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Council on Environmental Quality Substantially Rewrites National Environmental Policy Act Regulations

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In this article, the authors review the Phase II regulations under the National Environmental Policy Act (NEPA) published recently by the Council on Environmental Quality and examine how the amendments to the NEPA regulations affect the process for NEPA compliance, along with the scope of NEPA and the roles of federal agencies and the public.

The Council on Environmental Quality (CEQ) on May 1, 2024, published its Phase II regulations[1] under the National Environmental Policy Act (NEPA).[2] As part of a multiphase effort to amend the NEPA regulations that straddled the statutory amendments under the Fiscal Responsibility Act (FRA) of 2023,[3] the stated goals of the Phase II regulations are to "provide for an effective environmental review process; ensure full and fair public engagement; enhance efficiency and regulatory certainty; and promote sound Federal agency decision making that is grounded in science, including consideration of relevant environmental, climate change, and environmental justice effects."[4] Although NEPA's statutory and regulatory provisions remained relatively unchanged since the 1970s, recent years have brought numerous changes in rapid succession, beginning with a comprehensive revision of the 1978 regulations in 2020, followed closely by the relatively modest Phase I revisions in 2022 that largely sought to reincorporate certain provisions from the 1978 regulations and comprehensive revisions to the statute in 2023 that statutorily incorporated several concepts from the 2020 regulations.

These most recent amendments to the NEPA regulations are significant in scope and affect virtually all aspects of NEPA review. Although many changes may achieve the Biden administration's goals of efficiency and streamlined review, others may burden the regulatory agencies and proponents of projects subject to NEPA

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review. Agencies have one year from the effective date to implement their own NEPA regulations consistent with the policies and processes provided in the Phase II regulations; but certain changes may exceed statutory authority and are likely to face judicial challenge.

NEPA Overview

Clients face the possibility of needing an environmental review under NEPA whenever applying for federal permits or federal funds. NEPA requires that federal agencies undertake an environmental review for "major Federal actions significantly affecting the quality of the human environment."[5] NEPA is a broad-reaching statute that directly applies to federal agencies but indirectly impacts most regulated communities by requiring environmental review of certain federal agency actions, which may include funding or approvals needed for public or private projects. NEPA is implemented under the regulations promulgated by the CEQ, 40 C.F.R. Parts 1500-1508, along with the NEPA regulations promulgated by each individual agency. In essence, through the NEPA process an agency evaluates a proposed action and analyzes the reasonably foreseeable environmental impacts of such action to inform the federal agency and the public of such impacts and consider potential mitigation.

NEPA's sliding-scale approach recognizes that agency actions can be characterized as falling somewhere on a continuum with respect to environmental impacts. Proposed actions with the potential for "significant" environmental effects normally require an Environmental Impact Statement (EIS), while projects with little to no effects can be addressed through an Environmental Assessment (EA). The EA is most often used to determine whether the impacts are significant enough to warrant preparation of an EIS or whether the impacts can be avoided or mitigated, in which case the agency issues a Finding of No Significant Impact (FONSI). The third type of NEPA review is a Categorical Exclusion (CatEx). A CatEx is a category of actions that the reviewing agency has determined normally would not individually or cumulatively have potential for significant environmental impacts and can therefore be excluded from further NEPA review absent "extraordinary circumstances."

As explained in the Phase II regulations, President Joe Biden in June 2023 signed into law the FRA, which included amendments to several sections of NEPA.[6] Among the changes, the amendments:

1. Clarified that NEPA review is required to look at "reasonably foreseeable" effects of the agency action with a "reasonably close causal relationship" to the proposed agency action (Section 102);
2. Clarified the levels of review (Section 106);
3. Addressed coordination among agencies, allowed project sponsors to prepare environmental documents, imposed statutory page limits and deadlines, created a right for project sponsors to petition a court to enforce the new statutory deadlines and generally sought to improve streamlining of the process (Section 107);
4. Clarified an agency's ability to rely on programmatic reviews (Section 108);
5. Allowed for agencies to adopt the CatEx review of other agencies (Section 109);
6. Provided for the use of digital online technology to reduce delay and improve accessibility and transparency (Section 110); and
7. Provided new definitions of key terms such as "major federal action" (Section 111).

Part 1500 Purpose and Policy

Part 1500 of the regulations sets forth CEQ's broad interpretation and vision of the goals of NEPA and significantly expands CEQ's base interpretation of the purpose and policy. As discussed below, CEQ expects individual agencies to amend their own NEPA regulations to implement these policies.

