

OUTDOOR ALLIANCE

September 28, 2023

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

Submitted via regulations.gov

Re: National Environmental Policy Act Implementing Regulations Revisions Phase 2

Dear Chair Mallory,

Outdoor Alliance thanks you and your colleagues at the Council on Environmental Quality for your leadership in strengthening and modernizing the regulations that implement the National Environmental Policy Act. These comments summarize the human-powered outdoor recreation community's perspective on the draft Bipartisan Permitting Reform Implementation Rule (hereafter the Proposed Rule) including areas of emphasis, concerns, and recommendations for improvements. Overall, we strongly support the Proposed Rule and thank CEQ for undergoing the complex task of modernizing these regulations in a manner that upholds and restores NEPA's important role as our nation's foremost environmental law. We encourage you to quickly finalize a strong rule that builds upon what CEQ has proposed.

Outdoor Alliance is a coalition of ten member-based organizations representing the human powered outdoor recreation community. The coalition includes Access Fund, American Canoe Association, American Whitewater, International Mountain Bicycling Association, Winter Wildlands Alliance, The Mountaineers, the American Alpine Club, the Mazamas, Colorado Mountain Club, and Surfrider Foundation and represents the interests of the millions of Americans who climb, paddle, mountain bike, backcountry ski and snowshoe, and enjoy coastal recreation on our nation's public lands, waters, and snowscapes.

Outdoor Alliance and our member organizations have extensive experience with the NEPA process, particularly in the context of public land management decision-



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making, including forest planning and BLM resource management plan development, river management, travel management, recreation management, and other decisions regarding the use of public lands and waters. We work at all levels of the NEPA process, from participating in collaborative groups, to submitting comments and meeting with agency decision-makers, to participating in the objection resolution process, and, on rare occasions, as NEPA-related litigants. We also at times work as proponents of recreation infrastructure projects—like trail networks—that require navigating the NEPA process, and we are familiar with the frustrations that can accompany NEPA from that perspective. These experiences have provided us with an informed perspective on NEPA policies and practices. Overall, we consider the NEPA process vital to our community's ability to secure and protect sustainable recreation opportunities, sustain and grow the outdoor recreation economy, and ensure a healthy environment on federal public lands and waters.

In addition to engaging in numerous NEPA processes across the various land management agencies, Outdoor Alliance and our member organizations have been actively engaged in the past several years of NEPA rulemaking. During the development of the previous administration's problematic 2020 Rule, outdoor recreationists submitted more than 20,000 messages to lawmakers and the administration in defense of NEPA and its core values. Outdoor Alliance filed comments on the 2020 Rule, and two of our member organizations—Winter Wildlands Alliance and the American Alpine Club—eventually challenged the 2020 Rule through litigation. Our organizations also participated in the rulemaking process for the 2022 Phase 1 Rule, and in our comments, we encouraged CEQ to directly address environmental justice and climate change in the Phase 2 Rule. We appreciate and support how these elements have been incorporated into the Proposed Rule.¹

The Proposed Rule strikes a difficult balance between restoring core NEPA protections that were rescinded in the 2020 Rule, strengthening CEQ's regulations in order to account for modern environmental challenges like climate change, and making the NEPA process more efficient, including by implementing some of the

¹ See, Outdoor Alliance, Comments on 86 F.R. 55757 (November 19, 2021), <https://static1.squarespace.com/static/54aabb14e4b01142027654ee/t/619bda6cc46a9a60b25a1832/1637603949179/OA+NEPA+comment+final.pdf>.



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changes to NEPA recently mandated by Congress through the Fiscal Responsibility Act (FRA). We especially appreciate that the Proposed Rule:

- Restores language clarifying that the purpose and policy of NEPA is to protect the environment and public health.²
- Explicitly incorporates climate change and environmental justice, including by requiring agencies to consider climate impacts and disproportionate effects on environmental justice communities during the NEPA process.
- Includes Indigenous Knowledge in the definition of “special expertise.”³
- Restores the context and intensity factors for determinations of significance.⁴
- Includes extraordinary circumstances for evaluating when use of categorical exclusions may not be appropriate.⁵
- Requires agencies to identify an environmentally preferable alternative in environmental impact statements.⁶
- Promotes public involvement in the NEPA process and removes many of the barriers to public engagement from the 2020 Regulations.⁷

We also have concerns with certain provisions of the Proposed Rule, such as new pathways for establishing categorical exclusions, though we acknowledge that many of these are associated with implementing the FRA. Despite these concerns, we find that for the most part the Proposed Rule implements the FRA without undermining NEPA’s foundational principles, and we appreciate CEQ’s efforts to strike that balance.

