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Public Interest Comment¹ on

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National Environmental Policy Act Implementing Regulations

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The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Council on Environmental Quality's proposed rule revising its National Environmental Policy Act implementing regulations does not represent the views of any particular affected party or special interest but is designed to evaluate the effect of CEQ's proposal on overall consumer welfare.

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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Introduction

On October 7, 2021, the Council on Environmental Quality (CEQ) issued a notice of proposed rulemaking (NPRM) to revise its National Environmental Policy Act (NEPA) implementing regulations.³ Under President Biden, CEQ is proposing these changes to restore regulatory provisions that existed before the Trump administration modified them in 2020.⁴ This public comment briefly summarizes the background on CEQ’s NEPA regulations, offers feedback on two proposed revisions in the NPRM, and discusses how CEQ can align its NEPA regulations with analytical best practices.

Background on NEPA Rulemaking⁵

The National Environmental Policy Act of 1969 altered the way that federal agencies consider the environmental effects of their actions and created CEQ. NEPA establishes a national policy on the environment and aims to promote “efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”⁶ Federal agencies that take a “major federal action” must, under NEPA, consider whether their action might significantly affect the quality of the human environment.⁷ To incorporate potential environmental concerns into their actions and processes, agencies conduct environmental reviews that may involve three levels of analysis—categorical exclusions (CE), environmental assessments (EA), and environmental impact statements (EIS).⁸ An EIS represents the most extensive review under NEPA and is used when an action is anticipated to have significant environmental impacts. Although NEPA and its implementing regulations require certain procedural steps, agencies retain discretion over their decision-making on the substance of actions subject to NEPA.⁹

Initially, each affected agency designed its own procedures for complying with NEPA, in some cases issuing guidance to the public and in other cases using notice-and-comment rulemaking. In

³ CEQ, “National Environmental Policy Act Implementing Regulations Revisions,” 86 FR 55757, October 7, 2021, <https://www.federalregister.gov/d/2021-21867>.

⁴ 86 FR 55757.

⁵ This section draws from my previous public comments on CEQ’s 2018 ANPRM and its 2020 NPRM. Available at: <https://regulatorystudies.columbian.gwu.edu/council-environmental-quality-implementing-nepa>; <https://regulatorystudies.columbian.gwu.edu/ceqs-proposed-update-nepa>.

⁶ 42 USC § 4321 (2019). Available at: <https://www.govinfo.gov/content/pkg/USCODE-2019-title42/pdf/USCODE-2019-title42-chap55.pdf>.

⁷ 42 USC § 4332 (2019).

⁸ EPA, “National Environmental Policy Act Review Process,” accessed November 13, 2021, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>.

⁹ CRS, “The National Environmental Policy Act (NEPA): Background and Implementation,” January 10, 2011, p. 8. Available at: <https://crsreports.congress.gov/product/pdf/RL/RL33152>.

order to harmonize practices across agencies and to avoid conflicting interpretations of the statute, President Carter directed CEQ to issue government-wide NEPA regulations and ordered agencies to comply with them.¹⁰ The Supreme Court in *Sierra Club v. Andrus* asserted that the 1978 CEQ regulations deserved substantial deference, and they have been enforced by the courts ever since.¹¹

In August 2017, President Trump issued Executive Order (EO) 13807, which specifically directed CEQ to develop a list of actions to modernize the environmental review process.¹² In June 2018, CEQ published an advance notice of proposed rulemaking, requesting comments on potential revisions to update or clarify NEPA regulations, followed by a proposed rule in January 2020.¹³ In July 2020, CEQ published a final rule that made the first substantive revisions to its NEPA implementing regulations since 1986.¹⁴

Since the final rule's publication, several groups have filed lawsuits, resulting in temporary stays in court.¹⁵ Further, President Biden issued EO 13990 on his first day in office, which directed agencies to review regulations issued during the Trump administration to determine whether they met the goals of improving public health, making science-based decisions, and protecting the environment. Biden also revoked EO 13807 and in an accompanying fact sheet specifically directed CEQ to review the 2020 NEPA regulations for consistency with the new objectives of EO 13990.¹⁶ Following these directives, CEQ has begun a comprehensive review "to ensure that [the 2020 NEPA regulations] provide for sound and efficient environmental review of Federal actions, including those actions integral to tackling the climate crisis, in a manner that enables meaningful

¹⁰ Executive Order 11991, "Environmental Impact Statements," May 24, 1977. Available at: Gerhard Peters and John T. Woolley, The American Presidency Project <https://www.presidency.ucsb.edu/node/243181>.

