

March 10, 2010

Ms. Mary Neumayr, Chair
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

RE: **CEQ-2019-0003**
PROPOSED REVISIONS TO REGULATIONS IMPLEMENTING
THE NATIONAL ENVIRONMENTAL POLICY ACT

Dear Chairman Neumayr:

This letter represents the collective comments of 328 organizations and tribal nations, representing millions of members and supporters, responding to the Council on Environmental Quality's (CEQ) proposed revisions to regulations implementing the National Environmental Policy Act (NEPA or the Act). Many of our organizations and members will also be submitting individual comments.

This proposed revision of CEQ's NEPA regulations is deeply flawed, violates the letter and intent of NEPA and will not satisfy the objectives of this exercise as articulated in the preamble. It is therefore arbitrary and capricious and must be withdrawn.

I. INTRODUCTION

NEPA is the lodestar of this country's environmental conscience and actions. In NEPA, Congress clearly articulated environmental policies and goals for the United States, while acknowledging the "worldwide and long-range character of environmental problems".¹ Fully implemented, NEPA could help Americans meet today's dual challenges of climate change and loss of biological diversity. As Senator Henry Jackson, the primary Senate sponsor of the Act, explained, NEPA "serves a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values."² While full implementation of NEPA has yet to be realized, NEPA's procedural requirements, as interpreted through CEQ's regulations have fundamentally changed the nature of federal decision making for the better by providing thorough analysis and public involvement.

¹ 42 U.S.C. § 4332(F).

² Statement in *National Environmental Policy: Hearing before the Committee on Interior and Insular Affairs, United States Senate, 91st Congress, 1st Session, April 16, 1969, Appendix 2, p. 206*, quoted in Caldwell, Lynton Keith, *The National Environmental Policy Act: An Agenda for the Future*, p. xvi, Indiana University Press (1998).

NEPA currently requires “that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”³ Through NEPA, communities have been able to learn ahead of time when their government is proposing to permit the expansion of an airport, a new management plan on a nearby national forest, or a new deepwater port for export of coal. Through NEPA, Americans living, working and recreating near or on public lands have had an opportunity to consider proposed changes to land management plans and actions such as proposed timber harvest, oil and gas leasing and road construction, and to influence those decisions. Marginalized communities have had an opportunity to have their voices heard before construction of a proposed highway that might divide their community.

Receiving public comment is only part of the purpose of the NEPA process. Those comments must be evaluated and considered by the agencies when they are making decisions. Through compliance with the current regulations, federal agencies have learned that they are expected to stop, look and listen to the taxpayers they are serving before committing resources. Through public comments and comments from other agencies, lead agencies have learned of better alternatives to achieve a particular goal while minimizing harm to communities, public land and the environment. Federal agencies have learned important new information about an area that an agency manages or a community in which it operates. In short, while implementation has been far from perfect, Americans as a whole have benefitted from the important information and public involvement achieved through NEPA’s implementation.

In a response to CEQ’s Advance Notice of Proposed Rulemaking⁴ (ANPRM), many of the signatories to this letter urged that, “CEQ invest its modest resources and most importantly, its leadership position, in a systematic initiative to enforce [the regulations].” We pointed out that, “[c]hanges to the regulations will not result in improvements unless federal agencies have the organizational structure and resources that facilitate their implementation.” We explained, painstakingly, that the current regulations hold the key to almost all of the efficiency issues suggested by the ANPRM and that, “[w]hat is lacking is the capacity and will to fully implement the regulations.”⁵ Unfortunately, that well-grounded advice was fundamentally disregarded. While we welcome the long-overdue recognition of tribal nations throughout the regulations, the extreme reversals of long-held CEQ positions would serve neither tribes nor the public well but instead would have a significantly detrimental and adverse impact on decisionmaking.

We incorporate by reference the response to the ANPRM⁶ to this letter (Attachment A) and ask that CEQ respond to each point raised in that letter along with responses to this Notice of Proposed Rulemaking (NPRM).

³ 40 C.F.R. § 1500.1(b).

⁴ 83 Fed. Register 28591 (June 20, 2018).

⁵ Letter from 341 public interest organizations to Mary Neumayr, Council on Environmental Quality, in response to Docket No. CEQ-2018-0001, August 20, 2018.

⁶ *Id.*

The proposed revisions fundamentally mischaracterize and attempt to rewrite the purpose of NEPA. They seek to substantially reduce both the breadth and depth of NEPA analysis as well as eviscerate available remedies for inadequate compliance. They try to reduce or eliminate the applicability of NEPA to a wide range of actions. They dismiss conflict of interest concerns along with the public's interest in being able to enforce the law. Instead of the public's interest in sound decisionmaking being central to the NEPA process, they elevate the profit-driven objectives of private corporations.

Given the emphasis in the ANPRM on efficiency, it is particularly startling to see that the proposal contains several stunning reversals of long-held CEQ positions and decades of practice and case law. While agencies can change their position, it must show awareness of the change, give a reasoned explanation for it, and explain how the change is permissible under the relevant statute. In this instance, some changes are not even acknowledged in CEQ's preamble. For example, there is no acknowledgement that the proposed revision would eliminate all systematic public involvement in the referral process.⁷ There is also no acknowledgement that CEQ is eliminating the rule that EISs must be available for 15 days prior to a hearing on the EIS.⁸ Other changes are acknowledged but brushed off with a broad reference to providing "more flexibility"⁹ or stating that provisions in the current regulations are "unnecessarily limiting"¹⁰ and are devoid of a reasoned explanation and supporting rationale. For example, CEQ states in the preamble that NEPA does not contain the terms "direct indirect, or cumulative effects"¹¹ that it proposes to simplify the definition by simply eliminating those terms and eliminate the requirement to analyze cumulative effects all together, referencing excessively lengthy documentation and irrelevant or inconsequential information.¹² But CEQ never explains the basis on which they reached these conclusions, let alone acknowledge the fundamental importance of cumulative effects in meeting NEPA's mandate. CEQ cannot cure these deficiencies by providing a new rationale in a preamble to final regulations.

Other proposed revisions delete long-standing criteria that are replaced with the vaguest of direction – for example, the proposed deletion of the definition of "significantly" at 40 C.F.R. § 1508.27 and the substitution of vague, ambiguous language amenable to numerous interpretations. Neither of these tactics will result in efficiency; rather, they will result in further delays and inefficiencies and in a substantial amount of litigation.

⁷ Proposed revisions to § 1504, 85 Fed. Reg. at 1704.

⁸ Proposed § 1506.6(f), 85 Fed. Reg. at 111705.

⁹ Proposed 1506.5(c), 85 Fed. Reg. at 1705 (giving agencies more flexibility by allowing applicants to prepare EISs).

¹⁰ Preamble to Proposed § 1502.22(a), 85 Fed. Reg. at 1703 (proposing to delete the word "always" from the obligation to obtain information relevant to reasonably foreseeable significant adverse impacts in certain circumstances).

¹¹ 85 Fed. Reg. at 1707. This statement about the lack of the precise terms being in the statute is reminiscent of the Department of Labor's partial reliance on the lack of the term "service advisor" as a reason for reversing a long-standing position under the Fair Labor Standards Act. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 217, 2127 (2016).

¹² 85 Fed. Reg. at 1707-08.

The proposed revisions not only fail to satisfy the effectiveness objectives set forth by CEQ but also violate the Congressionally mandated purpose of NEPA of, among other goals, fulfilling the responsibilities of each generation as trustee of the environment for succeeding generations.¹³

Today, our country and our world face some of the most significant challenges to life on earth that we have encountered in recorded history. The science is clear that human caused activity is inducing both major changes in climate and in the extinction of flora and fauna. A plethora of authoritative studies and reports tell us that we have a rapidly closing window of time in which we can possibly prevent or slow continued warming that will harm humans' existence on earth for centuries as well as jeopardize the continued existence of about one million animal and plant species.¹⁴ As the United States Global Change Research Program stated,

The last few years have also seen record-breaking, climate-related weather extremes, the three warmest years on record for the globe, and continued decline in arctic sea ice. These trends are expected to continue in the future over climate (multi-decadal) timescales. Significant advances have also been made in our understanding of extreme weather events and how they relate to increasing global temperatures and associated climate changes. Since 1980, the cost of extreme events for the United States has exceeded \$1.1 trillion; therefore, better understanding of the frequency and severity of these events in the context of a changing climate is warranted.¹⁵

Climate change poses significant national security and economic risks to the United States. As the Department of Defense stated in 2019, "The effects of a changing climate are a national security issue with potential impacts to Department of Defense missions, operational plans, and installations." The report identifies climate-related events such as flooding, drought, desertification and wildfires on 79 military installations within the next twenty years.¹⁶ In addition, the Executive Vice President of the New York Federal Reserve Bank recently stated that, "Climate change has significant consequences for the US economy and financial sector through slowing productivity growth, asset revaluations and sectorial reallocations of business activity."¹⁷

¹³ 42 U.S.C. § 4331(b)(1).

¹⁴ "Global Assessment Report on Biodiversity and Ecosystem Services", Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, 2019; "Global Warming of 1.5°C, Intergovernmental Panel on Climate Change, 2018, available at <https://www.ipcc.ch/sr15/>.

¹⁵ Special Report: Fourth National Climate Science Assessment, Vol. 1, U.S. Global Change Research Program, Washington, D.C. pp. 12-34 (2017), available at <https://www.ipcc.ch/sr15/download/>.

¹⁶ Report on Effects of a Changing Climate to the Department of Defense, Office of the Under Secretary of Defense for Acquisition and Sustainment, January 2019, available at <https://media.defense.gov/2019/Jan/29/2002084200/-1/-1/1/CLIMATE-CHANGE-REPORT-2019.PDF>.

¹⁷ "Climate events have cost the US economy more than \$500 billion over the last 5 years, Fed official says", <https://markets.businessinsider.com/news/stocks/climate-change-impact-on-economy-has-cost-500-billion-fed-2019-11-1028675379>.

This nation's minority and low-income communities¹⁸ and Native American tribes¹⁹ experience and will continue to experience disproportionately severe effects of climate change. As the most recent climate change assessment for the United States says, "People who are already vulnerable, including lower-income and other marginalized communities, have lower capacity to prepare for and cope with extreme weather and climate-related events and are expected to experience greater impacts."²⁰ And the same study finds that:

The health risks of climate change are expected to compound existing health issues in Native American and Alaska Native communities, in part due to the loss of traditional foods and practices, the mental stress from permanent community displacement, increased injuries from lack of permafrost, storm damage and flooding, smoke inhalation, damage to water and sanitation systems, decreased food security, and new infectious diseases.²¹

Our national parks are particularly impacted by climate change, warming twice as fast as the rest of the country on average, given their geographic distribution in the U.S.²² Moreover, many parks contain unique geological and ecological features—e.g., high mountains and arid deserts—that are particularly vulnerable to changes in the climate. For instance, Cape Hatteras National Seashore is eroding into the sea from rising tides; Rocky Mountain National Park is experiencing record wildfires, scaring the landscape and devastating nearby communities and local economies; and namesake features at Glacier and Saguaro National Parks are disappearing from loss of snow and ice and other changes to the landscape resulting from warming temperatures. The changes within National Park landscapes put wildlife and cultural and natural resources in jeopardy, as well as increase risks to visitors. These treasured places must be protected and preserved, not only because they tell the stories of our nation's diverse history and provide unforgettable experiences, but also because they are important to the health of the ecosystems of which they are a part, protecting the air we breathe and the water we drink. Nor are these impacts limited to our parks – they apply equally to our national forests, national wildlife refuges, national monuments, and other public lands and resources. In short, now is precisely the wrong time to limit the way our nation considers climate impacts through the proposed evisceration of the NEPA process.

¹⁸ "A Roadmap to an Equitable Low-Carbon Future: Four Pillars for a Just Transition", the Climate Equity Network, April 2019, available at:

https://dornsife.usc.edu/assets/sites/242/docs/JUST_TRANSITION_Report_FINAL_12-19.pdf

¹⁹ <http://www.ncai.org/policy-issues/land-natural-resources/climate-change>.

²⁰ *Fourth National Climate Change Assessment*, Vol. II, Summary Findings, available at:

<https://nca2018.globalchange.gov/>.

²¹ *Id.*, chpt. 14. See also, *Climate Change Forcing Some Alaskan Villages to Relocate*, Insurance Journal, June 20, 2019, available at

<https://www.insurancejournal.com/news/west/2019/06/20/530000.htm>.

²² "Disproportionate Magnitude of Climate Change in United States National Parks",

Environmental Research Letters, Volume 13, Number 10, available at:

<https://iopscience.iop.org/article/10.1088/1748-9326/aade09>.

II. CEQ'S PROCESS FOR PROPOSING REVISIONS TO ITS REGULATIONS HAS BEEN GROSSLY INADEQUATE AND INAPPROPRIATE. CEQ IS ALSO IN VIOLATION OF ITS OWN NEPA REGULATIONS AND THE ENDANGERED SPECIES ACT.

A. The Public Process Has Been Grossly Inadequate.

CEQ has demonstrated its unfortunate and newfound contempt for both the NEPA process and the public by its design of a deeply inadequate public process for this proposed revision. It has made no effort whatsoever to approach this effort in a thoughtful, collaborative manner or even in a way designed to allow the most affected individuals to engage in it.

Despite CEQ's repeated public statements that it has engaged in significant public outreach, in fact, it has simply conducted the minimal processes. If there has been significant outreach, it has not been to the public. In no respect has this process mirrored the thoughtful process in which CEQ engaged when it developed the current regulations. As Nicholas Yost, former CEQ general counsel and the primary author of the current regulations has explained, that process involved not just soliciting ideas, but engaging in an iterative dialogue with a number of stakeholders with the goal of reaching common ground on a path forward. At that time, CEQ sought out complaints and concerns and discussed those concerns directly with the affected parties. As Mr. Yost observed, "The resulting public response to the final regulations was everything we had hoped for and worked to achieve," with support for the regulations offered by both the public interest and the business community.²³

The short ANPRM process was not a well-designed outreach effort but merely a list of broad and often repetitive questions, much more friendly to NEPA specialists than the public. The breadth of the questions provided no real focus what CEQ's intentions really were in terms of its proposed rulemaking.

The process for the proposed revisions is considerably worse. We have identified over 80 issues that warrant comment in the proposed regulations, including the 23 extra questions CEQ poses in the NPRM. Indeed, we continue to find new issues and are not at all certain that all of the problematic text has yet been identified and analyzed. Most of the issues raised involve complex legal issues and decades of case law; some involve other areas of the law entirely, such as tort law and Constitutional law. CEQ took 18 months to develop this proposal behind closed doors. Any expectation that the public can comprehensively respond to this proposal in 60 days is appallingly wrong at best, and highly cynical at worst.

The public meeting arrangements were equally and dramatically inadequate. Since the proposal has national implications, public meetings should have been held in a number of different regions around the country and the failure to do so seriously eroded the ability

²³ https://www.eli.org/sites/default/files/docs/yost_forum_2019_nov-dec.pdf.

of many who could not go to Denver or Washington, D.C. (and even if they had, might not have been able to secure a speaking slot) to directly address the agency. CEQ provided only a short, 90-minute notice of sign-up times on the website, during the daytime, thus making it almost impossible for anyone working and/or not at their computers during that time period to sign up. This is especially true given that all slots were signed up within 15 minutes. Indeed, the whole idea of holding meetings in restricted space with the need to get “tickets” to participate twists the ideals of democracy that NEPA represents into something more akin to a lottery.

All of us have been to dozens of NEPA scoping sessions and public hearings held in large auditoriums associated with various schools or community centers. CEQ’s choice of venue, especially in Denver, speaks loudly to its disinterest in hearing from the public.

Finally, CEQ’s refusal to respond to the requests of thousands of citizens and 167 Members of Congress for an extension of this comment period until five days before the end of the comment period is unfathomable and the response, when it finally came, extremely disappointing. By not providing a TIMELY response, CEQ breaks the bounds of rudimentary civility, let alone accountability and responsiveness to the public it was intended to serve.

B. CEQ Has Violated Its Own Regulations for this Proposed Revision and Must Prepare an Environmental Impact Statement (EIS) on this Proposal.

As CEQ noted in its preamble, it is disregarding its own past practices in failing to prepare NEPA analysis on these proposed revisions.²⁴ More bluntly, for the first time, it is violating its own regulations.²⁵ CEQ’s definition of “major federal action” specifically identifies proposed regulations and interpretations adopted pursuant to the Administrative Procedures Act. This proposed, massive revision, which would significantly alter how NEPA is implemented, clearly falls within the current definition as a major federal action.²⁶ The current regulations and the proposed regulations also state that in the context of informal rulemaking, the draft EIS shall normally accompany the proposed rule.²⁷ Thus, CEQ should have issued a draft EIS on January 10, 2020, when it published this proposal.²⁸

²⁴ Council on Environmental Quality, National Environmental Policy Act, Incomplete or Unavailable Information, Final Rule, 51 Fed. Reg. 15618, 15619 (April 25, 1986); Council on Environmental Quality, National Environmental Policy Act, Implementation of Procedural Provisions; Final Regulations, 43 Fed. Reg. 55978, 55989 (November 29, 1978).

²⁵ “CEQ, itself, of course, under established principles found in the Administrative Procedure Act, is required to adhere to its own regulations”. *Wingfield v. Office of Management and Budget*, 7 E.L.R. 20362 (D.D.C. 1977). In that case, the Court found that CEQ was not the cause of the plaintiff’s alleged injury. However, in this situation, all the action is CEQ’s and CEQ’s alone.

²⁶ 40 C.F.R. §1508.18(a) and (b)(1).

²⁷ 40 C.F.R. § 1502.5(d); proposed 1502.5(d).

²⁸ While we strongly believe that the impacts from this rulemaking rise well above the threshold for significance, as CEQ knows, it’s own regulations require, at a minimum, preparation of an EA for a proposed action that is not normally categorically excluded. 40 C.F.R. § 1501.4(b).

CEQ states that it need not comply with NEPA because the proposed rule would not authorize any activity or commit resources to a project that may affect the environment. Courts have established that an agency's interpretation of a statute can be subject to NEPA review when that interpretation can lead to subsequent, significant effects on the environment. For example, in both 1987 and 1997, the Office of Surface Mining Reclamation and Enforcement prepared an EIS analyzing several alternative ways of interpreting Valid Existing Rights for coal mining.²⁹ Similarly, attempts to use categorical exclusions to address regulations have been rejected. The Forest Service's attempt to use its categorical exclusion for rules and regulations to avoid preparing a EA or EIS on its nation-wide forest planning regulations was unsuccessful.³⁰ Among other changes, the 2005 planning regulations included a significantly different approach in regards to NEPA's applicability to forest plans, arguing that EISs were not required for plans that did not authorize site specific actions. The Court found that the planning regulations did not come within the scope of the CE, not just because it was a nationwide rule, but because "the USDA appears to have charted a new path and adopted a new policy approach regarding programmatic changes to environmental regulations."³¹ The Court stated that the issue was not just whether the action would cause significant impact but "whether the path taken to reach the conclusion was the right one in light of NEPA's procedural requirements"³² The Court also noted that "No Ninth Circuit case involving invocation of a CE, that was upheld on appeal, involved broad, far-reaching programmatic actions such as the 2005 Rule."³³

Here, CEQ has clearly not taken the right path. These revisions will change the environmental impact assessment process for the entire executive branch of government, covering millions of federal actions. The scope and impact of the Forest Service's planning regulations, while very significant, pale beside the impact of CEQ's regulations. The proposed regulations, clearly under the sole control and fully the responsibility of CEQ, a federal agency, will have a very significant effect on the quality of the human environment. We attach two set of examples that identify just a few of the differences between the current regulations and the proposed regulations in particular circumstances and demonstrate how these changes would affect birds³⁴ and the ocean environment.³⁵

C. CEQ's Proposed Revision Triggers the Need for Consultation under Section 7 of the Endangered Species Act

²⁹ 62 Fed. Reg. 20138 (April 25, 1997) 52 Fed. Reg. 2421 (January 22, 1987).

³⁰ *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007). See also, *Natural Resources Defense Council v. Duvall*, 777 F. Supp. 1533 (E.D. Ca. 1991) (Bureau of Reclamation was required to prepare an EIS on its proposed regulations setting the price of water utilized from its irrigation infrastructure.) See also, *Cal. Ex rel. Lockyer v. U.S. Dep't. of Agriculture*, 459 F. Supp. 2d 874, 1014 (N.D. Cal. 2006), affirmed, 575 F.3d 999 (9th Cir. 2009) (USDA's reliance on categorical exclusion for repeal of roadless rule and promulgation of new state petitions rule for roadless area was improperly and unreasonably categorically excluded as merely a procedural rule).

³¹ 481 F. Supp. 2d at 36.

³² *Id.* at 38.

³³ *Id.* at 39.

³⁴ Attachment B, "Impacts to Birds of Proposed Changes to NEPA."

³⁵ Attachment C, "Ocean Impacts of Proposed Changes to NEPA".

Section 7 of the Endangered Species Act (ESA) requires each agency to engage in consultation with the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) (collectively, the Services) to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species... determined...to be critical...”³⁶

As the Supreme Court has made clear, a Section 7 Consultation is required for each discretionary agency action that “may affect listed species or critical habitat.”³⁷ Agency “action” is broadly defined in the ESA’s implementing regulations to include “(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.”³⁸

The trigger for consultation is very low.³⁹ The “may affect” standard broadly includes “any possible effect, whether beneficial, benign, adverse or of an undetermined character.”⁴⁰ Even if the Services and action agency ultimately conclude that an action is not likely to adversely affect listed species, any possible effect triggers the consultation requirement.⁴¹ Only if an agency action truly has “no effect” on listed species, and the action agency makes such a finding, is the consultation requirement waived.⁴² The Services’ regulations clearly anticipate the use of “programmatic” consultations on federal, nationwide rulemakings that impact listed species that may affect listed species.⁴³

Since the decision to completely re-write the NEPA regulations clearly represents an agency action of the kind that falls within the scope of section 7, the only question is whether the proposed changes “may affect” endangered species or their designated critical habitats, and therefore require consultations. The clearest demonstration as to how the regulations may affect listed species is the proposed change that allows agencies to ignore cumulative impacts. By allowing all federal agencies to ignore cumulative impacts, environmental impacts that occur downstream, downwind or otherwise outside the action areas of an agency’s proposed action will never be evaluated.

For example, the cumulative impacts of degraded water quality will harm listed species — such as salmon, steelhead and bull trout — in downstream waters through higher

³⁶ 16 U.S.C. § 1536(a)(2).

³⁷ See *Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); 50 C.F.R. § 402.14.

³⁸ 50 C.F.R. § 402.02 (emphasis added).

³⁹ 50 C.F.R. § 402.14(a).

⁴⁰ 51 Fed. Reg. 19,926 (Jun. 3, 1986).

⁴¹ 51 Fed. Reg. 19,926 (June 3, 1986)). See *Karuk Tribe v. Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (“[A]ctions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are ‘not likely’ to do so—require at least some consultation under the ESA.”)

⁴² *Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 598 (D.C. Cir. 2019).

⁴³ See 50 C.F.R. § 402.02 (defining “action”); *Id.* (defining “programmatic consultation”).

pollution levels. Similarly, the failure to assess the cumulative effects of energy development projects on climate change will result in very significant impacts to all listed species. But because the NEPA regulations will allow federal agencies to ignore cumulative pollution impacts, these harms will never be assessed. And these impacts will not be consulted upon because the harm will occur beyond the scope of the NEPA assessment.

Under the joint regulations implementing the ESA, if an impact on a listed species may occur, then the EPA must complete consultations with the Services.⁴⁴ If EPA elects to first complete an informal consultation, it must first determine whether its action is “not likely to adversely affect” (NLAA) a listed species or is “likely to adversely affect” (LAA) a listed species.⁴⁵ The Services define “NLAA” determination to encompass those situations where effects on listed species are expected to be “discountable, insignificant, or completely beneficial.”⁴⁶ Discountable effects are very rare, and limited to situations where it is not possible to “meaningfully measure, detect, or evaluate” harmful impacts.⁴⁷ Any harm or take of an individual member of a listed species crosses the LAA threshold and requires formal consultations with the Services.⁴⁸

During a programmatic formal consultation process, the Services would assess the environmental baseline, potential cumulative effects to the species, and determine if the CEQ’s regulatory changes would jeopardize any listed species or action jeopardizes the continued existence of each species impacted by the agency action.⁴⁹ CEQ would be required to implement Reasonable and Prudent Measures for species that are not jeopardized by the rule change, and implement Reasonable and Prudent Alternatives for species that are jeopardized (or equally protective alternative measures).

Additionally, the proposed regulatory changes would gut the sole program that CEQ oversees to protect species listed under the ESA, replacing that program with an insignificant measure, in violation of ESA section 7(a)(1). The proposed rule changes would gut the sole program that CEQ provides to conserve species listed under the ESA, replacing that program with an insignificant measure, in violation of ESA section 7(a)(1). “[S]ection 7(a)(1) imposes a specific obligation upon all federal agencies to carry out programs to conserve each endangered and threatened species.”⁵⁰ “Total inaction is not allowed.”⁵¹ “[W]hile agencies might have discretion in selecting a particular program

⁴⁴ U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* (hereafter CONSULTATION HANDBOOK).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1146 (11th Cir. 2008) (citing *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir.1998)).

⁵¹ *Id.* (citing *Glickman*, 156 F.3d at 617–18; *Nat’l Wildlife Fed’n*, 332 F. Supp. 2d 170, 187 (D. D.C. 2004) (section 7(a)(1) confers discretion, but that “discretion is not so broad as to excuse

to conserve...they must in fact carry out a program to conserve, and not an ‘insignificant’ measure that does not, or is not reasonably likely to, conserve endangered or threatened species. To hold otherwise would turn the modest command of section 7(a)(1) into no command at all by allowing agencies to satisfy their obligations with what amounts to total inaction.”⁵² “Conservation” means to use all necessary methods and procedures to bring any listed species to the point at which ESA protections are no longer necessary.⁵³ An agency cannot strip away the sole existing conservation measure it provides for listed species without violating the duty to conserve imposed by section 7(a)(1).⁵⁴

CEQ’s current NEPA regulations provide benefits that promote the conservation of listed species by requiring an assessment of cumulative impacts that includes consideration of the cumulative impacts of future federal actions, unlike the regulations implementing the ESA itself, which limit the analysis to “those effects of future State or private activities, not involving Federal activities[.]”⁵⁵. Further, the existing CEQ NEPA regulations require the assessment of impacts that do not necessarily cause jeopardy in violation of the ESA, but nonetheless may be significant. The CEQ’s proposed regulatory changes would strip away those benefits by barring the assessment of cumulative impacts entirely and otherwise weakening the analysis of impacts that do not amount to violations of other federal laws, making the remaining consideration of impacts merely an “insignificant measure” that cannot satisfy the section 7(a)(1) duty. In sum, the proposed NEPA regulation revisions take away the additive value that NEPA analysis provides to informing decisions above and beyond the analysis that would occur in the course of an ESA section 7(a)(2) consultation, and do not provide any substitute for those stripped benefits.

D. Proposed § 1506.13 - Effective Date.

CEQ proposes to give agencies the discretion to apply the revised regulations to activities and environmental documents begun before the effective date of the final rule.⁵⁶ Given the emphasis in the proposal on efficiency and clarity, this proposed change is seriously counterproductive. This step would allow for agencies to change course in mid-stream. Under this proposed approach, an agency could decide to switch the regulatory approach after the public comment period has ended, creating confusion and wasting work already done.

total inaction”); *Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1174 (D. Or. 2005) (“compliance is not committed to agency discretion by law”).

⁵² *Fla. Key Deer v. Paulison*, 522 F.3d at 1147.

⁵³ 16 U.S.C. § 1532.

