

 **Columbia Law School** | COLUMBIA CLIMATE SCHOOL
SABIN CENTER FOR CLIMATE CHANGE LAW

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Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Submitted Via *Regulations.gov*

Re: National Environmental Policy Act Implementing Regulations Revisions Phase 2
(Docket Number CEQ-2023-0003)

To whom it may concern:

The Sabin Center for Climate Change Law (Sabin Center) at Columbia Law School submits these comments in response to the Notice of Proposed Rulemaking for the Phase 2 Revisions to the National Environmental Policy Act (NEPA) implementing regulations (Proposed Rule).¹

The Sabin Center strongly supports adoption of the Proposed Rule, which contains numerous provisions aimed at enhancing the quality and transparency of federal environmental reviews. We commend the Council on Environmental Quality (CEQ) for including provisions that will help federal agencies comply with their legal obligations to account for climate change and greenhouse gas (GHG) emissions when conducting NEPA reviews. While the Proposed Rule contains many important and much needed reforms, we wish to highlight four key changes that are essential for sound decision-making in the context of climate change:

- **Consideration of global context:** The Proposed Rule directs agencies to consider the global context, in addition to national, regional, and local contexts, when evaluating environmental impacts.² CEQ explicitly refers to fossil fuel extraction leases and pipeline approvals as

¹ National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924 (July 31, 2023) [hereinafter “Proposed Rule”].

² *Id.* at 49965 (amending § 1501.3).

examples of federal actions that have reasonably foreseeable global effects attributable to GHG emissions.³ We agree that consideration of the global context is essential in order for agencies to meaningfully and rationally assess the effects and significance of GHG emissions.⁴

- **Accounting for the effects of climate change on federal actions, and the implications for environmental impacts and mitigation:** The Proposed Rule clarifies that agencies should consider reasonably foreseeable future climate conditions in the local area that will be affected by their proposed actions, rather than merely describing general climate change trends at a global or national level.⁵ Consideration of local climate change impacts is necessary in order to provide an accurate baseline assessment of the affected environment. The Proposed Rule also appropriately directs agencies to connect the description of the baseline environmental conditions and reasonably foreseeable trends to their analysis of environmental consequences and mitigation measures.⁶ These provisions will help to ensure that agency analyses of climate change impacts are useful and actionable, and thus can inform decisions about whether and how to proceed with federal actions.
- **Best available science:** The Proposed Rule directs agencies to account for the best available science when characterizing the environmental baseline and evaluating project impacts.⁷ This requirement will help promote integrity in agencies' scientific analyses.⁸ However, as noted below, we believe there are some sections where the language surrounding scientific requirements for NEPA analyses should be strengthened.
- **Programmatic NEPA reviews:** The Proposed Rule provides greater clarity on the contexts in which agencies can utilize, as well as the requirements for, programmatic environmental documents and tiering. For example, it clarifies that programmatic documents can be used for Environmental Assessments (EAs) as well as Environmental Impact Statements (EISs), and that they can be used "thematically or by sector" including for actions that have "relevant

³ *Id.* at 49935.

⁴ For more information on the need to consider global context in NEPA reviews, see MICHAEL BURGER ET AL., INCORPORATING CLIMATE CHANGE IN NEPA REVIEWS: RECOMMENDATIONS FOR REFORM (2022), https://scholarship.law.columbia.edu/sabin_climate_change/190/.

⁵ Proposed Rule, *supra* note 1, at 49977 (amending §1502.15).

⁶ *Id.*

⁷ *Id.* at 49977-78 (amending §§1502.15, 1502.23).

⁸ See Burger et al., *supra* note 4.

similarities” and “common...impacts.”⁹ Expanded use of programmatic reviews can help promote sound decision-making on climate change, particularly where agencies use programmatic analyses to evaluate environmental impacts such as GHG emissions on a broad scale, and to identify and implement programmatic mitigation measures. Additionally, programmatic reviews can also be used to streamline and expedite the review of critical projects, without compromising the NEPA process.