Overall Agency Goals

Section 1500.1 stresses that federal agencies have a "continuing responsibility . . . to use all practicable means" to meet several goals of NEPA, including assuring "for all people safe, healthful, productive, and aesthetically and culturally pleasing surroundings"; preserving "important historic, cultural, and natural aspects of our national heritage, and maintain[ing], wherever possible, an environment which supports diversity and variety of individual choice"; and "enhance[ing] the quality of renewable resources and approach the maximum attainable recycling of depletable resources."[7] The

revisions state that information used in the NEPA review "shall be of high quality" and "most importantly, environmental documents must concentrate on the issues that are truly relevant to the action in question, rather than amassing needless detail."[8] Further revisions, such as page limits and clarity, are intended to implement this policy. For example:

- Section 1500.2 expects that federal agencies will implement procedures "to reduce paperwork and the accumulation of extraneous background data" and integrate NEPA into their own planning reviews so that they run concurrently.[9]
- Section 1500.4 requires federal agencies to "prepare analytical, concise, and informative environmental documents."
- Section 1500.5 requires federal agencies to "improve the efficiency of their NEPA processes" by undertaking certain steps, such as establishing more CatExes, engaging early in interagency cooperation with affected federal, state, tribal and local agencies before or during the preparation of an EA (as opposed to waiting for comments), and using the scoping process to identify the "important" issues that require detailed analysis.

Consistent with other themes, there is an emphasis on meeting deadlines and preparing documents early. These stresses on efficiency are welcome additions for project proponents, as they will infuse the NEPA process with greater certainty and timeliness. This may put more pressure on the agencies and increase workloads, but this pressure may be helped by other provisions allowing project proponents to undertake certain roles or adoption of other agencies' environmental reviews.

The changes to Section 1500.3 are most significant for removing the "exhaustion" requirements, which had required commenters to be specific with their comments. The Phase II regulations removed the language that "comments or objections of any kind not submitted, including those based on submitted alternatives, information, and analyses, shall be forfeited as unexhausted," which was an attempt to limit NEPA litigation and flyspecking of decision documents. In addition, the Phase II amendments removed the "remedies" section that stated the CEQ's intention that the regulations "create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm" or that any "alleged NEPA violation be raised as soon as practicable after final

agency action to avoid or minimize costs to agencies, applicants, and affected third parties." However, the changes included an additional provision recognizing that project sponsors may seek judicial review prior to the agency issuing the final agency action, which is consistent with Section 107(g)(3) of NEPA as amended. It must be noted, however, that judicial review in federal courts is slow and can often impact the ability to meet project development milestones.[10]

Lastly, Section 1500.6 clarifies that the requirement that an agency comply with NEPA "to the fullest extent possible" is not intended to "limit an agency's other authorities or legal responsibilities unless an agency activity, decision, or action is exempted from NEPA by law or compliance with NEPA is impossible." The preamble makes clear that "compliance with NEPA is only impossible within the meaning of this subsection when the conflict between another statute and the requirements of NEPA are clear, unavoidable, and irreconcilable."

Environmental Justice

The most significant addition is the requirement that all federal agencies "encourage and facilitate public engagement in decisions that affect the quality of the human environment, including meaningful engagement with communities such as those with environmental justice concerns."[11] The regulations also include a definition of "communities with environmental justice concerns," defined as those "communities that may not experience environmental justice"[12] as the term is defined in Section 1508.1:

> [T]he 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. Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and

2. Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

Although environmental justice (EJ) has been a focus of the U.S. Environmental Protection Agency (EPA) for quite some time,[13] this is the first real attempt to codify the requirement to consider disproportionate environmental impacts on agency actions. The requirement to engage with communities to promote "environmental justice" in all reviews is an explicit expansion of the duty to consider and discuss environmental protection in economically impoverished communities. The regulations encourage the use of available screening tools, such as the Climate and Economic Justice Screening Tool and the EJScreen Tool, to assist in identifying communities with EJ concerns.[14] Agencies also may develop procedures for the identification of such communities in their agency NEPA procedures.[15] As further discussed below, the requirement to mitigate the harm on EJ communities gives this review real impact.

Part 1501: NEPA and Agency Planning

As stated in Section 1501.1, the purposes of Part 1501 are to integrate the NEPA process with other planning and authorization processes at the earliest reasonable time in order to promote efficiency, identify the important environmental issues and deemphasize unimportant issues, and apprise the project proponent of what will be required and when to complete the NEPA process.[16] The stress on starting the process as early as possible and trying to focus on the most important issues have been championed by the private sector, members of which have frequently complained that NEPA can lead to "paralysis by analysis."

