Center for Energy Regulation & Policy Analysis,
School of Energy Resources

Navigating the New NEPA Landscape:

An Overview of the 2024 Phase 2 Regulations and Recent Statutory Changes

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Abstract

The National Environmental Policy Act (NEPA) has undergone significant changes in recent years, culminating in the Council of Environmental Quality's (CEQ) 2024 Phase 2 regulations that represent a major shift in the interpretation and implementation of this landmark environmental law. This paper provides an objective overview of these changes, focusing on how the 2024 regulations prioritize consideration of climate change and environmental justice, and aim to drive more substantive environmental objectives. We explore some potential implications of these changes for federal agency decision-making and environmental outcomes, offering our perspective on how they may impact NEPA practice.

NEPA Statute and Regulations *TIMELINE*

1970 — NEPA was enacted and signed into law by President Nixon

1978 — CEQ promulgates first comprehensive NEPA regulations

2020 — CEQ under the Trump and the Biden Administration completes first major NEPA regulatory rewrite in over 40 years.

2022 — CEQ under Biden Administration completes Phase 1 NEPA regulatory rollback.

2023 — Congress passes BUILDER Act, including first substantive NEPA changes in 53 years.

2024 — CEQ under Biden Administration completes Phase 2 NEPA Rule.

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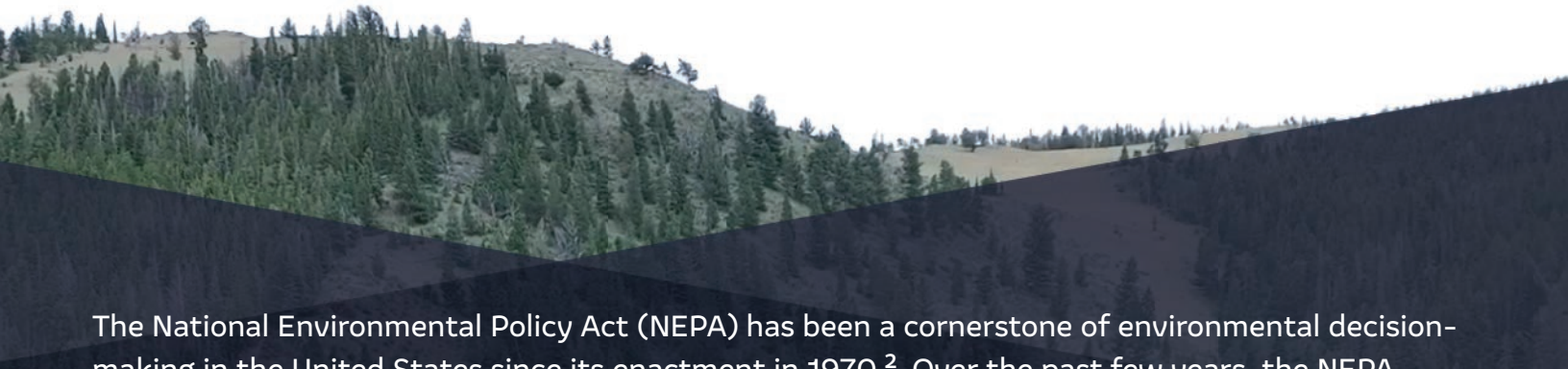
Introduction



The National Environmental Policy Act (NEPA) has been a cornerstone of environmental decision-making in the United States since its enactment in 1970.[2] Over the past few years, the NEPA regulations and statute have undergone a series of substantial changes. First, in 2020, the Trump Administration released the first comprehensive revisions to the original 1978 NEPA regulations in more than 40 years. In 2021, the Biden Administration rolled back three key elements of the regulations in the Phase 1 Rule. In 2023, Congress made the first substantial changes to the statute in more than 50 years as part of the Fiscal Responsibility Act. Most recently, on May 1, 2024, the Biden Administration released a more comprehensive rewrite of the regulations in the Phase 2 Rule, which went into effect on July 1, 2024. These rapid changes have left many struggling to keep up and understand the current state of NEPA law and practice.

The purpose of this paper is to provide a comprehensive analysis of the current state of NEPA, focusing on the most recent changes to the law and regulations. Our aim is to help practitioners, scholars, and students navigate this complex and evolving landscape by providing a detailed examination of key provisions of the Phase 2 Rule and their implications for environmental decision-making.

We begin with a brief history of NEPA and an overview of its requirements, including the 1978 regulations that guided NEPA practice for more than 40 years. We then turn to the modern era of regulatory and statutory reform, starting with the Trump Administration's 2020 regulatory revisions, followed by the Biden Administration's Phase 1 Rule, and the 2023 NEPA amendments included in the Fiscal Responsibility Act. The heart of our analysis focuses on the 2024 Phase 2 NEPA Rule, which represent a significant shift in the interpretation and implementation of NEPA. We examine how these regulations prioritize consideration of climate change and environmental justice, and how they aim to drive more environmentally-focused outcomes. We also delve into other substantial changes in the regulations, including those related to judicial review, determining the level of NEPA review, the use of categorical exclusions, environmental assessments, public engagement, and more.

Throughout our analysis, we offer our perspective on these changes and their potential implications for NEPA practice. We conclude with a summary of the key takeaways and a look ahead to the future of NEPA in light of these recent developments.

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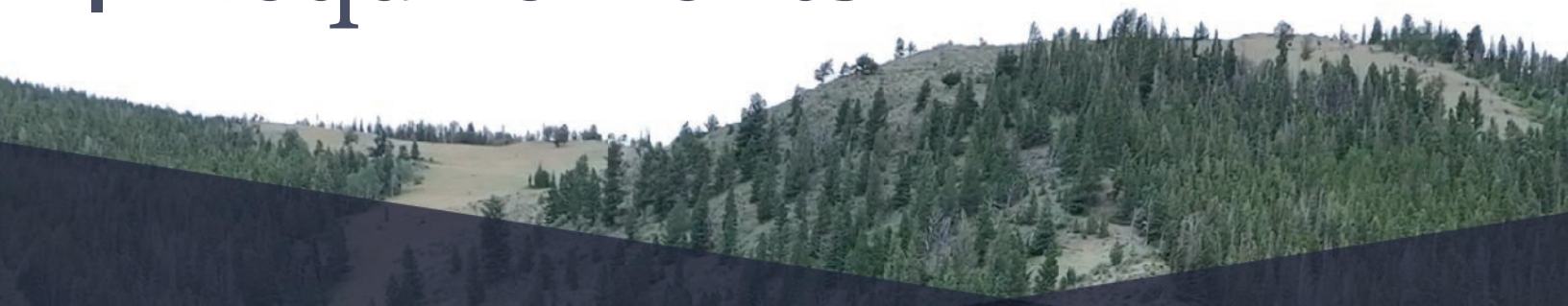
[2] The National Environmental Policy Act of 1970, 42 U.S.C. § 4321 (2023).

NEPA History and Key Requirements



Signed into law by President Nixon on January 1, 1970, NEPA has had a profound impact on environmental protection and decision-making in the United States.[3] Through NEPA, Congress established a "national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."[4] NEPA aims to protect and enhance the quality of the environment by requiring federal agencies to consider the environmental impacts of their proposed actions.[5] This ensures that federal agencies make informed decisions by exploring a range of possible alternatives and considering environmental consequences before committing resources to a project.[6] It is also often stated that NEPA promotes public participation in the decision-making process by requiring agencies to disclose their findings and involve the public.[7] Traditionally interpreted as a procedural statute, NEPA has become the cornerstone of environmental decisionmaking in the United States.

3 42 U.S.C. § 4321 et seq.

4 *Id.* § 4321.

5 *Id.* § 4332.

6 James P. Karp, *The NEPA Regulations,* 19 AM. BUS. L.J. 295, 313 (1981-1982).

7 Temple Stoellinger, "Having Your Voice Heard: How to Effectively Get the Agency's Attention in a NEPA Comment to Affect the Final Decision," *National Environmental Policy Act 9-1* (Rocky Mt. Min. L. Fdn. 2017) (noting that "[t]he closest the Act gets to encouraging public participation is to require that 'statements and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, *shall be made available to the President, the Council on Environmental Quality and to the public. . . .*' and to 'make available to States, counties, municipalities, institutes, and *individuals,* advice and information useful in restoring, maintaining, and enhancing the quality of the environment.' " 42 U.S.C. § 4332(C)&(J)).

I. Key Provisions of NEPA

NEPA's key provisions have established a strong foundation for assessing environmental impacts and ensuring informed decisionmaking by federal agencies. The following section summarizes the key components of NEPA that have contributed to its important impacts on environmental policy and practice in the United States.

Section 101 of NEPA includes a "declaration of national environmental policy" that establishes "that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, 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."[8]

While the declaration of national environmental policy in Section 101 sets forth the overarching goals and principles of NEPA, it is the procedural requirements outlined in Section 102 that have played a pivotal role in federal agency decisionmaking and environmental protection in the United States. Section 102's action-forcing mechanism mandates that federal agencies evaluate the potential environmental impacts of their proposed actions prior to making a final decision.[9] Specifically, section 102(C) requires that all agencies of the Federal Government, when considering a "major Federal action[] significantly affecting the quality of the human environment" provide a "detailed statement by the responsible official. . . ."[10] This detailed statement, known as an Environmental Impact Statement (EIS), must include:

> (i) reasonably foreseeable environmental effects of the proposed agency action;
>
> (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
>
> (v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.[11]

8 42 U.S.C. § 4331(a).

9 *Id.* § 4332.

10 *Id.* § 4332(C).

11 *Id.* § 4332(C)(i)-(v). (2023) (reflecting amendments from the Fiscal Responsibility Act, Pub. L. 118-5).

NEPA also established the Council on Environmental Quality (CEQ) within the Executive Office of the President to, among other things, oversee the implementation of NEPA.[12] The role of CEQ in overseeing NEPA implementation, however, has been somewhat ambiguous, as NEPA itself does not explicitly grant CEQ the authority to promulgate binding regulations.[13] Yet, NEPA provides only broad, general directives without detailed guidance on how federal agencies should implement its procedural requirements. In the early days of NEPA practice, this lack of specificity led to inconsistencies and uncertainties among agencies in their application of NEPA, making it clear that more detailed implementation regulations were necessary.[14] Recognizing this need, President Carter issued Executive Order 11991 in 1977, directing the CEQ to issue regulations that would provide federal agencies with uniform standards and procedures for complying with NEPA.[15] In response, CEQ issued the first comprehensive NEPA implementation regulations in 1978.[16]

I I. The 1978 Council on Environmental Quality NEPA Regulations

The 1978 CEQ NEPA regulations provided federal agencies with guidance on how to adhere to NEPA's procedures and accomplish its objectives. These regulations established three levels of environmental review: (1) environmental impact statements (EISs); (2) environmental assessments (EAs); and (3) categorical exclusions (CEs).[17] EISs are the most comprehensive level of review required for major federal actions significantly affecting the quality of the human environment.[18] The regulations established a standard format that agencies must follow[19] while providing detailed requirements for the preparation of EISs, including the format, content, and public review process.[20] The significance threshold for an EIS set out in the 1978 regulations required consideration of both context and intensity.[21] Intensity, in turn, involved consideration of 10 factors ranging from the degree to which the proposed action would affect public health and safety, to whether the proposed actions would involve unique or unknown risks, to the effects on sensitive resources such as cultural sites or species listed as threatened or endangered.[22]

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12 *Id.* § 4342.

13 Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy,* 33 WM. & MARY ENVTL. L. & POL'Y REV. 483, 511-12 (2009).

