



March 10, 2020

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

Re: Docket No. CEQ-2019-0003  
Proposed Revisions to Regulations Implementing the National  
Environmental Policy Act

Dear Ms. Neumayr:

This letter provides comments of the Natural Resources Defense Council on CEQ's proposed Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act. *See* 85 Fed. Reg. 1684 (Jan. 10, 2020). NRDC also joins in several other comment letters, as indicated by our signature on those letters. We appreciate the opportunity to comment.

## **I. NEPA's Promise, Mandate, and Goals**

### **A. NEPA's Promises**

Enacted in response to mounting crises across the nation,<sup>1</sup> the National Environmental Policy Act (NEPA) promised to correct the blind eye that American policymakers had long turned to environmental impacts of federal agency actions.<sup>2</sup> Congress recognized that "[t]raditional policies were primarily designed to enhance the production of goods and to increase the gross national product . . . . [b]ut [that], as a

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<sup>1</sup> *See* S. Rep. No. 91-296, at 4-5 (1969).

<sup>2</sup> *See id.* at 5 ("As a result of this failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. 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.").

nation, we have paid a price for our material well-being.”<sup>3</sup> With the understanding that “the Nation cannot continue to pay the price of past abuse,”<sup>4</sup> section 101 of NEPA imposes on the national government an obligation “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.”<sup>5</sup> The government thus had the “continuing responsibility” to, among other things, “assure for all Americans, safe, healthful, productive, and esthetically and culturally pleasing surroundings.”<sup>6</sup>

NEPA also looked to the future: Congress committed the federal government to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”<sup>7</sup> Prior to NEPA, federal policymaking did not systematically consider long-term environmental degradation. Instead, the “pursuit of narrower, more immediate goals” had fostered increasing “threats to the environment and the Nation’s life support system.”<sup>8</sup> NEPA was enacted as a change in course, forcing policymakers to consider “the long-range implications of many of the critical environmental problems” facing the nation.<sup>9</sup>

Congress recognized that meeting NEPA’s environmental goals is not only consistent with but necessary to economic well-being. Economic and environmental well-being need not be traded off. Rather, Congress understood that “[p]ast neglect and

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> NEPA § 101(a), *codified at* 42 U.S.C. § 4331(a).

<sup>6</sup> NEPA § 101(b)(2).

<sup>7</sup> NEPA § 101(b)(1).

<sup>8</sup> *See* S. Rep. No. 91-296, at 8-9 (“The challenge of environmental management is, in essence, a challenge of modern man to himself. The principal threats to the environment and the Nation’s life support system are those that man has himself induced in the pursuit of material wealth, greater productivity, and other important values. These threats—whether in the form of pollution, crowding, ugliness, or in some other form—were not achieved intentionally. They were the spinoff, the fallout, and the unanticipated consequences which resulted from the pursuit of narrower, more immediate goals.”).

<sup>9</sup> *See id.* at 8.

carelessness are now costing us dearly, not merely in opportunities forgone, in impairment of health, and in discomfort and inconvenience, but also in a demand upon tax dollars, upon personal incomes, and upon corporate earnings.”<sup>10</sup> “Economic good sense,” the Senate Committee reported, “requires the declaration of a policy and the establishment of a comprehensive environmental quality program now.”<sup>11</sup> Congress thus enacted NEPA with the understanding that environmental well-being is compatible with, and a component of, short-term and long-term economic well-being.<sup>12</sup>

## **B. NEPA’s Mandate and Goals**

To fulfill its promises, NEPA mandated that federal agencies consider the environmental impacts of their decisions.<sup>13</sup> Congress directed federal agencies to meet three goals: First, federal decisions must be informed by detailed environmental analyses. Second, decision makers must develop, study, and consider alternative courses of actions,<sup>14</sup> allowing a comparison of the potential environmental impacts of such alternatives. And third, agencies must involve the public in this evaluation and decisionmaking process.

As Senator Jackson — one of NEPA’s architects — said shortly before final passage: “A vital requisite of environmental management is the development of adequate methodology for evaluating the full environmental impacts and the full costs — social, economic, and environmental — of Federal actions.”<sup>15</sup> To this end, NEPA requires that the government:

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<sup>10</sup> *Id.* at 16.

<sup>11</sup> *Id.* at 17.

<sup>12</sup> *See id.* at 17 (“Today we have the option of channeling some of our wealth into the protection of our future. If we fail to do this in an adequate and timely manner, we may find ourselves confronted, even in this generation, with an environmental catastrophe that could render our wealth meaningless and which no amount of money could ever cure.”).

<sup>13</sup> NEPA § 102.

<sup>14</sup> NEPA §§ 102(2)(C)(iii), (E); *see* Pub. L. No. 94-83 (1975) (amending section 102(2) of NEPA).

<sup>15</sup> 115 Cong. Rec. 40,420 (Dec. 20, 1969) (Senate floor statement).

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 in decisionmaking which may have an impact on man's environment[.]<sup>16</sup>

Agencies must also provide a "detailed statement" on the environmental impacts of proposed decisions "significantly affecting the quality of the human environment" (known as an environmental impact statement or EIS).<sup>17</sup> Within that detailed statement, agencies must disclose "any" unavoidable adverse environmental effects of the decision.<sup>18</sup> And they must disclose "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."<sup>19</sup> Moreover, NEPA does not allow agencies to ignore analytic gaps: agencies must find ways to properly weigh "unquantified environmental amenities and values."<sup>20</sup>

NEPA directs federal decisionmakers to study and consider alternatives to their decisions, allowing comparisons the environmental impacts of such alternatives.<sup>21</sup> In particular, federal 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," even if its impacts do not rise to the level requiring an EIS.<sup>22</sup>

NEPA mandates inclusion of and disclosure to the public and other governmental entities of environmental impact analyses. The statute broadly directs agencies to act "in cooperation" with governmental entities and the public in the decision-making process.<sup>23</sup> Further, agencies must make available "advice and

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<sup>16</sup> NEPA § 102(2)(A).

<sup>17</sup> NEPA § 102(2)(C).

<sup>18</sup> NEPA § 102(2)(C)(ii).

<sup>19</sup> NEPA § 102(2)(C)(v).

<sup>20</sup> See NEPA § 102(2)(b).

<sup>21</sup> See NEPA §§ 102(2)(C)(iii), (E) ; see Pub. L. No. 94-83 (1975) (amending section 102(2) of NEPA).

<sup>22</sup> NEPA § 102(2)(E); see Pub. L. No. 94-83 (1975) (amending section 102(2) of NEPA).

<sup>23</sup> NEPA § 101(a).

information useful in restoring, maintaining, and enhancing the quality of the environment” to “States, counties, municipalities, institutions, and individuals.”<sup>24</sup>

These statutory requirements provide the standard against which any changes to the CEQ regulations must be measured. Unfortunately, as explored in more detail below, many of CEQ’s proposed regulatory changes conflict with this mandate. The proposal, if adopted and upheld, would lead federal agencies to make decisions with significant, and sometimes devastating, environmental impacts without ever considering those impacts in advance. It would raise barriers to public participation. And at the end of the day, it would lead to poor decisions, increased litigation, and less transparency.

## **II. The public comment process on this rulemaking has shown disrespect for public engagement**

Given the scope and potential impact of the regulatory changes that CEQ has proposed, the public interest demanded that the agency provide a robust opportunity for public comment and involvement. That has not happened.

There is no obvious need for haste; the existing rules have been in place for more than four decades. Yet CEQ speeds forward, rushing rather than encouraging public engagement, as if it already knows what it wants to do and does not much care whether the public and public officials have as much time as they need to thoughtfully participate in the rulemaking process. What harm would have been done had CEQ extended the comment period by a few months? Certainly, far less than the salutary effect of a robust dialogue with the public. The inadequate opportunity for public comment here is compounded by CEQ’s repeated failures to cite any evidence that supports the many implicit or explicit factual premises on which the rulemaking proposal rests.

CEQ has also requested public input on a number of issues where, it suggests, it might adopt revisions that have not yet been disclosed to the public. Many of these issues involve matters of considerable potential importance to NRDC and its membership. But we cannot meaningfully comment on proposals that CEQ has not

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<sup>24</sup> NEPA § 102(2)(G).

actually detailed publicly. We are not “psychic[s] able to predict the possible changes that could be made in the proposal when the rule is finally promulgated.”<sup>25</sup> Should CEQ propose to make further changes to its proposal before taking final action, we request that CEQ provide a supplemental notice of proposed rulemaking and supplemental opportunity to comment on those further changes.

### **III. The proposed regulation would impose unlawful procedural hurdles to public participation and litigation**

CEQ’s proposed rules purport to require other federal agencies to adopt a number of procedural requirements that appear designed to limit public participation, restrict access to the courts, and narrow judicial review. For example, CEQ proposes to require other agencies to constrain public comment opportunities on NEPA documents,<sup>26</sup> and to erect exhaustion requirements untethered from any statutory authority that CEQ has.<sup>27</sup> CEQ also expresses its “intention” that courts should review NEPA compliance only at the times and in the ways that CEQ prefers;<sup>28</sup> presumes to instruct courts on what evidentiary weight (“conclusive”) they should give to an agency official’s self-serving and conclusory certification of consideration;<sup>29</sup> and attempts to direct federal courts’ exercise of their equitable and remedial authority.<sup>30</sup> These proposals, if adopted, are certainly *ultra vires*, because CEQ has no authority to adopt them.

Federal agencies have no inherent lawmaking power. Instead, their authority to issue regulations with the force of law must come from Congress.<sup>31</sup> That’s missing here.

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<sup>25</sup> *City of Seabrook v. U.S. EPA*, 659 F.2d 1349, 1360-61 (5th Cir. Unit A Oct. 1981).

<sup>26</sup> See proposed §§ 1500.3(b)(3) (constraining public comment), 1503.1(b) (capping public comment period at 30 days), 1503.3 (setting out comment-specificity requirements), 1507.3 (prohibiting agencies from deviating from CEQ-mandated procedures), 85 Fed. Reg. at 1713, 1722, 1727.

<sup>27</sup> See proposed § 1503.3(b), 85 Fed. Reg. at 1722.

<sup>28</sup> See proposed § 1500.3(c), 85 Fed. Reg. at 1713.

<sup>29</sup> See proposed § 1502.18, 85 Fed. Reg. at 1720.

<sup>30</sup> See proposed § 1500.3(d), 85 Fed. Reg. at 1713.

<sup>31</sup> See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472-73 (2001); *Lyng v. Payne*, 476 U.S. 926, 937 (1986)

Congress recognized a role for CEQ in implementing NEPA, to be sure: Section 204 of the statute directs CEQ to, *inter alia*, “review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in [NEPA] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to *make recommendations* to the President with respect thereto.”<sup>32</sup> But nothing in NEPA suggests that CEQ has authority to issue regulations with the force of law. And CEQ points to no statute – in NEPA, or otherwise – authorizing it to require other federal agencies to limit public participation, restrict access to the courts, or narrow judicial review in NEPA cases.

Indeed, NEPA does not directly address judicial review or access to the courts *at all*, let alone authorize or impose any of the other procedural and judicial restrictions CEQ’s proposal purports to impose. Those matters are governed, generally by the Administrative Procedure Act,<sup>33</sup> or in some instances, by specific statutes administered by agencies other than CEQ. But neither CEQ nor any other agency – has “interpretive authority over the APA.”<sup>34</sup> Nor did Congress grant CEQ power to direct other agencies in how they should implement statutes that Congress charged *those* agencies, not CEQ, with implementing.<sup>35</sup>

CEQ’s invocation of the federal “Housekeeping Statute” as authority for its rulemaking is particularly puzzling.<sup>36</sup> The Housekeeping Statute was passed in 1789 “to help General Washington get his administration underway by spelling out the authority

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(explaining that “an agency's power is no greater than that delegated to it by Congress”); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>32</sup> 42 U.S.C. § 4344(3) (emphasis added).

<sup>33</sup> See, e.g., 5 U.S.C. §§ 553, 554, 706.

<sup>34</sup> See, e.g., *Sorenson Commc’ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014).

<sup>35</sup> Cf. *Railway Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (“Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely with the Constitution as well.” (emphasis in original)).

<sup>36</sup> 5 U.S.C. § 301.

for executive officials *to set up offices and file government documents.*"<sup>37</sup> Thus, the Housekeeping Statute simply allows a federal agency to issue regulations "to regulate its own affairs."<sup>38</sup> CEQ's proposals to limit public comment, restrict access to the courts, and limit judicial review, are not regulations of CEQ's *own* affairs, but rather, attempts by CEQ to require the heads of *other* agencies to issue regulations that restrict the rights of *the public* and the prerogatives of the *federal judiciary*. The Housekeeping Statute does not authorize this.

Nor can the several Executive Orders cited in the Notice of Proposed Rulemaking ("NPRM") fill the gap in necessary authority. "The legislative power of the United States is vested in the Congress," not the President, "and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."<sup>39</sup> Indeed, generally, "[t]he Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."<sup>40</sup> "[N]o provision in the Constitution ... authorizes the President to enact, to amend, or to repeal statutes."<sup>41</sup> Thus, when considering whether the President could give CEQ the power to issue legally binding regulations implementing NEPA, "[t]he pertinent inquiry is whether[,] under any of the arguable *statutory* grants of authority,"<sup>42</sup> Congress has granted the President or CEQ that authority. CEQ points to no such authority.

Given these fundamental constitutional principles, it is plain that CEQ has no power to restrict agency procedures or judicial review in ways it proposes in this rulemaking. For example, the appropriateness of judicial relief (e.g., proposed section 1500.3(d)), is a question for the courts, not CEQ. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the

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<sup>37</sup> *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1254 (8th Cir. 1998) (emphasis added) (citation omitted).

<sup>38</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979).

<sup>39</sup> *Chrysler Corp.*, 441 U.S. at 302.

<sup>40</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

<sup>41</sup> *Clinton v. City New York*, 524 U.S. 417, 438 (1998).

<sup>42</sup> *Chrysler Corp.*, 441 U.S. at 306.



necessities of the particular case. Flexibility rather than rigidity has distinguished it.”<sup>43</sup> “Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”<sup>44</sup> Courts do not “lightly assume that Congress meant to restrict the[ir] equitable powers.”<sup>45</sup> Federal agencies have no power to do so.<sup>46</sup> While “Congress clearly envisioned . . . a role” for CEQ in implementing NEPA, the statute “does not empower” CEQ “to regulate the scope of the judicial power vested by” other statutes.<sup>47</sup> (In any event, CEQ’s views on what constitutes irreparable harm, or not, are entirely unpersuasive: NEPA violations are inherently irreparable if resources are committed or decisions made in advance of required NEPA analyses. The whole point of NEPA is to conduct such an analysis before resources are committed or decisions are made.<sup>48</sup>)

Similarly, CEQ points to no congressional delegation of authority empowering it to direct other agencies to require public commenters on those other agencies’ NEPA documents to comment with certain degrees of specificity, *see* proposed §§ 1500.3(b), 1503.1, 1503.3(a), or to reiterate comments already submitted, by identifying matter the agency failed to adequately address in a final EIS, *see* proposed §§ 1500.3(b), 1502.17, 1503.3(b). The doctrines of waiver and exhaustion are questions governed by judicial precedent; they lie well outside CEQ’s statutory charter. Accordingly, CEQ lacks

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<sup>43</sup> *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

<sup>44</sup> *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971).

<sup>45</sup> *Miller v. French*, 530 U.S. 327, 336 (2000).

<sup>46</sup> *See, e.g., NRDC v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (“[A]s the Supreme Court has explained, the Judiciary, not any executive agency, determines the scope – including the available remedies – of judicial power vested by statutes establishing private rights of action.” (internal quotation marks omitted) (emphasis in original)).

<sup>47</sup> *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (interpreting the Migrant and Seasonal Agricultural Worker Protection Act).

<sup>48</sup> *See, e.g., Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (explaining that NEPA requires federal agencies to “take a ‘hard look’ at the environmental consequences before taking a major action” (citation omitted)); *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (“[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.”), *abrogated on other grounds by Marsh v. Or. Nat. Res. Council*, 490 U.S. 360 (1989).

authority to raise such hurdles to public participation, or to direct other agencies to impose them.<sup>49</sup>

In any event, CEQ's suggestion that it is merely "reinforc[ing] that parties may not raise claims based on issues they did not raise during the public comment period,"<sup>50</sup> also ignores well-established exceptions to that rule, including that federal agencies *can* be held liable for failing to consider flaws not raised by public commenters but that were "so obvious that there is no need for a commentator to point them out specifically."<sup>51</sup> Thus, for example, it appears that CEQ's proposed rule intends to shield an agency from liability where it failed to address an *obvious* flaw that *the agency knew about* (perhaps it was called to the agency's attention by its own scientists), if the public, given a short time to comment, did not *also* specifically articulate the flaw during the public comment process. This is not the law.

CEQ's proposal to deprive public commenters of their right to challenge defects in a final EIS, if the commenters do not specifically call the agency's attention to the agency's failure to address public comments *already made*,<sup>52</sup> attempts to place the burden of NEPA compliance and non-arbitrary decision making on the public. That approach would improperly "shift[] the burden of ensuring NEPA compliance from the agency that is proposing an action to those who wish to challenge that action."<sup>53</sup> Many public commenters may lack the resources to engage and reengage in the public comment process, and they should not need to; certainly if they have already brought their concerns to an agency's attention, it is not incumbent on those members of the public to remind the agency about its duty to respond. CEQ has no authority to require this.

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<sup>49</sup> Cf. *Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 17 n.2 (D.D.C. 2017) (noting, without deciding, that "NEPA itself does not expressly require that other agencies comply with the CEQ's regulations").

<sup>50</sup> 85 Fed. Reg. at 1693.

<sup>51</sup> *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 765 (2004).

<sup>52</sup> See proposed §§ 1500.3(b), 1503.1, 1503.3(b); 85 Fed. Reg. at 1693 ("It also would provide that agencies must include in the EIS a summary of comments received, and any objections to that summary must be submitted within 30 days of the publication of the notice of availability of the final EIS.").

<sup>53</sup> See *United States v. Coal. for Buzzards Bay*, 644 F.3d 26, 34 (1st Cir. 2011).

#### IV. The proposed rules would unlawfully narrow NEPA's scope

##### A. CEQ's proposed redefinition of "major federal action" is contrary to longstanding judicial precedent and a commonsense interpretation of NEPA

CEQ has, for more than four decades, adhered to the view that the statutory term "major Federal action" includes "actions with effects that may be major and which are potentially subject to Federal control and responsibility."<sup>54</sup> Under this understanding, "[m]ajor reinforces but does not have a meaning independent of significantly."<sup>55</sup> This interpretation of NEPA has been endorsed and applied by countless federal courts, including the Supreme Court.<sup>56</sup>

As explained elsewhere in this letter, CEQ does not have authority to overturn existing judicial precedent interpreting NEPA, because Congress did not delegate to CEQ the authority to issue regulations that have the force of law. But even if CEQ had such authority, CEQ's rationale for this change in interpretation of the statutory text is not sufficient to justify that change.

CEQ explains its proposed interpretive reversal on the basis that its existing interpretation is in tension with a well-known canon of statutory construction that says

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<sup>54</sup> 40 C.F.R. § 1508.18.

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., *Andrus v. Sierra Club*, 442 U.S. 347, 364 n.23 (1979); *Idaho Conservation League v. Bonneville Power Administration*, 826 F.3d 1173, 1175 (9th Cir. 2016); *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015); *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1214–15 & n.10 (11th Cir. 2002); *National Audubon Soc. v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997); *Bunch v. Hodel*, 793 F.2d 129, 135 (6th Cir. 1986); see also *Government of Province of Manitoba v. Zinke*, 849 F.3d 1111, 1115 (D.C. Cir. 2017) (treating the question of whether a federal action is "major" as being determined by whether the action has a significant environmental impact); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 698 (2d Cir. 1972) (accepting and applying DOT rule that clarified that any federal action significantly affecting the environment *is* major).

that courts should, where possible, give effect to every clause and word of a statute.<sup>57</sup> We can presume that the countless courts that have interpreted “major federal action” consistently with CEQ’s *existing* interpretation were familiar with the canon. That these courts nonetheless found CEQ’s existing interpretation persuasive – and interpreted NEPA in a manner consistent with that existing interpretation – indicates that CEQ’s proposal to reverse its interpretation is not compelled by any principle of statutory construction.

Indeed, a canon of construction that CEQ ignores holds that “[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute.”<sup>58</sup> CEQ’s existing interpretation – under which “major” describes the kind of impact a federal action must have for NEPA to apply – gives life to NEPA’s “overall statutory scheme.”<sup>59</sup> This is, after all, a statute that directs federal agencies to “use all practicable means” to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”<sup>60</sup> Consistent with that goal, CEQ’s existing interpretation recognizes that if a federal action causes significant harm to the environment, it is “major” for purposes of NEPA. By contrast, CEQ’s proposed new interpretation would allow federal agencies to significantly harm the environment without ever analyzing those harms, just because their actions were not deemed “major” by some other metric. This approach, taken literally, could have extraordinary and troubling consequences: If “major” were interpreted as creating a monetary threshold, for example, CEQ’s proposed approach could exempt from review federal actions with minor monetary costs but potentially devastating environmental or health impacts – say, risk of release of a toxic chemical, introduction of an invasive species, or spread of a lethal and contagious virus. That approach would rip an unjustified loophole out of NEPA’s protective mandate.

In any event, interpretive canons like that which CEQ invokes “are not mandatory rules,” but “guides . . . . to help judges determine the Legislature’s intent as

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<sup>57</sup> 85 Fed. Reg. at 1708-09.

<sup>58</sup> *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006).

<sup>59</sup> *King v. Burwell*, 135 S. Ct. 2480, 2492 (internal quotation marks omitted).

<sup>60</sup> NEPA § 101(b), *codified at* 42 U.S.C. § 4331(b).

embodied in particular statutory language.”<sup>61</sup> Congressional drafters often may not know or, if they know, may not adhere to such canons.<sup>62</sup> And as the Supreme Court has recognized, Congress may sometimes repeat something for clarity.<sup>63</sup> CEQ’s proposed new interpretation of “major federal action” is not necessary to give NEPA’s text meaning, and is less consistent with NEPA’s purposes than the agency’s existing interpretation. CEQ should therefore not redefine “major federal action” as it has proposed.

The proposed rule would further redefine “major federal action” to exclude “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.”<sup>64</sup> This proposed redefinition is inconsistent with the relevant caselaw – and therefore contrary to law – in at least three ways. First, the relevant inquiry in determining whether an action is “federal” for the purposes of NEPA does not turn on whether the agency exercises “sufficient control and responsibility over the effects of the action.” Rather, the question is whether the agency has the ability to *influence* the outcome of the project.<sup>65</sup> Second, the agency need not actually *exercise* “sufficient control” to render a private or state action “federal” for purposes of NEPA. Instead, the agency need merely “*have the authority*” to exercise such control.<sup>66</sup> Third, an action may be considered “federal” simply because of the provision of federal funds – whether in the form of loans, loan guarantees, or any other form of financial assistance. This is particularly the

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<sup>61</sup> *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *see also King*, 135 S. Ct. at 2492 (observing that “our preference for avoiding surplusage constructions is not absolute,” and that “rigorous application of the canon does not seem a particularly useful guide to a fair construction of the [statute at issue in that case]” (internal quotation marks omitted)).

<sup>62</sup> *See, e.g.,* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pt. 1), 65 *Stan. L. Rev.* 901, 934-36 (2013).

<sup>63</sup> *See, e.g., County of Washington v. Gunther*, 452 U.S. 161, 169-70 (1981).

<sup>64</sup> 85 Fed. Reg. at 1729 (proposed § 1508.1(q)).

<sup>65</sup> *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995).

<sup>66</sup> *Sw. Williamson Cty. Cmty. Ass’n, Inc. v. Slater*, 243 F.3d 270, 281 (6th Cir. 2001).

case when any such funding occurs after the preliminary planning stages of an action,<sup>67</sup> or when the federal agency provides a significant level of funding.<sup>68</sup>

CEQ has no authority to overturn existing case law by narrowing the definition of “major federal action.” Finalizing the proposed definition would be unlawful.

**B. The proposed rule’s provisions regarding supplementation, in conjunction with its proposed redefinition of “effects,” will cause significant, cumulative environmental impacts to be missed or ignored**

CEQ’s proposal would limit the preparation of supplemental environmental impact statements to circumstances where “a major Federal action remains to occur” and where one of two other conditions is met.<sup>69</sup> While the proposed rule states that this proposed revision “is consistent with Supreme Court case law,”<sup>70</sup> CEQ fails to consider the legal environment existing at the time when the Court decided *Marsh v. Oregon*<sup>71</sup> and *Norton v. Southern Utah Wilderness Alliance*.<sup>72</sup> At that time, agencies were required to consider the cumulative effects of major federal action.<sup>73</sup> Thus, even if an agency was not required to supplement an EIS for a coal leasing scheme in light of new developments in climate science and a new proposed action that created significant new circumstances bearing on the original EIS’s analysis of environmental impacts, the totality of the impacts would still be considered in the new proposed action’s EIS.<sup>74</sup>

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<sup>67</sup> See *Scottsdale Mall v. State of Ind.*, 549 F.2d 484, 489 (7th Cir. 1977); *Ross v. Fed. Highway Admin.*, 162 F.3d 1046, 1052 (10th Cir. 1998).

<sup>68</sup> See *Sierra Club v. Fish & Wildlife Serv.*, 235 F. Supp. 2d 1109, 1121 (D. Or. 2002) (holding a private project “federal” because it received more than \$3 million in federal funding “regardless of the percentage [of the total project cost] it represents”).

<sup>69</sup> 85 Fed. Reg. at 1719 (proposed § 1502.9(d)).

<sup>70</sup> 85 Fed. Reg. at 1700.

