

# Standing Up to Trump's Environmental Rollbacks

August 5, 2020



# Agenda

- 1) Welcome & Introductions
- 2) Overview of Trump Rollbacks
- 3) Waters of the U.S.
- 4) State / Tribal 401 Certifications
- 5) National Environmental Policy Act (NEPA)
- 6) Q&A

## Meet the Speakers

- Tarah Heinzen
  - Senior Staff Attorney, Food & Water Watch
- Andrew Hawley
  - Staff Attorney, Western Environmental Law Center
- Erin Saylor (Moderator)
  - Staff Attorney, Columbia Riverkeeper

# 100

The number of environmental regulations the Trump Administration has gutted to date

	Completed	In progress	Total
Air pollution and emissions	19	8	27
Drilling and extraction	11	8	19
Infrastructure and planning	12	1	13
Animals	11	1	12
Water pollution	4	7	11
Toxic substances and safety	6	2	8
Other	5	5	10
All	68	32	100

Source: NY Times <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html> (Updated July 15, 2020)

## “Waters of the U.S.”

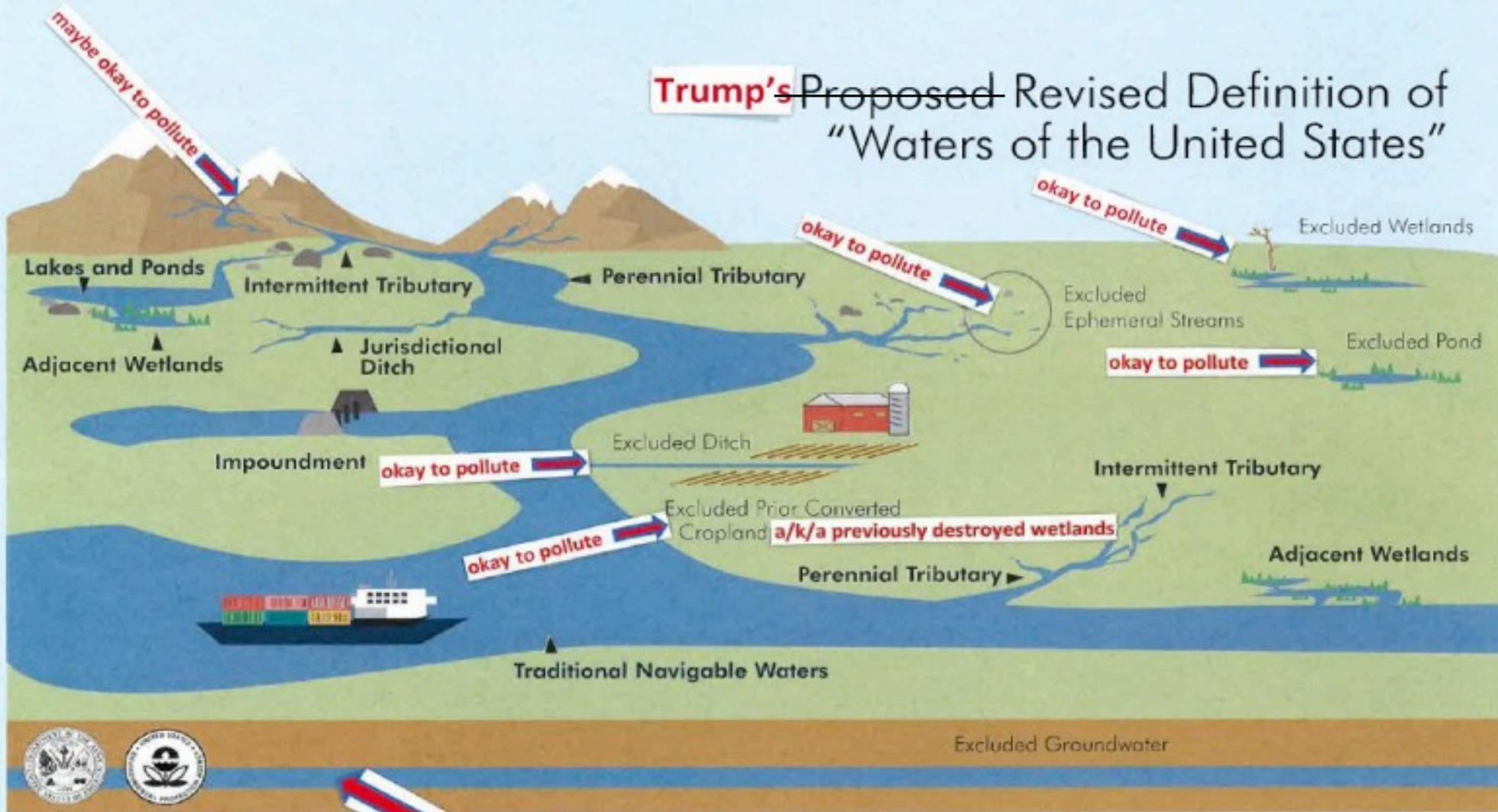
- What do we mean by “Waters of the U.S.?”
  - The Clean Water Act (CWA) regulates “navigable waters” – defined by statute as “the waters of the United States, including the territorial seas.”
  - Agencies, the regulated community, the courts, and advocates have long argued over which waterways are included in that definition.
  - In 2015, EPA released the “Clean Water Rule” which adopted a revised definition - including isolated streams and wetlands - so long as there was a “significant nexus” between those waters and traditionally navigable waters.