14 Karp, *supra* note 6, at 295 (without detailed regulations, NEPA was "a foundling bouncing from court to court seeking its guidance source.").

15 Relating to Protection and Enhancement of Environmental Quality, Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977).

16 Implementation of Procedural Provisions, 43 Fed. Reg. 55,978 (November 29, 1978).

17 40 C.F.R. § 1508.11 (1978) (definition of an environmental impact statement); § 1508.9 (definition of an environmental assessment); § 1508.4 (definition of a categorical exclusion).

18 *Id.* § 1502.3.

19 *Id.* §§ 1502.1-1502.24.

20 *Id.* § 1503.1 (inviting comments).

21 *Id.* § 1508.27.

22 *Id.*

EAs, introduced in the 1978 regulations, are concise public documents that agencies prepare to determine whether an EIS is necessary.[23] EAs must include a brief discussion of the need for the proposal, alternatives, environmental impacts, and serve as a tool for agencies to assess whether a proposed action's impacts are significant and warrant an EIS.[24] If the agency finds that the action will not have significant effects, it can issue a Finding of No Significant Impact (FONSI).[25] CEs, also established in the 1978 regulations, are categories of actions that agencies have determined do not individually or cumulatively have a significant effect on the human environment.[26] Actions falling under a CE are exempt from the requirement to prepare an EA or EIS, streamlining the NEPA process for projects with minimal environmental impacts.[27] Together, these three levels of review provide a framework for agencies to assess the environmental impacts of their proposed actions and make informed decisions based on the significance of those impacts.

In addition to establishing the three levels of NEPA review, the 1978 NEPA regulations introduced several other important concepts and requirements. The regulations required the agency to include a statement of purpose and need—i.e., the underlying purpose and need to which the agency is responding—which drives the range of reasonable alternatives.[28] The regulations added the concept of "cumulative impacts," requiring federal agencies to consider the incremental environmental impact of an action when added to other past, present, and reasonably foreseeable future actions, regardless of the agency or person undertaking those actions.[29] They also addressed connected actions, which are actions that are so closely related to the proposed action that they should be discussed in the same impact statement.[30]

23 *Id.* § 1508.9

24 *Id.*

25 *Id.* § 1508.13.

26 *Id.* § 1508.4.

27 *Id.* § 1500.5(k).

28 *Id.* § 1502.13

29 *Id.* § 1508.7.

30 *Id.* § 1508.25(a)(1).

Connected actions included projects that automatically trigger other actions that may require an EIS, cannot proceed unless other actions are taken, or are interdependent parts of a larger action.[31] Also noteworthy, the regulations required agencies to provide opportunities for public participation in the NEPA process, including public meetings, hearings, and comment periods on draft EISs.[32] The 1978 regulations also defined the roles and responsibilities of the lead agency (the agency with primary responsibility for preparing the NEPA document) and cooperating agencies (other agencies with jurisdiction or special expertise related to the proposed action).[33] And finally, the regulations allowed agencies to "tier" their NEPA documents, meaning that they can rely on broader, earlier NEPA documents (such as programmatic EISs) when preparing more specific, later NEPA documents (such as site-specific EAs).[34]

Since the establishment of the 1978 CEQ NEPA regulations, federal agencies have been required to develop their own NEPA procedures that supplement the CEQ regulations and are specific to their particular mission, authority, and decision-making processes.[35] These agency-specific NEPA regulations must be consistent with the CEQ regulations and are subject to CEQ's review and approval.[36] Many agencies have established CEs for actions that they have determined, based on their experience, do not individually or cumulatively have significant environmental impacts.[37] These CEs allow agencies to streamline their environmental review process for routine, low-impact actions. Agencies have also developed detailed guidance documents, handbooks, and other resources to help staff and the public navigate the NEPA process within their particular context.[38] The development of agency-specific NEPA regulations has allowed for more tailored and efficient implementation of NEPA across the federal government while ensuring consistency with the overarching principles and requirements established by the CEQ regulations.

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31 *Id.* § 1508.25(a)(1).

32 *Id.* § 1506.6.

33 *Id.* §§ 1501.5-1501.6.

34 *Id.* § 1502.28.

35 *Id.* § 1507.3 (federal agencies are directed to adopt their own NEPA regulations); *see also* Temple Stoellinger, "Federal Public Land Agency NEPA Authorities: The Current State of Affairs," *Public Land Law Regulation and Management 2-1* (Found. For Nat. Resources & Energy L. 2022).

36 40 C.F.R. § 1507.3.

37 Nancy Sutley, Memorandum for Heads of Federal Departments and Agencies: Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, Executive Office of the President, Council of Environmental Quality, (November 23, 2010), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf.

38 *See* Stoellinger, *supra* note 35 (summarizing federal public land agency NEPA requirements including guidance and handbooks).

Modern Regulatory and Statutory Reform Efforts

I. The 2020 Regulatory Revisions

On July 16, 2020, CEQ, under the Trump Administration, published the first comprehensive revisions to the NEPA regulations in more than 40 years.[39] The primary purpose of the regulations was to streamline the timing and procedural requirements of NEPA. The new regulations introduced, for the first time, deadlines and page limits for NEPA documents, allotting one year and 75 pages for an EA and two years and 150 pages for an EIS (unless the proposal is sufficiently complex, allowing for 300 pages) absent approval by a senior agency official to extend the deadline or page limit.[40] The deadline for an EA was to be measured from the date on which the agency decided an EA was needed until publication of the final EA and FONSI.[41] For EISs, the notice of intent to prepare an EIS in the Federal Register triggered the deadline and ended once the agency competed the Final EIS and signed the Record of Decision.[42] CEQ embraced other procedural efficiencies, including applicant-prepared EISs (in addition to EAs), expanded use of tiering, adoption of an EA or EIS prepared by another agency, and limitations on the agency's obligation to respond to public comments if not sufficiently specific or detailed.[43]

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39 Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (summarizing the federal public land agency NEPA requirements).

40 40 C.F.R. §§ 1501.5(f) (EA page limit), 1501.10(b) (deadlines), 1502.7 (EIS page limit) (2020).

41 *Id.* § 1501.10(b)(1).

42 *Id.* § 1501.10(b)(2).

43 *Id.* §§ 1501.11 (tiering), 1503.3 (specificity of comments), 1506.3 (adoption), 1506.5 (applicant-prepared EIS).

CEQ also made a number of substantive changes in the 2020 revisions. Most notably, CEQ revised the definition of and criteria for determining whether effects of a proposed action are "significant." CEQ discarded the "context and intensity" factors in favor of a general focus on the "the potentially affected environment and degree of the effects of the action," including consideration of short and long-term effects, beneficial and adverse effects, effects on public health and safety, and effects that would violate environmental laws.[44] CEQ further defined the purpose and need of an action to correspond to an applicant's goals when review is in response to a federal permit or other application.[45] CEQ also eliminated the separate category of "cumulative" effects, although CEQ stated that the concept of aggregate effects was preserved in the requirement to consider as part of the affected environment any reasonably foreseeable environmental trends and planned actions in the project area.[46] Finally, the revisions incorporated several judicial review principles, including limits on claims around issues not raised during public comment, express acknowledgment of NEPA's procedural nature and call for a procedural remedy for any violation, and disavowal of an injunction as a presumptive remedy that would halt a federally-approved project or otherwise undo a federal approval.[47]

Overall, as CEQ explained in the preamble to the 2020 revisions, many of the changes to the NEPA regulations were codification of more than 40 years of NEPA principles developed by the judiciary in interpreting the 1978 regulations. For instance, CEQ's revised definition of "effects" as limited to those that have "a reasonably close causal relationship to the proposed action or alternatives" was lifted almost verbatium from the U.S. Supreme Court's decision in *Department of Transportation v. Public Citizen*.[48] What some welcomed as the first common-sense changes to improve NEPA's efficiency and effectiveness in more than 40 years, others decried as an unnecessary and controversial gutting of the regulations in favor of shorter environmental review with less public involvement. As it turned out, however, the revisions would be short-lived with another administration change on the horizon.

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44 *Id.* § 1501.3(b).

45 *Id.* § 1502.13.

46 *See id.* § 1502.15.

47 *Id.* §§ 1500.1(a) (NEPA is a procedural statute), 1500.3(b) (exhaustion), 1500.3(d) (remedies).

48 *Dep't of Transp. v. Public Citizen,* 541 U.S. 752, 767 (2004) ("NEPA required 'a reasonably close causual relationship' between the environmental effect and the alleged cause."). The Supreme Court's holding in *Public Citizen* has been applied differently in the U.S. Circuit Courts of Appeal, with some circuits adhering to its limits on the scope of NEPA review and other circuits viewing the holding narrowly and the agency's NEPA obligations to consider indirect effects broadly. The circuit split will be addressed by the U.S. Supreme Court in its upcoming term in the case of *Seven County Infrastructure Coalition and Uinta Basin Railway, LLC v. Eagle County Colorado and Center for Biological Diversity,* No. 23-975, 2024 U.S. LEXIS 2764 (U.S. 2024).

II. 2022 Phase 1 NEPA Rule

Almost immediately after President Biden took office in 2021, he issued Executive Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.[49] President Biden called on federal agencies to assess the status of Trump Administration rules and regulations and identify those in need of revision to accomplish the Biden Administration's climate goals. The 2020 NEPA regulations were expressly included in the list of regulations for reconsideration, with instruction to agencies to not implement them pending further review by the Biden Administration. In short order, the Biden Administration prioritized a rollback of three key provisions of the 2020 NEPA regulations—the 2022 "Phase 1" Rule.[50]

Effective on May 20, 2022, the Phase 1 Rule made three key changes to reverse the 2020 regulations. First, CEQ eliminated the reference to "applicant goals" as a basis for the statement of purpose and need in a NEPA document, reverting to the 1978 requirement that the agency "specify the underlying purpose and need to which the agency is responding in proposing the alternatives. . . ."[51] Second, CEQ restored the definition of "effects" from the 1978 regulations, including the obligation to consider the "cumulative" effects of the proposed action and alternatives.[52] CEQ cited the longstanding application of the cumulative impacts analysis since the 1978 regulations, also noting that the U.S. Supreme Court had interpreted NEPA to require analysis of "cumulative" impacts even before the 1978 regulations.[53] Finally, CEQ removed the 2020 regulation's addition of "ceiling provisions" that prohibited agency-specific implementing regulations from imposing more stringent requirements for NEPA review than those set out by CEQ.[54] CEQ promised a more comprehensive revision in a Phase 2 rulemaking yet to come.[55]

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49 Exec. Order 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021) *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/.

50 National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022).

51 40 C.F.R. § 1502.13 (2022). The 2024 Phase 2 Rule further revises the definition to eliminate language from the 1978 rule specifying that the purpose and need should reflect the action "to which the agency is responding in proposing the alternatives." *Id.* § 1502.13 (2024). This further change reinforces the idea that the purpose and need should focus solely on the agency's purpose and need, setting aside the underlying applicant's goals and objectives as not relevant to the agency action or development of alternatives.

52 *Id.* § 1508.1(g)(3) (2022). CEQ also removed limiting language from the definition of "effect" tying the analysis to effects with a "reasonably close causal relationship." *Id.* § 1508.1(g)(2). CEQ described this language, which had been incorporated from the U.S. Supreme Court's *Dep't of Transp. v. Public Citizen* decision, as "unnecessary," "unhelpful," and adequately addressed by the "longstanding principle of reasonable foreseeability." 87 Fed. Reg. at 23,465.