⁵⁴ *Cf. Ctr. for Biological Diversity v. Vilsack*, 276 F. Supp. 3d 1015, 1032 (D. Nev. 2017), amended, No. 2:13-CV-1785-RFB-GWF, 2018 WL 3059913 (D. Nev. June 19, 2018) (terminating conservation program without providing any substitute measures to address adverse impact violated affirmative 7(a)(1) duty to conserve).

⁵⁵ 50 C.F.R. § 402.02.

⁵⁶ 85 Fed. Reg. 1684, 1706 (Jan. 10, 2020), proposed 40 C.F.R. § 1506.13.

Here are just some of the EISs that could be subject to this sudden switch in rules:

- EISs for a number of national forests in the process of forest plan revision as required by the National Forest Management Act (NFMA). The forests are in various phases of the revision effort, and a number are about to release for public comment/administrative review the draft environmental impact statement or the final environmental impact statement and proposed Record of Decision. These national forests include: Custer-Gallatin, Helena-Lewis & Clark, Grand Mesa-Uncompahgre-Gunnison, Carson, Cibola, Gila, Santa Fe, Sequoia, and Sierra National Forests.
- The EIS for the Draft North Cascades Grizzly Bear Restoration Plan⁵⁷
- The EIS for the Columbia River System Operations⁵⁸
- The EIS for the SPOT Terminals LLC, Deepwater Port License Application, Texas.⁵⁹

A switch in the rules mid-stream would negate the public involvement purpose of NEPA and create massive confusion. Any such new regulations should apply only to NEPA processes begun after publication of any final rule in the Federal Register.

III. THE PROPOSED REVISIONS ARE FUNDAMENTALLY INCONSISTENT WITH THE PURPOSE OF NEPA AND CONGRESS' CLEAR DIRECTION

CEQ's proposed revisions wrongfully mischaracterize the very purpose of NEPA and CEQ's implementing regulations. They do so by turning today's substantively robust process with a clear purpose and linkage to NEPA's policies into a paperwork "check the box" exercise. The current regulations make it clear that the President, the executive branch agencies and the courts "share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101."⁶⁰ The current regulations remind all branches of government and the public of the statutory duty to "interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations."⁶¹ Their overriding focus is on utilizing a common

⁵⁷ Draft EIS *available at* <https://parkplanning.nps.gov/document.cfm?parkID=327&projectID=44144&documentID=77025>.

⁵⁸ Notice of availability of draft EIS *available at*: <https://www.govinfo.gov/content/pkg/FR-2020-02-28/pdf/2020-04107.pdf>.

⁵⁹ Notice of availability of draft EIS *available at*: <https://www.govinfo.gov/content/pkg/FR-2020-02-07/pdf/2020-02452.pdf>.

⁶⁰ 85 Fed. Reg. 1684, *at* 1706; 40 C.F.R. § 1500.1(a).

⁶¹ 40 C.F.R. § 1500.2(a); 42 U.S.C. § 4332(1).

sense and public-friendly process as an “action-forcing” mechanism for achieving the goals of NEPA.⁶²

In contrast, the proposed revisions, beginning with the statement that NEPA is a procedural statute,⁶³ fundamentally mischaracterize NEPA and strip the process of its true purpose. Despite a partial repetition of the current regulation’s admonition that NEPA’s purpose is to provide for informed decision making and to foster excellent action,⁶⁴ a number of key changes make clear that the proposed regulations would dramatically undermine these critical goals. Such an intent runs throughout the proposed revisions but the proposed changes below particularly highlight this diminished, crabbed approach:

A. Proposed § 1500.1 - Purpose and Policy.

This section begins by characterizing NEPA as merely procedural and states that the “purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision making process.”⁶⁵ In fact, going through the process in and of itself does not satisfy the purpose and function of NEPA as the current Section 1500.1 makes clear. Rather, the purpose and function of the process is reflected in decisionmaking informed by the NEPA process. If the process is completed only by virtue of a paperwork exercise, then the federal agency has not considered the information “before decisions are made and before actions are taken” as currently required.⁶⁶

Further, the proposed articulation of the “purpose and function of NEPA” would recast the role of the public from its current iterative form to a more passive role of merely being informed; compare “Accurate scientific analysis, expert agency comments and public scrutiny are essential to implementing NEPA”⁶⁷ with “The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision making process.”⁶⁸

Both changes are a retrenchment from the current regulations and should be abandoned.

B. Section 40 C.F.R. § 1500.2 - Policy.

CEQ proposes to eliminate this section, which directs agencies to comply with various requirements of NEPA “to the fullest extent possible”, from the regulations entirely.

⁶² 40 C.F.R. § 1500.1(a).

⁶³ Proposed C.F.R. § 1500.1(a).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 40 C.F.R. § 1500.1(b).

⁶⁷ *Id.*

⁶⁸ Proposed 40 C.F.R. § 1500.1(a).

Section 102(2) of NEPA directs agencies to interpret and administer the policies, regulations and public laws of the United States in accordance with NEPA's policies "to the fullest extent possible".⁶⁹ In their deliberations on this provision of NEPA, Congress made it clear that:

... It is the intent of the conferees that the provision "the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in Section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.⁷⁰

CEQ's proposal to drop this section reinforces its inexplicable intention to define NEPA much more narrowly than the plain statutory language and Congressional require. Nothing in the preamble addresses the reason for doing this other than simplifying and eliminating redundancy and repetition, but the preamble never explains how dropping part of the law is justifiable simplification nor does it point the readers to provisions which make the current provision redundant or repetitious.⁷¹ Section 1500.2 should be restored in full to the regulations.

C. Proposed § 1500.3, "Mandate" and §1507.3(a) - Agency NEPA Procedures (retitled from "Agency Compliance").

This section purports to forbid agencies from imposing additional procedures or requirements beyond those set forth in the CEQ regulations "except as otherwise provided by law or for agency efficiency."⁷² Of course, CEQ cannot override statutory direction and thus we believe agencies are free to implement whatever procedures or requirements they believe will, in fact, implement NEPA "to the fullest extent possible."⁷³

However, CEQ's intent is clear even though the language is ambiguous. The proposed regulation is intended to strongly discourage any such efforts by line agency leadership who might actually want to implement the statute more robustly and comprehensively than outlined in the proposed regulations. It is appalling that CEQ, charged by Congress with overseeing implementation of all of NEPA, would characterize its regulations as a ceiling rather than a floor for agency NEPA implementation. CEQ has no authority to direct agencies to ignore the requirements of the law or to limit those agencies' discretion. All federal agencies are charged with implementing their own

⁶⁹ 42 U.S.C. § 4332.

⁷⁰ House of Representatives, Conference Report to accompany S. 1075, National Environmental Policy Act of 1969, Dec. 17, 1969, Report No. 91-765, at 9-10, *available at*, <https://ceq.doe.gov/docs/laws-regulations/Senate-Report-on-NEPA.pdf>.

⁷¹ 85 Fed. Reg. at 1693.

⁷² Proposed 40 C.F.R. § 1500.3(a).

⁷³ 42 U.S.C. § 4332; 40 C.F.R. § 1500.2.

statutory responsibilities in a manner consistent with NEPA's purposes and directives, whether CEQ's regulations captures the statute's requirements or not.⁷⁴ CEQ states in the preamble that this is a clarifying change, but it presents no argument in the preamble that this proposed regulation and prohibition is warranted or justified.⁷⁵ and it should be removed throughout the regulations.

D. Proposed § 1500.6 - Agency Authority.

Similar to the other provisions noted above, the proposed change in this regulation would narrow the concept of "full compliance with the purposes and provisions of the Act [NEPA]" to compliance with CEQ's new regulations. The current regulations correctly explain that each agency must interpret the provisions of NEPA as a supplement to its existing authority and as a mandate to interpret its policies and mission activities in that light. Again, CEQ demonstrates its intent to strip the statute down to the bare bones of its own regulations rather than a follow the letter of the law. This change should be rejected.

E. Proposed § 1502.1 - "Environmental Impact Statement Purpose".

Again reflecting its desire to reduce the NEPA process to paperwork, the proposed regulations abandon the current regulatory explanation that an EIS is intended to serve as "an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government."⁷⁶ Instead, the proposal characterizes the "primary purpose" of an EIS as ensuring the agencies consider the environmental impacts of their actions in decisionmaking. No one disputes that agency consideration of environmental impacts is a major purpose of an EIS, but the question is to what end that consideration is intended to achieve. Once again, the preamble offers no justification for this proposed change.⁷⁷ The current regulation should stand.

F. Proposed § 1502.9 - "Draft, Final and Supplemental EISs".

As the preamble notes, CEQ proposes to substitute the word "practicable" for the term "possible" throughout the proposed regulations. Both words have an appropriate place in the regulations. CEQ provides one sentence on this proposed change, merely stating that practicable "is the more commonly used term in regulation."⁷⁸ CEQ should not conflate these two words as they have different definitions and different appropriate application in this context. According to Black's Law Dictionary, "practicable" is defined to mean "[a]ny idea or project which can be brought to fruition or reality without any unreasonable demands."⁷⁹ In contrast, "possible" is defined to mean "[c]apable of existing or happening; feasible."⁸⁰ CEQ's proposal disregards this distinction.

⁷⁴ 42 U.S.C. § 4332.

⁷⁵ 85 Fed. Reg. at 1706.

⁷⁶ 40 C.F.R. § 1502.1.

⁷⁷ 85 Fed. Reg. at 1700.

⁷⁸ 85 Fed. Reg. at 1692.

⁷⁹ Black's Law Dictionary (11th ed. 2019).

⁸⁰ *Id.*

The current regulations use the word “practicable” for certain process requirements; for example, they require the lead agency to publish a notice of intent “as soon as practicable after its decision to prepare an EIS”.⁸¹ However, the proposed regulatory change that states that a draft EIS “must meet, to the fullest extent practicable, the requirements established for final statements in section 102(2)(C) of NEPA”⁸² is directly contrary to the statutory language to comply with the requirements for the detailed statement now known as an EIS “to the fullest extent possible”.⁸³ It must be revised to conform to the statutory language.

Additionally, we are concerned about proposed §1502.19(b) that directs agencies to prepare a supplemental draft if a draft EIS “is so inadequate as to preclude meaningful analysis.” The current regulations direct agencies to prepare a revised draft in these circumstances. The preamble does not explain why the proposed regulation makes this change so we are unable to comment on CEQ’s rationale if it has one. But if a draft EIS is fundamentally inadequate, the entire EIS needs to be revised and republished. If only one particular section is inadequate, a supplemental draft EIS would be appropriate.

In all these respects, the current regulation should stand.

G. Proposed § 1504.3 - “Pre-Decisional Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory”.

We are concerned about an omission in 1504.3(c)(1). The current regulation states that the agency referring a matter to CEQ should request that “no action be taken to implement the matter until the Council acts upon the referral.” The proposed revision does not include that requirement nor any direction to a lead agency to not proceed with the action during the course of the referral except in the instance of the lead agency requesting an extension of the time to respond at 1504.3(d).

When involved in a referral, CEQ considers the whole of NEPA’s policies and goals, not just an agency’s compliance with procedural requirements. Thus, CEQ’s recommendations have often dealt with whether a proposed action should proceed at all,⁸⁴ or if it does, how it should proceed.⁸⁵ Obviously, for the process to work, the proposed

⁸¹ 40 C.F.R. § 1501.7.

⁸² 40 C.F.R. § 1502.9(b).

⁸³ 42 U.S.C. § 4332.

⁸⁴ For example, in late 1981, CEQ recommended that the proposed Dickey-Lincoln School Lakes Project that would have been built on the St. John River be deauthorized. President Reagan subsequently signed a bill deauthorizing the Dickey portion of the project and after a feasibility study, the rest of the project was dropped. Rand, Sally and Tawater, Mark, “Environmental Referrals and the Council on Environmental Quality”, Environmental Law Institute, February, 1986, pp. 248-266, available at: <https://www.slideshare.net/whitehouse/august-1986-the-seventeenth-annual-report-of-the-council-on-environmental-quality>.

⁸⁵ See, for example, Findings and Recommendations of CEQ regarding the Tennessee-Tombigbee Waterway Wildlife Mitigation Feasibility Study, March 26, 1985, 50 Fed. Reg. 12850 (April 1, 1985).

action must not proceed while the referral is ongoing. Because there is no specific explanation for this omission in the preamble, it is impossible to tell if the omission was deliberate, and if so, what the rationale might be for removing this sentence. Whatever the reason for its omission, the underlying direction to the lead agency not to proceed with the action until the referral process has been concluded needs to be added back into this section.

H. Proposed § 1506.1(b) - “Limitations on Actions During the NEPA Process”.

The proposed revision to this section would expand the types of actions that can be taken before completion of the NEPA process. The current regulation was drafted both to minimize the possibility of biasing the decisionmaking process, including the possibility of foreclosing alternatives, and to address concerns that the limitations on pre-decisional action “would impair the ability of those outside the Federal government to develop proposals for agency review and approval.”⁸⁶ Thus, the current regulation states that applicants are not precluded from developing plans or other work necessary to support an application for government permits or assistance and gives the Rural Electrification Administration authority to approve minimal expenditures not affecting the environment (*e.g.*, long lead time equipment and purchase options) made by non-governmental entities seeking loan guarantees.

The proposed amendment to this regulation expands this by specifically proposing that agencies be authorized to engage in “such activities, including, but not limited to “acquisition of interests in land” while the NEPA process is still underway. This addition is of deep concern. Even with the best of intentions, advance acquisition of land is almost certainly going to bias the analytical and decisionmaking process. The preamble presents no justification for this dangerous addition other than a vague reference to making the process “more efficient and flexible”⁸⁷ We question how an applicant expending resources prior to the conclusion of the NEPA process achieves either efficiency or flexibility. In fact, it makes the process more efficient only if one assumes that the outcome is predetermined. The flexibility it affords runs only to the applicant, not to the public’s interest in a fair and unbiased process.

Courts have made it clear, often in the context of deliberating on injunctive relief, that allowing action to proceed before the completion of an adequate NEPA process undermines the purposes of the law. As the Court of Appeals for the First Circuit said in *Sierra Club v. Marsh*,⁸⁸ “The way that harm arises may well have to do with the psychology of decision makers, and perhaps a more deeply rooted human psychological instinct not to tear down projects once they are built.” As that Court noted, there is great “difficulty in stopping a bureaucratic steam roller, once started”⁸⁹

We believe that prior to the completion of the NEPA process project proponents should be limited to activities necessary to support their various applications for assistance,

⁸⁶ 43 Fed. Reg. 5598, 55986 (November 29, 1978).

⁸⁷ 85 Fed. Reg. at 1704.

⁸⁸ 872 F.2d 497, 504 (1st Cir. 1989).

⁸⁹ *Id.*

permits or approval and that this provision should not be broadened to acquisition of interests in land or other, unnamed activities that are not specifically for the purpose of supporting applications. Going beyond that fundamentally starts moving the horse behind the cart with likely bad results. No explanation for making these changes is offered in the preamble.⁹⁰ The regulation should not be amended.

Whether it should make any additional changes to 1506.1, including whether there are circumstances under which an agency may authorize irreversible and irretrievable commitments of resources

We believe the answer to this question is no, there are no such circumstances. Should there be a bona fide emergency situation that requires an action that would normally require an EIS, CEQ can address that need through the development of alternative arrangements.⁹¹ The Act itself flags “irreversible and irretrievable commitments of resources” as an element that must be included in the “detailed statement” (now termed an EIS) so that those considering the decision would understand the gravity and permanence of their actions.⁹² To allow such actions to proceed without completion of the NEPA process would be an illegal mockery of the law.

I. Proposed § 1506.2(d) - Elimination of Duplication with State, Tribal and Local Procedures.

While supporting the addition of tribal governments in the regulations, we note the addition of the sentence that reads, “While the statement should discuss any inconsistencies, NEPA does not require reconciliation.” Why this is this a desirable addition? What problem is it trying to solve? NEPA is replete with references to the need to cooperate with other levels of government to achieve NEPA’s goals. The preamble does not explain what advantage there is in including this addition.⁹³ We oppose the provision.

J. Proposed § 1508.1(s), Definition of “Mitigation”

Similar to the addition noted above, CEQ has chosen to affirmatively state that NEPA does not mandate the form or adoption of any mitigation. The CEQ regulations have never stated that mitigation is required under NEPA, although the current regulations do require consideration of mitigation measures as part of the analysis of alternatives,⁹⁴ environmental consequences,⁹⁵ and when a cooperating agency requires certain mitigation measures to address concerns.⁹⁶ Further, mitigation measures chosen by an agency must

⁹⁰ 85 Fed. Reg. at 1704.

⁹¹ 40 C.F.R. §1506.11.

⁹² 42 U.S.C. § 4332(2)(C)(v).

⁹³ 85 Fed. Reg. at 1704.

⁹⁴ 40 C.F.R. § 1502.14(f).

⁹⁵ *Id.* § 1502.16(h).

⁹⁶ *Id.* § 1503.3(d).

be included in any Record of Decision,⁹⁷ and, of course, implemented.⁹⁸ Mitigation may also be utilized to support an agency's Finding of No Significant Impact.⁹⁹

We believe that fifty years after NEPA's passage, federal agencies are well aware that there is not an enforceable duty under NEPA to mitigate each adverse impact. However, NEPA encourages them to try to do so in its admonition to administer the policies, regulations and public laws of the United States in accordance with NEPA's policies.¹⁰⁰ As the Supreme Court stated, "omission of a reasonably complete discussion of possible mitigation measures would undermine the "action forcing" function of NEPA."¹⁰¹ CEQ's proposed statement undermines the core purpose of the analysis and should be struck. This new and narrowed view from CEQ undercuts the law's purposes and policies. Juxtapose these proposed prohibitory statements with this statement made during the Senate debate about NEPA:

"An environmental policy is a policy for people. . . Its basic principle of the policy is that we must strive in all that we do to achieve a standard of excellence in man's relationships to his physical surroundings. If there are to be departures from this standard they will be exceptions to the rule and the policy. And as exceptions they will have to be justified in the light of public scrutiny."¹⁰²

CEQ's proposed statements about what NEPA does not require as a procedural matter inserted into the regulations reinforce the appearance that CEQ's apparent goal to reduce NEPA to a paperwork process, untethered from environmental policy. Agencies will clearly get the message that they should do only the minimum required by these regulations and may, in fact, be prohibited from doing more.¹⁰³ They should be removed from the regulations.

IV. CEQ UNJUSTIFIABLY PROPOSES TO ELIMINATE NEPA'S APPLICABILITY TO A WIDE VARIETY OF FEDERAL ACTIONS.

A. Proposed §§ 1501.1, 1507.3(c) and 1508.1(q) - Major Federal Action/Non-Major Federal Action.

CEQ proposes to reverse its long-standing position that if a proposed federal action has a significant impact, including a significant cumulative impact, it is a federal action significantly affecting the human environment. In place of the unitary reading of the

⁹⁷ *Id.* § 1505.2(c).

⁹⁸ *Id.* § 1505.3.

⁹⁹ Council on Environmental Quality, "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact", January 14, 2011. Additionally, of course, there may be considerable mitigation requirements under other laws such as the Clean Water Act and Endangered Species Act in particular situations.

¹⁰⁰ 42 U.S.C. § 4332.

¹⁰¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

¹⁰² 115 Cong. Rec. 21, 20956 (1969).

¹⁰³ Proposed sections 1500.3 and 1507.3(a).

direction to agencies to “include in every recommendation or report on proposals for legislation and other major federal action significantly affecting the quality of the human environment,” CEQ wants to go back to a minority line of cases from the early 1970’s that interpreted the phrase “major federal actions significantly affecting the quality of the human environment” as meaning that first, a determination of whether an action is a “major federal action” needed to be made, followed by a determination of significance.

From the beginning of its formal interpretation of NEPA, CEQ explained that:

(b) The statutory clause “major Federal actions significantly affecting the quality of the human environment” is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed actions, the environmental impact of which is to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action.¹⁰⁴

CEQ adopted a similar approach in the next iteration of guidelines published in 1973 after public review and comment.¹⁰⁵ Those guidelines explained that even if a proposed action was localized in its potential impact, “if there is potential that the environment may be significantly affected, the statement is to be prepared.”¹⁰⁶ The guidelines stated that the words “major” and “significantly” were intended to imply thresholds of importance and impact that had to be met before an EIS was required, discussed “federal control and responsibility” and pointed to the example of general revenue sharing funds as an example of when such control and responsibility did not exist.¹⁰⁷

¹⁰⁴ Council on Environmental Quality, Statements on Proposed Federal Actions Affecting the Environment, Guidelines, 36 Fed. Reg. 7724-25 (April 23, 1971).

¹⁰⁵ Council on Environmental Quality, Preparation of Environmental Impact Statements, Guidelines, 38 Fed. Reg. 20550, 20551 (August 1, 1973).

¹⁰⁶ *Id.* at 20551.

¹⁰⁷ *Id.* at 20552.

Subsequently, CEQ specifically adopted the reasoning in *Minnesota Public Interest Research Group v. Butz*.¹⁰⁸ As that decision explained:

To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act, *i.e.*, to ‘attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences.’ By bifurcating the statutory language, it would be possible to speak of a ‘minor federal action significantly affecting the quality of the human environment,’ and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA; the activities of federal agencies cannot be isolated from their impact upon the environment. This approach is more consonant with the purpose of NEPA and is supported in S.Rep. No. 91-296, *supra*, and the CEQ Guidelines.¹⁰⁹

Thus, the preamble to the final regulations explained, “any Federal action which significantly affects the quality of the human environment is ‘major’ for purposes of NEPA.”¹¹⁰ CEQ proposes to remove the sentence, “[m]ajor reinforces but does not have a meaning independent of significantly”.¹¹¹

A close look at CEQ’s rationale set out in its preamble for removing this sentence and at the associated case law reveals that CEQ’s concerns with the current regulation are not well-founded. First, Congress itself characterized “major” actions quite broadly. Note the wording in Section 102(2)(C) which states that, “all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal action significantly affecting the quality of the human environment, a detailed statement. . . .”¹¹² The use of the word “other” clearly means that Congress considered “every recommendation or report on proposals for legislation” to be major Federal actions. Consider also the Senate report language interpreting this provision that states:

¹⁰⁸ 498 F.2d 1314, 1321 (8th Cir. 1974). As one commentator has pointed out, although the discussion in CEQ’s 1973 guidelines influenced some courts to think that there were dual standards, “[t]he unitary standard adopted by CEQ appears correct.” Daniel R. Mandelker, et al., *NEPA Law and Litigation*, 544 (2019) (citing *NAACP v. Medical Center, Inc.*, 584 F.2d 619, 627 (3rd Cir. 1978)). Further as noted below, the case CEQ relied upon for its current regulation, in turn, found support for the unitary approach in the 1973 CEQ guidelines.

¹⁰⁹ *Id.* at 1321-22. Note that the Court found the 1973 Guidelines to be supportive of this interpretation.

¹¹⁰ Council on Environmental Quality, Final Regulations, 43 Fed. Reg. 55978, 55979 (November 29, 1978).

¹¹¹ 40 C.F.R. § 1508.18. It is also important to note that the Guidelines addressed only Subsection (C) of Section 102(2) of NEPA. 43 Fed. Reg. 55978 (November 29, 1978). It was not until promulgation of the 1978 NEPA regulations that CEQ developed the categorical exclusion provision that allows agencies to designate certain classes of actions as typically not requiring preparation of either an EA or an EIS.

¹¹² 42 U.S.C. § 4332(C) (emphasis added).

Each agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs, shall make a determination as to whether the proposal would have a significant effect upon the quality of the human environment. If the proposal is considered to have such an effect, then the recommendation or report supporting the proposal must include statements by the responsible official of certain findings¹¹³

This language simply does not support any interpretation of NEPA that suggests there is some subset of federal actions that have significant effects but are not “major”. Indeed, CEQ’s current regulation on this point is quite consistent with the Senate report language.

CEQ’s proposed reinterpretation of the phrase “major Federal actions significantly affecting the environment” focuses on giving independent meaning to a single word: “major” But “interpretation of a word or phrase depends upon reading the whole statutory text, considering the statute’s purpose and context.” CEQ’s existing interpretation is, moreover, more consistent with NEPA’s “overall statutory scheme.” That scheme starts with NEPA’s ambitious directive that the Federal government should “use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources” to, e.g., “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations,” “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,” and “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” 42 U.S.C. § 4331(b). It would not have been consistent with that goal for Congress to exempt federal actions with significant adverse impacts on the environment from NEPA’s action-forcing requirement simply because, by some non-environmental metric, an agency deemed the action not “major.” By far the more compelling interpretation is the one CEQ has held for decades, that *any* federal action significantly affecting the environment is, for purposes of NEPA, a major action.

Further, CEQ’s existing language does not make the term “major” meaningless, as the preamble alleges.¹¹⁴ Rather, the current regulation – a large portion of which CEQ proposes to retain – focuses on actions “that may be major and which are potentially subject to Federal control and responsibility.”¹¹⁵ That language is consistent with the Supreme Court’s in *Department of Transportation v. Public Citizen*¹¹⁶ that held that when an agency has no ability to prevent certain effects, the agency need not consider those effects when determining whether its action is a ‘major Federal action.’¹¹⁷ And, in fact, the Court cited the current regulatory definition of “major federal action” in explaining NEPA’s requirements and focusing on “federal control and responsibility” as a key element of the

¹¹³ Report of the Senate Committee on Interior and Insular Affairs to accompany S. 1075, No. 91-296, July 6, 1969, p. 20 (emphasis added).

¹¹⁴ 85 Fed. Reg. at 1709.

¹¹⁵ 40 C.F.R. § 1508.18.

¹¹⁶ 541 U.S. 752 (2004).

¹¹⁷ *Id.* at 770.

definition.¹¹⁸ Nothing in the Court’s unanimous opinion suggested in any way that CEQ’s current regulation was problematic.

The focus of the decision in *NAACP v. Medical Center, Inc.*, the case typically cited as authority for the so-called “dual standard” approach (that is, asking first whether a proposed federal action is “major” and second, whether it will have significant impacts) is actually consistent with the current regulatory definition. The case focused on the fact that the Department of Health, Education, and Welfare (HEW)’s involvement in approving a capital expenditure by the Wilmington Medical Center was *ministerial*.¹¹⁹ The underlying statute proscribed detailed standards by which HEW was obligated to reimburse states for certain health care and hospital costs. The decision observed that the regulations specifically excluded situations in which federal aid is distributed in a program such as revenue sharing, in which there is ‘no Federal agency control over the use’ of the funds. We believe that Medicare, Medicaid, and child health payments are analogous to payments under revenue sharing because the Secretary may not control their disbursal. Rather, he pays the hospital for its services to its patient under certain prescribed programs. The agency’s decision as to allocation of those funds is controlled by the health care provider’s costs and the agency is obligated to make payment except in narrow circumstances.”

A careful reading of this case shows that the same result would likely be reached under CEQ’s current regulations. While there was federal involvement in the form of funding, as the court pointed out, it was analogous to general revenue funds, which are excluded from the language of the current regulations.¹²⁰ The current regulations also define “proposal” in a manner that requires that an agency “has a goal and is actively preparing to make a decision one or more alternative means of accomplishing that goal.”¹²¹ That definition makes it clear that an agency has to have discretion to choose among alternatives, and thus the situation in *NAACP v. Medical Center* would likely be decided the same way under the current regulations.

In short, there is no sound rationale or non-arbitrary justification for the proposed deletion of the second sentence in Section 1508.18. There is also no case that we know of that holds a discretionary federal agency action – that is, a proposed action where an agency has sufficient control and responsibility – and that has significant environmental effects can be treated as “minor” and therefore outside of the scope of NEPA.

The major immediate impact of this proposed change would likely be massive confusion and uncertainty and certainly a great deal of litigation. If this standard were actually adopted, we anticipate agencies would identify some further subset of proposed federal actions with significant environmental impacts as not being actions for purposes of NEPA. We see the beginnings of this within the proposed definition itself with the specific exclusion of certain programs run by the Farm Service Agency and Small Business

¹¹⁸ *Id.* at 763.

