



## CEQ Finalizes “Phase 2” Revisions to NEPA Implementing Regulations

MAY 13, 2024

By [Tiffanie Ellis](#), [Jonathan Simon](#), [Molly Lawrence](#)

The Council on Environmental Quality (“CEQ”) is tasked with issuing National Environmental Policy Act (“NEPA”) regulations to guide federal agencies in its implementation. In 2021, CEQ began a two-phase process to revise these regulations. “Phase 1” largely reversed several changes made to the regulations in 2020 under the prior Trump Administration, including key changes relating to defining “purpose and need” and the long-used concepts of direct, indirect, and cumulative effects. The new “Phase 2” revisions are more extensive. Some of the Phase 2 revisions codify in regulation amendments to NEPA made by the Fiscal Responsibility Act of 2023 (“FRA”) and intended to improve the efficiency of the NEPA process, such as establishing page limits for environmental documents and facilitating the use of categorical exclusions (“CEs”). The Phase 2 revisions also restore additional concepts or provisions from the 1978 regulations and case law interpreting those regulations, remove additional changes made in 2020 that CEQ now “considers imprudent,” and, for the first time, specifically require consideration of effects relevant to environmental justice and climate change. We highlight some of these changes below.

The Phase 2 Final Rule will impact a broad range of projects needing federal authorizations or funding. Many of the efficiency measures included in the Final Rule implement changes that were enacted in the FRA. Although these changes could help address some long-standing issues in the NEPA process around delays and litigation, the effect of the proposed changes will be highly dependent on how the individual federal agencies carry out the changes through their own procedures and implementing regulations. Moreover, the Phase 2 Final Rule makes other important changes to the regulations that, rather than streamlining and improving efficiency, could increase burdens and challenges associated with NEPA compliance.

The Phase 2 Final Rule is scheduled to go into effect on July 1, 2024. However, industry groups and others already have signaled their frustration with these revisions, including several key members of Congress, led by Senator Joe Manchin, who have announced that they will seek to overturn the Phase 2 Final Rule using the Congressional Review Act.

### Provisions Directed Towards Promoting Efficiency and Streamlining

*Page Limits and Timelines.* The Final Rule makes many small and some larger changes to promote efficiency and streamline the NEPA process. The Final Rule incorporates the FRA’s page limits of 75 pages for environmental assessments (“EAs”), 150 pages for environmental impact statements (“EISs”), and 300 pages for EISs of “extraordinary complexity.” It includes the FRA’s time limits for completion of NEPA documents, requiring completion of EAs within one year and EISs within two years, although it allows for an agency to extend this deadline, in consultation with any project applicant, to the extent necessary to complete the

document. To further promote efficiency, the Final Rule also requires agencies to set deadlines and schedules appropriate to specific actions or types of actions.

*Categorical Exclusions.* The Final Rule also makes substantial changes to its regulations governing CEs that should facilitate agencies' adoption of CEs as a tool to streamline NEPA compliance in certain circumstances, as allowed under the FRA. It sets forth a process for agencies to adopt and utilize other agencies' CEs, as allowed under the FRA without having to amend their regulations. The Final Rule clarifies that agencies can establish CEs individually as well as jointly with other agencies. And it allows agencies to establish CEs through land use plans, decision documents supported by a programmatic EIS or EA, or similar planning or programmatic decisions, without having to go through a separate rulemaking process. According to CEQ, by expanding the means by which agencies can establish CEs, these changes will, among other things, encourage agencies to undertake programmatic and planning reviews, as well as promote and speed the process for establishing CEs.

*Programmatic Reviews and Tiering.* The Final Rule includes various revisions to codify best practices for the use of programmatic NEPA reviews and tiering, which CEQ acknowledges "are important tools to facilitate more efficient environmental reviews and project approvals."

### Provisions that Could Increase NEPA Compliance Burdens

While the Phase 2 Final Rule emphasizes efficiency, it includes a range of regulatory changes that could have the opposite effect, creating additional burdens and potentially perpetuating opportunities for contentious litigation.

