

SPECIAL ENVIRONMENTAL COUNSEL MEMORANDUM NO. 2024-2

DATE: July 25, 2024

TO: Tribal Environmental Professionals

FROM: Tribal Government Practice Group*
Ogden Murphy Wallace, PLLC

RE: Revisions to NEPA's Implementing Regulations Impact the Consideration of
Environmental Justice and Indigenous Knowledge

The Council on Environmental Quality (CEQ) recently published a final rule encouraging project proposals to consider environmental justice and the use of indigenous knowledge in the National Environmental Policy Act (NEPA) process (Final Rule).¹ This memorandum discusses the provisions of the Final Rule related to environmental justice and indigenous knowledge. We have also included information about the recent state-based challenge to the Final Rule.²

The Final Rule

Among other changes, the Final Rule includes new provisions updating the NEPA review process for actions that may affect environmental justice communities.³ The Final Rule also makes it clear that Indigenous Knowledge may be considered as a form of “relevant special expertise” or “high-quality information” for use in the NEPA decision-making process.⁴ These changes are significant, because NEPA did not previously encourage consideration of environmental justice concerns or describe how indigenous knowledge might be incorporated into the NEPA decision making process.

Environmental Justice

Requiring that environmental justice be considered in through the NEPA process could provide significant benefits to tribes. Prior to issuance of the NEPA Rule, President Biden issued an executive order titled “Revitalize Our Nation’s Commitment to Environmental Justice for All,” which affirmed that the concept of environmental justice was central to the fair and equitable implementation of federal environmental

*¹ The OMW Tribal Government Practice Group would like to thank our Summer Associate Hannah Waskom for her assistance in the preparation of this memo. Ms. Waskom is a rising 3L at the Seattle University School of Law.

¹ National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35538 (May 1, 2024) (codified at 40 C.F.R. pts. 1500, 1501, 1502, 1053, 1504, 1505, 1506, 1507, and 1508), [Federal Register :: National Environmental Policy Act Implementing Regulations Revisions Phase 2](#).

² Complaint at 1, State v. Couns. of Env’t Quality, Case No. 1:24-cv-0089-CRH (May 21, 2024), [Complaint - 1839000-1839587-https-ecf-ndd-uscourts-gov-doc1-13712148486.pdf](#).

³ See 40 C.F.R. § 1508.1(f), 40 C.F.R. § 1508.1(i)(4), 40 C.F.R. § 1508.1(m), 40 C.F.R. § 1508.1(o), 40 C.F.R. § 1500.2, 40 C.F.R. § 1501.3(d), 40 C.F.R. § 1502.14(f), 40 C.F.R. § 1502.16(a)(13), 40 C.F.R. § 1505.3(b).

⁴ See 40 C.F.R. § 1501.8(a), 40 C.F.R. § 1502.15(b), 40 C.F.R. § 1506.6(b).

law.⁵ The NEPA Rule's adoption of environmental justice as a part of the NEPA procedural process advances the goals expressed in that executive order.

Indigenous Knowledge

The incorporation of indigenous knowledge into the NEPA process will help ensure that federal actions are based on the best available information. Indigenous knowledge has been formally recognized by the Biden-Harris Administration "as one of the many important bodies of knowledge that contribute to the scientific, technical, social, and economic advancements of the United States and our collective understanding of the natural world."⁶ And the White House issued guidance to assist agencies in understanding indigenous knowledge and integrating indigenous knowledge into federal research, policies, management, and decision making.⁷ The Final Rule notes that the inclusion of indigenous knowledge, as a form of special expertise is to ensure that federal agencies respect and benefit from the unique knowledge that tribal governments bring to the environmental review process.⁸