¹¹⁹ 584 F.2d 619 at 629.

¹²⁰ 40 C.F.R. § 1508.18(a).

¹²¹ 40 C.F.R. § 1508.23.

Administration.¹²² But the harm will not stop there. The proposed regulations invite all agencies to identify other actions that they deem to be “[n]on-major Federal Actions”.¹²³ Within the context of this rulemaking, the harm includes the issues discussed below.

1. Proposed §1508.1(q) – Excluding Projects with Minimal Federal funding or Minimal Federal Involvement.

CEQ’s proposal to exempt projects with minimal federal funding or minimal federal involvement (where the agency cannot control the outcome of the project) is extremely vague and could lead to significant environmental harm. Even the example given in the preamble raises questions. What if that “very small percentage” of federal funding actually is critical for a small community? How is an agency supposed to determine the value of a particular contribution to whether a proposed action will or will not proceed without federal involvement? Where and how does an agency draw the line on mining and oil and gas operations on split estate lands? For good neighbor/shared stewardship projects on national forest land? What are examples of the problem this provision is trying to solve?

2. Proposed § 1508.1(q) – Excludes actions that do not result in final agency action under the Administrative Procedure Act and specifically exempts an agency’s “failure to act” from “major federal action” definition.

CEQ proposes to narrow the definition of “major federal action” such that the NEPA process would exclude actions that do not result in final agency action under the APA. It would also strike from CEQ’s current definition circumstances where a responsible agency official fails to act “and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law” as agency actions.¹²⁴ CEQ’s explanation for this proposed deletion is that in the circumstances described in the current regulation, “there is no proposed action and therefore no alternative that the agency may consider. *S. Utah Wilderness All.*, 542 U.S. at 70-73.”¹²⁵

But CEQ’s proposal is based on a misreading of the Supreme Court’s holding in regards to the APA. The Court found that in that case, there was neither a proposal by the Bureau of Land Management to act nor a requirement to do so. NEPA did not apply, in the Court’s view, because there was no proposed action for it to apply to in the context of that particular land management plan. But the Court was extremely clear that the Section 706(1) of the APA did authorize courts to compel an agency to act when

¹²² Proposed § 1508.1(q)(1), 85 Fed. Reg. 1712, 1729 (January 10, 2020).

¹²³ Proposed § 1507.3(c)(1), 85 Fed. Reg. at 1728.

¹²⁴ 40 C.F.R. § 1508.18.

¹²⁵ 85 Fed. Reg. at 1709. We note that the case was actually titled as *Norton v. Southern Utah Wilderness Alliance* in the Supreme Court. But then, as we point out, CEQ misread the holding also.

agency action is required and is unlawfully withheld.¹²⁶ And that is precisely the type of action to which CEQ's current regulation applies:

The reference in that Section to a 'failure to act' was not intended by the Council to require the preparation of an EIS where no Federal decision was required and none had been made. The phrase 'failure to act' was intended rather to describe one possible outcome in those situations where a Federal decision has been or was required to be made.¹²⁷

CEQ's proposal to remove this provision, which on its face is bounded by the APA or other applicable law, is actually inconsistent with the Supreme Court's holding in *Norton v. SUWA* as well as the plain language of the APA.¹²⁸ CEQ should withdraw this proposed deletion. Leaving it in violates agency responsibilities under the APA.

3. Proposed § 1508.1(q) - Exempts loans, loan guarantees and other forms of financial assistance

This section would specifically exclude farm ownership and operating loan guarantees by the Farm Service Agency (FSA) pursuant to 7 U.S.C. 1925 and 1941-1949 and Small Business Administration (SBA) pursuant to 15 U.S.C. 636(a), 636(m) and 695-697f from being considered a major federal action or action for purposes of NEPA. More generally, it states that actions do not include "loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of the action."¹²⁹

There is no legal justification for CEQ proposing to exclude these broad classes of actions from NEPA. Indeed, NEPA specifically states that:

it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.¹³⁰

Courts have found sufficient federal control and responsibility in the context of financial loans and other forms of financial assistance to warrant application of NEPA for loans, loan guarantees and other forms of financial assistance generally and for FSA and SBA actions specifically. For example, *Buffalo River Watershed Alliance v. Department of*

¹²⁶ 542 U.S. at 63.

¹²⁷ *Defenders of Wildlife v. Andrus*, 672 F.2d 1238, 1245 (D.C. Cir. 1980), quoting from letter by CEQ General Counsel Nicholas C. Yost to the Department of Justice.

¹²⁸ 542 U.S. at 63; 5 U.S.C. § 706(1).

¹²⁹ 85 Fed. Reg. at 1729.

¹³⁰ 42 U.S.C. § 4331(a) (emphasis added).

*Agriculture*¹³¹ dealt with a large hog farm (6,500 swine) backed by both a SBA and FSA loan guarantee. Importantly, a condition for eligibility for these guarantees was that the company could not obtain financing on reasonable terms from other institutions. In holding for the plaintiffs, the court distinguished the situation from a case where loan guarantees are given with no oversight and/or by virtue of nondiscretionary criteria. In enjoining FSA and SBA from making payment on their loan guarantees pending the agencies' compliance with NEPA and the Endangered Species Act, the court stressed that on "balance, the interest in getting the environmental assessment right outweighs any harm that enjoining the guaranties will cause the federal agencies. And the public interest is best-served by ensuring that federal tax dollars aren't backing a farm that could be harming natural resources and an endangered species."¹³² The court also found that plaintiffs' injuries were redressable because of the agencies' continuing oversight responsibilities.¹³³

In *Food & Water Watch v. U.S. Department of Agriculture*,¹³⁴ the court faced a similar factual situation involving a FSA loan guarantee for a poultry concentrated animal feeding operation. Again, the court found that without the FSA loan, it was unlikely that that the operation could have proceeded, since "an applicant for an FSA loan guarantee must certify that the applicant is 'unable to obtain sufficient credit elsewhere without a guarantee to finance actual needs at reasonable rates and terms.' 7 C.F.R. § 762.120(h)(1)."¹³⁵ Again, the court found the plaintiff's injuries were redressable, whether through imposition of mitigation measures or through withdrawal of the loan guarantee.¹³⁶

Similarly, the actions of the Rural Utilities Service (RUS) within the Department of Agriculture were the subject of two decisions involving the proposed expansion of the Sunflower Electric Power Corporation's coal-fired generating plant.¹³⁷ The court determined that the RUS assistance in the form of debt forgiveness and consent to a lien subordination as well as approvals relating to the expansion of the power plant were major federal actions under NEPA and that an EIS was required.¹³⁸

The preamble to this proposed revision argues that these types of actions are not actions for purposes of NEPA because the federal agencies involved do not operate the facilities themselves, control the bank, expend funds unless there is a default, or take physical possession of the property. Those factors, by themselves, are not determinative. The case law demonstrates that in some of these situations, the agencies retain ample control and responsibility through their legal authority to impose conditions, including

¹³¹ No. 13-cv-450, 2014 WL 6837005 (E.D. Ark. Dec. 2, 2014) (appeal dismissed (8th Cir. 15-1310) (April 24, 2015)).

¹³² *Id.* at *6.

¹³³ *Id.* at *3-4.

¹³⁴ 325 F. Supp. 3d 39 (D.D.C. 2018).

¹³⁵ *Id.* at 54.

¹³⁶ *Id.* at 55-57.

¹³⁷ *Sierra Club v. U.S. Department of Agriculture*, 777 F. Supp. 2d 44 (D.D.C. 2011); *Sierra Club v. U.S. Department of Agriculture*, 841 F. Supp. 349 (D.D.C. 2012).

¹³⁸ 777 F. Supp. 2d at 56-64; 841 F. Supp. 2d 349, 357-360 (D.D.C. 2012) (enjoining RUS from granting additional future approvals or financial support for Holcomb Expansion prior to completing an EIS).

mitigation measures, as part of the terms of financial assistance or to decline to grant the assistance in the first place. CEQ’s revisionist interpretation is thus contrary to law.

CEQ also invites comment on whether any types of financial instruments, including loans and loan guarantees, should be considered non-major Federal actions and the basis for such an exclusion.

CEQ must not exclude financial instruments, such as loans and loan guarantees, from what may be considered major federal actions triggering NEPA review. As discussed above, CEQ must also not narrow the definition of major federal action so as to exclude certain financial instruments from NEPA’s reach. These proposed changes defy the purpose and language of NEPA, undermine longstanding precedent and agency practice, and generate confusion, rather than achieve clarity.¹³⁹

Excluding or otherwise narrowing CEQ regulations to exclude certain financial instruments would violate the language, structure, and purpose of NEPA.¹⁴⁰ NEPA’s substantive policy directs the federal government to “use all practicable means” to “improve and coordinate Federal plans, functions, programs, *and resources*” so that the nation may achieve its environmental policy goals.¹⁴¹ Congress’s inclusion of the word “resources” recognizes that a commitment of significant federal funding may impact the environment, thus warranting NEPA review. Moreover, the statute explicitly states that the Federal Government is “to use all practical means and measures, *including financial and technical assistance*, . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . and fulfill the . . . requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a) (emphasis added). Thus, it is Congress’s clear, express intent that financial assistance, such as loans and loan guarantees, be included in NEPA review.

Congress’s intent for NEPA to apply to financial instruments is further supported by the statute’s explicit requirement that agencies comply with NEPA “to the fullest extent possible.”¹⁴² Agency loans and loan guarantees can be substantial—even, at times, reaching billions of dollars. These large commitments of resources may have significant environmental impacts in that they can enable projects with enormous long-term environmental impacts that would not have come to fruition without federal agency financial support. In order for agencies to effectuate Congress’s national environmental policy, these financial instruments properly fall within NEPA’s reach.

¹³⁹ See 85 Fed. Reg. 1684 (noting one of CEQ’s goals with the proposed rulemaking is to “provide greater clarity”).

¹⁴⁰ See *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (“It is a basic tenet that ‘regulations, in order to be valid, must be consistent with the statute under which they are promulgated.’”) (citation omitted).

¹⁴¹ 42 U.S.C. § 4331(b) (emphasis added).

¹⁴² 42 U.S.C. § 4332.

Courts and agencies have long-recognized that federal action triggering NEPA includes when a federal agency enables a private party to act.¹⁴³ Commitments of federal financing to private parties falls within this category of NEPA-eligible actions.¹⁴⁴ Applying NEPA to financial instruments makes sense given that NEPA “guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience that may also play a role in the decisionmaking process and the implementation of the decision.”¹⁴⁵ In other words, because federal financial tools enable private projects that may have significant environmental effects, decisionmakers must have the relevant information available to inform their decision.¹⁴⁶

CEQ’s proposals to exclude certain types of financial instruments from NEPA’s reach, therefore, undermine decades of court precedent and agency practice. CEQ offers no explanation for eliminating these longstanding practices and consequent protections. Moreover, rather than providing clarity—one of CEQ’s purported goals in the rulemaking—CEQ’s proposed changes would instead result in confusion among courts, agencies, and private parties seeking financial assistance as these stakeholders scramble to adjust to new expectations.¹⁴⁷ For these reasons CEQ must remove the proposed language relating to financial instruments.

In addition to soliciting comments on whether federal loans, loan guarantees, and other financial tools ought to be considered non-major federal actions, CEQ is proposing to redefine “Major Federal action” in such a way so as to unreasonably exclude certain financial instruments.¹⁴⁸ CEQ’s proposed redefinition provides:

(q) Major Federal action

¹⁴³ See *Save Barton Creek Ass’n v. FHWA*, 950 F.2d 1129, 1134 (5th Cir. 1992); *Scientists’ Inst. for Pub. Info. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (“there is ‘Federal action’ within the meaning of the statute not only when an agency [acts], but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment”).

¹⁴⁴ *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 155 (D.C. Cir. 1985) (“Federal funding has long been recognized as an appropriate basis to enforce NEPA’s requirements on non-federal parties.”).

¹⁴⁵ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

¹⁴⁶ See, e.g., *Scientists’ Inst. for Pub. Info. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (“there is ‘Federal action’ within the meaning of [NEPA] . . . whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment”); *Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept.*, 446 F.2d 1013, 1027 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972) (federal funding “triggered the advertisement for contract bids, the letting of contracts, and the commencement of construction,” thus implicating NEPA); NEPA Law and Litig. § 8:20 (federal financing of a private entity’s project is sufficient to require NEPA “because it is the federal agency that has ‘enabled’ the nonfederal entity to act.”).¹⁴⁶

¹⁴⁷ See 85 Fed. Reg. 1684 (CEQ’s proposed rule “would modernize and clarify the regulations”).

¹⁴⁸ *Id.* at 1729 (emphasis added).

(1) Actions do not include loans, loan guarantees, or other forms of financial assistance where the Federal agency *does not exercise sufficient control and responsibility over the effects of the action*.

The proposed language above—limiting NEPA applicability to financial instruments unless certain new criteria are met—is problematic for several reasons. First, agency control has historically been but one factor when evaluating whether NEPA applies to financial instruments; courts and agencies also evaluate the amount of financial assistance. It would be unreasonable for NEPA applicability to turn on control and responsibility alone. CEQ’s proposed language undermines established case law recognizing that agency control does not always equate “responsibility over” an action’s effects.¹⁴⁹ Last, CEQ fails to offer support for creating what amounts to an exclusion of many significant financial instruments from NEPA’s reach, and nor does CEQ explain or support this departure from past policy and practice.

CEQ’s proposed language creates a barrier to NEPA applicability based, unreasonably, solely on an agency’s “control and responsibility over the effects of an action.”¹⁵⁰ In contrast, CEQ’s existing regulations define “major Federal action” as an “action[] with effects that may be major and which [is] *potentially subject* to Federal control and responsibility.”¹⁵¹ Operating against CEQ’s existing requirement that control and responsibility may be possible—but *not required*—for NEPA to apply, courts have taken the approach of examining both the amount of a federal financial instrument and the potential for agency control.¹⁵² CEQ’s proposal eliminates one part of this evaluation—the financial instrument’s amount—without explanation. Given that federal financial commitments are often millions, and even billions, of dollars, it is unreasonable and irresponsible to remove this factor when evaluating whether an action may significantly affect the environment.

CEQ’s proposed language requiring control and responsibility *over the effects* also misconstrues the type of control relevant to NEPA and financial instruments. Typically, agencies exercise control in the context of financial instruments by, for example, evaluating whether a project meets certain eligibility criteria.¹⁵³ Agencies may then place conditions on a commitment of financial assistance.¹⁵⁴ Eligibility criteria and conditions on a financial

¹⁴⁹ *Scientists’ Institute for Public Information, Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079 (D.C. Cir. 1973) (recognizing major federal action occurs when an agency enables a private party to act).

¹⁵⁰ 85 Fed. Reg. 1729.

¹⁵¹ 40 C.F.R. § 1508.18 (emphasis added).

¹⁵² *See, e.g., Ka Makani ‘O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 960 (9th Cir. 2002); *Indian River Cty. v. Rogoff*, 201 F. Supp. 3d 1, 18 (D.D.C. 2016) (“The Court does not have before it any persuasive authority that financial assistance at the level provided by the PAB allocation, *when paired with federal-agency control*, cannot make up major federal action.”) (emphasis in original).

¹⁵³ *See, e.g.,* 10 C.F.R. § 611.100 (eligibility criteria for loan guarantees under the Department of Energy’s Title XVII program).

¹⁵⁴ *See, e.g., Indian River Cty. v. Rogoff*, 201 F. Supp. 3d 1, 19 (D.D.C. 2016) (noting that an agency’s “discretion to condition its loan award on the recipient’s compliance with various

instrument—sufficient controls to trigger NEPA—are nonetheless distinct from the kind of “responsibility over the effects” CEQ is prescribing. CEQ’s proposed language, therefore, fails to align with the realities of federal financial tools and must be removed.

Finally, CEQ’s proposed language is arbitrary and capricious on several grounds, necessitating its removal. CEQ’s docket accompanying this rulemaking offers no support for excluding financial instruments from NEPA’s reach, or otherwise narrowing the definition of major federal action so as to exclude financial instruments absent sufficient control and responsibility over the effects of the action. In this way, CEQ lacks reasonable grounds for making this change.

4. Proposed § 1508.1(q)(2)(i) - Recharacterizes the nature of “action” for treaties, international conventions and agreements.

This proposed revision would recharacterize the federal action for purposes of NEPA in the case of a treaty, international convention or agreement. Under the current regulation,¹⁵⁵ agencies have prepared NEPA analyses either prior to negotiations or prior to ratification. The proposed revision change would delay NEPA compliance until a treaty, convention or agreement has already been negotiated and ratified or executed by the United States and is being implemented. The proposed revision also removes the statement that “Proposals for legislation include requests for ratification of treaties” from the current definition of “Legislation”.¹⁵⁶ Thus, U.S. positions during negotiations and the decision whether to sign or ratify such an instrument would be devoid of analysis and public involvement. But if NEPA analyses are not conducted until after negotiations have been completed and agreements signed or ratified, those decisions will have been made uninformed by any NEPA analysis. For this reason, the proposed revision is contrary to law.

The proposed change is also contrary to decades of agency NEPA practice. CEQ fails to provide any explanation for the change. For example, in 1973, the Department of State prepared a draft and final EIS on the proposed ratification of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters. The National Oceanic and Atmospheric Administration prepared and a draft and final EIS in 1979-1980 in cooperation with the Department of State for the proposed Interim Convention on Conservation of North Pacific Fur Seals prior to its submission to the U.S. Senate. The Department of State prepared draft and final EISs in 1982 prior to negotiations for an international regime for Antarctic Mineral Resources, in 1984 prior to submitting the Compact of Free Association for Micronesia to Congress for ratification, and in 1988, prior to negotiations on the proposed Montreal Protocol on Substances that Deplete the Ozone

conditions, including environmental mitigation measures” proved sufficient to trigger NEPA); *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889, 915 (N.D. Cal. 2007) (when evaluating agency financing to a project, “the Court must consider carefully the nature of [agency] involvement in these projects and particularly what conditions, if any, the agencies impose in connection with financing.”).

¹⁵⁵ 40 C.F.R. § 1508.18 (b)(1).

¹⁵⁶ 40 C.F.R. § 1508.17.

Layer. In 1988, the Department of the Army prepared an Environmental Assessment for the Intermediate Range Nuclear Forces Treaty. Any departure from that practice, as well as from Congress's expressed intention that federal actions be informed by advance consideration of environmental impacts, demands a lawful and rational justification that the proposed rule's preamble does not provide.

5. Proposed § 1501.8(q)(2) - Guidance Documents.

This provision proposes to strike the word "guide" from the current definition of major federal action in the context of stating that, "Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based."¹⁵⁷

The rationale for this proposed deletion is simply that "guidance is non-binding." This statement significantly underestimates the impact of guidance. Guidance may vary in its nature and effect, but some guidance functions as the equivalent of a directive, setting a firm policy position that has legal effect. And "it is well established that an interpretative guidance issued without formal notice and comment rulemaking can qualify as final agency action."¹⁵⁸ In fact, CEQ's own guidance has been given "substantial deference" by the federal courts.¹⁵⁹

CEQ should abandon this entire effort to re-interpret the most well known phrase in NEPA.

ADDITIONAL QUESTIONS RELATED TO "MAJOR FEDERAL ACTION"

Should CEQ make any further changes to this paragraph [the definition of "major federal action" paragraph], including changing "partly" to predominantly" for consistency with the edits to the introductory paragraph regarding "minimal Federal funding." CEQ also invites comment on whether there should be a threshold (percentage or dollar figure) for "minimal Federal funding," and if so, what would be an appropriate threshold and the basis for such a threshold.

¹⁵⁷ 40 C.F.R. § 1508.18(b)(2) (emphasis added).

¹⁵⁸ *State of Arizona v. Shalala*, 121 F. Supp. 2d 40, 48 (D.D.C. 2000), citing, among other cases, *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) for a two-prong test that (1) the action must first mark the "consummation" of the decisionmaking process and secondly must cause "legal consequences" or "determine rights or obligations."

¹⁵⁹ *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 549 F.3d 1211 (9th Cir. 2008) (giving *Auer* deference to CEQ guidance on consideration of past actions in cumulative effects analysis); *Seattle Audubon vs. Lyons*, 871 F. Supp. 1291, 1319-20 (W.D. Wash. 1994) (relying in part on CEQ General Counsel's memo advising on correct formulation of the no action alternative to affirm Forest Service's framing of no action alternatives in regards to the proposed Pacific Northwest Forest Plan).

For good reason, CEQ has never equated the amount of federal funding for a proposed action with the level of analysis required for NEPA compliance. It should not take that step now. The level of environmental impact may be relatively small despite a large amount of federal funding or quite significant despite a modest amount of federal funding. For example, federal approval of the introduction of a foreign species for purposes of biological control may not involve a large amount of federal funding, but has the potential for significant ecological impact. Conversely, a decision to invest a significant amount of federal funding for preservation of a historic site may, by maintaining the site in its current condition, not have a significant impact.

Creating a financial threshold to determine whether a proposed action should be analyzed under NEPA would not be wise or supported by any evidence or rationale identified in the proposed rule's preamble. The threshold analysis for NEPA purposes turns on environmental and related social and economic effects, not funding levels. Categorical exclusions are the appropriate way to treat actions without significant impacts. Imposing funding limitations would invite efforts to avoid any such threshold and ultimately would be arbitrary and capricious. For the reasons stated above, we also oppose changing "partly" to "predominantly."

Whether the definition of "major Federal action" should be further revised to exclude other *per se* categories of activities or to further address what NEPA analysts have called "the small handle problem." Commenters should provide any relevant data that may assist in identifying such categories of relevant data that may assist in identifying such categories of activities.

As discussed above, we strongly disagree with CEQ's proposed reinterpretation of the key phrase in Section 102(2)(C) of NEPA, "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment". That proposed reinterpretation would reverse decades of consistent CEQ and case law interpretation to further the apparent goal of narrowing NEPA review. Thus, we do not support CEQ adding additional categories of federal actions allegedly exempt from NEPA review.

We also do not believe that the CEQ regulations should be revised to address what is informally characterized as the "small federal handle" issue. The preamble cites the discussion of this issue in a treatise by Professor Mandelker.¹⁶⁰ As Professor Mandelker's discussion illustrates, court decisions in this area depend largely on the facts of a particular case.¹⁶¹ For example, the 9th Circuit's decision in *Save Our Sonoran, Inc., v. Flowers*¹⁶² affirmed the lower court's determination that while the Corps' direct jurisdiction was over the desert washes at a development site, these washes were like "capillaries through

¹⁶⁰ Mandelker, Daniel R., Glicksman, Robert L., Aughey, Arianne Michalek, McGillivray, Donald, Doelle, Meinhard, MacLean, Jason, *NEPA Law and Litigation*, § 8.20, Thomas Reuters (2019), cited at 85 Fed. Reg. 1709.

¹⁶¹ *Id.*

¹⁶² 408 F.3d 1113 (9th Cir. 2004).

tissue”.¹⁶³ Thus, “any development the Corps permits would have an effect on the whole property [and] [t]he NEPA analysis should have included the entire property.”¹⁶⁴ As the Court of Appeals decision explained, the Supreme Court’s decision in *Dept. of Transportation v. Public Citizen*¹⁶⁵ is consistent with this reasoning:

In *Public Citizen*, the Supreme Court excluded from the scope of NEPA analysis any environmental effect that does not have a ‘reasonably close causal relationship’ to the proposed development. Here, the district court found that any development permitted by the Corps would affect the entire property. *Public Citizen*’s causal nexus requirement is satisfied.¹⁶⁶

Agencies have substantial guidance from case law. CEQ should not proceed to further rulemaking on this issue.

B. Proposed § 1508.17 - Legislation.

The current definition of legislation that reads “[l]egislation’ includes a bill or legislative proposal to Congress” should be retained. The proposed revision of the definition substitutes the word “means” for “includes.” However, there are potentially other instruments that a department may send to Congress besides a bill or legislation. For example, the action at issue in *NRDC v. Lujan*¹⁶⁷ was neither a bill nor legislation, but rather a report that Congress required the Secretary of the Interior to submit. The report had to include certain factual information, analysis and recommendations about the Arctic National Wildlife Refuge.¹⁶⁸

CEQ offers no explanation for this narrowing of the definition of legislation and it should be withdrawn.

CEQ also asks for comments on whether the legislative EIS requirement should be eliminated or modified because the President proposes legislation, and therefore it is inconsistent with the Recommendations Clause of the U.S. Constitution, which provides the President shall recommend for Congress’ consideration ‘such [m]easures as he shall judge necessary and expedient...’ U.S. Constitution, Ar. II, 3. The President is not a Federal agency, 40 CFR 1508.12, and the proposal of legislation by the President is not an agency action. *Franklin v. Mass.*, 505 U.S. 788, 800-01 (1992).

¹⁶³ *Id.* at 1122.

¹⁶⁴ *Id.* at 1122.

¹⁶⁵ 541 U.S. 752 (2004).

¹⁶⁶ *Save Our Sonoran, Inc.*, 408 F.3d at 1122 (citation omitted). *See also*, *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033 (9th Cir. 2009).

¹⁶⁷ 768 F. Supp. 870 (D.D.C. 1991).

¹⁶⁸ 16 U.S.C. § 3142(h).

CEQ cannot eliminate the legislative EIS (LEIS) requirement. The sole type of action that Congress specifically identified as being the subject of the “detailed statement” required by Section 102(2)(C) of NEPA is a “report on proposals for legislation.”¹⁶⁹

Nothing in the Supreme Court’s decision in *Franklin v. Massachusetts* stands for the proposition that Congress cannot require an agency to submit information to it in a systematic manner, which is exactly what Congress did in Section 102(2)(C) of NEPA. Rather, *Franklin* holds that in a situation in which the President’s “personal transmittal of the [decennial census] report to Congress settles the apportionment,” there is no final agency action for purposes of the APA.¹⁷⁰ But as has been pointed out, “[o]f course, there is a big difference between saying that APA review is unavailable and saying that officials do not have to comply with NEPA when they suggest legislation.”¹⁷¹ As the Court in *Public Citizen* stated:

Franklin is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties. . . . When the President’s role is not essential to the integrity of the process, however, APA review of otherwise final agency actions may well be available.¹⁷²

C. Proposed §§ 1502.4(b), 1502.4(c)(3) - Programmatic EISs.

CEQ proposes to eliminate the language in the current regulation that states that programmatic EISs “are sometimes required”¹⁷³ and to eliminate the requirement that programmatic EISs “shall” be prepared for federal or federally assisted research, development of demonstration programs for new technologies that, if applied, could significantly affect the quality of the environment.¹⁷⁴ Both proposed changes are unlawful and unwarranted.

Many years before CEQ’s current regulations were promulgated, the U.S. Court of Appeals for the D.C. Circuit determined that a programmatic EIS may be “sometimes required” in the context of the development of new technology. In the seminal decision of *Scientists’ Institute For Public Info, Inc. v. Atomic Energy Commission*,¹⁷⁵ the Court observed that the:

¹⁶⁹ 42 U.S.C. § 4332(2)(C).

¹⁷⁰ *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992). Note that the Court did not find that Congress was precluded from including the President under the Administrative Procedures Act. Rather, it found that “textual silence” was not enough to bring the Presidency within its purview and that out of respect for separation of powers, it “would require an express statement by Congress before assuming it intended the President’s performance of his statutory to be reviewed” under the APA. *Id.* at 800–01.

¹⁷¹ *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 554 (D.C. Cir. 1993) (Powell, J., concurring).

¹⁷² *Id.* at 552.

¹⁷³ 40 C.F.R. § 1502.4(b).

¹⁷⁴ 40 C.F.R. § 1502.4(c)(3).

¹⁷⁵ 481 F.2d 1079 (D.C. Cir. 1973).

Application of NEPA to technology development programs is further supported by the legislative history and general policies of the Act. When Congress enacted NEPA, it was well aware that new technologies were a major cause of environmental degradation. The Act's declaration of policy states:

The Congress [recognizes] the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of . . . new and expanding technological advances. National Environmental Policy Act, § 101(a), 42 U.S.C. §4331(a) (1970).