<sup>71</sup> 490 U.S. 360 (1989).

<sup>72</sup> 542 U.S. 55 (2004).

<sup>73</sup> *Baltimore Gas & Elec. Co. v NRDC*, 462 U.S. 87, 106-07 (1983) (stating that “NEPA requires an EIS to disclose the significant health, socioeconomic and cumulative consequences of the environmental impact of a proposed action”); see *Marsh*, 490 U.S. at 369-70.

<sup>74</sup> See *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1244-45 (D.C. Cir. 2018).

Since the proposed rule also seeks to jettison agencies' obligation to consider cumulative impacts,<sup>75</sup> the proposed change to section 1502.9 is not a mere codification of binding caselaw, but an affirmative – and unsupported – change to the legal landscape.

CEQ's proposed regulatory codification of the "major Federal action remains to occur" test for supplementation would further narrow the circumstances in which supplementation is required because CEQ is *simultaneously* proposing to narrow the meaning of "major Federal action" generally. For example, CEQ is proposing to require that a federal action be both a "major" action and an action that "significantly affects the environment" before that action would be considered a "major Federal action significantly affecting the environment"; as discussed elsewhere in these comments, this approach is new, and contrary to existing practice and precedent. The term "major federal action" is operative in the proposed rule's discussion of when supplementation would be required ("a major Federal action remains to occur"<sup>76</sup>). CEQ's proposal, if adopted and upheld, would thus substantially narrow the circumstances in which supplementation was required under *Marsh* and *Norton*. For example, if there remained Federal action to occur, and that remaining Federal action would significantly harm the environment, it appears that CEQ's proposal might require no supplementation if the remaining *component* of the overall Federal action was not independently "major." This is not supported by any existing precedent that CEQ has cited, and is arbitrary, capricious, and contrary to law.

In short, particularly taken in the context of other changes CEQ is proposing, the proposed rule's supplementation standard would substantially narrow the circumstances in which supplementation is presently required. CEQ has not justified that narrowing. And it would lead to significant environmental impacts being overlooked or ignored, in contravention of NEPA's intent.

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<sup>75</sup> 85 Fed. Reg. at 1708.

<sup>76</sup> 85 Fed. Reg. at 1719.

**C. Any restriction on NEPA’s extraterritorial application would be unlawful**

CEQ’s proposed rule seeks comment on “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).”<sup>77</sup> CEQ should not prohibit applying NEPA to all extraterritorial projects. Doing so would contradict the plain text of the statute, the intent of Congress, long-standing case law, and agency practice.

**1. NEPA applies extraterritorially on its face**

NEPA applies to “major Federal actions significantly affecting the quality of the human environment.”<sup>78</sup> The “human environment” is not the “domestic” or “U.S.” human environment, but plainly encompasses the whole human environment. CEQ cannot create qualifications that are not part of the statute, for Congress “says in a statute what it means and means in a statute what it says there.”<sup>79</sup> On its face, NEPA is intended to apply broadly to major federal actions: “[t]he sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action.”<sup>80</sup> And the need for federal agencies to apply NEPA to the overseas impacts of agency actions taken both within the U.S. and abroad is reinforced by the statute’s explicit requirement that agencies:

[R]ecognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to

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<sup>77</sup> 85 Fed. Reg. at 1709.

<sup>78</sup> NEPA § 102(C), codified at 42 U.S.C. § 4332(C).

<sup>79</sup> *Dodd v. United States*, 545 U.S. 353, 357 (2005) (citation omitted).

<sup>80</sup> See *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F. 2d 1109, 1122 (D.C. Cir. 1971); see also *Environmental Defense Fund, Inc. v. Massey*, 986 F. 2d 528, 536 (D.C. Cir. 1993) (holding NEPA is not limited to actions “that have significant environmental effects within U.S. borders”); *People of Enewetak v. Laird*, 353 F. Supp. 811, 816 (D. Haw. 1973) (finding NEPA phrased expansively and “there appears to have been a conscious effort to avoid the use of restrictive or limiting terminology”).



maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.<sup>81</sup>

Excluding major federal actions from NEPA compliance where a component takes place overseas contradicts the plain text of the statute.

## **2. NEPA's legislative history indicates Congress anticipated that it would apply outside the United States**

NEPA's legislative history reinforces that the statute was meant to have broad application to federal actions and that agencies must consider the international implications of their actions.

Key reports in the legislative history emphasize that federal agencies must comply with NEPA to the "fullest extent possible," and that they must take an expansive approach when determining to apply the statute. The Conference Report emphasized that agencies must expansively and diligently apply NEPA:

[E]ach agency of the Federal Government shall comply with the directives set out in [42 U.S.C. § 4332] 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 conferences 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 compliance.<sup>82</sup>

The Senate Report on NEPA stated:

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<sup>81</sup> NEPA § 102(2)(F), *codified at* 42 U.S.C. § 4332(2)(F); *see Massey*, 986 F. 2d at 536.

<sup>82</sup> H.R. Rep. No. 91-765, at 9-10 (1969) (Conf. Rep.).

[I]t is the continuing policy and responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal planning and activities to the end that certain broad national goals in the management of the environment may be attained.<sup>83</sup>

The legislative history also shows that Congress intended agencies to consider and evaluate the international environmental effects of their actions. The Senate Report on NEPA noted:

In recognition of the fact that environmental problems are not confined by political boundaries, all agencies of the Federal Government which have international responsibilities are authorized and directed to lend support to appropriate international efforts to anticipate and prevent a decline in the quality of the worldwide environment.<sup>84</sup>

And in the House Report, the Committee noted:

The testimony at the hearing also stressed the importance of the international aspects of the environmental problem. It is an unfortunate fact that many and perhaps most forms of environmental pollution cross international boundaries as easily as they cross State lines. Contamination of the oceans, with insufficient attention paid to its long-term consequences, appears to be a major problem, to which far too little attention has been spent in the past. The international aspects are clearly a major part of the questions which the Council would have to confront, and your committee feels confident that these would receive early attention by the Council.<sup>85</sup>

At the time of NEPA's enactment, the Executive Branch also informed Congress of the need to account for the environmental effects of agency action occurring overseas. In a letter to the Committee on Interior and Insular Affairs, William B. Macomber, Jr. from the Department of State noted:

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<sup>83</sup> S. Rep. No. 91-296, at 9 (1969).

<sup>84</sup> *Id.* at 21.

<sup>85</sup> H.R. Rep. No. 91-378, at 121 (July 11, 1969).

The U.S. interest in the international aspects is profound and real. It is dictated by the realization that the human environment is one, and that it would be fallacious and arbitrary to divorce the international aspects from the national. It has been fully documented that air and water pollution, to mention but two, are not respecters of international boundaries. Pollutant problems now considered local in character may be regional or international tomorrow and thus we cannot afford to be indifferent nor complacent about global pollution. It is this international nature of the threat and the concomitant need for international cooperation that has already focused U.S. attention on the need for a broad approach to environmental problems.<sup>86</sup>

We are aware of no legislative history even hinting that Congress did not expect NEPA to apply outside the United States.

### **3. Restricting NEPA's extraterritorial application would contravene case law**

Courts have repeatedly recognized that NEPA can apply extraterritorially.<sup>87</sup> Amending CEQ guidelines to prevent NEPA's extraterritorial application would

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<sup>86</sup> Letter from William B. Macomber Jr., Assistant Sec'y for Congressional Relations, Dep't of State, to Henry Jackson, Chairman of Comm. on Interior & Insular Affairs (Apr. 21, 1969), *reprinted in* S. Rep. No. 91-296, at 44-45.

<sup>87</sup> *See Massey*, 986 F. 2d at 529 (applying NEPA to research facility in Antarctica); *People of Enewetak*, 353 F. Supp. at 819 (applying NEPA to Pacific trust territory); *see also Natural Resources Defense Council v. U.S. Department of the Navy*, 2002 WL 32095131, at \*9-12 (C.D. Cal. Sept. 12, 2002) (finding presumption against extraterritoriality did not prevent application of NEPA to Navy sonar testing outside U.S. territorial waters); *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889, 908 (N.D. Cal. 2007) (finding presumption against extraterritoriality did not apply to OPIC or Export-Import Bank fossil fuel projects); *Hirt v. Richardson*, 127 F. Supp. 2d 833, 844 (W.D. Mich. 1999) (finding NEPA applied to decision to ship plutonium from New Mexico to Canada); *cf. Georgia Aquarium, Inc. v. Pritzker*, 135 F. Supp. 3d 1280, 1328 (N.D. Ga. 2015) (finding that presumption against extraterritoriality did not apply to Marine Mammal Protection Act import permit);

contradict this long line of cases. Such an action is therefore beyond CEQ's authority, for it has no delegated congressional authority to override judicial interpretations of the law.

The case cited in the NPRM preamble, *Kiobel v. Royal Dutch Petroleum Co.*,<sup>88</sup> does not support the idea of limiting NEPA's extraterritorial application. That case dealt solely with the question of whether the Alien Tort Statute (ATS) permitted suits based on violations of the law of nations occurring outside the United States.<sup>89</sup> The court's finding that the presumption against extraterritoriality barred ATS claims based on overseas conduct rested on the text and legislative history of the ATS.<sup>90</sup> It did not consider the text of NEPA, its legislative history, or case law recognizing NEPA's extraterritorial application. Consequently, *Kiobel* does not limit the circumstances where NEPA applies.

#### **4. Longstanding agency practice demonstrates that NEPA is successfully applied extraterritorially**

Excluding extraterritorial activities from NEPA review would conflict with the longstanding practice of agencies that regularly prepare environmental impact statements or other NEPA documents for qualified overseas activities. For example, the U.S. Department of the Navy frequently conducts training exercises in waters outside of the U.S. territorial sea and its exclusive economic zone (EEZ), including in areas of the Pacific and Indian Oceans, and prepares EISs evaluating the effects of these activities.<sup>91</sup>

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<sup>88</sup> 569 U.S. 108, 115-16 (2013).

<sup>89</sup> 569 U.S. at 113.

<sup>90</sup> *Id.* at 115-25.

<sup>91</sup> See U.S. Dep't of Navy, *Final Supplemental Environmental Impact Statement/Supplemental Overseas Environmental Impact Statement for Surveillance Towed Array Sensor System Low Frequency Active Sonar* (June 2019) [hereinafter "SURTASS SEIS"] (evaluating Navy activities in the Western and Central North Pacific and Eastern Indian oceans), [https://secureservercdn.net/198.71.233.163/2d9.7a1.myftpupload.com/wp-content/uploads/2019/06/Navy\\_SURTASS-LFA-FSEIS-SOEIS.pdf](https://secureservercdn.net/198.71.233.163/2d9.7a1.myftpupload.com/wp-content/uploads/2019/06/Navy_SURTASS-LFA-FSEIS-SOEIS.pdf); U.S. Dep't of Navy, *Mariana Islands Training and Testing Activities, Draft Supplemental Environmental Impact Statement/Overseas Environmental Impact Statement* (January 2019) (evaluating Navy

Interfering with agencies' existing practices for preparing EISs would deprive both government officials and the public of information needed to guide agency action. The Navy's overseas training exercises are again a useful example: Exposure to sonar activity, during overseas training exercises, can harm marine mammals, disrupting their communication, driving them away from key habitat, and interfering with regular feeding and reproductive behaviors.<sup>92</sup> The Navy's EISs provide information about the effects of training exercises on marine mammals and other sea life, as well as the mitigation measures needed to prevent harmful effects, to inform decisionmakers and the public.<sup>93</sup> CEQ identifies no rationale for ending this practice.

Eliminating the extraterritorial application of NEPA would disrupt agency practice and prevent the full consideration of environmental effects needed to ensure agency action does not harm the environment.

**V. CEQ's proposed changes to the purpose-and-need statement are bad policy, inconsistent with judicial precedent, and beyond CEQ's authority**

CEQ's proposal to revise current 40 C.F.R. § 1502.13 to add an express requirement that the responsible agency consider an applicant's goals in formulating a project's purpose-and-need statement would inappropriately elevate a private applicant's goals relative to Congress's direction to the federal agency. Agencies generally only act pursuant to authority granted by Congress, and must adhere to Congress's goals. Thus, "[w]here an action is taken pursuant to a specific statute, the

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activities in the Mariana Islands and adjacent areas on the high seas), <https://www.mitt-eis.com/Documents/2019-Mariana-Islands-Training-and-Testing-Supplemental-EIS-OEIS-Draft-Supplemental-EIS-OEIS>; *see also* U.S. Dep't of Navy, At-Sea Env'tl. Compliance, [https://www.navfac.navy.mil/products\\_and\\_services/ev/products\\_and\\_services/environmental-planning/at\\_sea\\_compliance.html](https://www.navfac.navy.mil/products_and_services/ev/products_and_services/environmental-planning/at_sea_compliance.html). The Navy typically labels these documents as environmental impact statements/overseas environmental impact statements, *See e.g.*, SURTASS SEIS. They are prepared pursuant to the requirements of both NEPA and Executive Order 12114. SURTASS SEIS at 1-8 to -9; 32 C.F.R. § 775.9(a).

<sup>92</sup> *See NRDC v. Pritzker*, 828 F. 3d 1125, 1130-31 (9th Cir. 2016).

<sup>93</sup> *See* SURTASS SEIS at ES-5 to -10, 4-11 to -62, 5-1 to -25.

statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS.”<sup>94</sup> It is neither appropriate nor lawful for an agency to define the “purpose” of an approval as meeting a private applicant’s goals, rather than fulfilling the public interest, as set forth in the statutes the agency is charged with administering.

In attempting to justify the proposed change, CEQ’s NPRM references prior CEQ guidance, including the “Connaughton Letter,”<sup>95</sup> and the “OFD Framework Guidance.”<sup>96</sup> Neither the Connaughton Letter nor the OFD Framework Guidance discuss an applicant’s goals in relation to the NEPA process. Rather, both documents appear to have been cited in CEQ’s proposed revision to address how the NEPA process should be conducted when multiple agencies are involved.

Other CEQ guidance documents, though not directly on point, touch on this issue. One of the questions addressed in CEQ’s “Forty Most Asked Questions Concerning CEQ’s [NEPA] Regulations” is whether, “[i]f an EIS is prepared in connection with an application for a permit or other federal approval, must the EIS rigorously analyze and discuss alternatives that are outside the capability of the applicant or can it be limited to reasonable alternatives that can be carried out by the applicant?”<sup>97</sup> CEQ answered that question as follows:

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<sup>94</sup> *Oregon Natural Desert Ass’n v. Bureau of Land Management*, 625 F.3d 1092, 1109 (9th Cir. 2010) (citation omitted).

<sup>95</sup> Letter from the Hon. James L. Connaughton, Chairman, Council on Env’tl. Quality, to the Hon. Norman Y. Mineta, Secretary, Department of Transportation (May 12, 2003), [https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-DOT\\_PurposeNeed\\_May-2013.pdf](https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-DOT_PurposeNeed_May-2013.pdf).

<sup>96</sup> M-18-13 (Mar. 20, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/04/M-18-13.pdf>.

<sup>97</sup> Council on Env’tl. Quality, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations* 3-4 (Mar. 23, 1981, amended 1986), <https://www.energy.gov/sites/prod/files/2018/06/f53/G-CEQ-40Questions.pdf>.

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 standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.<sup>98</sup>

CEQ addressed the same question in 1983 in its “Guidance Regarding NEPA Regulations.”<sup>99</sup> In a discussion of the selection of alternatives in licensing and permitting situations, the guidance document stated that “[n]either NEPA nor the CEQ regulations make a distinction between actions initiated by a Federal agency and by applicants.”<sup>100</sup>

As a general rule, NEPA does not permit an agency to “define its objectives” — that is, the purpose and need for a project — “in unreasonably narrow terms.”<sup>101</sup> In particular, an agency may not “define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action.”<sup>102</sup> And, while agencies have discretion to consider private goals, that “is a far cry from mandating that those private interests define the scope of the proposed project.”<sup>103</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> Council on Environmental Quality, *Guidance Regarding NEPA Regulations* 8-9 (1983), originally published at 48 Fed. Reg. 34,263 (1983), [https://www.energy.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/G-CEQ-GuidanceRegulations.pdf](https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-GuidanceRegulations.pdf).

<sup>100</sup> *Id.* at 9.

<sup>101</sup> *City of Carmel-By-The-Sea v. United States Dep’t. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).

<sup>102</sup> *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (Thomas, J.)).

<sup>103</sup> *Nat’l Parks & Conserv. Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070-71 (9th Cir. 2012) (finding that a purpose-and-need statement was impermissibly narrow, where three out of the four stated objectives were those of the private applicant).

CEQ's proposal to expressly require agencies to base their purpose-and-need statements in part on private applicants' goals would unlawfully restrict agency discretion. Congress certainly imposed no such requirement under NEPA, and CEQ cannot lawfully bootstrap NEPA in a way that overrides or displaces the statutory goals and objectives Congress placed on the relevant agency.

#### **VI. The proposed rule would encourage less informative, less thorough, and unlawfully incomplete environmental analyses**

"Congress' aim" in enacting section 102(2)(C) of NEPA was "to force federal agencies to consider environmental concerns early in the decisionmaking process so as to prevent any unnecessary despoiling of the environment."<sup>104</sup> Congress therefore required each agency to prepare a "detailed statement by the responsible official"<sup>105</sup> regarding the project's environmental impacts, with the goal that each agency "reach a decision only upon which it is fully informed and only after the decision has been well-considered."<sup>106</sup> This "detailed statement" "helps a reviewing court to decide whether an agency has met that objective," and serves "as an environmental full disclosure law so that the public can weigh a project's benefits against its environmental costs."<sup>107</sup> And, "[p]erhaps most important, the detailed statement insures the integrity of the agency process by forcing it to face those stubborn, difficult-to-answer objections without ignoring them or sweeping them under the rug."<sup>108</sup>

The changes that CEQ proposes to the scope and substantive content of environmental documentation conflict with these congressional goals and, as elaborated below, are arbitrary, capricious, and otherwise unlawful.

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<sup>104</sup> *Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1049 (2d Cir. 1985).

<sup>105</sup> NEPA § 102(C), codified at 42 U.S.C. § 4332(C).

<sup>106</sup> *Sierra Club*, 772 F.2d at 1049 (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (citing *Silva v. Lynn*, 482 F.2d 1282, 1284–85 (1st Cir. 1973)).



**A. CEQ's proposed revisions would unlawfully exclude analysis of cumulative and indirect effects**

CEQ's proposed rule would unlawfully eliminate "cumulative" and "indirect" from the definition of "effects." NEPA requires "in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment," that the responsible agency provide a detailed statement that discusses a number of elements including the "environmental impact of the proposed action," "[a]ny adverse environmental effects which cannot be avoided should the proposal be implemented," and "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity."<sup>109</sup> Agencies cannot satisfy these statutory requirements without considering cumulative and indirect effects.

**1. The legislative history of NEPA makes clear that Congress intended for agencies to analyze and disclose the full effects of their actions**

NEPA's legislative history demonstrates that Congress intended the detailed statement mandated in section 102(2)(C) to require agencies to analyze and disclose to the public the wide-ranging consequences of their actions on the environment, including direct, indirect, and cumulative effects. The Senate Report framed the problem this way:

As a result of th[e] failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. 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.<sup>110</sup>

The Senate Report describes the unintended environmental consequences of prior federal policies and actions, including the "proliferation of pesticides and other

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<sup>109</sup> NEPA § 102(C), *codified at* 42 U.S.C. § 4332(2)(C).

<sup>110</sup> S. Rep. No. 91-296, at 5.

chemicals”; “indiscriminate siting” of heavy industry; “pollution of the Nation’s rivers, bays, lakes, and estuaries”; loss of public lands; and “rising levels of air pollution.”<sup>111</sup> NEPA is “designed to deal with the long-range implications of many of the[se] critical environmental problems,” in part by ensuring that federal agencies undertake actions with “adequate consideration of, or knowledge about, their impact on the environment.”<sup>112</sup> This goal is unattainable if federal agencies do not analyze and disclose to decisionmakers and the public the full suite of the effects of their actions on the environment, including indirect and cumulative effects.

The House Report makes clear that one of CEQ’s primary responsibilities is to ensure that the federal government properly analyzes long-term environmental consequences. The Report acknowledges that the country faces “two types of [environmental] issues”: short-term, local “brushfire crises,” and “long-term methodical concerns about the environment.”<sup>113</sup> “The latter is by far the most difficult. It is the least spectacular, yet by far the most significant.”<sup>114</sup> According to the House Report, “[a]n independent review of the interrelated problems associated with environmental quality is of critical importance if we are to reverse what seems to be a clear and intensifying trend toward environmental degradation.”<sup>115</sup> CEQ was created so that “full-time expertise and attention” would be devoted to these complex environmental problems.<sup>116</sup>

## **2. Judicial precedent makes clear that NEPA requires agencies to consider indirect and cumulative effects**

In the years following NEPA’s passage – even before CEQ issued its 1978 regulations – courts interpreted NEPA to require federal agencies to include in their environmental analyses the indirect and cumulative effects of their proposed actions.

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<sup>111</sup> *Id.* at 8.

<sup>112</sup> *Id.* at 8-9.

<sup>113</sup> H. Rep. No. 91-378, at 5-6 (quoting testimony of Dr. David M. Gates, Chairman of the Board of Advisors to the Ad Hoc Committee on the Environment).

<sup>114</sup> *Id.* at 6 (quoting testimony of Dr. Gates).

<sup>115</sup> *Id.* at 3.

<sup>116</sup> *Id.* at 6.

For instance, in *City of Davis v. Coleman*, the court of appeals held that the Federal Highway Administration and its California counterpart were required to prepare an environmental impact statement under NEPA for construction of a portion of a federal highway because of the significant “secondary” or indirect environmental effects that could result from the project.<sup>117</sup> The court explained that the “growth-inducing effects” of the highway construction “are its *raison d’être*,” and “with growth will come growth’s problems: increased population, increased traffic, increased pollution, and increased demand for services such as utilities, education, police and fire protection, and recreational facilities.”<sup>118</sup> The agencies argued that these effects did not need to be considered under NEPA because they were “‘secondary’ environmental effects.”<sup>119</sup> The court disagreed, explaining 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.”<sup>120</sup>

Similarly, in *Minnesota Public Interest Research Group v. Butz*, the Eighth Circuit held that the U.S. Forest Service was required to complete an environmental impact statement for proposed additional logging activity in the Boundary Waters Canoe Area to assess the indirect effects associated with the logging permits.<sup>121</sup> The court observed that “[l]ogging creates excess nutrient run-off which causes algal growth in the lakes and streams, affecting water purity. Logging roads may cause erosion and water pollution and remain visible for as long as 100 years; this affects the rustic, natural beauty of the BWCA, recognized as unique by the Forest Service itself. Logging destroys virgin forest, not only for recreational use, but for scientific and educational purposes as well. All these are significant impacts on the human environment.”<sup>122</sup> Again, the court of appeals rejected the agencies’ argument that these and other effects were too remote to be considered under NEPA: “We think NEPA is concerned with indirect effects as well as direct effects. There has been increasing recognition that man

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<sup>117</sup> 521 F.2d 661, 666, 676-77 (9th Cir. 1975).

<sup>118</sup> *Id.* at 675.

<sup>119</sup> *Id.* at 676.

<sup>120</sup> *Id.* at 675-76.

<sup>121</sup> 498 F.2d 1314, 1323 (8th Cir. 1974).

<sup>122</sup> *Id.* at 1322 (footnote omitted).

and all other life on this earth may be significantly affected by actions which on the surface appear insignificant.”<sup>123</sup>

During this same period, courts also held that NEPA required agencies to consider the cumulative effects of their actions in environmental analyses. For instance, in *Kleppe v. Sierra Club*, the Supreme Court interpreted section 102(2)(C) of NEPA to require that when multiple proposals for 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.”<sup>124</sup> “Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.”<sup>125</sup> The Supreme Court has subsequently reiterated this understanding of the statute: “NEPA requires an EIS to disclose the significant health, socioeconomic and *cumulative consequences* of the environmental impact of a proposed action.”<sup>126</sup>

Consistent with this binding authority, the Second Circuit has repeatedly found agency environmental analyses insufficient under NEPA for their failures to consider cumulative impacts. For instance, in *Natural Resources Defense Council v. Callaway*, the court held that an EIS prepared by the Navy for the proposed dumping of polluted soil at a containment site was inadequate because it failed to consider the cumulative impact of additional dumping at the site from other future similar actions.<sup>127</sup> The court rejected the Navy’s treatment of the project “as an isolated ‘single-shot’ venture in the face of persuasive evidence that it is but one of several substantially similar operations, each of which will have the same polluting effect in the same area.”<sup>128</sup> The *Callaway* court explained that Congress plainly intended such impacts to be considered:

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<sup>123</sup> *Id.*

<sup>124</sup> 427 U.S. 390, 410 (1976).

<sup>125</sup> *Id.* In *Kleppe*, the Court determined that no such multiple proposals existed, and therefore a regional analysis of the cumulative impacts of a proposed mining operation was not required – particularly when the agency had separately prepared a program-wide EIS for all of its coal-related activities. *Id.* at 398-400.

<sup>126</sup> *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 106-07 (1983) (emphasis added).

<sup>127</sup> 524 F.2d 79, 87-90 (2d Cir. 1975).

<sup>128</sup> *Id.* at 88.

