Council on Environmental Quality
NEPA Implementing Regulations
- EPA Role
- Tribal Engagement



Hierarchy of NEPA Laws and Regulations





NEPA Statute Amendments from the Federal Fiscal Responsibility Act of 2023

- Analysis should focus on “*reasonably foreseeable environmental effects*” and that agencies shall evaluate “*a reasonable range of alternatives to the proposed agency action ... that are technically and economically feasible and meet the purpose and need of the proposal.*”
- Requires a lead federal agency to develop a schedule for reviews and be responsible for the preparation of a single environmental document and State, Tribal, or local agencies can also serve as joint lead agencies.
- Sets a 2-year limit on preparation of EISs and a 1-year limit on EAs. The deadline can be extended, in consultation with the applicant, if necessary.
- Creates a new avenue for project sponsors to petition a court if a deadline is missed, and a court can create a new schedule and deadline for the agency to act as soon as practicable.



NEPA Statute Amendments from the Federal Fiscal Responsibility Act of 2023

- Imposes page limits of **75 pages for EAs**, **150 pages for EISs**, and up to **300 pages** for EIS's analyzing actions of “**extraordinary complexity**” – **not including appendices**.
- Allows project sponsors to prepare environmental review documents under agency supervision, with the lead agency required to independently evaluate the environmental document and take responsibility for its contents.
- Defines the concept of “**major federal actions**” subject to NEPA as actions the agency “*determines [are] subject to substantial Federal control and responsibility.*” The definition also provides examples of actions that are not major federal actions.



National Environmental Policy Act

Recent Trends and Changes

- NEPA 101
- Fiscal Responsibility Act
- **Phase II Council on Environmental Quality
NEPA Implementing Regulations**
- EPA Role
- Tribal Engagement

CEQ Regulations are Designed to Implement Section 102(2) of NEPA

- Provide direction to Federal agencies to determine what actions are subject to NEPA's procedural requirements
- Prescribe the level of NEPA review required
- Ensure that relevant environmental information is identified and considered early in the process
- Ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable and timely manner





2022 CEQ NEPA Updates (effective May 20, 2022 and July 1, 2024)

- E.O. 13990 directed CEQ to review and update the 2020 NEPA regulations.
- **NEPA Phase 1 Updates:** Effective May 20, 2022. CEQ restored 1978 definitions for the following areas:
 - Restore the **purpose and need** provision to remove the requirement to base the purpose and need on the goals of applicants (40 CFR 1502.13 and 40 CFR 1508.1(z));
 - Remove **limitations on agency-specific** NEPA procedures (40 CFR 1507.3); and
 - Restore the definition of “**effects**,” including use of the terms “**direct**,” “**indirect**,” and “**cumulative**” and remove potential limitations on effects analysis (40 CFR 1508.1(g)).
- **NEPA Phase 2 Update:** CEQ issued on May 1, 2024



Phase 2 CEQ Regulations, 2024

- WHEN EFFECTIVE? July 1, 2024
- WHAT HAS CHANGED?
 - Changes to NEPA Statute included (Page Limits/Time Limits)
 - Focus on Climate Change, Environmental Justice, and Tribal Resources.
- CHALLENGES?



Phase 2 CEQ Regulations, 2024

- Roadmap to determine if NEPA applies
 - Assess scope of analysis, determine level of review needed
 - Lay out significance criteria, consider duration of effect
 - Only adverse effects can be significant
 - Reinstates “intensity effects”



Phase 2 CEQ Regulations, 2024

- Reinstates “intensity effects”
 - Public health and safety
 - Unique characteristics of the area, including cultural resources, Tribal sacred sites, ecologically critical areas
 - Conflict with Federal, State, Tribal, or local laws
 - Highly uncertain
 - Listed (or eligible) sites in National Register of Historic Places
 - Endangered and threatened species
 - Impacts to communities with environmental justice concerns
 - The degree to which the action may adversely affect rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders



Phase 2 CEQ Regulations, 2024

- Improved “efficiency” = More Adoptions, Categorical Exclusions, Tiering
- New definitions, “communities with environmental justice concerns” and “environmental justice”
- Increased references to Tribes, Indigenous Knowledge