# “Navigable Waters Protection Rule”

(April 2020)

- Eliminated the case-by-case “significant nexus” test. Defined “waters of the U.S.” as one of four categories:
  - Territorial seas and traditional navigable waters
  - Tributaries of those waters
  - Certain lakes, ponds, and impoundments
  - Wetlands adjacent to other jurisdictional waters
- Removed many other important waters from the definition, including:
  - Groundwater
  - Ephemeral Streams
  - Ditches
  - Diffuse stormwater runoff
  - Prior converted farmland
  - Artificially irrigated waters
  - Artificial lakes

# Trump's Proposed Revised Definition of "Waters of the United States"



Edited for clarity and accuracy, Earthjustice

\* For illustrative purposes only. Proposed jurisdictional waters in bold.

Groundwater, according to Trump, flows in straight, unconnected line like a pipe. "We don't know how that darn water got down there or where it goes!"

# Legal Challenges

- Tribes – coalition case in AZ, Navajo case in NM.
- States – coalition case in CA, rule stayed in CO. Industry groups seeking to intervene.
- Ranching groups – several suits (OR, WA, NM) claim the rule does not go far enough in limiting protections for waterways.
- Environmental groups – coalition suits in WA, SC, MA, DC. Industry groups seeking to intervene.

# Legal Challenges

## EIP et al v. EPA et al

- The rule excludes groundwater from WOTUS and does not allow jurisdiction for an “isolated” waterway based on a groundwater connection to a protected water.
- The rule acknowledges that “in certain circumstances, pollutants released to groundwater can reach surface water resources.”
- 2 days after EPA issued the final rule, the Supreme Court issued its *County of Maui* opinion.
- In *Maui*, the Court held that discharges through such hydrologically connected groundwater into a surface water are prohibited without a permit, if they are the “functional equivalent of a direct discharge.”

# 401 Certification

- Section 401(a) requires that:
  - Any applicant for a federal license or permit
  - which may result in a discharge into waters of the United States
  - must obtain a water quality certification from the certifying authority
  - that the discharge complies with all applicable water quality requirements.
- No license or permit shall be granted until the certification required by this section has been obtained or has been waived.
- No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

# 401 Certification

- Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.
- If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.

# 401 Certification

- (d) Limitations and monitoring requirements of Certification
  - Any certification provided under this section shall:
    - set forth any effluent limitations and other limitations and monitoring requirements
    - necessary to assure that any applicant for a Federal license or permit will comply with:
      - any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title,
      - standard of performance under section 1316
      - or prohibition, effluent standard, or pretreatment standard under section 1317, and
      - with any other appropriate requirement of State law set forth in such certification
- Terms of Cert shall become a condition on any Federal license or permit subject to the provisions of this section.

