



National Wildlife Federation

National Advocacy Center

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March 7, 2022

The Honorable Brenda Mallory, Chair
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Re: Recommendations for the Upcoming Phase 2 NEPA Rulemaking

Dear Chair Mallory:

On behalf of our more than 6.8 million members and supporters, the National Wildlife Federation urges the Council on Environmental Quality to use its upcoming Phase 2 NEPA rulemaking to reinstate the 1978 CEQ NEPA implementing regulations as the baseline for NEPA planning and then build on the 1978 regulations to help facilitate more robust, effective, and inclusive NEPA reviews.

A. Restore the 1978 CEQ NEPA Implementing Regulations

It is critical that the Phase 2 rulemaking fully reinstate the 1978 CEQ NEPA implementing regulations as the baseline for NEPA planning. This is our top priority because it is a foundational step for achieving NEPA's vital goals and ensuring a robust, effective, and inclusive NEPA process. Until they were largely and illegally eviscerated by the previous administration, the 1978 regulations established a solid and well-vetted approach for implementing NEPA that was consistent with the goals and mandates of the statute and firmly grounded in case law interpreting how NEPA should be implemented. Fully reinstating the 1978 regulations will also re-establish legal certainty to the NEPA process and avoid the confusion, legal skirmishes, and multiple lawsuits that will inevitably result from efforts to establish the meaning of new terms in the many harmful provisions not addressed through the Phase 1 rulemaking.

The Phase 2 rulemaking should then build on the 1978 NEPA regulations by providing additional direction to agencies regarding the steps they must take to: (1) effectively consult with Tribes and engage with communities during the NEPA process—and particularly steps that must be taken to effectively engage with disenfranchised communities such as black and brown communities, low income communities, and other frontline communities that experience or face disproportionate impacts from projects and existing levels of pollution or environmental degradation; and (2) effectively evaluate impacts and alternatives, facilitate public engagement, and increase transparency in the NEPA process.

B. Ensure Effective Community Engagement and Consultation with Tribes

As CEQ works to develop additional guidance on consulting with Tribes and engaging with communities, **it is critical that CEQ robustly and effectively reach out to Tribes and environmental justice communities to obtain their input on what the regulations should say.**

The National Wildlife Federation recommends that this additional regulatory guidance focus on three primary areas: identification, meaningful engagement, and assessment of impacts.

1. Identification: New provision should ensure that agencies identify all environmental justice communities and tribes that will be impacted by a proposed federal action. Identification of such communities should occur at the earliest possible stages of the NEPA process. Among other things, such provisions should:
 - Require agencies to compile demographic data to determine how the affected area might impact environmental justice communities and require this information be used to identify potentially impacted environmental justice and frontline communities that need to be engaged in the NEPA process **at the onset of the NEPA process (e.g. scoping)**.
 - Require agencies to identify all Tribes that are potentially impacted by the proposed federal action **at the onset of the NEPA process**.
 - Require agencies to appropriately define the “affected area” to capture potential impacts to environmental justice communities and Tribes that could otherwise be overlooked by placing arbitrary or ecologically inappropriate restrictions on the extent of the “affected area”.
2. Meaningful Engagement: New provisions should ensure that environmental justice communities and Tribes are meaningfully engaged in the NEPA process so that their voices and concerns are heard. This includes providing additional clarity on outreach, education, resources, and the amount of time provided to these communities from the very start of the NEPA process. Among other things, such provisions should:
 - Require agencies to begin outreach to identified environmental justice communities and tribes early in the scoping process
 - Ensure that there is adequate time for communities to understand the issues, comprehend the environmental impact statement (EIS) or environmental assessment (EA), and provide comment.
 - Require provision of additional resources to help environmental justice communities and Tribes engage in the NEPA process, such as a regional or project-specific NEPA ombudsman and/or providing pro bono technical or other expert resources.
 - Require agencies to develop more accessible summaries, fact sheets, and other materials explaining the project, the process, and what is at issue in terms that are easily understandable by community members.
 - Eliminate all (and prohibit agency-specific adoption of) requirements that comments must only be counted or considered by an agency if the comments provide scientific, technical, or specific information, or an explanation as to why an issue raised in the comments is significant.

