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CEQ Finalizes NEPA Phase Two Rulemaking



The Council on Environmental Quality (CEQ) finalized its Phase Two revisions to its National Environmental Policy Act (NEPA) implementing regulations on April 30, 2024, following an effort initiated in 2021 to "revise, update, and modernize" the regulations at 40 C.F.R. Parts 1500-1508.

CEQ published the Final Rule in the *Federal Register* on May 1, 2024, and the rule is effective on June 30, 2024.

The Final Rule's reforms are substantial; for the first time, climate change and environmental justice principles are codified for NEPA purposes, including a definition of "environmental justice." CEQ has also adopted a novel approach to new agency categorical exclusions (CEs) and addressed how agencies might approach projects with substantial beneficial effects.

Background

The NEPA rulemaking is part of a broad regulatory reform directed by President Biden in [Executive Order 13990](#), issued January 20, 2021. [Phase One](#) of CEQ's NEPA rulemaking, finalized April 20, 2022, was a targeted reversal of three of the agency's changes made in the last year of the Trump administration (2020 Rule). The Phase One revisions (1) require federal agencies to consider the "direct," "indirect," and "cumulative" effects of a proposed action; (2) revert to the previous regulatory definition of what constitutes the "purpose and need" of a proposal for agency action by eliminating references to the applicant's goals as a relevant consideration; and (3) restore the ability of federal agencies to expand their NEPA procedures and treat CEQ's regulations as a floor, not a ceiling.

CEQ released its [proposed Phase Two revisions](#) on July 31, 2023. For the most part, the Final Rule adopts the [proposed Phase Two rule](#) with relatively minor revisions in response to comments.

Environmental Justice

For the first time, CEQ has codified a definition of "environmental justice" for NEPA purposes. At Section 1508.1(m), the following definition is established:

"Environmental justice means the 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."

The Final Rule also incorporates environmental justice into the definition of "effects," which now includes "disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative." Alternatives analyses must also now identify and assess alternatives that address adverse health and environmental effects disproportionately affecting communities with environmental justice concerns.

Consideration of Climate Change

In the Final Rule, CEQ adopted its proposal to codify agency NEPA practice with respect to studying climate change-related effects. Specifically, the rule defines "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." As with environmental justice, alternatives analyses must now identify and assess alternatives to a proposed action that will reduce reasonably foreseeable climate change-related effects. CEQ has determined not to revise the text of the proposed rule in the final rule to codify its 2023 greenhouse gas guidance, except for one revision on quantification that was requested by some commenters and that is included in the Environmental Consequences section of Final Rule at § 1502.16(a)(6) ("Where applicable, climate change-related effects, including, where feasible, quantification of greenhouse gas emissions, from the proposed action and alternatives and the effects of climate change on the proposed action and alternatives").

Beneficial Effects and Significance Determination—Context and Intensity

As it did prior to 2020, CEQ now directs agencies to examine the "context" and "intensity" of effects as part of a determination of whether the effects of a proposed action are significant. CEQ believes these factors will assist agencies in determining the appropriate level of NEPA review for proposed actions by focusing the review on critical factors in determining significance.

Context (§ 1501.3(d)(1))

CEQ restored the standalone consideration of the context of the proposed action and provided broader examples of what "context" entails, including proximity to unique or sensitive resources or communities with environmental justice concerns. Agencies must now analyze the significance of an action in several contexts, including the potential global, national, regional, and local context, as well as the duration of an action's effects,

including short- and long-term effects. CEQ clarified that the determination of the appropriate contextual factors depends on the particular proposed action but that "identifying the global, national, regional, and local contexts reminds agencies that they should consider whether proposed actions have reasonably foreseeable effects across these various contexts," although an agency need not evaluate across all four contexts.

Intensity (§ 1501.3(d)(2))

CEQ has also reinstated a list of factors that have historically provided agencies with guidance in determining how the intensity of an action's effects may inform the significance determination. The Final Rule does not include a proposed revision stating that only actions with significant adverse effects require an environmental impact statement (EIS). CEQ clarified in the Final Rule that "significant effects" are limited in definition to adverse effects, and agencies cannot offset an action's adverse effects with beneficial effects to determine significance. Agencies cannot use a net benefit analysis across environmental effects to inform the level of NEPA review.