# 401 Certification

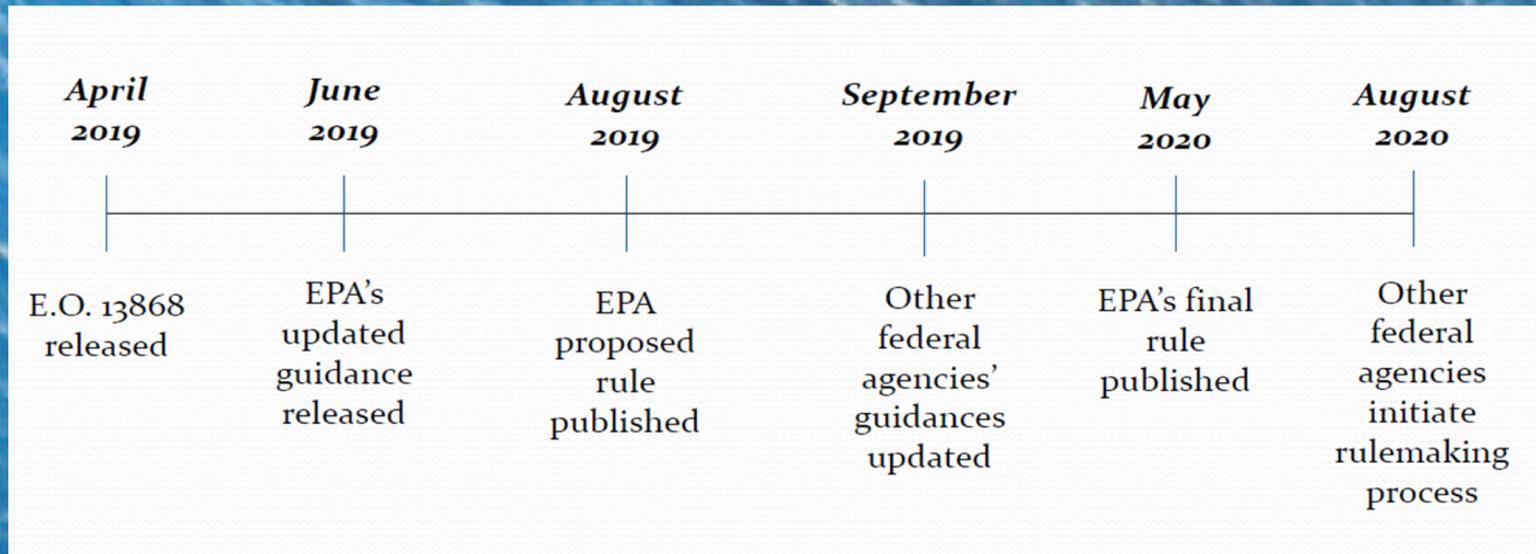
Section 401 recast pre-existing law and was meant to “continu[e] the authority of the State ... to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.” S.Rep. No. 92-414, p. 69 (1971).

*S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 380 (2006)

# Examples of 401 Cert. Impacts

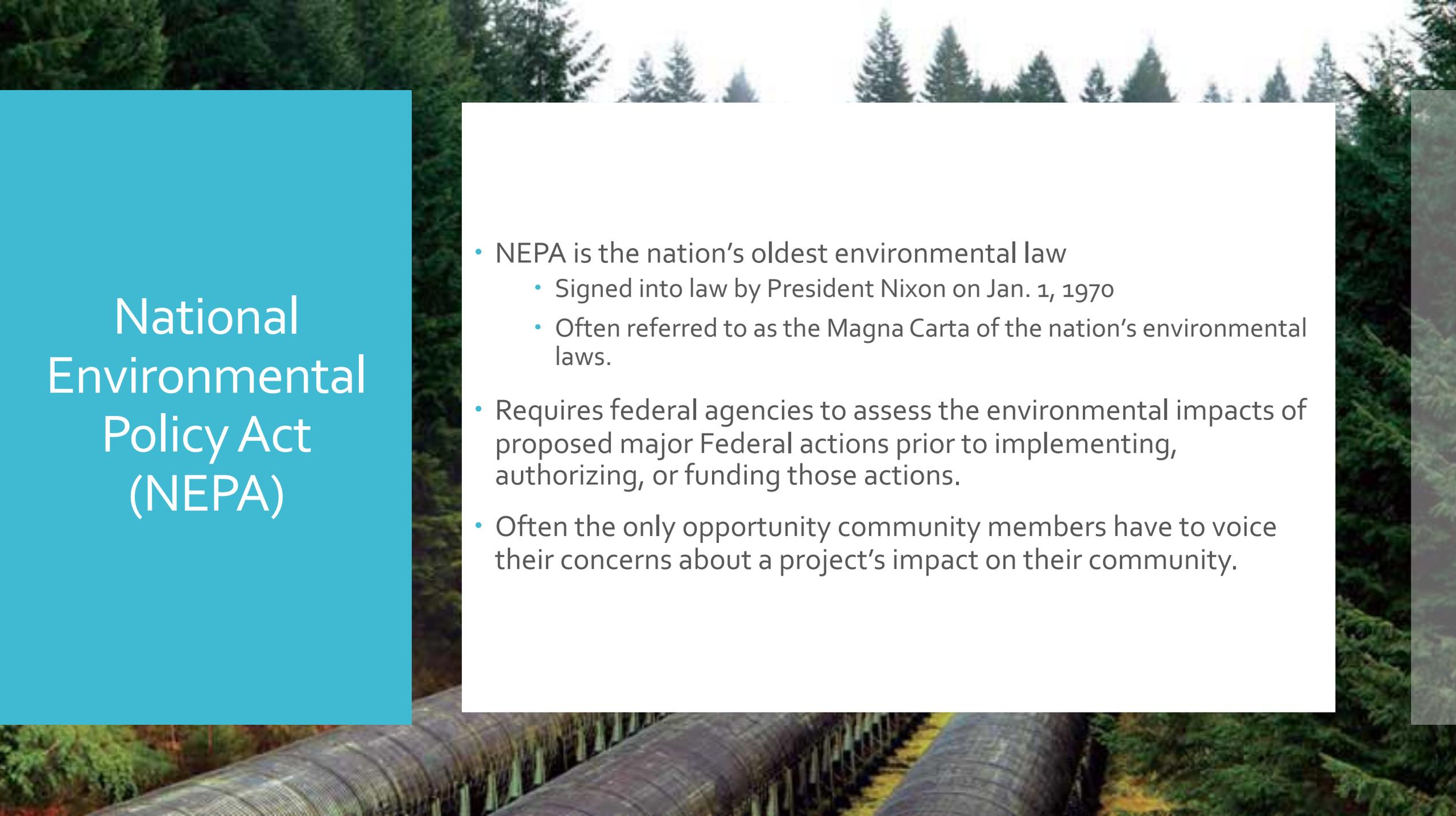
- **2017: Millennium Bulk Terminals (Longview, WA)**
  - State of Washington denied 401 certification to the proposed facility because of the project's potential harm to the Columbia River and surrounding environment.
  - If constructed, Millennium would have been the largest coal export facility in North America. The project's climate impact would have been equivalent to adding 8 million cars to the road.
- **2019: Jordan Cove Energy Project (Coos County, OR)**
  - Oregon Dept. of Environmental Quality denied 401 certification because the project proponents could not demonstrate that the massive LNG export terminal and pipeline would meet Oregon's clean water standards.
- **2020: Columbia River and Snake River Dams**
  - On May 7, 2020, Ecology issued 401 certifications on permits for federal dams on the Columbia and Snake rivers to address temperature pollution