One example of how indigenous knowledge has been utilized is cultural burns.⁹ Cultural burns, the indigenous practice of intentionally lighting smaller controlled fires to promote the health of vegetation and animals, had been integral to many Indigenous peoples' way of life for many millennia prior to European colonizers spreading across North America.¹⁰ Without cultural burns, organic matter built up and put forests at risk of devastating wildfire.¹¹ Fire suppression combined with urban development and climate change has led to larger uncontrolled fires that can spread quickly through areas with lots of underbrush.¹² The indigenous practice of human-ignited burns is currently being recognized as a valuable way to reduce uncontrollable wildfires.¹³ Partnerships between tribal, state, and federal government agencies are developing with the goal of reintroducing cultural burns in many areas throughout the United States.¹⁴ Cultural burns serve as an example of how indigenous knowledge can improve and inform the NEPA process.

⁵ Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 Fed. Reg. 25251 (Apr. 26, 2023).

⁶ *White House Releases First-of-a-Kind Indigenous Knowledge Guidance for Fed. Agencies*, THE WHITE HOUSE (Dec. 01, 2022), [White House Releases First-of-a-Kind Indigenous Knowledge Guidance for Federal Agencies | CEQ | The White House](#).

⁷ *Id.*

⁸ National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35481 (May 1, 2024) (codified at 40 C.F.R. pts. 1500, 1501, 1502, 1053, 1504, 1505, 1506, 1507, and 1508) <https://www.federalregister.gov/d/2024-08792/p-435>.

⁹ *Indigenous Fire Practices Shape our Land*, NAT'L PARK SERV. (Mar. 18, 2024), [Indigenous Fire Practices Shape our Land - Fire \(U.S. National Park Service\) \(nps.gov\)](#).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

States' Challenge to the Final Rule

Twenty states (Objecting States)¹⁵ have challenged the Final Rule, arguing against the inclusion of indigenous knowledge as “high quality information” to be considered under NEPA and also challenging provisions of the Final Rule regarding consideration of environmental justice.¹⁶

The Objecting States claim that the Final Rule imposes a burden as it requires agencies to consider these concerns and areas of expertise as a part of their NEPA review process. In short, the Objecting States argue that meaningful consideration of environmental justice communities and consideration of indigenous knowledge will harm them because these additional considerations will create significant and unnecessary delays.¹⁷ However, Objecting States ignore the benefits of providing for the consideration and incorporation of indigenous knowledge and consideration of environmental justice into agency decision-making. Factoring these additional sources of relevant information at the front end of the NEPA process will improve and lead to better informed agency decision making.

Conclusion

The NEPA process will be better informed and likely result in more equitable decision making by federal agencies as a result of the Final Rule. The Objecting States’ challenge to the Final Rule may delay or impair the effectiveness of the Final Rule. Time will tell. In any event, the OMW Tribal Government-Environmental Practice Group will continue to follow this matter as it proceeds and we are available to answer any questions you may have about the Final Rule. So please let us know if you have questions, or if we can be of assistance regarding this matter.

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¹⁵ The 20 Objecting States include: (1) Iowa, (2) North Dakota, (3) Alaska, (4) Arkansas, (5) Florida, (6) Georgia, (7) Idaho, (8) Kansas, (9) Kentucky, (10) Louisiana, (11) Missouri, (12) Montana, (13) Nebraska, (14) South Carolina, (15) South Dakota, (16) Tennessee, (17) Texas, (18) Utah, (19) West Virginia, and (20) Wyoming. Complaint at 1, State v. Couns. Of Env’t Quality, Case No. 1:24-cv-0089-CRH (May 21, 2024), [Complaint - 1839000-1839587-https-ecf-ndd-uscourts-gov-doc1-13712148486.pdf](https://www.uscourts.gov/doc1-13712148486.pdf).

¹⁶ Complaint at 3-4, State v. Couns. Of Env’t Quality, Case No. 1:24-cv-0089-CRH (May 21, 2024), [Complaint - 1839000-1839587-https-ecf-ndd-uscourts-gov-doc1-13712148486.pdf](https://www.uscourts.gov/doc1-13712148486.pdf).

¹⁷ *Id* at 23.