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.<sup>129</sup>

Similarly, in *Hanly v. Kleindienst*, the Second Circuit remanded an EA for reconsideration of the project's environmental effects on the basis that section 102(2)(C) of NEPA requires agencies to consider "the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area."<sup>130</sup> In *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, the Second Circuit affirmed a district court's finding that an EIS for the proposed construction of a segment of a federal highway had to assess the "cumulative environmental impact" that would result from the construction of the entire highway.<sup>131</sup> And in *City of Rochester v. U.S. Postal Service*, the Second Circuit explained that "[t]he cases in this circuit and elsewhere have consistently held that NEPA mandates comprehensive consideration of the effects of all federal actions. . . . To permit noncomprehensive consideration of the effects of all federal actions into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact would provide a clear loophole in NEPA."<sup>132</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> 471 F.2d 823, 830-31, 836 (2d Cir. 1972).

<sup>131</sup> 508 F.2d 927, 934-36 (2d Cir. 1974), *judgment vacated and remanded on other grounds*, 423 U.S. 809 (1975).

<sup>132</sup> 541 F.2d 967, 972 (2d Cir. 1976) (citing *Scientists' Inst. for Pub. Information v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086-87 (D.C. Cir. 1973)).

### 3. CEQ's own precedents indicate that analysis of indirect and cumulative effects is required by NEPA

CEQ's own guidance and regulations have consistently and repeatedly said that agencies must consider the indirect and cumulative effects of their actions, dating back to CEQ's proposed guidelines published in 1971, the year after NEPA was passed. A review of these guidelines and regulations makes clear that: (1) the environmental effects of projects can be individually insignificant but cumulatively significant; (2) analysis of the indirect and cumulative impacts of an agency action is necessary to determine whether significant effects exist under NEPA; (3) indirect and cumulative impacts must be considered as part of a scientifically based effects analysis; (4) indirect and cumulative impacts must be considered at multiple stages of the NEPA process, including when determining whether a category of projects is likely to be categorically exempt from NEPA, during scoping, and before developing a reasonable range of alternatives and mitigation measures; and (5) analysis and disclosure of both indirect and cumulative impacts are necessary to inform the public and decisionmakers.<sup>133</sup>

For instance, in its first publication in the Federal Register in 1971, CEQ acknowledged that section 102(2)(C) of NEPA requires agencies to include the following information in their environmental statements:

[t]he probable impact of the proposed action on the environment, including impact on ecological systems such as wildlife, fish, and marine life. Both *primary and secondary significant consequences* for the environment should be included in the analysis. For example, the implications, if any, of the action for population distribution or

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<sup>133</sup> See, e.g., CEQ, *Statements on Proposed Federal Actions Affecting the Environment*, 36 Fed. Reg. 7724, 7725 (Apr. 23, 1971); CEQ, *Preparation of Environmental Impact Statements*, 38 Fed. Reg. 20,550, 20,551 (Aug. 1, 1973); CEQ, *National Environmental Policy Act - Regulations*, 43 Fed. Reg. 55,978, 55,996, 56,003-06 (Nov. 29, 1978); CEQ, *Incorporating Biodiversity Considerations into Environmental Impact Analysis Under the National Environmental Policy Act* 18, 21 (1993); see generally CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* (1997); CEQ, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews* (2016) [hereinafter, "2016 Final GHG Guidance"].

concentration should be estimated and an assessment made of the effect of any possible change in population patterns upon the resource base, including land use, water, and public services, of the area in question;

and:

[t]he relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This in essence requires 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.<sup>134</sup>

Two years later, CEQ reiterated its determination that section 102(2)(C) "is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated."<sup>135</sup> "[A]gencies 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."<sup>136</sup>

Consistent with this understanding, CEQ's 1973 guidelines required agencies to include in their environmental statements "[s]econdary or indirect, as well as primary or direct, consequences for the environment" from their actions, alongside the "interrelationships and cumulative environmental impacts of the proposed action and other related Federal projects."<sup>137</sup>

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<sup>134</sup> 36 Fed. Reg. at 7725 (emphasis added).

<sup>135</sup> 38 Fed. Reg. at 20,551.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 20,553.

When CEQ issued its first regulations in 1978, it made indirect and cumulative effects the organizing principle behind NEPA reviews. CEQ stated that section 102(2)(C) of NEPA requires agencies to consider the environmental consequences of their actions, including direct, indirect, and cumulative effects.<sup>138</sup> It separately defined “indirect effects” to include those effects that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,” and “cumulative impacts” to include those impacts “which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”<sup>139</sup> It further specified that an action cannot qualify for a categorical exclusion if it has a cumulatively significant effect on the environment.<sup>140</sup> Finally, CEQ emphasized that the significance of an effect, as stated in section 102(2)(C), depends on whether “the action is related to other actions with individually insignificant but cumulatively significant impacts.”<sup>141</sup>

Over the next few decades, CEQ issued guidance both clarifying and emphasizing the importance of indirect and cumulative effects analyses to NEPA. In 1981, CEQ reiterated that the “environmental consequences” section of an EIS “should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives.”<sup>142</sup> Agencies cannot avoid this analysis by claiming a lack of information: “The EIS must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are ‘reasonably foreseeable.’”<sup>143</sup>

In 1993, CEQ chastised agencies for failing to properly consider the cumulative impacts of their actions, resulting in a threat to biodiversity inconsistent with NEPA’s

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<sup>138</sup> 43 Fed. Reg. at 55,996; *see also id.* at 56,005 (defining the scope of actions required to be considered in an EIS to include direct, indirect, and cumulative impacts).

<sup>139</sup> *Id.* at 56,004.

<sup>140</sup> *Id.* at 56,003-04.

<sup>141</sup> *Id.* at 56,006.

<sup>142</sup> CEQ, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,028 (Mar. 23, 1981).

<sup>143</sup> *Id.* at 18,031.



aims.<sup>144</sup> CEQ explained that many EISs and environmental assessments improperly addressed “only with project-specific considerations.”<sup>145</sup> Important environmental considerations like biodiversity can only be adequately assessed “on an ecosystem or regional scale, taking into account cumulative effects.”<sup>146</sup> “Avoidance or mitigation of impacts at the project level . . . has been, and will continue to be, critically important in minimizing biodiversity losses. Yet, in the absence of protection at the larger scale, ecosystem patterns and processes so important to biodiversity will not be sustained over the long term.”<sup>147</sup> CEQ instructed agencies that “[e]ven for small projects, it should always be the objective of the environmental document to analyze impacts at the largest relevant scale, based on the affected resources and expected impacts.”<sup>148</sup>

In 1997, CEQ issued an entire guidance document emphasizing the importance of considering cumulative effects under NEPA.<sup>149</sup> CEQ explained that “[e]vidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.”<sup>150</sup> This includes widespread and severe environmental effects like deforestation; exposure to carcinogens; polluted waterways; acid rain; pesticide pollution; global climate change; stratospheric ozone depletion; and even degradation of local communities.<sup>151</sup> “The passage of time has only increased the conviction that cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment.”<sup>152</sup>

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<sup>144</sup> CEQ, *Incorporating Biodiversity Considerations into Environmental Impact Analysis Under the National Environmental Policy Act* 18 (1993).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 21.

<sup>149</sup> CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* (1997).

<sup>150</sup> *Id.* at 1.

<sup>151</sup> *Id.* at 9 tbl. 1-3, 24-25.

<sup>152</sup> *Id.* at 3.

To that end, CEQ explained in detail how a cumulative impacts analysis should be incorporated into agencies' NEPA reviews at all stages of the process.<sup>153</sup> CEQ emphasized that a cumulative impacts analysis must anchor agencies' NEPA reviews to ensure that agencies' environmental statements are scientifically accurate; that agencies are reviewing the impacts of their projects over the long-term; that agencies are adequately informing the public and decisionmakers; that agencies are giving necessary detail to the formulation and consideration of alternatives and mitigation measures; and that agencies are conducting a proper significance determination, all of which are required by NEPA.<sup>154</sup>

Most recently, CEQ reiterated the importance of both indirect and cumulative impacts analyses in determining the contribution of federal agency actions to climate change. In its Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, CEQ "recommend[ed] that agencies quantify a proposed agency action's projected direct *and indirect* GHG emissions."<sup>155</sup> CEQ provided examples on the types of indirect effects that must be considered.<sup>156</sup> CEQ explained the need for agencies to analyze both indirect and cumulative GHG emissions and their impacts on climate change, recommending that an agency discuss "methods to appropriately analyze reasonably foreseeable direct, *indirect, and cumulative* GHG emissions and climate effects."<sup>157</sup> An evaluation of both direct and indirect

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<sup>153</sup> *Id.* at 10 tbl. 1-5.

<sup>154</sup> *Id.* at 24-47.

<sup>155</sup> Council on Env'tl. Quality, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews 11 (2016) [hereinafter, "2016 Final GHG Guidance"] (emphasis added).

<sup>156</sup> *Id.* at 16 n.42 ("For example, where the proposed action involves fossil fuel extraction, direct emissions typically include GHGs emitted during the process of exploring for or extracting the fossil fuel. The indirect effects of such an action that are reasonably foreseeable at the time would vary with the circumstances of the proposed action. For actions such as a Federal lease sale of coal for energy production, the impacts associated with the end-use of the fossil fuel being extracted would be the reasonably foreseeable combustion of that coal.").

<sup>157</sup> *Id.* at 5 (emphasis added).

impacts is necessary because, as CEQ has acknowledged, “[b]ased on the agency identification and analysis of the direct and indirect effects of its proposed action, NEPA requires an agency to consider the cumulative impacts of its proposed action and reasonable alternatives.”<sup>158</sup>

CEQ now proposes to reverse course from the interpretation and guidance it has provided for the past four decades – and apparently intends to try to overrule settled judicial precedent on these issues. Although CEQ has repeatedly described indirect and cumulative effects as examples of the types of effect that agencies must consider under NEPA,<sup>159</sup> CEQ’s proposed rule would take the opposite position. CEQ offers no evidence or persuasive justification for this change in position. Reasoned, non-arbitrary decision making requires more.

#### **4. CEQ’s proposed “codification” of *Public Citizen* misstates and is inconsistent with precedent**

CEQ proposes to “codify” what it describes as “a key holding of *Public Citizen*,” which, CEQ claims, “make[s] clear that effects do not include effects that the agency has no authority to prevent or would happen even without the agency action, because they would not have a sufficiently close causal connection to the proposed action.”<sup>160</sup> This is incorrect.

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<sup>158</sup> *Id.* at 17.

<sup>159</sup> *See, e.g.*, 38 Fed. Reg. at 20,553 (“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 . . . 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.”).

<sup>160</sup> 85 Fed. Reg. at 1708.

In *Department of Transportation v. Public Citizen*,<sup>161</sup> the Supreme Court addressed the question of whether NEPA requires an agency to analyze an environmental effect when the agency has no legal ability to prevent that effect. *Public Citizen* involved the Federal Motor Carrier Safety Administration's development of safety standards for Mexican trucks operating in the United States. The agency proposed those standards in expectation that the President would lift a moratorium on Mexican motor carriers operating in the United States. The question was whether the agency was required to consider the environmental effects of increased truck traffic that would result when the President lifted the moratorium.<sup>162</sup>

The Supreme Court determined that resolution of this question depended on the application of the "reasonably close causal relationship" test articulated in *Metropolitan Edison Co.*<sup>163</sup> Applying this test, the Court held that the agency did not have to consider the environmental effects at issue because the agency could not legally prevent them: once the President lifted the moratorium, the agency had no ability to "categorically . . . exclude Mexican motor carriers from operating within the United States," and thus prevent the pollution that would result from the truck traffic.<sup>164</sup> The agency could only set the safety standards for the trucks and ensure that they were willing to comply with them.<sup>165</sup> The Court "h[e]ld that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect" and thus does not need to analyze the effect under NEPA.<sup>166</sup>

As is clear from the discussion above, CEQ's proposal "to codify a key holding of *Public Citizen* relating to the definition of effects to make clear that effects do not include effects that the agency has no authority to prevent *or would happen even without the agency action*, because they would not have a sufficiently close causal connection to

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<sup>161</sup> 541 U.S. 752 (2004).

<sup>162</sup> *Id.* at 765.

<sup>163</sup> *Id.* at 767.

<sup>164</sup> *Id.* at 766.

<sup>165</sup> *Id.* at 769-70.

<sup>166</sup> *Id.* at 770.

the proposed action,”<sup>167</sup> misstates the law. *Public Citizen* does not stand for the proposition that an agency need not consider an environmental effect if that same effect will occur regardless of the agency’s actions. *Public Citizen* dealt only with the question of what is required under NEPA when the legal authority of the agency to *prevent* the action is at issue.

In fact, in *Sierra Club v. FERC*, (“*Sabal Trail*”), the D.C. Circuit subsequently made clear that the “touchstone of *Public Citizen*” was its holding that “[a]n agency has no obligation to gather or consider environmental information if it has no statutory authority to act on that information.”<sup>168</sup> Applying that rule, the court held that FERC was the “legally relevant cause” of the reasonably foreseeable downstream greenhouse gas emissions of a pipeline.<sup>169</sup> The court explained that Congress “broadly instructed the agency to consider ‘the public convenience and necessity’ when evaluating applications to construct and operate interstate pipelines.”<sup>170</sup> In doing so, FERC “balance[s] the public benefits against the adverse effects of the project,’ including adverse environmental effects.”<sup>171</sup> “Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment,” the court concluded, “the agency is a ‘legally relevant cause’ of the direct and indirect environmental effects of the pipelines it approves.”<sup>172</sup> The D.C. Circuit reiterated this reasoning in *Birckhead v. FERC*,<sup>173</sup> stating that FERC may “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.”<sup>174</sup>

This is the law. CEQ has no authority to codify a contrary interpretation.

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<sup>167</sup> 85 Fed. Reg. at 1708 (emphasis added).

<sup>168</sup> *Sabal Trail*, 867 F.3d at 1372-73 (emphasis in original).

<sup>169</sup> *Id.* at 1373.

<sup>170</sup> *Id.* (quoting 15 U.S.C. § 717f(e)).

<sup>171</sup> *Id.* (internal quotation marks omitted) (citing *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, 101-02 (D.C. Cir. 2014)).

<sup>172</sup> *Id.*

<sup>173</sup> 925 F.3d 510 (D.C. Cir. 2019) (per curiam).

<sup>174</sup> *Id.* at 519 (internal quotation marks omitted) (quoting *Sierra Club*, 867 F.3d at 1373).

**5. CEQ’s proposed new definition of “effects” ignores precedent about reasonable foreseeability.**

CEQ further proposes to redefine “effects” under NEPA to only include those that are “reasonably foreseeable.”<sup>175</sup> CEQ’s definition fails to reference or acknowledge expansive precedent on what qualifies as a “reasonably foreseeable” effect.

Case law establishes that a “reasonably foreseeable” effects inquiry under NEPA requires the agency to engage in a degree of reasonable forecasting and speculation. Moreover, courts have held explicitly that the greenhouse gas emissions of agency actions are “reasonably foreseeable” effects that must be analyzed and considered under NEPA – something that CEQ’s proposal ignores.

The D.C. Circuit first articulated the “reasonably foreseeable” standard in 1973 in *Scientists’ Institute for Public Information, Inc. v. Atomic Energy Commission*.<sup>176</sup> In that case, the court held that the Atomic Energy Commission was required to complete a comprehensive environmental impact statement for its liquid metal fast breeder nuclear reactor program. In describing what the Commission needed to do to satisfy NEPA, the court found:

[I]f the Commission’s environmental survey is prepared and issued in accordance with NEPA procedures, and if the Commission makes a good faith effort in the survey to describe the *reasonably foreseeable environmental impact* of the program, alternatives to the program and their *reasonably foreseeable environmental impact*, and the irreversible and irretrievable commitment of resources the program involves, we see no reason why the survey will not fully satisfy the requirements of Section 102[2](C).<sup>177</sup>

Moreover, the D.C. Circuit explained that the determination of whether an effect is “reasonably foreseeable” under NEPA requires the agency to engage in a degree of reasonable forecasting and speculation:

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<sup>175</sup> 85 Fed. Reg. at 1708.

<sup>176</sup> 481 F.2d 1079 (D.C. Cir. 1973).

<sup>177</sup> *Id.* at 1092 (emphasis added).

Section 102[2](C)'s requirement that the agency describe the anticipated environmental effects of proposed action is subject to a rule of reason. The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting. And one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. It must be remembered that the 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 fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry." . . . [I]mplicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to the fullest extent possible.<sup>178</sup>

The D.C. Circuit reiterated its "reasonably foreseeable" standard in several cases thereafter,<sup>179</sup> and at least three other Circuits subsequently agreed with *Scientists' Institute's* holding that NEPA requires agencies to consider the "reasonably foreseeable" environmental effects of their actions.<sup>180</sup> Courts have subsequently reiterated *Scientists'*

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<sup>178</sup> *Id.* (internal quotation marks and citation omitted).

<sup>179</sup> See, e.g., *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 798 (D.C. Cir. 1975) ("Section 102(2)(C)(i) of NEPA requires a 'detailed statement' on 'the environmental impact of the proposed action.' That language requires a description of reasonably foreseeable effects."); *Arkansas Power & Light Co. v. Fed. Power Comm'n*, 517 F.2d 1223, 1236 (D.C. Cir. 1975) (holding that the Federal Power Commission had "[t]o make a good faith effort to describe the reasonably foreseeable environmental impact of each curtailment plan using the five factors listed in NEPA's section 102[2](C)").

<sup>180</sup> See *Nat'l Helium Corp. v. Morton*, 486 F.2d 995, 1002 (10th Cir. 1973); *State of Louisiana v. Fed. Power Comm'n*, 503 F.2d 844, 877 (5th Cir. 1974); *Swain v. Brinegar*, 542 F.2d 364, 368 (7th Cir. 1976).

*Institute's* holding that the determination of whether an effect is “reasonably foreseeable” requires “reasonably forecasting and speculation.”<sup>181</sup>

Application of the “reasonably foreseeable” standard is particularly important in the context of climate change, where courts have held that NEPA requires agencies to analyze and disclose the reasonably foreseeable greenhouse gas emissions of their actions. For instance, in *Mid States Coalition for Progress v. Surface Transportation Board*, the Eighth Circuit held that the downstream greenhouse gas emissions associated with the agency’s approval of coal rail transport was a “reasonably foreseeable” effect that had to be considered by the agency.<sup>182</sup> The case involved the construction of an additional 280 miles of rail line and an upgrade of nearly 600 miles of rail line to transport coal from Wyoming’s Powder River Basin.<sup>183</sup> The project was anticipated to make an additional 100 million tons of coal available for annual use.<sup>184</sup> The court explained that “degradation in air quality” is “indeed something that must be addressed in an EIS if it is ‘reasonably foreseeable.’”<sup>185</sup>

The court first determined that “it is reasonably foreseeable – indeed, it is almost certainly true – that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal.”<sup>186</sup> The court then acknowledged that it was not yet known where the coal would be burned because there were no final contracts with utilities then in place, but concluded that this showed “only that the *extent* of the effect is speculative. The *nature* of the effect, however, is far from speculative.”<sup>187</sup> “[W]hen the *nature* of the effect is reasonably foreseeable but its *extent* is

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<sup>181</sup> See, e.g., *Wildearth Guardians v. Zinke*, 368 F.Supp.3d 41, 67 (D.D.C. 2019). For example, in the fossil fuel leasing context, greenhouse emissions from oil and gas drilling are reasonably foreseeable at the leasing stage and an agency can reasonably quantify and forecast those emissions. *Id.* at 67-68. See also *High County Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174, 1196 (D. Colo. 2014).

<sup>182</sup> 345 F.3d 520, 548-50 (8th Cir. 2003).

<sup>183</sup> *Id.* at 532.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 549.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*



not, we think that the agency may not simply ignore the effect.”<sup>188</sup> The court held that the agency was required to explain the environmental impact to the air quality from the additional coal consumption or explain why it did not have sufficient information to make that analysis at that time.<sup>189</sup>

Similarly, in *Sabal Trail*, the D.C. Circuit held that FERC had to consider the downstream greenhouse gas emissions associated with FERC’s approval of the construction of three gas pipelines meant to supply Florida power plants.<sup>190</sup> The court’s determination rested on its interpretation of what is “reasonably foreseeable”:<sup>191</sup>

What are the “reasonably foreseeable” effects of authorizing a pipeline that will transport natural gas to Florida power plants? First, that the gas will be burned in those power plants. This is not just “reasonably foreseeable,” it is the project’s entire purpose . . . . It is just as foreseeable, and FERC does not dispute, that burning natural gas will release into the atmosphere the sorts of carbon compounds that contribute to climate change. . . . [Thus,] the EIS for the [pipeline] 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.<sup>192</sup>

The D.C. Circuit clarified in *Birckhead* that *Sabal Trail* “hardly suggests” that a project’s downstream greenhouse gas emissions only have to be considered when the gas’s final destination is “specifically-identified” – an interpretation the court said would be “extreme.”<sup>193</sup> Instead, the agency must make a case-by-case determination of whether downstream greenhouse gas emissions from one of its pipeline projects are a “reasonably foreseeable” effect of that project – taking into account that NEPA requires the agency to engage in the necessary fact-gathering to answer that question fully.<sup>194</sup>

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 549-50.

<sup>190</sup> 867 F.3d at 1363.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 1371-74

<sup>193</sup> 925 F.3d 510, 519 (D.C. Cir. 2019) (per curiam).

<sup>194</sup> *Id.* at 518-20.

Courts have similarly held that, under NEPA, greenhouse gas emissions are a “reasonably foreseeable” effect of, *inter alia*, modifications to and expansions of coal mine leases;<sup>195</sup> expansion of existing coal mining permits;<sup>196</sup> the development of Resource Management Plans for uses of federal lands;<sup>197</sup> oil and gas leases on federal lands<sup>198</sup> and permits to drill<sup>199</sup>; and the development of Master Development Plans for federal lands.<sup>200</sup>

Based on the foregoing, CEQ’s proposed use of the phrase “reasonably foreseeable” is incomplete and fails to capture decades of precedent on what this term is meant to include.

**B. To ensure informed decision making, NEPA requires full and meaningful consideration, as well as a detailed description, of all reasonable alternatives to a proposed action**

NEPA’s requirement that agencies consider and discuss in detail the alternatives to the proposed action is a linchpin of the environmental impact statement. It is vital for

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<sup>195</sup> See, e.g., *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014); *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation and Enforcement*, 104 F. Supp. 3d 1208, 1229-31 (D. Colo. 2015), *appeal dismissed as moot and order vacated on other grounds*, 652 F. App’x 717 (10th Cir. 2016).

<sup>196</sup> See, e.g., *Diné Citizens Against Ruining Our Environment v. U.S. Office of Surface Mining Reclamation and Enforcement*, 82 F. Supp. 3d 1201, 1212-13 (D. Colo. 2015), *appeal dismissed as moot and order vacated in part on other grounds*, 643 F. App’x 799 (10th Cir. 2016).

<sup>197</sup> See, e.g., *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at \*11-13 (D. Mont. Mar. 26, 2018), *appeals voluntarily dismissed*, Nos. 18-35826 et al., 2019 WL 141346 (9th Cir. Jan. 2, 2019); *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1154-56 (D. Colo. 2018).

<sup>198</sup> *San Juan Citizens Alliance v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1243-44 (D.N.M. 2018); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 63-75 (D.D.C. 2019).

<sup>199</sup> *Diné Citizens Against Ruining Our Environment v. Bernhardt*, 923 F. 3d 831, 852-54 (10th Cir. 2019).

<sup>200</sup> *Citizens for a Healthy Community v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1236-38 (D. Colo. 2019)

ensuring that agencies have explored whether less environmentally destructive approaches exist “before decisions are made, and before actions are taken.”<sup>201</sup> And it gives the public an opportunity to scrutinize the reasoning and data behind the agency’s choice of the proposed action rather than other options.<sup>202</sup>

CEQ’s proposed changes to section 1502.14 inexplicably undercut NEPA’s purpose of ensuring informed decision-making. They hinder public participation, and are contrary to decades of case law clearly establishing agencies’ obligations under NEPA to consider and evaluate the full range of reasonable alternatives.

CEQ’s proposed changes to its regulation’s requirements for alternatives analysis do not merely “simplify and clarify” those regulations, as CEQ claims.<sup>203</sup> Instead, the proposed changes undermine the alternatives analysis. In particular, CEQ’s arbitrary decision to strike the word “all” and to delete the existing direction to agencies that the analysis and comparison of alternatives must be robust contravenes long-standing interpretations of NEPA by the courts and CEQ, and will as a result create more confusion, uncertainty, and delay.

### **1. NEPA requires agencies to evaluate all reasonable alternatives**

CEQ proposes to delete the word “all” before “reasonable alternatives.”<sup>204</sup> CEQ states that “NEPA itself provides no specific guidance concerning the range of alternatives an agency must consider,” and that “NEPA’s policy goals are satisfied when an agency analyzes reasonable alternatives, and that an EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum.”<sup>205</sup> Further, CEQ states the “reasonableness of the analysis of alternatives in a final EIS is resolved not by any

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<sup>201</sup> 40 C.F.R. § 1500.1(b).

<sup>202</sup> See *NRDC v. Callaway*, 524 F.2d 79, 94 (2d Cir. 1975) (stating “the Final EIS fails to perform its vital task of exposing the reasoning and data of the agency proposing the action to scrutiny by the public and by other branches of the government” by not presenting a complete analysis and comparison of alternatives).

<sup>203</sup> 85 Fed. Reg. at 1701.

<sup>204</sup> *Id.* at 1701-02.