Categorical Exclusions

The rule, at § 1501.4, reflects the Fiscal Responsibility Act codification of the 2020 Rule's expanded provisions for CEs with revisions to add new forms and means of adopting CEs, broadening their availability to agencies in the NEPA process. Agencies can now establish CEs jointly with other agencies either through shared substantiation documents and listing the joint CEs in respective NEPA procedures, or through identifying the CEs through a separate joint document. The rule also provides agencies more flexibility to establish a CE outside their NEPA procedures. Agencies could establish CEs through a land use plan, a decision document supported by a programmatic environmental impact statement or environmental assessment (EA), or other equivalent planning or programmatic decisions.

The rule also adds a definition of "extraordinary circumstances" (§ 1508.1(o)) to guide when application of a CE is inappropriate. "Extraordinary circumstances" means "factors or circumstances that indicate a normally categorically excluded action may have a significant effect. Examples of extraordinary circumstances include potential substantial effects on sensitive environmental resources; potential substantial disproportionate and adverse effects on communities with environmental justice concerns; potential substantial effects associated with climate change, and potential adverse effects on historic properties or cultural resources."

Supplementation

After considering comments on the proposed Phase Two rulemaking, CEQ determined that it should not create a different supplementation standard for EAs from EISs "since the purpose of supplementation is to address circumstances where the analysis upon which the agency based its decision has changed and there is potential for new significant effects." CEQ stated that aligning the standards for EISs and EAs will also reduce the complexity of the NEPA regulations and the environmental review process.

As a result, CEQ has added new subsections at 1501.5(h)-(j) to address supplementation, particularly for EAs. Specifically, the new 1501.5(h) clarifies that agencies may reevaluate or supplement an EA if a major federal action remains to occur and the agency considers it appropriate to do so. Agencies may reevaluate an EA or otherwise document a finding that changes to the proposed action, circumstances, or information relevant to environmental concerns are not substantial or the underlying assumptions of the analysis remain valid.

Public and Governmental Engagement

CEQ noted that many commenters from the 2020 revisions up through the Phase Two rulemaking have requested increased opportunities for public engagement and increased transparency about agency decision-making, along with general requests that CEQ elevate the importance of public engagement in the NEPA process. These informed CEQ's revisions to the "scoping" regulations, now referred to as "public and governmental engagement." In the Final Rule, CEQ moved updated provisions of 40 C.F.R. 1506.6 ("public involvement") into 1501.9 (now, "public and governmental engagement") and moved provisions of 1501.9 specific to EIS scoping to 1502.4 for purposes of consistency.

Agency Responsibility for Environmental Documents

The 2020 Rule amended 40 C.F.R. 1506.5 to allow an applicant to prepare EISs on behalf of an agency. The 2023 NEPA amendments require that *agencies* (not CEQ regulations) establish procedures for project sponsors to prepare EAs and EISs. In the Final Rule, CEQ noted that these amendments do not affect the ability of CEQ to address agency responsibility for environmental documents. Specifically, applicants and project sponsors must still provide information to agencies to assist agencies or contractors in the preparation of environmental documents. The Final Rule addresses confusion from commenters and separates out the provisions related to applicants from provisions related to agency-directed contractors.

CEQ Nixes Their Proposed Innovative Approaches to NEPA Reviews

CEQ proposed to add a new regulation (at 40 C.F.R. § 1506.12), which invites 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 suggested codifying 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 did not receive concrete examples of situations where commenters thought agencies could successfully use such approaches. CEQ declined to include this provision in the Final Rule, noting that updated provisions on programmatic environmental reviews and new methods of establishing or adopting CEs "provide agencies sufficient flexibility to innovate and address extreme environmental challenges."

Implications

The changes are extensive, detailed, and a mix of restoring the [1978 version of the regulations](#) and responding to certain aspects of the 2020 Rule. They also impose new requirements, such as requiring agencies to evaluate the climate change and environmental justice impacts of a proposed action and incorporate such considerations into an alternatives analysis. The rule also expands how agencies can adopt categorical exclusions. Whether these reforms will speed reviews or increase efficiencies remains to be seen.

On balance, CEQ's changes 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 under NEPA and related statutes as necessary for the advancement of the Biden administration's infrastructure agenda. In that sense, the Final Rule is limited to amendment of the NEPA process without specific provisions to address broader issues of interagency coordination and agency decision-making processes.

Authors

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