53 87 Fed. Reg. at 23,464 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976)).

54 *Id.* at 23,460 (citing 40 C.F.R. § 1507.3 (2020)).

55 *Id.* at 23,455.

III. 2023 Fiscal Responsibility Act NEPA Amendments

In June 2023, while the CEQ was contemplating further comprehensive changes to the NEPA rules, Congress enacted the Fiscal Responsibility Act (FRA) that included a number of permitting reform measures amending NEPA's requirements.[56] The effort at permitting reform was a recognition that, despite NEPA deadlines in the CEQ's 2020 regulations and other efficiency efforts, such as the FAST-41 permitting process,[57] NEPA review continued to pose a substantial hurdle to project development across the United States, including for major energy, transmission, and infrastructure projects deemed critical to the energy transition and the Administration's climate change goals.[58]

The FRA includes the following notable NEPA amendments:

EIS Scope (Revised Section 102). NEPA has always required EISs to provide a detailed statement of the environmental impacts of proposed agency action.[59] NEPA now clarifies that the EIS should focus on "reasonably foreseeable" environmental effects.[60] Agencies should also limit the analysis to consideration of a "reasonable range of alternatives," which must be "technically and economically feasible" and "meet the purpose and need of the proposal."[61] The FRA directs agencies to "ensure the professional integrity" of environmental documents and use "reliable data and resources" in meeting their NEPA obligations.[62]

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56 Pub. L. 118-5, § 321 (June 3, 2023)(the Builder Act adopted as part of the Fiscal Responsibility Act). The Builder Act stands for "Building U.S. Infrastructure through Limited Delays & Efficient Reviews." The House Committee on Transportation and Infrastructure described the Builder Act as an effort to "modernize[] the outdated [] NEPA to make infrastructure project reviews more efficient, reduce project costs, spur economic recovery and rebuild America." Press Release (Apr. 14, 2021), *available* at https://transportation.house.gov/news/documentsingle.aspx?DocumentID=405330.

57 42 U.S.C. § 4370m. Fixing America's Surface Transportation Act (FAST-41) was enacted in 2014 to improve transparency, predictability, and outcomes of the federal environmental review and authorization process for certain large-scale infrastructure projects.

58 *See* CEQ, *Environmental Impact Statement Timelines* (2010-2018) (June 12, 2020), *available at* https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf; Nat'l Assoc. of Env't Profs., *2022 Annual NEPA Report* (July 2022), *available at* https://naep.memberclicks.net/assets/annual-report/NEPA_Annual_Report_2022.pdf (average timeframes for EISs in 2022 was 4.2 years).

59 42 U.S.C. § 4332(C) (1970).

60 *Id.* § 4332(C)(i), (ii) (2023).

61 *Id.* § 4332(C)(iii), (F). Use of the phrase "purpose and need of the proposal" could be construed to reassert the relevance of an applicant's goals and objectives where the proposal is made by a third-party applicant and not the agency.

62 *Id.* § 4332(D), (E).

Thresholds for NEPA and Determining the Level of Review (New Section 106). Codifying existing law, NEPA now provides four categories of actions that do not trigger NEPA review: (1) non-final agency action; (2) actions subject to CEs; (3) when preparing a NEPA document would "clearly and fundamentally conflict" with the requirements of other law; and (4) non-discretionary agency action.[63] For the first time, the amendments also acknowledge EAs as a NEPA compliance tool for agency actions that will not have significant effects, or for which the significance of the effects is unknown.[64] An EA is described as "a concise public document" setting forth "the agency's finding of no significant impact or determination that an [EIS] is necessary."[65]

Agency Roles (New Section 107(a), (b)). Where multiple agencies are participating in the NEPA review, Section 107(a) promotes selection of one lead agency.[66] The criteria to determine the lead agency includes the magnitude of agency involvement, approval authority, expertise concerning the action's environmental effects, and duration and sequence of agency involvement.[67] A state, tribal, or local agency may participate as a joint lead agency.[68] Any federal, state, tribal, or local agency with "jurisdiction by law or special expertise," but not designated as a lead agency, may participate as a cooperating agency.[69] The lead agency "shall" develop a schedule, in consultation with the cooperating agencies and the applicant for completing the environmental review, permit, or authorization, and take measures necessary to comply with the schedule.[70] Section 107 includes a conflict resolution process when multiple federal agencies fail to agree on the lead agency designation.[71] Where multiple agencies are involved, to the extent practicable, they should coordinate on a single NEPA document that meets the needs of all agencies for decisionmaking.[72]

Page Limits (New Section 107(e)). Taking its cue from the 2020 NEPA regulations, Congress incorporated page limits into the statute. Exclusive of citations or appendices, an EIS should be no longer than 150 pages, or 300 pages for an EIS of "extraordinary complexity." An EA is limited to 75 pages.[74]

63 *Id.* § 4336(a).

64 *Id.* § 4336(b)(2).

65 *Id.*

66 *Id.* § 4336a(a).

67 *Id.* § 4336a(a)(1).

68 *Id.*

69 *Id.* § 4336a(a)(3).

70 *Id.* § 4336a(a)(2).

71 *Id.* § 4336a(a)(4), (5).

72 *Id.* § 4336a(b).

73 *Id.* § 4336a(e).

74 *Id.*

Applicant-Prepared NEPA Documents (New Section 107(f)). NEPA now expressly sanctions applicant-prepared EAs and EISs "under the supervision of the agency."[75] Congress made this change in the interest of efficiency and in recognition of limited agency resources in some cases to ensure timely NEPA review. Regardless, the lead agency "shall independently evaluate the environmental document and shall take responsibility for the content."[76]

NEPA Deadlines (New Section 107(g)). Drawing from the 2020 NEPA regulations, the statute incorporates deadlines for NEPA review.[77] The agency "shall complete" an EIS within two years of the earlier of: (1) the date on which the agency determines that NEPA requires an EIS for the action; (2) the date on which the agency notifies the applicant that an application for a right-of-way is complete; and (3) the date on which the agency issues a notice of intent to prepare an EIS for the action.[78] A one-year deadline applies to EAs, applying the sooner of the same three triggers.[79] Agencies can take advantage of an exception to the deadline if the agency determines that the deadline cannot be met, consults with the applicant, and establishes a new deadline that "provides only so much additional time as is necessary to complete" the NEPA document.[80] An applicant has the right to petition the court for the agency's "alleged failure" "to act in accordance with an applicable deadline," and the court has the authority to set a schedule and deadline for the agency "to act as soon as practicable, which shall not exceed 90 days from the date on which the order of the court is issued, unless the court determines a longer time period is necessary to comply with applicable law."[81] Agencies are directed to report annually to Congress regarding EISs and EAs not completed within the statutory deadlines.[82]

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75 *Id.* § 4336a(f).

76 *Id.*

77 In addition to the amendments highlighted in the text, Section 107 also codifies the NEPA scoping process for EISs, *id.* § 4336a(c), and the definition of purpose and need, *id.* § 4336a(d).

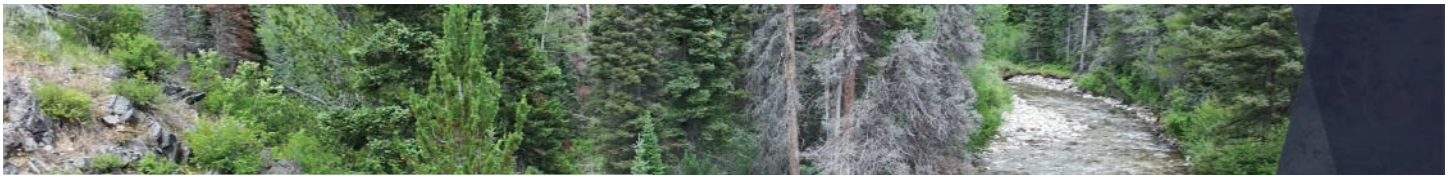
78 *Id.* § 4336a(g)(1).

79 *Id.*

80 *Id.* § 4336a(g)(2).

81 42 U.S.C § 4336a(g)(3). In February 2024, the first FRA deadline lawsuit was filed. *Signal Peak v. Haaland*, No. 24-cv-366 (D.D.C.). Plaintiffs alleged that the Office of Surface Mining Reclamation and Enforcement failed to "act in accordance" with the two-year deadline for the applicant's mine plan EIS when it provided an EIS schedule that extended to 3.5 years. Federal Defendants moved to dismiss the case as unripe because the two-year deadline had not yet passed. The court agreed, finding the claim for enforcement of the two-year deadline to be prudentially unripe. *Signal Peak Energy, LLC v. Haaland*, 2024 U.S. Dist. LEXIS 149325, at *25 (D.D.C. Aug. 21, 2024).

82 *42 V.S.C.* § 4336a(h).



Programmatic EISs or EAs (New Section 108). The NEPA amendments create a presumption that any programmatic EIS or EA finalized in the last five years remains valid.[83] Within that time, additional review of the programmatic analysis is not required to tier to the programmatic document, unless there are substantial new circumstances or information about the significance of adverse effects that would trigger supplementation.[84] After five years, the agency must reevaluate the analysis in the programmatic document and ensure reliability before tiering to or incorporating the analysis.[85]

Adopting Categorical Exclusions (New Section 109). With an eye toward NEPA efficiencies, NEPA now provides a process for one agency to adopt the CE of another agency after consulting with the agency that established the CE, giving notice to the public, and documenting the adoption.[86]

E-NEPA (New Section 110). To improve accessibility and transparency, the statute directs CEQ to, within one year, submit a report to Congress regarding potential for online and digital technologies to help address delays, including a "unified permitting portal" that would (1) allow for applicants to submit documents to support the review, (2) promote collaboration among the lead and cooperating agencies, and (3) act as a central repository of information.[87] Congress appropriated $500,000 for this effort to modernize and organize the NEPA process.[88]

Major Federal Action (New Section 111). Section 111 includes new NEPA definitions,[89] most of which are codifications of the 1978 regulatory definitions. Significantly, Congress updated the definition of "major federal action," the jurisdictional minimum required for application of NEPA. The amendments provide that a "major federal action" is one that is "subject to substantial Federal control and responsibility."[90] The definition excludes non-federal actions "with no or minimal Federal funding" or "with no or minimal federal involvement where a Federal agency cannot control the outcome of the project"—a codification of the "small handles" doctrine.[91]

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83 *Id.* § 4336b.

84 *Id.*; *see also* 40 C.F.R. § 1502.9 (2024) (supplementation standard).

85 42 U.S.C. § 4336b.

86 *Id.* § 4336c.

87 *Id.* § 4336d(a).

88 *Id.* § 4336d(b).

89 *Id.* § 4336e.

90 *Id.* § 4336e(10).

91 *Id.* The "small handles" doctrine provides that minimal Federal involvement in a non-Federal project does not justify "federalizing" the whole project for NEPA review and advises a more limited scope for the NEPA analysis, focusing on the federally approved portion. *See Macht v. Skinner,* 916 F.2d 13 (D.C. Cir. 1990) (state highway project not federalized when Army Corps of Engineers permit required for 3.58 acres of 22.5 mile project); but see *Maryland Conservation Council v. Gilchrist,* 808 F2d. 1039 (4th Cir. 1986) (highway project federalized where "middle" segment of highway would pass through federal park).