Finally, we offer several suggestions for improvements to the Proposed Rule. These include:

- Finalize CEQ’s *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change* and incorporate elements of the guidance into the final rule.

² Proposed Sections 1500.1 and 1500.2.

³ Proposed Section 1501.8(a).

⁴ Proposed Section 1501.3(d).

⁵ Proposed Sections 1501.4(a) and 1508.1(m).

⁶ Proposed Section 1502.14(f).

⁷ Proposed Section 1501.9



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- Incorporate outdoor recreation into the list of significance factors at § 1501.3(d)(2)(iii).
- Provide more detail on what qualifies as “technically and economically feasible” under § 1507.2(g).
- Remove § 1501.4(c), which allows agencies to develop categorical exclusions during the land use planning process.
- Strengthen § 1501.4(e) by providing additional information about how agencies should adopt categorical exclusions listed in other agency’s NEPA procedures.

These recommendations, along with other specific comments on the Proposed Rule, are outlined in more detail below.

Outdoor Alliance Comments on Specifics of the Phase 2 Proposed Rule:

1. Outdoor Alliance appreciates CEQ’s restoration and improvement upon 1978 Rule Language in § 1500.1 and § 1500.2 of the Proposed Rule.

§ 1500.1 (Purpose) restores much of the 1978 Rule and emphasizes the purposes and value of NEPA as described in Section 101 of the law. This is a vast improvement over the 2020 Rule, which characterized NEPA as primarily a procedural statute while deemphasizing the law’s broader goal of protecting the environment and public health. By clearly articulating that the purpose of NEPA is to protect the environment, the Proposed Rule emphasizes that NEPA isn’t just about checking boxes, following procedures, and giving the environment a cursory nod. Instead, in § 1500.1(1) of the Proposed Rule, CEQ affirms that the purpose of the NEPA process is to help agencies make decisions that are based on an understanding of environmental consequences and take actions that protect, restore, and enhance the environment. This language sets the stage for agencies to make reasoned, science-based decisions that don’t lead to unintended or unmitigated environmental harms for future generations.

Likewise, § 1500.2 (Policy) restores 1978 Rule language that is integral to understanding and implementing the true intent of NEPA. We appreciate that this language has been restored and that § 1500.2 has been further strengthened by incorporating new direction encouraging community engagement and consideration of environmental justice, climate impacts, and health effects. In our



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experience, NEPA is at its best when agencies engage with the public in a meaningful way, leaving space for public comments to shape alternatives and final decisions rather than treating public comment periods as pro-forma exercises. Community engagement is also critical to understanding potential public health or environmental justice impacts. While scientific studies, modeling, and expert opinions are important, the general public oftentimes can offer first-hand experiences and perspectives on an issue that help bring to light potential impacts. For example, backcountry skiers and mountaineers are first-hand witnesses to how our changing climate is affecting glaciers, snowscapes, and other vulnerable landscapes. Through meaningful public engagement, agencies can gather information to build upon specialist expertise, ground-truthing theoretical knowledge to paint a well-rounded picture of current conditions and potential impacts.

2. Outdoor Alliance supports restoring opportunities for judicial review and eliminating restrictions on public comment.

The outdoor recreation community was extremely dismayed by the curtailment of public comment and judicial review in the 2020 Rule, and we support CEQ's decision to remove the 2020 Rule's restrictions on judicial review, such as in § 1500.3 and § 1503.3. The opportunity to challenge government decisions and seek legal recourse for decisions believed to be harmful are important elements of the NEPA process.

