

COUNCIL ON ENVIRONMENTAL QUALITY PROPOSES PHASE TWO REVISION TO ITS NEPA IMPLEMENTING REGULATIONS

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The Council on Environmental Quality (CEQ) has proposed further amendments to its National Environmental Policy Act (NEPA) implementing regulations as part of its phased rulemaking initiated in 2021. The proposed [Bipartisan Permitting Reform Implementation Rule](#) (Proposed Rule), published in the July 31, 2023, *Federal Register*, is the second phase of CEQ's rulemaking effort and reflects a broad proposal to "revise, update and modernize" the regulations at 40 C.F.R. pts. 1500–1508.

Phase one of CEQ's NEPA rulemaking, finalized on April 20, 2022 (2022 Rule), was a targeted reversal of three of the agency's more controversial changes made in the last year of the Trump administration (2020 Rule). By comparison, the Proposed Rule is a vehicle for Biden administration priorities, including implementation of bipartisan permitting reforms in the Fiscal Responsibility Act and first-time codification of climate change and environmental justice principles for NEPA purposes. The proposed revisions are substantial. While many changes are intended to restore the rules to their 1978 language and intent, CEQ also introduces a novel approach to new agency categorical exclusions (CEs), addresses how agencies might approach projects with substantial beneficial effects (such as renewable energy infrastructure), and invites stakeholder input regarding innovative approaches to NEPA compliance where extreme environmental challenges are at issue.

Proposed Rule

CEQ is proposing to make extensive and detailed revisions to its regulations at 40 C.F.R. pts. 1500–1508. Rather than cover every revision, this update focuses on some of CEQ's more novel and potentially impactful proposals. For those readers looking to study the changes with granularity, we note that CEQ also published a [redline comparison](#) of the proposal against the current rule.

Environmental Justice

Environmental justice has long been a part of NEPA analysis and is addressed in Executive Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 16, 1994) and CEQ guidance. The Proposed Rule would, for the first time, codify a definition of "environmental justice" for NEPA purposes. At section 1508.1(k), environmental justice would mean:

[T]he just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that affect human health and the environment so that people:

- (1) Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers;
- and

(2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.¹

CEQ would also codify, as a statement of policy, that an alternatives analysis should identify and assess alternatives that address adverse health and environmental effects disproportionately affecting communities with environmental justice concerns.² The Proposed Rule would also incorporate environmental justice in the definition of “effects,” which may include “disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative.”³

Climate Change

The Proposed Rule would codify agency NEPA practice with respect to studying climate change-related effects. Specifically, the Proposed Rule would define “effects” to include “climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives.”⁴ An agency’s effects analysis would need to discuss the reasonably foreseeable climate change-related effects and consider possible conflicts between the proposed action and the objectives of federal, regional, state, tribal, and local plans; policies; and controls addressing climate change.⁵ CEQ would also encourage agencies to use the NEPA process to identify and assess alternatives to a proposed action that will reduce climate change-related effects.⁶

Beneficial Effects

The Proposed Rule would state that only actions with significant adverse effects require an environmental impact statement (EIS). In other words, an action with only beneficial effects and no significant adverse effects would not require an EIS.⁷ CEQ would also clarify that a significant adverse effect may exist even if, on balance, the agency determines that the effects of an action will be beneficial.⁸

CEQ provides two examples to illustrate an approach to analyzing beneficial effects. In the first case, CEQ explains that a renewable energy project may have short-term construction-related greenhouse gas (GHG) emissions as well as long-term reductions in GHG emissions;

¹ 88 Fed. Reg. 49,924, 49,986 (July 31, 2023).

² *See id.* at 49,924 (proposed sections 1500.2(e); 1502.14(f)).

³ *Id.* at 49,986. CEQ clarifies that a “communit[y] with environmental justice concerns” would mean a community that does not experience environmental justice as defined in proposed section 1508.1(k). *See id.* at 49,960.

⁴ *Id.* at 49,960.

⁵ *Id.* at 49,950.

⁶ *Id.* at 49,931.

⁷ *Id.* at 49,936.

⁸ *Id.* at 49,969 (proposed section 1501.3(d)(2)(i)).

there, the agency might reasonably determine that the climate effects of the proposed action would not be significantly adverse, and therefore that an EIS would not be required.⁹

As the second example, CEQ describes a forest restoration project that may have a short-term adverse effect on a species by displacing it from the area while the project is carried out, but also long-term beneficial effects to the species by reducing the risk that a severe wildfire will destroy the habitat altogether. The agency would consider both effects in assessing whether the action significantly affects the species and, in that case, might determine the overall effects on the species would not be significantly adverse and, therefore, not require an EIS.¹⁰

Significance Determination—Context and Intensity

CEQ would substantially revise how it describes the threshold question of whether NEPA applies, in particular, the question of whether the effects of a proposed action are significant. The Proposed Rule would once again direct an agency to examine the “context” and “intensity” of effects as part of this significance determination. Whereas these terms operated as part of the pre-2020 definition of “significantly,” CEQ does not propose to restore the 1978 version of this definition, even though it remains a component of most agency NEPA procedures.