IV. 2023 Phase 2 NEPA Rule Proposal

In July 2023, CEQ issued the proposed Phase 2 NEPA Rule, delivering on its promise of a comprehensive rewrite of the 2020 rules.[92] CEQ described two overarching goals: (1) to implement the NEPA amendments in the FRA; and (2) provide for efficient and effective environmental review processes.[93] Efficient and effective review would be accomplished through a review process that promotes better decisionmaking that is efficient and transparent, ensures full and meaningful public engagement, is guided by principles of informed and science-based decisionmaking, facilitates improved environmental, climate change, and environmental justice outcomes, and promotes regulatory certainty.[94] CEQ received 1.1 million comments on the proposed rule, ranging from praise for CEQ's return to the language and principles of the 1978 rules to complaints that the agency had lost sight of the fundamental procedural purpose of NEPA. On May 1, 2024, CEQ published the final Phase 2 NEPA Rule, which became effective on July 1, 2024.[95]

92 National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49,924 (July 31, 2023).

93 CEQ, *NEPA Implementing Regulations Bipartisan Permitting Reform Implementation Notice of Proposed Rulemaking Presentation* (August/September 2023), *available at* https://ceq.doe.gov/docs/laws-regulations/Proposed-Rule-Presentation-Slides.pdf.

94 *Id.*

95 National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442 (May 1, 2024).

The 2024 Phase 2 NEPA Rule

I. Major Changes in Regulatory Focus

Despite CEQ's ostensible purpose to rollback the 2020 NEPA regulatory changes and return to the 1978 rules, the final Phase 2 Rule does much more than that. The Phase 2 Rule marks a sizable, if not seismic, shift from the procedural obligations of the 1978 rules toward a more rigorous approach to drive environmentally preferable outcomes, especially for projects with effects on climate change and communities with environmental justice concerns. This section discusses those major changes that are reflected throughout the Phase 2 Rule. We offer our perspective below on the major changes using a list format. It should be noted that there may be some redundancies in the references, but this is intentional so that readers can view the information under different headings depending on the particular questions they have about the Phase 2 Rule.

1. The Shift from a Procedural Mandate to Substantive Outcomes

One of the notable changes in the Phase 2 Rule is a shift in the interpretation of NEPA from a primarily procedural statute to one with more substantive requirements. NEPA has historically been interpreted as a procedural statute rather than one that mandates specific environmental outcomes or decisions.[96] This interpretation is rooted in the language of the statute itself, which requires federal agencies to follow a specific process for assessing the environmental impacts of their proposed actions but does not dictate the substantive decisions that agencies must make based on those assessments.[97] In other words, NEPA has been interpreted to require agencies to take a "hard look" at the environmental consequences of their actions and to consider alternatives, but not to require agencies to choose the most environmentally friendly option or to prioritize environmental concerns over other factors in their decisionmaking.[98] As long as an agency has followed the procedural requirements of NEPA and has adequately considered the environmental impacts of its proposed action, courts have generally deferred to the agency's substantive decision, even if that decision may have negative environmental consequences.[99]

The Phase 2 Rule signals a shift in the interpretation of NEPA from a primarily procedural statute to one with more substantive requirements, as the CEQ indicated that it views NEPA and its regulations as mechanisms to "facilitate better environmental outcomes."[100] This shift is evident in several key provisions of the Phase 2 Rule.

Description of the Statute. The shift of interpretation begins

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96 *E.g., Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 352 (1989) (NEPA does not require "that a complete mitigation plan be actually... adopted...."); *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 371 (1989) ("NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to 'prevent or eliminate damage to the environment and biosphere' by focusing Government and public attention on the environmental effects of proposed agency action.").

97 *See* 42 U.S.C. §§ 4332, 4321; *e.g., Robertson,* 490 U.S. at 352.

98 *See e.g., Natural Resources Defense Council Inc., v. Morton,* 458 F.2d 827, 838 (D.C. Cir. 1972) ("[s] long as the officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken."); *Baltimore Gas & Elec. Co. v. Natural Resource Defense Council,* 462 U.S. 87, 97 (1983).

99 *E.g., Citizens for Smart Growth v. Sec'y of the Dep't of Transp.,* 669 F.3d 1203, 1210 (11th Cir. 2012) (because NEPA imposes purely procedural requirements, rather than substantive results, and does not mandate any specific outcome, "agencies may make a decision that preferences other factors over environmental concerns as long as they have first adequately identified and analyzed the environmental impacts").

100 89 Fed. Reg. at 35,450.

with amendments to § 1500.1(a) that delete text describing NEPA as a procedural statute and insert new text that emphasizes the environmental protection aspects of NEPA.[101] CEQ explained that describing NEPA as a purely procedural statute is an "inappropriately narrow view of NEPA's purpose and ignores the fact that Congress established the NEPA process for the purpose of promoting informed decision making and improved environmental outcomes."[102]

Mitigation and Compliance Plans. To ensure that agencies follow through on the mitigation commitments made, the new rule under § 1505.3(c), requires that when an agency incorporates and relies upon mitigation measures—whether in its analysis of reasonably foreseeable effects or to reach a FONSI in what is known as a "mitigated FONSI"—the lead agency or a cooperating agency must explain the enforceable mitigation requirements or commitments to be undertaken and the authority to enforce them (e.g. permit conditions or other agreements) and prepare a monitoring and compliance plan.[103] A monitoring and compliance plan should describe the mitigation measures, including who is responsible for monitoring and implementation, how information regarding implementation will be publicly available, the timeline, the standards for implementation, and how mitigation and monitoring will be funded.[104] CEQ has clarified that NEPA itself does not provide agencies with authority to impose mitigation measures, and thus agencies must look to their organic statutes and other authorities as a basis for making mitigation obligations mandatory.[105]

Environmentally Preferred Alternative. The Phase 2 Rule now requires that agencies "identify the environmentally preferable alternative or alternatives amongst the alternatives considered in the environmental impact statement."[106] The "environmentally preferable alternative will best promote the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal, and natural resources, including rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders; or causing the least damage to the biological and physical environment."[107] Although agencies are not required to select and implement the environmentally preferable alternative, the requirement to identify one may make it challenging for agencies to justify not choosing it.

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101 40 C.F.R. § 1500.1(a) (2024).

102 89 Fed. Reg. at 35,449.

103 40 C.F.R. § 1505.3(c) (2024).

104 *Id.* § 1505.3(d).

105 89 Fed. Reg. at 35,516–17 (explaining that while the revised regulations allow agencies to approve proposals containing unenforceable mitigation measures, they must not base their assessment of the action's potential reasonably foreseeable effects on the assumption that these measures will be effectively implemented).

106 40 C.F.R. § 1502.14(f) (2024).

107 *Id.* (the regulations also note that the environmentally preferable alternative could be the proposed action, the no action alternative, or any other reasonable alternative).

2. Prioritization of Climate Change Effects to Drive Decisionmaking

As a disclosure statute, NEPA has been interpreted as requiring consideration of the "reasonably foreseeable" environmental effects of a proposed federal action.[108] The statute itself does not prioritize or single out any particular category of environmental effects for review and analysis. Nor did the 1978 regulations, defining "effects" broadly and generally to include ecological, aesthetic, historic, cultural, economic, social, or health effects, whether beneficial or detrimental.[109] To the extent the 1978 regulations brought attention to a particular category of resource impacts, the resource was generally protected by other laws—i.e., CEQ's direction to consider the degree of effects to sites listed or eligible for listing on the National Register of Historic Places or species listed as threatened or endangered under the federal Endangered Species Act.[110]

The Phase 2 Rule breaks with the previous resource-neutral approach to prioritize consideration of climate change effects throughout.[111] Where the 1978 regulations did not mention climate change at all, the Phase 2 Rule incorporates the concept into eight separate regulatory provisions.[112] Further, greenhouse gas emissions are the sole environmental impact in the Phase 2 Rule that require quantification, where applicable,[113] and climate change effects are the only environmental impact for which agencies are encouraged to "employ mathematical models or other models that project a range of possible outcomes."[114] CEQ disclaims any intent to elevate climate change as the preeminent environmental concern for environmental review, or the expectation that agencies will make decisions based on climate change effects.[115] Not surprisingly, commenters on the proposed Phase 2 Rule received a different message with many applauding and others decrying prioritization of climate change and the likelihood that agencies would apply the regulations to favor projects and alternatives with fewer greenhouse gas emissions.

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108 This standard is now codified at 42 U.S.C. § 4332(C).

109 40 C.F.R. § 1508.8 (1978).

110 *Id.* § 1508.27(b)(8), (9).

111 88 Fed. Reg. at 49,952. Notably, the Phase 2 Rule removes language requesting comments specific to "economic and employment" impacts (1503.3(a)) because such a requirement "inappropriate[ly]" "single[s] out these considerations for special treatment." Yet, CEQ incorporates special consideration of climate change throughout the regulations.

112 40 C.F.R. §§ 1500.2(e) (2024) (policy), 1502.14 (environmentally preferable alternative), 1502.15 (affected environment), 1502.16 (environmental consequences), 1506.6 (methodology and scientific accuracy), 1508.1(i) (definition of effects), 1508.1(m) (definition of environmental justice), 1508.1(o) (definition of extraordinary circumstances).

113 *Id.* § 1502.16(a)(6).

114 *Id.* § 1506.6(d).

115 89 Fed. Reg. at 35,527.

CEQ incorporates climate change impact analysis into the Phase 2 Rule as follows:

Policy. Agencies "shall to the fullest extent possible" identify and assess reasonable alternatives to the proposed action that will avoid or minimize adverse effects, specifically "alternatives that will reduce climate change-related effects."[116] This direction to develop alternatives to address the effects of a particular resource concern is unprecedented.

Significance Threshold. In determining whether environmental effects will be significant, agencies are newly required to consider the effects in the global context.[117] CEQ explains that consideration of environmental effects should not be confined to the local context, but extended, where relevant to global concerns, such as climate change.[118]

Alternatives. The environmentally-preferred alternative, which must now be identified in the draft EIS stage, is the one that will "best promote" NEPA policy by "maximizing environmental benefits, such as addressing climate change-related effects."[119] The regulation goes on to list other factors for consideration, such as protecting historic and cultural resources and causing the least damage to the biological and physical environment, among others. But climate change is listed first and foremost.

Affected Environment. In describing the affected environment, agencies are directed to describe "reasonably foreseeable environmental trends, including anticipated climate-related changes to the environment."[120]

Environmental Consequences. Two subsections of the Phase 2 Rule demand climate consideration. First, agencies must analyze "where applicable" conflicts between the proposed action and the objectives of federal, regional, state, tribal, and local plans and policies, including those addressing climate change.[121] Second, agencies must analyze "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."[122] Though the Phase 2 Rules does not expressly say so, the requirement to also consider "relevant risk reduction, resiliency, or adaptation measures" as part of the proposed action and alternatives is a further nod to the importance of planning for and approving actions that address a future affected by climate change.[123]

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116 40 C.F.R. § 1500.2(e) (2024).

117 *Id.* § 1501.3(d).

118 88 Fed. Reg. at 49,935.

119 40 C.F.R. § 1502.14(f) (2024).

120 *Id.* § 1502.15(b).

121 *Id.* § 1502.16(a)(5).

122 *Id.* § 1502.16(a)(6). The requirement to quantify greenhouse gas emissions did not appear in the proposed rule but was added to the final rule. 89 Fed. Reg. at 35,508.

123 40 C.F.R. § 1502.16(a)(9)(2024); 88 Fed. Reg.at 49,950 ("these proposed revisions would clarify that agencies must address both effects of the proposed action and alternatives on climate change, and the resiliency of the proposed action and alternatives in light of climate change.").

