

# NEPA, Recent Changes, & Ohio's National Forest

Ohio Public Interest Environmental Law Conference



September 19, 2024

# Introduction

---

Conference Theme:

**“Protecting the Spaces and Places of Ohio’s Environment”**

We will cover three fairly broad topics:

- NEPA 101
- Some of the recent changes to the NEPA statute and regulations
- NEPA oil and gas litigation in Ohio’s National Forest

# Part I

What is NEPA?

# Brief History

## The “Magna Carta” of Environmental Law

- First major modern U.S. environmental statute
- Passed by wide margins in both chambers in 1969
- Signed into law by Richard Nixon on January 1, 1970
- Has served as a model for governments across the globe
- Up until 2020, operated under a set of regulations issued in 1978



# Congressional declaration of national environmental policy

“[I]t is the continuing policy of the Federal Government [...] to use all practicable means and measures [...] to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”

“The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”

42 U.S.C. § 4331(a)-(c)

# What is NEPA?

---

National Environmental **POLICY** Act of 1969, as amended. 42 U.S.C. 4321, et seq.

- Procedural statute
  - NEPA requires federal government agencies to consider the potential environmental impacts of their proposed actions.
  - Requires consideration of alternatives.
  - Generally requires public engagement.
  - Requires the agencies to explain their reasoning.
  - Does not require substantive outcomes. (But is “action-forcing.”)
- Applies to “major Federal actions”
  - Permitting
  - Federal building projects
  - Federal project funding
  - Management actions on federal lands (e.g., mineral leasing, logging projects)

# NEPA's "Twin Aims"

---

- Require the Federal government to “look” and “think” before it “leaps”
- Require the Federal government to inform the public of its thought processes

Put somewhat differently, the goal of NEPA is to foster:

- Federal government transparency and disclosure
- Public involvement
- More informed agency action; and, ultimately
- Better agency action



# How Does NEPA Work?

---

NEPA applies to proposals for major Federal actions significantly affecting the quality of the human environment by requiring Federal agencies to prepare a **detailed statement** on:

(i) reasonably foreseeable environmental effects of the proposed agency action;

[...]

(iii) a reasonable range of alternatives to the proposed agency action, including [a no-action alternative];

[...]

42 U.S.C. § 4332



# EIS, EA, or CE?

---

- Environmental Impact Statement (EIS)
  - The statutory “detailed statement”
  - Full-blown NEPA process
  - Comparatively very rare
- Environmental Assessment (EA)
  - Conducted to determine whether “significant effects” may occur, which requires an EIS
  - Otherwise, conclude in a Decision Notice (DN) and Finding of No Significant Impact (FONSI)
  - Comparatively rare
- Categorical Exclusion (CE or CATEX)
  - Pre-defined regulatory/statutory categories of action that are presumed non-significant
  - Default presumption can be overcome through showing of “extraordinary circumstances”
  - Most common avenue for Federal agency NEPA actions

# Part II

Recent Changes to NEPA and the CEQ Rules

# CEQ

NEPA established the Council on Environmental Quality within the Executive Office of the President to ensure that Federal agencies meet their obligations under NEPA.

In a nutshell, CEQ:

promulgates NEPA regulations that apply to all agencies

Issues guidance and regulatory interpretation

Reviews and approves federal agency NEPA procedures

# Five year NEPA Tug-of-War

Since 2020:

- Four administrative actions targeting NEPA.
- One major legislative action directed at NEPA.
- Most of these actions have triggered federal court litigation that currently remains unresolved.
- Whiplash is a reasonable reaction and this is not over yet.

# The 2020 CEQ Rule Revisions

Trump Administration effort to “reform” and “streamline” NEPA

A few key elements:

- Set time limits for EAs and EISs
- Exempted certain projects from environmental review
- Limited consideration of cumulative effects such as those caused by climate change.

Partially reversed and partially codified

In litigation as inconsistent with underlying statute but stayed because of RM.

# Biden CEQ Phase 1 Rulemaking

Final rule issued April 2022 to reverse key aspects of the 2020 rule

Key elements:

- Adds back direct, indirect and cumulative effects.
- Expands purpose and need statements beyond the goals of the applicant.
- Restores agency authority to adopt NEPA procedures that go beyond the CEQ requirements.

# CEQ Interim Climate Guidance - January 9, 2023

Builds on Obama-era climate guidance that was withdrawn by the Trump administration.

Clarifies existing law under NEPA but does not establish new requirements.

Two themes:

1. Agencies should evaluate the climate change effects of their actions.
2. Agencies should account for the effects of climate change on their actions.

Additional themes:

Quantification, Contextualization, Mitigation, and Environmental Justice

# Fiscal Responsibility Act - Legislative Context

Inflation Reduction Act - August 16, 2022 through budget reconciliation

- Lots of money to address climate change and other things.
- Biden and Schumer needed Manchin's vote
- To get it, they made the "side deal" to pass permitting reform legislation.

Fiscal Responsibility Act passed in June 2023 to address the debt ceiling crisis.