- Require accurate translation of NEPA documents into languages used by potentially impacted communities.
 - Require that agencies accept and respond to comments that are not in English.
 - Require that agencies provide documents in accessible ways for community members who may not have on-line access.
 - Require that Tribes be consulted as sovereign nations that must be engaged from the onset of the NEPA Process. Explicitly recognize that Tribes must be engaged through a process that recognizes and respects Tribal sovereignty, Tribal engagement and inclusion, treaty rights, the federal trust responsibility, and the need to engage through government-to-government relationship.
 - Require Tribal representation in all procedural steps of the NEPA process.
 - Require outreach to individual Tribes and explicitly state that listening sessions or similar types of activities alone will not suffice for Tribal consultation.
 - Require agencies to appoint a Tribal NEPA Liaison and to offer to appoint a Tribal NEPA Liaison to individual Tribes
3. Assessment of Impacts: New provisions should ensure better and more explicit assessment of impacts from major federal actions to environmental justice communities and Tribes. Among other things, such provisions should:
- Require agencies to explicitly consider the potential environmental justice and Tribal impacts of a proposed federal action, including by conducting a health impact assessment and social impact assessment, and create explicit and meaningful criteria to guide such assessments and propose mitigation measures for those impacts.
 - Require agencies to specifically consider issues of Tribal consent in assessing both impacts and alternatives of a major federal action.
 - Require agencies to assess mitigation and monitoring of potential impacts to environmental justice communities and Tribes to track and better account for impacts and mitigation.

C. Ensure Effective Evaluation of Impacts and Alternatives, Robust Public Engagement, and Increased Transparency

The National Wildlife Federation also urges CEQ to build on the re-promulgated 1978 regulations by adding the additional guidance outlined in the March 2, 2022 letter to Chair Mallory from multiple conservation organizations, including the National Wildlife Federation, that collectively represent many millions of members and supporters.¹ We highlight some of the key recommendations included in this letter below.

Add Climate Change to the Definition of “Effects”: CEQ should ensure assessment of the increasingly severe and dangerous impacts of climate change by adding climate impacts to the definition of

¹ March 22, 2022 letter to the Honorable Brenda Mallory from Earthjustice, Environmental Defense Fund, Friends of the Earth, National Parks Conservation Association, National Wildlife Federation, Natural Resources Defense Council, Ocean Conservancy, Southern Environmental Law Center, and The Wilderness Society.

“effects.”² CEQ should also clarify that properly assessing the effects of climate change will require the agencies to: (1) assess the effects of proposed actions and alternatives on climate change; (2) assess the effects of climate change on a proposed action and alternatives; (3) assess the effects of the proposed action and alternatives on increasing or reducing the resilience and adaptive capacity of communities—including vulnerable communities—and fish and wildlife; and (4) assess the cumulative effect of individual actions on climate change (for example, agencies that manage large carbon stocks, like the Forest Service, should be required to analyze the cumulative impacts of multiple actions on climate rather than dismissing each individual project as insignificant). Analysis and action on climate change in both EISs and EAs are fundamental to meeting NEPA’s goals, to protecting and increasing the ability of communities and wildlife to thrive in the face of the changing climate, and to achieving the important goals established by this administration.

Ensure Full and Timely Analysis of All Reasonably Foreseeable Direct, Indirect, and Cumulative Effects.

CEQ should ensure full and timely analysis of effects, as clearly required by NEPA, by: (1) directing agencies to assess cumulative and indirect effects at “the earliest possible time”; (2) clarifying that agencies may not defer analysis of cumulative and indirect effects to subsequent, related, connected, or tiered analyses; (3) strengthening the mandate to assess direct effects at the earliest possible time, including in programmatic EISs when such effects are reasonably foreseeable; (4) prohibiting the use of approaches and mechanisms that do not ensure the full evaluation of site-specific effects, including but not limited to such things as “Condition-Based Management” and Determinations of NEPA Adequacy; and (5) clarifying that agencies have the responsibility and authority to assess all reasonably foreseeable direct, indirect, and cumulative effects even if the lead agency does not have direct responsibility and control over such effects (i.e., address the “small federal handle” doctrine). Ensuring full and timely analysis of all reasonably foreseeable effects is essential to achieving the critical goals of NEPA, protecting public health and safety, and ensuring that wildlife can thrive.