Methodology and Scientific Accuracy. An agency's environmental analysis must be based on high-quality information and reliable data.[124] "where appropriate, agencies shall use projections when evaluating the reasonably foreseeable effects, including climate change-related effects. Such projections may employ mathematical or other models that project a range of possible future outcomes, so long as agencies disclose the relevant assumptions or limitations."[125] The reference to mathematical models for purposes of assessing climate change was understood by some commenters as an endorsement of the social cost of greenhouse gas methodology that is embraced by the current Administration and some courts that have required it for analysis of climate change effects.[126] But CEQ disclaims any intent to specifically require use of the social cost of greenhouse gas methodology.[127]

Definitions. Climate change is now specifically referenced as an "effect" for consideration in a NEPA document,[128] and is also included in the definition of "environmental justice," which means the disproportionate and adverse human health and environmental effects of the proposed action and alternatives, including those related to climate change.[129] Finally, climate change effects are defined among the "extraordinary circumstances" that can foreclose the application of a categorical exclusion.[130]

In the proposed rule, CEQ requested comment on whether it should codify all or part of its 2023 NEPA Guidance for Consideration of Greenhouse Gas Emissions and Climate Change.[131] Ultimately, CEQ chose not to codify the guidance, but did incorporate the requirement to quantify greenhouse gases, where applicable and feasible, and make use of mathematical models to project potential climate change outcomes.[132] The final Phase 2 Rule leaves no room for doubt that climate change is of critical importance to an environmental impact analysis.

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124 42 U.S.C. § 4332(E); 40 C.F.R. § 1506.6(b) (2024).

125 40 C.F.R. § 1506.6(d) (2024).

126 *See* CEQ, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change* (Jan. 2023), *available at* https://www.regulations.gov/docket/CEQ-2022-0005.

127 89 Fed. Reg. at 35,527. While the CEQ's 2023 GHG guidance provides for its use as a proxy to compare alternatives, CEQ clarifies that the regulations do not require it.

128 40 C.F.R. § 1508.1(i)(4) (2024).

129 *Id.* § 1508.1(m).

130 *Id.* § 1508.1(o).

131 88 Fed. Reg. at 49,945.

132 *See* 89 Fed. Reg. at 35,494.

3. Emphasis on Effects to Communities with Environmental Justice Concerns

The 2024 Phase 2 Rule introduces new requirements for addressing environmental justice concerns, marking a significant addition to the NEPA process that aims to ensure federal agencies assess and mitigate the disproportionate impacts of their actions on low-income and minority communities. This inclusion of environmental justice requirements in the Phase 2 Rule is similar to the addition of climate change considerations. The new focus on environmental justice stems from the Biden Administration's Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad," and Executive Order 14096, "Revitalizing Our Nation's Commitment to Environmental Justice for All."[133] These executive orders not only designate CEQ as the lead agency in coordinating a government-wide approach to advancing environmental justice but also mandate that all federal agencies address environmental justice concerns as part of their missions.[134] Although the codification of these requirements, particularly the regulation directing agencies to consider mitigation for impacts on environmental justice communities, is new, many agencies have already been including some level of environmental justice analysis in their NEPA reviews based on additional federal government-wide and agency-specific policies, as well as court precedents. The following section outlines the key provisions in the Phase 2 Rule that integrate environmental justice considerations into the NEPA process.

Policy. As noted above, the Phase 2 Rule addresses climate change, but also environmental justice in the policy section at § 1500.2(e), which directs federal agencies to "[u]se the NEPA process to identify and assess reasonable alternatives to proposed actions that will avoid or minimize adverse effects . . . upon the quality of the human environment[.]"[135] This provision specifically emphasizes the need to consider climate change and environmental effects that disproportionately affect communities with environmental justice concerns, ensuring that these communities are not unduly burdened by the impacts of federal actions.[136] In the Federal Register notice, CEQ acknowledged that it had received comments from those opposed to this addition, suggesting that CEQ's regulations are directing or favoring particular substantive outcomes.[137] In response, CEQ stated that "[p]aragraph (e) prompts agencies to give appropriate regard to environmental effects related to climate change and environmental justice," and that "the references to climate change and environmental justice in paragraph (e) reflect and advance NEPA's statutory objectives, text, and policy statements[.]"[138]

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133 Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021); Exec. Order No. 14096, 88 Fed. Reg. 25,251 (Apr. 21, 2023).

134 *Id.*

135 40 C.F.R. § 1500.2(e) (2024).

136 *Id.*

137 89 Fed. Reg. at 35,452.

138 *Id.*

Significance. As discussed in the climate section above, the Phase 2 Rule introduces new factors for determining the significance of a proposed action's environmental impacts, which play a crucial role in deciding whether an EIS is required.[139] Related to environmental justice, when assessing the context of an action, agencies must now consider the potentially affected environment, including any communities with environmental justice concerns that may be disproportionately impacted.[140] Additionally, when evaluating the intensity of an action, the regulations direct agencies to analyze the degree to which the action may affect communities with environmental justice concerns.[141] These new requirements ensure that environmental justice considerations are integrated into the process of determining whether an EIS is necessary.

Alternatives. As noted above, the Phase 2 Rule requires agencies to identify an environmentally preferable alternative or alternatives.[142] Related to environmental justice, it is worth noting that the Phase 2 Rule states that the environmentally preferable alternative will maximize environmental benefits by addressing the "disproportionate and adverse effects on communities with environmental justice concerns[.]"[143]

Environmental Consequences. When assessing the environmental consequences of a proposed action, which includes a comparison of the proposed action and reasonable alternatives, the Phase 2 Rule directs agencies to consider the "disproportionate adverse human health and environmental effects on communities with environmental justice concerns."[144] CEQ explained that it added the "where applicable" to "make clear that not all proposed actions will have such effects."[145]

Mitigation. Related to mitigation, the Phase 2 Rule under § 1505.3(b), states that a lead or cooperating agency should "where relevant and appropriate, incorporate into its decision mitigation measures that address or ameliorate significant human health and environmental effects of proposed Federal actions that disproportionately and adversely affect communities with environmental justice concerns."[146] This provision ensures that agencies not only consider the impacts of their actions on these communities but also take concrete steps to mitigate any disproportionate and adverse effects identified during the NEPA review process. This is a new requirement, and CEQ notes that its inclusion "reflects the particular importance of addressing environmental justice."[147]

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139 40 C.F.R. § 1501.3(d) (2024).

140 *Id.* § 1501.3(d)(1).

141 *Id.* § 1501.3(d)(2)(vii).

142 *Id.* § 1502.14(f).

143 *Id.*

144 *Id.* § 1502.16 (a)(13).

145 89 Fed. Reg. at 35,510.

146 40 C.F.R. § 1505.3(b) (2024).

147 89 Fed. Reg. at 35,518.

Definition. The Phase 2 Rule introduces a definition of environmental justice at § 1508.1(m), which states that "[e]nvironmental 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) [a]re fully protected from disproportionate and adverse . . . impacts. . . including . . . climate change; and (2) [h]ave equitable access to a healthy, sustainable . . . environment." Some commenters have raised concerns about the use of the term "fully protected," arguing that it may set an unachievable agency standard.

II. Other Substantial Rule Changes

In addition to the overarching changes in NEPA's focus described above, the Phase 2 Rule made substantial changes throughout the regulations. Some bring the requirements back in line with the 1978 regulations, and others add important new tools and concepts.

1. Removing Limits on Judicial Review and Remedies

The Phase 2 Rule removes several changes included in the 2020 rule relating to exhaustion and judicial remedies that were intended to reduce NEPA-related litigation and project delays. However, CEQ also expands judicial review, consistent with the FRA statutory amendments, for a project sponsor claiming that an agency has failed to act in accordance with a statutory NEPA deadline.

Exhaustion. The Phase 2 Rule removes the exhaustion provision contained in the 2020 regulations at § 1500.3(b), which required commenters to provide specific comments during the NEPA process in order to preserve their right to challenge an agency's decision in court.[148] CEQ explained that its decision to remove the exhaustion provision was based on the finding that the 2020 regulations established an "inappropriately stringent exhaustion requirement for public commenters and agencies."[149]

Injunctive Relief. Under § 1500.3(b), the Phase 2 Rule removes the remedies provision of the 2020 regulation, which declared that injunctive relief should not be the presumptive remedy for a procedural NEPA violation.[150] CEQ noted that it was "questionable" whether the agency had the authority to direct courts how to apply Administrative Procedure Act remedies, suggesting that such decisions should be left to the discretion of the courts based on the specific circumstances of each case.[151]

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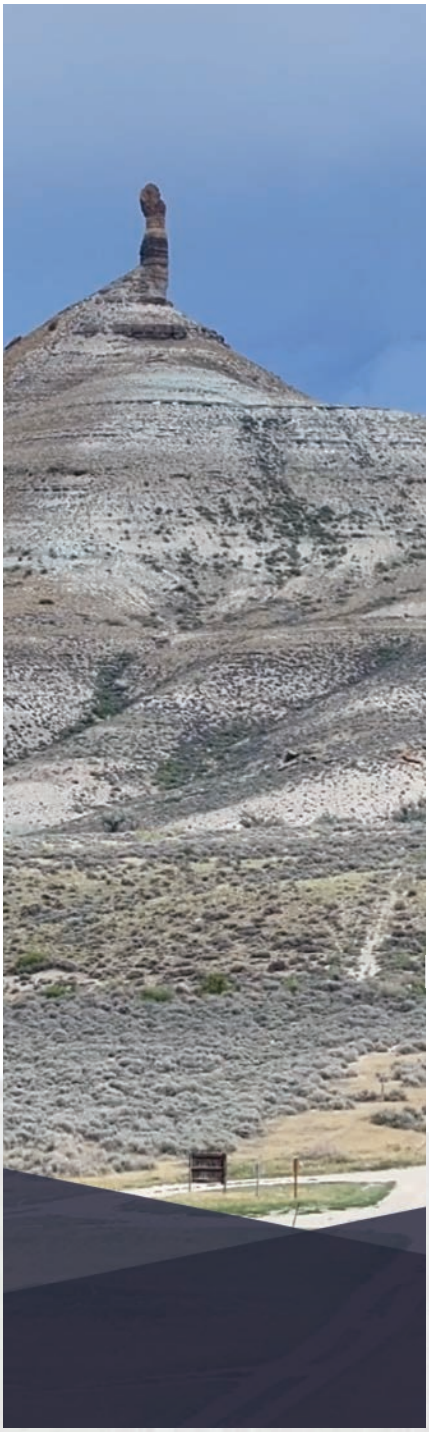
148 89 Fed. Reg. at 35,454.

149 *Id.*

150 40 C.F.R. § 1500.3(b) (2020).

151 89 Fed. Reg. at 35,455.



Deadlines. In contrast to the previously mentioned removals, the Phase 2 Rule expands judicial review under § 1500.3(b) by incorporating the statutory claim now available to a project sponsor if an agency fails to act in accordance with the NEPA § 107(g)(3) deadlines.[152]

2. Determining the Level of NEPA Review

The Scope of Analysis—NEPA Applicability, Connection Actions, and Segmentation.