FRA makes significant changes to "reform" and "streamline" NEPA

- Not CEQ regulations.
- Statutory amendments to NEPA.



# Fiscal Responsibility Act - Key Elements

- Definition of “major federal action” narrowed to require NEPA review in fewer circumstances
- Scope of review narrowed in several ways.
- Procedural requirements modified to reduce time required to complete review.
- Use of categorical exclusions expanded to make it possible to avoid EAs and EISs in more circumstances.

# BIDEN CEQ Phase 2 Rulemaking

Reverses most but not all of the remaining elements of the 2020 regulations.

- Embraces consideration of climate change effects.
- Increases emphasis on environmental justice and Tribal Sovereignty.
- Restores important considerations for determining significance.
- Enhances public engagement process to make it more meaningful.
- Ensures that agencies identify and assess reasonable alternatives to the proposed action.
- Implements the FRA.
- Speeds up environmental reviews by expanding the use of CEs and programmatic reviews.

# Biden CEQ Phase 2 Rulemaking - Part 2

## Beneficial Effects Rule

- Potentially controversial component of the Phase 2 rule.
- If a proposal has only beneficial effects and no adverse effects, no EIS is required.
- Departure from historic NEPA/CEQ rule the EIS required for all significant effects (beneficial or otherwise).
- Driven by desire to promote clean energy development

Litigation -- Red state lawsuit before hostile judge in North Dakota

# Pending Legislation Targeting NEPA

## Energy Permitting Reform Act - Manchin / Barrasso

- Contains legislated CEs for renewable energy projects (not all bad).
- Exempts certain transmission plans from NEPA reviews.
- Shortens statute of limitations for legal challenges to 150 days.

## Westerman Discussion Draft

- Extensive revision of NEPA that would gut the statute

## Congressional Review Act Joint Resolution of Disapproval

- Would invalidate the Phase 2 NEPA rule with some perverse effects.

# Part III

NEPA and Ohio Public Land

# Why Public Lands Are Important

---

## Numerous Benefits

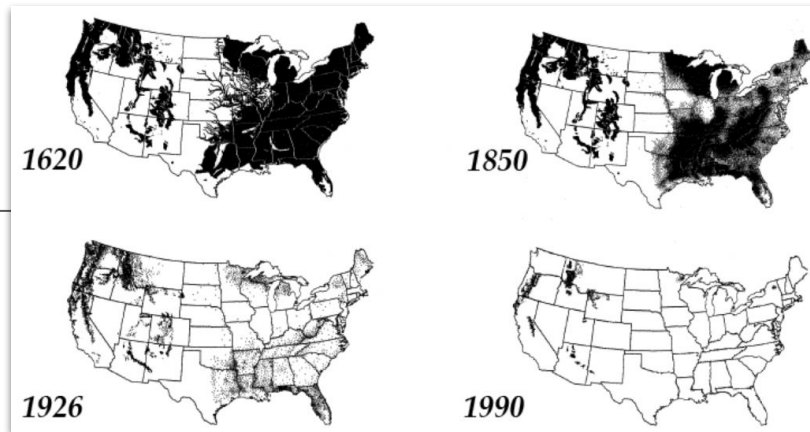
- Health, wellness, connection to nature
- Biodiversity and wildlife habitat
- Economic drivers (outdoor recreation; tourism)
- Climate

## Ecological Loss

- More than 90% of Ohio's wetlands are gone
- Old growth forest -- only small remnant pockets remain
- Connectivity -- 77% of Ohio forestland is within ¼ mile of a road

## Opportunity

- The Public has a voice
- Potential for long-term initiatives
- Potential for large-scale initiatives



America's old growth forests

# Ohio's Public Lands in Context (scarcity increases value)

---

- Ranked 44th of 50 in public land acres per capita
- Only 4.4% of Ohio land is publicly owned (including only 15% of OH's forest acres)

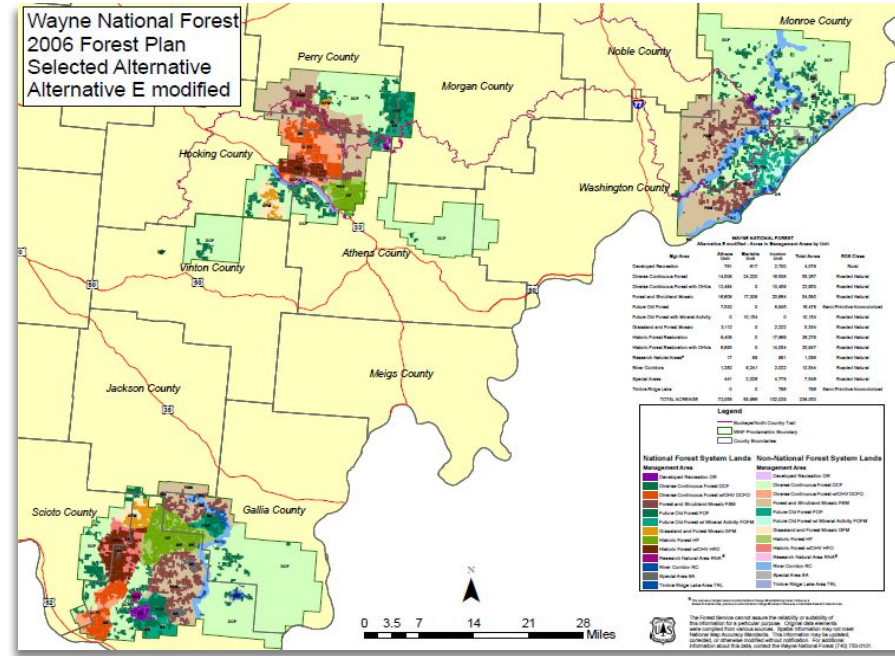
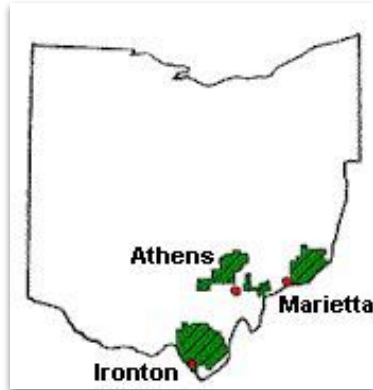