<sup>205</sup> *Id.* at 1702.

particular number of alternatives considered, but by the nature of the underlying agency action.”<sup>206</sup> According to CEQ, the deletion of the word “all” would “provide further clarity on the scope of the alternatives analysis,”<sup>207</sup> implying that the current regulation’s inclusion of the word “all” forces agencies to unnecessarily consider a large number alternatives beyond what is required of agencies under “NEPA’s policy goals.”<sup>208</sup>

CEQ’s purported justification for this change ignores decades of case law — including cases both before and after CEQ issued its 1978 regulations. Those cases, as well as prior CEQ guidance, emphasize that the term “reasonable” controls the number of alternatives agencies must consider.<sup>209</sup> If an alternative is not *reasonable*, meaning its “effect cannot be reasonably ascertained” or its “implementation is deemed remote or speculative,” then agencies are not obligated to consider it.<sup>210</sup> Accordingly, the word “all” in the 1978 NEPA regulations does not obligate agencies to consider every conceivable alternative. But it does require consideration of the full range of *reasonable* alternatives, consistent with NEPA itself. No change in the regulations is necessary to “clarify” this point, because it is already crystal clear on the face of the existing regulations, and in judicial precedent.

In short, if an alternative is “reasonable,” NEPA requires agencies to consider it.<sup>211</sup> “The existence of a viable but unexamined alternative renders an environmental

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1701.

<sup>208</sup> *Id.* at 1702.

<sup>209</sup> For example, CEQ’s 1973 guidelines on the preparation of Environmental Impact Statements specifically uses “reasonable” to qualify the types of alternatives that agencies are expected to consider in their impact statements. See 38 Fed. Reg. 20,550, 20,554 (Aug. 1, 1973).

<sup>210</sup> *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974) (quoting *Life of the Land v. Brinegar*, 485 F. 2d 460, 472 (9th Cir. 1973)); see also *NRDC v. Callaway*, 524 F.2d at 93 (stating that “there is no need to consider alternatives of speculative feasibility”).

<sup>211</sup> See *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 825 (D.C. Cir. 1976); see also *Dubois v. US Dep’t of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996) (stating “under NEPA, the agency has a duty “to study all alternatives that appear reasonable and appropriate for

impact statement inadequate.”<sup>212</sup> Otherwise, agencies would be failing to satisfy the NEPA’s requirement that “each agency decision maker has before him and takes into proper account all possible approaches to a particular project . . . which would alter the environmental impact.”<sup>213</sup>

Consider, for example, *NRDC v. Callaway*, in which an agency’s failure to address all reasonable alternatives resulted in the court finding the EIS legally inadequate.<sup>214</sup> The Navy had proposed to dredge the Thames River near New London, Connecticut, to accommodate a specific class of submarine, and further proposed to dispose the polluted dredged spoil at a dumping site in Long Island Sound. NRDC challenged the Navy over violations of NEPA, based in part on the agency’s failure to look at reasonable alternatives, such as more suitable sites for disposal. The Court of Appeals for the Second Circuit held the Navy’s Environmental Impact Statement did not meet NEPA standards because the Navy failed to present a “comprehensible and thorough discussion of *all* the alternative dumping sites” that the Navy itself had suggested.<sup>215</sup> The court stated:

The content and scope of the discussion of alternatives to the proposed action depends upon the nature of the proposal. . . . Although there is no need to consider alternatives of speculative feasibility or alternatives which could only be implemented after significant changes in governmental policy or legislation or which require similar alterations of existing restrictions, the EIS must nevertheless consider such alternatives to the proposed action as may partially or completely meet the proposal’s goal . . . .<sup>216</sup>

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study” (quoting *Roosevelt Campobello Int’l Park Comm’n v. U.S. EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982)).

<sup>212</sup> *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) (quoting *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 575 (9th Cir. 1998)).

<sup>213</sup> *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

<sup>214</sup> 542 F.2d at 93-95.

<sup>215</sup> *Id.* at 94 (emphasis added).

<sup>216</sup> *Id.* at 93 (citations omitted).

The word “all” in the 1978 NEPA regulations means that, if an alternative is reasonable, NEPA requires agencies to consider it. That word is important, because this is what NEPA requires. As such, CEQ has no justification for striking “all” from the direction to consider “reasonable alternatives.” It would not make agencies’ obligations under NEPA clearer. Instead, it would make those obligations less clear.

While CEQ seems to suggest the word “all” in the 1978 NEPA regulations inhibits agencies from limiting the range of reasonable alternatives that must be considered,<sup>217</sup> this rationale is spurious. Case law developed soon after NEPA’s passage, as well as CEQ’s guidance, already specifically addresses what range of alternatives an agency must consider for each proposal. Again, the controlling factor is the “rule of reason.”<sup>218</sup> Agencies are not “obligated to consider in detail each and every conceivable variation of the alternatives stated,” but do need to discuss a range of alternatives that is sufficient to permit a reasoned choice.<sup>219</sup> An “agency is not required, under NEPA, to consider alternatives when such consideration would serve no purpose,” and “need not consider in its impact statement alternatives with consequences indistinguishable from the action proposed.”<sup>220</sup> Those types of alternatives are not considered to be reasonable. However, if a reasonable alternative is “significantly distinguishable from the alternatives actually considered,” then the agency is obligated under NEPA to consider it.<sup>221</sup> CEQ provides no evidence of

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<sup>217</sup> 85 Fed. Reg. at 1702.

<sup>218</sup> In reviewing the adequacy of an EIS, courts apply the “rule of reason,” which determines whether the “statement contained sufficient discussion of the relevant issues and opposing viewpoints to enable the [agency] to take a hard look at the environmental impacts of the proposed [action] and its alternatives, and to make a reasoned decision.” *Colo. Env’tl. Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999).

<sup>219</sup> *Monroe Cty. Conservation Council Inc. v. Adams*, 566 F.2d 419, 425 (2d Cir. 1977), cert. denied, 435 U.S. 1006 (1978) (quoting *Coal. for Responsible Regional Dev. v. Coleman*, 555 F.2d 398, 400 (4th Cir. 1977) (quotation marks omitted)).

<sup>220</sup> *NRDC v. SEC*, 606 F.2d 1031, 1054 (D.C. Cir. 1979) (citing *Citizens for Safe Power, Inc. v. Nuclear Regulatory Comm’n*, 524 F.2d 1291, 1301 (D.C. Cir. 1975); *Iowa Citizens for Env’tl. Quality, Inc. v. Volpe*, 487 F.2d 849, 852-53 (8th Cir. 1973)).

<sup>221</sup> *Westlands Water Dist.*, 376 F.3d at 868 (quoting *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990)).

confusion on these points. Nor does it show that its proposed deletion would eliminate confusion without creating new confusion in its place.

Further, CEQ's guidance, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," advised that "[t]he phrase 'range of alternatives' refers to the alternatives discussed in environmental documents. It includes *all* reasonable alternatives, which must be rigorously explored and objectively evaluated . . . ." <sup>222</sup> To be sure, when there is an infinite number of possible reasonable alternatives, "only a reasonable number of examples, covering the *full spectrum* of alternatives, must be analyzed and compared in the EIS." <sup>223</sup> "What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case." <sup>224</sup>

Thus, in contrast to CEQ's rationale, <sup>225</sup> the placement of the word "all" before "reasonable alternatives" serves to clarify agencies' obligations under NEPA. It signals to agencies that if an alternative is neither "remote, speculative, or impractical or ineffective," nor "significantly [in]distinguishable from the alternatives already considered," then it must be considered. <sup>226</sup> Therefore, CEQ's arbitrary proposal to delete "all" is inconsistent with precedent, will create rather than eliminate confusion, and must be withdrawn.

## **2. NEPA requires agencies to thoroughly study and describe in detail all reasonable alternatives**

The consideration and comparison of alternatives under NEPA "fosters informed decision-making and informed public participation." <sup>227</sup> CEQ's proposal would undermine this requirement by proposing to delete the following phrases:

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<sup>222</sup> 46 Fed. Reg. 18,026, 18,026 (Mar. 23, 1981) (emphasis added).

<sup>223</sup> *Id.* at 18,027 (emphasis added).

<sup>224</sup> *Id.*

<sup>225</sup> 85 Fed. Reg. at 1701.

<sup>226</sup> *High Country Conservation Advocates v. U.S. Forest Serv.*, No. 18-1374, 2020 WL 994988, at \*7 (10th Cir. Mar. 2, 2020) (quoting *New Mexico ex rel. Richardson, Bureau of Land Mgmt.*, 565 F.3d 683, 708-09 (10th Cir. 2009)).

<sup>227</sup> *Cal. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

- “it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public,”
- “[r]igorously explore and objectively evaluate,” and
- “[d]evote substantial treatment to.”<sup>228</sup>

Under NEPA, agencies must consider and evaluate all reasonable alternatives in a manner that “would permit a decision-maker to fully consider and balance the environmental factors.”<sup>229</sup> The discussion of alternatives must go beyond “‘mere assertions’ and provide sufficient data and reasoning to enable a reader to evaluate the analysis and conclusions and to comment on the EIS.”<sup>230</sup> The discussion of alternatives must be undertaken in “good faith”; it “is not to be employed to justify a decision already reached.”<sup>231</sup> Courts have found EISs that failed to adequately and objectively evaluate all reasonable alternatives in a manner that allowed for informed decision making to be inadequate.<sup>232</sup>

CEQ’s proposed changes would seem designed to signal to agencies that conducting a detailed study and comparison of alternatives is not important. Such a result would hinder the public’s ability to ensure NEPA’s mandated decisionmaking process has in fact taken place. And it would limit the public’s ability to evaluate and balance the factors and to understand and offer useful comments on better or different approaches. CEQ’s proposal, unfortunately, does not grapple with these anticipated consequences.

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<sup>228</sup> Compare 85 Fed. Reg. at 1720 with 43 Fed. Reg. at 55,996.

<sup>229</sup> *Concerned about Trident*, 555 F.2d at 827 (quoting *Sierra Club*, 510 F.2d at 819).

<sup>230</sup> *Callaway*, 524 F.2d at 93 (quoting *Silva v. Lynn*, 482 F.2d 1282, 1287 (1st Cir. 1973)).

<sup>231</sup> *Citizens Against the Destruction of Napa v. Lynn*, 391 F. Supp 1188, 1995 (N.D. Cal. 1975).

<sup>232</sup> For example, in *Silva v. Lynn*, the First Circuit found an EIS to be inadequate because the agency’s justification for a proposed drainage plan, and for the proposed number and placement of housing units, lacked sufficient discussion of alternatives and a reasoned basis for the choices made. 482 F.2d 1282, 1288 (1st Cir. 1973).



### 3. Long-standing precedent requires agencies to evaluate reasonable alternatives not within their jurisdiction

CEQ proposes to strike from its regulations the existing requirement that agencies evaluate reasonable alternatives not within the jurisdiction of the lead agency.<sup>233</sup> Further, CEQ states its proposed redefinition of “reasonable alternatives” would preclude alternatives outside the agency’s jurisdiction because they would not be technically feasible due to the agency’s lack of statutory authority to implement that alternative.”<sup>234</sup> CEQ justifies this deletion by stating “it is not efficient [n]or reasonable to require” agencies to conduct such analyses.<sup>235</sup>

This proposed change is not in accordance with the law. Under NEPA, an agency “must consider [reasonable] alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide.”<sup>236</sup> Central to NEPA’s goal of ensuring that agencies do not undertake a project “without intense consideration of other more ecologically sound courses of action” is a “thorough consideration of all appropriate methods of accomplishing the aim of the action, including those without the area of the agency’s expertise and regulatory control.”<sup>237</sup>

Courts have long interpreted NEPA to require agencies to consider reasonable alternatives not within the jurisdiction of the lead agency. In *Natural Resources Defense Council v. Morton*, for example, the D.C. Circuit considered whether NEPA obligated the Department of the Interior to consider an alternative outside of its jurisdiction in the context of an EIS prepared for a proposed off-shore oil and gas lease off the coast of Louisiana.<sup>238</sup> NRDC argued that the EIS was inadequate because it did not include an alternative of eliminating oil import quotas. The Department of the Interior argued in response that it was not obligated to consider such an alternative, because the agency could neither adopt nor implement it. The D.C. Circuit rejected the Department of the

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<sup>233</sup> 85 Fed. Reg. at 1702.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974) (citing *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972)).

<sup>237</sup> *Envtl. Def. Fund, Inc. v. Army Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974).

<sup>238</sup> 458 F.2d 827 (D.C. Cir. 1972).

Interior's argument that the alternatives required under NEPA were only those alternatives that could be adopted and implemented by the agency issuing the EIS. The court explained that NEPA had "infused into the decision-making process in 1969 . . . a directive as to environmental impact statements that was meant to implement the Congressional objectives of Government coordination, a comprehensive approach to environmental management . . ." <sup>239</sup> The court reasoned:

Congress contemplated that the Impact Statement would constitute the environmental source material for the information of the Congress as well as the Executive, in connection with the making of relevant decisions, and would be available to enhance enlightenment of – and by – the public. The impact statement provides a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action. <sup>240</sup>

Thus, "[t]he impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers, and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration along with the various other elements of the public interest." <sup>241</sup>

In other words, because an alternatives analysis informs not just the agency, but the government and the public as a whole, the fact that an alternative is outside the *lead* agency's jurisdiction does not mean an EIS should ignore it. Quite the contrary. Thus, while the court recognized that the Interior Department did not have the authority to modify or eliminate oil import quotas, the court noted that both Congress and the President did have such authority. As such, NEPA obligated the Interior Department to consider the alternative of eliminating oil import quotas because it would be useful for the guidance of other decision-makers. We would have thought that an Administration with as strong an adherence to the Unitary Executive theory as this one would have recognized this principle, too.

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<sup>239</sup> *Id.* at 836.

<sup>240</sup> *Id.* at 833.

<sup>241</sup> *Id.* at 835

Even aside from case law, CEQ's guidance document, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," explains the importance of 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 serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).<sup>242</sup>

CEQ's proposed striking of paragraph (c) of 40 C.F.R. 1502.14 is not only contrary to the goals of NEPA of ensuring informed decision-making, but it is contrary to judicial interpretations of NEPA itself. If CEQ finalizes this proposal, it will lead to arbitrary and capricious agency decision-making. Agencies that fail to evaluate a reasonable alternative outside their jurisdiction are in jeopardy of finding their EISs overturned by the courts. Rather than incite such unlawful agency action, and provoke resulting uncertainty, litigation, and delays, CEQ's proposal should be withdrawn.

**4. Establishing a "presumptive maximum number of alternatives for evaluation of a proposed action, or alternatively for certain categories of proposed actions," would violate agencies' statutory obligations to objectively evaluate all reasonable alternatives**

CEQ has requested 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)."<sup>243</sup> CEQ justifies this proposal by stating "[a]nalyzing a large number of alternatives,

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<sup>242</sup> 46 Fed. Reg. at 18,027.

<sup>243</sup> 85 Fed. Reg. at 1702.

particularly where it is clear that only a few alternatives would be economically and technically feasible and realistically implemented by the applicant, can divert limited agency resources.”<sup>244</sup>

Again, this proposed change to the 1978 NEPA regulations is not in accordance with the law. The number of alternatives that must be considered is plainly context specific, and it is hard to imagine a one-size-fits-all presumption that would not be entirely arbitrary. CEQ simply lacks the authority to pick an arbitrary number of alternatives that an agency must consider, and doing so would be contrary to NEPA.

As discussed above, “NEPA is premised on the assumption that all reasonable alternatives will be explored by [an] agency.”<sup>245</sup> An agency “has a duty ‘to study all alternatives that appear reasonable and appropriate for study . . . as well as significant alternatives suggested by other agencies or the public during the comment period.”<sup>246</sup>

By establishing a presumptive maximum number of alternatives for consideration, CEQ would not only be inhibiting agencies from engaging in informed decision making, but would also be inhibiting informed public participation. In addition, if a maximum were imposed, legitimate reasonable alternatives, including those that are called to the agencies’ attention by members of the public, would inevitably be ignored rather than evaluated. A cap on the number of alternatives considered would therefore likely prompt frequent – and meritorious – litigation, preventing agencies from using their limited resources effectively. That is precisely the opposite result that CEQ claims to want from imposing a cap. CEQ’s rationale is arbitrary.

**C. NEPA’s detailed statement of environmental impacts depends upon and requires a clear articulation of baseline conditions**

CEQ proposes to modify section 1502.15 of its regulations, “Affected Environment,” to explicitly allow an environmental document to combine its analyses

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<sup>244</sup> *Id.*

<sup>245</sup> *Concerned About Trident*, 555 F.2d at 825.

<sup>246</sup> *Dubois v. Dep’t of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996) (quoting *Roosevelt Campobello Int’l Park Comm’n v. U.S. EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982)).

of the affected environment – the baseline – and environmental consequences. CEQ’s stated justification for this proposal is that it “would ensure that the description of the affected environment is focused on those aspects of the environment that are affected by the proposed action.”<sup>247</sup> That obtuse and conclusory justification fails to identify any specific problem with the existing NEPA process, or to explain why its change would address that problem.

CEQ’s proposed conflation of an EIS’s description of baseline conditions and its analysis of environmental consequences would obfuscate rather than clarify such analyses. Without a clear understanding of the baseline, it is often impossible to understand the significance of the effects. Merging these two discussions would inevitably muddy them.

Currently, section 1502.15 of CEQ’s regulations requires an EIS to “succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration.”<sup>248</sup> Describing “the baseline conditions” allows an agency “to determine what effect the proposed action will have on the environment.”<sup>249</sup> “Without establishing the baseline conditions, there is no way to determine what effect the proposed action will have on the environment and, consequently, no way to comply with NEPA.”<sup>250</sup> As such, courts have generally held that a thorough and complete affected environment section is essential, as it ultimately establishes the environmental baseline needed to “identify the environmental consequences of a proposed agency action.”<sup>251</sup>

Courts have found environmental impact statements to be insufficient for failing to establish a clear environmental baseline. In *Half Moon Bay Fishermans’ Marketing*

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<sup>247</sup> 85 Fed. Reg. at 1702.

<sup>248</sup> 40 C.F.R. § 1502.15.

<sup>249</sup> *W. Watersheds Project v. Bureau of Land Mgmt.*, 552 F. Supp. 2d 1113, 1126-1127 (D. Nev. 2008).

<sup>250</sup> *Id.* at 1127.

<sup>251</sup> *Oregon Nat. Desert Ass’n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016) (quoting *Am. Rivers v. Fed. Energy Reg. Comm’n*, 201 F.3d 1186, 1195 n.15 (9th Cir. 1999), and noting that “several cases have found environmental analyses insufficient for failing to establish an environmental baseline”).

*Association v. Carlucci*, for example, the court of appeals ruled that the analysis in the EIS was inadequate because it failed to assess baseline underwater conditions at a site where it was proposed dredged materials would be dumped.<sup>252</sup> Similarly, in *Oregon Natural Desert Association v. Jewell*, the court of appeals held that BLM had failed to adequately assess baseline numbers of sage grouse present at a wind turbine site during winter months.<sup>253</sup> Clarity about the baseline is essential to an accurate, defensible EIS.

CEQ's proposal to allow the combining of the two sections unlawfully blurs the baseline and the environmental impacts. This outcome would impede analysis of potential impacts from the proposed action and the alternatives. That in turn would prevent informed decision making, and result in the wasteful drafting of inadequate EISs.

**D. CEQ's proposed delegation of EIS preparation to an applicant is improper**

CEQ's current regulations set out conflict-of-interest protections designed to maintain the integrity of the environmental review process when a party other than the federal government prepares environmental documents.<sup>254</sup> CEQ proposes to delete those protections and instead: (1) allow an agency to delegate preparation of an EIS to an inherently conflicted project applicant; (2) allow a private third party to choose a contractor to prepare an EIS; and (3) eliminate conflict-of-interest disclosure requirements of any private non-agency party preparing an EIS. Removing these conflict-of-interest provisions and allowing anyone—including a self-interested, profit-motivated, private-industry applicant—to prepare an EIS would undercut the public's trust in NEPA and the integrity and reliability of the environmental review process. CEQ must ensure the integrity of NEPA by maintaining, or even better, strengthening, its conflict-of-interest requirements.

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<sup>252</sup> 857 F.2d 505, 510 (9th Cir. 1988).

<sup>253</sup> 840 F.3d at 568.

<sup>254</sup> 40 C.F.R. § 1506.5.

As the public has recently seen in the context of airplane safety,<sup>255</sup> industry self-policing with only vague regulatory oversight can be a recipe for disaster. CEQ's proposed change to conflict of interest and delegation is a reversal of CEQ's long-standing position, and yet CEQ provides no support for this substantial alteration of how the statute is interpreted. CEQ's proposal is thus arbitrary and capricious.

**1. The proposal to allow delegation of EIS preparation to a project applicant is reversal of CEQ's long-standing position**

For the last forty years, CEQ has understood that preventing conflict of interest in preparation of environmental documents is vital "to preserve the objectivity and integrity of the NEPA process."<sup>256</sup> CEQ has interpreted the conflict-of-interest requirements in section 1506.5 broadly<sup>257</sup> because there is a "conflict of interest inherent in the situation of those outside the government coming to the government for money, leases or permits while attempting impartially to analyze the environmental consequences of their getting it."<sup>258</sup>

As legal scholars have explained regarding environmental assessments generally:

If handled properly, an [environmental document] may allay or at least reduce the fears and suspicions that individuals in the community may harbor about a particular proposed development. A good [environmental document] and a good process are useful tools in trying to build public support for an action. On the other hand, if the process appears biased or the outcome appears predetermined, the public will most likely lose

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<sup>255</sup> See, e.g., Natalie Kitroeff, David Gelles & Jack Nicas, "The Roots of Boeing's 737 Max Crisis: A Regulator Relaxes Its Oversight," *New York Times* (July 27, 2019), <https://www.nytimes.com/2019/07/27/business/boeing-737-max-faa.html>.

<sup>256</sup> 46 Fed. Reg. at 18,031; see also *Burkholder v. Peters*, 58 F. App'x 94, 98 (6th Cir. 2003) (citing *Associated Workers for Aurora's Residential Env't v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1129 (10th Cir. 1998) (quoting *Citizens Against Burlington v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991))).

<sup>257</sup> 46 Fed. Reg. at 18,031.

<sup>258</sup> 43 Fed. Reg. at 55,987.

confidence in the [environmental document] and support for the venture itself may well vanish.<sup>259</sup>

Thus, CEQ has not previously allowed applicants to prepare an EIS without independent and rigorous agency review. Applicants have an obvious conflict of interest when it comes to the relative thoroughness and potential stringency of environmental reviews. NEPA requires that decision makers understand all of the environmental impacts of a project before any decision about the project is made; it is well established NEPA law that an “EIS has to help the federal agency make a decision justifiable, rather than to justify a decision already made.”<sup>260</sup> But an applicant inherently only starts an environmental review process after it has already decided the basics of its proposal and, often, made a significant monetary investment in developing its proposal. The applicant therefore has a baked-in predisposition to ensure that the project is approved and proceeds in a way that creates the most profit. That, in turn, presents an obvious and inherent conflict of interest with NEPA’s goals.<sup>261</sup>

## **2. CEQ offers no evidence to support its delegation proposal, and available evidence does not support that proposal either**

Over the more-than-forty years during which CEQ’s current standard for delegation and conflicts-of-interest limitations has stood, the law and the federal

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<sup>259</sup> William L. Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 Colum. J. Envtl. L. 17, 47–48 (2000); see also Mark Squillace, *An American Perspective on Environmental Impact Assessment in Australia*, 20 Colum. J. Envtl. L. 43, 101 (1995) (“[W]hen handled properly, EIA enhances the political process because it inspires public confidence and builds public support for the chosen outcome. When the public is not involved in the EIA process or when the public lacks confidence in the documents produced during the process, support can be lost. This would occur even in those circumstances when the public might objectively support a project on its merits. No issue is more likely to undermine public confidence in the EIA process than the sense that it is biased.”).

<sup>260</sup> Robert P. Frank, *Delegation of Environmental Impact Statement Preparation: A Critique of NEPA’s Enforcement*, 13 B.C. Envtl. Aff. L. Rev. 79 (1985).

<sup>261</sup> See William L. Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 Colum. J. Envtl. L. 17, 48 (2000).



agencies tasked with implementing it have generated reams of evidence demonstrating the need for the current limitations. Yet, CEQ offers no examples of why the current system should be, in great measure, abandoned. All CEQ provides to support this major change is the conclusory statement that it is “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.”<sup>262</sup> This unsupported statement alone is insufficient to justify such a major reversal.

Available evidence in fact shows that delegation of authority impairs the quality of NEPA documents and, at least if sufficient oversight is conducted, the efficiency of the NEPA process. For example, there have been multiple instances in which the process has been delayed by an applicant that “does not initially provide the quantity or quality of information necessary for resource agencies’ field office staff to complete permits and consultations. These staff must then request additional information from the lead federal agency or project sponsor, extending the permit or consultation reviews.”<sup>263</sup> The Nuclear Regulatory Commission (NRC) provides a useful example. NRC currently has applicants prepare the environmental report.<sup>264</sup> Private applicants fail to include everything that is needed, requiring significant effort from the agency to badger them to include it, thereby opening the door to more litigation when the public sees the document and finds more holes in the review.<sup>265</sup>

Further, when responsibility to prepare an environmental review rests with the applicant, it is the applicant who then retains the detailed understanding of the project, not the agency. An immediate result is that the decision makers and public lack direct access to the information required to make an informed decision and lack direct access

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<sup>262</sup> 85 Fed. Reg. at 1705.

<sup>263</sup> Gov’t Accountability Office, *Highway and Transit Projects, Better Data Needed to Assess Changes in the Duration of Environmental Reviews*, GAO-18-536 (July 2018)[hereafter “GAO Highway and Transit Projects”].

<sup>264</sup> Anthony Roisman, Erin Honaker & Ethan Spaner, *Regulating Nuclear Power in The New Millennium (The Role Of The Public)*, 26 Pace Env’tl. L. Rev. 317, at 340 (2009).