And the Senate report notes, as one of the conditions demanding greater concern for the environment:

A growing technological power which is far outstripping man's capacity to understand and ability to control its impact on the environment. S.Rep. No. 91-296.

NEPA's objective of controlling the impact of technology on the environment cannot be served by all practicable means, see 42 U.S.C. §4331(b) (1970), unless the statute's action forcing impact statement process is applied to ongoing federal agency programs aimed at developing new technologies which, when applied, will affect the environment. To wait until a technology attains the stage of complete commercial feasibility before consideration the possible adverse environmental effects attendant upon ultimate application of the technology will undoubtedly frustrate meaningful consideration and balancing of environmental costs and other benefits. Modern technological advances typically stem from massive investments in research development, as is the case here. Technological advances are therefore capital investments and, as such, once brought to a stage of commercial feasibility the investment in their developments acts to compel their application. Once there has been, in the terms of NEPA, "an irretrievable commitment of resources" in the technology development stage, the balance of environmental costs and economic and other benefits shifts in favor of ultimate application of the technology.¹⁷⁶

The Court stated that it "tread firm ground in holding NEPA requires impact statements for major federal research programs . . . aimed at development of new technologies which, when applied, will significantly affect the quality of the human environment."¹⁷⁷ While as in all NEPA case law, holdings most typically depend on the facts of a particular situation, the articulation of NEPA law in the D.C. Circuit's decision in *Scientists' Institute v. AEC* stands.

Also before CEQ's current regulations were promulgated, the U.S. Supreme Court recognized that in some cases, an EIS on a proposed program could be required. While

¹⁷⁶ *Id.* at 1089-90.

¹⁷⁷ *Id.* at 1091.

determining that in the particular case at hand, factually there was not a proposed program, the Court in *Kleppe v. Sierra Club*¹⁷⁸ made it clear that in “certain situations,” a comprehensive EIS would be required.¹⁷⁹ The Supreme Court further explained that “when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.”¹⁸⁰

Far from clarifying NEPA’s requirements or making the process more efficient, CEQ’s proposed deletion of the fact that programmatic EISs are “sometimes required” and the proposed change from “shall” to “should” in relationship to programmatic EISs at an appropriate stage of technological development will mislead and confuse agencies and likely result in violations of law. There is no explanation in the preamble for these changes¹⁸¹ and they should be rejected in any final rulemaking.

Whether the regulations should clarify that NEPA does not apply extraterritorially, consistent with *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-16 (2013), in light of the ordinary presumption against extraterritorial application when a statute does not clearly indicate that extraterritorial application is intended by Congress.

The regulations should not state that NEPA does not apply to federal agency decisions in regards to federal actions that would take place outside of the United States or with effects outside of the United States. The “extraterritoriality issue” is a red herring in the context of NEPA.

The presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”¹⁸² The presumption also “helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branch.”¹⁸³ Examples of situations in which the presumption has been applied include the applicability of the Eight Hour Law to American workers in foreign countries where the U.S. law would have applied to citizens working in their own country for an American contractor were the statute applied abroad,¹⁸⁴ the application of U.S. security laws when the statements at issue were made from a foreign company’s

¹⁷⁸ 427 U.S. 390 (1976).

¹⁷⁹ *Id.* at 409.

¹⁸⁰ *Id.* at 410. The Court went on to say that, “[c]umulative environmental impacts are, indeed, what requires a comprehensive impact statement.” *Id.* at 413.

¹⁸¹ 85 Fed. Reg. at 1700.

¹⁸² *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 108 (2013) (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

¹⁸³ *Id.* at 116.

¹⁸⁴ *Foley Bros. v. Filardo*, 336 U.S. 281, 287 (1949).

headquarters in its home country,¹⁸⁵ and allegations that certain corporations violated the law of nations in a foreign country.¹⁸⁶

In contrast, implementation of NEPA does not regulate the conduct of either individuals or corporations. Where courts have found that application of NEPA would, in fact, have serious foreign policy implications, they have excused agencies from compliance.¹⁸⁷ But in a case where the federal agency decisionmaking occurs primarily in the U.S. and a case does not present a conflict between U.S. and foreign sovereign law, the presumption against extraterritoriality does not apply to NEPA implementation of federal agency decisionmaking.¹⁸⁸ Further, courts have analyzed the presumption differently when the proposed action in question has effects in the U.S.¹⁸⁹

NEPA's legislative history and statutory language clearly evidence concern and awareness about environmental degradation of the worldwide environment and biosphere.¹⁹⁰ Shortly after the law's passage, Congressional Members and Congressional committees that had been involved in NEPA's enactment stated that the EIS requirement was meant to apply to federal agency actions wherever they were proposed to occur. In responding to a suggestion made during an oversight hearing that perhaps NEPA did not apply fully to the international environmental effects of agency actions, a Merchant Marine and Fisheries Committee report contained the following admonition:

Stated most charitably, the committee disagrees with this interpretation of NEPA. The history of the Act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context.¹⁹¹

When Congress was debating proposed legislation (which did not pass) to exempt the Export-Import Bank from NEPA, Senator Muskie stated that he was amazed at:

¹⁸⁵ *Morrison v. Nat'l Australia Bank*, 561 U.S. 247, 255 (2010).

¹⁸⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013).

¹⁸⁷ *See, e.g., Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1366 (D.C. Cir. 1981).

¹⁸⁸ *Envtl. Def. Fund v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993).

¹⁸⁹ *Nat'l Org. for the Reform of Marijuana Laws v. Dep't of State*, 452 F. Supp. 1226, 1233 (D.D.C. 1978); *see also, U.S. v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997).

¹⁹⁰ *See, e.g.,* 115 CONG. REC. 29,082 (1969) (“Although the influence of U.S. policy will be limited outside its borders, the global character of ecological relationships must be the guide for domestic activities. Ecological consideration should be infused into all international relations.”); 115 CONG. REC. 26,576 (1969) (“It is an unfortunate fact that many and perhaps most forms of environmental pollution cross international boundaries as easily as they cross state lines.”). 42 U.S.C. § 4321 (“The purposes of this chapter are . . . to promote efforts which will prevent or eliminate damage to the environment and biosphere”); 42 U.S.C. § 4332(F) (recognizing the “worldwide and long-range character of environmental problems”).

¹⁹¹ Administration of the National Environmental Policy Act, Merchant Marine and Fisheries Committee, H.R. REP. NO. 92-316, pt. 1, at 53 (1971).

[b]ureaucratic descriptions of legislative intent 180 degrees opposite from what I know the actual legislative intent to have been. The thought never occurred to me that somewhere down the line nine years later the argument would be made that because major Federal actions impacting on areas outside the United States were not specifically referenced that, therefore, they were excluded.¹⁹²

The Agency for International Development (A.I.D.) has followed regulations implementing NEPA since 1976 for projects such as irrigation projects, road construction, water and sewage projects and resettlement projects.¹⁹³ When site specific NEPA analysis is prepared for actions in host countries, A.I.D. representatives hold consultations with the host government throughout the process, including appropriate public participation.¹⁹⁴

NEPA also applies to transboundary effects caused by U.S. federal agency actions. In *Backcountry Against Dumps v. Perry*,¹⁹⁵ the Court held that NEPA required DOE to consider the effects in Mexico of a proposed transmission line that would be partly constructed in the United States and partly in Mexico.¹⁹⁶ Similarly, the Bureau of Reclamation was required to analyze the impacts of transferring water from the Missouri River Basin to the Hudson Bay Basin and the associated concerns regarding biota transfer in Canada.¹⁹⁷

In short, in many circumstances that do not involve the presumption against extraterritoriality, agencies have a responsibility to assess actions and effects outside of the United States. CEQ should not proceed with rulemaking on this issue.

D. Proposed §§1501.1(a)(2) and 1507.3(c) - NEPA Threshold Applicability, Non-Discretionary Actions.

This proposed threshold would state that actions that are non-discretionary actions, in whole or in part, are not subject to NEPA. The CEQ regulations and applicable case law make it clear that an agency has to have some discretion for NEPA's procedural requirements to apply.¹⁹⁸ This makes sense given the relationship of the NEPA process to decisionmaking. On the other hand, far too often, we have found that agencies proffer a

¹⁹² Export-Import Bank Amendments of 1978: Hearings before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 2d Session (1978), p. 220.

¹⁹³ 22 C.F.R. pt. 216.

¹⁹⁴ *Id.* at § 216.8.

¹⁹⁵ 2017 WL 3712487 (S.D. Cal. 2017).

¹⁹⁶ *Id.* at 4–5.

¹⁹⁷ *Manitoba v. Salazar*, 691 F. Supp. 2d 37, 51 (D.D.C. 2010); *see also*, *Swinomish Tribal Cmty. v. FERC*, 627 F. 2d 499 (D.C. Cir. 1980); *Wilderness Soc'y v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972).

¹⁹⁸ A “proposal,” for purposes of NEPA “exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision one or more alternative means of accomplishing that goal. . . .” 40 C.F.R. § 1508.23. *See also*, *State of South Dakota v. Andrus*, 614 F.2d 1190, 1193 (8th Cir. 1980), *Milo Cmty. Hosp. v. Weinberger*, 525 F.2d 144, 148 (1st Cir. 1975).

much more modest view of their discretion when considering NEPA's applicability than they do in other contexts. And agencies have sometimes incorrectly asserted that a statutory authorization to undertake an action excuses the need to comply with NEPA.¹⁹⁹

Even if legislation directs an agency to construct a particular structure at a particular location, the agency typically retains considerable discretion as to design, construction and mitigation measures. While we believe it is unnecessary to include this provision in the CEQ regulations at all, we particularly object to the proposed language suggesting that an action is not subject to NEPA if there is a lack of discretion "in part". If such a situation truly exists, the agency must still comply with NEPA for the remainder of the action and explain its rationale for not analyzing alternatives for the non-discretionary portion of the action. The current wording invites confusion and abuse and should be removed or modified.

E. Proposed §§ 1501.1(a)(4) and 1507.3(c) - NEPA Threshold Applicability and Congressional Intent.

This provision invites agencies to judge for themselves whether Congress intended there to be compliance with NEPA for a particular type of action. The preamble does not identify any legal authority or justification for this proposal and we do not believe there is any such authority. Congress included in NEPA the admonition, as we need to keep reminding CEQ, that agencies should implement the provisions of Section 102(2) "to the fullest extent possible."²⁰⁰ Congress is quite capable of exempting either a class of actions or a particular project from NEPA and has done so unequivocally on several occasions. The U.S. Supreme Court has stated quite clearly that:

NEPA's instruction that all federal agencies comply with the impact statement requirement – and with all the other requirements of § 102 – 'to the fullest extent possible,' 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. This conclusion emerges clearly from the statement of the Senate and House conferees, who wrote the 'fullest extent possible' language into NEPA" 'The purpose of the new language is to make it clear that each agency of the Federal Government *shall* comply with the directives set out in [§ 102(2)] *unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid

¹⁹⁹ See, e.g., *Friends of Columbia Gorge, Inc. v. U.S. Forest Serv.*, 546 F. Supp. 2d 1088, 1094–95 (D. Or. 2008).

²⁰⁰ 42 U.S.C. § 4332.

compliance.’ 115 Cong. Rec. 39703 (1969) (House conferees. *See id.* at 40418 (Senate conferees). *See also* 40 CFR §1500.4(a) (1975).²⁰¹

Courts have also been clear that legislation authorizing a particular project does not relieve an agency from the obligation to evaluate the project under NEPA. In *Izaak Walton League of America v. Marsh*,²⁰² appellants argued that Congressional authorization for a particular lock and dam project on the Mississippi River demonstrated that Congress did not mean for the Corps to undertake the NEPA process subsequent to the authorization’s passage. Citing to the U.S. Supreme Court’s consistent position that repeal by implication is disfavored, the Court held that passage of the authorization bill did not relieve the Corps from its NEPA obligations.²⁰³ As the Court said in *Izaak Walton*:

We note, however, that NEPA itself states that all government action must be taken in accordance with the goals set forth in the Act. [cite omitted] Moreover, Congress has shown that it is fully capable of expressing its desire to exempt projects from NEPA. . . . Given Congress’ clearly expressed desire to ensure that all government actions are taken in accordance with NEPA, and its ability to expressly override the requirements of the Act, we believe that, even when substantive legislation is involved, repeal by implication should be found only in the rarest of circumstances. Absent very strong evidence in the legislative history demonstrating a congressional desire to repeal NEPA, or a direct contradiction between that Act and the new legislation, claims under NEPA should be reviewed.’²⁰⁴

Thus, the law is already clear that the only statutory conflict that can excuse an agency from NEPA compliance is when Congress “expressly prohibits” or makes full compliance with some aspect of NEPA’s requirements “impossible”. CEQ’s proposed invitation to agencies to second guess Congress’ intent invites agencies to go down an unlawful pathway. This proposal should be withdrawn.

F. Proposed § 1501.1(5) and 1507.3(b)(6) - NEPA Threshold Applicability and Functional Equivalence.

These proposed sections invite all agencies to substitute any other analysis or process for NEPA. According to the proposed text, the analysis or process could be mandated by another law or by an executive order for proposed regulations or in the case of other proposed actions, apparently a process developed by the agency itself. The open invitation to abandon the NEPA process comes with three general criteria that are so broad and vague as to be open to multiple interpretations: 1) there are substantive and procedural standards that ensure full and adequate consideration of environmental issues; 2) there is public participation before a final alternative is selected, and 3) a purpose of the review

²⁰¹ *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n*, 426 U.S. 776, 788 (1976) (emphasis added).

²⁰² *Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981).

²⁰³ *Id.* at 368. The court also noted that prior decisions had come to the conclusion that Congressional appropriations do not eliminate an agency’s responsibility to comply with NEPA. *Id.* at 367.

²⁰⁴ *Id.* at 367.

that the agency is conducting is to examine environmental issues. The preamble provides no legal rationale for this proposal.²⁰⁵

While some public participation is required under CEQ's proposal, it does not have to be equivalent to NEPA. Limiting public participation runs counter to CEQ's long standing position that "public scrutiny [is] essential to implementing NEPA."²⁰⁶ Allowing another statutory process that is not primarily focused on environmental issues to replace the NEPA process runs counter, of course, to the whole purpose of NEPA. And there is no requirement that reasonable alternatives, the very core of NEPA analyses, need to be analyzed. In fact, pretty much any process that includes some look at environmental issues and some modicum of public participation could, under the proposed rule, be substituted for NEPA.

There is neither a policy rationale nor a legal basis for this wholesale abandonment of NEPA in CEQ's regulations. The government-wide implementation of the functional equivalence exemption would trigger considerable debate in every agency and within every affected community of interest. Is this meant to be the end of NEPA implementation for federal land management planning? For military installation planning? For fishery management plans? For all permit processes? Would all of these various other processes need to be supplemented with elements that they currently rely on the NEPA process for in reaching a decision? What level of public participation would suffice?

Throughout NEPA's fifty years of implementation, the functional equivalence doctrine has been narrowly approved by federal courts for the Environmental Protection Agency (EPA) in the context of implementing certain pollution control laws such as particular activities under the Clean Air Act²⁰⁷ and RCRA.²⁰⁸ Those cases have rested on the notion that EPA's mission in carrying out those particular statutory responsibilities was primarily environmental protection. That specific application of the functional equivalence doctrine has support in NEPA's legislative history.²⁰⁹ But as the D.C. Circuit said in the context of a decision applying the functional equivalent doctrine to EPA's cancellation of most uses of DDT, "We are not formulating a broad exemption from NEPA for all environmental agencies or even for all environmentally protective regulatory actions of such agencies. Instead, we delineate a narrow exemption from the literal requirements for those actions which are undertaken pursuant to sufficient safeguards so that the purpose and policies behind NEPA will necessarily be fulfilled."²¹⁰

²⁰⁵ See, 85 Fed. Reg. at 1695.

²⁰⁶ 40 C.F.R. § 1500.1(b).

²⁰⁷ *Portland Cement Ass'n v. Ruckelhaus*, 486 F.2d 375 (D.C. Cir. 1973).

²⁰⁸ *State of Alabama ex rel. Siegelman v. U.S. EPA*, 911 F.2d 499 (11th Cir. 1990).

²⁰⁹ Colloquy between Senator Boggs and Senator Muskie, differentiating between "what we might call the environmental impact agencies rather than the environmental enhancement agencies", identifying as the later the Federal Water Pollution Control Administration and the National Air Pollution Control Administration, later subsumed into EPA, 115 Cong. Rec. 40425 (December 20, 1969).

²¹⁰ *Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

In light of the Bureau of Land Management's recent statement that they may promulgate regulations exempting the planning process under the Federal Land Policy and Management Act from NEPA,²¹¹ it is important to understand that when the Senate deliberated on the passage of NEPA, they were fully cognizant of the "procession of landmark conservation measures on behalf of recreation and wilderness, national recreational planning, national water planning and research . . . urban planning for open space . . ." and other related measures.²¹² However, Congress also perceived a "very real reason for concern" given the absence of an environmental policy that applied to all federal agencies and a procedure that would be used by "all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment. This would be true of the licensing functions of independent agencies as well as the ongoing activities of the regular Federal agencies."²¹³

Courts have rejected attempts by other agencies to utilize the functional equivalence doctrine, including attempts by the Forest Service for timber harvests,²¹⁴ the U.S. Fish and Wildlife Service for sport hunting regulations in national wildlife refuges around the country,²¹⁵ and the National Marine Fisheries service for issuance of permits under the Marine Mammal Protection Act.²¹⁶ As the District Court in Alaska said in the latter decision:

The mere fact an agency has been given the role of implementing an environmental statute is insufficient to invoke the 'functional equivalent' exception. To extend the doctrine to all cases in which a federal agency administers a statute which was designed to preserve the environment would considerably weaken NEPA, rendering it inapplicable in many situations. Given that NEPA requires that '*all agencies* of the Federal Government' shall 'to the fullest extent possible' incorporate the EIS into their decision making, it is clear Congress did not intend this result. *See* 42 U.S.C. §4332.²¹⁷

CEQ now proposes to go far beyond Congress' intent and case law and open functional equivalence to every agency in the government, regardless of their mission. This is a prescription for a complete lack of predictability with agencies able to create ad hoc processes on a case by case basis. A less efficient way to manage the environmental review process can scarcely be imagined. This proposal should be withdrawn.

²¹¹ <https://thehill.com/policy/energy-environment/481477-blm-weighs-cutting-environmental-review-when-crafting-public-lands>.

²¹² Report of the Senate Committee on Interior and Insular Affairs to accompany S. 1075, No. 91-296, July 6, 1969, p. 14.

²¹³ *Id.*

²¹⁴ *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201, 208 (5th Cir. 1978), reh'g denied, 576 F.2d 931 (5th Cir. 1978).

²¹⁵ *Fund for Animals v. Hall*, 448 F. Supp. 2d 127, 134 (D.D.C. 2006).

²¹⁶ *Jones v. Gordon*, 621 F. Supp. 7, 13 (D Alaska 1985), *aff'd in part, rev'd in part*, 792 F.2d 821 (9th Cir. 1986).

²¹⁷ *Id.* at 13.

G. Proposed § 1506.9 - Use of functional equivalence doctrine for proposed regulations and Proposed § 1502.4, Deletion of regulations as a type of action appropriately subject to preparation of a programmatic EIS.

We strongly oppose proposed Section 1506.9 that authorizes the blanket utilization of other processes to replace the NEPA process for proposed regulations. CEQ's stated rationale for this revision is that it would "promote efficiency and reduce duplication in the assessment of regulatory proposals."²¹⁸ To the contrary, the proliferation of a variety of processes would promote inefficiency. The proposed change is also unlawful.

There is no doubt that proposed regulations are actions for purposes of NEPA.²¹⁹ The question, then, becomes why CEQ would seek to substitute other processes for the NEPA process for this entire class of actions. To the extent that any other processes applicable to rulemaking contain similar requirements as the NEPA process, just as for all other actions subject to NEPA, CEQ has consistently directed the NEPA process to be integrated into those processes. The current regulations themselves direct agencies to prepare draft EISs "concurrently with and integrated with" environmental impact analyses and other requirements of other laws and executive orders "to the fullest extent possible".²²⁰

CEQ has emphasized the need for agencies to comply concurrently, rather than sequentially, with all applicable requirements for a proposed action for many years. For example, CEQ's *Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act*²²¹ states in relevant part that:

Agencies must integrate, to the fullest extent possible, their draft EIS with environmental impact analyses and related surveys and studies required by other statutes or Executive Orders. Coordinated and concurrent environmental reviews are appropriate whenever other analyses, surveys, and studies will consider the same issues and information as a NEPA analysis. Such coordination should be considered when preparing an EA as well as when preparing an EIS. Techniques available to agencies when coordinating a combined or a concurrent process include combining the scoping, requests for public comment, and preparation and display of responses to public comments. [fn. 61. 40 CFR 1502.25(a). Examples provided in the Regulation are: The Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*); the

²¹⁸ 85 Fed. Reg. at 1,705.

²¹⁹ Indeed, one of the earliest appellate court decisions interpreting NEPA dealt with proposed regulations, *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1972), *cert. denied*, 404 U.S. 942 (1972). *See also*, *New York v. U.S. Nuclear Regulatory Comm'n*, 824 F.3d 1012 (D.C. Cir. 2016); *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8 (D.D.C. 2007), *American Public Transit Ass'n v. Goldschmidt*, 485 F. Supp. 811 (D.D.C. 1980), *rev'd on other grounds*, 655 F.2d 1272 (D.C. Cir. 1981).

²¹⁹ 40 C.F.R. § 1502.25(a).

²²⁰ 40 C.F.R. § 1502.25(a).

²²¹ 77 Fed. Reg. 14473 (March 12, 2012).

National Historic Preservation Act (16 U.S.C. 470 *et seq.*); and the Endangered Species Act (16 U.S.C. 1531 *et seq.*.)]

The goal should be to conduct concurrent rather than sequential processes whenever appropriate. In situations where one aspect of a project is within the particular expertise or jurisdiction of another agency an agency should consider whether adoption or incorporation by reference of materials prepared by the other agency would be more efficient.

A coordinated or concurrent process may provide a better basis for informed decision making, or at least achieve the same result as separate or consecutive processes more quickly and with less potential for unnecessary duplication of effort. In addition to integrating the reviews and analyses, the CEQ Regulations allow an environmental document that complies with NEPA be combined with a subsequent agency document to reduce duplication and paperwork. [fn.62, 40 C.F.R. 15006.4, 1500.4(k), 15004(n).]²²²

There is no legal authority or justification for a wholesale substitution of any other process for the NEPA process. Regulatory review and the NEPA process have fundamentally different purposes. The details of the processes differ; for example, regulatory review has no requirement for scoping, nor does it provide for public meetings held in affected communities. Substituting the executive order-based regulatory impact analysis process for the statutorily mandated NEPA process is unacceptable and this proposed regulation must not be carried forward in any final rulemaking. Such a substitution would likely also eliminate judicial review given that Executive Order 12866 and subsequent related executive orders, like most executive orders, includes language that states that it is not enforceable by law.²²³ As one federal court decision stated in response to an argument that the Administrative Procedures Act is sufficient to replace NEPA because it affords public notice comment, “An exception of such staggering breadth would render NEPA meaningless.”²²⁴

²²² *Id.* at 14478-79. *See also*, Council on Environmental Quality and Governor’s Office of Planning and Research, State of California, *NEPA and CEQA: Integrating Federal and State Environmental Reviews*” (February, 2014) for a step-by-step guide to how to integrate compliance with NEPA and a state environmental quality review act to avoid duplication of both process and documentation.

²²³ E.O. 12866, 58 Fed. Reg. 51,735 (October 4, 1993)(“§10 Judicial Review. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person”); E.O. 13563, 76 Fed. Reg. 3,821 (January 21, 2011) (supplementing EO 12866 and reading “§ 7(d)This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person”).

²²⁴ *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 237 (D.D.C. 2011).

Finally, regulations should be included in Section 1502.4(b) describing the types of actions that are appropriately subject to preparation of a programmatic EIS.²²⁵

Neither of these proposed changes should go forward.

H. Proposed §1501.1(b) - NEPA threshold applicability analysis.

This provision would allow federal agencies to make determinations about whether particular actions are exempt from NEPA under one of the many theories discussed above either in their agency NEPA procedures or on an individual basis for a particular proposed action. First, we strongly disagree that there are legally sound rationales for the proposed “exemptions” discussed above. To the extent an agency believes that there is a class of actions exempt from NEPA, the agency should identify that in its draft NEPA procedures subject to public review and comment. Inviting this type of analysis on an ad hoc basis invites behind-closed-door negotiations between agencies and project proponents and will lead to confusion, inconsistency, and inefficiency as well as likely resulting in an unprecedented proliferation of litigation.

V. FOR THOSE ACTIONS THAT WOULD REMAIN SUBJECT TO NEPA UNDER THE PROPOSED REVISIONS, CEQ’S PROPOSAL WOULD ILLEGALLY ELIMINATE KEY COMPONENTS OF EFFECTS ANALYSIS.

A. Proposed § 1508.1(g) - Cumulative Effects.

CEQ’s shocking and arbitrary proposal to delete cumulative impacts from all levels of NEPA analysis cannot stand. It is true, as the preamble states, that NEPA simply references environmental impacts and effects and does not use the “terms direct, indirect and cumulative impacts.” It also doesn’t contain the term “environmental impact statement,” or, for that matter, the term “reasonably foreseeable”. However, Section 102(2)(C) of NEPA directs agencies to provide a “detailed statement” on “the environmental impacts”. It doesn’t say a subset of impacts or impacts that are convenient to analyze.

NEPA’s legislative history is replete with references to the complexity of environmental impacts, the consequences of “letting them accumulate in slow attrition of the environment” and the “ultimate consequences of quiet, creeping environmental decline” - all of which pointed to the need for an analysis of proposed impacts beyond the immediate, direct effects of an action²²⁶. For 50 years, CEQ has interpreted the law to accomplish just that.

²²⁵ We have further comments on the treatment of programmatic EISs in the proposed revisions, *supra* in Section IV (C).

²²⁶ 115 Cong. Rec. 29070 (October 8, 1969); *see also*, report accompanying S. 1075, National Environmental Policy Act of 1969, Senate Committee on Interior and Insular Affairs, July 9, 1969.

Within a few months of its establishment, CEQ explained that, “The statutory clause ‘major Federal actions significantly affecting the quality of the human environment’ is to be construed by agencies with a view to the overall, cumulative impacts of the action proposed (and of further actions contemplated).”²²⁷ It also explained that the requirement in Section 102(2)(C) of NEPA to identify “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity” in the detailed statement (now known as an EIS) required the agency “to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.”²²⁸ CEQ has consistently interpreted NEPA ever since then as requiring analysis and consideration of cumulative effects; indeed, it has been a primary focus of CEQ’s work. In 1973, CEQ’s revised Guidelines repeated the statement from the 1971 Guidelines with the additional admonition to agencies that:

In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulative considerable. This can occur when one or more agencies over a period of years put into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major decision. In all such cases, an environmental statement should be prepared if it reasonable to anticipate a cumulatively significant impact on the environment from Federal action²²⁹.

Federal courts recognized the importance of cumulative effects analysis long before CEQ’s 1979 regulations. In 1975, the Court of Appeals for the Second Circuit reversed a lower court decision in part on the grounds that the analysis in the EIS at issue evaluated only the effects of the particular proposed action, a proposal for dumping two million cubic yards of polluted spoil in Long Island Sound.²³⁰ The Court made it clear that the Navy should have considered the cumulative environmental impacts of other closely related projects (e.g., the Corps’ further deepening of the Thomas River channel, the maintenance of that channel, the dredging of the Thames by the Electric Boat Division of General Dynamics and the Coast Guard’s Thames River dredging project in its NEPA analysis. Alluding to the legislative history referenced above, the Court pointed out that:

²²⁷ Council on Environmental Quality: Statements on Proposed Federal Actions Affecting the Environment; Interim Guidelines, April 30, 1970, Section 5(b) (filed with Fed. Reg. May 11, 1970), available in *Environmental Quality, The First Annual Report of the Council on Environmental Quality*, 288 (1970) available at <https://www.slideshare.net/whitehouse/august-1970-environmental-quality-the-first-annual-report-of>. The Interim Guidelines were published in final form with similar text. 36 *Fed. Reg.* 7,724 (April 23, 1971).