Early Integration of NEPA

Section 1501.3 requires the agencies to undertake a "threshold determination" at the outset in order to "assess whether NEPA applies to the proposed activity or decision."[17] There are five possible types of agency action that would not trigger NEPA:

1. The action is exempt by law,
2. Compliance would conflict with the provision of another law,
3. The activity is "not a major Federal action" (per Section 1508.1(w)),
4. The activity is not a final agency action, and
5. The activity is a "non-discretionary action" to which the agency does not have authority to take environmental factors into consideration.[18]

The regulations stress that the agencies should use public engagement and scoping to "inform consideration of the scope of the proposed action and determination of the level of NEPA review."[19] There is also a caution against segmenting an action into smaller component parts to avoid review and a requirement to consider "connected" actions.[20] This is consistent with prior interpretations of NEPA, which allows for projects with independent utility to be analyzed separately.

Section 1501.3 stresses that agencies "make use of any reliable data source and are not required to undertake new scientific or technical research unless it is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable."[21] What is "unreasonable" will be up for debate.

Finally, Section 1501.3 provides further guidance on how agencies are to analyze "significance" of effects, by reintroducing the concepts of "context and intensity" discarded in the 2020 regulations. The new language stressing "context and intensity" of an effect provides that agencies may consider "the extent to which an effect is adverse at some points in time and beneficial in others" but that the beneficial effects cannot be used to offset the short-term harm.[22] The new regulations provide a laundry list of factors to consider in analyzing the intensity of effects that expands beyond those that existed in the 1978 regulations, including the "degree to which the action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, parks, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas," whether the action may be inconsistent with local or tribal policies that may affect the environment, effects on EJ, effects on historic properties, and effects on the rights of tribal nations.[23] The stress on impacts to tribal

interests is an expansion of NEPA that appears to overlap with the National Historic Preservation Act.

CatExes

The FRA's amendments to NEPA (Section 109) allowed for agencies to adopt the CatExes of other agencies, which reflected changes introduced in the 2020 regulations.[24] Section 1501.4 attempts to promote and expand the use of CatExes by allowing agencies to collaborate on new exclusions and adopt other agencies' existing exclusions.[25] CatExes are widely favored as a means of expediting NEPA review for actions that have already been determined not to have significant effects. The problem has always been that it takes a considerable amount of time to approve a new CatEx. Allowing agencies to establish CatExes through land use plans and existing EISs and Programmatic reviews would speed up adoption, although they still require CEQ approval and public notice.[26] Creation of new CatExes via this process may also be slowed by the detailed requirements of this section.[27]

Sections 1501.5 and 1501.6 address EA and FONSIs in terms of what is required to supplement the documents if there are new circumstances that have not been reviewed. This clarifies that the need for supplemental review is limited to the new circumstances and may be mitigated.

Scoping

Section 1501.9 renames "scoping" to "public and government engagement," sending a clear message about the expanded duty to engage with the public.[28] Setting forth "agencies' responsibilities and best practices to conduct public and governmental engagement," this section requires early outreach and notification to any likely affected federal, state, tribal, and local agencies and governments, engagement with the public, and consideration of "what methods of outreach and notification are necessary and appropriate based on the likely affected entities and persons; the scope, scale, and complexity of the proposed action and alternatives; the degree of public interest; and other relevant factors."[29] There also appears to be an emphasis on public meetings, along with a requirement to make the NEPA document available 15 days before a meeting.[30]

Collectively, expansion of these scoping requirements may be in tension with the goals of efficiency and speedy review, as well as lend themselves to new areas of litigation challenging project approvals.

Deadlines

Section 1501.10 provides various deadlines and schedules for the NEPA process and states that any necessary updates must be made in concurrence with any joint lead, cooperating and participating agencies and in consultation with any applicants.[31] Consistent with past amendments to the law and regulations, EAs must be prepared within one year and EISs within two years, and those deadlines can be expanded only in consultation with the applicant.[32] The starting point is the earlier of when the agency decides that an EIS or EA is required or a notice of intent (NOI) is issued.[33] Under the 2020 regulations, the clock began to run only on issuance of the NOI, which allowed agencies to delay the process by holding back on issuing the NOI. The statutory amendments under the FRA sought to remedy this situation by clarifying that the clock also begins to run once the agency decides that an EIS or EA is necessary. Further, agencies must report missing deadlines to Congress.