¹¹ See, Brian F. Mannix and Bridget C.E. Dooling, "Codifying the Cost-Benefit State," Gray Center Working Paper 19-19, September 2019, <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2019/09/Mannix-Dooling-Working-Paper-19-19.pdf>.

¹² Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," August 15, 2017, 82 FR 40463, <https://www.federalregister.gov/d/2017-18134>.

¹³ 83 FR 28591, <https://www.federalregister.gov/d/2018-13246>.

¹⁴ 85 FR 43304. Also see, 51 FR 15618. Available at: <https://ceq.doe.gov/docs/laws-regulations/FR-1986-04-25-51-FR-15618-CEQ-NEPA-Regulations-NOFR-amending-1502-22.pdf>.

¹⁵ 86 FR 55758.

¹⁶ Executive Order 13990. "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," January 25, 2021, 86 FR 7037, <https://www.federalregister.gov/d/2021-01765>; White House Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

public participation, respects Tribal sovereignty, protects our Nation’s resources, and promotes better environmental and community outcomes.”¹⁷

Under President Biden, CEQ is planning to revise its NEPA implementing regulations in two stages. The Phase 1 rulemaking—CEQ’s current NPRM—is proposing changes to several provisions that “pose significant near-term interpretation or implementation challenges for Federal agencies.”¹⁸ Subsequently, a Phase 2 rulemaking would propose broader changes to the 2020 regulations. The following discussion in this public comment will focus on CEQ’s Phase 1 proposals, while also highlighting several areas where CEQ might propose regulatory revisions in Phase 2.

Feedback on Proposed Revisions

CEQ’s proposal includes three main changes to the provisions of its NEPA implementing regulations. Each change is made in response to revisions undertaken by the final 2020 NEPA regulations. While not a wholesale return to the exact text of the 1978 regulations, CEQ’s Phase 1 proposal generally reverts the NEPA implementing regulations back to agency practices prior to the 2020 regulations. Below, I discuss two of the three core revisions from the Phase 1 rulemaking: 1) direction on adopting the statement of purpose and need for a proposed action; and 2) the definition of “effects” or “impacts,” including cumulative effects.

Purpose and Need

CEQ proposes that an agency need not make applicant goals a primary or necessary factor in developing the purpose and need for its proposed action when the agency is reviewing an application for authorization. While the 2020 regulations required agencies to base the purpose and need for certain actions on an applicant’s goals (e.g., an applicant requesting a permit from a federal agency),¹⁹ the proposal would return additional discretion to agencies when crafting the purpose and need for a major federal action. By returning to the text of the 1978 regulations, agencies retain discretion to consider applicant goals when developing the purpose and need statement for an environmental review.

CEQ’s proposed text for 40 CFR § 1502.13 and 40 CFR § 1508.1(z) would read as follows (underlined and strikethrough text indicate additions and deletions):²⁰

¹⁷ 86 FR 55759.

¹⁸ 86 FR 55759.

¹⁹ 85 FR 43330, <https://www.federalregister.gov/d/2020-15179/p-420>

²⁰ For 40 CFR § 1502.13, see 86 FR 55768, <https://www.federalregister.gov/d/2021-21867/p-138>; for 40 CFR § 1508.1(z), see 86 FR 55769, <https://www.federalregister.gov/d/2021-21867/p-148>.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action. ~~for the proposed action. When an agency's statutory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency's authority.~~

Reasonable alternatives means a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action, ~~and, where applicable, meet the goals of the applicant.~~

A drawback of the current regulatory text is that it may restrict the set of alternatives that the agency considers by including the language for meeting the goals of the applicant. As CEQ articulates, the statement of need and purpose “sets the parameters for the range of reasonable alternatives an agency considers and informs the scope of effects that an agency must analyze in an EIS.”²¹ A thorough analysis of alternatives provides essential information to decision-makers on the effects of the proposed action compared to those of alternate options against a consistent baseline. Not only does this process explicate the environmental impacts of the proposed action but it also reveals whether different approaches could achieve substantial benefits with less adverse environmental consequences.

