

Council on Environmental Quality
National Environmental Policy Act Implementing
Regulations Revisions Phase 2
Special Environmental Assessment

July 2023

I. Background

Section 102(2) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires Federal agencies to consider in their decision-making processes the environmental effects of their proposed actions, disclose those impacts, and involve the public in the NEPA process. 42 U.S.C. 4332(2). The Council on Environmental Quality (CEQ) oversees the implementation of NEPA. 42 U.S.C. 4342, 4344. In 1978, CEQ issued NEPA implementing regulations at 40 CFR parts 1500 through 1508 (NEPA regulations), which set forth the procedures for agencies to comply with section 102(2) of NEPA. 43 FR 55978 (Nov. 29, 1978). CEQ subsequently made technical amendments in 1979, 44 FR 873 (Jan. 3, 1979), and amended one provision in 1986, 51 FR 15618 (Apr. 25, 1986). The NEPA regulations, as amended through April 25, 1986, are referred to collectively as the 1978 regulations. In 2020, CEQ made significant changes throughout the NEPA regulations. 85 FR 43304 (July 16, 2020) (2020 regulations).

CEQ has since engaged in a review of the 2020 regulations and is revising them using a phased rulemaking approach. First, CEQ issued an interim final rule that amended the 2020 regulations to extend the deadline for Federal agencies to make their agency NEPA procedures consistent with the 2020 regulations. 86 FR 34154 (June 29, 2021). Next, CEQ issued a final rule that made three targeted changes to the NEPA regulations, clarifying the 2020 regulation’s definition of “effects;” the requirements for addressing the purpose and need of an action in an environmental impact statement; and agencies’ authority to develop NEPA implementing procedures that go beyond the minimum requirements set forth in the NEPA regulations. 87 FR 23453 (April 20, 2022).

On June 3, 2023, President Biden signed the Fiscal Responsibility Act of 2023 (FRA) into law, which included a range of amendments to NEPA. These amendments modified section 102(2)(C), added sections 102(2)(D) through (F), and added sections 106 through 111 to NEPA. Sec. 321, Pub. L. 118-5, 137 Stat. 10.

CEQ is now proposing additional changes to better align the regulations with CEQ’s extensive experience implementing NEPA; CEQ’s perspective on how NEPA can most effectively inform agency decision-making; longstanding Federal agency experience and practice with environmental review processes; NEPA’s purpose and statutory text, including making decisions informed by the best available science and information; and case law interpreting NEPA’s requirements. The proposed changes also implement the amendments made to NEPA by the

FRA. CEQ has detailed these proposed changes in a notice of proposed rulemaking (NPRM). The amendments to NEPA from the FRA are also further explained in the NPRM.

The NEPA regulations provide for three levels of NEPA review for major Federal actions. When a Federal agency is considering an action that is likely to have significant environmental effects, it must prepare an environmental impact statement (EIS). *See* 40 CFR part 1502.¹ Agencies also must identify categories of actions that normally do not have significant environmental effects in their agency NEPA procedures, and then apply these categorical exclusions (CEs) to individual actions after considering whether there are extraordinary circumstances present that preclude the application of the CE. *See* 40 CFR 1501.4, 1507.3(e)(2)(ii). Finally, for actions where the significance of the effects is unknown or for those actions that are not likely to have significant environmental effects and where the agency does not have an established CE, agencies prepare an environmental assessment (EA) to comply with NEPA. *See* 40 CFR 1501.5. EAs briefly provide sufficient evidence and analysis to determine whether to prepare an EIS or to make a finding of no significant impact (FONSI). 40 CFR 1501.5(c)(1). Agencies may prepare EAs on any action to assist agency planning and decision making. 40 CFR 1501.5(b).

CEQ has not adopted agency-specific NEPA procedures and has not established CEs for its own actions. Consistent with the majority of CEQ's past practice, it has prepared this special EA to accompany and inform its proposed rulemaking to amend the NEPA regulations.