<sup>265</sup> *Id.* at 323.

to those individuals who know that vital information.<sup>266</sup> A longer-term effect of the agency not preparing the environmental documents is that the agency will not be obligated to staff environmental experts, changing the internal culture of the agency. For example, because the Forest Service had to comply with NEPA, it had to hire “persons with backgrounds in biology, ecology, wildlife management, and soil protection” rather than those with backgrounds in logging and timber.<sup>267</sup>

Encouraging excessive communication between an agency and a private applicant is not always beneficial to the environmental review process. For example, critics of the Keystone XL pipeline “allege that the environmental review process has been tainted by State Department favoritism toward the company that plans to build the pipeline and by a financial conflict of interest in the company hired to develop an important environmental impact statement.”<sup>268</sup> Similar problems are apparent with the NRC, where agency staff side with the applicant in the hearing proceedings and not with the public party challenging the environmental review.

Experience with states’ preparation of environmental analyses for certain transportation projects provides additional evidence of problems. The Government Accountability Office recently reviewed the success of the Department of Transportation’s pilot program delegating environmental review responsibilities to the states. The Government Accountability Office found state-reported time savings “to be questionable for several reasons.”<sup>269</sup> While delegation may be easier for an agency as it limits the work the agency has to do, such delegation without critical and sufficient safeguards conflicts with NEPA’s mandates.

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<sup>266</sup> *Id.* at 324; Gov’t Accountability Office, *Highway and Transit Projects, Evaluation Guidance Needed for States with National Environmental Policy Act Authority*, GAO-18-222, at 25 (Jan. 2018).

<sup>267</sup> Mark Squillace, *An American Perspective on Environmental Impact Assessment in Australia*, 20 Colum. J. Envtl. L. 43, 102 n.31 (1995).

<sup>268</sup> Robert R. Kuehn, *Bias in Environmental Agency Decision Making*, 45 Envtl. L. 957, 959 (2015).

<sup>269</sup> Gov’t Accountability Office, *Highway and Transit Projects, Evaluation Guidance Needed for States with National Environmental Policy Act Authority*, GAO-18-222, at 27.

**3. CEQ's proposed safeguards will not effectively address the conflicts of interest created by delegating EIS preparation to a project applicant**

CEQ claims that its proposed rules would continue to ensure the integrity of NEPA by having agencies “guide,” “participate in,” and “evaluate” applicants’ environmental reviews. These undefined and vague standards are not sufficient to prevent errors or to satisfy NEPA’s requirements that agencies themselves take a hard look at the environmental consequences of their decisions. Indeed, it seems like an agency could claim to have complied with these proposed safeguards by making one small comment or a glancing evaluation, without doing the hard work necessary to catch errors and remove an applicant’s bias.

Such short-cuts are likely given the limited resources and time agencies have to complete necessary environmental analysis and public participation. Limited resources encourage agencies to rely heavily on the applicant. Indeed, if an agency were going to do as much work as if it were holding the pen, this approach would require duplication of effort – not efficiency. And if an agency does rely heavily on an applicant, the agency will not have brought its own full expertise and independence to the assessment process – the intent of NEPA.

**VII. The proposed regulations fail to meet NEPA’s mandate to evaluate the impacts of climate change**

As discussed above, NEPA requires agencies to analyze cumulative and indirect effects in order to fulfill their statutory mandate to “fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations.”<sup>270</sup> Congress enacted NEPA in “recogni[tion of] the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances.”<sup>271</sup>

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<sup>270</sup> NEPA § 101(b)(1), 42 U.S.C. § 4331(b)(1).

<sup>271</sup> *Id.* § 4331(a).

Climate change is the perfect example of a significant long-term environmental effect that must be analyzed and disclosed by an agency. Congress enacted NEPA to force agencies to look over time and space at problems that might not reveal themselves when simply focused on the direct effects of a specific agency action being considered. CEQ's proposed regulations unlawfully excuse agencies from adequately analyzing climate change impacts of and on their action. Likewise, CEQ's Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions (hereinafter, "Draft GHG Guidance")<sup>272</sup> unlawfully excuses agencies from adequately analyzing climate change impacts. In response to CEQ's request regarding codifying aspects of this guidance, we oppose any such codification.

NRDC submitted comments to CEQ on its Draft GHG Guidance on August 26, 2019.<sup>273</sup> In addition to preparing its own comments, NRDC joined comments submitted by NYU's Institute for Policy Integrity.<sup>274</sup> These comments identify numerous deficiencies in the Draft GHG Guidance, which are reiterated here. Both the Draft GHG Guidance and the proposed rule propose to restrict unlawfully agencies' analyses of GHG emissions and their impacts on the climate. CEQ's Draft GHG Guidance conflicts with NEPA and interpreting case law and would lead agencies toward non-compliance. We incorporate these prior comments by reference.

While purporting to guide agencies in complying with NEPA, the Draft GHG Guidance fails to inform agencies of the best available science and relevant judicial decisions addressing incorporation of GHG emissions and impacts into NEPA analysis. CEQ fails to inform agencies of the numerous tools now available for calculating GHG emissions and the impacts that such emissions can cause. Specifically, CEQ fails to offer guidance on existing methodology and proper scope of lifecycle GHG analysis,

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<sup>272</sup> 84 Fed. Reg. 30,097 (June 26, 2019).

<sup>273</sup> Natural Resources Defense Council, *Comments on Draft National Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, Docket identification number CEQ-2019-0002 (August 26, 2019), [hereinafter, "NRDC Comments"], attached hereto and incorporated herein as Exhibit 1.

<sup>274</sup> Institute for Policy Integrity, et al., *Misstatements of Legal Requirements and the Social Cost of Greenhouse Gases in the Draft Guidance on Consideration of Greenhouse Gas Emissions* (August 26, 2019) [hereinafter, "IPI Comments"], attached hereto and incorporated herein as Exhibit 2.

including upstream and downstream effects. CEQ also fails to provide guidance on agencies' requirements to identify and consider alternatives that would lessen the impacts of GHG emissions and climate change and to identify and analyze reasonable mitigation measures to reduce emissions. In fact, the words "climate change" are notably absent from the Draft GHG Guidance and CEQ's proposed rule changes, except in reference to the 2016 Final Guidance. Codification of CEQ's Draft GHG Guidance will violate and prompt violations of NEPA's statutory requirements.

**A. Climate change impacts are already occurring and must be analyzed and disclosed with greenhouse gas emissions**

The science on climate change is clear: greenhouse gases emitted into the atmosphere – the vast majority of which come from the anthropogenic combustion of fossil fuels – have caused approximately 1.0°C of global warming above pre-industrial levels.<sup>275</sup> The effects of this warming have already been felt, and will continue to be felt in the United States and around the world, in the form of greater intensity and frequency of extreme weather events (including heatwaves, forest fires, droughts, and

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<sup>275</sup>See Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report: Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 2, 4-5 (2015) [hereinafter "IPCC Synthesis Report"]; Intergovernmental Panel on Climate Change, *Climate Change 2013 Physical Science Basis: Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 11-12, 50-52, 96-97, 124-25, 166-67, 465-553 (2013) [hereinafter "IPCC Physical Science Basis Report"]; Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C* at 6-7 (2018) [hereinafter "IPCC Global Warming of 1.5°C"]; U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* at 10-11 (2017) [hereinafter "NCA4 Volume I"].

heavy rainfall); melting glaciers and sea ice; rising sea levels; and ocean acidification.<sup>276</sup> These effects are predicted to get worse the more global warming increases.<sup>277</sup>

Additional warming will likely lead to further impacts according to the IPCC, including:

- Warming of extreme temperatures in many regions. The number of hot days is projected to increase in most land regions;<sup>278</sup>

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<sup>276</sup> See, e.g., IPCC Synthesis Report, *supra*, at 40-43; 49-54; 56-73; IPCC Global Warming of 1.5°C, *supra* note, at 7-10; NCA4 Volume 1, *supra*, at 185-411; see generally Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation, and Vulnerability Part A: Global and Sectoral Aspects* (2014); Intergovernmental Panel on Climate Change, *Climate Change 2014 Impacts, Adaptation, and Vulnerability Part B: Regional Aspects* (2014); Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate: A Special Report of the Intergovernmental Panel on Climate Change* (2019); Intergovernmental Panel on Climate Change, *Climate Change and Land: An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems* (2019); U.S. Global Change Research Program, *Fourth National Climate Assessment: Volume II Impacts, Risks, and Adaptation in the United States* (David Reidmiller et al. eds. 2018), [https://nca2018.globalchange.gov/downloads/NCA4\\_2018\\_FullReport.pdf](https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf) (emphasis omitted) [hereinafter, “NCA4 Volume II”], attached hereto and incorporated herein as Exhibit 5.

<sup>277</sup> See, e.g., IPCC Synthesis Report, *supra*, at 8 (“Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems.”); *id.* at 17 (“Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st century will lead to very high risk of severe, widespread and irreversible impacts globally (*high confidence*).” (emphasis in original)).

<sup>278</sup> 2018 Intergovernmental Panel on Climate Change, *Summary for Policymakers, in Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* 9 (Valérie Masson-Delmotte et al. eds., 2018),

- Increases in frequency, intensity, and/or amount of heavy precipitation in several regions;<sup>279</sup>
- Increase in intensity or frequency of droughts in some regions;<sup>280</sup>
- Rise in global mean sea level, which could potentially expose millions of people to related risks including increased saltwater intrusion, flooding, and damage to infrastructure;<sup>281</sup>
- Impacts on biodiversity and ecosystems, including species loss and extinction associated with forest fires, the spread of invasive species, transformation of ecosystems from one type to another, loss of geographic range, and other climate related changes;<sup>282</sup>
- Increases in ocean temperature as well as associated increases in ocean acidity and decreases in ocean oxygen levels, and resultant risks to marine biodiversity, fisheries, and ecosystems, and their functions and services to humans;<sup>283</sup>
- Shifts in the ranges of many marine species to higher latitudes, increasing the amount of damage to many ecosystems; loss of coastal resources and reduced productivity of fisheries and aquaculture; irreversible loss of many marine and coastal ecosystems;<sup>284</sup>
- Ocean acidification-driven impacts to the growth, development, calcification, survival, and thus abundance of a broad range of species;<sup>285</sup>
- Risks to fisheries and aquaculture via impacts on the physiology, survivorship, habitat, reproduction, disease incidence, and risk of invasive species;<sup>286</sup>
- Disproportionately higher risk of adverse consequences to certain populations, including disadvantaged and vulnerable populations, some indigenous peoples,

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available at:

[https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15\\_SPM\\_version\\_stand\\_alone\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf) [hereinafter, *Summary of IPCC 1.5°C Report*], attached hereto and incorporated herein as Exhibit 4..

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 13

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 67.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

and local communities dependent on agricultural or coastal livelihoods. Poverty and disadvantage are expected to increase in some populations as global warming increases;<sup>287</sup>

- Negative consequences for human health including heat-related morbidity and mortality, ozone-related mortality, amplified impacts of heatwaves in cities resulting from urban heat islands, and increased risks from some vector-borne diseases, such as malaria and dengue fever, including potential shifts in their geographic range;<sup>288</sup>
- Net reductions in yields of maize, rice, wheat, and potentially other cereal crops, particularly in sub-Saharan Africa, Southeast Asia, and Central and South America, and in the CO<sub>2</sub>-dependent nutritional quality of rice and wheat;<sup>289</sup> and
- Potential adverse impacts to food security, depending on the extent of changes in feed quality, spread of diseases, and water resource availability.<sup>290</sup>

The 2018 United States Fourth National Climate Assessment ( NCA4 ) found “that the evidence of human-caused climate change is overwhelming and continues to strengthen, that the impacts of climate change are intensifying across the country, and that climate-related threats to Americans’ physical, social, and economic well-being are rising.”<sup>291</sup> Like the IPCC, the authors of NCA4 found that impacts are already occurring, concluding that “[t]he impacts of global climate change are already being felt in the United States and are projected to intensify in the future – but the severity of future impacts will depend largely on actions taken to reduce greenhouse gas emissions and to adapt to the changes that will occur.”<sup>292</sup> NCA4 found that:

- More frequent and intense extreme weather and climate-related events, as well as changes in average climate conditions, are expected to continue to damage

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<sup>287</sup> *Id.* at 69.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> U.S. Global Change Research Program, *Fourth National Climate Assessment: Volume II Impacts, Risks, and Adaptation in the United States* 36 (David Reidmiller et al. eds. 2018), [https://nca2018.globalchange.gov/downloads/NCA4\\_2018\\_FullReport.pdf](https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf) (emphasis omitted) [hereinafter, *NCA4*], attached hereto and incorporated herein as Exhibit 5.

<sup>292</sup> *Id.* at 34.



infrastructure, ecosystems, and social systems that provide essential benefits to communities.<sup>293</sup>

- 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.<sup>294</sup>
- Regional economies and industries that depend on natural resources and favorable climate conditions, such as agriculture, tourism, and fisheries, are vulnerable to the growing impacts of climate change.<sup>295</sup>
- Rising temperatures are projected to reduce the efficiency of power generation while increasing energy demands, resulting in higher electricity costs.<sup>296</sup>
- With continued growth in emissions at historic rates, annual losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century – more than the current gross domestic product (GDP) of many U.S. states.<sup>297</sup>
- Rising air and water temperatures and changes in precipitation are intensifying droughts, increasing heavy downpours, reducing snowpack, and causing declines in surface water quality, with varying impacts across regions. Future warming will add to the stress on water supplies and adversely impact the availability of water in parts of the United States.<sup>298</sup>
- Groundwater depletion is exacerbating drought risk in many parts of the United States, particularly in the Southwest and Southern Great Plains.<sup>299</sup>
- Rising air and water temperatures and more intense extreme events are expected to increase exposure to waterborne and foodborne diseases, affecting food and water safety.<sup>300</sup>

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<sup>293</sup> U.S. Global Change Research Program, *Summary Findings 25*, [https://nca2018.globalchange.gov/downloads/NCA4\\_Ch01\\_Summary-Findings.pdf](https://nca2018.globalchange.gov/downloads/NCA4_Ch01_Summary-Findings.pdf), attached hereto and incorporated herein as Exhibit 6.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 26.

<sup>298</sup> *Id.* at 27.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

- With continued warming, cold-related deaths are projected to decrease and heat-related deaths are projected to increase; in most regions, increases in heat-related deaths are expected to outpace reductions in cold-related deaths.<sup>301</sup>
- Climate change is also projected to alter the geographic range and distribution of disease-carrying insects and pests, exposing more people to ticks that carry Lyme disease and mosquitoes that transmit viruses such as Zika, West Nile, and dengue, with varying impacts across regions.<sup>302</sup>
- Many Indigenous peoples are reliant on natural resources for their economic, cultural, and physical well-being and are often uniquely affected by climate change. The impacts of climate change on water, land, coastal areas, and other natural resources, as well as infrastructure and related services, are expected to increasingly disrupt Indigenous peoples' livelihoods and economies, including agriculture and agroforestry, fishing, recreation, and tourism.<sup>303</sup>
- Increasing wildfire frequency, changes in insect and disease outbreaks, and other stressors are expected to decrease the ability of U.S. forests to support economic activity, recreation, and subsistence activities.<sup>304</sup>
- Climate change has already had observable impacts on biodiversity, ecosystems, and the benefits they provide to society, including the migration of native species to new areas and the spread of invasive species. Such changes are projected to continue, and without substantial and sustained reductions in global greenhouse gas emissions, extinctions and transformative impacts on some ecosystems cannot be avoided in the long term.<sup>305</sup>
- While some regions (such as the Northern Great Plains) may see conditions conducive to expanded or alternative crop productivity over the next few decades, overall, yields from major U.S. crops are expected to decline as a consequence of increases in temperatures and possibly changes in water availability, soil erosion, and disease and pest outbreaks.<sup>306</sup>
- Climate change and extreme weather events are expected to increasingly disrupt our Nation's energy and transportation systems, threatening more frequent and

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<sup>301</sup> *Id.* at 28.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 29.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

longer-lasting power outages, fuel shortages, and service disruptions, with cascading impacts on other critical sectors.<sup>307</sup>

- The continued increase in the frequency and extent of high-tide flooding due to sea level rise threatens America's trillion-dollar coastal property market and public infrastructure, with cascading impacts to the larger economy. Expected increases in the severity and frequency of heavy precipitation events will affect inland infrastructure in every region, including access to roads, the viability of bridges, and the safety of pipelines.<sup>308</sup>
- Rising water temperatures, ocean acidification, retreating arctic sea ice, sea level rise, high-tide flooding, coastal erosion, higher storm surge, and heavier precipitation events threaten our oceans and coasts. These effects are projected to continue, putting ocean and marine species at risk, decreasing the productivity of certain fisheries, and threatening communities that rely on marine ecosystems for livelihoods and recreation.<sup>309</sup>

## **B. Federal government decisions regarding fossil fuels will have impacts to climate change**

To avoid the worst of these impacts, experts have suggested that the international community keep global average surface temperatures rise to between 1.5°C to 2°C.<sup>310</sup> Studies have shown that in order to achieve that goal, a substantial portion of existing fossil fuel reserves would have to remain unused.<sup>311</sup> In fact, in order

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<sup>307</sup> *Id.* at 30.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 31.

<sup>310</sup> IPCC Global Warming of 1.5°C, *supra*, at 7-10.

<sup>311</sup> See, e.g., Christophe McGlade & Paul Ekins, *The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2°C*, 517 *Nature* 187, 187 (2015), attached hereto and incorporated herein as Exhibit 30; see also IPCC Synthesis Report, *supra*, at 30 ("Substantial reductions in emissions would require large changes in investment patterns . . ."); IPCC Physical Science Basis Report, *supra*, at 1033 ("To limit the warming caused by anthropogenic CO<sub>2</sub> emissions alone to be *likely* less than 2°C relative to the period 1861-1880, total CO<sub>2</sub> emissions from all anthropogenic sources would need to be limited to a cumulative budget of about 1000 PgC since that period. About half [445 to 585 PgC] of this budget was already emitted by 2011. Accounting for

to make reaching a 1.5°C goal more likely than not, existing fossil fuel infrastructure would have to be phased out – i.e., allowed to come to the end of its expected lifetime – immediately, and no new construction of fossil fuel infrastructure could occur.<sup>312</sup>

In this context, federal agencies’ fossil fuel production and transportation decisions are significant. A review of the best available science suggests that new fossil fuel extraction and end uses, such as combustion, will result in greenhouse gas emissions that will contribute to climate change. Each new federal agency action that allows additional coal mining or oil and gas extraction decreases the remaining global carbon budget available to avoid the worst impacts of climate change. And the federal government’s contribution to fossil fuel emissions is not minor: according to the U.S. Geological Survey (USGS), fossil fuel production on federal lands accounted for approximately twenty-four percent of national carbon dioxide emissions and seven percent of national methane emissions between 2005 and 2014.<sup>313</sup>

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projected warming effect of non-CO<sub>2</sub> forcing, a possible release of GHGs from permafrost or methane hydrates, or requiring a higher likelihood of temperatures remaining below 2°C, all imply a lower budget.”); IPCC Global Warming of 1.5°C, *supra*, at 14; NCA4 Volume I, *supra*, at 15.

<sup>312</sup> See Christopher J. Smith et al., *Current Fossil Fuel Infrastructure Does Not Yet Commit Us to 1.5°C Warming*, *Nature Communications* 2 (2019); see also United Nations Environment Programme, *Emissions Gap Report 2019*, at xiv (2019) (“Countries collectively failed to stop the growth in global GHG emissions, meaning that deeper and faster cuts are now required.”).

<sup>313</sup> Matthew D. Merrill et al., *Federal Lands Greenhouse Gas Emissions and Sequestration in the United States: Estimates for 2005-14*, U.S. Geological Survey Scientific Investigations Report 2018-5131 at 6 (2018)[hereinafter *USGS 2018 Report*], attached hereto and incorporated herein as Exhibit 11; see also Jayni Foley Hein, *Federal Lands and Fossil Fuels: Maximizing Social Welfare in Federal Energy Leasing*, 42 *Harv. Env’tl. L. Rev.* 1, 9, n. 26 (2018), available at: [https://policyintegrity.org/files/publications/federal\\_land\\_energy\\_leasing.pdf](https://policyintegrity.org/files/publications/federal_land_energy_leasing.pdf), attached hereto and incorporated herein as Exhibit 8 (citing U.S. Energy Info. Admin., *Sales of Fossil Fuels Produced from Federal and Indian Lands, FY 2003 through FY 2014* 9 (2015), available at: <https://perma.cc/AG74-3H3U>, attached hereto and incorporated herein as Exhibit 9); Office of Policy Analysis, U.S. Dep’t of the Interior, *U.S. Department of the Interior Economic Report FY 2015* 1 (2016), available at:

The Department of the Interior's Bureau of Land Management (BLM) acknowledges that the energy sector accounts for 84 percent (5,424.8 MMT CO<sub>2</sub> Eq.) of GHG emissions in the United States<sup>314</sup> and that fossil fuel combustion is the largest source of energy-related GHG emissions.<sup>315</sup> BLM states that U.S. energy related emissions increased 1.5 percent from 1990 to 2017, which were largely from fossil fuel combustion, non-energy use of fuels, and petroleum systems.<sup>316</sup> Thus, in the Draft GHG Guidance, CEQ must instruct federal agencies on how to fully analyze and disclose the impacts of their fossil fuels leasing and development decisions on GHG emissions and climate change.

Federal lands are also a critical carbon sink. The USGS found that in 2014, federal lands of the conterminous United States stored an estimated 83,600 MMT CO<sub>2</sub> Eq., in soils (63 percent), live vegetation (26 percent), and dead organic matter (10 percent).<sup>317</sup> In addition, the USGS estimated that Federal lands "sequestered an average of 195 MMT CO<sub>2</sub> Eq./yr between 2005 and 2014, offsetting approximately 15 percent of the CO<sub>2</sub> emissions resulting from the extraction of fossil fuels on Federal lands and their end-use combustion."<sup>318</sup> Yet the Draft GHG Guidance fails to provide guidance to federal agencies on how they should analyze the impacts of decisions that contribute to the elimination or degradation of these crucial carbon sinks, resulting loss of carbon storage, and related climate change impacts.

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[https://www.doi.gov/sites/doi.gov/files/uploads/fy2015\\_doi\\_econ\\_report\\_2016-06-20.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/fy2015_doi_econ_report_2016-06-20.pdf), attached hereto and incorporated herein as Exhibit 10).

<sup>314</sup> See Erik Vernon, Bureau of Land Management, Utah Office, Specialist Report – Greenhouse Gas Analysis for BLM Utah Oil and Gas Leasing at 4-5 (2019) [hereinafter, *Utah GHG Emissions Report*], [https://eplanning.blm.gov/epl-front-office/projects/nepa/121035/20000240/250000291/2019\\_BLM\\_Utah\\_OG\\_Leasing\\_Specialist\\_Report\\_on\\_GHG\\_revised.pdf](https://eplanning.blm.gov/epl-front-office/projects/nepa/121035/20000240/250000291/2019_BLM_Utah_OG_Leasing_Specialist_Report_on_GHG_revised.pdf), attached hereto and incorporated herein as Exhibit 12.

<sup>315</sup> *Id.* at 56.

<sup>316</sup> *Id.*

<sup>317</sup> USGS 2018 Report at 12-13.

<sup>318</sup> *Id.* at 1.

In addition, infrastructure projects such as bridges and railyards which will increase vehicle miles traveled (VMT), as well as regulatory projects such as the so-called SAFE regulation,<sup>319</sup> which is designed to stop increases in the federal corporate average fuel economy (CAFE) standards, will lead to increases in GHG emissions. The Draft GHG Guidance allows federal decisionmakers to conduct NEPA analyses on these projects in the dark, without appreciation or consideration of the background, causes, and nature of the risk that federal projects or regulatory actions pose to climate change.

Codifying the Draft GHG guidance would violate NEPA's mandate. To fulfill their NEPA obligations, agencies must disclose the full impacts of their decisions on the climate – rather than minimizing them by labeling them as “too remote.” Further, agencies must explain to the public what the quantitative estimates of their reasonably foreseeable greenhouse gas emissions mean in terms of their “*actual* environmental effects.”<sup>320</sup> CEQ cannot unlawfully preclude agencies from satisfying this obligation by labeling the impacts of their decisions on climate change as “insignificant” or “too remote” simply because climate change is a global phenomenon.

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<sup>319</sup> Nat'l Highway Traffic Safety Admin. & Env'tl. Prot. Agency, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (Aug. 24, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-08-24/pdf/2018-16820.pdf>, attached hereto and incorporated herein as Exhibit 13.

<sup>320</sup> *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008) (“While the EA quantifies the expected amount of CO<sub>2</sub> emitted from light trucks MYs 2005-2011, it does not evaluate the ‘incremental impact’ that these emissions will have on climate change or on the environment more generally. . . . The EA does not discuss the *actual* environmental effects resulting from those emissions . . . .”); *Or. Nat. Res. Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818, 822-23 (9th Cir. 2006) (rejecting assessment of logging project's impacts by looking exclusively at the number of acres to be harvested); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) (While tallies of “the number of acres to be harvested” and “the total road construction anticipated” were “a necessary component” and “a good start” to the analysis, respectively, they do not amount to the required “description of *actual* environmental effects”).

**C. Agencies must analyze and disclose the true magnitude of GHG pollution using the best available science**

NEPA requires agencies to fully analyze and disclose to the public the impacts of GHGs on the environment and climate change. When preparing NEPA documents, federal agencies are required to use high-quality information and accurate scientific analysis, and to ensure the professional and scientific integrity of the discussions and analyses therein.<sup>321</sup> CEQ's Draft GHG Guidance falls short of this standard.