Although we strongly support the Proposed Rule, we believe it could be further strengthened in some respects. We recommend that CEQ incorporate several additional elements into the Proposed Rule to further enhance the quality, transparency, and consistency of agency analyses related to GHG emissions and climate change, specifically:

- **Consideration of climate change in EAs:** We encourage CEQ to incorporate more specific directives regarding the scope and content of EAs, particularly with regards to the analysis of environmental impacts, alternatives, and mitigation measures.
- **Significance determinations for GHG emissions:** We encourage CEQ to adopt a quantitative threshold or standard test for agencies to use when evaluating the significance of GHG emissions, either as part of these regulatory amendments or in a separate guidance document.¹⁰ Alternatively or in addition, CEQ could incorporate more general guidelines on how agencies should evaluate the “context” and “intensity” of environmental effects that would provide parameters for agency assessments of GHG significance.
- **Use of scientific data and models:** We recommend that CEQ adopt stronger language related to the use of the “best available science” and the disclosure of scientific assumptions and limitations, for example, by specifying that agencies “shall” disclose relevant assumptions or limitations.

We provide further detail on these recommendations below.

⁹ Proposed Rule, *supra* note 1, at 49943-45; 49973 (amending §1501.11).

¹⁰ The Sabin Center also included this recommendation in its comments on CEQ’s Interim NEPA Climate Guidance. See Sabin Center for Climate Change Law, *Comments on CEQ’s Interim Guidance on Consideration of Greenhouse Gas Emissions and Climate Change in NEPA Agency Reviews* (submitted April 10, 2023), [https://climate.law.columbia.edu/sites/default/files/content/Sabin%20Center_CEQ%20NEPA%20Guidance%20-%20Comment%20\(final_attachments\).pdf](https://climate.law.columbia.edu/sites/default/files/content/Sabin%20Center_CEQ%20NEPA%20Guidance%20-%20Comment%20(final_attachments).pdf).

1. Consideration of Climate Change in EAs

The NEPA implementing regulations currently state that an EA should be conducted where a proposed federal action “is not likely to have significant [environmental] effects or when the significance of the effects is unknown” (unless a categorical exclusion applies or the agency proceeds directly to prepare an EIS).¹¹ The regulations provide federal agencies with little guidance on conducting EAs, stating only that EAs must “[b]riefly discuss the purpose and need for the proposed action, alternatives . . . and the environmental impacts of the proposed action and alternatives.”¹² Although the Proposed Rule includes some important amendments to the EA regulations (e.g., requiring an opportunity for public comment on draft EAs), it does not incorporate additional criteria or directives related to the scope and content of the environmental impact analysis.

CEQ’s 2016 Climate Guidance directed agencies to account for both GHG emissions and the effects of climate change in EAs (as well as EISs).¹³ CEQ’s 2023 interim climate guidance does the same, and provides additional, valuable instructions to agencies on ensuring robust analysis of GHG emissions and climate change effects.¹⁴ Importantly, however, CEQ guidance does not have the same legal force as a regulation and agency practice may deviate from it. A 2019 Sabin Center survey of EAs issued in connection with fossil fuel projects found significant variation in the nature and extent of agencies’ climate change analysis.¹⁵ For example:

- While all of the surveyed EAs included a quantitative estimate of GHG emissions generated directly by the project under review, only some quantified indirect emissions (e.g., associated with upstream and downstream activities).¹⁶
- The surveyed EAs used different methodologies to calculate project-related GHG emissions. When estimating downstream emissions (i.e., from the end use of fossil fuels), most EAs did

¹¹ 40 C.F.R. § 1501.5(a).

¹² *Id.* § 1501.5(c)(2).

¹³ Memorandum from Christina Goldfuss, Council on Environmental Quality, for Heads of Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (Aug. 1, 2016).

¹⁴ National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan 9, 2023).

¹⁵ MADELINE SIEGEL & ALEXANDER LOZNAK, SURVEY OF GREENHOUSE GAS CONSIDERATIONS IN FEDERAL ENVIRONMENTAL IMPACT STATEMENTS AND ENVIRONMENTAL ASSESSMENTS FOR FOSSIL FUEL-RELATED PROJECTS (2019).

¹⁶ *Id.* at 20-22.

not account for the effect of proposed fossil fuel production on energy markets, prices, and consumption patterns.¹⁷

- Most of the surveyed EAs did not compare estimated GHG emissions from the proposed action and reasonable alternatives.¹⁸ None of the EAs discussed mitigation measures or alternative actions to avoid or minimize GHG emissions.¹⁹

The above findings suggest that regulatory amendments or more detailed guidelines are needed to ensure that federal agencies meaningfully account for climate change when conducting EAs. In addition, establishing a significance threshold or test for GHG emissions, as recommended below, would help ensure that federal agencies conduct a comprehensive assessment of environmental impacts from actions that generate significant quantities of GHGs.