II. Purpose and Need

The purpose and need for this rulemaking is to implement the FRA's amendments to NEPA; provide for an effective environmental review process that promotes better decision making; ensure full and fair public involvement; provide for an efficient process and regulatory certainty; and provide for sound decision making grounded in science, including consideration of relevant environmental, climate change, and environmental justice effects. CEQ's action to address those elements will help to better execute NEPA's statutory requirements and purposes, including to clearly communicate requirements for Federal agencies, to ensure that Federal decisions are guided by the best available information, to better protect and enhance the quality of the human environment, and to provide timely and meaningful processes that inform and engage the public before decisions are made.

III. Proposed Action and Alternatives

The proposed action would include revisions throughout the NEPA regulations, as described in the NPRM. CEQ incorporates the NPRM herein and refers readers to that document for a more detailed description of CEQ's proposed changes. In this special EA, CEQ groups the proposed changes into the following five categories: improvements to provide efficiency and flexibility in the NEPA process, promoting better environmental outcomes, prioritizing meaningful public engagement, structural updates, and clarifying amendments.

¹ In this document, CEQ uses the section symbol (§) to refer to the proposed regulations as set forth in the NPRM and "40 CFR" to refer to the current CEQ NEPA regulations, as set forth in 40 CFR parts 1500–1508.

- **Proposed changes to improve NEPA efficiency and add flexibility** would update requirements for agency collaboration and expand agency flexibility to allow agencies to adapt environmental reviews to their unique operational needs and statutory obligations.
- **Proposed changes would promote better environmental outcomes** by codifying the need to evaluate climate change impacts in environmental analyses; by encouraging the use of the best available information; and by directing agencies to engage with impacted stakeholders, including communities with environmental justice concerns, such as communities of color, low-income communities, and Tribal Nations, earlier in the process.
- **Proposed changes would prioritize meaningful public engagement** by improving agency notice requirements, encouraging robust and meaningful comments from stakeholders, and ensuring agencies advance environmental justice and respect Tribal sovereignty.
- **Proposed structural updates** to the CEQ regulations would ensure internal consistency and enhance the readability of the regulations.
- **Proposed clarifying amendments** would provide clear direction to agencies in implementing NEPA by more closely aligning the regulations with the requirements and policy objectives of NEPA, codifying agency best practices, and identifying appropriate agency roles and responsibilities.

CEQ has determined that this action does not involve unresolved conflicts concerning the alternative uses of available resources that would warrant consideration of other alternatives required by 42 U.S.C. 4332(2)(E).

IV. Environmental Effects

The proposed changes to the CEQ regulations would, in themselves, have no environmental effect. The regulations do not dictate that Federal agencies reach any particular outcome or take any specific action. Rather, the CEQ regulations establish a process that Federal agencies must follow consistent with the national environmental policy set forth in section 101 of NEPA and the procedural requirements set forth in section 102 of NEPA. The proposed changes would improve this process, which is expected to result in Federal agencies making better and timely decisions that take into account potential environmental effects of their actions.

A. *Proposed Changes to Improve NEPA Efficiency and Add Flexibility*

CEQ proposes to make substantive changes to agency obligations within the NEPA regulations. In some instances, these changes reflect a return to the long-standing requirements under the 1978 regulations. In other places, CEQ proposes changes that are intended to implement the FRA's amendments to NEPA, improve the efficiency of agency processes, facilitate collaboration, and provide agencies with greater flexibility to prepare environmental analyses in the context of their unique operational needs and statutory obligations. These changes include, among others:

- Amending language in § 1500.6 regarding agency implementation of NEPA “as interpreted by the regulations” and confirms agencies have an independent obligation to ensure full compliance with NEPA, conforming this section with the update to § 1507.3

in the 2022 final rule that eliminated the concept that the CEQ regulations are a ceiling for NEPA compliance;