Phase 2 CEQ Regulations, 2024

- Collaboration
 - Coordination with state, tribal, local governments – may serve as joint lead
 - Special expertise may include indigenous knowledge for purposes of determining cooperating agency
 - Consideration of time required for Tribal consultation to be considered in determining project scheduling



Phase 2 CEQ Regulations, 2024

- Meaningful Engagement
 - Consider the needs of affected communities when developing outreach and notification strategies (consider language needs)
 - invite comments on draft EA (if published), consider in final EA
 - public notification of NEPA-related hearings, public meetings, and availability of environmental documents
 - make draft EIS available at least 15 days in advance when subject to a public meeting or hearing
 - encourage conducting early engagement and invite early participation of affected parties and agencies



National Environmental Policy Act

Recent Trends and Changes

- NEPA 101
- Fiscal Responsibility Act
- Phase II Council on Environmental Quality
NEPA Implementing Regulations
- **EPA Role**
- Tribal Engagement



EPA Roles and Responsibilities



1. Serve as lead agency for EPA's actions subject to NEPA
2. Serve as a cooperating agency
3. Administer the EIS filing process
4. Review and comment on draft EISs under Section 309 of the Clean Air Act



EPA AS A LEAD AGENCY

EPA Actions that Require NEPA

- Award of wastewater treatment construction grants under Title II of the Clean Water Act;
- EPA's issuance of new source National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act;
- Certain research and projects;
- Development and issuance of regulations;
- EPA actions involving renovations or new construction of facilities;
- Certain grants awarded for projects authorized by Congress through the Agency's annual Appropriations Act.





EPA AS A COOPERATING AGENCY

Purpose – formal cooperative consultation among agencies throughout the NEPA process where EPA:

- Provides early, wide-ranging regional expertise as part of pre-draft “scoping” process
- Provides input on potential impacts, reasonable alternatives, and practicable mitigation for issues where EPA has jurisdiction by law or special expertise
- Leverages technical expertise from all relevant EPA media programs



EPA's Administrative Role in NEPA:

1. Under CEQ NEPA regulations, EPA manages the EIS filing for all federal agency EISs.
2. EPA sets the official start of the public comment/review periods and the minimum times for those review periods.
3. EPA may waive the minimum times if there are compelling reasons of national policy.