NEPA's Applicability. The Phase 2 regulations add a new § 1501.3(a) that incorporates the threshold determinations from the FRA, reiterating that NEPA does not apply to (1) exempted activities and decisions, (2) actions for which compliance with NEPA would "clearly and fundamentally" conflict with other federal law, (3) activities or decisions that are not "major Federal actions," (4) non-final activities or decisions, and (5) non-discretionary activities or decisions for which the agency cannot take into consideration environmental factors.[153]

Connected Actions. Once an agency has identified a major Federal action, the agency must identify the scope of the proposed action, including any connected actions that should be considered in the same NEPA review.[154] CEQ retained the definition of connected actions from the 2020 regulations, which limited connected actions to closely related Federal activities or decisions.[155] CEQ forbids improper segmentation—breaking an action into smaller component parts—to avoid a determination of significance.[156] Agencies may not avoid a finding of significant impacts by falsely defining effects as temporary that are not, in fact, temporary.[157] This concept of temporary effects was previously considered as one of the "intensity" factors for a significance finding, discussed below, but CEQ determined it was more relevant to defining the scope of the agency action for review, and revised and moved the concept to § 1501.3(b).[158]

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152 40 C.F.R. § 1500.3(b) (2024) (citing 42 U.S.C. § 4336a(g)).

153 40 C.F.R. § 1501.3(a); 42 U.S.C. § 4336(a).

154 40 C.F.R. § 1501.3(b).

155 *Id.*

156 *Id.*

157 *Id.*

158 *Compare* 40 C.F.R. § 1508.27(b)(7) (1978) (including concept of temporary effects as an "intensity" factor for significance determination) *with* 40 C.F.R. § 1501.3(b) (2024) (addressing same concept as a scoping concern).

Significance. The 1978 regulations defined "significance," the threshold for an EIS, in terms of context and intensity.[159] Context required consideration of the action's impacts on "society as a whole (human, national), the affected region, the affected interests, and the locality."[160] The rule specified that for site-specific actions, significance would likely turn on "effects in the locale rather than in the world as a whole."[161] CEQ listed 10 factors that should be considered in evaluating intensity (or severity), focusing primarily on the degree of effect to various sensitive resources.[162] Over the years, one of the most highly litigated NEPA issues has been whether the agency should have prepared an EIS, rather than an EA, and the courts have developed a body of case law around the intensity factors.[163]

The 2020 regulations opted for a simpler approach. Agencies were directed to consider the degree of effects.[164] Retaining the principle of context, the regulations provided that agencies should consider "the affected area (national, regional, or local)."[165] CEQ reiterated from the 1978 regulations that the significant impacts of site-specific actions "would usually depend only upon the effects in the local area."[166] CEQ also recommended that in evaluating the degree of effects, agencies consider (1) both the short- and long-term effects; (2) both beneficial and adverse effects; (3) effects on public health and safety; and (4) effects that would violate federal, state, tribal, or local law protecting the environment.[167]

159 40 C.F.R. § 1508.27 (1978).

160 *Id.* § 1508.27(a).

161 *Id.*

162 *Id.* § 1508.27(b). The factors were: (1) impacts that may be both beneficial and adverse, (2) effects to public health or safety, (3) unique characteristics of the area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic reivers, or ecologically critical areas, (4) whether the effects are likely to be "highly controversial," (5) whether the effects are "highly uncertain or involve unique or unknown risks," (6) whether the action may establish a precedent for future actions with significant effects, (7) whether the action is related to other actions with individually insignificant but cumulatively significant impacts, (8) adverse effects to sites listed or eligible for listing on the National Register of Historic Places, (9) effects to endangered or threatened species or its habitat that has been determined to be critical under the ESA, and (10) whether the action threatens violation of federal, state, or local law. *Id.*

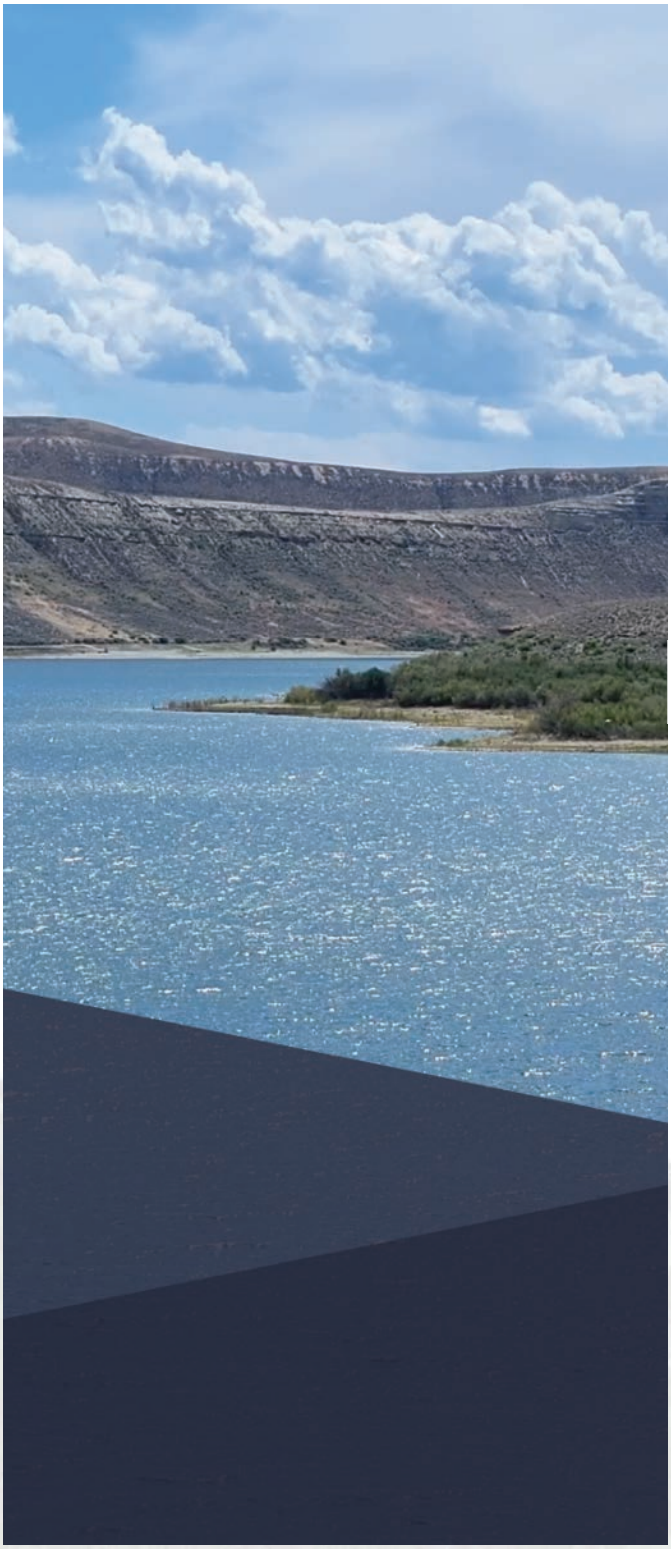
163 *See Barnes v. U.S. Department of Transportation,* 655 F.3d 1124, 1139 (9th Cir. 2011); *Blue Mountain Biodiversity Project v. Jeffries,* 99 F.4th 438, 447-48 (9th Cir. 2024).

164 40 C.F.R. § 1501.3(b) (2020).

165 *Id.* § 1501.3(b)(1).

166 *Id.*

167 *Id.* § 1501.3(b)(2).



Context. The Phase 2 Rule restores the context and intensity factors from the 1978 regulations, with a few notable exceptions. First, context now explicitly includes the "global" context—"agencies should consider the potential global, national, regional, and local contexts as well as duration, including short- and long-term effects."[168] The new rule excises the declaration that the significance of site-specific actions should usually depend on local effects. Responding to criticism that incorporating the global context would constitute an onerous burden if required for all actions, CEQ explained that not all four contexts must be evaluated for every action, and that agencies should focus on the relevant contexts and reasonably foreseeable effects.[169]

Intensity. The Phase 2 Rule also returns to the intensity factors, but now lists only eight. The first 1978 factor advising that effects may be both beneficial and adverse, and that "significant effect[s] may exist even if the Federal agency believes that on balance the effects will be beneficial"[170] was moved to introductory text discussing the concept of intensity.[171] More importantly, the Phase 2 Rule reversed the 1978 concept that actions with significant *beneficial* effects still require an EIS. Instead, CEQ provides that only adverse effects count toward significance, and agencies are allowed to "net" the adverse and beneficial effects to a particular resource to avoid a finding of significance.[172] For instance, where the short-term effects may be significant and adverse, but the long-term effects will offset those adverse effects with beneficial ones, an EIS may not be required.[173]

168 40 C.F.R. § 1501.3(d)(a) (2024).

169 89 Fed. Reg. at 35,465.

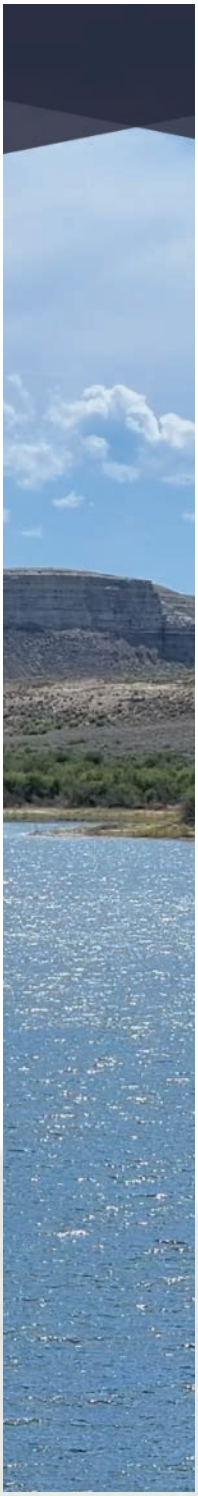
170 40 C.F.R. § 1508.27(b)(1) (1978).

171 *Id.* § 1501.3(d) (2024).

172 *Id.*

173 *Id.*

CEQ also jettisoned the factor for evaluating whether the effects of the proposed action are highly controversial, clarifying that "legitimate disagreement on technical grounds may relate to uncertainty," but that public controversy over the proposed activity or its effects is not an appropriate factor for a significance determination.[174] The factors relating to creating a precedent for other future actions with significant effects and cumulative effects were removed in the Phase 2 Rule.[175] Instead, they are incorporated into the provisions addressing the appropriate scope of the EIS.[176] CEQ added two new factors to round out the eight—the degree to which the action may adversely affect communities with environmental justice concerns and the degree to which the action may adversely affect rights of tribal nations that have been reserved through treaties, statutes, or Executive Orders.[177] CEQ also expanded the factor for consideration of whether the proposed action would violate other federal, state, and local laws to also include whether the proposed action would be "inconsistent" with federal, state, tribal, or local policies or plans designed for the protection of the environment.[178]



3. Adoption and Use of Categorical Exclusions

The Phase 2 Rule introduces several new regulations that build upon and expand the CE provisions contained in the FRA. These regulations aim to streamline the NEPA process by providing agencies with more flexibility in adopting and utilizing CEs, while also ensuring that potential environmental justice concerns and climate change risks are adequately considered.

Creation of CEs Through Land Use Plans and Programmatic Documents. Reaching beyond the FRA, the new rule permits agencies to develop CEs through land use plans, decision documents supported by a programmatic EIS or EA, or other equivalent planning or programmatic decisions with prepared environmental documents.[179] This process requires agencies to provide CEQ an opportunity to review and comment prior to public input, notify and invite public comment, substantiate that the actions typically do not have significant effects, identify extraordinary circumstances, and establish a procedure for determining the applicability of a CE to specific actions, even in the presence of extraordinary circumstances.[180] CEQ claims this ability will lead to efficiencies and expediency in NEPA reviews by streamlining the process for establishing and applying CEs.

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174 89 Fed. Reg. at 35,467.