- Moving and consolidating the threshold NEPA applicability factors and adding factors from section 106 of NEPA in proposed §§ 1501.3(a)(1)–(4), as well as restoring and updating the context and intensity factors for determining significance that were removed in the 2020 regulations;
- Updating the process for establishing CEs in §§ 1501.4 and 1507.3, including confirming that agencies can jointly develop CEs, allowing agencies to establish CEs through programmatic environmental reviews and other planning processes, clarifying that CEs may incorporate mitigation measures, and enabling agencies to apply another agency’s CE to a proposed action or category of actions set forth in section 109 of NEPA;
- Clarifying the roles and responsibilities of lead and cooperating agencies in §§ 1501.7 and 1501.8;
- Improving flexibility for interagency coordination and early interagency collaboration and dispute resolution in §§ 1504.1 and 1504.2;
- Requiring agencies to set schedules in § 1501.10 to meet the one- and two-year deadlines for an EA and EIS, respectively;
- Directing agencies to establish EIS and EA schedules in § 1501.10 in consultation and concurrence with cooperating and participating agencies and in consultation with project sponsors or applicants, where applicable;
- Codifying best practices for programmatic environmental documents and tiering in § 1501.11;
- Providing clearer direction on agency adoption of EAs, EISs, and CE determinations in § 1506.3;
- Adding a new section in § 1506.12 that would allow Federal agencies to pursue innovative approaches to NEPA implementation when addressing extreme environmental challenges; and
- Adding additional clarification on requirements for developing agency NEPA procedures in § 1507.3, including for establishing CEs, identifying extraordinary circumstances, and emergency actions.

CEQ does not anticipate that there would be any reasonably foreseeable environmental effects from these changes, but to the extent there are, such effects would be beneficial. CEQ expects these changes will increase the efficiency of environmental reviews, lead to a more predictable and transparent NEPA process, and result in better environmental documents.

B. *Proposed Changes to Promote Better Environmental Outcomes*

In order to promote better environmental outcomes, CEQ proposes to ensure that NEPA documents appropriately consider all reasonably foreseeable environmental effects, including climate change and the impacts of greenhouse gas emissions, using high-quality information. CEQ proposes to improve the use of scientific analyses by reverting some provisions back to the original 1978 language, modernizing some of those 1978 provisions, and adding new requirements to reflect the current consensus of the scientific community. CEQ also proposes to add language to implement the FRA’s amendments to NEPA. These changes include, among others:

- Clarifying the expectations for the use of incomplete or unavailable information, ensuring evaluation of high-quality and accurate information, and ensuring the professional integrity, including scientific integrity of the discussions and analyses in environmental documents in §§ 1500.1(b), 1501.5(i), 1502.21, and 1502.23;
- Highlighting climate change and disproportionate adverse health and environmental effects on communities with environmental justice concerns as important considerations when evaluating project alternatives in § 1500.2 and requiring the inclusion of reasonably foreseeable climate change effects of the proposed action and reasonable alternatives, as well as a discussion of the effects of climate change on the proposed action and reasonable alternatives, in § 1502.16;
- Requiring discussion of the potential for disproportionate and adverse human health and environmental effects on communities with environmental justice concerns (§ 1502.16);
- Requiring analysis of any adverse environmental effects of the no action alternative (§ 1502.16);
- Restoring and updating agency evaluation of context and intensity factors and encouraging a balanced consideration of beneficial effects when making a determination of significance in §§ 1501.3(b) and (d);
- Amplifying the use of Indigenous Knowledge as a source of relevant expertise for cooperating agencies in § 1501.8(a);
- Requiring identification of the environmentally preferable alternative in EISs (§ 1502.14);
- Encouraging the use of high-quality information for reasonably foreseeable trends, including the effects of climate change, in § 1502.15;
- Expanding the use of reliable high-quality information, including the flexibility for agencies to utilize newly gathered data in § 1502.23;
- Requiring agencies to develop a monitoring and compliance plan when an EA or EIS relies on mitigation to analyze the reasonably foreseeable environmental effects of a proposed action (§§ 1501.6, 1505.2, and 1505.3); and
- Modernizing definitions in § 1508.1 to incorporate climate change, including “effects,” and “extraordinary circumstances.”

CEQ does not anticipate that there would be any reasonably foreseeable environmental effects from these changes, but to the extent there are, such effects would be beneficial. CEQ expects the proposed changes would result in the use of high-quality information, including best-available science and reliable data, and encourage a systems-based approach to analyze potential effects. These proposed changes would result in more informative environmental documents, more scientifically accurate analyses, and better-informed government decision making. The proposed changes also will increase the predictability of the NEPA process and, as a result, may reduce litigation risks. Taken together, CEQ expects the proposed changes to have no or net-positive effects on the environment.

