



September 27, 2023

The Honorable Brenda Mallory
Chair
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Council on Environmental Quality

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

[Docket No. CEQ-2023-0003]

RIN: 0331-AA07

**Re: The Pew Charitable Trusts' Comments on the National Environmental Policy Act
Implementing Regulations Revisions Phase 2**

Dear Chair Mallory:

The Pew Charitable Trusts (Pew) submits the following comments to the Council on Environmental Quality (CEQ) regarding the Notice of Proposed Rulemaking (NPRM) to revise its regulations for implementing the procedural provisions in the National Environmental Policy Act (NEPA).

Pew is a non-partisan, global research and public policy organization working to achieve meaningful, measurable results with programs in environmental, health, and consumer policy initiatives. Domestically, our environmental policy and research efforts are currently active at the federal level and in most states, where we engage with both Republican and Democratic administrations and a wide array of stakeholders on local, state, and federal policy.

I. Introduction

Congress intends for NEPA and CEQ's implementing regulations¹ to serve two key functions – (1) ensure robust environmental review that includes an analysis of reasonable alternatives to proposed actions, including consideration of cumulative impacts, and (2) engage the public in order to promote more informed and transparent federal agency decisions. All federal agencies must prepare a thorough assessment with full consideration of environmental consequences of a major federal action prior to its undertaking.² The NEPA process was initially designed to ensure that the impacts of proposed federal actions on the quality of the human and natural environment are considered, that alternatives which might help to avoid or mitigate any adverse impacts are considered, and that the public - whose taxes support

¹ Council on Environmental Quality (CEQ), Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 C.F.R. §§ 1500-1508, <https://ceq.doe.gov/laws-regulations/regulations.html>.

² 42 U.S.C. § 4332(2)(C).

agency actions and whose lands are held in trust by the federal government - are informed and have a voice throughout the process.

CEQ previously revised its NEPA regulations in 2020³ (2020 Rule). Pew had serious objections to the justification for overhauling NEPA; the circumvention of adequate consideration of alternatives, impacts, and reviews; and the reduction of opportunities for public engagement, among others. Pew shared these concerns in a comment letter dated March 10, 2020. We are pleased that the current Proposed Rule remedies most of those detrimental changes, while retaining other portions, such as enhanced Tribal involvement, which strengthened NEPA procedures.

CEQ's Phase 1 Rule, promulgated in April 2022, addressed some of the most immediate shortfalls in the 2020 Rule, including: restoration of direct, indirect, and cumulative impacts; elimination of language that removed agencies' flexibility to expand their NEPA procedures and treat regulations as a floor, not a ceiling; and withdrawal of the requirement that an agency base its decision-making and choice of alternatives solely on the applicant's goals. Pew supported these changes, which reinstated provisions that had been in effect for decades prior to the 2020 Rule and that positively contributed to how agencies conducted NEPA analyses and made sound decisions and investments.

Along with recent administrative changes to NEPA's implementing regulations, other modifications have occurred through legislative action. The 2023 Fiscal Responsibility Act called for mandatory page limits and timely schedules; allowed for joint NEPA documents and decision-making; reformed the categorical exclusion (CE) process; narrowed the scope of agency review; and permitted project sponsors to prepare environmental assessments (EAs) and environmental impact statements (EISs), to name a few changes. While Pew has concerns with some of those changes to the regulations, our comments below focus only on the contents of the NRPM.

II. Substantive Comments on Phase 2 Proposed Regulations

Pew largely supports the general intent and direction of the Phase 2 Proposed Regulations (Proposed Rule) as it relates to responsible, efficient, and robust review of environmental impacts stemming from federal actions and the consideration of action alternatives. We offer CEQ the following substantive comments in response to several of the specific provisions outlined in the NPRM.

A. Role of NEPA

For four decades prior to the 2020 Rule, federal agencies and the courts emphasized that agency rules should have an overarching focus on promoting common sense and public-friendly processes as an action-forcing mechanism for achieving NEPA's goals of protection of the environment and human welfare. However, the 2020 Rule's reduction of NEPA to a simple paperwork exercise did not meet Congress' clear intent when it passed NEPA. Pew therefore supports the current Proposed Rule's emphasis that NEPA reviews should contain action-forcing mechanisms to ensure that agencies implement the spirit of the law.