175 *See* 40 C.F.R. § 1501.3(b); 89 Fed. Reg. at 35,468.

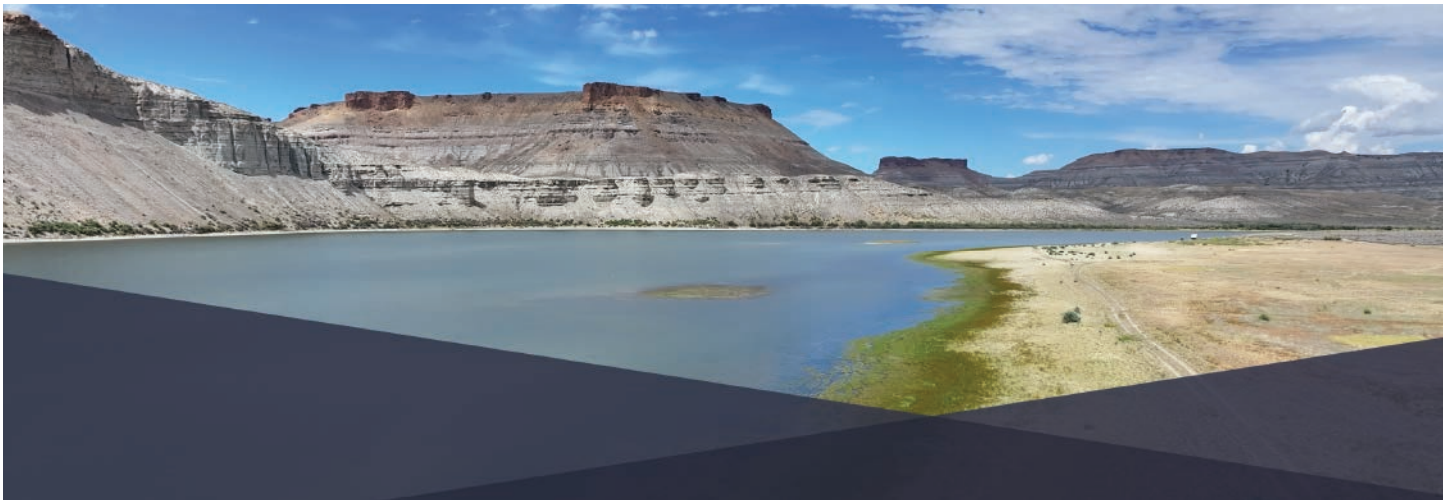
176 40 C.F.R. § 1501.3(b); 89 Fed. Reg. at 35,468.

177 *Id.* § 1501.3(d)(vii), (viii) (2024).

178 *Id.* § 1501.3(d)(iii).

179 *Id.* § 1501.4(c).

180 *Id.* § 1501.4(c)(1-6).



CE Adoption Process. Compatible with the FRA, the Phase 2 Rule introduces a new procedure under § 1501.4(e) outlining how agencies can adopt and utilize CEs from other agencies' NEPA procedures, with specific conditions.[181] To adopt another agency's CE, an agency must identify the relevant CE, consult with the originating agency to confirm its appropriateness, and provide public notice of the adoption with details about the proposed actions, evaluation process for extraordinary circumstances, and interagency consultation.[182]

Extraordinary Circumstances. Under the new definition of extraordinary circumstances at § 1508.1(o), environmental justice concerns and risks from the effects of climate change can be considered extraordinary circumstances, limiting the opportunity to use a CE.[183]

4. Environmental Assessments and Findings of No Significant Impact

The Phase 2 Rule introduces several new provisions related to EAs that aim to enhance public participation and provide agencies with more explicit authority to use mitigated FONSIs.

Public Comment. The Phase 2 Rule includes a new provision in § 1501.5(e) that requires agencies to invite public comments on draft EAs if they choose to publish them.[184] This means that while agencies are not obligated to publish draft EAs, if they do so, they must provide an opportunity for public comment and consider the feedback received when preparing the final EA.

Mitigated FONSI. Under § 1501.6(a)(2), the Phase 2 Rule incorporates mitigated FONSIs as one of three possible documents an agency can prepare after completing an EA.[185] This addition provides agencies more explicit authority to prepare a FONSI if there is a significant impact that the agency can mitigate. However, it is important to note that if an agency adopts a mitigated FONSI, § 1505.3(c) now requires the agency to develop a mitigation and compliance plan.

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181 *Id.* § 1501.4(e).

182 *Id.* § 1501.4(e)(1-5).

183 *Id.* § 1508.1(o).

184 *Id.* § 1501.5(e).

185 *Id.* § 1501.6(a)(2). Under § 1501.6(a) the other two potential documents include a standard FONSI, or an EIS if the agency determines based on the EA that the action will have significant environmental effects.

5. Cooperating Agencies

The Phase 2 Rule expands the agencies that could qualify for cooperating agency status. Federal agencies with jurisdiction by law are mandatory cooperators, if requested by the lead agency.[186] Those with "special expertise with respect to any environmental issue" may also be cooperating agencies. State, tribal, and local agencies "of similar qualifications" may be cooperating agencies.[187] Relevant special expertise now includes "Indigenous Knowledge,"[188] but CEQ expressly declines to define "Indigenous Knowledge."[189] This change likely provides tribes with Indigenous Knowledge broader opportunities to serve as cooperating agencies with early and ongoing input into NEPA processes, especially for proposed actions within their ancestral homelands. Cooperating agencies are expected to play a key role and CEQ removed the 2020 Rule's limitation that a cooperating agency can only comment on those issues within their jurisdiction by law or special expertise.[190] CEQ explained that imposing a limitation could "undermine the kind of collaborative engagement between lead agencies and cooperating agencies that enhances the efficiency and quality of environmental reviews."[191]

6. Public and Government Engagement

The Phase 2 Rule introduces several changes aimed at enhancing public participation and government engagement in the NEPA process. As stated in the White House press release, "the new rule promotes early public engagement in environmental review processes to help reduce conflict, accelerate project reviews, improve project design and outcomes, and increase legal durability."[192] The key provisions of the Phase 2 Rule related to public comment include:

Public Comment on EAs. As noted in Section 4 above, the Phase 2 Rule includes a new provision in § 1501.6(e) that requires agencies to invite public comments on draft EAs if they choose to publish them, providing an opportunity for public input and consideration of feedback in the preparation of the final EA.

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186 40 C.F.R. § 1501.8(a) (2024).

187 *Id.*

188 *Id.*

189 89 Fed. Reg. at 35,481-82. CEQ directs agencies to consider Department of Interior guidance in 301 Departmental Manual 7, Departmental Responsibilities for Consideration and Inclusion of Indigenous Knowledge in Departmental Actions and Scientific Research (Dec. 5, 2024), *available at* https://www.doi.gov/document-library/departmental-manual/301-dm-7-deparmental-responsibilities-considerations-and.

190 89 Fed. Reg. at 35,482. *Compare* 40 C.F.R. § 1501.8(b)(7) (2020) *with* 40 C.F.R. § 1501.8(b)(7) (2024).

191 89 Fed. Reg. at 35,482.

192 Press Release, The White House, Biden-Harris Administration Finalizes Reforms to Modernize Environmental Reviews, Accelerate America's Clean Energy Future, Simplify the Process to Rebuild our Nation's Infrastructure, and Strengthen Public Engagement (April 30, 2024), https://www.whitehouse.gov/ceq/news-updates/2024/04/30/biden-harris-administration-finalizes-reforms-to-modernize-environmental-reviews-accelerate-americas-clean-energy-future-simplify-the-process-to-rebuild-our-nations-infrastructure/.

Early Engagement. The Phase 2 Rule includes a provision in § 1501.9(c)(2) that directs lead agencies to "conduct, as appropriate, early engagement with likely affected or interested members of the public[.]"[193] However, the Rule does not specify what this engagement should entail, leaving room for interpretation. The preamble suggests that "meaningful engagement" requires an "active dialogue," which may not be feasible for all actions.[194] This lack of clarity could potentially lead to inconsistencies in how agencies approach early public engagement across different projects.

7. Deadlines and Schedules

CEQ updated the NEPA deadlines in the Phase 2 Rule for consistency with the requirements of the FRA.

Deadlines. Agencies must complete an EA within one year, and an EIS within two years, of the date on which the agency determines an EA or EIS is required, the date on which the agency notifies the applicant that its application for a right-of-way is complete, or the date on which a notice of intent is issued for the proposed action, whichever is sooner as applicable.[195] The lead agency can extend the deadline in writing "in consultation with any applicant" and only for "so much additional time as is necessary to complete" the NEPA document.[196] To demonstrate compliance, the agency must publish the EA or the Notice of Availability of the final EIS before the deadline.[197] By contrast, under the 2020 NEPA regulations, the agency was required to complete the *Record of Decision* for an EIS within the two-year period.[198] The Phase 2 Rule does not address the FRA's judicial petition process as a potential remedy for failure to act in accordance with a NEPA deadline, except to acknowledge it in § 1500.3(b).[199]

193 40 C.F.R. § 1501.9(c)(2).

194 88 Fed. Reg. at 49,942.

195 40 C.F.R. § 1501.10(b) (2024).

196 *Id.*

197 *Id.* § 1501.10(b)(4).

198 40 C.F.R. § 1501.10(b)(2) (2020) ("Two years is measured from the date of the issuance of the notice of intent to the date a record of decision is signed.").

199 *Id.* § 1500.3(b) (2024).

Publication Schedules. In addition to deadlines, the Phase 2 Rule provides for publication of EIS schedules to the public.[200] Agencies must publish revisions to an EIS schedule and explain "substantial changes."[201] The schedule should include major milestones and agencies should take appropriate measures to meet the schedule.[202] While the regulations include a process to elevate disputes that may be contributing to a failure to meet NEPA milestones and stick to the schedule,[203] there is no real consequence in the Phase 2 Rule for failure to adhere to the schedule and broad discretion is afforded to the agency to change the schedule. In setting out a schedule, agencies should consider a number of factors, including the potential for environmental harm, size of the proposed action, analytic techniques, degree of public need for the action, number of people and agencies affected, availability of relevant information, and time limits imposed by law or the courts.[204] The Phase 2 Rule adds to this list the degree to which a substantial dispute exists as to the size, location, nature, or consequences of the proposed action and its effects.[205] This factor interjects the "controversy" intensity factor that was removed from consideration in determining whether a proposed action's effects are significant into the schedule—the more controversial the project, the longer the schedule. Agencies are also newly directed to consider the time necessary to conduct government-to-government tribal consultation.[206]

8. Supplementation

The updated regulations introduce provisions for supplementing EAs and EISs under specific conditions. These changes ensure that ongoing or incomplete federal actions are subject to additional environmental review when there are substantial changes or significant new information, maintaining consistency with established standards.

EA Supplementation. The inclusion of § 1501.5(h) allows for the first time the supplementation of EAs if a major Federal action is "incomplete or ongoing" and if there are substantial changes to the proposed action relevant to environmental concerns or significant new information regarding adverse effects.[207] Supplementation is not required where the agency action is final. However, the regulation's new use of the term "incomplete" agency action is not clearly defined and could be interpreted by some to open the door to supplementation after the final agency decision has been made but before the action is fully implemented, broadening the current limits on supplemental NEPA review.[208]

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200 *Id.* § 1501.10(h).

201 *Id.*

202 *Id.* § 1501.10(c).

203 *Id.*

204 *Id.* § 1501.10(d).

