



DESERT TORTOISE COUNCIL

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Via <https://www.regulations.gov>

September 29, 2023

Amy B. Coyle, Deputy General Counsel
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

RE: Proposed Revisions to NEPA Regulations – Phase 2 (Docket Number CEQ–2023–0003)

Dear Ms. Coyle,

The Desert Tortoise Council (Council) is a non-profit organization comprised of hundreds of professionals and laypersons who share a common concern for wild desert tortoises and a commitment to advancing the public’s understanding of desert tortoise species. Established in 1975 to promote conservation of tortoises in the deserts of the southwestern United States and Mexico, the Council routinely provides information and other forms of assistance to individuals, organizations, and regulatory agencies on matters potentially affecting desert tortoises within their geographic ranges.

Both our physical and email addresses are provided above in our letterhead for your use when providing future correspondence to us. When given a choice, we prefer to receive emails for future correspondence, as mail delivered via the U.S. Postal Service may take several days to be delivered. Email is an “environmentally friendlier way” of receiving correspondence and documents rather than “snail mail.

We appreciate this opportunity to provide comments on the above-referenced proposed revised regulation. Please accept, carefully review, and include in the administrative record the Council’s following comments for the proposed revised regulations.

The Council on Environmental Quality (CEQ) proposes to revise its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA), including the implementation of the Fiscal Responsibility Act's (FRA) amendments to NEPA. CEQ is proposing these changes in response to several lawsuits filed against CEQ about the NEPA regulations that

were modified in 2020 and to comply with Executive Order 13990 “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis” issued on January 20, 2021. Some of these revisions include:

- Modifying wording to provide consistency and improve clarity especially with respect to the purpose and goals in the statute, reinstate severability, and add language that assures a more accessible and transparent process to the public
- Requiring schedules for completing environmental assessments and environmental impact statements
- Requiring agencies to conduct a rigorous analysis and consideration of alternatives, consistent with the longstanding principle that agencies take a “hard look” at their actions fully explore the reasonable alternatives to their proposed actions; CEQ would not require agencies to consider alternatives outside their jurisdiction or preclude agencies from doing so
- Identifying an environmentally preferable alternative as newly defined in these regulations
- Encouraging agencies to use high-quality information, including best available science and data, in recognition that these should inform all agency decisions
- Requiring a discussion of reasonably foreseeable environmental effects including climate change-related effects, and requiring agencies to address any risk reduction, resiliency, or adaptation measures (e.g., wildfire risk, extreme heat, extreme weather events, drought, flood risk, loss of historic and cultural resources and food scarcity) included in the proposed action and alternatives
- Promoting the use of high-quality information including best available science and reliable data, models, and resources, and using projections when evaluating reasonably foreseeable effects, including climate change-related effects
- Requiring agencies to prepare a monitoring and compliance plan for mitigation relied upon in a decision
- Requiring agencies to publicly disclose when they are adopting a Categorical Exclusion determination
- Authorizing Federal agencies to pursue innovative approaches to comply with NEPA and the regulations in order to address extreme environmental challenges
- Adding environmental assessments as documents for which a Notice of Intent may be published

Many of the proposed changes would return the wording to the 1978 regulations.

CEQ is requesting comments from the public on revisions to the regulations, In addition, it requests comments on specific changes to the regulations:

- Whether CEQ should codify its 2023 NEPA guidance on greenhouse gases and climate change as part of the final rule
- Whether CEQ should provide additional guidance on the “no action” alternative
- Whether CEQ’s definition of “environmental justice” is appropriate
- Requiring agencies to consider effects of proposed projects on the rights of Tribal Nations
- Whether CEQ should further clarify when something is a “major federal action.”

- Whether the proposed definition of “significant effects” as *adverse effects* [emphasis added] identified by an agency as significant based on the criteria set forth in § 1501.3(d) should be adopted. This would clarify that beneficial effects are not significant effects as the phrase is used in NEPA and, therefore, do not require an agency to prepare an environmental impact statement.