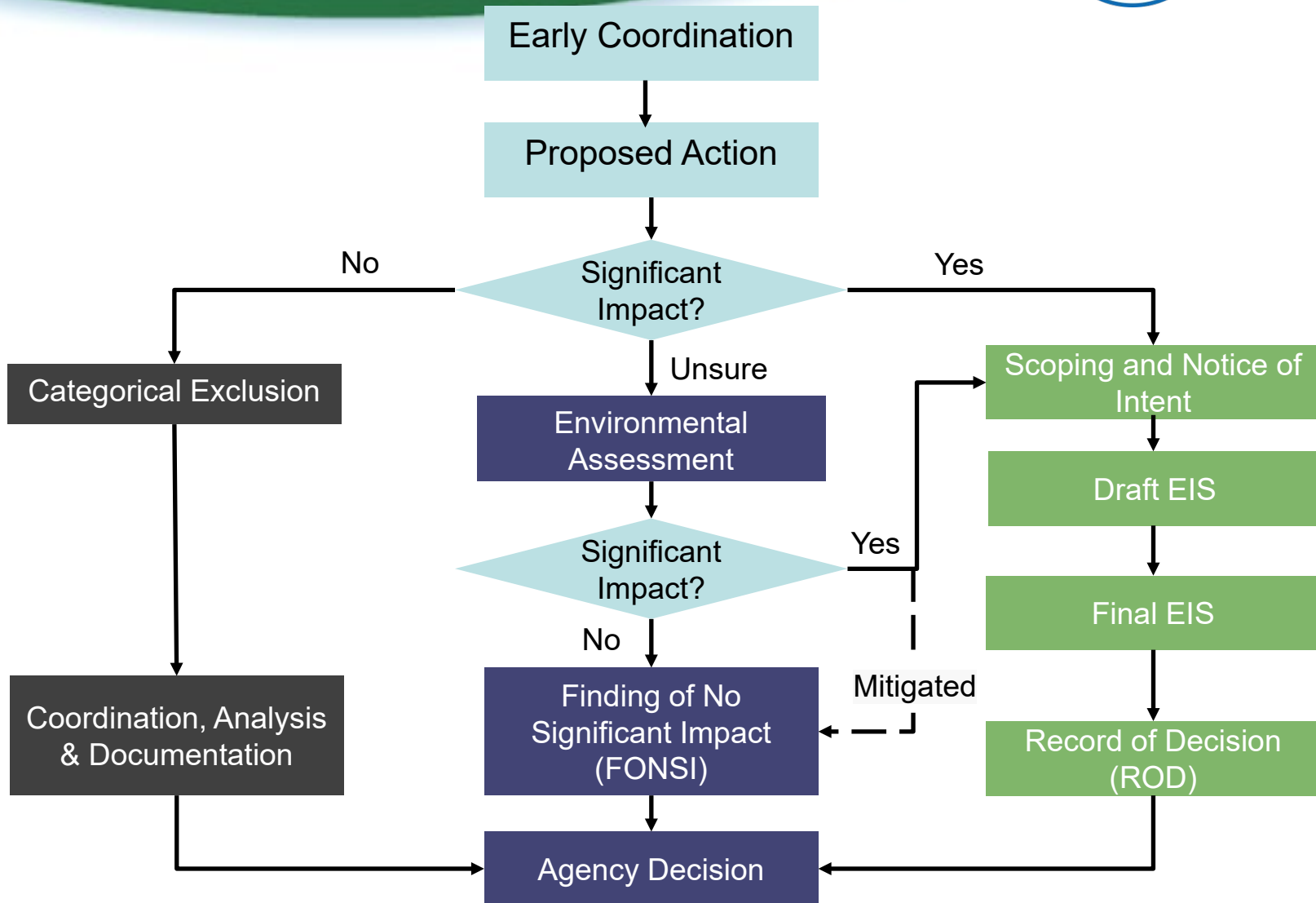


National Environmental Policy Act

Recent Trends and Changes

- NEPA 101
- Fiscal Responsibility Act
- Phase II Council on Environmental Quality
NEPA Implementing Regulations
- EPA Role
- **Tribal Engagement**

