

**EPN Comments on CEQ's National Environmental Policy Act
Implementing Regulations Phase 2**

Docket No: CEQ-2023-0003

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The Environmental Protection Network (EPN) harnesses the expertise of more than 600 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

Thank you for the opportunity to review the Phase 2 Draft NEPA Regulations. We commend the Council on Environmental Quality (CEQ) for this reworking of the seminal National Environmental Policy Act (NEPA) regulations to reflect both the purpose and goals of NEPA and current efforts to make the process of implementation more efficient and effective. We believe that the draft regulations are largely responsive to calls for reform. The update is also responsive to the urgent needs to address environmental justice, build climate resilience, repair our aging infrastructure, and respond to climate change by transitioning to clean energy.

We strongly support the following clarifications and additions to the regulations:

1. **Strengthening the link between the purpose and policy aspects of NEPA and its implementation**, which helps to focus on information, analysis, and alternatives that are important for decision making consistent with NEPA's clear intent and goals and clarifies that NEPA is a mandate for federal agencies.
2. **Improving coordination and accountability among federal, state, and Tribal actors through project-specific coordinated schedules** based upon real-world experience with similar projects but tailored to specific circumstances. This includes permitting agencies in the process of establishing schedules and identification of information needed for both NEPA environmental reviews and permit agencies, without forcing cookie-cutter solutions.
3. **Securing the integrity of proposed mitigation** for Categorical Exclusions (CEs), Environmental Assessments (EAs), and Environmental Impact Statements (EISs) through incorporation into legally binding vehicles and requiring compliance monitoring and enforcement.
4. **Improving the readability and focus of EISs** by using these modifications:
 - a. **A standard front page cover** that provides key standard information for complex projects and that excludes charts, photos, and graphs.
 - b. **Flexibility in the structure of the EIS**, including opportunities to combine environmental baseline conditions in sections with projected impacts. We believe that this can improve the focus of data gathering to those items critical to decision making.
 - c. Encouraging pre-application review, as is done by the Federal Energy Regulatory Commission.

5. **Avoiding duplication** by
 - a. **Strengthening tiering** off programmatic EISs and land use plans for project reviews.
 - b. **Enabling adoption of CEs, EAs, and EISs from other federal agencies** where it is shown to be relevant. We believe adoption of state and Tribal EISs would be problematic in the absence of a mechanism to ensure compatibility with federal requirements and quality controls and is best achieved with collaborative development of the EISs.
 - c. **Emphasizing the integration of NEPA analysis** into other federal agency actions.
6. **Improving access to information and accountability** by
 - a. Requiring agency websites to provide standard elements of information to the public.
 - b. Requiring inclusion of scoping summary and comments in a Draft EIS.
7. **Focusing the NEPA analysis on what is important** by
 - a. Setting a standard for the level of detail and quality of information linked to what is needed for decision making.
 - b. Requiring scoping for EISs.
8. **Supporting adoption of mitigation measures** identified through a more elaborate EIS into general practice so that these issues can be addressed by less intensive CE and EAs in future projects with similar impacts.

We have identified below several areas which can be strengthened and clarified:

1. **Strengthen the integration of the climate change imperative within NEPA implementation.** A recent analysis¹ of seven EISs for major fossil fuel projects found that agencies systematically understated greenhouse gas (GHG) emissions from oil and gas projects by an average of 98%. CEQ has taken important steps to improve EIS treatment of GHGs in its Interim Final Guidance on Greenhouse Gases and Climate Change, and CEQ has taken public comment to further strengthen the guidance. As part of the Phase 2 comment period, CEQ has asked for comment on whether parts of the GHG guidance should be codified. We believe that the GHG Guidance should be strengthened and codified to the extent feasible in order to provide clear and consistent direction to agencies that often default to old habits without unambiguous and consistent direction. We recognize that some of this material may be too detailed to include in the NEPA implementing regulations. However, in particular, there are missed opportunities to strengthen climate change in the NEPA process. We recommend that NEPA implementation require proposals that increase fossil fuel use be made to consider their full impact on national and global efforts to deploy clean energy, conserve energy, and achieve GHG reduction goals.
2. **The proposal allows moving from Draft to Final** without a full reissuance of a final document, but this should not be allowed if the resulting document is not readily understandable.