3. Outdoor Alliance supports the climate and environmental justice provisions in the Proposed Rule.

The Proposed Rule marks the first time that CEQ mentions climate change in its NEPA regulations, and we appreciate that this topic is thoroughly integrated into the proposed regulations. The climate crisis is the foremost environmental challenge of our time, and understanding and addressing climate change is critical to protecting human health and the environment. Due to the complex nature of quantifying and evaluating climate impacts, we encourage CEQ to finalize its 2023 *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change* and to consider incorporating elements of the guidance into the final rule.



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We also appreciate that the Proposed Rule explicitly mentions environmental justice as an issue that government agencies must consider in environmental reviews. By requiring that agencies pursue meaningful engagement with communities of color, low-income communities, and Indigenous and Tribal communities early and throughout the NEPA process and consider alternatives that reduce adverse health and environmental effects that would disproportionately affect these communities, the Proposed Rule helps to ensure that impacts to frontline communities will be considered and mitigated. Previous NEPA rules failed to explicitly protect environmental justice communities, leading to many of the environmental justice inequities we see today. We also appreciate that the Proposed Rule includes “potential disproportionate and adverse effects on communities with environmental justice concerns” in the definition of extraordinary circumstances.⁸ As more Categorical Exclusions are developed—by agencies and by Congress—it is critical to have a robust extraordinary circumstances filter to ensure that potentially harmful projects are subject to proper analysis. Additionally, we acknowledge that traditional ecological knowledge is key to addressing the climate crisis and other land management challenges on public lands and waters, and to this end we greatly appreciate the inclusion of Indigenous knowledge in § 1501.8.

Finally, we support CEQ’s proposed requirement that agencies identify an environmentally preferable alternative in NEPA analyses.⁹ This will greatly help our members, who are interested in protecting the environment, in assessing alternatives and agency decisions.

4. Outdoor Alliance appreciates CEQ’s efforts to make NEPA documents more informative and concise.

Outdoor Alliance, its member organizations, and their members are well acquainted with lengthy, repetitive NEPA documents and therefore very much appreciate CEQ’s efforts to make this process more concise *and* more informative through the Proposed Rule. We strongly support the purpose of NEPA that CEQ has articulated in § 1500.1(c), that “the NEPA process is intended to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the

⁸ Proposed Section 1501.8

⁹ Proposed Section 1502.14(f)



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environment.” Likewise, the policies outlined in § 1500.2 provide agencies with clear guidance on what must be accomplished and who should be included during a NEPA review. For example, the Proposed Rule replaces the word “significant” with “important” here and throughout the Rule. This small but important word change is a vast improvement over the 2020 Rule, as it broadens the scope of what should be considered in NEPA. Significance, in the context of NEPA, is a high bar, and we agree with CEQ that important issues should also be subject to thorough consideration in environmental reviews.

We also appreciate the Proposed Rule’s instructions that agencies write NEPA documents in plain language and reduce background material. Lengthy, technical NEPA documents are often extremely difficult for the general public to review and thus can alienate important stakeholders from the decision-making process. At the same time, it is important that NEPA documents include enough background information for readers to understand the context of an analysis.

5. CEQ should incorporate outdoor recreation into the list of “significance factors” in § 1501.3(d)(2)(iii).

We appreciate the inclusion of the “significance factors” in § 1501.3(d)(2), and we are glad to see the Proposed Rule acknowledge that impacts to important recreational resources like park lands and Wild & Scenic rivers should factor into an agency’s determination of whether a federal action rises to the level of significance. We recommend adding “outdoor recreation resources” to the list in § 1501.3(d)(2)(iii) in order to more appropriately account for the potential impacts of federal actions on high value recreational resources like trail systems, climbing areas, backcountry ski terrain, whitewater runs, and important coastal recreation areas. In our experience, federal agencies are sometimes unaware of the impacts that their actions might have on popular recreation resources, and in some cases are unaware of the location and extent of outdoor recreation sites altogether. For example, in 2020, the Bureau of Land Management proposed an oil and gas lease sale on land encompassing the Slickrock trail near Moab, Utah—a globally-significant mountain biking destination.¹⁰ Through the public comment opportunities afforded by the NEPA process, outdoor recreationists submitted

¹⁰ See, Levi Rose, *BLM Plans to Auction Off Land That Includes Moab’s Iconic Slickrock Trail*, Outdoor Alliance (February 20, 2020), <https://www.outdooralliance.org/blog/2020/2/20/blm-plans-to-auction-off-land-that-includes-moabs-iconic-slickrock-trail>.