For the first time, the Phase II amendments require agencies to set milestones for reviews, permits, and authorizations with the concurrence of other agencies. Agencies may hold one another accountable for the deadlines. The schedule is based on "agency expertise" and a number of factors, several of which might be used to set long schedules.[34] Nonetheless, having an actual schedule of deadlines is a welcome development for permit applicants that hopefully leads to more certainty for project proponents.

Programmatic Review and Tiering

Section 1501.11 provides significantly more details on the requirements to utilize programmatic NEPA processes to evaluate the "effects of policies, programs, plans, or groups of related activities."[35] Programmatic NEPA review is an effective, if underutilized, process of undertaking a larger review of a program or project with multiple components and then "tiering" off that programmatic review to review individual projects as they materialize.

Under the Phase II regulations, "agencies may use programmatic environmental documents to conduct a broad or holistic evaluation of effects or policy alternatives; evaluate widely applicable measures; or avoid duplicative analysis for individual actions by first considering relevant issues at a broad or programmatic level."[36] The regulations provide a more expansive list of possible uses for programmatic review, including land use or resource management plans, actions with multiple stages or phases, and groups of related projects.[37] A programmatic review is valid for five years without additional review and may be reevaluated thereafter.[38]

In turn, this section stresses the use of "tiering" from existing NEPA reviews.[39] Agencies can avoid duplication and unnecessary review by adopting an EIS by reference for a later proposed action and only analyzing the site-, phase-, or stage-specific conditions and reasonably foreseeable effects.[40] Use of tiering is an effective way of promoting efficiency and avoiding duplicative review.

Definition of "Major Federal Action"

The question of when an activity is exempt because it is "not a major federal action" is perhaps the most difficult decision an agency will face. The FRA clarified that certain types of funding are exempt from NEPA because funding alone does not provide the agency sufficient control over the environmental effects. Consistent with that concept, the Phase II regulations define the phrase "major federal action" as an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility."[41] Examples include granting permits, licensees or other authorizations, as well as approving programs or carrying out specific agency projects such as construction activities.

The following example is also offered to address how an agency should analyze situations where the action is financial assistance:

> Providing more than a minimal amount of financial assistance, including through grants, cooperative agreements, loans, loan guarantees, or other forms 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 the effects of the activity for which the agency is providing the financial assistance.[42]

On the other hand, the Phase II regulations clarify that "major federal action" does not include "non-federal actions" with "no or minimal federal funding or situations where the Federal agency cannot control the outcome of the project."[43] This is consistent with the FRA, which specifically amended NEPA to exclude financial assistance "where a Federal Agency does not does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action."[44]

There is clear tension between the example of major federal action and the financial assistance exemption. Although an agency cannot require NEPA review if it does not control the outcome of the project, this would be easily sidestepped if, through the agreement that offers the funding, the agency maintains the authority to deny the assistance due to environmental effects. This raises the question of whether providing funding should give an agency authority to analyze the effects of an entire project, which would otherwise be outside of its control (e.g., impacts on air pollution if EPA is not the funding agency). The U.S. Supreme Court in *Department of Transportation v. Public Citizen* explained that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Therefore, to require the agency to prepare an EIS with information that the agency has no statutory authority to consider "would serve 'no purpose' in light of NEPA's regulatory scheme as a whole."

Parts 1502 and 1503 Environmental Impact Statements and Public Comments

The amended regulations stress that an EIS is expected to be an "action forcing device" that infuses the goals of NEPA into ongoing programs and federal actions.[45] Consistent with other sections, Part 1502 stresses the need to facilitate the early involvement of other agencies and invite public participation.[46] The NOI to prepare an EIS must include the "identification of any cooperating and participating agencies, and any information that such agencies require in the notice to facilitate their decisions or authorizations."[47] In theory, early involvement of other agencies, and a clear identification of

what is needed, will make the process more efficient. Of course, this could also have the unintended effect of delaying the start of the scoping process as information is gathered.