When CEQ’s 2020 proposed rule suggested that the regulations set a presumptive maximum number of alternatives to be evaluated in an EIS (e.g., three alternatives), I argued that such a provision would have perverse incentives, such as making it easier for agencies to contrast their preferred action with less desirable alternatives and discouraging agencies from considering a variety of mechanisms for achieving the action’s purpose.²² Conversely, analytical processes that highlight the minimum set of alternatives that an agency should consider better position an agency to make an informed decision on a potential action.²³ For similar reasons, CEQ’s current proposal is advisable because it gives agencies more flexibility to examine alternatives that might be beyond the scope of the applicant’s preferred proposal.

²¹ 86 FR 55760.

²² Mark Febrizio, “Public Interest Comment on the Council on Environmental Quality’s Proposed Rule Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” submitted March 10, 2020, pp. 11-12. Available at: <https://regulatorystudies.columbian.gwu.edu/ceqs-proposed-update-nepa>.

²³ OMB Circular A-4, “Regulatory Analysis,” September 17, 2003, p. 16. Available at: <https://www.reginfo.gov/public/jsp/Utilities/a-4.pdf>.

Recommendation 1: CEQ should modify its NEPA regulations to give agencies more discretion on whether to consider applicant goals when developing the statement of purpose and need, primarily to expand the set of alternatives that agencies may consider in an environmental review.

Definition of "Effects" or "Impacts"

CEQ's proposal would reinstate the definitions of direct effects and indirect effects contained in the 1978 regulations, restore cumulative effects to the definition of effects, and remove limitations on analyzing effects established by the 2020 regulations. I discuss each of these three modifications in turn.

CEQ's proposed text for 40 CFR § 1508.1(g) would read as follows:²⁴

(g) Effects or impacts means changes to the human environment from the proposed action or alternatives and include the following: that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives.

(1) Direct effects, which are caused by the action and occur at the same time and place.

(2) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

(3) Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

(4) (1) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment),

²⁴ 86 FR 55768-9, <https://www.federalregister.gov/d/2021-21867/p-143>.

social, or health, whether direct, indirect, or cumulative effects. Effects may also include those resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial.

~~(2) A “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.~~

~~(3) An agency's analysis of effects shall be consistent with this paragraph (g). Cumulative impact, defined in 40 CFR 1508.7 (1978), is repealed.~~

1. Reinstating “Direct” and “Indirect” Effects

The 2020 regulations did not prohibit the analysis of direct and indirect effects, but they removed the explicit definitions of each and discouraged the consideration of effects that are “remote in time, geographically remote, or the product of a lengthy causal chain” in 40 CFR § 1508.1(g)(2). CEQ’s Phase 1 proposal would restore these definitions and encourage agencies to analyze all reasonably foreseeable effects, regardless of their timing and geography.

Given that NEPA tasks agencies with considering “every significant aspect of the environmental impact of an action before proceeding with it,”²⁵ restoring definitions of these two categories of effects is prudent. An EIS both documents this consideration and publicly conveys the findings, and the scope of effects considered should sufficiently inform decision-makers of the consequences of their actions. In regulatory impact analysis, agencies adhere to similar standards for analyzing effects by considering ancillary benefits (or co-benefits) and countervailing risks (or indirect costs).²⁶ OMB Circular A-4 instructs that properly evaluating the impacts of a proposal and its alternatives includes “identify[ing] the expected undesirable side-effects and ancillary benefits” and appropriately adding them to the direct effects.²⁷

In future rulemaking, CEQ should consider adding separate guidance or modifying the regulatory text to instruct agencies on best practices for reporting the analysis of different categories of effects. For example, agencies should distinguish categories of effects within an EIS to increase

²⁵ CRS 2011, p. 1, <https://crsreports.congress.gov/product/pdf/RL/RL33152>. Also see, 42 USC § 4332(2)(C) (2019).