First, agencies must not understate the climate impact of GHG emissions by using outdated or inaccurate estimates of global warming potential (GWP), which is a measure of the amount of warming caused over a designated period by the emission of one ton of a particular greenhouse gas relative to one ton of carbon dioxide.<sup>322</sup> GWPs are calculated for multiple time frames, commonly 20 years, 100 years, and 500 years, because the amount of warming a particular GHG causes differs when calculated for different time periods. For example, the GWPs for methane estimate how many tons of carbon dioxide emissions produce the same amount of global warming as a single ton of methane (36 tons over a 100-year period, 87 tons over a 20-year period).<sup>323</sup> Using GWPs to calculate equivalent emissions is important because some GHGs, such as methane, are much more potent than carbon dioxide, and/or have much greater climate impacts in the near-term than the long-term.<sup>324</sup> Under NEPA, "both short- and long-term effects are relevant."<sup>325</sup> Thus, agencies must consider the global warming potential

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<sup>321</sup>40 C.F.R. §§ 1500.1(b), 1502.24; *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1034 (10th Cir. 2001) (requiring agencies to use "the best available scientific information" pursuant to NEPA) (citation and footnote omitted).

<sup>322</sup> *Utah GHG Emissions Report* at 3; Gunnar Nyhre & Drew Shindell, et al., *Anthropogenic and Natural Radiative Forcing in IPCC, Climate Change 2013: The Physical Science Basis, Contribution of Working Group 1 to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 710-712 (2013), [http://www.climatechange2013.org/images/report/WG1AR5\\_Chapter08\\_FINAL.pdf](http://www.climatechange2013.org/images/report/WG1AR5_Chapter08_FINAL.pdf) [hereinafter, *IPCC Physical Science Basis*], attached hereto and incorporated herein as Exhibit 14.

<sup>323</sup> See IPCC Physical Science Basis Report 714.

<sup>324</sup> *Id.*

<sup>325</sup> 40 C.F.R. § 1508.27(a).

of GHG emissions over both the short-term (20-year GWP) and long-term (100- and 500-year GWPs).

Agencies, however, often fail to discuss the 20-year GWP for shorter-lived GHGs, such as methane, that have a disproportionately large climate-changing impact in the near term. There is no scientific argument for selecting 100 years compared with other choices.<sup>326</sup> For such a pollutant, it is arbitrary and capricious to consider only the 100-year GWP.<sup>327</sup> Further, NEPA requires a “full and fair discussion of significant environmental impacts.”<sup>328</sup> The environmental information made available to the public “must be of high quality,” and “[a]ccurate scientific analysis” proves “essential to implementing NEPA.”<sup>329</sup> NEPA requires an agency to ensure “scientific integrity” in its analyses.<sup>330</sup> Agencies must provide a “full and fair discussion” of the methane pollution resulting from their actions, as required by NEPA.<sup>331</sup>

The reverse problem exists with extremely long-lived GHGs, which last in the atmosphere much longer than 100 years. For these compounds, analysis is incomplete without discussing the 500-year GWP as well as the 100-year GWP.<sup>332</sup>

In order to disclose and assess both the long- and short-term impacts of its decisions as required by NEPA, CEQ should advise agencies to analyze and disclose the warming potential of GHG emissions using each of the IPCC’s current 20-year, 100-year, and 500-year GWPs.<sup>333</sup> Applying the current GWPs for GHGs for all three time periods could substantially change agencies’ assumptions regarding the GHG pollution impacts of a project or a regulatory change. A district court recently agreed with

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<sup>326</sup> *Id.* at 711.

<sup>327</sup> *See, e.g., Utah GHG Emissions Report* at 3; Federal Energy Regulatory Commission, *Draft Environmental Impact Statement for the Jordan Cove Energy Project* (CP17-494-000 and CP17-495-000) (March 29, 2019), <https://www.ferc.gov/industries/gas/enviro/eis/2019/03-29-19-DEIS.asp>.

<sup>328</sup> 40 C.F.R. § 1502.1.

<sup>329</sup> 40 C.F.R. § 1500.1(b).

<sup>330</sup> 40 C.F.R. § 1502.24.

<sup>331</sup> *See id.* § 1502.1.

<sup>332</sup> *See IPCC Physical Science Basis* at 711-712.

<sup>333</sup> *See IPCC Physical Science Basis Report*, at 712.



commenters on this point, finding that BLM violated NEPA where it failed to justify its use of GWPs based on a 100-year time horizon rather than the 20-year time horizon of the resource management plans (RMPs).<sup>334</sup>

**D. Agencies must analyze and disclose the impacts that could result from the greenhouse gas emissions produced by their actions**

In addition to including quantitative estimates of the total GHG emissions resulting from their approvals, agencies must also assess the ecological, economic, and social impacts of those emissions, including assessing their significance.<sup>335</sup> The inclusion of this information in an agency's NEPA analysis allows "members of the public and interested parties to evaluate this information, submit written comments where appropriate, and spur further analysis as needed."<sup>336</sup> Without all the relevant information, a NEPA analysis cannot "foster informed decision-making" and is unlikely to survive judicial scrutiny.<sup>337</sup> Agencies must analyze the significance and severity of emissions, so that decisionmakers and the public can determine whether and how those emissions should influence the choice among alternatives.<sup>338</sup>

Agencies should not place the burden of analyzing data and drawing conclusions from it on the public.<sup>339</sup> Even if it were possible for the public to analyze GHG emissions of agency decisions based on the data made available, it does not relieve agencies from their burden to consolidate the available data as part of its "informed decisionmaking" before taking action.<sup>340</sup>

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<sup>334</sup> *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, CV16-21-GF-BMM, 2018 WL 1475470, at \*18 (D. Mont. Mar. 26, 2018)

<sup>335</sup> See 40 C.F.R. §§ 1508.8(b), 1502.16(a)-(b).

<sup>336</sup> *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, CV16-21-GF-BMM, 2018 WL 1475470, at \*16 (D. Mont. Mar. 26, 2018).

<sup>337</sup> *Id.* (citing *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

<sup>338</sup> See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989) (recognizing that EIS must discuss "adverse environmental effects which cannot be avoided[,]'" which is necessary to "properly evaluate the severity of the adverse effects" (internal quotation marks and citation omitted)).

<sup>339</sup> *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 69 (D.D.C. 2013).

<sup>340</sup> *Id.* (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 303 (D.C. Cir. 2013)).

To take the required “hard look,” agencies must tell the public what quantitative estimates mean in terms of “actual environmental effects.”<sup>341</sup> While an agency is not required to use any specific protocols to determine the significance of emissions under NEPA, it must undertake a more robust discussion of GHG emissions.<sup>342</sup> This is because an agency’s failure to provide a discussion of the significance of impacts resulting from its decisions and associated climate implications deprives the public of important information on the cumulative GHG emissions and true climate implications of agency actions.<sup>343</sup> Accepted methods exist to quantify and analyze the significance of GHG emissions (through monetization), which agencies could use to evaluate the significance of those emissions and to balance consequences of emissions against benefits of a specific approval.<sup>344</sup>

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<sup>341</sup> *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008) (“While the EA quantifies the expected amount of CO<sub>2</sub> emitted from light trucks MYs 2005-2011, it does not evaluate the ‘incremental impact’ that these emissions will have on climate change or on the environment more generally. . . . The EA does not discuss the *actual* environmental effects resulting from those emissions . . . .”); *see also Or. Nat. Res. Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818, 822-23 (9th Cir. 2006) (rejecting assessment of logging project’s impacts by looking exclusively at the number of acres to be harvested); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) (holding that, while tallies of “the number of acres to be harvested” and “the total road construction anticipated” were “a necessary component” and “a good start” to the analysis, respectively, they do not amount to the required “description of *actual* environmental effects”); 40 C.F.R. § 1508.25(c).

<sup>342</sup> *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77 (D.D.C. 2019) (explaining that “quantitative analyses, combined with a robust qualitative discussion of local, regional, and national climate change, would satisfy NEPA’s hard look requirement”).

<sup>343</sup> *See Or. Nat. Desert Ass’n v. U.S. Bureau of Land Mgmt.*, 625 F.3d 1092, 1099 (9th Cir. 2010) (“[NEPA] require[es] agencies to take a ‘hard look’ at how the choices before them affect the environment, and then to place their data and conclusions before the public.”).

<sup>344</sup> *See* Jayni Hein et al., NYU School of Law Inst. for Policy Integrity, *Pipeline Approvals and Greenhouse Gas Emissions* 32 (2019), <https://policyintegrity.org/publications/detail/pipeline-approvals-and-greenhouse->

Thus, CEQ should encourage agencies to use appropriate tools to analyze and disclose the significance of emissions and related climate change impacts. One such tool is the Interagency Working Group’s Social Cost of Carbon,<sup>345</sup> which – even though purportedly withdrawn by Executive Order 13783<sup>346</sup> – remains the best available scientific and economic basis for determining the value of avoiding each ton of GHG emissions. Even Executive Order 13783 contemplates that agencies will:

monetiz[e] the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates . . . .<sup>347</sup>

For further discussion of the issues surrounding estimating the social costs of GHGs, see comments submitted by the Institute for Policy Integrity at New York University School of Law on the Draft GHG Guidance and this proposed rule.

The same considerations apply under NEPA. While the Draft GHG Guidance expands on the monetization of some impacts, it states that not all effects, like GHG emissions, need be monetized or quantified, but “[t]here may be some effects that are more capable of monetization or quantification, such as employment or other socio-economic impacts,” and the monetization of those can be included in a NEPA

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gas-emissions [hereinafter, *Pipeline Approvals and GHG Emissions*]; *Utah GHG Emissions Report* at 21.

<sup>345</sup> See Interagency Working Group on Social Cost of Greenhouse Gases, United States Government, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (Aug. 2016) [hereinafter, “IWG 2016 Report”], [https://www.epa.gov/sites/production/files/2016-12/documents/sc\\_co2\\_tsd\\_august\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf), attached hereto and incorporated herein as Exhibit 20.

<sup>346</sup> 82 Fed. Reg. 16,093 (Mar. 31, 2017).

<sup>347</sup> *Id.* § 5(c).

analysis.<sup>348</sup> However, an agency's failure to disclose the costs of its actions while simultaneously touting the economic benefits violates NEPA.<sup>349</sup>

### 1. The social cost of carbon

The 2016 Final Guidance stated that an agency may determine that a monetized assessment of GHG emissions may be appropriate and offered the social cost of carbon protocol (hereinafter, "SCC") as a metric to reflect the damages associated with an increase in carbon emissions.<sup>350</sup> Conversely, the Draft GHG Guidance specifically states that agencies need not use the SCC or other similar metrics, and goes on to explain that SCC estimates were originally developed for rulemakings and "not intended for socio-economic analysis under NEPA or decision-making on individual actions, including project-level decisions."<sup>351</sup> No reason is given for this abrupt change.

The SCC analysis is an important tool to effectuate the purposes of NEPA. The SCC can be used by agencies to put the significance of the emissions in a context that decisionmakers and members of the public can understand because it was "designed to quantify a project's contribution to costs associated with global climate change."<sup>352</sup> The SCC allows agencies to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options."<sup>353</sup>

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<sup>348</sup> Council on Env'tl. Quality, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,097, 30,098-99 (June 26, 2019), available at: [https://www.whitehouse.gov/wp-content/uploads/2017/11/CEQ-NEPA-Draft-GHG-Guidance-0331-ZA03-Final-062119\\_Web-Version.pdf](https://www.whitehouse.gov/wp-content/uploads/2017/11/CEQ-NEPA-Draft-GHG-Guidance-0331-ZA03-Final-062119_Web-Version.pdf) [hereinafter, *Draft GHG Guidance*].

<sup>349</sup> *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190-91 (D. Colo. 2014) (holding that the SCC was an available tool to quantify the significance of GHG impacts, and it was "arbitrary and capricious to quantify the *benefits* of the lease modifications and then explain that a similar analysis of the *costs* was impossible").

<sup>350</sup> 2016 *Final Guidance* at 32, n.86.

<sup>351</sup> *Draft GHG Guidance* at 30,098-99.

<sup>352</sup> *High Country Conservation Advocates*, 52 F. Supp. at 1190-91.

<sup>353</sup> 40 C.F.R. § 1502.14.

The SCC was developed by the Interagency Working Group (IWG) on Social Cost of Greenhouse Gases.<sup>354</sup> The IWG was comprised of multiple federal agencies and White House economic and scientific experts, and the SCC was developed using up-to-date peer-reviewed models.<sup>355</sup> According to one analysis, “[t]he SCC estimates the benefit to be achieved, expressed in monetary value, by avoiding the damage caused by each additional metric ton (tonne) of carbon dioxide (CO<sub>2</sub>) [released] into the atmosphere.”<sup>356</sup> These costs are created when GHG emissions force climate change,

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<sup>354</sup> Interagency Working Grp. on Social Cost of Greenhouse Gases (IWG), Technical Support Document: Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis - Under Executive Order 12866 at 1 (2016), *available at*: [https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc\\_tsd\\_final\\_clean\\_8\\_26\\_16.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc_tsd_final_clean_8_26_16.pdf) [hereinafter, IWG 2016 Report], attached hereto and incorporated herein as Exhibit 20. While Exec. Order No. 13783 (March 28, 2017) at § 5(b), disbanded the Federal Government’s Interagency Working Group on the Social Cost of Carbon, and withdrew its Technical Support Document (“TSD”) “as no longer representative of governmental policy,” notably, the Order did not refute or undermine the scientific or economic basis of the TSD, but rather withdrew the document for political reasons. Therefore, the protocol remains a credible tool for assessing the impacts of GHG emissions.

<sup>355</sup> Interagency Working Grp. on Social Cost of Carbon (IWG), Technical Support Document: - Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis - Under Executive Order 12866, at 2, 4 (2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulator-impact-analysis.pdf>, attached hereto and incorporated herein as Exhibit 21; Interagency Working Group on Social Cost of Carbon (IWG), Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, at 1-3 (2010), [https://www.epa.gov/sites/production/files/2016-12/documents/scc\\_tsd\\_2010.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf), attached hereto and incorporated herein as Exhibit 22.

<sup>356</sup> Ruth Greenspan Bell & Dianne Callan, *Env’tl. L. Inst., More than Meets the Eye: The Social Cost of Carbon in U.S. Climate Policy, in Plain English* 1 (2011), [https://wriorg.s3.amazonaws.com/s3fs-public/pdf/more\\_than\\_meets\\_the\\_eye\\_social\\_cost\\_of\\_carbon.pdf?\\_ga=2.264401292.2091293810.1554226136-1873117202.1554226136](https://wriorg.s3.amazonaws.com/s3fs-public/pdf/more_than_meets_the_eye_social_cost_of_carbon.pdf?_ga=2.264401292.2091293810.1554226136-1873117202.1554226136), attached hereto and incorporated herein as Exhibit 23.

increasing global temperatures. This leads to sea level rise, increased intensity of storms, drought, and other changes, which have negative economic impacts including property damage from storms and floods, reduced agricultural productivity, impacts on human health, and reduced ecosystem services. The SCC estimates the dollar value of these negative economic impacts and recognizes that every marginal ton of CO<sub>2</sub> carries with it a social cost of carbon.<sup>357</sup>

While the SCC may underestimate climate costs because it does not include all important damages, the IWG's social cost metrics remain the best estimates yet produced by the federal government for monetizing the impacts of GHG emissions and are "generally accepted in the scientific community."<sup>358</sup> Several courts have rejected agency refusals to use the SCC as a means of evaluating the impact of GHG emissions that result from agency action.<sup>359</sup> If an agency monetizes the economic benefits of fossil fuel extraction, it must then also monetize the costs of carbon pollution.<sup>360</sup> An agency may not assert that the social cost of fossil fuel development is \$0: "by deciding not to quantify the costs at all, the agencies effectively zeroed out the cost in [the] quantitative analysis."<sup>361</sup>

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<sup>357</sup> See Richard Revesz et al., *Global Warming: Improve Economic Models of Climate Change*, 508 *Nature* 173 (2014), [https://web.stanford.edu/~goulder/Papers/Published%20Papers/Revesz%20et%20al%20-%20Social%20Cost%20of%20Carbon%20\(Nature%20508\).pdf](https://web.stanford.edu/~goulder/Papers/Published%20Papers/Revesz%20et%20al%20-%20Social%20Cost%20of%20Carbon%20(Nature%20508).pdf), attached hereto and incorporated herein as Exhibit 24.

<sup>358</sup> 40 C.F.R. § 1502.22(b)(4).

<sup>359</sup> See, e.g., *Montana Env'tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1094-99 (D. Mont. 2017) (rejecting agency's failure to incorporate the federal SCC estimates into its cost-benefit analysis of a proposed mine expansion); *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 678-79 (7th Cir. 2016) (holding estimates of the SCC used to date by agencies were reasonable); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1189-93 (D. Colo. 2014) (holding the SCC was an available tool to quantify the significance of GHG impacts, and it was "arbitrary and capricious to quantify the *benefits* of the lease modifications and then explain that a similar analysis of the *costs* was impossible") (emphasis in original).

<sup>360</sup> See *Montana Env'tl. Info. Ctr.*, 274 F. Supp. 3d at 1094-99.

<sup>361</sup> *High Country Conservation Advocates*, 52 F. Supp. 3d at 1192; see also *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008)

As noted, while Executive Order 13783 purports to have revoked the Interagency Working Group's work product, it instructs agencies to rely on OMB Circular A-4. That document instructs that:

Special ethical considerations arise when comparing benefits and costs across generations. Although most people demonstrate time preference in their own consumption behavior, it may not be appropriate for society to demonstrate a similar preference when deciding between the well-being of current and future generations. Future citizens who are affected by such choices cannot take part in making them, and today's society must act with some consideration of their interest.<sup>362</sup>

For this reason, OMB cautioned against using high discount rates for decisions with intergenerational consequences.<sup>363</sup>

Even if NEPA does not require a cost-benefit analysis in every case, NEPA does require agencies to assess the significance of their actions, and the SCC remains one of the best tools available to analyze and disclose to the public the significance of GHG emissions and should not be arbitrarily taken off the table as a tool for analysis. For example, disclosing that a lease sale will have \$100 million in climate impacts presents an easily digestible figure for the public, as opposed to trying to minimize the impacts as a percentage of total emissions, for example, 0.05 percent.

## 2. The social cost of methane

Similarly, the Social Cost of Methane is another available tool that agencies could use in their NEPA analyses to analyze and disclose the significance of impacts of their decisions as required by CEQ's existing regulations, 40 C.F.R. §§ 1508.8(b), 1502.16(a)-

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(finding that while there is a range of potential social cost figures, "the value of carbon emissions reduction is certainly not zero").

<sup>362</sup> Office of Management and Budget, *Circular A-4*, at 35 (Sept. 17, 2003), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>, attached hereto and incorporated herein as Exhibit 25.

<sup>363</sup> *Id.* at 36.

(b). In August 2016, the IWG provided an update to the SCC technical support document,<sup>364</sup> adopting a similar methodology for evaluating the climate impact of each additional ton of methane and nitrous oxide emissions.<sup>365</sup> Similar to the SCC, the Social Cost of Methane provides a standard methodology that allows state and federal agencies to quantify the social benefits of reducing methane emissions.

The Social Cost of Methane is intended to “offer a method for improving the analyses of regulatory actions that are projected to influence [methane or nitrogen oxide] emissions in a manner consistent with how [carbon dioxide] emission changes are valued.”<sup>366</sup> Like the SCC, the Social Cost of Methane is presented as a range of figures across four discount rates; it is based on results from three integrated assessment models; displayed in dollars per metric ton of emissions; and increases over time because emissions become more damaging as their atmospheric concentrations increase.<sup>367</sup> The IWG estimated that each additional ton of methane emitted in 2020 will cost between \$540 and \$3,200 dollars (measured in 2007 dollars).<sup>368</sup>

The IWG’s social cost metrics remain the best estimates produced by the federal government for monetizing the impacts of GHG emissions and are “generally accepted

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<sup>364</sup> *IWG 2016 Report* at 2-3. The August 2016 update added some clarifying information around uncertainties in the modeling that supports the social cost of carbon, *id.* at 3-4, but did not adjust the damages values (the costs) published in the 2015 update, *id.*; compare *id.* at 4 with Interagency Working Group on Social Cost of Carbon (IWG), *Technical Support Document: - Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis - Under Executive Order 12866*, at 1, 3, 7 (revised 2015).

<sup>365</sup> Interagency Working Group on Social Cost of Greenhouse Gases (IWG), *Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide* 2-3 (2016), [https://www.epa.gov/sites/production/files/2016-12/documents/addendum\\_to\\_sc-ghg\\_tsd\\_august\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf), attached hereto and incorporated herein as Exhibit 26.

<sup>366</sup> *Id.* at 3.

<sup>367</sup> *Id.* at 3-77.

<sup>368</sup> *Id.* at 7 tbl.1. For comparison purposes, the current social cost of carbon values for CO<sub>2</sub> emissions in the 2019 to 2020 range is \$120 to \$123 per ton. *IWG 2016 Report* at app. A, tbl.A1, at 25.



in the scientific community,” as required by 40 C.F.R. § 1502.22(b)(4). This is true despite the issuance of Executive Order 13,783, which disbanded the IWG and formally withdrew its technical support documents “as no longer representative of governmental policy.”<sup>369</sup> However, this Executive Order did not find fault with any component of the IWG’s analyses. To the contrary, it encourages agencies to “monetiz[e] the value of changes in greenhouse gas emissions” and instructs agencies to ensure such estimates are “consistent with the guidance contained in OMB Circular A-4.”<sup>370</sup> The IWG tools, however, illustrate how agencies can appropriately comply with the guidance provided in Circular A-4, as OMB participated in the IWG and did not object to the group’s conclusions. As agencies follow the Circular’s standards for using the best available data and methodologies, they will necessarily choose similar data, methodologies, and estimates as the IWG, since the IWG’s work continues to represent the best estimates presently available.<sup>371</sup> Thus, the IWG’s 2016 update to the estimates of the Social Costs of Greenhouse Gases remains the best available and generally accepted tool for assessing the significance of GHG emissions, notwithstanding the fact that this document has since been withdrawn.

“‘Accurate scientific analysis’ is ‘essential to implementing NEPA,’” as CEQ itself has long understood, and “NEPA requires an agency to ensure ‘scientific integrity’ in its environmental assessments.”<sup>372</sup> For example, agencies “may not forgo using the social

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<sup>369</sup> Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, § 5(b), 82 Fed. Reg. 16,093, 16095-96 (Mar. 31, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-03-31/pdf/2017-06576.pdf>.

<sup>370</sup> *Id.* § 5(c), at 16,096.

<sup>371</sup> Richard L. Revesz et al., *Best Cost Estimate of Greenhouse Gases*, 357 Science 655, 655 (2017), [http://policyintegrity.org/files/publications/Science\\_SCC\\_Letter.pdf](http://policyintegrity.org/files/publications/Science_SCC_Letter.pdf), attached hereto and incorporated herein as Exhibit 27 (explaining that, even after President Trump’s Executive Order, the social cost of GHG estimate of \$50 per ton of carbon dioxide is still the best estimate).

<sup>372</sup> *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 79 n.31 (D.D.C. 2019) (citations omitted). CEQ is proposing to delete from its regulations its existing statement that accurate scientific analysis is essential to NEPA’s implementation, but CEQ cannot seriously be disputing the importance of accurate science. If it is, CEQ has provided no rationale for a change in position on this issue..

cost of carbon simply because courts have thus far been reluctant to mandate it.”<sup>373</sup> *Id.* “Given that the Department of Energy and other agencies consider the social cost of carbon reliable enough to support rulemakings . . . the protocol may one day soon be a necessary component of NEPA analyses.”<sup>374</sup>

In the absence of other tools, CEQ’s Draft GHG Guidance should encourage agencies to use the Social Costs of Greenhouse Gases to assist in analyzing and disclosing to the public the significance of the GHG emissions resulting from their actions under NEPA. Even if NEPA does not require a cost-benefit analysis in all cases, it does require agencies to assess the significance of their actions, and the Social Costs of Greenhouse Gases remain as some of the best tools available to analyze and disclose to the public the significance of GHG emissions. Critically, these protocols not only contextualize costs associated with climate change but can also be used as a proxy for understanding climate impacts and comparing alternatives.<sup>375</sup>

Because the Draft GHG Guidance proposes to restrict agencies’ abilities to contextualize the significance of the GHG emissions by encouraging them not to use the SCC or other similar metrics, agencies will struggle to determine the significance of the GHG emissions resulting from their actions. Consequently, the Draft GHG Guidance should not be codified in the proposed rule.

### 3. Global carbon budgeting

Another measuring standard available to agencies for analyzing the significance of GHG emissions is to apply those emissions to the remaining global carbon budget through carbon budgeting – which offers a cap on the remaining stock of greenhouse

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<sup>373</sup> *Id.*

<sup>374</sup> *Id.* (citing *Zero Zone, Inc. v. U.S. Dep’t of Energy*, 832 F.3d 654, 677 (7th Cir. 2016)); see *High Country Conservation Advocates*, 52 F. Supp. 3d at 1193 (“I am not persuaded by the[] cases [the Government cites], or by anything in the record, that it is reasonable completely to ignore a tool in which an interagency group of experts invested time and expertise.”).