The 2020 Rule narrowed the consideration of “context” to the potentially affected environment, which CEQ now finds “overly limiting.” CEQ would restore standalone consideration of the context of the proposed action and provide broader examples of what “context” entails, including proximity to unique or sensitive resources or vulnerable communities.¹¹ The Proposed Rule would prompt agencies to analyze the significance of an action in several contexts, including the potential global, national, regional, and local contexts, as well as the duration of an action’s effects, including short- and long-term effects. CEQ notes this broader use of “context” complements the 2022 Rule’s reinstatement of the concept of indirect and cumulative effects.

CEQ also proposes to reinstate “intensity” as a consideration in determining significance, which the 2020 Rule has reframed as the “degree” of the action’s effects. With certain modifications, CEQ would reinstate a list of factors that have long provided agencies with guidance in determining how the intensity of an action’s effects may inform the significance determination. CEQ would also clarify that agencies should consider the duration of effects and provides an example of a proposed action with short-term adverse effects but long-term beneficial effects.¹²

Categorical Exclusions

CEQ proposes to add new forms and means of adopting CEs, broadening their availability to agencies in the NEPA process. One change implements the Fiscal Responsibility Act amendments by allowing agencies to establish CEs jointly with other agencies; agencies can

⁹ *Id.* at 49,936.

¹⁰ *Id.*

¹¹ *Id.* at 49,935.

¹² *Id.* at 49,936.

do this through a shared substantiation document and listing the joint CEs in their respective NEPA procedures or identifying the CEs through another joint document.¹³

The Proposed Rule would also provide agencies more flexibility to establish a CE outside of their NEPA procedures. Agencies could establish CEs through a land use plan, a decision document supported by a programmatic EIS or environmental assessment, or other equivalent planning or programmatic decisions.¹⁴ Once established, agencies could apply CEs to future actions addressed in the program or plan, including site-specific or project-level actions.

CEQ anticipates that giving agencies more mechanisms to establish CEs will encourage them to conduct programmatic and planning reviews, increase the speed with which they can establish CEs, promote the development of CEs tailored to specific contexts, geographies or project types, and allow decision-makers to consider the cumulative effects of related actions on a geographic area over a longer time frame than agencies generally consider in a review of a single action.¹⁵

Innovative Approaches to NEPA Reviews

Without proposing specific innovations, CEQ would include a new regulation (40 C.F.R. § 1506.12) inviting a federal agency to pursue, with CEQ's approval, innovative approaches to NEPA compliance to address "extreme environmental challenges" due to climate change. The Proposed Rule would codify the following examples of extreme environmental challenges: sea level rise; increased wildfire risk; bolstering the resilience of infrastructure to increased disaster risk from the effects of climate change; water scarcity; degraded water or air quality; species loss; disproportionate and adverse effects on communities with environmental justice concerns; imminent or reasonably foreseeable loss of historic, cultural, or tribal resources; and impaired ecosystem health.

CEQ outlines how an agency would seek its approval to pursue an "innovative" approach to NEPA compliance and notes that CEQ would evaluate any request within 60 days. CEQ seeks public comment on whether these provisions are needed and how they might be employed in practice while providing the following general examples of potential innovative approaches: new ways to use information technology; cooperative agreements or work with local communities; methods more fully incorporating "Indigenous Knowledge"; new ways to work with project proponents and communities to advance proposals; and innovative tools for engaging the public and providing public comment opportunities, which could enhance participation from communities with environmental justice concerns.

Implications

The proposed changes are extensive, detailed, and a mix of restoring the 1978 regulations and responding to certain aspects of the 2020 rules. The Proposed Rule would go beyond the 1978 and 2020 rules by effectively requiring agencies to evaluate the climate change and environmental justice impacts of a proposed action. While analyses of climate change and environmental justice impacts are familiar elements of a contemporary EIS, critics of the 2020

¹³ *Id.* at 49,937.

¹⁴ *Id.* at 49,938.

¹⁵ *Id.*

Rule and related guidance have complained that they had inappropriately downplayed such considerations.

Other changes signal potential shifts in how whole categories of projects may pursue NEPA compliance—in particular projects with beneficial effects. For instance, CEQ’s revision of “context” and “intensity” to focus on significant “adverse” environmental effects appears intended to avoid detailed environmental documentation of environmental restoration projects that are beneficial to the environment.

On balance, CEQ proposes changes that emphasize increased efficiency in the NEPA process, without materially advancing the role of CEQ and the NEPA process in managing the resolution of broader environmental issues, such as the advancement of the Biden administration’s infrastructure agenda. In that sense, the CEQ proposals are limited to amendment of the NEPA process without specific provisions to address broader issues of permitting reform.