All too often, however, agencies seek to avoid the timely assessment of effects, including by deferring the analysis of cumulative, indirect—and even well understood direct—effects until subsequent stages in the NEPA process such as tiered, connected, or related analyses. Deferring such analyses dramatically undermines the NEPA process and the ability of decisionmakers, the public, and other federal, tribal, state, and local agencies to fully appreciate the full suite of potential effects of each agency decision (including decisions reached through a programmatic EIS that set future actions—and impacts—in motion). These problems are greatly compounded by the fact that agencies often do not follow through on carrying out analysis of cumulative and indirect effects at the site specific level, and increasingly are not following through even on analyzing site-specific direct effects. Multiple examples of agency attempts to avoid site-specific analysis were recently provided to CEQ by ninety-four public interest organizations.³ Addressing the “small federal handle” doctrine is equally critical because, as CEQ acknowledged in the preamble to the Phase 1 rule: “Reasonably foreseeable environmental effects do not fall neatly within discrete agency jurisdictional or regulatory confines; rather, agencies make decisions about reviews and authorizations that have real world impacts, including effects like water or

² Former 40 C.F.R. 1508.8 or current 1508.1 (g)(1).

³ *Request for CEQ-Issued Guidance and/or Regulatory Change Addressing Federal Land Management Agency Attempts to Avoid Site-Specific NEPA and Disclosure*, to Brenda Mallory, Chair, CEQ, Jayni Hein, Senior Director for NEPA & Counsel, CEQ, and Justin Pidot, General Counsel, February 3, 2022, available at: <https://westernlaw.org/wp-content/uploads/2022/02/2022.02.03-Request-to-CEQ-re-CBM.pdf>.

air pollution that are measurable and ascertainable yet may have physical effects outside an agency's statutory purview."⁴

Improve the Usefulness and Validity of the "No Action" Alternative: CEQ should improve the usefulness and validity of the no action alternative by requiring agencies to: (1) analyze the present effects of past actions to identify any continuing, additive impacts of those actions on the environment that would be affected by a new proposed action and alternatives; (2) analyze the "no action" alternative based on data that is free from any assumption that a proposed action will be taken; (3) fully incorporate the effects of climate change into the no action alternative; and (4) not include unlawful activities as part of the no action alternative. This additional guidance would help ensure that the analysis of the effects of the no-action alternative can act as a meaningful baseline against which the decisionmaker and the public can understand the true scope of the effects of the action alternatives.

Make Mitigation Matter: CEQ should ensure that effects and mitigation are fully identified, and that mitigation is implemented by: (1) requiring agencies to mitigate adverse impacts to the maximum extent practicable; (2) requiring agencies to clearly state how each mitigation measure would be funded and monitored; (3) requiring agencies to consider mitigation measures, including compensatory mitigation, for the reduction of GHG emissions; (4) requiring agencies to mandate implementation of mitigation measures relied on to reduce environmental impacts to the degree that the agency can issue a FONSI, and require the agency to prepare an EIS if those identified mitigation measures appear unlikely to occur or are unlikely to produce the promised ecological outcomes; and (5) establishing clear definitions of "mitigation enforcement monitoring" and "mitigation effectiveness monitoring" to guide mitigation planning. Identifying mitigation is a critically important part of the NEPA process, and understanding any barriers to full implementation of mitigation is critical to informed decision-making. If the mitigation discussed in a NEPA documents will not be carried out or will not work, that NEPA document by definition presents a flawed picture of project impacts. Importantly, ensuring the implementation of promised mitigation is critical for public health and safety and for maintaining thriving populations of fish and wildlife.

Restrain Inappropriate Promulgation and Use of Categorical Exclusions: In addition to re-promulgating the 1978 definition of "categorical exclusions" that references cumulative effects, CEQ should reign in the inappropriate promulgation and use of categorical exclusions by: (1) requiring agencies to publish an administrative record for public review and comment that supports the proposed categorical exclusion and explicitly analyzes the cumulative effects of the proposed exclusion; (2) requiring scoping or other public notice of the use of categorical exclusions with information supporting the applicability of the particular categorical exclusion and the absence of extraordinary circumstances, and providing an opportunity for public comment; (3) prohibiting agencies from using other agencies' categorical exclusions, which may have been developed in very different contexts without a formal adoption process and opportunity for public comment; and (4) prohibiting agencies from "stacking" categorical exclusions—i.e., breaking interconnected actions apart and covering constituent pieces with different categorical exclusions. These changes are essential for ensuring that categorical exclusions are used only for actions that have no or truly de minimis environmental effects, both individually and cumulatively.

⁴ 86 Fed. Reg. 55757, 55766.

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D. Conclusion

The National Wildlife Federation appreciates the hard work that CEQ is putting in to restoring essential requirements to CEQs NEPA implementing regulations. As that work continues, we ask you to carefully consider these recommendations which we believe would result in a more robust, effective, inclusive, and transparent NEPA process. Please do not hesitate to reach out to either of us if you have any questions.

Sincerely,



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