*Climate Change, Environmental Justice, and Tribal Resources.* Reflected in a wide range of revisions to the regulations, the Phase 2 Final Rule aims to further advance the Biden Administration's policy focus on climate change, environmental justice, and Tribal resources. Among other provisions, the Final Rule explicitly requires agencies to analyze "disproportionate and adverse human health and environmental effects on communities with environmental justice concerns" and climate change-related effects, including quantification of greenhouse gas emissions where feasible, in their NEPA reviews. Agencies also must review these effects, as well as effects on Tribal rights and resources, in identifying the environmentally preferable alternative or alternatives. Similarly, the Final Rule defines "extraordinary circumstances"—which agencies must consider in determining whether to apply a CE—to include potential substantial disproportionate and adverse effects on communities with environmental justice concerns, potential substantial climate change effects, and potential substantial effects on historic or cultural properties. Moreover, agencies now "should, where relevant and appropriate, incorporate mitigation measures" to address effects "that disproportionately and adversely affect communities with environmental justice concerns." And the Final Rule directs agencies, where appropriate, to use projections when evaluating climate change-related effects, including relying on models to project a range of possible future outcomes, provided that they disclose relevant assumptions or limitations. While these codifications are new—particularly the regulation directing agencies to consider mitigation for impacts to

environmental justice communities—most agencies have been including some environmental justice and greenhouse gas emission impacts in their NEPA reviews based upon federal governmentwide and agency policy and court precedent.

*Major Federal Actions.* Implementing changes in the FRA and further responding to changes made in the 2020 rule, the Final Rule revises the definition of “major federal action”—the trigger for environmental review under NEPA. The FRA, in addition to specifying that a major federal action requires “substantial Federal control and responsibility,” established several exclusions including for certain types of projects receiving loans, loan guarantees, or other types of federal financial assistance. In an effort to address some of the uncertainty raised by these exclusions, the revised regulations provide that major federal actions generally include “[p]roviding more than a minimal amount of financial assistance, . . . where the agency has the authority to deny in whole or in part the assistance due to environmental effects, has authority to impose conditions on the receipt of the financial assistance to address environmental effects, or otherwise has sufficient control and responsibility over the subsequent use of the financial assistance” or effects of the funded activity.

*Alternatives.* The Phase 2 Final Rule clarifies that agencies are not required to consider “every conceivable alternative to a proposed action” but rather only “a reasonable range of alternatives that will foster informed decision making.” Additionally, the revised regulations provide that agencies have the discretion, but are not required, to include reasonable alternatives not within the lead agency’s jurisdiction. CEQ continues to anticipate that this will occur relatively infrequently and notes that such alternatives still must be technically and economically feasible and meet the proposed action’s purpose and need. The Final Rule also requires that environmental documents (and not just records of decision) identify one or more environmentally preferable alternatives, which could be the proposed action, the no action alternative, or a reasonable alternative.

*Mitigation.* Although NEPA has long been understood to be a procedural, rather than substantive, requirement, the Phase 2 Final Rule includes several provisions intended to encourage agencies to mitigate the impacts of proposed actions and to ensure that mitigation measures that agencies rely on in making their environmental determinations are actually carried out. When an agency incorporates and relies upon mitigation measures—whether in its analysis of reasonably foreseeable effects or in a mitigated finding of no significant impact—the revised regulations require the agency to explain the enforceable mitigation requirements or commitments to be undertaken and the authority to enforce them (for example, permit conditions, agreements, or other measures), and to prepare a monitoring and compliance plan.

*Development of New Information.* While agencies generally historically have not been required to develop data that was not readily available, CEQ “now considers it vital to the NEPA process for agencies to undertake studies and analyses” that provide information “essential to a reasoned choice among alternatives,” provided the overall costs are not unreasonable, and includes provisions to that effect in the Final Rule.

*Exhaustion, Judicial Review, and Remedies.* The Phase 2 Final Rule removes several changes included in the 2020 rule relating to exhaustion, judicial review, and remedies that were intended to reduce NEPA-related litigation and project delays.

The Phase 2 revisions take effect on July 1, 2024, and apply to any NEPA process that commences after that date, although the Final Rule states that agencies may apply them to ongoing activities and environmental documents that commence prior to that date. In addition to following the CEQ regulations, agencies also have adopted agency-specific NEPA implementing procedures. Agencies must revise these procedures to incorporate changes necessitated by the Phase 2 Final Rule by July 1, 2025.

### For More Information

Van Ness Feldman, LLP closely monitors and counsel clients on NEPA-related issues. If you would like more information on how these updates may impact your business, please contact [Jonathan Simon](#), [Molly Lawrence](#), [Tiffanie Ellis](#), or any member of the firm's Land, Water, and Natural Resources practice in Washington, D.C. at (202) 298-1800 or Seattle, WA at (206) 623-9372.

Follow us on X [@VanNessFeldman](#)

© 2024 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.