²²⁸ *Id.* at Section 7(a)(iv); see also. 42 U.S.C. § 4331(b)(1).

²²⁹ Council on Environmental Quality, Guidelines, Preparation of Environmental Impact Statements, 38 *Fed. Reg.* 20550, 20551 (August 1, 1973).

²³⁰ *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 87-90 (2nd Cir. 1975).

As was recognized by Congress at the time of passage of NEPA, a good deal of our present air and water pollution has resulted from the accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources. ‘Important decisions concerning the use and the shape of man’s future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.’ S. Rep. No. 91-296, 91 Cong., 1st Sess. 5 (1969). NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration. [cites omitted]. The fact that another proposal has not yet been finally approved, adopted or funded does not foreclose it from consideration, since experience may demonstrate that its adoption and implementation is extremely likely.²³¹

The Court explained that the fact that the other dredging projects in question had not been proposed by the Navy and, in fact, had not yet been approved were not the deciding factors. Rather, “all are to occur in the same geographical area, all are related in that they involve dredging and disposal of spoil, all present similar problems of pollution, and the spoil from each project is likely to be dumped in the New London area. Clearly the projects are closely enough related so that they can be expected to produce a cumulative environmental impact which must be evaluated as a whole.”²³²

In 1976, the U.S. Supreme Court acknowledged the importance of cumulative impacts. While ruling that in the particular situation at issue an EIS was not required, the Court stated that, “when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequence must be considered together.”²³³ The Court reasoned that “[o]nly through *comprehensive* consideration of pending proposals can the agency evaluate different courses of action.”²³⁴

Given this long and consistent interpretation of NEPA, it likely surprised no one that CEQ included a regulatory definition of cumulative effects²³⁵ when it promulgated the current regulations. In fact, at the time the regulations were issued in final form in 1978, the preamble did not identify any comments critical of the requirement to analyze cumulative effects.²³⁶ Similarly, cumulative effects were not the subject of any of the “40 Most Asked Questions Regarding the NEPA Regulations.”²³⁷

²³¹ *Id.* at 88-89.

²³² *Id.* at 89.

²³³ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

²³⁴ *Id.* (emphasis added).

²³⁵ 40 C.F.R. § 1508.7.

²³⁶ 43 Fed. Reg. 55978 (November 29, 1978).

²³⁷ Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026 (March 23, 1981).

The Fifth Circuit Court of Appeals also provided important guidance to agencies by laying out a widely accepted step-by-step approach to analyzing cumulative effects in *Fritiofson v. Alexander*, a case involving permits for dredging canals around West Galveston Island, Texas.²³⁸ The Court's direction was simple to understand and feasible to follow, consisting of 1) identifying the area in which effects of the proposed project will be felt; 2) identifying the impacts expected in that area from the proposed project; 3) identifying past, present and reasonably foreseeable actions that have had or are expected to have impacts in the same area; 4) identifying the expected impacts from these other actions, and 5) considering the overall impacts that can be expected if the individual impacts are allowed to accumulate.²³⁹

It is especially tragic that CEQ would attempt to abandon the requirement to analyze cumulative effects even as our country and our world are increasingly experiencing the impacts of cumulative change, for as one court stated, "the impact of greenhouse gas emission on climate change is precisely the kind of cumulative impacts analyses that NEPA requires agencies to conduct."²⁴⁰ In fact, this proposed and wrenching change in the NEPA process is so fundamental and so ill advised that one has to ask why this is being proposed now. The preamble explanation is strikingly brief to justify the removal of the most important requirements in the NEPA regulations. The preamble alludes primarily to wanting agencies to focus their time and resources on the most significant effects rather than producing "encyclopedic documents" that include irrelevant or inconsequential information.²⁴¹ But the direction to avoid producing encyclopedic documents and to focus on the most significant effects simply mirrors CEQ's current regulations.²⁴²

In fact, contrary to the preamble's suggestion that the requirement to assess cumulative impacts diverts agencies from focusing their time and resources on the most significant effects, leading to excessively long documentation that includes irrelevant or inconsequential information, cumulative effects analysis has led to some important changes in agency decisionmaking. Sometimes cumulative impacts are, in fact, the most significant effects of an action.

One example is the U.S. Forest Service's 2019 decision not to allow oil and gas leasing in the Ruby Mountains of Humboldt-Toiyabe National Forest in Nevada, expressly based on its analysis of cumulative impacts under NEPA. In response to a request from BLM to offer 52,533 acres of Forest Service lands in the Ruby Mountains for leasing, USFS initially proposed to make the lands available for leasing, subject to stipulations to

²³⁸ *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985), *abrogated by Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992).

²³⁹ *Id.* at 1245. *See also, Grand Canyon Trust v. FAA*, 290 F.3d 339 (D.C. Cir. 2002).

²⁴⁰ *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508 (9th Cir. 2007), amended at 538 F.3d 1172 (9th Cir. 2008).

²⁴¹ 85 Fed. Reg. at 1708.

²⁴² 40 C.F.R. § 1500.1.

protect surface resources.²⁴³ Based on the analysis in an EA that the Forest Service prepared, the Forest Supervisor concluded that, “Even with multiple No Surface Occupancy stipulations applied, the cumulative effects would be noticeable. These effects include increased noise, dust and light pollution, and disturbance to wildlife and fisheries. These adverse effects outweigh the benefits that could result from oil and gas development.”²⁴⁴ The Forest Supervisor stated that his final decision to select the No Leasing Alternative instead was based on the combined impact of a list of “primary factors” that included these cumulative effects.²⁴⁵ Notably, these impacts were not only cumulative, but also indirect effects in the Forest Service’s view, as the EA stated: “For the majority of resources analyzed, the effects from the leasing decision would be indirect since no ground disturbing activities are authorized at the leasing stage.”²⁴⁶ In sum, the analysis of indirect cumulative effects played a primary role in reversing the Forest Service’s position from proposing to allow leasing to instead making the lands unavailable for oil and gas development.

Another example is the Tennessee Valley Authority’s (TVA) 1993 decision to deny requests from three companies separately seeking authorization to build barge terminals along a 12-mile stretch of the Tennessee River in Alabama and Tennessee that would serve adjacent wood chip mills,²⁴⁷ which was expressly based on the analysis of cumulative impacts in its final EIS. *Chip Mill Terminals on the Tennessee River—Record of Decision*.²⁴⁸ TVA identified the no action alternative as the preferred one “after weighing the potential benefits of the requests with the likelihood of substantial, cumulative localized impacts and the risk of significant timber harvesting impacts.” *Id.* at 28,431. The cumulative impacts were traffic associated with the chip mills that would be served by the barge terminals. *See id.* at 28,432–33 (“In addition to the potential risk of significant timber harvesting impacts, localized impacts in the vicinity of the chip mill facilities themselves are of concern to TVA. TVA estimates that the movement of logs into the three chip mills would add approximately 1,080 truck movements to the daily average traffic flows in and around South Pittsburg. On State Route 156, approximately 93 trucks per hour (or more than one per minute) would be added.... the potential cumulative localized impacts, especially truck traffic impacts, are a serious concern.”). Although TVA recognized that an action alternative that required obtaining agreement from the state forestry agencies, the

²⁴³ *See* USDA Forest Service, Ruby Mountains Oil and Gas Leasing Availability Environmental Assessment, March 2019, at 8, *available at* https://www.fs.usda.gov/nfs/11558/www/nepa/107601_FSPLT3_4630840.pdf and at Attachment E.

²⁴⁴ USDA Forest Service, Decision Notice and Finding of No Significant Impact for Ruby Oil and Gas Leasing Availability Analysis, May 2019, at 3, *available at* https://www.fs.usda.gov/nfs/11558/www/nepa/107601_FSPLT3_4646040.pdf and at Attachment D.

²⁴⁵ USDA Forest Service, Decision Notice and Finding of No Significant Impact for Ruby Oil and Gas Leasing Availability Analysis at 2-3.

²⁴⁶ USDA Forest Service, Ruby Mountains Oil and Gas Leasing Availability Environmental Assessment, March 2019, at 15.

²⁴⁷ One of the companies was also seeking permission from TVA related to building a chip mill facility.

²⁴⁸ 58 Fed. Reg. 28,429 (May 13, 1993). Available at Attachment F.

mill operators, the forestry associations, and the timberland owners to employ better protective practices was environmentally preferable, it was unable to obtain the necessary agreements, and therefore selected the no action alternative. *Id.* at 28,431. Whereas the *cumulative* localized impacts were a key factor in the decision, the final EIS specifically noted that the “localized environmental impacts associated with each mill by itself are expected to be insignificant on an individual basis.”²⁴⁹

Further, the TVA decision to deny the barge terminal authorizations also “weighed heavily” the indirect effects on ESA-listed wildlife from increased timber harvesting associated with the three chip mills. TVA explained that:

Although TVA does not think that the Endangered Species Act precludes approving one or more of the requests, TVA has weighed heavily the Service’s technical determination of likely impacts to listed species if harvesting occurs. TVA’s own assessment of potential impacts to listed species concluded that some species could be significantly impacted depending on where and how timber harvesting may occur.²⁵⁰

Thus, even though TVA believed that its decision to deny the authorizations for the barge terminals was not required by the ESA, the analysis of significant impacts of timber harvesting, along with the analysis of localized cumulative impacts, were the driving factors that led TVA to select the no action alternative.

Reference is also made in the preamble to the notion that determining the geographic and temporal scope of such effects “has been difficult.”²⁵¹ Agencies already need to determine the appropriate geographic and temporal scope of all impacts, even for direct impacts. There is no explanation given as to why the guidance CEQ has provided in the handbook on cumulative effects is inadequate or what particular aspects of this work is the most challenging. Ironically, we note that E.O. 12866, “Regulatory Planning and Review”²⁵² which CEQ suggests might be used as a substitute for the NEPA process for proposed regulations, requires agencies to assess the impact of cumulative regulations on a particular business sector, communities and government entities.²⁵³

While federal courts have found some NEPA documents to be legally inadequate because of an agency’s failure to assess cumulative effects, the identified problems are quite amenable to being addressed (and often are in revised documents). Common failures include presenting general, broad statements “devoid of specific, reasoned conclusions”²⁵⁴ or identifying reasonably foreseeable actions that will affect the same resource as the

²⁴⁹ Tennessee Valley Authority, Final Environmental Impact Statement Chip Mill Terminals on the Tennessee River, Feb. 1993, Volume 1, at 32. Available at Attachment G.

²⁵⁰ 58 Fed. Reg. 28,432.

²⁵¹ *Ibid.* at 1708.

²⁵² 58 Fed. Reg. 51735 (October 4, 1993).

²⁵³ *See id.* § 1(b)(11).

²⁵⁴ *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 811-12 (9th Cir. 1999)

proposed action but then failing to actually do the analysis.²⁵⁵ More recently, federal courts have held that agencies have failed to meet the challenge of assessing the incremental impacts of proposed oil and gas projects on climate change. For example, in its NEPA analyses for oil and gas leasing on federal land in three western states, the Bureau of Land Management’s (BLM) documents acknowledged that the additional oil and gas wells it was considering would contribute incrementally to total regional and global GHG emission levels.²⁵⁶ BLM declined to go further, arguing that in order to analyze or disclose cumulative climate impacts the agency would have to identify every past, present, or reasonably foreseeable project on earth to produce a separate cumulative impact analysis. The reviewing court correctly stated that NEPA does not require that feat. But as the court noted, there is often an option between global analysis and nothing, and here, the court directed BLM to quantify emissions from individual leasing decisions when added to GHG emissions from other BLM projects in the region and nation. “To the extent other BLM actions in the region – such as other lease sales – are reasonably foreseeable when an EA is issued, BLM must discuss them as well.”²⁵⁷

Neither the vague statements in the preamble nor the fact that agencies have lost some cases because of their failure to follow the current regulation are justification for reversing CEQ’s long held position articulated through multiple notice and comment periods and upheld by dozens of court opinions. CEQ’s decision to bar consideration of cumulative effects will have real world environmental consequences by thwarting the development of information that has in the past altered agency decision-making. CEQ must withdraw this arbitrary proposal. If the agencies need further guidance on how to analyze cumulative effects, CEQ can provide that guidance. But it cannot obliterate a fifty-year-old legal requirement that is based on consistent interpretation of the law.

Additionally, CEQ asks whether it should codify any aspects of its proposed GHG guidance in the regulation, and if so, how CEQ should address them in the regulations.

We do not think CEQ should include its proposed GHG guidance in the regulations in any form. The courts have made it clear for many years that climate change is among the impacts to be assessed.²⁵⁸ CEQ’s draft guidance fell woefully short of the mark in many respects. Among other problems, it significantly failed to reflect relevant judicial decisions regarding issues such as quantification of GHG emissions and analysis of the

²⁵⁵ See, e.g., *Sierra Club v. U.S. Dept. of Agr.*, 116 F.3d 1482 (7th Cir. 1997) (unpublished table decision) (“the discussion fails to analyze the effects of the various activities in combination . . . to determine whether the sum of these incremental disturbances will create a significant detrimental effect.”).

²⁵⁶ *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 56 (D.D.C. 2019).

²⁵⁷ *Id.* at 77. See also, The Wilderness Society, “Measuring the Climate Impact of Trump’s Reckless Leasing of Public Lands,” (July 16, 2019), https://www.wilderness.org/sites/default/files/media/file/TWS%20Report_Measuring%20the%20climate%20impact%20of%20Trump%20reckless%20leasing_July%202019.pdf (last accessed July 28, 2019).

²⁵⁸ *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003); *Border Power Plant Working Grp. v. Dep’t of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003).

actual effects resulting from them, the scope of that analysis, upstream and downstream effects, alternatives, cumulative effects analysis, the effects of climate change on vulnerable populations and on the proposed action itself. We are including more comprehensive criticisms submitted during the comment period on that draft guidance as part of the record with this letter.²⁵⁹

B. Proposed § 1508.1(g) - Indirect Effects.

CEQ's proposed deletion of the definition and references to indirect effects is unlawful and will lead to confusion and litigation. Like cumulative effects, indirect effects have long been the subject of CEQ direction and guidance and the need for agencies to analyze indirect or secondary effects has also been the subject of numerous federal court decisions. Analysis of indirect effects is required whether CEQ's regulations specify them or not.

Along with the above-noted statements about cumulative effects, CEQ first addressed the need to analyze indirect or secondary effects in the 1970 Interim Guidelines.²⁶⁰ Those guidelines explained that, "Both primary and secondary significant consequences for the environment should be included in the analysis". The example given of secondary effects – the implications of a proposed action for population distribution or concentration and the effects of such a population change on resources such as water and public services in the area, was included in the 1971 Guidelines.²⁶¹ The 1973 Guidelines expanded on this discussion by explaining that:

"Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e.g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities, or through changes in natural conditions, may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects. Such population and growth impacts should be estimated if expected to be significant (using data identified as indicated in § 1500.8(a)(1) and an assessment made of the effect of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, of the area in question."²⁶²

²⁵⁹ Letter from forty-one organizations in response to Docket No. 2019-0002, Attachment H.

²⁶⁰ 35 Fed. Reg. 7390, 7391 (May 12, 1970).

²⁶¹ 36 Fed. Reg. 7724, 7725 (Apr. 23, 1973). ("Significant adverse effects on the quality of the human environment include both those that directly affect human beings and those that indirectly affect human beings through adverse effects on the environment.")

²⁶² 40 C.F.R. § 1500.8(a)(3)(ii) (1973).

CEQ succinctly explained the necessity and challenges of analyzing secondary, or what is now called indirect impacts, in its Fifth Annual Report. In that report, CEQ pointed out that:

“Impact statements usually analyze the initial or primary effects of a project, but they very often ignore the secondary or induced effects. A new highway located in a rural area may directly cause increased air pollution as a primary effect. But the highway may also influence residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth. For many projects, these secondary or induced effects may be more significant than the project’s primary effects.”²⁶³

In the 1975 annual report, CEQ again pointed out that agencies needed to improve their analysis of secondary impacts as those impacts were often the public’s major concerns about various types of development projects, transportation plans and projects involving social and economic effects.²⁶⁴

After a discussion of CEQ’s work in analyzing secondary effects of public infrastructure projects and sponsoring studies to investigate better methodologies for prediction, CEQ stated that:

“While the analysis of secondary effects is often more difficult than defining the first-order physical effects, it is also indispensable. If impact statements are to be useful, they must address the major environmental problems likely to be created by a project. Statements that do not address themselves to these major problems are increasingly likely to be viewed as inadequate. As experience is gained in defining and understanding these secondary effects, new methodologies are likely to develop for forecasting them, and the usefulness of impact statements will increase.”²⁶⁵

CEQ then codified the current definition of indirect effects²⁶⁶ with no apparent objections or concerns evidenced in the preamble to the current regulations regarding the definition.

Federal courts affirmed that NEPA requires agencies to consider indirect or secondary effects in long before promulgation of the regulations. In *City of Davis v. Coleman*,²⁶⁷ the Court held that an EIS prepared for a proposed highway interchange in a hitherto agricultural area did not meet NEPA’s requirements because it failed to analyze the growth-inducing effects of the proposed interchange. Although the highway agencies

²⁶³ CEQ, THE FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, 410-11 (1974).

²⁶⁴ CEQ, THE SIXTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, 656 (1975).

²⁶⁵ *Id.* at 411.

²⁶⁶ 40 C.F.R. § 1508.8(b) (2020).

²⁶⁷ 521 F.2d 661 (9th Cir. 1975).

maintained that the proposed interchange was for highway safety reasons, there was considerable evidence leading the court to conclude that it was intended to help support what was elsewhere in the record characterized as a “rapid change to urban development.”²⁶⁸ The Court stated that:

“We think that this is precisely the kind of situation Congress had in mind when it enacted NEPA: substantial questions have been raised about the environmental consequences of federal action, and the responsible agencies should not be allowed to proceed with the proposed action in ignorance of what those consequences will be. NEPA and CEQA require that the interchange’s environmental impact be studied and analyzed in good faith before CDHW and FHWA decide whether the project is to be completed as planned, or to be modified or abandoned.”²⁶⁹

Courts have been clear that when the record shows that growth-inducing impacts or other indirect impacts are reasonably foreseeable, agencies must analyze these impacts.²⁷⁰ Courts have also been clear that the Supreme Court’s holding in *Department of Transportation v. Public Citizen*²⁷¹ did not obliterate the obligation to analyze indirect effects when they are reasonably foreseeable as a result of an agency’s proposed decision. For example, in *Florida Wildlife v. U.S. Army Corps of Engineers*,²⁷² the court found the Corps’ reliance on *DOT v. Public Citizen* to be misplaced when the Corps had jurisdiction over a development and the record showed that the proposed development was explicitly anticipated to serve as a “catalyst for growth”.²⁷³ Similarly, the D.C. Circuit held that FERC should have considered potential downstream greenhouse gas emissions from power plants burning natural gas supplied by the proposed pipeline when conducting its NEPA analysis.²⁷⁴

²⁶⁸ *Id.* at 674.

²⁶⁹ *Id.* at 675-76.

²⁷⁰ *Friends of the Earth, Inc. v. U.S. Army Corps of Eng’rs*, 109 F.Supp.2d 30, 41 (2006) (holding that the Corps’ practice of issuing individual environmental assessments on floating gambling casinos along the Mississippi coast without analyzing the indirect effects of what the Corps’ did concede would likely be future development resulting from the proliferating number of gambling barges along the coast).

²⁷¹ 541 U.S. 752 (2004). (It should be noted that the decision in *Public Citizen* also referenced with approval the lead agency’s assessment of cumulative effects); *See also, id.* at 769-70.

²⁷² 401 F. Supp. 2d 1298 (S.D. Fla. 2005).

²⁷³ *Id.* at 46. *See also, Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124 (9th Cir. 2011) (finding that the indirect effects of permitting an additional runway at an airport 12 miles west of the City of Portland were so obvious that the FAA had a responsibility to analyze them even absent a comment specifically identifying concerns regarding “growth inducing effects.”).

²⁷⁴ *Sierra Club v. Federal Energy Regulatory Comm’n.*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (“We conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.”). *See also, Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145 (D. Colo. 2018) (“BLM failed, in part, to take a hard look at the severity and impacts of GHG pollution. Namely, it failed to take a hard look at the reasonably foreseeable indirect impacts of oil and gas.”).

The justification for striking the terms “direct” and “indirect” and deleting the definition of “indirect effects” from the regulations is as transparent and inadequate as the justification for deleting the requirement to analyze cumulative effects. The rationale is simply that it is too hard. In fact, we seriously disagree with that proposition.

To the extent agencies are truly having difficulty with how to go about assessing effects, CEQ should be working on further guidance or workshops or whatever would be the best mechanism for transmitting information on how to best and most efficiently meet the goals and requirements of the law. To the extent the difficulties are either self-imposed (for example, by agencies feeling pressured to omit references to climate change) or because they lack the capacity to prepare or oversee adequate NEPA analyses, CEQ should also address those problems. We remind CEQ that lack of agency resources is not a valid excuse for failing to comply with the law.²⁷⁵ But CEQ cannot arbitrarily delete requirements that would strip NEPA analyses down to solely direct effects, thereby re-creating one of the fundamental problems that NEPA was intended to address.

For all of the reasons stated above, we strongly oppose both the deletion of the definition of indirect effects in CEQ’s regulation and any possible attempt in the final regulation or future rulemaking to affirmatively state that agencies are not required to analyze indirect effects. In fact, agencies are required to analyze the full array of reasonably foreseeable impacts, including indirect effects, along with direct impacts and cumulative impacts. The current regulatory provisions should stand.

C. Proposed § 1508.1(g) - Definition of “Effects or Impacts”.

The proposed revision of the definition of effects directs agencies to focus their efforts on an extremely narrow range of what effects would, under the proposed revision, remain to be analyzed once cumulative and possibly indirect effects are eliminated.

In support of amending the definition of effects, CEQ cites two Supreme Court cases with distinct fact patterns that apply proximate cause to NEPA cases.²⁷⁶ As laid out below, the holdings of *Metropolitan Edison* and *Public Citizen* narrowly apply to distinct factual scenarios and cannot be extrapolated to all NEPA cases.

In *Metropolitan Edison*, the Supreme Court attempted to give greater context to the meaning of the terms effects and impacts within NEPA.²⁷⁷ The *Metropolitan Edison* plaintiffs challenged the proposed restart of one of the reactors at the Three Mile Island Nuclear Power Plant and argued NEPA required the Nuclear Regulatory Commission to consider the threats to the psychological health of residents in an environmental impact

²⁷⁵ *Pub. Emps. for Envtl. Responsibility v. U.S. Fish and Wildlife Serv.*, 177 F. Supp. 3d 146, 155 (D.D.C. 2016) (“The Court is aware of no case condoning an agency’s failure to examine alternatives in an EA solely on the ground of unavailability of resources.”).

²⁷⁶ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. at 766, (2004); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. at 766.

²⁷⁷ 460 U.S. at 774.

statement.²⁷⁸ In describing the rationale for the effect and impact requirements, the court described the requirements as “like the familiar doctrine of proximate cause from tort law.”²⁷⁹ However, this description is dicta. The court’s holding focused on the congressional intent of promoting human welfare and effects on the physical environment.²⁸⁰ Given this, the court concluded that fear of a nuclear accident did not have a sufficiently close connection to the physical environment and NEPA does not apply. In making this ruling, the operative reasoning was not proximate cause, but the lack of a sufficiently close connection to the physical environment.²⁸¹

Like *Metropolitan Edison*, the facts of *Public Citizen* also involved unique circumstances. *Public Citizen* involved rules issued by the Federal Motor Carrier Safety Administration (FMCSA) that concerned safety regulations for Mexican motor carriers.²⁸² After issuing the proposed rules, FMCSA issued a programmatic environmental assessment and made a finding of no significant impact.²⁸³ Environmental groups filed petitions for judicial review for FMCSA’s rules and argued that the rules were promulgated in violation of NEPA.²⁸⁴ Subsequently, the President lifted a moratorium on qualified Mexican motor carriers and the court of appeals held the EA was deficient for not considering the environmental impact of lifting the moratorium.²⁸⁵

In making the holding, the *Public Citizen* court quoted language in *Metropolitan Edison* pointing to the proximate cause requirement in tort law. Ultimately, the court held the EA did not need to consider the environmental effects arising from the entry of Mexican motor carriers. The main reasoning behind this holding was not proximate cause, but that the lifting of the moratorium was a result of the President’s actions. The court concluded that FMCSA had no discretion to prevent the entry of Mexican trucks and therefore did not need to consider the environmental effects in its EA.

Courts are reluctant to apply a proximate cause requirement to NEPA based on *Metropolitan Edison* and *Public Citizen*. For example, in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1029, the Ninth Circuit declined to apply *Metropolitan Edison* and its proximate cause analogy to its case. The *Mothers for Peace* court laid out a chain of three events at issue: (1) a major federal action; (2) a change in the physical environment; and (3) an effect.²⁸⁶ The court found that *Metropolitan Edison* was concerned with the relationship between events 2 and 3 (the change in the physical environment and the effect), whereas the case at bar concerned the relationship between events 1 and 2 (the

²⁷⁸ *Id.* at 768-69.

²⁷⁹ *Id.* at 774.

²⁸⁰ *Id.* at 773.

²⁸¹ *Id.* at 778.

²⁸² *Pub. Citizen*, 541 U.S. at 758-79.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1029 (9th Cir. 2006).

major federal action and the change in the physical environment).²⁸⁷ *Mothers of Peace* demonstrates the narrow application of *Metropolitan Edison* to cases where the impact is not on the physical environment and there is a missing link in the chain of causation.²⁸⁸

Public Citizen also has a narrow application. For example, in the 2019 decision in *Birkhead v. FERC*,²⁸⁹ the D.C. Court of Appeals discussed FERC's claim that it need not consider downstream greenhouse-gas emissions if it 'cannot be considered a legally relevant cause' of such emissions due to lack of jurisdiction over any entity other than the pipeline applicant. The court stated:

But this line of reasoning [from *Public Citizen*] gets the Commission nowhere. . . Because the Commission may therefore 'deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves – even where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline. . . . Accordingly, the Commission is 'not excuse[d] . . . from considering these indirect effects' in its NEPA analysis.²⁹⁰

Other courts recognize the limited application of *Public Citizen* and its holding.²⁹¹ The proposed rule supports the changes using dicta from these two cases but ignores the fact patterns and reasoning behind the holdings. Importantly, the case law cited in the preamble represents narrow factual applications that do not provide an adequate legal basis for the new definition of effects in the regulations. The current definition of effects should be retained.²⁹²

D. Proposed § 1508.1(aa) - Definition of "reasonably foreseeable"

CEQ proposes to adopt a definition of "reasonably foreseeable" as being "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision."²⁹³ Although the preamble does not specifically say so, we assume this is another attempt to graft tort law onto NEPA law. In the context of tort law,

²⁸⁷ *Id.* at 1029-30 (citing *Metropolitan Edison*, 460 U.S. at 775 n.9).

²⁸⁸ *Id.* (citing *No Gwen All. of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)).

²⁸⁹ 925 F.3d 510 (D.C. Cir. 2019).

²⁹⁰ *Id.* at 519.