Section §1508.1(i) in the proposal would require agencies to identify an *environmentally preferable alternative* for each action. Notably, this section does not require that the agency select that alternative in its draft or final decisions. We understand that creating and assessing an *environmentally preferable alternative* will involve agency judgement and a balancing of certain factors, including multiple possible environmental harms and benefits. However, Pew believes that agencies should be required to identify an *environmentally preferable alternative* as such a benchmark will help contextualize the remaining alternatives and improve the public's ability to substantively comment on the proposed action.

³ 40 CFR Part 1500 (2020).

B. Climate Change

The Phase 1 Rule addressed some of Pew's immediate concerns in the 2020 Rule regarding the inclusion of climate change impacts, particularly the reinstatement of evaluating indirect and cumulative impacts. Nonetheless, we are pleased that CEQ is now proposing to go a step further in considering and formalizing the effects of climate change in NEPA reviews.

Agencies had previously considered the effects of climate change when conducting environmental reviews, as directed by Executive Orders, agency guidance, or other non-regulatory mechanisms. However, consideration of these effects was never regulatorily required to be analyzed as part of the NEPA process until these proposed regulations, representing a long-overdue update to how reviews are conducted. Given the pervasiveness of climate-related environmental impacts, Pew believes that CEQ should specifically reference in this regulation its 2023 Guidance on Consideration of Greenhouse Gases (GHGs), and any future updates of that guidance, addressing consideration of climate change in NEPA reviews.

Furthermore, Pew supports the Proposed Rule in its call for agencies to incorporate forward-looking climate projections (§1502.15), which creates a clearer and more transparent process for evaluating impacts into the future. Relying on historical data alone, as was the case previously, results in an incomplete assessment of climate-related impacts, given that reasonably anticipated future impacts, in many if not most instances, will not mirror past events and trends. NEPA reviews must always incorporate the best available science, as well as a level of agency judgment, to determine reasonably foreseeable future conditions and impacts. Climate-smart, or climate-ready, approaches can address complex environmental issues by embracing forward-looking goals and conducting multiple scenario planning.⁴ These changes will allow agencies to better account for uncertainty in their NEPA review.

C. Environmental Justice

Considerations of environmental justice (EJ) have yet to be formally incorporated into NEPA rules, with previous and current administrations addressing them through Executive Orders and guidance. The Proposed Rule seeks to establish a definition for EJ and require that the alternatives analysis identify and assess options that address adverse health and environmental effects that may disproportionately affect communities with a history of environmental injustice. Additionally, agencies will be required to both evaluate EJ effects in determining the appropriate level of NEPA review (e.g., whether to perform an EA or EIS) and mitigate EJ impacts where relevant and appropriate. Pew supports each of these long-overdue inclusions of EJ into the NEPA process.

Pew broadly supports proposed revisions to the Environmental Protection Agency's long-standing EJ definition. Specifically, references to climate change and disproportionate effects relative to populations impacted by the legacy of racism and other systemic barriers is both appropriate and welcomed. However, Pew encourages CEQ to view this definition change as merely an initial step in a broader effort to detail the intersection of climate-related and other adverse environmental conditions with historic land use and development patterns that have led to social vulnerabilities for low-income populations, communities of color, and others disadvantaged members of society.

Following efforts laid out in this Proposed Rule, Pew encourages CEQ to take steps to address certain EJ considerations. Pew recommends CEQ develop a broad strategy to promote public outreach, engagement, and awareness around the individual elements addressed in the revised definition, including widespread

⁴ Stein, B.A., P. Glick, N. Edelson, and A. Staudt (eds.). 2014. *Climate-Smart Conservation: Putting Adaptation Principles into Practice*. National Wildlife Federation, Washington, D.C. Available at: https://www.nwf.org/-/media/PDFs/Global-Warming/2014/Climate-Smart-Conservation-Final_06-06-2014.ashx.

efforts to improve awareness of climate-related and other adverse environmental conditions in socially vulnerable communities. This should be paired with solutions designed to mitigate these adverse impacts. Additionally, CEQ should work to enhance the public's understanding of the NEPA process and goals, while itself recognizing and addressing, to the fullest extent possible, the challenges that EJ communities and individuals may face in participating in the NEPA process.