Comments on the Proposed Regulation

Science, Mitigation, and Monitoring: CEQ proposes the revisions to the NEPA regulations to “provide for sound decision making grounded in science,” We request that CEQ place a consistent emphasis and requirement on the use of science throughout the NEPA regulations in (1) developing the proposed action and alternatives, (2) analyzing the direct, indirect, and cumulative impacts to affected resource issues, (3) developing and implementing effective mitigation to successfully achieve its purpose, and (4) designing and implementing a plan to monitor the mitigation.

The 1978 language in the regulations (the last major revision to the NEPA regulations prior to the 2020 revision) was not clear in this requirement that NEPA processes and decisions be science-based. We contend the 2023 revised regulations are not clear. For example, in 40 CFR 1500(b), CEQ says, “[t]he information *should* [emphasis added] be of high quality, science-based, and accessible.” In 40 CFR 1502.15(b), CEQ says, “[a]gencies *should* [emphasis added] 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.” The word “should” indicates this is not a requirement. Given the availability of scientific research in peer-reviewed journals on the Internet, scientific information is easily accessible to Federal agencies/anyone preparing a NEPA document and available to the public. This accessibility/availability means Federal agencies are able to easily access this information and include it in NEPA documents. The Council affirms that scientific data should always be the foundation for making decisions in NEPA documents. We request that CEQ revise the revised regulations to ensure that the appropriate wording is used to require rather than suggest the use of science.

In addition, we request that the NEPA implementing regulations require that mitigation and monitoring be science-based. For example, the revised language on mitigation does not include the word “effective.” In our experience, Federal agencies include mitigation in the NEPA document (e.g., revegetation of areas that will experience temporary surface disturbance in southwest deserts) but the methodology proposed will not result in effective revegetation because it is not science-based. The results of numerous studies on the most effective methods to revegetate areas with surface disturbance in desert environments have been reported in scientific literature. Unfortunately, Federal agencies continue to describe and implement measures that are ineffective because they are not science-based. Consequently, CEQ should modify the regulations to *require* Federal agencies to use the most recent science in the development and implementation of *effective* mitigation and to monitor its effectiveness using a science-based monitoring plan.

We suggest adding to the definition of mitigation (40 CFR 1508.1(w)) so it says, “*Mitigation* means implementing effective measures that avoid, minimize, or compensate for effects caused by a proposed action or action alternatives as described in an environmental document or decision document and that have a connection to those effects. To be effective, any proposed mitigation shall be developed and implemented using current scientific knowledge, and its effectiveness shall be monitored using a science-based monitoring plan to ensure the mitigation achieves the intended results.”

Consideration of Alternatives: In 40 CFR 1502.14(a), CEQ is requiring agencies to conduct a rigorous analysis and consideration of alternatives, consistent with the longstanding principle that agencies take a “hard look” at their actions and fully explore the reasonable alternatives to their proposed actions. However, CEQ would not require an agency to consider alternatives outside its jurisdiction, nor would it preclude agencies from doing so.

Our experience with Federal agencies is, if it is not required, it will not be implemented usually to save time and effort. Consequently, CEQ’s revised regulations to not require agencies to consider alternatives outside their jurisdiction effectively guarantees that agencies will not do this. Because there are court decisions that require this consideration in developing alternatives, we assert that CEQ should revise the revised regulations and to say, “[a]gencies shall consider whether there are reasonable alternatives not within the jurisdiction of the lead agency that would satisfy the purpose and need. If there are, they shall be included in the NEPA document.”

Reasonably Foreseeable Effects including Climate Change: We applaud CEQ for adding the requirement to the NEPA regulations that reasonably foreseeable effects including those from climate change are analyzed in the NEPA document. Climate change should be considered and analyzed in all environmental assessments and environmental impact statements. Requiring the inclusion of reasonably foreseeable effects ensures that the analysis of effects conducted by Federal agencies will not end at the termination of construction but will include the operation and maintenance of proposed actions into the future as reasonably predicted by scientific models, etc.