The NEPA Process



Public Involvement Requirements

**Categorical
Exclusion
Statement**



**Public involvement is
not required for
individual projects**

**Environmental
Assessment
(EA)**



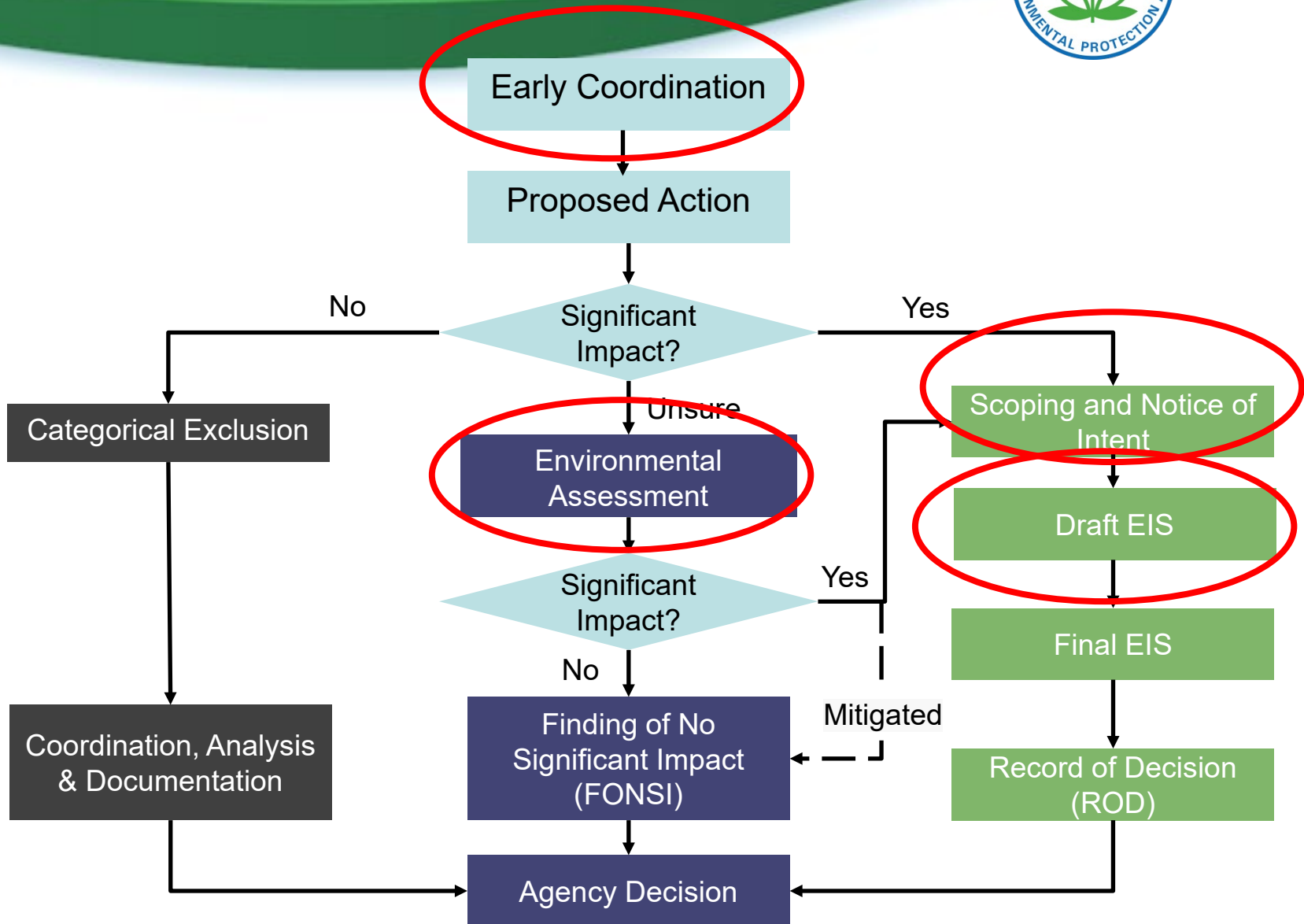
**Public involvement
to the extent
practicable**

**Environmental
Impact
Statement
(EIS)**



**CEQ regulations
set forth numerous
requirements for
public involvement
and disclosure
(with timelines)**

The NEPA Process





Scoping

- An **early and open process** to determine the scope of issues for analysis in an EIS.
- **Identifies** the significant issues and **eliminates** from further study non-significant issues.
- May begin **as soon as practicable** after the proposed action is sufficiently developed for agency consideration.
- **Invites the participation** of cooperating and participating agencies, including Tribes.
- Conducts **scoping outreach** to persons, agencies, or Tribes that may be interested or affected.



Public Involvement

- Public Involvement/Engagement vs. Tribal Consultation
- Agencies must make **diligent efforts to involve the public** in preparing and implementing their NEPA procedures.
- NEPA-related hearings, public meetings, and other opportunities for public involvement, and the availability of environmental documents.
- Share Indigenous Knowledge with Lead Agency to inform decisionmaking



Best Practices for Comments

- Promote informed decision making.
- Be as **specific as possible**,
 - Provide as much detail as necessary to **meaningfully participate and fully inform** the agency of concern or position.
- Explain why the issues raised are **important** to potential environmental **impacts, alternatives** to the proposed action, **economic and employment** impacts, sacred sites, traditional collecting property, etc.
- **Reference** the appropriate section/page of Draft EIS with **recommended specific changes**, where possible.
- Include or describe the **data sources and methodologies** supporting the proposed changes.



QUESTIONS?

National Environmental Policy Act Recent Trends & Changes

*Spring 2024 Regional Tribal Operations Committee
May 30, 2024*

Desean Garnett; garnett.deasean@epa.gov
Laney Gordon; gordon.laney@epa.gov
Connell Dunning; dunning.connell@epa.gov
Francisco Donez; donez.francisco@epa.gov