²⁹¹ *Fla. Wildlife Fed'n v. United States Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1324-25 (S.D. Fla. 2005) (rejecting reliance of *Public Citizen* where the agency has discretion to prevent or manage indirect effects); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (*Public Citizen* applies only to "situations where an agency has 'no ability' because of lack of 'statutory authority' to address the impact") *Humane Soc'y of the United States v. Johanns*, 520 F. Supp. 2d 8, 25-26 (D.D.C. 2007) ("The holding in *Public Citizen* extends only to those situations where an agency has "no ability" because of lack of "statutory authority" to address the impact. NPS, in contrast, is only constrained by its own regulation from considering impacts on the Preserve from adjacent surface activities").

²⁹² 40 C.F.R. § 1508.8 (2020).

²⁹³ 85 Fed. Reg. at 1730.

however, the appropriate definition would specifically reference a “reasonably prudent decision maker” and not an “ordinary person”. Under the Restatement 2d of Torts, “[i]f an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.”²⁹⁴

In the context of NEPA compliance, the decision maker is an actor with a high level of skills, which would be taken into account when determining whether the duty to discuss impacts is present. In other words, the reasonable person is a reasonable decision maker in the agency with the knowledge and skills to evaluate the impacts. And that decision maker must remember that:

[t]he basic thrust of an agency’s responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects are known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempts to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’ ‘The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible. . . .’ [cite omitted] But implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to ‘the fullest extent possible.’²⁹⁵

We do not believe a definition of “reasonably foreseeable” is needed nor do we believe that this definition is either in conformance with the law nor helpful. It should not be retained.

CEQ also asks for comments on whether to include in the definition of effects the concept that the close causal relationship is “analogous to proximate cause in tort law,” and if so, how CEQ could provide additional clarity regarding the meaning of this phrase.”

CEQ should not attempt further imposition of tort law in the context of its regulations implementing NEPA. The two bodies of law have quite different purposes. Tort law is a system of determining liability for harm that has already occurred. A fundamental purpose of NEPA and the NEPA process is to predict and prevent harm. Given those differences, it is quite necessary for NEPA to require a broader analysis of potential impacts than tort law’s post-event analysis of causation. Imposing tort concepts into NEPA law narrows the agencies’ responsibilities and ultimately is likely to lead to the harm to the environment and to present and future generations that NEPA seeks to prevent.

E. Proposed Deletion of Current Definition of Significance at 40 C.F.R. §1508.27 and Proposed § 1501.3 - Definition of Significance and Appropriate Level of NEPA Review.

²⁹⁴ Restatement (Third) of Torts: Phys. & Emot. Harm § 12 (2010).

²⁹⁵ *Scientists’ Institute for Public Information, Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

With one brief and unenlightening phrase in the preamble, “Because the entire definition of significantly is operative language,”²⁹⁶ CEQ proposes to eliminate without further explanation the long-standing factors of context and intensity and arbitrarily reference only a subset of the effects that are cognizable under NEPA. If the goal of this exercise is to foster uncertainty and confusion, these proposals are perfect. If, however, as articulated, the goal includes efficiency, these proposed changes are about the most unproductive measures imaginable. The question of whether a proposed action has “significant impacts” is the single most common inquiry in the context of NEPA compliance. CEQ’s proposal to remove clear direction on this point and substitute poorly drafted, inadequate text is irresponsible. For decades, agencies at all levels of government and the public at large have become familiar with the current criteria for significance and used them systematically as a roadmap to evaluate a proposed action. Courts have also used the criteria as a guide.²⁹⁷

CEQ fails to justify its proposed change from its well-established previous position. How does the notion that “significantly” is an operational term in NEPA eliminate the need for regulatory direction on how the term should be interpreted? Further, the one brief sentence in the preamble directs the reader to proposed §1501.4 for a further discussion of significance. Proposed §1501.4 addresses categorical exclusions. We assume that the reference is meant to be to proposed § 1501.3 that discusses “the appropriate level of NEPA review”.²⁹⁸ However, that proposed regulation is similarly inadequate. The preamble acknowledges that “significance” is “central to determining the appropriate level of review”. But CEQ proposes to “simplify” the definition by omitting “context” and “intensity”, two key terms with decades of utilization, and substituting “the potentially affected environment” for context and nothing at all for “intensity” with no explanation of whether there is some difference in meaning intended by the change in terms for “context” and no substitute for “intensity”.²⁹⁹ Proposed §1501.3 then goes on to identify only two types of effects in this section. Specifically, the proposed revision omits or weakens (with no explanation in the majority of instances) the following criteria that are in CEQ’s current regulation in the definition of “significantly”:

The following should be considered in evaluating intensity:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

²⁹⁶ 85 Fed. Reg. at 1710.

²⁹⁷ For instance, in *Friends of Back Bay v. U.S. Army Corps of Eng’rs*, the court considered these factors in determining that consideration of a proposal that would impact an estuary designated as nationally significant by the EPA required preparation of an EIS. 681 F.3d 581, 589 (4th Cir. 2012). Similarly, in *Fund for Animals v. Norton*, the court used these factors to determine that preparation of an EIS was required before authorizing a permit to the state of Maryland to manage the population of mute swans. 281 F. Supp. 2d 209 (D.D.C. 2003).

²⁹⁸ *Id.* at 1714.

²⁹⁹ *Id.* at 1695.

- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.³⁰⁰

Out of these ten factors for agencies to consider, CEQ weakens the first by deleting the second sentence explaining that a significant impact may exist even if the Federal agency official believes “that on balance the effect will be beneficial,”³⁰¹ and weakens the last consideration by changing “threatens a violation” to “violates” and then states affirmatively that there is no need to try to reconcile any such differences.³⁰² It completely abandons historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers and ecologically critical areas, highly controversial effects, highly uncertain, unique or unknown risks, precedential action, cumulatively significant impacts, significant scientific, cultural, or historical resources, endangered and threatened species and their habitat. In short, CEQ proposes to abandon seven of the criteria entirely, and weaken two of them, leaving only public health and safety intact. Are agency officials now supposed to assume that impacts on air, water, soil, wildlife, historic and cultural resources, aesthetic values, social effects, are now not to be evaluated for significance? This is both illogical

³⁰⁰ 40 C.F.R. § 1508.27(b).

³⁰¹ 40 C.F.R. § 1508.27(b)(1).

³⁰² Proposed 40 C.F.R. § 1506.2(d).

and unlawful. Congress made it clear that consideration of all of the factors currently listed in the effects definition is part of the federal government’s continuing responsibility.³⁰³ What is the rationale for removing them as criteria for significance?

Astonishingly, the preamble only explains the deletion of two of these factors. First, CEQ states that it is removing controversy as a consideration “because this has been interpreted to mean scientific controversy”.³⁰⁴ But CEQ never explains why scientific controversy isn’t worthy of being a consideration in determining the significance of the effects of a proposed action. In fact, the current regulation already makes it clear that the controversy referenced is controversy about the effects and not about the action itself. What is the rationale for removing this factor?

Additionally, CEQ states that it did not include the seventh factor in the current regulation, dealing with individually insignificant but cumulatively significant impacts because it is addressed in two other regulations. But those regulations deal with scoping and EISs respectively, not the threshold question of whether an EIS is needed in the first place. Further, only a portion of the current criteria is addressed in those other sections while all references to cumulatively significant impacts are deleted. The preamble fails to note this. The preamble also fails to address any reason at all for removal of criteria (3), (4), (6), and (8), (9).

The current definition of “significantly” is extremely useful and should be retained.

F. The Proposed Revisions Gut the Alternatives Requirement – the Heart of the NEPA Process.

Two statutory provisions of NEPA clearly state that the required analysis must include: “a detailed statement by the responsible official on . . . alternatives to the proposed action”³⁰⁵ and that agencies must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources”.³⁰⁶ These requirements are essential to NEPA’s purpose of ensuring informed decision-making. The thoughtful and thorough consideration of reasonable alternatives ensures that federal agencies have considered the information “before decisions are made and before actions are taken”.³⁰⁷ A number of key

³⁰³ 42 U.S.C. § 4331(b)

³⁰⁴ 85 Fed. Reg. at 1695; *see also* *NPCA v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2000) (“Agencies must prepare environmental impact statements whenever a federal action is ‘controversial,’ that is, when ‘substantial questions raised as to whether a project may cause significant degradation of some human environmental factor,’ . . . cites omitted. A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI . . . casts serious doubt upon the reasonableness of an agency’s conclusions”) (citations omitted); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1032 (9th Cir. 2007).

³⁰⁵ 42 U.S.C § 4332(C)(iii).

³⁰⁶ 42 U.S.C. § 4332 (E).

³⁰⁷ 40 C.F.R. § 1500.1(b).

changes make clear that CEQ intends to downgrade the importance of alternatives. The proposed changes below particularly highlight this diminished, crabbed approach:

1. Proposed §1502.14 - Heart of the EIS Process.

CEQ begins its proposed revisions in this section by ripping from the current regulation the statement that alternatives are “the heart of the environmental impact statement.”³⁰⁸ The original phrase is there for a reason.³⁰⁹ Without a robust analysis of alternatives, the NEPA process becomes a process documenting the effects of a “done deal” rather than contributing to a decisionmaking process. There is no explanation in the preamble of why CEQ is proposing to delete the phrase.³¹⁰ Deleting this phrase signals to agencies and to the public CEQ’s intent to downgrade the importance of alternatives and many of the other changes to this key regulation substantiate that intent.

2. Proposed §1502.14(a) - “Rigorously explore and objectively evaluate all reasonable alternatives”.

The proposed text would (1) eliminate the direction to “rigorously explore and objectively evaluate” alternatives and, (2) would eliminate “all” before the phrase “reasonable alternatives.” The deletion of “rigorously explore and objectively evaluate” is another example of downgrading the importance of the alternatives analysis. CEQ has directed agencies to rigorously explore and objectively evaluate alternatives since at least April, 1970.³¹¹ The deletion of that direction does not “simplify and clarify” the regulations, as the preamble suggests,³¹² but rather weakens them.

The preamble also states that CEQ’s proposes to delete “all” in this sentence because “NEPA itself provides no specific guidance concerning the range of alternatives an agency must consider.” But the preamble cites the very guidance CEQ issued to interpret the alternatives requirement in 40 C.F.R. § 1502.14 as the rationale for amending 40 C.F.R. §1502.14. As the very first question in CEQ’s 40 Most Asked Questions document makes clear, the interpretation of the alternatives requirement is informed by the rule of reason and has never required agencies to examine, for example, every single possible iteration of an alternative.³¹³ There is no need to drop “all” from the direction to analyze “all reasonable alternatives.” Doing so would send a signal that the requirement to fully analyze

³⁰⁸ 40 C.F.R. § 1502.14.

³⁰⁹ In fact, many years before promulgation of the current CEQ regulations, a court characterized alternatives as the “linchpin” of the impact statement – a less elegant, but similar way of making the same point. *Monroe County Conservation Council, Inv. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).

³¹⁰ See 85 Fed. Reg. at 1701-02.

³¹¹ Council on Environmental Quality: Statements on Proposed Federal Actions Affecting the Environment; Interim Guidelines, April 30, 1970, Section 7(a)(iii), *supra* at fn. 92.

³¹² 85 Fed. Reg. at 1701.

³¹³ Council on Environmental Quality, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations”, 46 Fed. Reg. 18026, 18026-27 (March 23, 1981).

and consider all reasonable alternatives, including those identified and presented in a timely manner from the public, is now less than it once was.³¹⁴

3. Deletion of 40 C.F.R. § 1502.14(c) - Reasonable alternatives not within the jurisdiction of the lead agency.

Once again, CEQ proposes to overturn a principle established long before the current NEPA regulations were promulgated by entirely removing the requirement for an agency to consider reasonable alternatives to the proposed action not within its own jurisdiction. The issue of whether Congress intended to bound an agency's responsibility to analyze alternatives by its jurisdiction was decided early in NEPA's history. In the landmark case of *Natural Resources Defense Council v. Morton*,³¹⁵ the Court of Appeals for the District of Columbia considered whether the Department of the Interior was obliged to consider an alternative outside of its jurisdiction in the context of an EIS prepared for a proposed off-shore oil and gas lease sale off the coast of eastern Louisiana.³¹⁶ As the court noted, the proposal was responsive to President Nixon's directive on supply of energy. Alternatives analyzed within the EIS focused on possible changes to the proposed offering that would help mitigate environmental impacts.

Plaintiffs had argued that the EIS should include an alternative of eliminating oil import quotas. Department of the Interior officials rejected this idea, arguing in the EIS that such an alternative involved many complex factors and concepts, including foreign affairs and national security. Further, the Department officials argued that the alternatives required under NEPA were only those alternatives that could be adopted and implemented by the agency issuing the EIS.

The Court understood that NEPA's broad purposes did not support this narrow approach. In reflecting on NEPA's legislative history and statutory language, it said:

What NEPA infused into the decisionmaking process in 1969 was a directive as to environmental impact statements that was meant to implement the Congressional objectives of government coordination, a comprehensive approach to environmental management, and a determination to face problems of pollution 'while they are still of manageable proportions and while alternative solutions are still available' rather than persist in environmental decision-making wherein 'policy is established by default and inaction' and environmental decisions

³¹⁴ See, e.g., *Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233 (D. Colo. 2012), in which the Court found that the Bureau of Land Management failed to analyze a reasonable "community alternative."

³¹⁵ 458 F.2d 827 (D.C. Cir. 1972).

³¹⁶ The lower court had enjoined the proposed sales, *Nat. Res. Def. Council, Inc. v. Morton*, 337 F. Supp. 165 (D.D.C.), *supplemented*, 337 F. Supp. 167 (D.D.C. 1971), and the government appealed that decision.

‘continue to be made in small but steady increments’ that perpetuate the mistakes of the past without being dealt with until ‘they reach crisis proportions.’³¹⁷

Given this background, the court felt that it would be “particularly inapposite” for the Department to limit its analysis of alternatives by jurisdictional lines of authority. The issue of energy supply was a national one with a broad scope, broader than that of any one particular entity in the federal government. The court held that, “When the proposed action is an integral part of a coordination plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened.”³¹⁸

While it was true that the Department of the Interior did not have the authority to modify or eliminate oil import quotas, the court noted that both the Congress and the President did have such authority. A broad examination of alternative ways of fulfilling a goal would be useful, not just for the “exposition of the thinking of the agency” but also for the guidance of other decision-makers who would be provided with the environmental effects of all reasonably achievable alternatives.

Finally, the court noted that there were pragmatic ways to address concerns about the challenge of analyzing alternatives outside of an agency’s jurisdiction. In a frequently-quoted discussion, the court stated:

We reiterate that the discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned. As to alternatives not within the scope of authority of the responsible official, reference may of course be made to studies of other agencies – including other impact statements³¹⁹. Nor is it appropriate, as Government counsel argues, to disregard alternatives merely because they do not offer a complete solution to the problem. If an alternative would result in supplying only part of the energy that the lease sale would yield, then its use might possibly reduce the scope of the lease sale program and thus alleviate a significant portion of the environmental harm attendant on offshore drilling.³²⁰

As CEQ explained in its guidance about this requirement:

An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may

³¹⁷ 458 F.2d at 836 (quoting S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969), p. 5).

³¹⁸ *Id.* at 835

³¹⁹ The CEQ regulations explicitly permit adoption of other agencies’ EISs, 40 C.F.R. § 1506.3, and incorporation by reference of other publicly available material, 40 C.F.R. § 1502.21.

³²⁰ 458 F.2d at 836.

serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).³²¹

In our collective experience, this issue tends to be raised more in the abstract than in the actual NEPA administrative process. Most of the time, most of us are focused on reasonable alternatives that are within the lead agency's jurisdiction. But there are situations in which it is reasonable to evaluate alternatives outside of an agency's jurisdiction. CEQ's preamble actually cites two such examples - when preparing a legislative EIS and to respond to specific Congressional directives.³²² But there are also other times when it is reasonable to consider such alternatives. For example, in the context of the NEPA process for a proposed land exchange between the Forest Service and Weyerhaeuser Co., the Muckleshoot Indian Tribe raised the possibility of the Forest Service purchasing the land it desired through the Land and Water Conservation Fund. Although the funds to do so would have had to have been appropriated by Congress, the Forest Service could have made a request for them to do so. Given that such an acquisition appeared compatible with the agency's goal, consideration of that alternative was required.³²³ CEQ should not rescind this requirement.

CEQ also asked for comment on whether the regulations should establish a presumptive maximum number of alternatives for evaluation of a proposed action, or alternatively for certain categories of proposed actions. CEQ seeks comment on (1) specific categories of actions, if any, that should be identified for the presumption or for exceptions to the presumption; and (2) what the presumptive number of alternatives should be (e.g., a maximum of three alternatives including the no action alternative).

CEQ should not establish a maximum number of alternatives for proposed actions or for certain categories of proposed actions. There is neither a rationale nor legal support for such an approach. Setting an artificial number could, on the one hand, encourage the development of 'strawman' alternatives (that is, made up alternatives that are not actually reasonable but created for the sake of having a certain number of alternatives) and, on the other, would certainly discourage legitimately reasonable alternatives. It could certainly discourage development, analysis and consideration of community-developed alternatives, an important mechanism for members of the public to meaningfully and constructively engage in the NEPA process in a solutions-oriented fashion.

H. Proposed §1502.22 - Incomplete and Unavailable Information.

CEQ proposes two ill-advised and unsupported changes to this important section. First, it proposes to remove the word "always" from the first statement in the current regulation that reads, "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall **always** make clear that such

³²¹ CEQ, Forty Most Asked Questions, Q. 2(b), 46 Fed. Reg. 18026 (Mar. 23, 1981).

³²² 85 Fed. Reg. at 1702.

³²³ *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 (1999).

information is lacking.”³²⁴ The sole reason given in the preamble for this proposed deletion is that the word “always” is “unnecessarily limiting”.³²⁵ Indeed, the word “always” is supposed to be prescriptive and that is precisely why it should stay in the regulation. As the Court of Appeals for the D.C. Circuit made clear early in its consideration of NEPA’s requirements, “one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown.”³²⁶

This is no adequate justification proffered in the preamble as to why “always” should be deleted nor is there is any indication of what criteria an agency should use to determine in what instances incomplete or unavailable information about reasonably foreseeable significant adverse effects should, per the proposed revision, not be identified. This proposed change runs counter to CEQ’s avowed goal of efficiency by creating uncertainty over when an agency has to make clear that such information is lacking.

The second proposed change to this regulation is to replace the term “exorbitant” with “unreasonable” in the portion of the regulation that excuses an agency from obtaining complete information relevant to reasonably foreseeable significant adverse impacts. In other words, under the current regulation, an agency has to obtain such information if that is possible unless the overall costs of obtaining it are “exorbitant”; the proposed amendment would change the criteria to “unreasonable costs.” We oppose the change in terminology. “Exorbitant” is a term that is more objectively evaluated than “unreasonable”. The preamble cites no actual problems that the term “exorbitant” has caused any agencies.³²⁷

In both instances, the original language of 40 C.F.R. § 1502.22 should be retained.

CEQ also asks for comments on whether the ‘overall costs’ of obtaining incomplete or unavailable information warrants further definition to address whether certain costs are or are not unreasonable.

The preamble cites no problems with implementation of the current language in the regulation. We believe that language should be retained and that additional regulatory language on “overall costs” is not needed.

I. Proposed § 1502.24 - Methodology and scientific accuracy.

CEQ proposes to amend this regulation by adding the astonishing statement that, “Agencies . . . are not required to undertake new scientific and technical research to inform their analyses.”

³²⁴ 40 C.F.R. § 1502.22 (bolding added).

³²⁵ 85 Fed. Reg. at 1703.

³²⁶ *Scientists’ Institute for Public Information, Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973), cited in CEQ’s preamble to the proposed revision of 40 C.F.R. § 1502.22, 50 Fed. Reg. 32,234, 32,236 (Aug. 9, 1985) and the preamble to the final revised rule, 51 Fed. Reg. 15,618, 15,620 (Apr. 24, 1986).

³²⁷ 85 Fed. Reg. at 1703.

NEPA's legislative history evidences a high degree of interest in scientific and technical research to inform decisionmaking.³²⁸ And while there was increasing awareness in the late 1960's of the need for much more scientific research on environmental issues, NEPA was unique:

An important difference between the proposals before the 90th Congress and the efforts and proposals described in the preceding paragraphs is that in pending legislation the knowledge assembled through survey and research would be systematically related to official reporting, appraisal and review. The need for more knowledge has been established without doubt. But of equal and perhaps greater importance at this time is the establishment of a system to insure that existing knowledge and new findings will be organized in a manner suitable for review and decision as matters of public policy.³²⁹

Indeed, the first mandate to agencies in NEPA is that "all agencies of the Federal Government shall . . . utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment."³³⁰

Judicial decisions reflect the importance of obtaining information prior to making a decision, even if that involves undertaking new scientific research. "NEPA requires each agency to undertake research needed adequately to expose environmental harms."³³¹ For example, when the National Park Service proposed to significantly increase cruise ship traffic in Glacier Bay National Park and Preserve, the EA it prepared to support that decision identified numerous gaps in information about the impacts on marine mammals and other wildlife. There was evidence that there would be environmental effects but uncertainty over the intensity of those effects. However, the agency issued a Finding of No Significant Impact (FONSI). As the Court of Appeals for the 9th Circuit described the situation:

The Park Service proposes to increase the risk of harm to the environment and then perform its study. . . . This approach has the process exactly backwards. See *Sierra Club*, 843 F.2d at 1995. Before one brings about a potentially significant irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges. A part of the preparation process here could well be to conduct the studies that the Park Service recognizes are needed. . . .

³²⁸ Lynton K. Caldwell, *The National Environmental Policy Act: An Agenda for the Future*, Indiana University Press, pp. 55-58 (1998).

³²⁹ Lynton K. Caldwell & William J. Van Ness, *A National Policy for the Environment*, Special Report to the Senate Committee on Interior and Insular Affairs, introduced by Senator Henry M. Jackson, Legislative History of S. 1075, Cong. Rec.-Senate, 29071, October 8, 1969.

³³⁰ 42 U.S.C. § 4332(2)(A).

³³¹ *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir. 1984).

The Park Service's lack of knowledge does not excuse the preparation of an EIS; rather it requires the Park Service to do the necessary work to obtain it.³³²

Obtaining new science in the context of NEPA can also be extremely useful in developing for future proposed actions. For example, The Northwest Forest Plan requires the Forest Service to survey for rare species, and to protect them with no-harvest buffers prior to implementing ground-disturbing activities such as logging. These surveys are then used in the agency's effects analysis and the general location, number, and prevalence of the species occurrence is disclosed to the public. In many cases, citizens have collected survey data and provided it to the Forest Service for consideration during the NEPA process. Often, the surveys and related effects analysis results in "new research" that not only limits project effects (because acres are buffered from harvest), but also results in new information about rare species that is relevant to future projects and scientific study more broadly.

The proposed amendment to Section 1502.24 is wrong as a matter of law and contrary to the purpose and policies of NEPA. There is explanation for this proposed regulation in the preamble.³³³ It must be withdrawn.

J. Proposed §§ 1501.4(a), 1508.1(d) - Categorical Exclusions Definition.

CEQ proposes to revise the definition of categorical exclusion (CE) by deleting the explanation that these are categories of actions "which do not individually or cumulatively have a significant effect on the human environment" and adding the word "normally". It also deletes the sentence in the current definition that states that an agency may decide, in its procedures or otherwise, to prepare environmental assessments to aid its compliance with NEPA even if the actions falls within a CE. All three changes are problematic.

As explained earlier,³³⁴ cumulative impact analysis is an integral part of NEPA compliance and cannot be ignored or removed. That is just as true in the context of an agency's promulgation of a CE as it is for an EA or an EIS. For example, the Forest Service was required to take into consideration the cumulative effects of promulgating a categorical exclusion for certain fuel reduction projects on national forests.³³⁵ The notion that the agency might catch cumulative effects in the context of project level analysis (presumably, as an extraordinary circumstance) was not adequate. The court pointed to specific aspects of the CE that could result in significant cumulative effects and held that "In order to assess significance properly, the Forest Service must perform a programmatic cumulative impacts

³³² *NPCA v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001); see also *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1335 (S.D. Ala. 2002) ("NEPA was designed to prevent uninformed action. . . . Defendant's argument in this case would turn NEPA on its head, making ignorance into a powerful factor in favor of immediate action where the agency lacks sufficient data to conclusively show not only that proposed action would harm an endangered species, but that the harm would prove to be 'significant.'").

³³³ See, 85 Fed. Reg. at 1703.

³³⁴ *Supra* at Section V. (A).

³³⁵ *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 1007).

analysis for the Fuels CE.”³³⁶ The court stated that if “assessing the cumulative impacts of the Fuels CE as a whole is impractical, then use of the categorical exclusion mechanism was improper.”³³⁷ Cumulative impacts must go back into the definition of a CE.

The addition of the word “normally” to the definition of a CE is also troublesome. The rationale for this change given in the preamble is to take into account the possibility of extraordinary circumstances that may require an agency to prepare an EA or an EIS. But that provision already exists in the current definition³³⁸ so the need to change the definition and delete the specific reference to extraordinary circumstances only to insert “normally” into it to reference what was deliberately deleted is not well reasoned.³³⁹ A reader could easily interpret this change to indicate that the standard for a CE has been changed and weakened. The current definition should be retained.

Finally, the preamble gives no reason for the deletion of the statement that agencies can choose to do EAs even if an action might potentially qualify as a CE. We can think of no good reason for this deletion ourselves. The sentence should be retained.

K. Proposed § 1501.4(b)(1) - Extraordinary Circumstances.

We are concerned with the proposed regulatory language and associated preamble language that would authorize an agency to consider whether “mitigating circumstances or other conditions are sufficient to avoid significant effects and therefore categorically exclude the proposed action.” Obviously, we want to see effects on resource conditions mitigated. However, doing so in the context of a categorical exclusion allows an agency to essentially do the type of analysis that is required for an EA without any public notice or involvement. If the proposed action truly will have no effect on a particular resource, there should not be a need for analysis. If it appears that the proposed action may have an impact on a resource, the agency should move to an EA. If it appears that it may have a significant impact, the agency must do an EIS.³⁴⁰ This language should be withdrawn.

L. Proposed § 1507.3(e)(5) - Borrowing Another Agency’s CE.

This proposed provision would allow agencies to apply another agency’s categorical exclusion. This is a dangerous erosion of the whole concept of CEs which has

³³⁶ *Id.* at 1029.

³³⁷ *Id.* at 1028.

³³⁸ 40 C.F.R. § 1508.4 (“Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”)

³³⁹ 40 C.F.R. § 1508.4.

³⁴⁰ *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 481 F. Supp. 2d 1059, 1090 (N.D. Cal. 2007).

always been based on each individual agency's experience with its normal activities in its normal context and organization and based on its administrative record.³⁴¹

There is no reasonable legal or policy justification for this provision. CEQ has issued comprehensive, detailed guidance on how to establish or revise a CE, how to apply CEs and how to conduct periodic reviews of CEs.³⁴² The guidance also addresses an appropriate way to use another agency's experience with a particular categorical exclusion.³⁴³

Clearly, given the number of CEs in the executive branch, it is simply not that difficult to go through the regular process of documenting the justification for a CE, consulting with CEQ, going out for public notice and comment and, as appropriate, finalizing the CE. We are already concerned that many CEs rest on insufficient record and are subject to being misused. That concern is widespread.³⁴⁴ This proposed endorsement of co-mingling CEs throughout the executive branch will exacerbate that concern about misuse and abuse. Furthermore, as we discuss below,³⁴⁵ this proposal would enable an agency to use a CE without even the minimal public notice provided in situations where agencies use other agencies' analysis. CEQ should withdraw the regulation and disavow this direction in the preamble.

Additionally, CEQ asks whether there are any other aspects of CEs that CEQ should address in its regulations. Specifically, CEQ invites comment on whether it should establish government-wide CEs in its regulations to address routine administrative activities, for example, internal orders or directives regarding agency operations, procurement of office supplies and travel, and rulemakings to establish administrative processes such as those established under FOIA. Alternatively, CEQ invites comment on whether and how CEQ should revise the definition of major Federal action to exclude these categories from the definition, and if so, suggestions on how it should be addressed.