D. Public Participation

As noted above, Pew strongly opposed provisions in the 2020 Rule that reduced opportunities for public engagement. We have long supported robust engagement throughout the NEPA process, particularly for major federal actions requiring an EIS. Regardless of the outcome, a process that includes and involves well-informed citizens establishes a level of trust between federal agencies and the public. Here, we are pleased that the Proposed Rule removes the requirement that comments be "*sufficiently detailed*" in order for the agency to accept them. Many commenters may lack the necessary resources to prepare fully detailed comments, though still able to substantively and qualitatively comment on a proposal. Moreover, the 2020 Rule did not adequately define the threshold for what would constitute a *sufficiently detailed* comment, leading to not only widespread ambiguity about this provision, but also potential disqualification of previous comments.

Pew also supports CEQ's requirement that agencies publish NEPA documents on their websites and create tracking numbers for EAs and EISs (§1501.5). Establishing user-friendly and easily searchable resources can only serve to bolster the NEPA process, through facilitating an informed and engaged public. We encourage CEQ to continue to expand opportunities to solicit and receive the public's feedback. In addition, by creating what could, in essence, become a library of environmental impact study data, agencies might help to expedite future analyses, allowing project proponents and the public to consider information gathered in previous reviews.

E. Beneficial Effects

The NPRM states that only actions with significant adverse effects require an EIS (§1501.3(d)(2)(i)), and those with only beneficial effects or no significant adverse effects do not require an EIS. To frame the significance determination, §1501.3(d) states that the agency shall consider the *context* of the action and *intensity* of the action's effects based on several factors. Section §1501.3(d)(2)(i) also directs agencies to consider the duration of effects, noting that effects may be adverse or beneficial across timescales. Pew encourages CEQ to clarify §1501.3 to explain that the significance determination through the application of the context and intensity factors across timescales applies to each individual 'effect category' (e.g., wildlife, GHG emissions, cultural resources, etc.) that is implicated by the proposed action -- i.e., that each category is considered separately when determining significance. Without this clarification, decisionmakers could conflate categories of effects by considering an action's effects as a whole such that it dismisses significant adverse effects within an individual category on a given timescale, if in the decisionmaker's determination the action is beneficial overall. Such a situation would potentially undermine the broader purposes of NEPA.

The narrative discussion of Section §1501.3 in the NPRM provides two examples to illustrate the concepts described in this section of the proposed regulation: a renewable energy project and a forest restoration project. In the former example, CEQ notes that there may be a short-term increase in GHG emissions during the construction phase, but a decrease in GHG emissions in the long-term due to onboarding of clean energy. However, there may be other non-GHG-related impacts from the project, such as habitat fragmentation, species disruption during construction, alterations to migration corridors, and others. If there were to be significant effects to any of these other effect categories, an EIS-level analysis should be required for those categories of effects.

In the latter example, CEQ describes a situation in which adverse short-term species displacement may result from a forest restoration project, while species would experience long-term benefits from a reduction in the risk of severe wildfire impacting their habitat. While this may be true for some species, it may not be the case for all species (e.g., range- or population- size limited threatened and endangered species) and there may be other categories of effects that warrant an EIS depending on their context and intensity, such as soil erosion into streams. Again, non-similar effects categories should be analyzed and, where appropriate, should require NEPA review.

F. Categorical Exclusions

Section §1501.4(c) proposes to provide agencies the ability to establish CEs through a land use plan, a decision document supported by a programmatic EIS or EA, or other equivalent planning or programmatic decision. Because CEs are the only type of NEPA review that do not require agencies to seek public comments, CEQ should only allow them in limited and well-defined circumstances. Pew noted the changes in the Fiscal Responsibility Act above, which allow agencies to adopt other agencies' CEs, thus providing more flexibility to expedite the NEPA process.