Various subsections of Part 1502 address the core elements of the EIS—purpose and need, alternatives, affected environment and environmental consequences. The FRA amendments limit an EIS to 150 pages, unless the proposal is one of extraordinary complexity, and even then an EIS would be limited to 300 pages.[48] This may lead to more information being contained in appendices. The EIS must include a summary that identifies the environmentally preferable alternative or alternatives and should use visual aids and charts.[49] Further, the previous requirement to state the estimated total cost of preparing the draft and final EIS on the cover page has been replaced with a requirement to simply include the identification number included in the NOI.[50]

Lastly, an EIS may be reopened if an agency action is incomplete or ongoing and there are "substantial" new circumstances or information "about the significance of adverse effects that bear on the analysis."[51] Agencies may reevaluate an EIS to determine that a supplemental EIS is not required and should document its decision (or prepare a new EA). In practice, these provisions could lead to subsequent administrations reopening final decisions of prior administrations at some point long after those decisions have been made, which may result in delays of projects already approved and underway, but not yet completed.

Alternatives

The changes to the section dealing with alternatives clarifies that, while an agency must "rigorously explore and objectively evaluate reasonable alternatives to the proposed action," the "agency need not consider every conceivable alternative to a proposed action."[52] The focus on "a reasonable range of alternatives that will foster informed decision making" would avoid forcing project proponents to analyze an endless list of alternatives. The regulations also state that "agencies also may include reasonable alternatives not within the jurisdiction of the lead agency,"[53] which is a change from the 2020 regulations. Requiring analysis of alternatives outside the control of the agency seems inconsistent with other aspects of NEPA, including the fundamental requirement to analyze the "agency action."

There is also a new requirement for determining the "environmentally preferable alternative." Although not in the definitions section, under Section 1502.14, the "environmentally preferable alternative" is the alternative that "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 EJ 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."[54] This clearly tips the balance in favor of projects that meet the current administration's goals in terms of climate change and EJ, while creating new opportunities for plaintiffs to challenge projects they disfavor.

Affected Environment

Section 1502.15 requires agencies to "use high-quality information, including reliable data and resources, models, and Indigenous Knowledge to describe reasonably foreseeable environmental trends, including anticipated climate-related changes to the environment, and when such information is incomplete or unavailable, provide relevant information consistent with § 1502.21."[55] Notably, there is no definition of "Indigenous Knowledge," despite its use in various sections of the regulations. The preamble states that it was a deliberate choice not to define this phrase because it would not be workable across contexts and tribal nations.[56] Thus, it will be left to the agencies and the relevant tribes to define this phrase and work it out on a project or program basis, which may add an additional point of contention and delay the overall review process. The level of detail to meet the requirement to analyze anticipated climate-related changes will likely take some time to sort out and may burden the NEPA process with forecasting or extrapolations.

Environmental Consequences

Under Section 1502.16, the environmental consequences of a proposed action are measured against a baseline of "no action."[57] The analysis of "no action" may include the adverse effects of no

action.[58] The focus of this analysis is on the "significant or important effects" of the proposed action and comparable alternatives.[59] This section must also include, 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" as well as "relevant risk reduction, resiliency, or adaptation measures incorporated into the proposed action or alternatives, informed by relevant science and data on the affected environment and expected future conditions."[60] This level of analysis is unquestionably complex and will be controversial. EJ must also be considered in this analysis.[61]

Filing Comments on an EIS

Revisions in Part 1503 removed the prior requirement that comments on an EIS shall be raised within the comment period on the draft EIS provided by the agency, and that comments and objections of any kind not provided within the comment period(s) shall be considered unexhausted and forfeited.[62] Although CEQ removed this as an impediment to legal challenges and to avoid important information from being overlooked,[63] the requirement to raise issues during the comment period allowed agencies to reasonably promote early engagement and finality to the process. These revisions go against the goals of efficiency and likely increase the gamesmanship that has become inherent in NEPA process. Further, in responding to comments the revisions now require agencies to respond to individual comments or groups of comments, whereas an agency previously had discretion on whether to respond to those comments.[64] This requirement will likely increase the amount of time between the end of the comment period on the draft EIS and publication of the final EIS, as agencies take additional time to prepare responses to the comments received.

Part 1504: Dispute Resolution and Pre-Decisional Referrals

This part establishes procedures for referring to the CEQ interagency disagreements concerning the NEPA process.[65] The regulations favor early dispute resolution among the agencies with the option to elevate to CEQ for resolution.[66] The Phase II

regulations add an informal dispute resolution process that allows CEQ to "request additional information, provide non-binding recommendations, convene meetings of those agency decision makers necessary to resolve disputes, or determine that informal dispute resolution is unhelpful or inappropriate."[67] Although it is unclear if CEQ has the bandwidth to mediate multiple disputes, this process could be useful for project proponents that feel caught between agencies. In practice, these provisions would presumptively apply only to disputes between agencies under different departments, since departmental leadership has the capacity to resolve conflicts between agencies within its own department.