Jesse Owens State Park →



# Wayne National Forest (WNF)

- Only National Forest in Ohio
- Largest public forest in Ohio
- Divided into three Units in SE Ohio



National Forests are often policy battlegrounds.

WNF is where much of OH's public lands NEPA work occurs.



# ***Ctr. for Biological Diversity v. U.S. Forest Serv., 444 F. Supp. 3d 832 (S.D. Ohio 2020).***

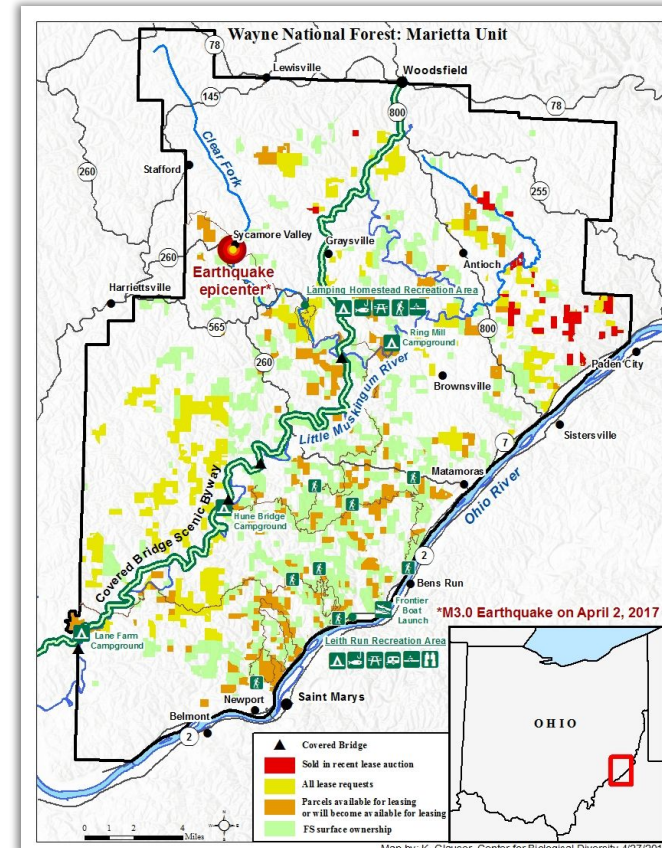
Lead agency Bureau of Land Management (BLM) proposes leasing 40,000 acres of WNF for oil and gas development, i.e., fracking.

The rough equivalent of 30,303 football fields; an area larger than Cuyahoga Valley National Park.

Agencies' analysis treated shale development like conventional drilling.

Court held agencies failed to take NEPA hard look at several categories of effects:

- Surface disturbance (well pads and pipelines)
- Air impacts (failure to quantify emissions)
- Water use impacts (cumulative effects)
- Species impacts (cumulative effects)



# 2024 BLM Supplemental EA

---

- Hard look failures continue, including cumulative effects analysis
- Environmental Justice concerns
- Multifactor significance determination per 40 C.F.R. § 1501.3
- Social Cost of Carbon estimated in hundreds of millions of dollars
- Project's GHG emission potential equivalent to cancelling all WNF carbon sequestration for 30 years



# NEPA & Public Lands - very quick and dirty practice tips

---

- Building the record; objection phase; litigation
- **“Hard Look” / “arbitrary and capricious” standard of review**
  - relevant factors considered?
  - reasoned explanations provided?
  - substantial questions unanswered?
- Effects – Direct, Indirect, Cumulative
- Significance of effects (EIS trigger)
- Alternatives (reasonable/feasible)
- Mitigation (enforceable?)
- Consistency with LRMP (Forest Plan)



# Questions?

---

**Paul Sanford**

paul\_sanford@tw.s.org

**Nathan Johnson**

njohnson@theoec.org



**The  
Wilderness  
Society**



**Ohio Environmental Council**