Environmental Consequences: In 40 CR 1502.16, CEQ proposes the revised regulations to say, “[t]he environmental consequences section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA that are within the scope of the environmental impact statement...” “The comparison of the proposed action and reasonable alternatives shall be based on the discussion of the effects.” “An analysis of the effects of the no action alternative, including any adverse environmental effects.” In 40 CFR 1502(c), “[e]nvironmental impact statements shall be analytical...”

We note that the Federal agency must conduct an analysis of the effects of the no action alternative but is not required to conduct an analysis of effects of the proposed action or other action alternatives, only a discussion. The Council contends that Federal agencies should analyze all alternatives, not just the no action alternative, regarding effects to relevant resource issues. “Analyze” and “discuss” are not synonyms as analyze means to “discover or reveal (something) through detailed examination” or to “examine methodically and in detail the constitution or structure of (something, especially information), typically for purposes of explanation and

interpretation” whereas discuss means to “talk or write about (a topic) in detail.” In keeping with CEQ’s emphasis of making science-based decisions when implementing NEPA, NEPA documents should analyze environmental consequences as this process is science-based. We strongly recommend that CEQ consistently use the word “analyze” throughout the NEPA regulations on environmental consequences and not use “analyze” for some parts and “discuss” for others.

Comments on Specific Changes to the Regulations as Requested by CEQ

Codify CEQ’s 2023 NEPA guidance on greenhouse gases and climate change: The Council strongly supports making this guidance part of the NEPA implementing regulations so it will be required to implement. Our experience is that Federal agencies do not implement “guidance.” Please see our comments that follow on cumulative effects.

Codify CEQ’s 1997 NEPA guidance on cumulative effects analysis: CEQ issued “Considering Cumulative Effects under the National Environmental Policy Act” in 1997. We strongly encourage CEQ codify this document as part of the NEPA implementing regulations and make this guidance mandatory. Although the Council only reviews about 45 NEPA documents annually, our experience with Federal agencies preparing cumulative effects analysis in NEPA documents is that they do not follow this guidance. Their cumulative effects section, if it is included in a NEPA document, is limited in area to the project footprint and the percentage of each resource that will be lost from implementation of the proposed action. They do not consider the arrangement of the resource (e.g., connectivity), the future survival/persistence of the resource, synergistic effects, and interactive effects. They do not *analyze* the impacts; they merely describe what will remain after construction is completed.

Whether CEQ should provide additional guidance on the “no action” alternative: We suggest that the no action alternative be added to the 40 CFR 1508.1 Definitions. In this definition, we suggest wording that clarifies that the no action alternative is the baseline and is not considered one of the action alternatives. We recently reviewed an environmental assessment with only two alternatives, the no action alternative and the proposed action. In the EA, the agency stated the no action alternative was the other alternative to the proposed action that the agency’s NEPA manual required. NEPA regulations should clearly define the difference between the action alternatives and no action alternative, and that more than one action alternative should be analyzed in an environmental assessment or environmental impact statement.

Limiting the definition of “significant effects” as *adverse effects* [emphasis added] and beneficial effects do not require an agency to prepare an EIS: The Council supports this change. However, we are unsure this change is allowed under NEPA. CEQ says in the regulations that “section 102(2)(C) of NEPA, environmental impact statements are to be included in every Federal agency recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” Based on this information, NEPA apparently does not distinguish between significant beneficial effects and significant adverse effects. Consequently, we are unable to support this change in the regulations as it appears to contradict the statute.

We appreciate this opportunity to provide the above comments and trust they will help conserve natural and cultural resources including tortoises when implemented. The Desert Tortoise Council wants to be identified as an Affected Interest for the proposed NEPA regulations and requests to be added to the list of Interested Parties regarding future actions proposed by CEQ about NEPA. The Council's contact information is listed above in our letterhead.

Respectfully,



Edward L. LaRue, Jr., M.S.
Chairperson, Ecosystems Advisory Committee

Literature Cited

[CEQ] Council on Environmental Quality. 1997. Considering Cumulative Effects under the National Environmental Policy Act.
https://ceq.doe.gov/publications/cumulative_effects.html