²⁶ OMB Circular A-4, p. 26.

²⁷ OMB Circular A-4, pp. 2-3.

transparency and assist decision-makers in parsing the nature and significance of expected impacts. When the line between direct and indirect effects is blurred, agencies should note such uncertainty and provide their best assessment of the proper category.

Recommendation 2: CEQ should reinstate the definitions of direct and indirect effects, consistent with the best practice of including ancillary impacts in agency analyses, and CEQ should encourage agencies to distinguish between different categories of effects and note uncertainties to aid policymakers in making decisions.

2. Adding “Cumulative Effects” to the Definition of “Effects”

CEQ proposes to reinstate the definition of cumulative effects that was included in the definition of effects before being removed by the 2020 regulations.²⁸ Although this removal did not prohibit agencies from considering cumulative effects, it deemphasized analysis of cumulative impacts in environmental reviews to redirect focus toward effects that are “reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives.”²⁹ In contrast, CEQ’s current proposal “would clarify that agencies must analyze and disclose reasonably foreseeable cumulative effects.”³⁰

The decision to restore the discussion of cumulative effects to the definition of effects in CEQ’s NEPA regulations is sensible. Considering a proposed action’s cumulative effects in environmental reviews is important to providing the full picture of its environmental consequences. An action that plausibly precipitates separate actions with environmental impacts or produces an incremental effect that is only significant when combined with other similar effects is worth disclosing to the public and accounting for in a final decision.

Nevertheless, CEQ’s concern in the 2020 regulations about extensive delays and excessive documentation is valid.³¹ CEQ’s own reports indicate that the median length of draft and final EISs (397 and 447 pages)³² substantially exceed the limits established in NEPA regulations (150 pages normally, or 300 pages for unusually complex proposals).³³ From 2010-2018, the median time it

²⁸ 40 CFR § 1508.1(g)(3). Available from eCFR, last amended November 18, 2021: <https://www.ecfr.gov/current/title-40/chapter-V/subchapter-A/part-1508/section-1508.1>.

²⁹ 85 FR 43343, <https://www.federalregister.gov/d/2020-15179/p-544>

³⁰ 86 FR 55764.

³¹ See, e.g., the discussions at 85 FR 43305 and 85 FR 43343.

³² CEQ, “Length of Environmental Impact Statements (2013-2018),” June 12, 2020, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Report_2020-6-12.pdf

³³ 40 CFR § 1502.7. Available from eCFR, last amended November 18, 2021: <https://www.ecfr.gov/current/title-40/chapter-V/subchapter-A/part-1502/section-1502.7>. Also see the 2019 edition of the regulatory text, indicating

took for agencies to complete an EIS was 3.5 years, and the average time was 4.5 years.³⁴ Reducing documentation and delay should be a priority, but CEQ should consider what evidence exists regarding the core drivers of these problems. What actually is driving up the length of paperwork and creating long report timelines? To what extent is cumulative effects analysis responsible? In a public comment on CEQ’s 2020 NPRM, I argued that CEQ needed to explore, *ex ante*, how it expected its proposal to alter agency practice.³⁵ Relatedly, better understanding the primary drivers of delays and lengthy paperwork would give CEQ more clarity on whether its approach to remove the definition of cumulative effects could have even been expected to address the underlying problems.

To mitigate the consideration of inconsequential cumulative impacts, agencies would still be bound by focusing on effects that are “reasonably foreseeable” and prioritizing them by their significance. Specifically, CEQ would retain the definition of “reasonably foreseeable” newly established by the 2020 regulations,³⁶ and the regulatory text would still advise agencies that nonsignificant impacts warrant only a brief discussion.³⁷ CEQ also requested feedback on whether it “should provide in a Phase 2 rulemaking more specificity about the manner in which agencies should analyze certain categories of effects.”³⁸ In future rulemaking, CEQ may consider ways to clarify and expand on what “effects analysis remains bound by the notion of reasonable foreseeability” means in a practical sense.³⁹ Are additional limitations and guidance necessary to ensure that agencies restrict their assessment of cumulative impacts to those that are reasonably foreseeable?