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thousands of comments to the BLM, ultimately causing the agency to withdraw the proposed lease sale around Slickrock. While an extreme example, this shows how important recreation sites—and their associated benefits for local economies—might factor into an agency’s calculation of the appropriate level of environmental review for a potential federal action.

6. Screening Criteria for Alternatives

We would like to see CEQ provide more detail in § 1507.2(g) of the Proposed Rule, which states that agencies shall develop alternatives that are technically and economically feasible. Without more clarification, we are concerned that agencies will be pressured by project proponents to define “economically feasible” as only those alternatives that would be profitable for the proponent, and “technically feasible” only as those alternatives that are easy for the proponent to achieve. An alternative need not be profitable nor easy to qualify as technically and economically feasible, and it should not be the federal government’s concern whether a company is able to make a profit when using public resources, especially if doing so is at the expense of public health or the environment. We would like to see specific criteria developed and definitions stated which emphasize these points.

7. Outdoor Alliance has concerns about how the Proposed Rule addresses Categorical Exclusions.

While we appreciate that the proposed Phase 2 Rule restores important sideboards to the use of categorical exclusions (CEs), such as extraordinary circumstances,¹¹ we are concerned by CEQ’s proposal to allow agencies to create CEs during land use planning or other programmatic decisions.¹² CEs are an important tool, but in order to ensure they are not abused, it is important that CE creation be thoughtfully considered and applicable across a broad range of settings. If, for example, individual National Forests create their own specific CEs through this authority, we are concerned that there will be a proliferation of CEs that are confusing for the public to monitor or understand and have potential for abuse. This could lead to unnecessary conflict and delay in NEPA processes and increased litigation. One

¹¹ Proposed Section 1501.4(a)

¹² Proposed Section 1501.4(c)



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important aspect of CEs being created nationally is that there is consistency in how they are applied and what the intention of the CE is. This is potentially lost if CEQ proceeds with including § 1501.4(c) in the Phase 2 Rule. We also request that CEQ require that agencies publish a list of all CEs on their websites, not just those potentially developed under this new authority.¹³

Per CEQ's request for comments on how to approach the new changes to Section 109 of NEPA established by Congress in the Fiscal Responsibility Act, allowing agencies to apply CEs developed by other agencies, we recommend CEQ add language to § 1501.4(e) requiring that agencies receive concurrence from the agency that originally developed the CE certifying that the CE is intended to be applied in the manner proposed. Furthermore, because agencies develop their own lists of extraordinary circumstances, it is necessary to provide guidance in the Phase 2 rule for which agency's definition of extraordinary circumstances applies when an agency is using a CE developed by a different agency. We suggest that both agencies' extraordinary circumstances lists should apply in this scenario. Finally, we encourage CEQ to clarify that "normally" in § 1501.4(a) means "unless extraordinary circumstances apply." We understand that the Fiscal Responsibility Act amended NEPA's statutory language to define CEs as applicable for actions that do not "normally" have a significant effect, but this Rule provides an opportunity for CEQ to provide additional clarification around this language. We appreciate and support CEQ's wording in § 1501.4(a) that effects should be considered individually and in the aggregate, but believe it is also important to delineate how extraordinary circumstances play into decisions around use of CEs. Adding this language would be supportive, but not duplicative, of what CEQ has already stated in § 1501.4(b) regarding extraordinary circumstances.

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Outdoor Alliance and our member organizations appreciate the opportunity to provide feedback on the Proposed Rule and thank CEQ for reversing the damaging 2020 NEPA Regulations and bringing the focus of NEPA reviews back to the fundamental purposes of the law. We remain committed to assisting the agency as it navigates the implementation of this rulemaking and look forward to seeing how

¹³ Proposed Section 1501.4(c)(6)



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the changes to CEQ's NEPA regulations that are proposed in this Rule affect the efficiency and inclusiveness of future environmental reviews.

Best regards,



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