205 *Id.* § 1501.10(d)(7). CEQ explains that controversy should not be an excuse for delay and all parties need expeditious decisionmaking, whether the party is opposed or in favor of a proposed action. 88 Fed. Reg. at 49,943.

206 40 C.F.R. § 1501.10(d)(9).

207 *Id.* § 1501.5(h).

208 *Id.*

EIS Supplementation. Section 1502.9(d) specifies the two circumstances in which a supplemental EIS may be required.[209] The first applies when "[t]he agency makes substantial changes to the proposed action that are relevant to environmental concerns[.]"[210] And the second now applies when "[t]here are substantial new circumstances or information about the significance of adverse effects that bear on the analysis."[211] Additionally, CEQ revised § 1502.9(e) to provide direction for when an agency may "reevaluate an environmental impact statement to determine that the agency does need to prepare a supplement under paragraph (d) of this section."[212] The revised language notes that an agency should document its findings, or potentially prepare a supplemental EA and FONSI, if needed.[213]

9. Cover

In 2020, CEQ added a requirement to publish on the EIS cover the estimated cost for its preparation.[214] While agencies are still required to track this type of information,[215] many commented that imposing such a burden for publication of an EIS is unnecessary.[216] CEQ removed the requirement in the Phase 2 Rule.[217]

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209 *Id.* § 1502.9(d).

210 *Id.* § 1502.9(d)(i).

211 *Id.* § 1502.9(d)(ii).

212 40 C.F.R.§ 1502.9(e) (2024).

213 *Id.*

214 40 C.F.R. § 1502.11(g) (2020).

215 88 Fed. Reg. at 49,947

216 *Id.*

217 40 C.F.R. § 1502.11 (2024).

10. Purpose and Need

The 2020 NEPA regulations incorporated into the purpose and need requirement an express acknowledgment, consistent with existing case law,[218] that the purpose and need should be based on an applicant's goals when the agency action is in response to a third-party application.[219] This acknowledgment was one of the first things to go as part of the Phase 1 NEPA rulemaking in 2022. CEQ reverted to the 1978 Rule that "[t]he statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[220] Now, CEQ has removed any vestige of applicant-guided purpose and need by removing from the definition of purpose and need any reference to the proposal "to which the agency is responding in proposing the alternatives."[221] This new definition is consistent with the FRA, which provides that a statement of purpose and need will "briefly summarize[] the underlying purpose and need for the proposed agency action."[222]

11. Alternatives

The Phase 2 Rule provides enhanced guidance on the agency's responsibility to consider a reasonable range of alternatives and now requires agencies to identify the environmentally preferable alternative, which best promotes national environmental policy by maximizing environmental benefits and minimizing adverse effects.

Reasonable Range of Alternatives. While the FRA requires agencies to consider a reasonable range of alternatives, including technically and economically feasible options that meet the purpose and need, the Phase 2 Rule provides additional clarity on the agency's responsibilities.[223] Specifically, § 1502.14(a) informs an agency that it "need not consider every conceivable alternative to a proposed action; rather it shall consider a reasonable range of alternatives that will foster informed decision making."[224] Of note, the Phase 2 Rule goes on to state that "[a]gencies also may include reasonable alternatives not within the jurisdiction of the lead agency."[225] The preamble clarifies that alternatives not within the jurisdiction of the lead agency are not always required, and, if included, should still meet the purpose and need, and be technically and economically feasible.[226]

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218 *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 199 (D.C. Cir. 1991) (an agency "cannot redefine the goals of the proposal that arouses the call for action"); *see also City of Carmel-by-the-Sea v. United States. Dept. of Transp.,* 123 F.3d 1142, 1155 (9th Cir. 1997); *Envtl. Law and Policy Center v. U.S. Nuclear Regulatory Comm'n,* 470 F.3d 676, 683-84 (7th Cir. 2006). The definition of the purpose and need is important, of course, because it dictates the range of reasonable alternatives, which must meet the purpose and need. 42 U.S.C. § 4332(C)(iii).

219 40 C.F.R. § 1502.13 (2020).

220 40 C.F.R. § 1502.13 (2022).

221 40 C.F.R. § 1502.13 (2024).

222 42 U.S.C. § 4336a(d).

223 42 U.S.C. § 4332(C)(iii) (2023).

224 40 C.F.R. §1502.14(a) (2024)

225 *Id.*

226 88 Fed. Reg. at 49,948.

Environmentally Preferable Alternative. As discussed in previously, the Phase 2 Rule requires agencies to identify the environmentally preferable alternative or alternatives during the NEPA process, as specified in § 1502.12 and § 1502.14(f).[227] Section § 1502.14(f) notes that the "environmentally preferable alternative will best promote the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits, such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal, and natural resources, including rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders; or causing the least damage to the biological and physical environment."[228] This alternative could be the proposed action, the no-action alternative, or another reasonable alternative.[229] The inclusion of the statement that the environmentally preferred alternative will "best promote" section 101 of NEPA could be interpreted to suggest that the environmentally preferred alternative should always be the agencies' default preferred alternative.

12. Environmental Consequences

As discussed above, the most substantial changes to the regulations requiring analysis of environmental consequences are the express directions to include climate change effects (including, where feasible, quantification of greenhouse gas emissions) and disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.[230] The Phase 2 Rule also clarifies that the no action alternative "should serve as a baseline against which the proposed action and other alternatives are compared."[231] Consistent with the FRA, analysis of the no action alternative should include any adverse environmental effects from not implementing the proposed action.[232]

227 40 C.F.R. §§ 1502.12, 1502.14(f).

228 *Id.* § 1502.14(f).

229 *Id.*

230 *Id.* § 1502.16(a)(5), (6), (9).

231 *Id.* § 1502.16(a).

232 *Id.* § 1502.16(a)(2); 42 U.S.C. § 4332(2)(C)(iii)(2023).

13. Applicant-Prepared Environmental Documents

Consistent with the 2020 regulations and the FRA, the Phase 2 Rule acknowledges the ability of an applicant to prepare an EA or EIS on behalf of an agency.[233] The agency "shall exercise its independent judgment and briefly document its determination that an environmental document meets the standards under NEPA."[234] Applicants must still provide information to assist agencies or contractors in the preparation of environmental documents.[235] CEQ declined to provide any guidance to the agencies regarding how the process for applicant-prepared environmental documents should work in terms of scoping requirements, public and government engagement, exchange of information, and agency supervision. Instead, CEQ pointed to the FRA amendments that direct the agencies, not the CEQ, to establish those procedures.[236]

14. Methodology and Scientific Accuracy

The NEPA requirement to ensure the professional integrity, including scientific integrity, of the effects analysis has been moved in the Phase 2 Rule from § 1502.23 to § 1506.6.[237] CEQ added in the Phase 2 Rule that high-quality information includes Indigenous Knowledge, although CEQ declined to define the term.[238]

CEQ also removed from the Phase 2 Rule the 2020 regulatory changes that made explicit that an agency need not "undertake new scientific and technical research to inform their analyses." Commenters questioned the removal of this language, particularly in light of the FRA's NEPA amendments that state an agency "is not required to undertake new scientific or technical research unless the new scientific or technical research is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable." [240] CEQ explained that the FRA amendments limiting the use of "new scientific or technical research" apply only when determining the level of NEPA review, and not to the analysis as a whole, so that removing the limiting language is not inconsistent with the statute.[241] CEQ also pointed out that it is common practice for agencies, when necessary or appropriate, to engage in additional research and create new data, especially in describing the affected environment for a proposed action.[242]

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233 40 C.F.R. § 1506.5(a), (b)(3) (2024). Applicants cannot, however, prepare the FONSI or Record of Decision. 88 Fed. Reg. at 49,956.

234 40 C.F.R. § 1506.5(a).

235 *Id.* § 1506.5(b).

236 *Id.*

237 *Id.* § 1506.6(a).

238 *Id.* § 1506.6(b).

239 40 C.F.R. § 1502.23 (2020) (emphasis added). Commenters raised concern that removing the language from 1502.23 would imply that agencies should undertake new, non-essential research for an EIS.

240 42 U.S.C. § 4336(b)(3).

241 89 Fed. Reg. at 35,526-27.

242 *Id.* at 35,527.

Conclusion

The past few years have seen a whirlwind of changes to NEPA implementation and practice, from the Trump Administration's comprehensive 2020 revisions to the regulations, to the Biden Administration's phased approach to revising the rules, to the enactment of the FRA with its NEPA-related provisions. The 2024 Phase 2 NEPA Rule, in particular, represents a significant shift in the interpretation and implementation of NEPA, with a greater focus on addressing climate change and environmental justice, and a move towards more substantive environmental outcomes.

The Phase 2 Rule has garnered both praise and criticism. Supporters argue that the regulatory changes represent a long-overdue modernization of NEPA that will lead to better environmental decisionmaking. Critics contend that the Phase 2 Rule goes beyond NEPA's procedural mandate and constitutes CEQ overreach. Legal challenges have already been filed opposing the Phase 2 Rule, with plaintiffs asserting that the CEQ has exceeded its statutory authority in promulgating the new regulations.[243] The recent Supreme Court decision overturning *Chevron* deference,[244] which previously required courts to defer to an agency's permissible interpretation of ambiguous statutes, could impact the outcome of these challenges and how courts interpret and apply the new NEPA requirements. Given the fluctuating NEPA landscape and the potential for yet another shake up in the White House in 2025, practitioners, scholars, and students should closely monitor these developments and their potential implications for future environmental decisionmaking and implementation of the Phase 2 Rule. As we move forward, it will be important to continue to engage in dialogue and debate about how best to implement NEPA in a way that balances environmental protection with other important considerations.

243 *State of Iowa v. Council of Environmental Quality,* Case 1:24-cv-00089-DMT-CRH (N.D 2004).

244 *Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244, 603 U.S. __ (2024).

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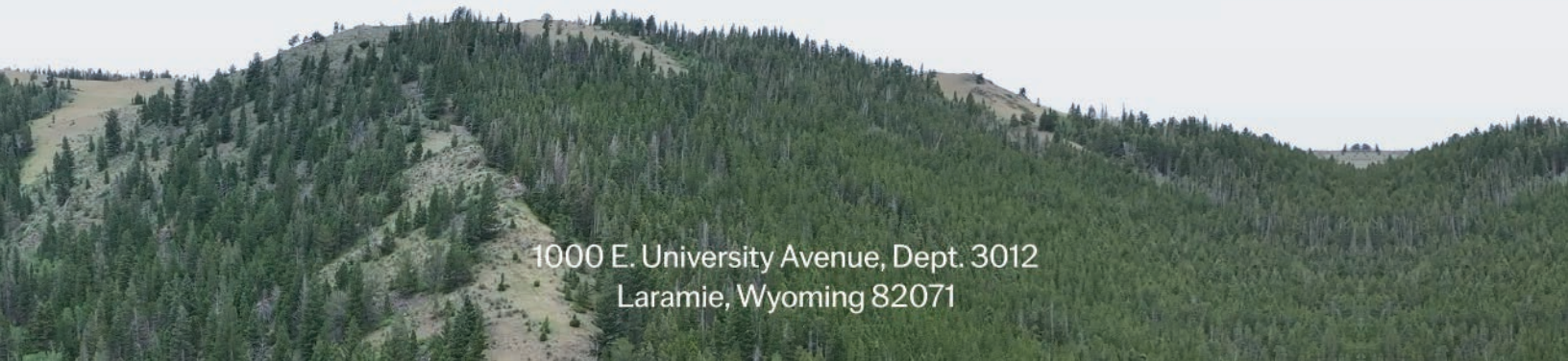

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