Recommendation 3: CEQ should restore the discussion of cumulative effects to the definition of effects, and it should consider how to ensure agencies’ analyses remain focused on reasonably foreseeable and significant effects.

that these page limits existed before the 2020 revisions: <https://www.govinfo.gov/content/pkg/CFR-2019-title40-vol37/pdf/CFR-2019-title40-vol37-sec1502-7.pdf>.

³⁴ CEQ, “Environmental Impact Statement Timelines (2010-2018),” June 12, 2020, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

³⁵ Febrizio, “Public Interest Comment on the Council on Environmental Quality’s Proposed Rule Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” submitted March 10, 2020, pp. 9-10.

³⁶ 85 FR 43351, <https://www.federalregister.gov/d/2020-15179/p-629>.

³⁷ See, 40 CFR § 1500.4(e), § 1502.2(b). Available from eCFR, last amended November 18, 2021: <https://www.ecfr.gov/current/title-40/chapter-V/subchapter-A>.

³⁸ 86 FR 55767.

³⁹ 86 FR 55765, <https://www.federalregister.gov/d/2021-21867/p-103>.

Recommendation 4: CEQ should investigate the underlying drivers of extensive delays and excessive documentation to inform future rulemaking on its NEPA implementing regulations.

3. Removing Limitations on Effects Analysis

CEQ also proposes to remove the language defining effects as having a “reasonably close causal relationship” to a proposed action and stating that “a ‘but for’ causal relationship is insufficient” to establish whether an effect should be considered. CEQ’s decision to remove that language would likely be beneficial.

The current regulatory language on causality is overly restrictive, particularly in a policymaking context. Causality is a high bar in an academic context, but scholars rarely need to make policy decisions within real-world time constraints. Further, agency policies affecting the environment are often associated with significant uncertainty, making causality a more stringent standard than necessary or prudent—especially for a procedural requirement designed to inform agency decision-making. For instance, the existence of a strong correlation between a proposed action and an adverse environmental effect, even absent a clear causal effect, is worth disclosing to the public and sharing with policymakers.

Although it is unclear exactly what a “but for” causal relationship entails (presumably, effect A would not occur *but for* the implementation of action B), this standard could exclude relevant impacts that would not happen absent the implementation of a major federal action. In fact, the basic framework for benefit-cost analysis implicitly presumes a “but for” causal relationship by comparing the anticipated costs and benefits of a policy and its alternatives against a consistent baseline.⁴⁰ Therefore, removing this standard and focusing on comparing a proposed action and alternatives to a baseline is a better approach. Further, to the extent that agencies must undertake additional analysis to sufficiently establish “a reasonably close causal relationship,” a more flexible standard could help mitigate the risk of paralysis by analysis.

Recommendation 5: CEQ should remove the limitations on effects analysis that require a “reasonably close causal relationship” between a major federal action and its impacts and prevent agencies from analyzing effects stemming from a “but for” causal relationship.

Aligning NEPA Regulations with Analytical Best Practices

Because this Phase 1 rulemaking is focusing on a “discrete set of provisions” with a near-term effect on implementation,⁴¹ CEQ is planning to undertake more extensive revisions in a future

⁴⁰ OMB Circular A-4, 2003.

⁴¹ 86 FR 55759, <https://www.federalregister.gov/d/2021-21867/p-49>.

Phase 2 rulemaking. Nevertheless, I want to briefly discuss several points related to how CEQ can better align its NEPA regulations with analytical best practices.

First, CEQ needs to identify and regularly collect data on metrics that convey relevant information on the state of NEPA implementation. In my previous public comments to CEQ, I summarized how the existing reports assessing NEPA implementation consistently emphasize lack of data and consistent government-wide reporting as barriers to understanding the efficiency and effectiveness of the NEPA process over time.⁴² CEQ has made improvements in the last several years, notably by publishing reports on EIS length and EIS timelines.⁴³ But there is little indication that these reports have meaningfully contributed to CEQ's understanding of the effectiveness of NEPA practice. Relatedly, the Federal Interagency Working Group on Environmental Justice's NEPA Committee released a 2016 report, "Promising Practices for EJ Methodologies in NEPA Reviews,"⁴⁴ but it is unclear whether agencies have begun to consistently implement these practices in their environmental reviews.