Part 1505: NEPA and Agency Decision-Making

Part 1505 sets forth the requirements for the Record of Decision (ROD) that follows an EIS and sets forth the agency's final decision on alternatives, rationale and mitigation conditions.[68] The most significant changes in this part deal with the enforceability of mitigation conditions. Under the Phase II regulations, "[m]itigation shall be enforceable when the record of decision incorporates mitigation and the analysis of the reasonably foreseeable effects of the proposed action is based on implementation of that mitigation."[69] To ensure enforceability, the ROD must "identify the authority for enforceable mitigation, such as through permit conditions, agreements, or other measures, and prepare a monitoring and compliance plan. . . ."[70] The requirements for a monitoring plan have also been significantly expanded and include "standards for determining compliance with the mitigation and the consequences of non-compliance."[71]

There are specific requirements for "mitigation measures that address or ameliorate significant human health and environmental effects of proposed Federal actions that disproportionately and adversely affect communities with EJ concerns."[72]

Part 1506: Other Requirements of NEPA

Part 1506 addresses a variety of issues such as limitations on actions during the NEPA process, elimination of duplication with state, tribal, and local procedures, adoption, and combining documents. In particular, Section 1506.12 requires agencies to comply

with the regulations for proposed actions begun after the July 1, 2024, effective date of the final rule. However, agencies may "determine on a case-by-case basis whether applying provisions of the revised regulations to ongoing reviews will facilitate a more effective and efficient process, and CEQ declines to limit agency flexibility in this regard."[73] Thus, the rules could be relied upon by federal agencies as of the publication of the Phase II regulations.

Interim Actions During NEPA Review

Section 1506.1 addresses the scope of activities that may go forward during the NEPA process. NEPA originally required federal agencies to consider "any irreversible or irretrievable commitment of resources" in the evaluation of environmental consequences should a proposal be implemented.[74] Generally speaking, courts interpreted the old provision as restricting parties from taking irreversible action that has significant impacts before the NEPA process is completed where such action might limit the agency's ability to fully study impacts and require mitigation if necessary. The classic example is building a road right up to the line of an area of federal jurisdiction from both sides. However, the FRA amendments made to NEPA that now limit this provision to "any irreversible and irretrievable commitments of *Federal* resources which would be involved in the proposed *agency* action should it be implemented." These new statutory limitations arguably call into question the line of cases that previously interpreted this provision as applying to the commitment of nonfederal resources and actions. Notwithstanding these changes, the Phase II regulations provide that an agency considering a proposal for federal funding to authorize certain activities, including, but not limited to, acquisition of interests in land (e.g., fee-simple, rights-of-way, and conservation easements), purchase of long lead time equipment and purchase options made by applicants "if the agency determines that such activities would not limit the choice of reasonable alternatives and notifies the applicant that the agency retains discretion to select any reasonable alternative or the no action alternative regardless of any activity taken by the applicant prior to the conclusion of the NEPA process."[75] Arguably, the only alternatives considered in the funding context are other sources of funding or the decision not to fund. Thus, NEPA review should not be an impediment to

allowing certain interim work. However, the Phase II regulations largely ignore any implication from the FRA amendments to the prior statutory provision that forms the original basis for this provision being included in the regulations.

In cases where there is a required review for a program, the action may go forward if it is covered by an existing environmental document, has independent justification and will not prejudice the ultimate decision on the program.[76] These provisions are essential for project proponents that do not want a small federal handle (e.g., partial funding) to halt an otherwise non-federal project pending NEPA review. Importantly, the proposed regulation would have removed the word "required," which would have allowed agencies to essentially stop work under entire programs by simply initiating discretionary reviews, but the final rule retained the restriction that this provision only applies to "required environmental reviews for a program."[77]

Adoption of Other Agency NEPA Reviews

Section 1506.3 expanded the ability of agencies to adopt another agency's work into an EIS, promoting efficiency and reducing redundant review. An agency can adopt another agency's draft or final EIS provided that the agency "conducts an independent review of the statement and concludes that it meets the standards for an adequate statement."[78] If the actions are the same, then the agency just adopts or files the EIS; otherwise, it may undertake a supplemental analysis to fill the gaps.[79] A similar standard applies to an EA.[80]

This section also seeks to expand the adoption of another agency's CatExes.[81] If the proposed action and the action covered by the existing CatEx are substantially the same, the acting agency can adopt the other agency's CatEx and publish its adoption on the agency website.[82]