While this provision may be a well-intentioned attempt to improve the efficiency by which CEs are established, this approach may not prove useful in the federal land use planning context. Land use plans, unlike CEs, do not authorize any particular action to be taken; rather, they are guides for determining whether subsequently proposed activities are appropriate for that planning unit within the goals and objectives defined by the plan. As such, retention of this provision in the final rule would erroneously equate planning-level decisions with project-level decisions. This would create confusion for the public and would necessitate an expanded scope of planning-level NEPA analyses, both of which would detract from NEPA efficiency. Pew doubts that it was CEQ's intention to convert land use plans and environmental review documents, neither of which make project decisions, into decision-making documents. As such, we recommend that CEQ omit this provision in the final rule.

G. Significance Determination

In Section §1501.3, CEQ proposes to revive the context and intensity thresholds when determining whether NEPA applies to a proposed action. Pew finds these considerations prudent and useful when deciding whether to conduct an EIS or EA. Pew agrees that the 2020 Rule was overly limiting when it narrowed the consideration of *context* to only the potentially affected environment. By expanding the context of the action to include global, national, regional, and local contexts, along with the duration of those effects, the Proposed Rule more accurately reflects the spatial and temporal impacts of a proposed action, thus providing a fuller picture of how an action may affect the environment. We believe this inclusion is consistent with the Phase 1 Rule that reinstated analysis of indirect and cumulative impacts.

The Proposed Rule also reinstates the *intensity* factors as considerations in determining whether an action will have significant effects, which CEQ had long used before the 2020 Rule removed this requirement. Pew agrees that agencies should use the intensity factors to guide their determination of the degree to which an action may have adverse impacts on unique or special areas, such as historic or cultural resources, sacred Tribal lands, wild and scenic rivers, and other environmentally, historically, or culturally critical areas.

H. Innovative Approaches

Section §1506.12 would allow agencies, with CEQ approval, to pursue innovative approaches to NEPA compliance for the purpose of addressing extreme environmental challenges, mostly stemming from climate change. Pew agrees with CEQ that there are significant stressors, which are creating a variety of severe environmental challenges for people and nature and that, in response, urgent and comprehensive solutions are needed. However, Pew has some concerns that this approach may not be an appropriate

means of addressing these challenges. It may afford CEQ too broad of discretion to determine what approaches it deems “consistent” without guidelines for how that determination would be made. It also removes the public from the regulatory process by only requiring consultation with cooperating agencies. Furthermore, it is unclear if Section §1506.12 comports with the Administrative Procedure Act’s requirements for formal rulemakings and whether there is even a need for this provision given the other NEPA pathways available to agencies under these proposed regulations (not including §1506.12). Pew appreciates CEQ’s desire to encourage agencies to explore opportunities for novel approaches to NEPA compliance – that are consistent with the statute’s spirit – in order to meet the pressing challenges of our day. Therefore, CEQ should further define the contours of agency applicability with respect to this provision before including it in the final regulations.

III. Conclusion

Pew previously commented that we found little justification for the 2020 Rule and were deeply concerned about limiting the scope of environmental reviews, analyses, and impacts, as well as diminishing the public’s ability to meaningfully engage with federal agencies. We therefore commend CEQ for revisiting the 2020 Rule and reinstating the original intent of NEPA, while expanding upon the regulations to evaluate contemporary issues more effectively, such as placing a greater emphasis on climate change and EJ issues in the NEPA process. At a time when scientific research and studies underscore the interconnectedness of humans’ actions on the natural environment, CEQ should be encouraging more rigorous assessments and additional opportunities for the public to take part.

Thank you for the opportunity to submit comments, and we look forward to engaging further on this critical issue. Please do not hesitate to reach out should you have any questions or require any clarification.

Sincerely,



Thomas A. Wathen
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The Pew Charitable Trusts

CC: Amy Coyle, Deputy General Counsel, Council on Environmental Quality