We recommend that CEQ amend 40 C.F.R. § 1501.5(c) to clarify that agencies, when preparing an EA, shall:

- consider the same scope of environmental effects that they would consider in a full EIS, including indirect effects such as the downstream emissions from the consumption of fossil fuels produced or transported as a result of a federal action;
- provide decision-makers with an adequate summary and comparison of impacts under different alternatives, including a comparison to the no-action alternative; and
- consider alternatives or mitigation measures to address adverse environmental effects, such as those associated with GHG emissions.

Although an EA need not contain the same level of detail as an EIS, agencies do at least need to consider these issues in order to assess the significance of impacts and determine whether a full EIS is required under NEPA. To the extent that there is variation in terms of how agencies should treat climate change and GHG emissions in EAs and EISs, this could be further addressed through revisions to the 2023 interim climate guidance.

¹⁷ *Id.* at 22-24.

¹⁸ *Id.* at 26.

¹⁹ *Id.* at 26-27.

2. Significance Determinations for GHG Emissions

CEQ should consider adopting a quantitative significance threshold or standard test for GHG emissions to help federal agencies determine the appropriate level of NEPA review, evaluate environmental impacts, and identify mitigation measures. We have previously recommended that a significance threshold be incorporated into CEQ's guidance on NEPA and climate change,²⁰ but a threshold or test could also be introduced via regulatory amendments.

We recognize that this action would be somewhat unusual, as CEQ has not adopted numeric thresholds or standard tests for assessing the significance of other types of environmental impacts. However, there is precedent for the use of quantitative significance metrics. For example, federal agencies sometimes rely on quantitative metrics, such as air quality thresholds, to assess the significance of impacts,²¹ and local agencies in California have been using significance thresholds to evaluate the significance of GHG emissions for several years.²²

A regulatory threshold or test that applies across different agencies and project types would also be justified in light of several considerations:

- Unlike many other impacts considered in NEPA reviews, GHG emissions have the same effect on global climate change regardless of local environmental conditions.
- Many agencies have expressed uncertainty about how to assess the significance of GHG emissions due to the global nature of climate change and the lack of significant thresholds for GHG emissions.²³
- In the absence of a numeric threshold, federal agencies often conclude that emissions are insignificant (in some cases still drawing comparisons to national or global GHG emissions despite CEQ guidance that this is inappropriate) or they simply do not reach a conclusion on the issue of significance. This is true even in the context of fossil fuel projects that will generate

²⁰ Sabin Center Comments, *supra* note 10.

²¹ See, e.g., NPS, *Technical Guidance on Assessing Impacts to Air Quality in NEPA and Planning Documents* (January 2011).

²² See, e.g., Bay Area Air Quality Management District, *CEQA Thresholds and Guidelines Update*, <https://www.baaqmd.gov/plans-and-climate/california-environmental-quality-act-ceqa/updated-ceqa-guidelines>

²³ See, e.g., BLM, *Alpine Satellite Development Plan for the Proposed Greater Mooses Tooth 2 Development Project FEIS* (2018) at 306 (“Climate change is by its very nature a cumulative global problem, and no single project or action contributes a significant amount of greenhouse gases when compared to global greenhouse gas emissions. Specific thresholds for greenhouse gas emissions have not been established by the EPA, and thus there is no threshold of significance against which to compare project-level greenhouse gas emissions to determine major, moderate, or minor impacts.”).

millions of tons of GHG emissions and thus clearly exceed any reasonable threshold of significance.²⁴

Adoption of a numeric threshold or test would be useful insofar as it would standardize agency practice and ensure that EISs are prepared and mitigation measures are considered for all projects with significant GHG impacts. If CEQ were to adopt a numeric threshold, it could address concerns about administrative burden and legal defensibility by specifying a relatively high threshold at which emissions are presumed to be significant (e.g., 100,000 tons per year of CO₂-equivalent), while recognizing that GHG emissions below this threshold *may* also be significant. As an alternative to adopting a numeric threshold, CEQ could adopt a standardized test for assessing the significance of GHG emissions. There are already established tests that CEQ could look to, including the “Climate Test” which was developed by scientists at the Natural Resources Defense Council and “provides a metric to determine the extent to which the anticipated . . . GHG emissions [from a proposed federal action] are consistent or inconsistent with holding warming to 1.5°C” in line with the goals of the Paris Agreement.²⁵