# 401 Certification



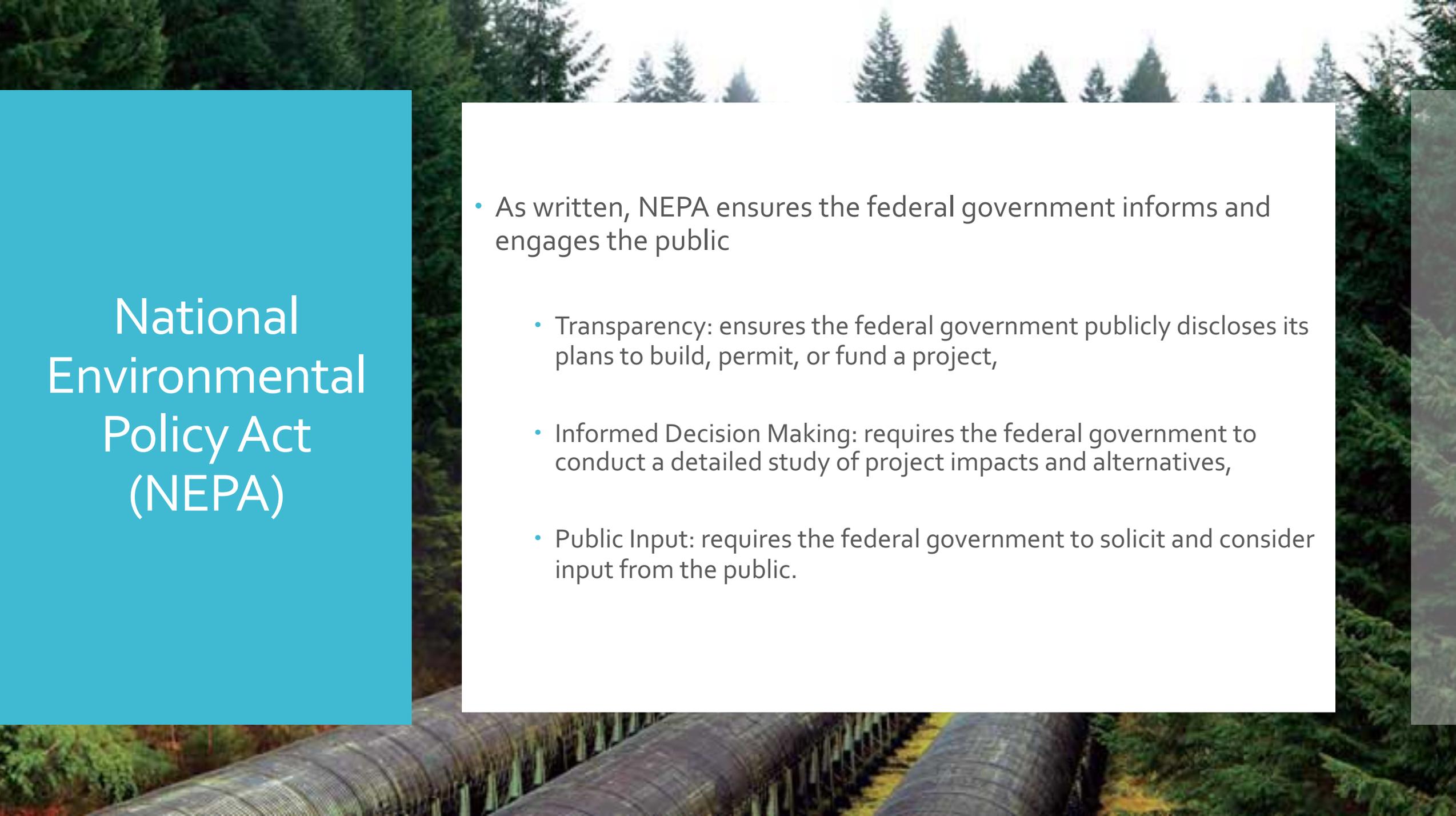
# Implications of New Guidance

- Proposed Changes:
  - Scope of Review
    - Discharge v. Discharge from a point source
    - Discharge v. Activity
  - Time and Information
    - Handcuffs: federal agencies set deadlines
    - Blindfold: regulations limit the information that would be needed to initiate a review and limit the states ability to obtain more information
  - Standards for Decision making
    - Water quality requirements v. WQS and Other Appropriate Requirements of State Law
  - Federal Agency Review
    - Federal agencies are effectively allowed to veto state decisions they do not like



# National Environmental Policy Act (NEPA)

- NEPA is the nation's oldest environmental law
  - Signed into law by President Nixon on Jan. 1, 1970
  - Often referred to as the Magna Carta of the nation's environmental laws.
- Requires federal agencies to assess the environmental impacts of proposed major Federal actions prior to implementing, authorizing, or funding those actions.
- Often the only opportunity community members have to voice their concerns about a project's impact on their community.



# National Environmental Policy Act (NEPA)

- As written, NEPA ensures the federal government informs and engages the public
  - Transparency: ensures the federal government publicly discloses its plans to build, permit, or fund a project,
  - Informed Decision Making: requires the federal government to conduct a detailed study of project impacts and alternatives,
  - Public Input: requires the federal government to solicit and consider input from the public.

# NEPA Process

- Environmental Assessment (EA)
  - Determines whether a federal action has the potential to cause significant environmental effects
    - Evaluates:
      - The need for the proposal
      - Alternatives
      - The environmental impacts of the proposed action and alternatives
      - A listing of agencies and persons consulted
  - If the agency determines the action will not have a significant environmental impact it will issue a Finding of No Significant Impact (FONSI) that presents the agency's findings
  - If the agency determines the environmental impacts will be significant, an Environmental Impact Statement must be prepared

# NEPA Process

- Environmental Impact Statement (EIS)
  - Required where a proposed major federal action is determined to significantly affect the environment.
- The EIS must evaluate:
  - (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 the environment and long-term productivity, and
  - (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

# Criticisms

- Critics of NEPA have long asserted that NEPA places an unreasonable burden on federal agencies and is simply an avenue for environmentalists to delay projects and drive up costs.
  - NEPA cases generally involve claims that an agency failed to comply with the Act's procedural requirements or that an agency failed to adequately consider the environmental impacts of a proposed project.
- In reality, lack of funding, project complexity, changing markets /economics, and changes in local politics are usually the drivers behind a project failing
- Over a recent 13-year period only one in 450 NEPA decisions was litigated.
  - John C. Ruple & Kayla M. Race, Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases 50 *Envtl. Law* 479 (2020)

# Trump's Rollback Essentially Guts NEPA

- Limits environmental reviews to two years
- Eliminates the government's responsibility to consider the cumulative effects of projects
  - Including cumulative impact of multiple projects in a single community
  - Climate change
- Reduces the range of alternatives that need to be considered
- Increases onus on communities seeking to challenge a project – significantly impacting low-income and minority communities most likely to be directly affected by the project
  - Requires comments to be very technical, site page numbers, etc.
  - Recommends that a bond be posted to cover the cost of any project delays that result from a legal challenge

# Q&A

- Please submit your questions through the chat function