<sup>375</sup> See 40 C.F.R. § 1502.22(a) (stating agency “shall” include all “information relevant to reasonably foreseeable significant adverse impacts [that] is essential to a reasoned choice among alternatives”).

gases that can be emitted while keeping global average temperature rise below scientifically researched warming thresholds, beyond which climate change impacts may result in severe and irreparable harm.<sup>376</sup> Research shows that enormous and rapid cuts in GHG emissions are needed to meet climate goals. The IPCC's Special Report on 1.5°C estimated a remaining budget from the start of 2018 of approximately:

- 420 Gigatonnes of CO<sub>2</sub> (GtCO<sub>2</sub>) for a two-thirds chance of limiting warming to 1.5°C;<sup>377</sup>
- 580 GtCO<sub>2</sub> for a 50 percent chance of limiting warming to 1.5°C;<sup>378</sup>
- 1170 GtCO<sub>2</sub> for a two-thirds chance of limiting warming to 2°C;<sup>379</sup> and
- 1500 GtCO<sub>2</sub> for a 50 percent chance of limiting warming to 2°C.<sup>380</sup>

In order to meet these targets, global CO<sub>2</sub> emissions would need to reach net zero in about 30 years to stay within a 580 GtCO<sub>2</sub> budget, reduced to 20 years for a 420 GtCO<sub>2</sub> budget.<sup>381</sup>

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<sup>376</sup> The Paris Agreement states that global warming must be held “well below 2°C above pre-industrial levels” with a goal to “limit the temperature increase to 1.5°C.” U.N. Framework Convention on Climate Change Conference of the Parties, Twenty-First Session, *Adoption of the Paris Agreement*, Art. 2, U.N. Doc. FCCC/CP/2015/L.9/Rev.I (Dec. 12, 2015), [http://unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf) [hereinafter, *Paris Agreement*], attached hereto and incorporated herein as Exhibit 28.

<sup>377</sup> See Joeri Rogelj et al., *Mitigation Pathways Compatible With 1.5°C in the Context of Sustainable Development* 108 tbl.2.2 (V. Masson-Delmotte et al. eds., 2018) (IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty) [hereinafter, *Chapter 2 of IPCC 1.5°C Report*], [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15\\_Chapter2\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_Chapter2_Low_Res.pdf), attached hereto and incorporated herein as Exhibit 29.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* at 96.

However, there are also significant uncertainties in these carbon budgets – uncertainties that in some cases are nearly as large as the entire budgets themselves. While the multiple sources of uncertainties cannot be formally combined, the IPCC concluded that, overall, “current understanding of the assessed geophysical uncertainties suggests at least a  $\pm 50\%$  possible variation for remaining carbon budgets for 1.5°C-consistent pathways.”<sup>382</sup> In other words, the remaining global carbon budget may be significantly smaller than these estimated budgets. The potential carbon emissions from existing fossil fuel reserves – the known belowground stock of extractable fossil fuels – considerably exceed both 2°C and 1.5°C of warming. Globally, the IPCC found in AR5 that, “[e]stimated total fossil carbon reserves exceed [the 2°C budget] by a factor of 4 to 7.”<sup>383</sup> Another study found that, to meet the target of 2°C, “a third of oil reserves, half of gas reserves and over 80 percent of current coal reserves should remain unused from 2010 to 2050.”<sup>384</sup>

Research shows that potential emissions from just U.S. federal fossil fuels could take up all or a significant portion of the remaining global carbon budget. A 2015 analysis prepared by EcoShift Consulting estimated that the potential emissions from all U.S. fossil fuels is 697-1,070 GtCO<sub>2</sub>eq.<sup>385</sup> Federal fossil fuels – including crude oil, natural gas, coal, oil shale, and tar sands – account for as much as 492 GtCO<sub>2</sub>eq, or

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<sup>382</sup> *Id.* at 107.

<sup>383</sup> 2014 Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report: Contribution of Working Groups I, II, and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 63 (Rajendra K. Pachauri et al. eds. 2015), available at: [https://archive.ipcc.ch/pdf/assessment-report/ar5/syr/SYR\\_AR5\\_FINAL\\_full\\_wcover.pdf](https://archive.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf) (emphasis omitted) [hereinafter, AR5], attached hereto and incorporated herein as Exhibit 7.

<sup>384</sup> Christophe McGlade & Paul Ekins, Letter, *The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2°C*, 517 *Nature* 187, 187 (2015), <https://www.nature.com/articles/nature14016.pdf>, attached hereto and incorporated herein as Exhibit 30.

<sup>385</sup> Dustin Mulvaney et al., EcoShift Consulting, *The Potential Greenhouse Gas Emissions of U.S. Federal Fossil Fuels* 18 (2015), <https://www.ourenergypolicy.org/wp-content/uploads/2015/08/Potential-Greenhouse-Gas-Emissions-U-S-Federal-Fossil-Fuels.pdf>, attached hereto and incorporated herein as Exhibit 31.

approximately 46 to 50 percent of total potential emissions.<sup>386</sup> Unleased federal fossil fuels comprise 91 percent of these potential emissions, with already leased federal fossil fuels accounting for as much as 43 GtCO<sub>2</sub>eq.<sup>387</sup> Unleased federal natural gas has potential GHG emissions ranging from 37.86 to 47.26 GtCO<sub>2</sub>eq, while leased federal gas represents 10.39 to 12.88 GtCO<sub>2</sub>eq.<sup>388</sup> Unleased federal crude oil has potential GHG emissions ranging from 37.03 to 42.19 GtCO<sub>2</sub>e, while potential emissions from leased federal crude oil represents from 6.95 to 7.92 GtCO<sub>2</sub>e.<sup>389</sup>

While global carbon budgets are imperfect, they represent tools presently available to agencies to use in analyzing and disclosing to the public the significance of their decisions on GHG emissions and their implications for climate change. The global carbon budget is rapidly being spent, and every additional ton of emissions is a debit against the climate. Thus, CEQ's Draft GHG Guidance should encourage agencies to measure the cumulative emissions resulting from their actions against the remaining carbon budget, thereby providing agencies and the public the necessary context for understanding the significance of their decisions.<sup>390</sup> CEQ should not codify the Draft GHG Guidance since it provides no guidance to agencies on how to contextualize the significance of the emissions resulting from their actions in a meaningful way for decisionmakers and the public to understand.

**E. Agencies must consider a range of reasonable alternatives, including those that reduce GHG emissions**

Congress, through the NEPA process, requires agencies to “study, develop, and describe” reasonable alternatives to the agency’s proposed action.<sup>391</sup> This alternative analysis forms the “heart” of the NEPA process.<sup>392</sup> To fulfill this mandate, federal agencies must “[r]igorously explore and objectively evaluate *all* reasonable

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<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> See 40 C.F.R. § 1508.27(a).

<sup>391</sup> 42 U.S.C. § 4332(2)(C)(iii), (2)(E).

<sup>392</sup> 40 C.F.R. § 1502.14.

alternatives.”<sup>393</sup> As the Ninth Circuit has explained, “[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate.”<sup>394</sup>

Agencies must analyze and disclose the GHG emissions associated with each alternative, so they can meaningfully consider a reasonable range of alternatives that would decrease the emissions resulting from their actions. For example, the Ninth Circuit violated NEPA when it found that the National Highway Traffic Safety Administration failed to analyze an alternative raised by an outside commentator in its environmental analysis that would have decreased emissions.<sup>395</sup>

Further, in *Western Organization of Resource Councils (WORC) v. BLM*, the court invalidated EISs for the Buffalo and Miles City resource management plans (RMPs) because BLM failed to consider a reasonable alternative that reduced the amount of coal made available under the plans.<sup>396</sup> The court found that “BLM’s failure to consider any alternative that would decrease the amount of extractable coal available for leasing rendered inadequate the Buffalo EIS and Miles City EIS in violation of NEPA.”<sup>397</sup> The court explained, “BLM cannot acknowledge that climate change concerns defined, in part, the scope of the RMP revision while simultaneously foreclosing consideration of alternatives that would reduce the amount of available coal based upon deference to an earlier coal screening that failed to consider climate change.”<sup>398</sup> Similarly, in *Wilderness Workshop v. BLM*, the court found that BLM failed to consider reasonable alternatives by omitting any option that would meaningfully limit oil and gas leasing and development

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<sup>393</sup> *Id.* § 1502.14(a) (emphasis added).

<sup>394</sup> *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) (citation omitted).

<sup>395</sup> *Center for Biological Diversity v. NHTSA*, 538 F.3d. at 1217- 1219; see also *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1236 (10th Cir. 2017) (holding that BLM erred in adopting a “no action” alternative that assumed that coal from proposed project would be perfectly substituted for in the energy marketplace, leading BLM to conclude, wrongly, that environmental impacts of proposed action would not differ between proposed action and “no action” alternative); *Mont. Envtl. Info. Ctr.*, 274 F.Supp.3d at 1098 (same).

<sup>396</sup> No. CV 16-21-GF-BMM, 2018 WL 1475470 at \*9 (D. Mont. Mar. 26, 2018).

<sup>397</sup> *Id.*.

<sup>398</sup> *Id.* at \*17.

within the planning area.<sup>399</sup> Accordingly, CEQ must instruct agencies on how to avoid these types of NEPA violations in the future.

In the 2016 Final Guidance, CEQ instructed: “[w]hen conducting the [reasonable alternatives] analysis, an agency should compare the anticipated levels of GHG emissions from each alternative – including the no-action alternative – and mitigation actions to provide information to the public and enable the decision maker to make an informed choice.”<sup>400</sup> It also instructed agencies to “consider reasonable alternatives and mitigation measures to reduce action-related GHG emissions or increase carbon sequestration in the same fashion as they consider alternatives and mitigation measures for any other environmental effects.”<sup>401</sup>

Conversely, the Draft GHG Guidance provides little guidance on alternatives, merely noting that “agencies should consider reasonable alternatives to the proposed action” and that “comparing alternatives based on potential effects due to GHG emissions, along with other potential effects and economic and technical considerations, can help agencies differentiate among alternatives.”<sup>402</sup> CEQ should make specific recommendations and provide detailed guidance for agencies on how to properly quantify GHG emissions for each analyzed alternative, so that agencies can meaningfully analyze and differentiate among alternatives – including mitigation alternatives to reduce GHG emissions and climate change – to present to decisionmakers and the public.

For these reasons, CEQ should not codify its Draft GHG Guidance as written.

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<sup>399</sup> 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018).

<sup>400</sup> 2016 *Final Guidance* at 15.

<sup>401</sup> *Id.*

<sup>402</sup> *Draft National Env'tl. Policy Act Guidance on Considerations of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019).

## F. Mitigation measures

CEQ's 2011 guidance on mitigation and monitoring states that agencies must include mitigation measures among the alternatives compared in an EIS.<sup>403</sup>

In the 2016 Final Guidance, CEQ found that mitigation was an essential part of NEPA and recommended that federal agencies work with state, local, and tribal governments and private parties to determine the best ways to mitigate effects of the proposed federal action.<sup>404</sup> It also recommended that federal agencies ensure mitigation measures are implemented and monitor them for effectiveness.<sup>405</sup> Examples of mitigation measures were provided, such as enhanced energy efficiency, lower GHG-emitting technology, carbon capture, carbon sequestration, sustainable land management practices, and capturing or beneficially using GHG emissions such as methane.<sup>406</sup> By contrast, the Draft GHG Guidance provides no assistance to agencies in determining effective mitigation measures in an attempt to reduce or eliminate emissions – instead, it merely notes that “NEPA does not require agencies to adopt mitigation measures.”<sup>407</sup>

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<sup>403</sup> Council on Env'tl. Quality, *Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact 6* (2011), [https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation\\_and\\_Monitoring\\_Guidance\\_14Jan2011.pdf](https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf), attached hereto and incorporated herein as Exhibit 32; 40 C.F.R. § 1502.14(f) (requiring agencies to “include appropriate mitigation measures not already included in the proposed action or alternatives” in an EIS); see also *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (“Though NEPA, of course, does not require that [environmental] harms actually be mitigated, it does require that an EIS discuss mitigation measures, with ‘sufficient detail to ensure that environmental consequences have been fairly evaluated.’”).

<sup>404</sup> 2016 *Final Guidance*, at 18-19.

<sup>405</sup> *Id.* at 19-20.

<sup>406</sup> *Id.* at 19.

<sup>407</sup> *Draft GHG Guidance*, 84 Fed. Reg. at 30,098.



## **G. The state of the affected environment**

NEPA requires identification of the affected environment to provide a basis for comparing the current and future state of the environment.<sup>408</sup> Agencies must consider whether the proposed action would be affected by reasonably foreseeable changes to the affected environment. First, the Draft GHG Guidance simply states that no new research or analyses of potential changes to the environment must be completed.<sup>409</sup> By contrast, the 2016 Final Guidance went into much greater detail, recommending agencies consider how future climate change risks, adaptation, and resilience will affect the affected environment and thus the proposed action.<sup>410</sup> The 2016 Final Guidance also recognized the potential vulnerability of an environment to climate change, and how impacts from a proposed action may be exacerbated in a vulnerable environment.<sup>411</sup> Although the 2016 Final Guidance also provided that no new research or analyses are required where none exists, it directed agencies to refer to the most recent reports and climate modeling, like the national climate assessments.<sup>412</sup> The Draft GHG Guidance that CEQ is currently considering codifying in its proposed rule changes does not.

## **H. Agencies must analyze and disclose the impacts of their decisions on vulnerable populations and public health**

The Draft GHG Guidance being considered notably lacks a discussion regarding how agencies should analyze and disclose the impacts of GHG emissions and climate change on vulnerable populations and public health.

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<sup>408</sup> See 40 C.F.R. § 1502.15.

<sup>409</sup> *Draft GHG Guidance*, 84 Fed. Reg. at 30,098 (“In accordance with NEPA’s rule of reason and standards for obtaining information regarding reasonably foreseeable effects on the human environment, agencies need not undertake new research or analysis of potential changes to the affected environment in the proposed action area . . .”).

<sup>410</sup> *2016 Final Guidance*, at 20 (stating that climate change adaptation and resilience are “important considerations for agencies contemplating and planning actions with effects that will occur both at the time of implementation and into the future”).

<sup>411</sup> *Id.* at 21.

<sup>412</sup> *Id.* at 22.

## 1. Vulnerable populations

While CEQ's 2016 Final Guidance recommended that federal agencies incorporate environmental justice principles into their programs, policies, and activities,<sup>413</sup> the Draft GHG Guidance makes no mention of this. The 2016 Final Guidance further recommended that agencies consider whether the effects of climate change, in association with the effects of a proposed agency action, may result in a disproportionate effect on minority and low-income populations.<sup>414</sup>

Federal agencies are required to consider environmental justice impacts under Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations," which was issued to ensure that the environmental consequences of federal actions do not unduly fall on minority and low-income populations.<sup>415</sup> Minority and low-income populations are most severely impacted by climate change because they live in places "more susceptible to climate change and in housing that is less resistant; lose relatively more when affected; have fewer resources to mitigate the effects; and get less support from social safety nets or the financial system to prevent or recover from the impact."<sup>416</sup> Agencies that make decisions impacting climate change should consider environmental justice because any adverse effects of GHG emissions or climate change are exacerbated in these vulnerable populations.<sup>417</sup> However, in contrast to the 2016 Final Guidance, the Draft GHG Guidance makes no mention of

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<sup>413</sup> *Id.* at 23.

<sup>414</sup> *Id.*

<sup>415</sup> *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12,898, 59 Fed. Reg. 32 (Feb. 11, 1994), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>, attached hereto and incorporated herein as Exhibit 33.

<sup>416</sup> Human Rights Council, *Climate Change and Poverty: Report of the Special Rapporteur on Extreme Poverty and Human Rights* 5 (2019), [https://srpoverty.org.files.wordpress.com/2019/06/unsr-poverty-climate-change-a\\_hrc\\_41\\_39.pdf](https://srpoverty.org.files.wordpress.com/2019/06/unsr-poverty-climate-change-a_hrc_41_39.pdf), attached hereto and incorporated herein as Exhibit 34

<sup>417</sup> See Douglas Fisher, *Climate Change Hits Poor Hardest in U.S.*, Scientific Am. (May 29, 2009), <https://www.scientificamerican.com/article/climate-change-hits-poor-hardest/>, attached hereto and incorporated herein as Exhibit 44.

environmental justice issues or climate change impacts on vulnerable populations and thus should not be codified.

## 2. Public health

CEQ has long understood that Federal agencies must consider the public health impacts of a proposed action pursuant to NEPA.<sup>418</sup> As indicated by the references cited earlier in these comments, climate change driven by GHG emissions has severe impacts on public health, including heat-related deaths and illnesses, increased ground-level ozone, which is associated with diminished lung function, and the creation of a more hospitable environment for fleas, ticks, mosquitos, and other carriers of vector-borne diseases such as Lyme disease and West Nile virus.<sup>419</sup>

In the 2016 Final Guidance, CEQ acknowledged findings by the United States Global Change Research Program (“USGCRP”), the National Research Council, the IPCC, and the U.S. Environmental Protection Agency (“EPA”) that elevated concentrations of GHGs are anticipated to endanger the public health and welfare.<sup>420</sup> The 2016 Final Guidance recommended that federal agencies use the projected GHG emissions of a proposed action as a proxy to assess the proposed action’s effect on climate change,<sup>421</sup> and quantify GHG emissions to disclose the public health impacts of

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<sup>418</sup> 40 C.F.R. §§ 1508.25, 1508.8 (requiring agencies to consider direct, indirect, and cumulative impacts in an environmental impact statement, which include ecological, aesthetic, historic, cultural, economic, social, or *health* effects); Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. Env’tl. Aff. L. Rev. 601, 605 (2006), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1101&context=ealr>, attached hereto and incorporated herein as Exhibit 35.

<sup>419</sup> *Climate Change and Public Health*, Geo. Env’tl. L. Rev. Online 1, 1 (2017), attached hereto and incorporated herein as Exhibit 36.

<sup>420</sup> See 2016 Final Guidance, at 8; see also *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

<sup>421</sup> 2016 Final Guidance, at 10.

a proposed action in clear terms to fulfill NEPA obligations by providing sufficient information to make a reasoned choice between alternatives.<sup>422</sup>

By contrast, the Draft GHG Guidance provides no guidance on public health and only briefly mentions the requirement to consider health in the NEPA analysis in its discussion of cost-benefit analysis.<sup>423</sup> The Draft GHG Guidance states that not all effects, including potential effects of GHG emissions, are required to be quantified in the NEPA analysis and merely recommends that an agency should “explain the choices it has made” when the agency decides to quantify some effects but not others.<sup>424</sup> Also absent from the Draft GHG Guidance is any discussion of the potential endangerment to public health resulting from elevated concentrations of GHGs. Such omissions fail to meet NEPA’s statutory mandate and should not be codified.

#### **I. CEQ fails to justify its departure from past practice regarding analysis of climate change**

CEQ’s 2016 Final Guidance offered many suggestions for quantifying GHG emissions. It directed agencies to quantify GHG emissions using available analyses, unless such analyses or information are “unavailable, or the complexity of comparing emissions from various sources would make quantification overly speculative.”<sup>425</sup> If this were the case, agencies were advised that they must still quantify emissions to the extent possible and then explain the extent to which the information is unavailable.<sup>426</sup> It also noted that there are sophisticated and reliable tools widely available for government use.<sup>427</sup> For estimates of direct and indirect GHG emissions, the 2016 Final Guidance directed agencies to several analyses by governmental agencies and offices and other available information.<sup>428</sup>

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<sup>422</sup> *Id.*

<sup>423</sup> *Draft GHG Guidance*, 84 Fed. Reg. at 30,099.

<sup>424</sup> *Id.*

<sup>425</sup> *2016 Final Guidance* at 16.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* at 12.

<sup>428</sup> *Id.* at 16.

Available tools for quantifying GHG gas emissions include:<sup>429</sup>

U.S. Department of Agriculture

- The Carbon On Line Estimator (COLE), a software program that allows users to generate estimates for forest carbon inventory and carbon growth-and-yield curves. It can be used by agencies to compare estimated net GHG emissions and carbon stock changes that are expected to occur under proposed land or resource management actions.<sup>430</sup>
- The agency's 2014 report entitled *Quantifying Greenhouse Gas Fluxes in Agriculture and Forestry: Methods for Entity-Scale Inventory*, which provides a comprehensive review of techniques for estimating GHG emissions and removals from agricultural and forestry activities and outlines preferred scientific methods for estimating GHG emission at the farm or forest scale.<sup>431</sup> A study produced for the agency in 2012 entitled *Report of Greenhouse Gas Accounting Tools for Agriculture and Forestry Sectors*, which provides an overview of publicly accessible tools for quantifying GHG emissions and offsets from agricultural and forestry activities.<sup>432</sup>
- A study produced for the agency in 2011 entitled *Greenhouse Gas Emissions from U.S. Agriculture and Forestry: A Review of Emission Sources, Controlling Factors, and Mitigation Potential*, which provides a synthesis of the best available science regarding controlling factors and mitigation technologies for GHG emissions in U.S. agriculture and forestry.<sup>433</sup>

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<sup>429</sup> Because the majority of these tools are software programs, they are not included as exhibits attached to the Comments. Nonetheless, full citations to their locations online have been included to assist CEQ officials in accessing and reviewing them.

<sup>430</sup> COLE (*Carbon OnLine Estimator*), U.S. Dep't of Agric. & U.S. Forest Serv. (last visited Mar. 8, 2020), <https://www.fs.usda.gov/ccrc/tools/cole>.

<sup>431</sup> Marlen Eve et al. eds., U.S. Dep't of Agric., *Quantifying Greenhouse Gas Fluxes in Agriculture and Forestry: Methods for Entity-Scale Inventory* (2014).

<sup>432</sup> Karolien Denef et al., U.S. Dep't of Agric., *Report of Greenhouse Gas Accounting Tools for Agriculture and Forestry Sectors* (2012).

<sup>433</sup> Karolien Denef et al., U.S. Dep't of Agric., *Greenhouse Gas Emissions from U.S. Agriculture and Forestry: A Review of Emission Sources, Controlling Factors, and Mitigation Potential* (2011).

- USDA has also developed several software programs to assist with sector-specific GHG accounting. That includes COMET-Farm (for crop and grazing land and livestock production practices);<sup>434</sup> Forest Vegetation Simulator (FVS) (for forest growth simulation that can estimate carbon stock changes over time);<sup>435</sup> and Fuels and Fire Tools (FFT) (for calculation of carbon changes between alternatives in agencies' NEPA analyses).<sup>436</sup>

#### Department of Energy

- The agency's 2014 report entitled *Quantifying Greenhouse Gas Fluxes in Agriculture and Forestry: Methods for Entity-Scale Inventory*, which provides a comprehensive review of techniques for estimating GHG emissions and removals from agricultural and forestry activities and outlines preferred scientific methods for estimating GHG emission at the farm or forest scale.<sup>437</sup> A study produced for the agency in 2012 entitled *Report of Greenhouse Gas Accounting Tools for Agriculture and Forestry Sectors*, which provides an overview of publicly accessible tools for quantifying GHG emissions and offsets from agricultural and forestry activities.<sup>438</sup>
- A study produced for the agency in 2011 entitled *Greenhouse Gas Emissions from U.S. Agriculture and Forestry: A Review of Emission Sources, Controlling Factors, and Mitigation Potential*, which provides a synthesis of the best available science regarding controlling factors and mitigation technologies for GHG emissions in U.S. agriculture and forestry.<sup>439</sup>

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<sup>434</sup> COMET-Farm, U.S. Dep't of Agric. & Colo. State Univ. (last accessed March 8, 2020), <http://comet-farm.com/>.

<sup>435</sup> Forest Vegetation Simulator (FVS), U.S. Dep't of Agric. & U.S. Forest Serv. (last accessed March 8, 2020), <https://www.fs.fed.us/fvs/index.shtml>.

<sup>436</sup> Fire and Environmental Research Applications Team: Fuel and Fire Tools, U.S. Forest Serv. (last updated Sept. 14, 2015), <https://www.fs.fed.us/pnw/fera/fft/index.shtml>.

<sup>437</sup> Marlen Eve et al. eds., U.S. Dep't of Agric., *Quantifying Greenhouse Gas Fluxes in Agriculture and Forestry: Methods for Entity-Scale Inventory* (2014).

<sup>438</sup> Karolien Denef et al., U.S. Dep't of Agric., *Report of Greenhouse Gas Accounting Tools for Agriculture and Forestry Sectors* (2012).

<sup>439</sup> Karolien Denef et al., U.S. Dep't of Agric., *Greenhouse Gas Emissions from U.S. Agriculture and Forestry: A Review of Emission Sources, Controlling Factors, and Mitigation Potential* (2011).

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#### U.S. Environmental Protection Agency

- The Facility Level Information on Greenhouse Gases Tool ("FLIGHT"), a software program that estimates GHG emissions by facility, industry, location, or fuel.<sup>443</sup>
- The Motor Vehicle Emission Simulator ("MOVES"), a software program that estimates emissions for mobile sources at national, county, and project level.<sup>444</sup>
- EPA has provided detailed guidance for calculating GHG emissions from a variety of industries, including petroleum and natural gas systems.<sup>445</sup>
- The Greenhouse Gas Equivalencies Calculator, a software program that allows users to convert energy usage into equivalent amounts of GHG emissions expected to be produced from that usage.<sup>446</sup>

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<sup>440</sup> *COMET-Farm*, U.S. Dep't of Agric. & Colo. State Univ. (last accessed March 8, 2020), <http://comet-farm.com/>.

<sup>441</sup> *Forest Vegetation Simulator (FVS)*, U.S. Dep't of Agric. & U.S. Forest Serv. (last accessed March 8, 2020), <https://www.fs.fed.us/fvs/index.shtml>.

<sup>442</sup> *Fire and Environmental Research Applications Team: Fuel and Fire Tools*, U.S. Forest Serv. (last updated Sept. 14, 2015), <https://www.fs.fed.us/pnw/fera/fft/index.shtml>.

<sup>443</sup> *FLIGHT*, U.S. Env'tl. Protection Agency (last updated Aug. 4, 2019), <https://ghgdata.epa.gov/ghgp/main.do#>.

<sup>444</sup> *MOVES and Other Mobile Source Emissions Models*, U.S. Env'tl. Protection Agency (last updated Aug. 22, 2019), <https://www.epa.gov/moves>.

<sup>445</sup> See generally U.S. Env'tl. Protection Agency, *Mandatory Reporting of Greenhouse Gases: Petroleum and Natural Gas Systems*, 75 Fed. Reg. 74,4458 (Nov. 30, 2010), codified at 40 C.F.R. Part 98 Subpart W.