¹ <https://www.symonspa.com/post/analysis-of-nepa-reviews-for-fossil-fuel-projects>

3. **Enhance the capability of federal agency websites to serve public engagement and accountability.**
 - a. Include specific relevant scoping actions in the schedule to the extent in minimum website requirements in § 1501.9(8).
 - b. Strengthen the role of CEQ in rationalizing websites among federal agencies for specific projects within geographic areas and for similar project types.
 - c. In § 1507.4(a)(5), add mapping capability to identify multiple projects in a geographic area that have completed or are undergoing NEPA review.
 - d. Include tracking of and the rationale for schedule changes and escalation of issues consistent with recent legislative proposals.
4. **Add a requirement for agency programs to include funding for participating** in agency quick response teams for environmental review of specific project types to facilitate analysis, decision making, and learning lessons from one project to the next.
5. **Include a more routine process to reinforce graduated environmental reviews** by systematically extracting mitigation and avoidance measures from EISs and EAs that could be adopted in mitigated EAs and CEs, respectively, so as not to have to revisit them in more elaborate analyses.
6. **Compliance and enforcement:** § 1507.3 addresses Agency NEPA procedures. We believe that agency procedures should include language drawn in large part from §§1501.5 and 1501.6 in regard to "Determination of Level of NEPA Review." It should include process(es) to ensure that any environmental effects are not significant with a process that defines institutional authority and resources to secure compliance with mitigation measures, monitoring and enforcing such measures pursuant to § 1501.
7. **Categorical Exclusions:** The draft is unnecessarily confusing and complicated in its proposed process for handling extraordinary circumstances for what would otherwise be a Categorical Exclusion. Instead, it would reinforce the cascading triage inherent in the NEPA process if a federal agency was required to prepare an EA resulting in either a Finding of No Significant Impact (FONSI) or EIS. In addition, §§ 1501.4 (e)(4) and (e)(5) provide for public notice and documentation of a CE from another agency. We recommend that it be made clear that this is best accomplished through regulation unless it is an isolated incident.
8. **Notification:** § 1501.9(d) says an agency *may* notify entities and persons who have requested regular notifications. We feel this language could be strengthened and could provide a better description of what satisfies public engagement.
9. **Baseline:** The baseline that must be used for comparison with the impacts of reasonable alternatives is a frequent source of misunderstandings. We believe the current draft regulations do little to address this problem. The term "baseline" is used in both § 1502.15 (Affected Environment) and § 1502.16 (Environmental Consequences). In § 1502.16, it refers to baseline assessment and baseline conditions. In § 1502.16, baseline is used in regard to the No action alternative. Confusion will continue unless the treatment of baseline for NEPA analysis is clear. The regulations should give this issue more prominence. We suggest substituting another word for "baseline" in § 1502.15 and creating a section on the "no

action alternative" instead of burying it within § 1502.16 on Environmental Consequences.

10. **Preparation of an EA or EIS by a project sponsor:** Recognizing that the Fiscal Responsibility Act changed NEPA to allow preparation of EAs and EISs by a project sponsor, it remains important that there be an attempt to avoid a conflict of interest in having an EA or EIS prepared by a project proponent and to clarify that a project proponent should not be preparing a decision document for a federal agency in the form of either a FONSI or Record of Decision.
11. **Scoping:** It is important that the scoping process required for EIS preparation have integrity. To the extent there is a pre-application review between a federal agency and a project proponent, that pre-application process should not serve to meet required scoping, especially since it can and might exclude the public and other federal, state, local, and tribal government officials. There should always be a role for stakeholders and scoping needs to be transparent.
12. **Threshold for having to prepare an EIS:** The draft appears to require an EIS only when there are significant adverse environmental impacts. We believe strongly that NEPA addresses both adverse and beneficial impacts and that any balancing of beneficial and adverse impacts should be explicit within the context of the NEPA analysis and not a basis for excluding a proposed project from NEPA.

In closing, we congratulate CEQ on this important effort. The proposed Phase 2 NEPA implementing regulations will make the NEPA process more efficient and effective in addressing urgent environmental and social impacts such as climate change and environmental justice. It reincorporates important elements of the original 1978 NEPA implementing regulations, incorporates proposals from recent legislation for additional discipline and focus in the NEPA process, strengthens public engagement and accountability through transparency and enforceability, incorporates tribal entities and rights where they were left out of previous regulations, reinforces the use of websites, schedules, and electronic documents to improve both discipline and access—all leading to improved decision making and results.