In addition, CEQ could adopt more general criteria for significant determinations aimed at improving the analysis of a wide range of environmental impacts, including but not limited to GHG emissions. In particular, Section 1501.3(d) could be further amended to specify that:

- When evaluating the intensity of impacts, agencies shall consider the full scope of impact in terms of affected geographic areas, environmental processes, natural and biological resources, ecosystems, people, communities, and infrastructure, including transboundary impacts.
- When evaluating intensity, agencies shall also evaluate whether impacts will contribute to complex hazards, systemic risks, and/or cascading processes, i.e., by generating adverse impacts or risks that spread within and across systems and sectors.

²⁴ See, e.g., BLM Alton Coal Tract Lease EA (2018), Appendix L, at 100 (finding that 11,337,750 metric tons of CO₂-equivalent attributable to a coal lease was insignificant because it was only a small fraction of total global emissions). See also Siegel & Loznak, *supra* note 15, at 28 (between 2017 and 2018, federal agencies issued at least ten findings of no significant impact (FONSIs) for fossil fuel leases that would cumulatively contribute between 640 and 668 million metric tons of CO₂-equivalent).

²⁵ For a discussion of the Climate Test Tool, see Letter from Jeremy Lieb, EarthJustice, et al., to Stephanie Rice, Bureau of Land Management (Aug. 29, 2022). BLM used this tool in its final supplemental analysis of the Willow Project, after receiving comments urging it to do so, and BLM found that CO₂ emissions were significant under all project alternatives other than the “no action” alternative. BLM, Willow Master Development Plan FEIS (2023), Chapter 3.2, Appendix E.2.

- As part of the analysis of environmental justice (Section 1501.3(d)(2)(ix)), agencies shall consider whether impacts may disproportionately affect people and communities that are not direct beneficiaries of the action, including people and communities in other jurisdictions.

These amendments would help to ensure that agencies meaningfully evaluate the significance of GHG emissions as well as a wide array of other environmental impacts, particularly those which contribute to complex and pervasive environmental problems.

3. Strengthening Mandates Related to Scientific Analysis

The Proposed Rule includes important language aimed at ensuring federal agencies use the “best available science” and that they fully disclose scientific information and assumptions in NEPA reviews. We support the inclusion of this language but we believe that CEQ should also strengthen the language in these sections, specifically:

- Section 1502.23 (“Methodology and scientific accuracy”) subpart (a) should be amended as follows: “Agencies ~~should~~ shall explain any relevant assumptions or limitations of the information or the particular model or methodology selected for use.”
- Section 1502.15 (“Affected Environment”) subpart (b) should be amended as follows: “Agencies ~~should~~ shall use high-quality information, including the best available science and data to describe reasonably foreseeable environmental trends, including anticipated climate-related changes to the environment, and when such information is lacking provide relevant information consistent with § 1502.21. This description of baseline environmental conditions and reasonably foreseeable trends ~~should~~ shall inform the agency's analysis of environmental consequences and mitigation measures (§ 1502.16).”

This language would clarify that these are mandatory requirements for all federal agencies and NEPA reviews.

4. Conclusion

We appreciate this opportunity to comment on the Proposed Rule for the Phase 2 revisions to the NEPA implementing regulations. We believe that the proposal already contains many

important provisions that will improve the quality of NEPA reviews and agency decision-making, and that it could be further strengthened through the amendments recommended above.

Sincerely,

/s/ Romany Webb

Romany M. Webb
Deputy Director, Sabin Center for Climate Change Law
Research Scholar, Columbia Law School
Email: rwebb@law.columbia.edu

Michael Burger
Executive Director, Sabin Center for Climate Change Law
Senior Research Scholar, Columbia Law School
Email: mburger@law.columbia.edu

Jessica Wentz
Non-Resident Senior Fellow, Sabin Center for Climate Change Law
Email: jess.wentz@gmail.com