Project Proponent's Roles

The Phase II amendments clarify that an agency may rely on applicant-provided information provided that the agency "shall independently evaluate the information submitted by the applicant and, to the extent it is integrated into the environmental document,

shall be responsible for its accuracy, scope, and contents."[83] Consistent with the FRA amendments to NEPA, the regulations now make clear that an applicant may prepare an EA or EIS.[84] As discussed below, it appears that agencies must adopt regulations before a project proponent may prepare an EA or EIS. Contractors, which have always been relied on, should be supervised by the agency, and the agency must document its evaluation of the document. Further, despite the changes now allowing project sponsors to prepare these documents (and somewhat inconsistent with that addition) the regulations still retain the requirement that contractors execute disclosure statements "specifying that the contractor has no financial or other interest in the outcome of the action."[85]

Methodology and Scientific Accuracy

Section 1506.6 provides a new standard for methodology and scientific accuracy, requiring that agencies rely on "high-quality information, including of reliable data and resources, models, and Indigenous Knowledge."[86] The agencies are required "where appropriate" to "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."[87] The requirement to model for climate change–related effects will likely pose issues for project proponents where the nature of the impacts are not obvious (e.g., a wetland fill for a shopping center).

Part 1507: Agency Compliance

Part 1507 applies directly to the agency's duties during the NEPA review process. The individual agencies have a year from July 1, 2024, to revise their regulations to implement the policies and requirements of NEPA as expressed in the Phase II regulations.[88] This includes development of new CatExes[89] and a process to allow an applicant to prepare an EA or EIS under agency supervision.[90] That process must include requirements that the agency review and approve the purpose and need statement, independently evaluate the document and place a prohibition on the applicant preparing the FONSI or ROD.[91] The Phase II regulations also require designation

of a "Chief Public Engagement Officer" who would "be responsible for facilitating community engagement in environmental reviews across the agency."[92]

Part 1508: Definitions

Part 1508 includes numerous new definitions. As discussed above, the Phase II regulations provide a definition for "[c]ommunities with environmental justice concerns"[93] and "environmental justice,"[94] as well as expanded definitions of "effects"[95] and "extraordinary circumstances"[96] to include impacts on EJ, climate change, and tribal resources. These definitions fundamentally expand the scope of what has to be considered during the process. In turn, the new definition of "major federal action"[97] in the context of federal funding appears to ensure that most types of federal funding will be subject to an EA or EIS. All told, the definitions are consistent with the expansion of NEPA as discussed above.

Conclusion

The Phase II regulations result in a comprehensive overhaul of NEPA. The CEQ has made fundamental changes to the process for compliance, scope of NEPA, and roles of the agencies and the public. Although certain changes will meet the stated goals of efficiency and transparency, expansion of the scope of what has to be analyzed will unquestionably make the process more cumbersome and leaves much up for debate. Impacts of these changes are likely to be felt across many regulated communities.

Notes

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1. 40 C.F.R. Part 1500.

2. Council on Environmental Quality, National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442-35577 (May 1, 2024).

3. Pub. L. No. 118-5 (June 3, 2023).

4. 89 Fed. Reg. at 35442.
5. 42 U.S.C. § 4332(c).
6. Specifically, it amended Section 102(2)(C) and added Sections 102(2)(D) through (F) and Sections 106 through 111. 89 Fed. Reg. at 35443 (citing 42 U.S.C. 4332(2)(C)-(D), 4336-4336e.).
7. 40 C.F.R. § 1500.1(a)(1)(i)-(vi).
8. 40 C.F.R. § 1500.1(b).
9. 40 C.F.R. § 1500.2(a)-(c).
10. Earlier this year, a mining company filed suit seeking to take advantage of this new statutory NEPA provision in the District Court for the District of Columbia. Signal Peak Energy LLC v. Haaland; case number 1:24-cv-00366 (D.D.C.). The company recently filed a motion for injunction in that case alleging that the Office of Surface Mining Reclamation and Enforcement (OSMRE) has retaliated against the company for filing the suit by halting further review of its mine plan approval and demanding that the company withdraw its challenge before OSMRE would resume work.
11. 40 C.F.R. § 1500.2(d).
12. 40 C.F.R. § 1508.1(f).
13. EPA Environmental Justice, at https://www.epa.gov/environmentaljustice.
14. 40 C.F.R. § 1508.1(f).
15. 40 C.F.R. § 1508.1(f).
16. 40 C.F.R. § 1501.1(a)-(e).
17. 40 C.F.R. § 1501.3(a).
18. 40 C.F.R. § 1501.3(a)(1)-(5).
19. 40 C.F.R. § 1501.3(b).
20. 40 C.F.R. § 1501.3(b).
21. 40 C.F.R. § 1501.3(c).
22. 40 C.F.R. § 1501.3(d).
23. 40 C.F.R. § 1501.3(d)(2)(ii).
24. 42 U.S.C. § 4336c.
25. 40 C.F.R. § 1501.4(a).
26. 40 C.F.R. § 1501(c).
27. 40 C.F.R. § 1501.4(d).
28. 40 C.F.R. § 1501.9.
29. 40 C.F.R. § 1501.9(c).
30. 40 C.F.R. § 1501.9(d).
31. 40 C.F.R. § 1501.10(a).
32. 40 C.F.R. § 1501.10(b).
33. 40 C.F.R. § 1501.10(b)(3).
34. 40 C.F.R. § 1501.10(d).
35. 40 C.F.R. § 1501.11(a).
36. 40 C.F.R. § 1501.11(a).
37. 40 C.F.R. § 1501.11(a)(2).