C. *Proposed Changes to Prioritize Meaningful Public Engagement, Including Advancing Environmental Justice and Respecting Tribal Sovereignty*

Consulting with and responding to affected stakeholders is critical to achieving the requirements and policy objectives of NEPA and the goals of transparent and informed decision-making. In

particular, ensuring agencies listen to and incorporate feedback from communities with environmental justice concerns, which often include low-income communities, communities of color, areas within the boundaries of Tribal Nations, and other historically under-represented communities, is critical to considering and addressing the disproportionately adverse health and environmental effects on these groups. CEQ proposes to clarify or strike certain provisions in the 2020 regulations that may be misinterpreted to limit public engagement and community involvement in Federal decision making. CEQ also proposes to provide procedures to facilitate evaluation of local and cumulative impacts to vulnerable communities and achieve better environmental and community outcomes. CEQ further proposes procedures to ensure that public engagement occurs early in the NEPA process because early identification of issues and conflicts can lead to more efficient and effective decision making. These changes include, among others:

- Restoring and modifying the policy provision of § 1500.2 from the 1978 regulations by updating subsections (a) and (e) to promote meaningful engagement, specifically including engaging with communities with environmental justice concerns as well as clarifying in § 1501.5(c)(3) that agencies should list the Federal agencies, as well as the State, Tribal, and local governments with which they consulted;
- Improving transparency by encouraging publication of an agency determination where the agency determines to apply a CE when an extraordinary circumstance exists in § 1501.4(b)(1), and requiring notice and public comment in § 1501.4(c)(2) when an agency establishes a CE through a programmatic review;
- Adding consideration of disproportionate and adverse effects on communities with environmental justice concerns and adverse effects on rights of Tribal nations that have been reserved through treaties, statutes, or Executive Orders to the list of intensity factors in § 1501.3(d);
- Clarifying that if an agency publishes a draft EA, they must invite public comment on the draft EA (§ 1501.5(e));
- Determining the appropriate methods of public and government engagement, including the right mechanisms for notification, publication, and public meetings and hearings in § 1501.9;
- Conforming the scoping requirements in § 1502.4 with provisions on public engagement in § 1501.9;
- Clarifying that agencies should “work together and with” potential applicants and relevant agencies in § 1502.5(b) to encourage early coordination, process efficiencies, and better environmental outcomes;
- Increasing accessibility of conclusions for public review; for instance, requiring that the executive summary of the EIS identify the environmentally preferable alternative (§ 1502.12);
- Removing some of the commenting burdens added by the 2020 regulations in § 1503.3, including removing language encouraging commenters to discuss economic and employment impacts, and removing ambiguity around requirements for agencies to respond to public comments in § 1503.4(a);
- Promoting the incorporation of mitigation measures that address or ameliorate significant adverse human health and environmental effects of proposed Federal actions that disproportionately and adversely affect communities with environmental justice concerns in § 1505.3(b); and

- Modernizing definitions in § 1508.1 to incorporate communities with environmental justice concerns, such as within the definitions of “effects” and “extraordinary circumstances” and adding a definition of “environmental justice.”

CEQ does not anticipate that there would be any reasonably foreseeable environmental effects from these changes, but to the extent there are, such effects would be beneficial. The proposed changes would facilitate public engagement to ensure that agencies incorporate perspectives from communities regarding direct, indirect, and cumulative effects, including effects that may otherwise not be analyzed. In addition, these changes would result in better community outcomes by amplifying the voices of those who may be most impacted by the proposed Federal action and, because the proposed changes prioritize early public engagement, they may result in more efficient and effective decision making and reduce potential litigation risks.