Recommendation 6: To evaluate agency implementation of NEPA practice, CEQ should collect and analyze metrics on a consistent basis. At a minimum, CEQ should continue to produce reports on EIS length and timelines, and it should investigate to what extent agencies incorporate environmental justice considerations into their NEPA reviews.

Second, planning for retrospective review is an important component of regulatory policymaking that should be incorporated into present and future revisions to CEQ's NEPA implementing regulations, consistent with Executive Order 12866 and Executive Order 13563. Including "clear performance goals and metrics for outputs and outcomes" in its Phase 2 rulemaking would assist CEQ in evaluating the results of changes to the NEPA process.⁴⁵ In hindsight, if CEQ had included performance metrics in its 2020 regulations, we might have more clarity on whether its changes actually affected agency NEPA practices (e.g., by establishing a connection between removing cumulative impacts from the definition of "effects" and shorter EIS timelines). Even preliminary

⁴² Febrizio, "Public Interest Comment on the Council on Environmental Quality's Proposed Rule Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," submitted March 10, 2020, pp. 3-7. Also see, GAO, "Little Information Exists on NEPA Analyses," GAO-14-369, April 2014, <https://www.gao.gov/assets/gao-14-369.pdf>.

⁴³ See, CEQ, NEPA Practice, accessed November 19, 2021, <https://ceq.doe.gov/nepa-practice/eis-length.html>.

⁴⁴ Report of the Federal Interagency Working Group on Environmental Justice & NEPA Committee, "Promising Practices for EJ Methodologies in NEPA Reviews," March 2016, https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.

⁴⁵ Marcus C. Peacock, Sofie E. Miller, and Daniel R. Pérez, "A Proposed Framework for Evidence-Based Regulation," GW Regulatory Studies Center Working Paper, February 22, 2018, <https://regulatorystudies.columbian.gwu.edu/proposed-framework-evidence-based-regulation>.

findings could inform decision-makers on whether the 2020 regulations were beneficial or detrimental in key areas.

Recommendation 7: CEQ should plan for retrospective review in its Phase 2 rulemaking, including by instituting periodic reviews of NEPA implementation at set intervals.

Third, as CEQ notes in several places in its Phase 1 proposal, the 2020 regulations lacked clear evidence for their changes.⁴⁶ This pattern underscores the importance of identifying what problems a regulatory action intends to solve and clearly outlining the expected effects of the proposal. Conversely, tweaking what should and should not be included in an EIS, as the 2020 regulations attempted, is unlikely solve the problem. Until CEQ investigates why, for instance, substantial delays are occurring for Department of Transportation EISs,⁴⁷ changes on the margin are unlikely to produce better outcomes.

Unfortunately, CEQ fails to provide a clear assessment of the costs and benefits of its Phase 1 proposal, as required by Executive Order 12866.⁴⁸ Instead, after briefly mentioning several possible effects of the proposal, CEQ shifts the burden to the public, requesting “public comment on those expected impacts and the role they should play in informing the final rule.”⁴⁹ Granted, the Phase 1 proposal would merely return agencies to their previous NEPA practices. However, in its more extensive Phase 2 rulemaking, CEQ should conduct and publicly publish a formal analysis of the expected costs and benefits of its proposal in a manner consistent with the accounting statement in OMB Circular A-4—even if the entirety of the evaluation is qualitative in nature.⁵⁰

Recommendation 8: CEQ’s Phase 2 rulemaking proposal should include a formal analysis of the expected positive and adverse effects of its process changes, even if these impacts are only qualitatively discussed.

⁴⁶ See, e.g., discussions on 86 FR 55761, 86 FR 55762, 86 FR 55763-4, 86 FR 55765.

⁴⁷ CEQ 2020, EIS Timelines Report, pp. 6, 10. Available at: https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

⁴⁸ Executive Order 12866, § 1(a), § 1(b)(6), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

⁴⁹ 86 FR 55767, <https://www.federalregister.gov/d/2021-21867/p-113>.

⁵⁰ OMB Circular A-4, pp. 44-47.