Since its establishment, CEQ has avoided making determinations about the level of analysis needed for specific categories of proposed actions and we would advise CEQ to maintain that posture unless there is a compelling reason to do otherwise. No such reason has been cited here. In regards to major Federal action, as discussed earlier, we oppose CEQ's unwarranted interest in reversing decades of law and agency practice to impose a two-step process.

³⁴¹ We note that CEQ does not propose that each agency be bound by other agency's categories of actions that require the preparation of EISs.

³⁴² Council on Environmental Quality, "Establishing Applying, and Revising Categorical Exclusions under the National Environmental Policy Act" (Nov. 23, 2010), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf.

³⁴³ *Id.* at 9.

³⁴⁴ Daniel R. Mandelker, *et al.*, *NEPA Law and Litigation*, § 7.17, "Categorical Exclusions – Use, abuse, and proposals for reform," Thomas Reuters (2019).

³⁴⁵ *Infra* at Section VI. (H).

M. Proposed §§ 1501.6(a) and 1508.1(l) - Finding of No Significant Impact.

There is a discrepancy in the definition of a Finding of No Significant Impact (FONSI) between proposed § 1501.6(a), where it describes a FONSI as being appropriate when the proposed action is “not likely to have significant effects” and the definition of a FONSI at § 1508.1(l) that correctly explains that a FONSI briefly presents the reason why a proposed action will not have a significant effect. The provision in §1501.6(a) needs to conform to the definition. There is no rationale or justification for changing the phrase “will not” to “not likely”. Since the preamble itself uses the “will not” construct in relationship to the proposed § 1501.6(a) regulatory language,³⁴⁶ we trust this is a mistake that will be corrected if and when the regulations become final.

N. Proposed §§ 1502.9(c)(4), 1507.3 - Changes to Proposed Action or New Circumstances and Information Deemed Not Significant

A proposed addition to the current provisions for supplementing EISs would, as the preamble notes, codify the existing practice of some federal agencies that prepare a non-NEPA document to determine whether a supplemental NEPA analysis is required. We oppose those agencies’ use of this type of documentation. For example, the Bureau , avoid NEPA review and, in effect, to inappropriately justify a distinct implementation-level “proposal” on the basis of an existing NEPA analysis developed for a separate, typically programmatic level decision. For example, BLM has sought to use DNAs to justify the sale of geographically discrete oil and gas leases on the basis of land use plan-level NEPA analyses. But BLM’s programmatic NEPA analyses—which can cover millions of acres—does not provide the requisite site-specific analysis of impacts or consider alternatives calibrated to geographically specific proposed oil and gas leases, including the option not to issue the oil and gas lease or to condition the lease on site-specific stipulations or mitigation measures. A DNA, which is not a NEPA document, cannot be used to provide for that analysis. It should therefore be no surprise that these DNAs—because of conflicts with NEPA’s statutory framework—have triggered litigation.

We have seen this attempted dodge of analysis before by agencies trying to rely on a programmatic NEPA analysis that simply does not cover a proposed site-specific action. The DNA process is simply putting a new label on it. To the degree that agencies think implementation-level actions should not require further NEPA review, the proper course is not to contrive a new, non-NEPA mechanism, but to correctly utilize the tiering process³⁴⁷ improve the robustness of programmatic NEPA analyses that address these implementation-level issues in advance or to consider and justify appropriate categorical exclusions.

³⁴⁶ 85 Fed. Reg. 1684, 1698.

³⁴⁷ See Council on Environmental Quality, *Effective Use of Programmatic NEPA Reviews*, December 18, 2014; available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Effective_Use_of_Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf.

Similarly, for many years, some agencies, such as the U.S. Army Corps of Engineers, have utilized a Supplemental Information Report (SIR) as a mechanism for evaluating new information related to an action analyzed in an EIS. Except for new information that clearly has no potential for significance relevant to environmental concerns or substantial changes related to the proposed action, this type of analysis should be evaluated through the NEPA process. The analysis could be presented in an EA available for public review or, of course, through a supplemental EIS. Further, an SIR is not an appropriate place to present new analysis of information available at the time the original NEPA documentation was provided. As one court explained:

The Forest Service may use a [supplemental information report] to analyze the significance of information that is ‘truly new’”, but may not use a [supplemental information report] for information that it ‘knew or should have known’ at the time it prepared the original [NEPA document]. It is ‘inconsistent with NEPA for an agency to use [a supplemental information report], rather than a supplemental [environmental assessment] or [environmental impact statement], ‘to add information it knew or should have known. Environmental consideration documents must be ‘prepared early enough so that [they] can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.’³⁴⁸

Generally, the default mechanism for evaluating new information, especially in the context of a proposed action analyzed in an EIS, should be, at a minimum, an EA with public involvement. Agencies continue to lose cases by relying on the very types of documents that CEQ proposes to authorize.³⁴⁹ A brief EA with public involvement is the most appropriate and efficient way to assess the significance of new information or changed circumstances.

O. Proposed § 1501.10 - Time Limits

CEQ proposes to set time limits of one year for preparation of an EA and two years for preparation of an EIS. Time is to be measured from the date of a decision to prepare an EA to the publication of a final EA or publication of a Notice of Intent (NOI) for an EIS until publication of a Record of Decision. A senior agency official of the lead agency may approve a longer period based on certain enumerated factors.³⁵⁰

³⁴⁸ *Rock Creek Alliance v. U.S. Forest Service*, 703 F. Supp. 2d 1152, 1180-81 (D. Mont. 2010).

³⁴⁹ *See, e.g., Triumvirate LLC v. Bernhardt*, 367 F. Supp. 3d 1011 (D. Alaska 2019) (in forgoing an EA, BLM improperly relied on DNA to issue another outfitter’s permit even though the permits would have had similar effects); *W. Watersheds Project v. Zinke*, 336 F. Supp.3d 1204, 1212 (D. Idaho 2018) (enjoining oil and gas leasing in sage grouse habitat via DNAs without additional public notice and comment); *Friends of Animals v. BLM*, 232 F. Supp. 3d 53 (D.D.C. 2017) (approving use of DNA where the new gather was part of an ongoing action in the same herd management area); *Friends of Animals v. BLM*, 2015 WL 555980 (D. Nev. 2015) (reliance on DNA violated NEPA where the new gather was an action of different scope and intensity).

³⁵⁰ 85 Fed. Reg. at 1717; proposed § 1501.10.

There are several problems with this proposed regulation. First, the measurement of time for EISs is glaringly wrong. An accurate assessment of how long an EIS takes should begin with the NOI and end with the publication of the final EIS. The time period between publication of a final EIS and a Record of Decision is not driven by NEPA, but rather by a variety of factors that the decision maker may or may not even control. For example, there may be change in leadership and a change in policy direction or direction to delay making certain decisions. A project proponent may ask for a “time out” because of changed circumstances (including changed project economics). National security concerns may dictate a different course of action. The possibilities are many, but they are not driven by NEPA since absent the unusual circumstance of an agency being required to supplement a final EIS, there are no procedural requirements under NEPA between a final EIS and the Record of Decision.

Second, the proposed regulation’s use of the ROD as the end of the two-year period is arbitrary because it will put at particular disadvantage those agencies that provide by regulation a pre-decisional period in which draft decisions may be protested or objected to. Both the Forest Service and the Bureau of Land Management have adopted such procedures as a way to identify areas of disagreement with stakeholders, and to provide the agency an opportunity to modify draft proposals to reduce the potential for future litigation. The purpose of increasing public support and reducing litigation would seem to be one CEQ would support.

BLM regulations mandate that after a final EA or an EIS on a land use plan or amendment is filed, the public has 30 days to file a protest.³⁵¹ BLM regulations set no deadline for completion of agency review of protests, stating only that “[t]he Director [of BLM] shall promptly render a decision on the protest.”³⁵² BLM guidance states that “[i]t will be the BLM’s goal to resolve all protests within 90 days.”³⁵³ Only “after protests are resolved” does BLM issue a ROD.³⁵⁴ Thus, assuming that BLM prepares an EIS on a land use plan revision, agency regulations and guidance anticipate that the pre-decisional administrative protest process will take 120 days, all of which occur prior to the ROD’s issuance.³⁵⁵ This post-analysis process thus could consume roughly one-sixth (or more) of

³⁵¹ 43 C.F.R. § 1610.5-2(a)(1).

³⁵² *Id.* § 1610.5-2(a)(3).

³⁵³ Bureau of Land Management, Land Use Planning Handbook, H-1601-1 (Mar. 11, 2005), at Appendix E, page 1, available at https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1601-1.pdf (last viewed Mar. 8, 2020).

³⁵⁴ *Id.* at Appendix F, page 20.

³⁵⁵ In practice, BLM can take many months to resolve all objections and issue a ROD. For example, BLM issued its Final EIS and proposed Resource Management Plan for the Uncompahgre Field office in June 2019; eight months later, the agency still has not ruled on the protests or issued a ROD. *See* BLM, Uncompahgre Field Office Resource Management Plan webpage, available at <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=86003> (last viewed Mar. 8, 2020).

the entire two-year period the draft rule provides for an agency to complete the EIS from notice of intent to ROD.

The Forest Service provides for pre-decisional challenges to agency decisions both at the plan and project implementation level. Forest Service regulations permit interested parties to file written objection to a new plan, plan amendment, or plan revision within 60 days of the proposed decision, and following completion of the FEIS.³⁵⁶ The Forest Service “must issue a written response . . . within 90 days,” but “[t]he reviewing officer has the discretion to extend the time when it is determined to be necessary to provide adequate response to objections or to participate in discussions with the parties.”³⁵⁷ Thus, the time period between completion of a Forest Plan FEIS and a ROD can be 150 days or longer, or more than 20% of the two-year period provided in the draft rule.

For projects implementing a forest plan, Forest Service regulations require the agency to provide the public 30 days after the Final EIS to file a pre-decisional objection if the proposal is an authorized hazardous fuel reduction project, and 45 days for all other projects.³⁵⁸ The Forest Service has the following 45 days to issue a written decision, although the regulations permit “[t]he reviewing officer . . . to extend the time for up to [an additional] 30 days when he or she determines that additional time is necessary to provide adequate response to objections or to participate in resolution discussions with the objector(s).”³⁵⁹ The Forest Service regulations do not require the Forest Service to issue the ROD by a certain deadline after the objection decision is issued. All told, the Forest Service may take 120 days or longer after the FEIS is complete to issue the ROD.

By placing a two-year cap on the period between the Notice of Intent and the ROD, the proposed rule may thus have the perverse effect of compressing the time to prepare NEPA analysis for numerous BLM and Forest Service decisions when compared to other agencies who do not provide a pre-decisional protest or objection period. We request that CEQ explain why it takes this position, and that CEQ identify all agencies that have a pre-decisional protest, objection, or appeal period so that the public and CEQ can understand the disparate (and so far undisclosed) impact of this proposed rule on agencies with such processes.

A third problem is agency capacity. Today, many agencies lack sufficient capacity to competently execute their NEPA responsibilities, whether preparing their own analyses and conducting their own public involvement or overseeing contractors. In that context, forcing a “one size fits all” timeframe will likely result in longer time periods before compliance is actually completed. Rushed NEPA documents will result in badly flawed results, increased litigation, decreased agency credibility with the public and distorted, poorly reasoned decisionmaking.

³⁵⁶ *Id.* § 219.56(a).

³⁵⁷ *Id.* § 219.56(g).

³⁵⁸ *Id.* §§ 218.7(c)(2)(iv) & 218.26(a).

³⁵⁹ *Id.* § 218.26(b).

The exception to the proposed rule allowing for an extended period to be approved by a senior agency official does not fix the problem. Understanding the pressure to produce faster and faster, agency staff will be reluctant to even ask for an extension. Further, the criteria for a senior agency official to consider regarding time period considerations³⁶⁰ have been revised to delete the time required for obtaining information.³⁶¹

This proposed regulation should be withdrawn.

P. Proposed §§ 1501.5(e), 1501.7, 1502.7 – Page Limits

While recognizing that the length of environmental review documents are influenced by, “the complexity and significance of the proposed action and environmental effects the EIS considers,”³⁶² CEQ proposes to afford agencies less flexibility to navigate these factors by setting more rigid “presumptive” page limits and adding more bureaucracy by adding a requirement for senior agency officials to approve lengthier documents in writing. The additional requirement of written approval only adds time to the environmental review process and does not serve CEQ’s stated purpose of advancing regulatory changes that will reduce delay. Additionally, if implemented as currently proposed, it appears the preparers of an EIS may seek the additional pages late in the drafting process, once it is realized it may not be possible to comply with the set limits. The time to consider and set page limits reflecting the complexity of review is early in the process, which is why the current regulations wisely encourage agencies to set page limits during the scoping process in § 1501.7.

The proposed regulation also fails to acknowledge the direction at both current and proposed 40 C.F.R. § 1502.25 regarding integration of an EIS with other information required by other environmental review requirements.

CEQ should withdraw the proposed changes to page limits. To reduce the length of environmental review documents, CEQ should retain the current flexibility of the regulations and focus on ensuring agencies have the resources necessary to produce timely reviews.

V. CEQ PROPOSES A NUMBER OF CHANGES INTENDED TO ELEVATE THE ROLE OF A PRIVATE SECTOR APPLICANT WHILE DIMINISHING THE ROLE OF THE PUBLIC.

A. Proposed § 1506.5(c) - Agency Responsibility for Environmental Documents.

This now misnamed section would reverse CEQ’s prohibition against private sector applicants preparing EISs for their own projects. It would also delete the current conflict of interest provisions prohibiting consultants who have a financial interest or other interest

³⁶⁰ 40 C.F.R. § 1501.8(b).

³⁶¹ 85 Fed. Reg. at 1717; *also see*, discussion proposed § 1502.24

³⁶² 85 Fed. Reg. at 1700.

in the outcome of the proposed action to prepare EISs for their own projects. The proposal attempts to assuage concerns about the bias that would be introduced by requiring that the agency provide guidance, participate in its preparation, independently evaluate the EIS and take responsibility for its scope and content.

CEQ's preamble states that, "These changes are intended to improve communication between proponents of a proposal for agency action and the officials tasked with evaluating the effects of the action and reasonable alternatives, to improve the quality of NEPA documents and efficiency of the NEPA process."³⁶³

In the immortal words of Ludovico Ariosto, "This dog won't hunt. This horse won't jump."³⁶⁴ CEQ's solicitude for contractor-agency communication is misplaced. The current regulations already direct agencies to designate policies or staff to advise potential applicants of studies or other information foreseeably required for later Federal action,³⁶⁵ to involve applicants to the extent practicable in preparing environmental assessments,³⁶⁶ set time limits at the request of an applicant,³⁶⁷ assist the applicant by outlining the types of information required,³⁶⁸ and specifically states that nothing is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.³⁶⁹ In short, it is hard to identify any barriers to communication with an applicant. Importantly, CEQ neither identifies any such barriers nor explains why this change is needed to improve communications.

This change would negate the purpose of EISs by allowing a biased party to conduct the analysis. CEQ clearly understands the risks of conflict of interest because it previously published guidance interpreting Section 1506.5(c) and the conflict of interest provision. That guidance addressed the importance of this provision:

Some persons believe these restrictions are motivated by undue and unwarranted suspicion about the bias of contractors. The Council is aware that many contractors would conduct their studies in a professional and unbiased manner. However, the Council has the responsibility of overseeing the administration of the National Environmental Policy Act in a manner most consistent with the statute's directives and the public's expectations of sound government. The legal responsibilities for carrying out NEPA's objectives rest solely with federal agencies. Thus, if any delegation of work is to occur, it should be arranged to be

³⁶³ *Id.* at 1705.

³⁶⁴ Ariosto, Ludovico, *Orlando Furioso*, Canto VII (1532). *See also*, Jennings, Waylon, "That Dog Won't Hunt", © Sony/ATV Music Publishing LLC (1986) ("You think you can say some words, take away the hurt, . . . But when it ain't working out we got a saying down South, Baby that dog won't hunt").

³⁶⁵ 40 C.F.R. § 1501.2(d)(1).

³⁶⁶ *Id.* § 1501.4(b).

³⁶⁷ *Id.* § 1501.8(a).

³⁶⁸ *Id.* § 1506.5(a).

³⁶⁹ *Id.* § 1506.5(c).

performed in as objective a manner as possible. Preparation of environmental impact statements by parties who would suffer financial losses if, for example, a "no action" alternative were selected, could easily lead to a public perception of bias. It is important to maintain the public's faith in the integrity of the EIS process, and avoidance of conflicts in the preparation of environmental impact statements is an important means of achieving this goal.³⁷⁰

In that guidance, CEQ again stressed that there was no barrier to applicants communicating with agencies by providing them with information, nor were consulting firms barred from competing because they might have a future interest in the action.³⁷¹ Thus, CEQ sought to walk a careful line between balancing the public interest and acknowledging the role of outside consultants to supplement the agency's capacity, or lack thereof to prepare EISs.

CEQ now proposes to erase that line entirely. It fails to address the complete elimination of the conflicts of interest provisions in the regulations other than a vague reference to commenters urging that CEQ allow "greater flexibility for the project sponsor to prepare NEPA documents." But CEQ never explains why it proposed to reverse its position on conflict of interest and why it thinks doing so is in the public interest.

In *Davis v. Mineta*,³⁷² the Court of Appeals identified precisely the type of harm that can occur when an applicant prepares a NEPA document. In that case, the applicant for several connected highway projects hired a consultant to distribute an EA. The contract with the consultant also required that a FONSI be signed and distributed by a date certain. The Court unsurprisingly found that the consultant had an "inherent, contractually-created bias in favor of issuance of a FONSI rather than preparation of an EIS."³⁷³

It is true that federal agencies themselves are proponents of actions for which they prepare EISs. State and local governments may also act as both proponent and as a joint preparer under CEQ's current regulations.³⁷⁴ But there is an important difference. The responsibility of government agencies is to act in the public's interest. The responsibility of companies is to act in their shareholders' interest. Both segments of society have legitimate – but quite different roles to play and NEPA law has recognized that difference.

CEQ's proposes to eliminate the conflict of interest provision and in its place institutionally codifies an inherent conflict of interest. This is counter to widely accepted ethical standards that restrict people with a conflict of interest from influencing important government decisions. That is why senior level federal government employees must file public financial disclosure statements and why conflicts of interests are broadly interpreted and regulated by the Office of Government Ethics. Indeed, a federal employee who fails to recuse him or herself from a particular matter if it would have a direct and predictable

³⁷⁰ 48 Fed. Reg. 34,263, 34,266 (July 28, 1983).

³⁷¹ *Id.*

³⁷² 302 F.3d 1104 (10th Cir. 2002).

³⁷³ *Id.* at 1112.

³⁷⁴ 40 C.F.R. § 1506.2.

effect on that employee's own financial interests or certain other financial interests that are treated as the employee's own are subject to potential criminal prosecution.³⁷⁵ That is why there are rules about judges recusing themselves from cases in which they have an interest³⁷⁶ and why the American Bar Association's Model Rules of Professional Conduct, adopted by a number of jurisdictions, have detailed rules and prohibitions related to conflict of interest.³⁷⁷ It is why responsible newspapers identify any conflict of interest inherent in their reporting, such as interests of their ownership.³⁷⁸ There are also important considerations regarding conflicts of interest in the medical field, especially pharmaceutical industry, the financial industry and many other spheres of modern life. People generally understand that no matter how good one's intentions are, self-interest is a powerful motivation and that therefore, conflict of interest rules have an important public policy purpose. It is difficult to think of any context in which conflicts of interest provisions have been eliminated once imposed. CEQ should not aim at setting a precedent in this regard.

CEQ's proposal, if finalized, would undermine the integrity of the NEPA process. It should be withdrawn.

B. Proposed § 1502.13 - Purpose and Need

CEQ proposes to reword the brief definition of purpose and need to highlight the needs of the applicant and diminish the role of alternatives. Specifically, the definition would be altered to direct an agency to base the purpose and need "on the goals of the applicant and the agency's authority." It also changes the context for purpose and need from alternatives to the proposed action.³⁷⁹ Neither change is acceptable.

The purpose and need of a proposed action is fundamentally related to the public purpose underlying a federal agency's authority to act on a particular proposal. Every time a federal agency considers whether to grant permit or license, approve funding or take some other federal action at the request of an applicant, it does so because Congress decided there was a national interest in a federal agency making a decision in the public's interest. The public interest is what the agency needs to be considering when conducting a NEPA analysis, not the goals of the applicant.³⁸⁰

³⁷⁵ 18 U.S.C. § 208.

³⁷⁶ See 28 U.S.C. § 455 for recusal rules for Supreme Court Justices, federal judges, and federal magistrate judges.

³⁷⁷ American Bar Ass'n., Model Rules of Professional Conduct, §§ 1.7 – 1.12.

³⁷⁸ See, e.g., *Ethical Journalism, A Handbook of Values and Practices for the News and Editorial Departments*, NEW YORK TIMES, <https://www.nytimes.com/editorial-standards/ethical-journalism.html> (last visited Mar. 4, 2020).

³⁷⁹ 85 Fed. Reg. at 1720.

³⁸⁰ Obviously, the agency has to communicate with the applicant about the project, and as we have discussed immediately above, there is no barrier to doing that. The agency needs to do due diligence in understanding the applicant's purposes for the process to make sense.

Obviously, the agency has to communicate with the applicant about the project, and as we have discussed immediately above, there is no barrier to doing that. The agency needs to do due diligence in understanding the applicant’s purposes for the process to make sense.

In proposing this change, the preamble cites a 2003 letter sent by Chairman James Connaughton to Secretary of Transportation Norman Mineta discussing CEQ’s interpretation of purpose and need.³⁸¹ The specific quote utilized from that letter is that, “Thoughtful resolution of the purpose and need statement at the beginning of the process will contribute to a rational environmental review process and save considerable delay and frustration later in the decision[-]making process.”³⁸² We agree, especially given that the purpose and need statement frames the alternatives that an agency evaluates. But what the letter does not do is support the notion of putting an applicant’s needs up front in the purpose and need statement. Indeed, the entire letter is in the context of transportation projects where local and state governments have specific statutory roles in the planning process. It does not address purpose and need in the context of an applicant from the private sector. But even in the transportation context, the Connaughton letter cautions that agencies must not “put forward a purpose and need statement that is so narrow as to ‘define competing ‘reasonable alternatives’ out of consideration (and even out of existence),” *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997); [see also,] *Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723 (9th Cir. 1995).”³⁸³

Several federal court decisions have addressed the appropriate way to frame the purpose and need when an agency is considering an application for a federal permit, approval or benefit of some sort. For example, in *Simmons v. U.S. Army Corps of Engineers*,³⁸⁴ the Corps argued that they were restricted to analyzing the particular alternative that the applicant proposed. The Court disagreed and explained that:

This is a losing position in the Seventh Circuit. . . . The general goal of Marion’s application is to supply water to Marion and the Water District –not to build (or find) a single reservoir to supply that water. . . . An agency cannot restrict its analysis to those ‘alternative means by which a particular applicant can reach his goals.’ [cites omitted] This is precisely what the Corps did in this case. The Corps has ‘the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.’” [cite omitted] And that is exactly what the Corps has not shown in its wholesale acceptance of Marion’s definition of purpose.³⁸⁵

³⁸¹ *Id.* at 1701.

³⁸² *Id.* (citing Letter from the Hon. James L. Connaughton, Chairman, Council on Environmental Quality, to the Hon. Norman Y. Mineta, Secretary, Department of Transportation (May 12, 2003) (“Connaughton Letter”), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-DOT_PurposeNeed_May-2013.pdf).

³⁸³ *Id.*

³⁸⁴ 120 F.3d 664 (7th Cir. 1997).

³⁸⁵ *Id.* at 669 (internal citations omitted).

In *National Parks & Conservation Ass'n v. Bureau of Land Management*,³⁸⁶ the proposed action was construction of a landfill near Joshua Tree National Park. A land exchange with the Bureau of Land Management (“BLM”) was part of the applicant’s plan. The purpose and need statement in the EIS included three goals of the proponent and one goal of BLM. BLM did not dispute “that the majority of these purposes and needs respond to Kaiser’s goals, not those of the BLM.”³⁸⁷ While the court acknowledged that agencies had to consider the goals of a private applicant, it pointed out that it “is a far cry from mandating that those private interests define the scope of the proposed project.”³⁸⁸ The Court held that the purpose and need statements unlawfully narrowed BLM’s examination of other alternatives to meet Kaiser’s objectives and thus eliminated from analysis reasonable alternatives that would have been responsive to BLM’s own purpose and need. “The BLM adopted Kaiser’s interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange.”³⁸⁹

These decisions make clear that an agency should not confine the purpose and need to an applicant’s goals. Rather, an agency should frame the purpose and need to be responsive to the public purpose as well. Thus, the proposed revision of the purpose and need definition should not be finalized because it unduly elevates the goals of an applicant over needs of the public. The current definition should be retained.

C. Proposed § 1508.1(z) - Definition of “Reasonable Alternatives”

CEQ proposes to add a definition of “reasonable alternatives” to the regulations. The proposed definition would, among other things, state that reasonable alternatives “meet the purpose and need for the proposed action, and, where applicable meet the goals of the applicant.”

Similar to our position on the insertion of the applicant’s goals into the definition of purpose and need, we oppose including an applicant’s goals as an intrinsic criterion for the definition of “reasonable alternatives.” CEQ articulated the correct position in its “Forty Most Asked Questions”, published shortly after promulgation of the current regulations. In that guidance, in response to the question of whether an agency had the responsibility for analyzing alternatives outside of the capability or the applicant, CEQ stated:

Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is “reasonable” rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic

³⁸⁶ 606 F.3d 1058 (9th Cir. 2010).

³⁸⁷ *Id.* at 1070.

³⁸⁸ *Id.* at 1072.

³⁸⁹ *Id.*; see also, *Backcountry Against Dumps v. Chu*, 215 F. Supp. 3d 966, 977–80 (S.D. Cal. 2015) (finding the purpose and need statement for a permit to construct an electric transmission line was unlawful because it limited consideration of alternatives to the project).

standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.³⁹⁰

A number of federal court decisions have affirmed this approach. For example, in *Van Abbema v Fornell*,³⁹¹ the Court of Appeals for the Seventh Circuit focused on the Corps of Engineers' evaluation of alternatives prior to its decision on a permit application for coal loading facility proposed for construction on the Mississippi River. The Court found the Corps' evaluation of alternatives to be inadequate and stated that:

At the outset we note that the evaluation of "alternatives" mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals. In the current proposal the general goal is to deliver coal from mine to utility. . . . In some discussion of alternatives to the proposal, the Corps has suggested that an alternative may not be feasible at least partly because the applicant does not own the necessary land or perhaps cannot gain access to it. . . . The fact that this applicant does not now own an alternative site is only marginally relevant (if it is relevant at all) to whether feasible alternatives exist to the applicant's proposal. This is particularly true because an existing facility in Quincy, Illinois is presently transloading the mine's coal from truck to barge.³⁹²

The Court of Appeals for the First Circuit issued a similar holding in *Dubois v. U.S. Department of Agriculture*.³⁹³ In that case, instead of "rigorously exploring" various alternatives raised by members of the public, the Forest Service evaluated only alternatives that provided an advantage to that particular applicant. The court found that the agency's evaluation was not in accordance with the law.³⁹⁴

Agencies must independently assess whether an alternative is a reasonable alternative to meeting the purpose and need and not rely solely on the assessment of the applicant. For example, in *Southern Utah Wilderness Alliance v. Norton*,³⁹⁵ the Bureau of Land Management's "unquestioning acceptance" of the project proponents for oil and gas

³⁹⁰ Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Regulations, 46 Fed. Reg. 18,026, 18,027 (March 23, 1981) (emphasis in original).

³⁹¹ 807 F.2d 633 (7th Cir. 1986).