D. *Proposed Changes to Update Structure and Consistency of NEPA Regulations*

CEQ proposes to improve the logical structure of the NEPA regulations, to ensure consistency among internal cross-references, and to make additional non-substantive changes. These changes would improve the readability and clarity of the regulations, which is likely to improve the efficiency of agency compliance with NEPA. These proposed changes include, among others:

- Restoring the purpose and policy sections in §§ 1500.1 and 1500.2 to reflect a structure similar to the long-standing purpose and policy sections in the 1978 regulations, and updating sections to be consistent with other regulatory changes, such as the inclusion of climate change and consideration of effects on communities with environmental justice concerns, throughout the regulations;
- Removing the comment exhaustion requirement in § 1500.3(b) to reduce burden on public commenters and making substantive changes to §§ 1503.1 and 1503.3 to conform with this change;
- Emphasizing the importance of public engagement in the NEPA process, including adding early engagement language in § 1501.1(b), moving the requirements for public engagement to part 1501 to highlight it as a core component of the NEPA process and agency planning, and updating and moving requirements for scoping in § 1502.4;
- Consolidating provisions on applicability of NEPA, consideration of scope, and determination of the level of NEPA review in one section in § 1501.3, along with restoring and updating of context and intensity factors for evaluating significant effects; and
- Consolidating provisions on programmatic environmental documents and tiering in § 1501.11.

CEQ does not anticipate that there would be any reasonably foreseeable environmental effects from changes that improve the structure of the regulations and provide for internal consistency. CEQ expects that organizing the regulations logically, consolidating related provisions, and ensuring internal conformity would improve efficiency in the NEPA process, in part by reducing agency and public confusion regarding regulatory provisions. This generally would lead to improved NEPA compliance and better-informed agency decision making.

E. *Proposed Changes to Enhance Clarity in NEPA Regulations*

CEQ proposes to enhance the clarity of the NEPA regulations by more clearly articulating the intent of NEPA, identifying agency best practices, and providing certainty for agency roles and responsibilities. These changes would provide agencies and the public with a clear understanding of how to implement NEPA in a way that encourages the consideration of high-quality information, supports robust public engagement, and results in fully-informed and transparent federal decision-making. CEQ also proposes changes that would implement the FRA's amendments to NEPA. These changes include, among others:

- Clarifying that the purpose of the NEPA regulations is to advance the “letter and spirit” of NEPA and achieve the environmental and community benefits envisioned by Congress (§§ 1500.1 and 1500.3(a)) and removing the misleading emphasis that NEPA is simply a procedural statute (§ 1500.1);
- Ensuring that consideration of climate change and environmental justice are appropriately included throughout the regulations (e.g., §§ 1500.2(e), 1502.14(f), 1502.16(a), 1502.23, and 1508.1(g));
- Clearly describing and cross-referencing agency requirements for creating concise and informative environmental documents (§ 1500.4), including amending potentially confusing provisions from the 2020 regulations, and clarifying the limited conditions in which it may be impossible for agencies to comply with NEPA requirements (§ 1500.6);
- Highlighting the importance of early stakeholder engagement in describing the overarching purpose of the regulations (§ 1501.1);
- Striking the “functional equivalence” provision in § 1501.1(a)(6), consistent with the NEPA statute and case law;
- Clarifying the determination of scope and closely related activities or decisions in § 1501.3(b) as well as the appropriate level of NEPA review that must be prepared by an agency;
- Codifying best practices, such as for mitigated findings of no significant impact (§ 1501.6), programmatic environmental documents (§ 1501.11), and early interagency dispute resolution (§ 1504.2); and
- Adding language regarding flexibility and agency obligations when establishing CEs in § 1501.4, including traditional CEs consistent with § 1507.3, allowing agencies to establish CEs through programmatic or planning NEPA documents, and setting forth the process through which an agency can use another agency's CE.

CEQ does not anticipate that there would be any reasonably foreseeable environmental effects from these changes, but to the extent there are, such effects would be beneficial. CEQ expects that updating the regulatory language to reflect more accurately the requirements and policy objectives of NEPA will help agencies more effectively and efficiently carry out their obligations consistent with NEPA and has the potential to reduce litigation risk. These proposed changes would result in transparent agency decision making, concise and informative environmental documents, and better environmental outcomes.

V. List of Agencies and Persons Consulted

CEQ provided this special EA to Federal agencies as part of the Office of Management and Budget's Office of Information and Regulatory Affairs (OMB OIRA) interagency review process for significant rules under E.O. 12866, *Regulatory Planning and Review*, 58 FR 51735 (Oct. 4, 1993). CEQ is making this special EA available to the public and seeking comments through the NPRM process.