38. 40 C.F.R. § 1501.11(c).
39. 40 C.F.R. § 1501.11(b).
40. 40 C.F.R. § 1501.11(b)(1).
41. 40 C.F.R. § 1508.1(w)(1)(i)-(v).
42. 40 C.F.R. § 1508.1(w).
43. 40 C.F.R. § 1508.1(w).
44. 42 U.S.C. § 4336e(10).
45. 40 C.F.R. § 1502.1(a).
46. 40 C.F.R. § 1502.4(a)-(c).
47. 40 C.F.R. § 1502.4(e)(9).
48. 40 C.F.R. § 1502.7.
49. 40 C.F.R. § 1502.12.
50. 40 C.F.R. § 1502.11(g).
51. 40 C.F.R. § 1502.9(d).
52. 40 C.F.R. § 1502.14(a).
53. 40 C.F.R. § 1502.14(a).
54. 40 C.F.R. § 1502.14(a).
55. 40 C.F.R. § 1502.15(b).
56. 89 Fed. Reg. at 35481.
57. 40 C.F.R. § 1502.16.
58. 40 C.F.R. § 1502.16(a)(2).
59. 40 C.F.R. § 1502.16(a).
60. 40 C.F.R. § 1502.16(a)(6)-(7).
61. 40 C.F.R. § 1502.16(a)(13).
62. Prior 40 C.F.R. § 1503.3.
63. 89 Fed. Reg. at 35453-54.
64. 40 C.F.R. § 1503.4(a).
65. 40 C.F.R. § 1504.1.
66. 40 C.F.R. § 1504.2.
67. 40 C.F.R. § 1504.2(c).
68. 40 C.F.R. § 1505.2.
69. 40 C.F.R. § 1505.2(c).
70. 40 C.F.R. § 1505.2(c).
71. 40 C.F.R. § 1505(d)(1)-(6).
72. 40 C.F.R. § 1505.3(b).
73. 89 Fed. Reg. at 35530.
74. 42 U.S.C. § 4332.
75. 40 C.F.R. § 1506.1(b).
76. 40 C.F.R. § 1506.1(c).
77. 40 C.R.R. § 1506.1(c).
78. 40 C.F.R. § 1506.3(b).
79. 40 C.F.R. § 1506.3(b)(1).
80. 40 C.F.R. § 1506.3(c).
81. 40 C.F.R. § 1506.3(d).

82. 40 C.F.R. § 1506.3(d)(1).
83. 40 C.F.R. § 1506.5(b)(2).
84. 42 U.S.C. § 4336a(f); 40 C.F.R. § 1506.5(c).
85. 40 C.F.R. § 1506.5(c)(4).
86. 40 C.F.R. § 1506.6(b).
87. 40 C.F.R. § 1506.6(d).
88. 40 C.F.R. § 1507.3.
89. 40 C.F.R. § 1507.3(b)(8).
90. 40 C.F.R. § 1507.3(b)(12).
91. 40 C.F.R. § 1507.3(b)(12)(i)-(iii).
92. 40 C.F.R. § 1507.2(a).
93. 40 C.F.R. § 1508.1(f).
94. 40 C.F.R. § 1508.1(m).
95. 40 C.F.R. § 1508.1(i)(4).
96. 40 C.F.R. § 1508.1(o).
97. 40 C.F.R. § 1508.1(w).