³⁹² 807 F.2d 633, 638–39 (7th Cir. 1986) (emphasis in original) (internal citations omitted).

³⁹³ 102 F.3d 1273 (1st Cir. 1996).

³⁹⁴ *Id.* at 1288–90. To the extent CEQ's 1983 guidance on alternatives suggested that the First Circuit's decision in the earlier case of *Roosevelt Campobello International Park Commission v. U.S. EPA*, 684 F.2d 1041 (1st Cir. 1982), is contrary to the decisions in *Dubois* or *Van Abbema*, we must point out that CEQ's analysis failed to note a critical part of court's reasoning. Plaintiffs in that case did not identify and suggest to the lead agency any alternatives it thought should be studied in the EIS during the administrative process. The Court concluded that, "petitioners' argument that EPA erred by restricting its consideration to alternative sites in Maine must fail, because they did not suggest any reasonable alternatives to EPA during the comment period." *Id.* at 1047.

³⁹⁵ 237 F. Supp. 2d 48 (D.D.C. 2002).

leasing inappropriately limited the agency’s alternative analysis.³⁹⁶ And in the context of restoration projects funded by British Petroleum (BP) in the wake of the Deepwater Horizon disaster, the responsible federal agencies erred by limiting the alternatives to only those alternatives that BP and the Trustees thought were reasonable.³⁹⁷

Requiring alternatives to meet the purpose and need of an applicant also overlooks the importance of alternatives developed outside of the agency but which must be considered by the agency. For example, in 2008, the Bureau of Land Management leased the entire Roan Plateau for oil and gas development. That decision was challenged by a coalition of sportsmen and conservation groups. In 2012, a federal court ruled that BLM had violated NEPA by failing to consider a reasonable alternative of protecting the top of the plateau while allowing oil and gas development on less sensitive areas around the base of the plateau.³⁹⁸ Following that ruling, the parties to the lawsuit reached a settlement that led BLM to prepare a supplemental NEPA analysis considering an alternative protecting almost the entire top of the plateau, while allowing drilling around the base. In 2016, the agency selected that alternative in a new resource management plan for the Roan. Under that plan, the wildlife, pristine lands and other resources atop the plateau are protected, while oil and gas development is currently proceeding on less sensitive lands around the base.

The proposed definition of reasonable alternatives is fatally flawed and must be withdrawn.

D. Proposed § 1501.9(a) – Scoping

CEQ proposes to reverse its long-standing position that the publication of a NOI triggers the scoping process. Our concern with the proposed section is the sentence that reads, “Scoping may include appropriate pre-application procedures or work conducted prior to publication of the notice of intent.”

This sentence is confusing in part because the term “pre-application procedures” generally refers to what an applicant needs to do to submit a complete application to a federal agency. Some agencies have very detailed pre-application procedures that includes distribution of information to other agencies and to the public,³⁹⁹ but other have a much

³⁹⁶ *Id.* at 52–53.

³⁹⁷ See *Gulf Restoration Network v. Jewell*, 161 F. Supp. 3d 1119, 1130 (S.D. Ala. 2016) (“The Trustees point to the PEIS’s ‘purpose and need’ statement—to *accelerate* meaningful restoration—and argue that they have fulfilled their duty to consider a reasonable range of restoration alternatives. Since there could be no early restoration project absent an agreement with (and funding from) BP, no other project could achieve the stated goal. . . . This is the paradigm of a self-fulfilling prophecy. While ‘no minimum number of alternatives’ must be considered, [] agencies must present a reasoned alternatives analysis.” (internal citation omitted)).

³⁹⁸ *Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233 (D. Colo. 2012).

³⁹⁹ See, e.g., 18 U.S.C. § 5.6 (detailing the Federal Energy Regulatory Commission’s pre-application procedures).

more informal process that is basically conducted between the agency and the applicant. However, either a formal or informal pre-application process does not serve the same purposes as scoping.

CEQ has previously stated that scoping can be a useful tool prior to publication of an NOI, “so long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.” Further, CEQ stated that “scoping that is done before the assessment, and in aid of its preparation, cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.”⁴⁰⁰

CEQ should not allow agencies to count communications between it and an applicant to be considered scoping unless the public has notice and opportunity to also participate in scoping at the same stage.

E. Proposed §§ 1502.16, 1504.2 - Environmental Consequences and Criteria for Referral to CEQ

CEQ proposes to add to the environmental consequences that must be evaluated in an EIS, “where applicable, economic and technical considerations, including the economic benefits of the proposed action” as a required part of the discussion of environmental consequences in an EIS. This is confusing, redundant and in part, outside of the scope of NEPA. Economic effects interrelated with environmental effects are currently included in the definition of effects⁴⁰¹ and would remain in the definition in the proposed revision of that regulation.⁴⁰² Technical considerations are not really “effects”, but would normally be part of an agency’s assessment as to whether an alternative was a reasonable alternative.

The proposed additions of economic and technical considerations as a required part of effects analysis in an EIS are troubling and misguided. The preamble says that this section is being proposed “[t]o align with the statute.”⁴⁰³ Presumably, the reference is to Section 102(2)(B) of NEPA which directs agencies to:

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations[.].⁴⁰⁴

⁴⁰⁰ Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Regulations, 46 Fed. Reg. 10826, 10830 (Mar. 23, 1981).

⁴⁰¹ 40 C.F.R. § 1508.8(b).

⁴⁰² 85 Fed. Reg. at 1729.

⁴⁰³ 85 Fed. Reg. at 1702.

⁴⁰⁴ 42 U.S.C. § 4332 (2)(B).

CEQ appears to misunderstand the meaning of this provision. The Senate report accompanying NEPA explains its purpose:

In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them *in comparison* with economic and technical factors. As a result, unless the results of planning are radically revised at the policy level and this often means the Congress-environmental enhancement opportunities may be forgone and unnecessary degradation incurred. A vital requisite of environmental management is the development of adequate methodology for evaluating the full environmental impacts *and the full costs of Federal actions*.⁴⁰⁵

In other words, this provision was included in NEPA to try to even out the playing field by directing agencies to develop “methods and procedures, in consultation with CEQ,” to insure that environmental values and impacts were given consideration *along with* (not as part of) economic and technical considerations. Congress was not worried that economic and technical considerations weren’t being considered; it was concerned that *environmental impacts* were not being considered. To the extent that economic factors are referenced, the Senate report refers to the “full costs” of federal actions. This could appropriately include analysis of the costs of environmental attributes such as natural barriers to flooding that could be adversely affected by federal actions. CEQ’s proposed addition turns Congress’ intent on its head.⁴⁰⁶

The federal courts have correctly understood for many years that purely economic interests do not fall within NEPA’s zone of interest. Because NEPA claims are brought under the APA, plaintiffs must show that they are “adversely affected or aggrieved by agency action within the meaning of a relevant statute”.⁴⁰⁷ Courts “have long described the zone of interests that NEPA protects as being environmental.”⁴⁰⁸ In the words of the D.C. Circuit Court of Appeals, “NEPA is meant to supplement federal agencies’ other nonenvironmental objectives.”⁴⁰⁹

For the same reasons, CEQ should delete proposed § 1504.2(g), which would add economic and technical considerations as a criteria for agencies to weigh in deliberating on whether to refer a proposed action to CEQ.

⁴⁰⁵ S. Rep. No. 91-296, at 20 (1969) (emphasis added).

⁴⁰⁶ It is also dismaying to see that under this proposed provision, the economic benefit need only be assessed for the proposed action, typically the preferred alternative and/or the applicant’s proposal. For other types of impacts in Section 1502.16 (environmental consequences), analysis is to be undertaken for the proposed action and reasonable alternatives. This difference clearly reinforces the notion that this proposed revision is intended to be for the benefit of private proponents.

⁴⁰⁷ 5 U.S.C. § 702.

⁴⁰⁸ *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005) (citations omitted).

⁴⁰⁹ *Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1092 (D.C. Cir. 1984) (citing 42 U.S.C. § 4335).

CEQ should delete these proposed additions from any final rulemaking.

F. Proposed § 1506.6(c) - Public Involvement – 15 Days

CEQ says it is proposing to update the public involvement section to give agencies “greater flexibility to design and customize public involvement to meet the specific circumstances of their proposed actions.”⁴¹⁰ We can think of no circumstances which would require holding a public hearing on an EIS immediately after the publication of an EIS, nor does the preamble or proposed regulation identify any such circumstances.⁴¹¹ We are left without any rational explanation, then, of why the proposed regulation deletes the current requirement for an agency to make an EIS available to the public for at least 15 days prior to such a hearing. This is outrageously unfair. The EIS needs to be released in sufficient time before the hearing so that the public can properly prepare. The current requirement at Section 1506.6(c)(2) should be retained.

G. Proposed § 1506.6(f) - Public Involvement - FOIA Exemption

CEQ proposes to delete the provision in the current regulations that makes agency comments on EISs available to the public pursuant to the Freedom of Information Act (FOIA) without regard to the exclusion for interagency memoranda.⁴¹² The preamble explains this deletion by stating that FOIA has been amended numerous times since NEPA was enacted. That is a true statement but it fails to explain the rationale for this deletion. The only amendment to the provision for exclusion for interagency memoranda caps the time period in which the exclusion can be claimed to twenty-five years. Twenty-five years is obviously not a relevant timeframe for NEPA purposes and that time limit has no rational connection to the deletion that CEQ proposes.⁴¹³ This proposed deletion should be withdrawn.

H. Proposed § 1503.4 – Response to Comments

CEQ’s current regulations state that agencies “shall assess and consider comments both individually and collectively.”⁴¹⁴ The proposed revision “clarifies” that agencies “may respond individually and collectively.” To be clear, this proposed revision is not a clarification; it is a rollback of agency’s responsibility to address each substantive comment (or summaries thereof, if the response has been exceptionally voluminous). Does this mean that any response to comments whatsoever is optional? Does it mean that an agency can

⁴¹⁰ 85 Fed. Reg. at 1,705; *see also* 40 C.F.R. § 1506.6(f).

⁴¹¹ Emergency situations involving proposed actions that would normally require an agency to prepare an EIS are, of course, already covered under current 40 C.F.R. § 1506.11 or proposed § 1506.12.

⁴¹² 40 C.F.R. § 1506.6(f).

⁴¹³ 5 U.S.C. § 552(b)(5) (“[I]nter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested[.]”).

⁴¹⁴ 40 C.F.R. § 1503.4(a).

choose to summarize their responses to comments collectively even if there were only 65 comments? CEQ needs to explain rationale for changing “shall” to “may” and for removing the responsibility to assess comments both individually and collectively.

Additionally, there is no explanation as to why CEQ is proposing to remove the “detailed language”,⁴¹⁵ from paragraph 5(a), governing an agency’s response when it believes comments do not require an agency response. The current language requiring an agency to cite sources, authorities, or reasons which support the agencies position that no response is warranted and setting out what might change an agency’s thinking is intended gives the public some level of assurance that all comments are being considered.

Neither of these changes should be adopted and the current regulation regarding response to comments should be retained.

I. Proposed § 1506.3 – Adoption

CEQ proposes to amend the section on one agency adopting another agency’s EIS to allow adoption of both EAs and CEs. But it fails to provide the safeguard that is built into the adoption process for EISs – public notification – for either EAs or CEs and fails to explain that omission.⁴¹⁶ We want to emphasize how extraordinarily disturbing this is from the public’s perspective.

For EAs, the proposed regulation states at § 1506.3(d) that notice will be given “consistent with § 1501.6.” But proposed §1501.6 deals solely with FONSI and FONSI are not a type of document subject to adoption. Any such adoption provision should specifically state that EAs can only be adopted after appropriate public involvement is afforded in compliance with §1506.6, at a minimum.

As discussed earlier,⁴¹⁷ we strongly oppose the proposal to allow one agency to use another agency’s categorical exclusion. The provision at § 1506.3(f) dramatically highlights our concern. This provision would transform the adoption process – up until now, a relatively transparent one – into a process shielded from any outside scrutiny. This process is much worse than the current categorical exclusion process, where at least the public can reference an agency’s approved NEPA procedures to determine what type of actions are likely to be categorically excluded. This proposed adoption provision, however, leaves the public totally in the dark, without any sense of which of the some 2,000 categorical exclusions that exist might be utilized by an agency.

We strongly object to categorical exclusion “adoption” and urge that it be withdrawn entirely.

J. Proposed §§ 1504.3(e), 1504.3(f) - Procedures for Referral and Response.

⁴¹⁵ 85 Fed. Reg. at 1704.

⁴¹⁶ See, 85 Fed. Reg. at 1704-05.

⁴¹⁷ *Supra* at Section V. (L).

The proposed revision to the referral procedure drops the provisions that currently provides for an opportunity for the public to submit written comments on the matter under referral, as well as deleting the specific option of “holding public meetings or hearings.” No rationale is offered for these changes in the preamble other than a vague, general allusion to simplification and efficiency.

Matters referred to CEQ are among the most highly visible and potentially significant federal actions. CEQ has always entertained outside comments under this regulation and depending on the nature of the referral, held public meetings or hearings, conducted site visits and/or provided for a written public comment period. For example, during the referral process for the proposed Manteo (Shallowbag) Bay Project located in Dare County, North Carolina (more commonly referred to as the Oregon Inlet matter), CEQ sought public comments on the referral and received extensive comments from the public, their elected representatives, and interested state agencies. CEQ also held a public meeting in Manteo, North Carolina.⁴¹⁸

In other words, while retaining flexibility CEQ has customarily conducted the referral process in a manner consistent with the basic NEPA principles of public involvement and transparency. It is very disturbing and consistent with the current CEQ’s disdain for the public, that CEQ is proposing to remove all provisions for public involvement are being removed. CEQ should retain the current provisions for public involvement.

VI. THE PROPOSALS TO LIMIT OR ELIMINATE JUDICIAL REVIEW ARE OUTSIDE OF THE SCOPE OF CEQ’S AUTHORITY.

A. Proposals to Limit or Eliminate Judicial Review

CEQ proposes multiple regulatory changes that are clearly intended to limit or eliminate judicial review under the APA’s judicial review provisions, 5 U.S.C. § 701–706. For example, the proposed regulations attempt to: establish burdensome commenting requirements (§ 1503.3); purport to define “final agency action” for purposes of judicial review (§ 1500.3(c)); purport to interpret the judicially-created exhaustion doctrine (§ 1503.3(b)); purport to instruct federal courts on what causes of action exist and what remedies are available (§1500.3(d)); and direct agencies to self-certify compliance with the regulations with the notion that said certification would act as a shield from courts’ traditional “hard look” at agency compliance by creating a “conclusive presumption” of compliance (§ 1502.18). CEQ also invites agencies to structure their decision making

⁴¹⁸ Resolution of the October 16, 2001 National Oceanic and Atmospheric Administration referral to the Council on Environmental Quality for the Army Corps of Engineers’ Manteo (Shallowbag) Bay Project, available at: https://georgewbush-whitehouse.archives.gov/ceq/text/ceq_frnotice.html and <https://georgewbush-whitehouse.archives.gov/ceq/oregoninlet>

processes in a manner that would allow for a stay pending judicial review, possibly contingent on a bond and security requirements or other conditions (§1500.3(c)).

CEQ lacks statutory authority to interpret the APA through its NEPA regulations in a manner that would bind other federal agencies or that would warrant judicial deference, let alone limit by regulation judicial review of NEPA challenges. It is black letter law that courts do not defer to regulations construing statutes that the agency does not administer. Where courts have afforded deference to CEQ regulations, they have done so solely within the confines of interpreting NEPA's requirements. Nothing in NEPA or the APA bestow upon CEQ the authority to interpret the APA in the NEPA regulations to be followed by the entire executive branch. Since no single agency oversees administration of the APA, the courts do not defer to agencies' interpretation of the statute. As the Supreme Court said in *United States v. Florida East Coast Railroad Co.*:

[The Administrative Procedure Act] is not legislation that the Interstate Commerce Commission, or any other single agency, has primary responsibility for administering. An agency interpretation involving, at least in part, the provisions of that Act does not carry the weight, in ascertaining the intent of Congress, that an interpretation by an agency "charged with the responsibility" of administering a particular statute does.⁴¹⁹

See also *Adams Fruit Co. v. Barrett*⁴²⁰ ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*⁴²¹ ("[W]hen it comes to statutes administered by several different agencies—statutes, that is, like the APA []—courts do not defer to any one agency's particular interpretation.").

This principle is at its strongest when applied to Chapter 7 of the APA. The APA's judicial review provisions are administered solely by the courts. Congress did not delegate to CEQ or any other agency authority to speak with the force of law in administering and interpreting this chapter. Because any final regulation purporting to interpret the APA's provisions as applied to NEPA challenges does not fall within CEQ's delegated interpretive authority to resolve ambiguities and fill gaps in NEPA, it would warrant no deference whatsoever.⁴²²

The proposed regulations are replete with instances where CEQ oversteps its bounds and intrudes on the authority of the judiciary to administer, interpret, and apply the APA's judicial review provisions. Proposed § 1500.3(c) states CEQ's "intention" that

⁴¹⁹ 410 U.S. 224, 252 n.6 (1973) (citations omitted).

⁴²⁰ 494 U.S. 638, 649 (1990) (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)).

⁴²¹ 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (citation omitted).

⁴²² See *Crandon v. United States* (*Chevron* deference inappropriate where "[t]he law in question . . . is not administered by any agency but by the courts"); *Sorenson Communications Inc. v. FCC* ("To accord deference would be to run afoul of congressional intent [in enacting the APA] From the outset, we note an agency has no interpretive authority over the APA. . .we cannot find that an exception applies simply because the agency says we should.").

judicial review “not occur before an agency has issued the [ROD] or taken other final agency action.” The federal judiciary, however, has developed an extensive body of caselaw on what constitutes final, reviewable agency action under 5 U.S.C. § 704.⁴²³ A reviewing court will not be bound by CEQ’s regulation in determining whether the action at issue in a particular NEPA challenge is final and reviewable. Federal agencies cannot limit the subject matter jurisdiction of federal courts under the APA by regulation.⁴²⁴

Similarly, CEQ’s language in this subsection regarding agencies’ authorities to structure their decision making to incorporate administrative procedures for private parties to seek stays, including procedures establishing bond or other security requirements, encroaches on a well-developed body of caselaw interpreting and applying the language of 5 U.S.C. § 704 and § 705. CEQ’s opinion as to the propriety of such rulemaking will neither expands federal agencies’ authorities to promulgate rules structuring their NEPA decision making nor meaningfully inform a court determining whether a party’s compliance (or lack thereof) with such rules has affected the finality of an agency decision. Likewise, CEQ’s “intention” that “minor, non-substantive errors that have no effect on agency decision making shall be considered harmless,” proposed § 1500.3(d), is superfluous to the harmless error doctrine that the courts have developed under 5 U.S.C. § 706(2). To the extent CEQ seeks to expand this doctrine, it is without authority to do so.

Just as CEQ lacks delegated interpretive authority for the APA, so too does it lack authority to interpret the body of statutory and common law that establishes the judiciary’s powers and limits thereto and enshrine this interpretation in the NEPA regulations. CEQ may not instruct a reviewing court sitting in equity as to what it may or may not presume when determining whether a NEPA violation is a basis for irreparable harm or injunctive relief under applicable judicial precedents, although CEQ purports to do so in proposed § 1500.1(d). Nor may CEQ impose binding regulatory exhaustion requirements that originated in judicially-created and prudential doctrines subject to exceptions to restrict judicial review, as it attempts to do in proposed § 1500.3(b)(3) (“Comments or objections not submitted shall be deemed exhausted and forfeited.”). Finally, CEQ cannot create a “conclusive presumption” that restricts a reviewing court’s discretion to determine whether an agency “has considered the information in the submitted alternatives, information, and analyses section submitted by public commenters,” as stated in proposed § 1502.18, merely because the agency decision maker has certified in the ROD that she has done so. *See also* proposed § 1500.3(b)(4) (certification requirement). These draft regulatory changes inappropriately encroach on the judiciary’s constitutional functions to interpret and apply the law, including both statutory and common law.

Any federal agency relying on CEQ’s regulations purporting to interpret the APA or the federal judiciary’s powers and constraints as applied to NEPA challenges to defend its actions or support its arguments does so at its peril. That agency will be unable to take advantage of the pass-through deference courts otherwise accord to CEQ’s NEPA regulations (where valid). CEQ’s attempts to stick its oar into what are plainly—and exclusively—judicial waters will only lead to potential confusion within agencies,

⁴²³ *See, e.g., Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

⁴²⁴ *See Munsell v. Dep’t of Agric.*, 509 F.3d 572, 580 (D.C. Cir. 2007).

inconsistencies in amendments to agency-specific NEPA regulations, and protracted litigation. CEQ should abandon these attempts.

VII. CEQ'S PROPOSAL FUNDAMENTALLY UNDERMINES ENVIRONMENTAL JUSTICE CONSIDERATIONS AND PUTS FRONTLINE COMMUNITIES AT RISK.

It is accepted fact that frontline communities are disproportionately impacted by pollution and other environmental and health hazards.⁴²⁵ However, it is these low-income, rural, and minority communities that would be most severely impacted by CEQ's proposed revisions, placing them at extreme risk by ignoring cumulative impacts, limiting scientific analysis, narrowing the scope of review, shielding significantly impactful projects from any type of meaningful public input or disclosure of impacts, limiting consideration of alternatives, and making it much more difficult for environmental justice ("EJ") communities to hold the government accountable by limiting or eliminating judicial review.

While the substance of these technical comments *writ large* contains a litany of concerns with the effect that CEQ's draft rule will have on EJ communities, we wish to use this section to bond them together in greater detail in order to better illustrate CEQ's shameful disregard of the frontline communities most at risk by ill-considered projects or decisions.

In NEPA, Congress presciently placed environmental justice concerns at the core of the statute by recognizing that each person "should enjoy a healthful environment" and by premising the entire requirement for an environmental impact statement on "major Federal actions significantly affecting the quality of the *human* environment."⁴²⁶

The term "environmental justice" formally entered the federal lexicon in 1994 when President Clinton signed an Executive Order addressing "Environmental Justice in Minority and Low-Income Populations." Critically, the Executive Order was the first acknowledgment that exposure to environmental hazards is related to race and income levels, mandating federal agencies to develop strategies for "identifying and addressing...[the] disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations."⁴²⁷ That President Clinton, in a memorandum subsequently cited by CEQ itself its "Environmental Justice Guidance Under the National Environmental Policy Act" ("EJ Guidance"), recognized "the importance of procedures under NEPA" and emphasized "the importance of NEPA's public participation process" in implementing later EO 12898

⁴²⁵ American Bar Association, *Resolution on Environmental Justice and Report to the House of Delegates*, Approved by House of Delegates, Aug. 11, 1993, reprinted in Hill, Barry E., *Environmental Justice Legal Theory and Practice*, pp. 407-414, ELI Press (2009).

⁴²⁶ 42 U.S.C. § 4332(C)

⁴²⁷ "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994), amended by Exec. Order No. 12,948, 60 Fed. Reg. 6381 (Jan. 30, 1995).

(“Federal Action to Address Environmental Justice in Minority Populations and Low-Income Populations”) lends great strength to the statement that NEPA and the current regulations are the most effective way to identify and address environmental justice concerns.

CEQ notes in its EJ Guidance that EJ issues “may arise at any step of the NEPA process and agencies should consider these issues at each and every step of the process.”⁴²⁸ In this sweeping proposal that will fundamentally change nearly every step of the NEPA review process, CEQ has provided no explanation or analysis of how the development and implementation of this rule would affect implementation of EO 12898 and, consequently, EJ communities. The potential for disproportionate impacts should have been considered in a NEPA analysis on this proposal, but as noted above⁴²⁹, CEQ has disregarded its own responsibility to comply with NEPA and prepare an EIS on the proposal.⁴³⁰ Further, without providing the analysis CEQ says it prepared under EO 12898 for review by the public at large or the affected environmental justice communities,⁴³¹ CEQ cursorily concluded that the proposed rule “would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income.”⁴³² Further, CEQ’s EJ Guidance, which outlines environmental justice principles and considerations in the NEPA process, would be rescinded.

Of particular concern is CEQ’s proposal to eliminate the requirement to consider cumulative impacts, which CEQ identifies as one of the six general principles that agencies should consider in environmental reviews as they seek to incorporate environmental justice concerns under EO 12898.⁴³³ ⁴³⁴ Eliminating cumulative effects analysis will disproportionately and adversely affect EJ communities. As CEQ noted, “Evidence is increasing that the most devastating environmental effects may not result from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.”⁴³⁵ This is particularly true with EJ communities. The EPA recently found that people of color and the poor are much more likely to be exposed to pollution, impacting their health. The pollution to which communities are exposed does not come from a single action or source, but rather from multiple actions over a period of time. Cumulative effects analysis under NEPA is one of the few tools available to agencies to consider exactly how a proposed project may contribute to past, present, and future pollution burdens.⁴³⁶

⁴²⁸ “Environmental Justice Guidance Under the National Environmental Policy Act,” CEQ. 1997.

⁴²⁹ *Supra* at Section II (B).

⁴³⁰ *Id.*

⁴³¹ 85 Fed. Reg. at 1711-1712.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.* (“Agencies should consider relevant public health data and industry data concerning potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards.”)

⁴³⁵ *Ibid.*

⁴³⁶ *See* Louisiana Energy Servs, L.P. (Claiborne Enrichment Center), CLI 98-3, 47 N.R.C. 77 (1998); Private Fuel Storage, L.L.C. The Louisiana Energy Services Corporation applied to the U.S. Nuclear Regulatory Commission for a license to construct and operate a nuclear fuel

The current proposal not only eliminates critical cumulative impact analysis on which EJ communities rely, it sidelines these communities by multiple provisions with the current proposal which would limit or entirely eliminate meaningful public input. Specifically, CEQ narrows the scope of review and unjustifiably proposes to eliminate NEPA's applicability to a wide variety of federal actions.⁴³⁷ Additional measures, such as new limitations on additional scientific analysis⁴³⁸, the proposal to gut the alternatives requirement⁴³⁹, elimination of the requirement to give the public 15 days to review an EIS,⁴⁴⁰ and establishing burdensome commenting requirements⁴⁴¹ will severely limit the public's access to information on impacts to their communities and make it nearly impossible to meaningfully engage in the decisionmaking process.

Taken together, the proposed changes in CEQ's proposal will institutionalize a decisionmaking process across the federal government that unconscionably shields EJ communities from the most relevant information on impacts to their communities and unconscionably silences their voices in the decisionmaking process.

VII. CONCLUSION

We urge CEQ to withdraw this entire regulatory proposal and work to enforce the sensible and lawful provisions of the current CEQ regulations. We remind CEQ again that studies conducted to determine the cause of delay in federal actions coming under NEPA have consistently found that NEPA is *not* the primary driver of delay.⁴⁴² Further, we believe that the outcome of upending five decades of NEPA law and attempting to redesign the process will actually result in more, not less, time spent on NEPA. But most urgently, the consequences of finalizing these proposed revisions will be to do lasting damage to the quality of our human environment and will restrict the public's ability to actively engage in decisionmaking.

enrichment facility near the small rural community of Homer, Louisiana. The proposed site was located near two unincorporated communities populated primarily by low-income, minority families that were descendants of freed slaves. Among other social and economic impacts, the facility would have eliminated a road connecting the two communities, causing residents to experience greatly increased travel times to work, school, and other activities.

⁴³⁷ *Supra*, Section IV.

⁴³⁸ *Supra* at Section V (I).

⁴³⁹ *Supra* at Section V (F).

⁴⁴⁰ *Supra* at Section VI (F).

⁴⁴¹ *Supra* at Section VI.

⁴⁴² USDA Forest Service, *Environmental Analysis and Decision Making: The Current Picture* (Phoenix, Az. Sept. 2017), Department of Treasury report by Toni Horst, et al., *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*, (December, 2016) Congressional Research Service, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, R42479, (April 11, 2012).

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