<sup>446</sup> *Greenhouse Gas Equivalencies Calculator*, U.S. Env'tl. Protection Agency (last updated Oct. 15, 2018), <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator>.

- U.S. Greenhouse Gas Inventory Report, an annual report prepared by EPA to track total annual U.S. emissions and removals of GHGs by source, economic sector, and greenhouse gas.<sup>447</sup>

#### Department of Transportation

The Infrastructure Carbon Estimator, a spreadsheet tool that estimates the lifecycle energy and greenhouse gas emissions from the construction and maintenance of transportation facilities.<sup>448</sup>

#### Energy Information Administration

- *The National Energy Modeling System*, a report which estimates energy production, demand, imports, and prices which can then be used by agencies like FERC and DOE to estimate the climate impacts of fossil fuel transportation projects.<sup>449</sup>

#### Bureau of Ocean Energy and Management

- The *OCS Oil and Natural Gas: Potential Lifecycle Greenhouse Gas Emissions and Social Cost of Carbon* report, produced in 2016 to present a methodology for analyzing the full lifecycle GHG emissions of oil and gas produced on the Outer Continental Shelf of the United States and to estimate the effects of leasing decisions on those emissions.<sup>450</sup>

In addition, many of CEQ's sister federal agencies have developed useful tools and analysis to evaluate the effects (including cumulative and indirect) of GHG gas emissions. These tools include:

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<sup>447</sup> U.S. Greenhouse Gas Inventory Report: 1990-2014, U.S. Env'tl. Protection Agency (last updated Feb. 23, 2017), <https://www.epa.gov/ghgemissions/us-greenhouse-gas-inventory-report-1990-2014>.

<sup>448</sup> *Infrastructure Carbon Estimator*, U.S. Dep't of Transp. (last updated June 28, 2017), [https://www.fhwa.dot.gov/environment/sustainability/energy/tools/carbon\\_estimator/index.cfm](https://www.fhwa.dot.gov/environment/sustainability/energy/tools/carbon_estimator/index.cfm).

<sup>449</sup> U.S. Energy Info. Admin., *The National Energy Modeling System: An Overview 2018* (2019).

<sup>450</sup> Bureau of Ocean Energy Mgmt., U.S. Dep't of the Interior, *OCS Oil and Natural Gas: Potential Lifecycle Greenhouse Gas Emissions and Social Cost of Carbon* (2016).



National Oceanic and Atmospheric Administration

- Adaptation Tool Kit: Sea-level Rise and Coastal Land Use<sup>451</sup>
- Climate Change Vulnerability Assessment Tool for Coastal Habitats<sup>452</sup>

U.S. Department of Agriculture

- Adaptation Workbook for Land Management and Conservation<sup>453</sup>

U.S. Environmental Protection Agency

- Climate Change Adaptation Resource Center<sup>454</sup>
- The EnviroAtlas, which allows users to access a range of interactive maps and resources to explore the benefits people receive from nature. These map analysis tools can help agencies understand potential ecological and human health outcomes of various activities.<sup>455</sup>

U.S. Forest Service

- Climate Change Atlas for Tree and Bird Species<sup>456</sup>

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<sup>451</sup> *Adaptation Tool Kit: Sea-Level Rise and Coastal Land Use*, U.S. Climate Resilience Toolkit (last updated Jan. 26, 2018), <https://toolkit.climate.gov/tool/adaptation-tool-kit-sea-level-rise-and-coastal-land-use>.

<sup>452</sup> *Climate Change Vulnerability Assessment Tool for Coastal Habitats (CCVATCH)*, U.S. Climate Resilience Toolkit (last updated Jan. 26, 2018), <https://toolkit.climate.gov/tool/climate-change-vulnerability-assessment-tool-coastal-habitats-ccvatch>.

<sup>453</sup> *Adaptation Workbook for Land Management and Conservation*, U.S. Climate Resilience Toolkit (last updated Oct. 25, 2019), <https://toolkit.climate.gov/tool/adaptation-workbook-natural-resources>.

<sup>454</sup> *Climate Change Adaptation Resource Center (ARC-X)*, U.S. Climate Resilience Toolkit (last updated Oct. 23, 2019), <https://toolkit.climate.gov/tool/climate-change-adaptation-resource-center-arc-x>.

<sup>455</sup> *EnviroAtlas*, U.S. Climate Resilience Toolkit (last updated Oct. 2, 2018), <https://toolkit.climate.gov/tool/enviroatlas>.

<sup>456</sup> *Climate Change Atlas for Tree and Bird Species*, U.S. Climate Resilience Toolkit (last updated Oct. 24, 2019), <https://toolkit.climate.gov/tool/climate-change-atlas-tree-and-bird-species>.

- Climate Change Resource Center, a program that allows natural resource planners, land managers, and other decision makers to find usable science as well as approaches to adaptation and mitigation from the U.S. Forest Service to help them address climate change impacts.<sup>457</sup>

#### U.S. Geologic Survey

- Advanced Hydrologic Prediction Service<sup>458</sup>
- The Land Carbon tool, which allows users to explore carbon storage capacity and carbon flux of ecoregions in the contiguous United States. For each ecosystem, users can examine baseline values and projected estimates for future carbon storage and flux under three emissions scenarios.<sup>459</sup>

#### Center for Disease Control and Prevention

- Assessing Health Vulnerability to Climate Change<sup>460</sup>

#### U.S. Department of Defense

- Climate Adaptation for DoD Natural Resource Managers<sup>461</sup>

Finally, federal agencies currently use a variety of tools to assess the vulnerability of proposed projects to climate change. These tools include:

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<sup>457</sup> *Climate Change Resource Center*, U.S. Climate Resilience Toolkit (last updated Oct. 25, 2019), <https://toolkit.climate.gov/tool/climate-change-resource-center>.

<sup>458</sup> *Advanced Hydrologic Prediction Service*, U.S. Climate Resilience Toolkit (last updated Aug. 2, 2019), <https://toolkit.climate.gov/tool/advanced-hydrologic-prediction-service>.

<sup>459</sup> *LandCarbon*, U.S. Climate Resilience Toolkit (last updated Nov. 7, 2019), <https://toolkit.climate.gov/tool/landcarbon>.

<sup>460</sup> *Assessing Health Vulnerability to Climate Change: A Guide for Health Departments*, U.S. Climate Resilience Toolkit (last updated Dec. 12, 2019), <https://toolkit.climate.gov/tool/assessing-health-vulnerability-climate-change-guide-health-departments>.

<sup>461</sup> *Climate Adaptation For DoD Natural Resource Managers*, U.S. Climate Resilience Toolkit (last updated June 19, 2019), <https://toolkit.climate.gov/tool/climate-adaptation-dod-natural-resource-managers>.

U.S. Department of Transportation

- Transportation Climate Change Sensitivity Matrix<sup>462</sup>

Energy Information Administration

- Energy Infrastructure with Flood Vulnerability<sup>463</sup>

Rather than indicating NEPA's mandate to analyze GHG emissions and the effects that may result from such emissions, the Draft GHG Guidance that CEQ is considering codifying in its rule changes takes a more permissive approach. The Draft GHG Guidance states that "[a]gencies should attempt to quantify a proposed action's projected direct and reasonably foreseeable indirect GHG emissions *when the amount of those emissions is substantial enough to warrant quantification.*"<sup>464</sup> "Substantial enough" is not a NEPA term nor is it clear what it means. Further, CEQ states that "[a]gencies are not required to quantify effects where information necessary for quantification is unavailable, not of high quality, or the complexity of identifying emissions would make quantification overly speculative."<sup>465</sup> There is no recommendation to quantify emissions to the extent possible.

Courts, however, have repeatedly held that agencies must analyze and disclose to the public the GHG emissions resulting from the production, transportation, processing, and end-use of fossil fuels that will be produced or transported as a result of agency approvals.<sup>466</sup> Agencies "need not foresee the unforeseeable, but ... reasonable

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<sup>462</sup> *Transportation Climate Change Sensitivity Matrix*, U.S. Climate Resilience Toolkit (last updated Oct. 23, 2019), <https://toolkit.climate.gov/tool/transportation-climate-change-sensitivity-matrix>.

<sup>463</sup> *Energy Infrastructure with Flood Vulnerability*, U.S. Climate Resilience Toolkit (last updated Jan. 26, 2018), <https://toolkit.climate.gov/tool/energy-infrastructure-flood-vulnerability>.

<sup>464</sup> *Draft GHG Guidance*, at 30,098 (emphasis added).

<sup>465</sup> *Id.* (citing 40 C.F.R. § 1502.22).

<sup>466</sup> Michael Burger & Jessica Wentz, Columbia Law School Sabin Center for Climate Change Law, *Working Paper – Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review* 15 (2016), [https://web.law.columbia.edu/sites/default/files/microsites/climate-change/downstream\\_and\\_upstream\\_ghg\\_emissions\\_-](https://web.law.columbia.edu/sites/default/files/microsites/climate-change/downstream_and_upstream_ghg_emissions_-)

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proper\_scope\_of\_nepa\_review.pdf; see also, e.g., *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (GHG emissions from the combustion of gas “are an indirect effect of authorizing this [pipeline] project, which [the agency] could reasonably foresee”); *Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1237 (D. Colo. 2019) (“Defendants acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at the foreseeable indirect effects resulting from the combustion of oil and gas.”); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 71 (D.D.C. 2019) (“BLM failed to take a hard look at the environmental impacts of leasing because it failed to quantify and forecast aggregate GHG emissions from oil and gas development.”); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003); *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1242-43 (D.N.M. 2018) (BLM’s reasoning for not analyzing indirect GHG emissions was “contrary to the reasoning in several persuasive cases that have determined that combustion emissions are an indirect effect of an agency’s decision to extract those natural resources”); *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, 2018 WL 1475470, at \*13 (D. Mont. Mar. 26, 2018) (“In light of the degree of foreseeability and specificity of information available to the agency while completing the EIS, NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs.”); *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining Reclamation & Enft*, 274 F. Supp. 3d 1074, 1094, 1098-99 (D. Mont. 2017) (holding indirect effects from coal trains includes the 23.16 million metric tons of GHG emissions from the combustion of coal extracted from the mine); *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1156 (D. Colo. 2018) (“BLM acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at the indirect effects resulting from the combustion of oil and gas in the planning area under the [Resource Management Plan].”); *Diné Citizens Against Ruining Our Env’t v. U.S. Office of Surface Mining Reclamation and Enft*, 82 F. Supp. 3d 1201, 1213 (D. Colo. 2015) (“[T]he coal combustion-related impacts of [the mine’s] proposed expansion are an ‘indirect effect’ requiring NEPA analysis”), *vacated as moot*, 643 Fed. App’x 799 (2016); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1198 (D. Colo. 2014) (“[R]easonably foreseeable effect [of downstream combustion] must be analyzed, even if the precise extent of the effect is less certain.”).

forecasting and speculation ... is implicit in NEPA.”<sup>467</sup> Consequently, CEQ must not encourage agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as “crystal ball inquiry.”<sup>468</sup> Contrary to the Draft GHG Guidance’s implication, emissions quantification over the lifetime of projects or programs is not too complex or too speculative for agencies to undertake.

Most of the information needed is indeed readily available. For example, the emissions associated with the production of fossil fuels from federal lands can be divided into two categories: (1) direct emissions associated with activities such as construction, drilling, completion, and well operation; and (2) indirect or “downstream” emissions associated with activities such as transportation, processing and end use of those fuels. Since direct emissions from production represent only a small proportion of the life cycle emissions from the fossil fuels, agencies must analyze and disclose to the public both the direct and indirect effects for the entire supply chain. This includes emissions from exploration, development, drilling, completion (including hydraulic fracturing), production, gathering, boosting, processing, transportation, transmission, storage, distribution, refining, and end use. Agencies must disclose their estimates of emissions from these sources and describe the methodologies used to make their estimates. The same is true for federal projects such as roads and ports where vehicle miles traveled increase calculations are regularly made. Likewise, the emissions consequences of changing fuel economy regulations are readily estimated.

Agencies sometimes fail to include all indirect emissions sources in their NEPA reviews. For example, in its draft environmental impact statement for the Mountain Valley pipeline (hereinafter, “MVP DEIS”), the Federal Energy Regulatory Commission (FERC) failed to evaluate the indirect GHG emissions. FERC attempted to justify this on the purported ground that “induced or additional natural gas production is not a ‘reasonably foreseeable’ indirect effect resulting from the proposed MVP” and “the environmental effects resulting from natural gas production are not linked to or caused

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<sup>467</sup> *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (quoting *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C.Cir.1973)).

<sup>468</sup> *See id.*

by a proposed pipeline project.”<sup>469</sup> However, the production of gas is a predicate for the transportation of the gas, and therefore must be accounted for in the NEPA analysis. In fact, the 2016 Final Guidance on climate provided examples of the types of impacts that should be considered specifically for resource extraction projects.<sup>470</sup> The EPA concluded that FERC should have estimated the GHG emissions from the development and production of gas being transported through the proposed pipelines, as well as from product end use, due to the reasonably close causal relationship of this activity to the project.<sup>471</sup>

FERC also argued in the MVP DEIS that “[w]hile we know generally that natural gas is produced in the Appalachian Basin, there is no reasonable way to determine the exact wells providing gas transported in the MVP and the EEP pipelines, nor is there a reasonable way to identify the well-specific exploration and production methods used to obtain those gas supplies.”<sup>472</sup> However, it is not necessary to know the exact locations of all of the wells that will supply gas to the pipelines, or the methods used to obtain that gas, in order to analyze the potential impacts. This is because FERC already knows the total capacity of the pipeline and the region from which gas will be supplied. Average production rates and production methods from wells in the supply region could be obtained from state databases,<sup>473</sup> which could then be used to estimate the

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<sup>469</sup> Mountain Valley Pipeline, LLC, FERC Docket No. CP16-10, *Draft Environmental Impact Statement*, FERC eLibrary No. 20160916-4001 at 4-516 (Sept. 16, 2016)[hereinafter, “MVP DEIS”], attached hereto and incorporated herein as Exhibit 16; *Mountain Valley Pipeline, LLC, FERC Docket No. CP16-10, et al., U.S. Environmental Protection Agency, Mountain Valley Project and Equitrans Expansion Project Draft Environmental Impact Statement; Pennsylvania, West Virginia, and Virginia; September 2016 (FERC Docket Nos. CP16-10-000 and CP16-13-000; CEQ # 2016-0212)*, FERC eLibrary No. 20161229-0033 at 3 (Dec. 29, 2016)[hereinafter, “EPA Comments on MVP DEIS”], attached hereto and incorporated herein as Exhibit 17.

<sup>469</sup> See MVP DEIS at 1-22, 1-23, attached hereto and incorporated herein as Exhibit 15.

<sup>470</sup> 2016 Final Guidance at 14.

<sup>471</sup> EPA Comments on the MVP DEIS at 3.

<sup>472</sup> MVP DEIS at 1-22.

<sup>473</sup> See, e.g., The Pennsylvania Department of Environmental Protection, Office of Oil and Gas Management Oil & Gas Reporting,

number of wells and the types of equipment and production methods necessary to supply the full pipeline capacity. FERC could also request such information from producers and marketers that have contracts to supply gas to the pipeline.<sup>474</sup> This information could then be used to analyze the potential GHG emissions and to develop a reasonable range of alternatives and mitigation measures to offset such emissions should a project move forward. The Draft GHG Guidance must not be codified without providing this guidance.

CEQ previously recognized the legal requirement and the tools available to meet NEPA's mandate in its 2016 GHG Guidance. Without any justification or evidence to support it, CEQ is now considering reversing itself. If CEQ codifies its Draft GHG Guidance, its regulations run the risk of being invalidated in court. In addition, agency actions that rely on such unsupported and unlawful guidance also run the risk of being invalidated in court. Such uncertainty is the opposite of what CEQ says it is trying to do in its proposed rule changes.

### **VIII. The proposed rule's conclusive presumption of regularity is unlawful**

CEQ proposes to create a requirement for lead agency decision makers to "certify in the record of decision that the agency considered all the alternatives, information, and analyses submitted . . . in developing the environmental impact statement."<sup>475</sup> According to the proposed rule, such certification would entitle environmental impact statements "to a conclusive presumption that the agency has considered the information included in the submitted alternatives, information, and analyses section."<sup>476</sup> This naked attempt at eliminating judicial review is unlawful.

As a threshold matter, CEQ lacks the legal authority to create a conclusive regulatory presumption. By definition, a conclusive presumption is "a rule of

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<https://www.paoilandgasreporting.state.pa.us/publicreports/Modules/Welcome/Welcome.aspx>.

<sup>474</sup> *Id.*; see also *Birckhead v. FERC*, 925 F.3d 510, 520 (D.C. Cir. 2019) ("It should go without saying that NEPA also requires the Commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities.").

<sup>475</sup> 85 Fed. Reg. at 1713, 1720.

<sup>476</sup> *Id.* at 1720.

substantive law,”<sup>477</sup> because it withdraws the underlying matter from judicial review by “direct[ing] . . . the court to find the elemental fact once convinced of the basic facts triggering the presumption.”<sup>478</sup> As a “creature[] of Congress,” however, CEQ lacks the power to create substantive rules of law ““unless and until Congress confers [that] power upon it.””<sup>479</sup> Considering that judicial review of agency action under NEPA is governed by the APA,<sup>480</sup> any action by CEQ to limit judicial review of agency action under NEPA must be grounded in a congressional grant of authority for the agency to promulgate substantive rules under the APA. Notably, the CEQ does not claim to have any delegated Congressional power to administer the APA – nor could it, as the APA contains no “special charge” for CEQ to administer that statute.<sup>481</sup>

In fact, in attempting to create a conclusive presumption that limits judicial review, the proposed rule goes squarely against the longstanding “strong presumption that Congress intends judicial review of administrative action.”<sup>482</sup> And this “strong presumption” cannot be overcome absent “persuasive reason to believe that such was the purpose of Congress.”<sup>483</sup> The proposed rule proffers no “specific language or specific legislative history that is a reliable indicator of congressional intent” to preclude judicial review of agency action under NEPA.<sup>484</sup> Thus, CEQ fails to overcome “the heavy burden” of the “strong presumption” that Congress intended for agency action under NEPA to be subject to judicial review.<sup>485</sup>

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<sup>477</sup> Presumption, Black’s Law Dictionary (11th ed. 2019); see also *Fanchon & Marco, Inc. v. Paramount Pictures*, 215 F.2d 167, 169 (9th Cir. 1954).

<sup>478</sup> *Pigee v. Israel*, 670 F.2d 690, 692-96 (7th Cir. 1982) (citing *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979)).

<sup>479</sup> *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (quoting *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 374 (1986)).

<sup>480</sup> *Tulare Cty. v. Bush*, 306 F.3d 1138, 1143 (D.C. Cir. 2002).

<sup>481</sup> *Profl Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm’n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991)

<sup>482</sup> *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

<sup>483</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)

<sup>484</sup> *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)

<sup>485</sup> *Bowen*, 476 U.S. at 672.



To the extent that a federal agency officer's actions are entitled to any "presumption of regularity," that presumption is rebuttable. While this "presumption of regularity" calls for court to "presume that [public officers] have properly discharged their official duties," it is not absolute.<sup>486</sup> Thus, when an agency "skew[s] the record by excluding unfavorable information"<sup>487</sup> or when it "exclude[s] information simply because it did not rely on it for its final decision,"<sup>488</sup> the presumption ceases to apply. Further, any such presumption would not apply to every aspect of the agency's decision. For example, an agency is not entitled to a presumption of regularity as it relates to compliance with certain procedural requirements, such as the legal obligation to hold a notice-and-comment period and respond to all comments.<sup>489</sup>

Thus, in the context of the proposed rule, no signature or certification from any agency official can have the preclusive effect of entitling an agency "to a conclusive presumption that [it] has considered the information included in the submitted alternatives, information, and analyses section."<sup>490</sup> CEQ's attempt to create such a presumption is unlawful.

**IX. By excusing agencies from the need to undertake new scientific and technical research, the proposed rule would all but ensure *uninformed* decision making**

NEPA's mandate is broad but clear: in addition to preparing "detailed statements" on proposals for major federal actions significantly affecting the quality of the environment,<sup>491</sup> federal agencies must "identify and *develop* methods and procedures . . . which will insure that presently *unquantified* environmental amenities and values may be given appropriate consideration in decisionmaking."<sup>492</sup> CEQ's

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<sup>486</sup> *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926).

<sup>487</sup> *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 369 (D.D.C. 2007)

<sup>488</sup> *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 20 (D.D.C. 2013), *aff'd sub nom. Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015).

<sup>489</sup> Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 Harv. L. Rev. 2431, 2434 (2018) (citing *Shell Oil Co. v. E.P.A.*, 950 F.2d 741, 758 (D.C. Cir. 1991)).

<sup>490</sup> 85 Fed. Reg. at 1720.

<sup>491</sup> 42 U.S.C. § 4332(C).

<sup>492</sup> *Id.* § 4332(B) (emphases added).

decision to broadly excuse agencies from the need to “undertake new scientific and technical research to inform their analyses”<sup>493</sup> impedes both of the statute’s requirements, jeopardizing NEPA’s goal to ensure informed decision making.

While there are circumstances in which existing scientific or technical research are adequate, the statutory text clearly recognizes that there are circumstances in which an agency has a duty to undertake new scientific or technical research. When a proposal subject to NEPA requires the agency to consider unquantified environmental amenities and values and the acting agency’s existing research and methodologies are sufficient to evaluate those values, the agency need only *identify*<sup>494</sup> any such existing scientific or technical research in its “discussions and analyses” in the “detailed statement.”<sup>495</sup> However, NEPA also anticipates situations in which the agency lacks the adequate scientific and technical research necessary to adequately analyze a proposed action’s effects on the environment. It is precisely for this reason that section 102(B) of the statute also contemplates an agency’s need to “*develop* methods and procedures” to analyze those effects.<sup>496</sup> Excusing agencies from the need to “develop methods and procedures” to properly analyze environmental effects would directly contravene NEPA’s text.

The proposed rule’s attempt to exempt agencies from the need to undertake new scientific or technical research is antithetical to NEPA’s direction to include “detailed” statements on proposals for major federal actions. The purpose of the “detailed statement” is “to aid in the agencies’ own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action.”<sup>497</sup> To that end, it must “explicate fully its course of inquiry, its analysis and its reasoning.”<sup>498</sup> This requires that the detailed statement be “[s]upported by empirical or experimental data” that “fully evaluate the project and its alternatives.”<sup>499</sup>

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<sup>493</sup> 85 Fed. Reg. at 1721.

<sup>494</sup> 42 U.S.C. § 4332(B).

<sup>495</sup> See 40 C.F.R. § 1502.24.

<sup>496</sup> 42 U.S.C. § 4332(B) (emphasis added).

<sup>497</sup> *Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

<sup>498</sup> *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971).

<sup>499</sup> See *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973).

Clearly, when the existing body of research is insufficient to meet these goals, an agency may need to undertake new scientific or technical research in order to meet the very basic statutory requirements. By excusing agencies from the need to undertake new scientific or technical analysis, even when the existing body of research is insufficient to meet these goals, the proposed rule flies directly against NEPA's mandate to prepare "detailed" statements. It would violate the plain language of NEPA for an agency to prepare a statement of environmental impacts the only "detail[]" of which said "we don't have enough information to discuss these impacts." Simply put, the proposed rule fails to ensure that agencies' environmental analyses "[r]igorously explore and objectively evaluate" all significant environmental impacts and reasonable alternatives to the proposed course of action.<sup>500</sup>

Lastly, the proposed rule fails to advance a good justification – let alone a reasoned explanation – for this change. Introducing the revision to § 1502.24, the proposed rule's preamble merely echoes the text of the rule change and announces that it is consistent with the requirements of a different section of its regulations<sup>501</sup> – although that purported consistency is far from obvious. This is simply insufficient reason to justify such a drastic change to the regulations. And the proposed rule's vague assertion that this change "would promote the use of reliable data" is equally unavailing.<sup>502</sup> In fact, by unqualifiedly ignoring that an agency may need to conduct new scientific or technical analysis to gather "reliable data" to inform its analysis, the proposed rule flouts the very purpose of the justification it seeks to advance here. Failing to present an adequate justification for this change, the proposed revision to § 1502.24 is arbitrary.<sup>503</sup>

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<sup>500</sup> *Nw. Envtl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1542 (9th Cir. 1997) (quoting *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310 (9th Cir. 1990)).

<sup>501</sup> 85 Fed. Reg. at 1703.

<sup>502</sup> *Id.*

<sup>503</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

**X. The proposal would permit unlawful commitment of resources in advance of NEPA compliance**

**A. NEPA requires environmental analysis before any irreversible and irretrievable commitments of resources**

NEPA's text is unambiguous: the agency must complete its environmental impact analysis before any "irreversible and irretrievable commitments of resources" occur.<sup>504</sup> The statute does not allow an agency to delay the review of such commitments of resources until after their occurrence. Instead, the text of section 102 of the statute explicitly calls for the preparation of "detailed statements" addressing "any irreversible and irretrievable commitments of resources which *would* be involved in the proposed action *should* it be implemented."<sup>505</sup> The plain text of NEPA thus clearly requires analysis prior to commitment.

The reason behind this requirement is self-evident: A principal purpose of NEPA is "to insure that the agency considers all possible courses of action and assesses the environmental consequences of each proposed action."<sup>506</sup> Agencies can only achieve this by "integrat[ing] the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values."<sup>507</sup> If environmental concerns are not interwoven at an early stage of the planning process, "the 'action-forcing' characteristics of § 102(2)(C) [are] lost."<sup>508</sup> Thus, agencies must ensure that any environmental assessment "occur at an early stage when alternative courses of action are still possible."<sup>509</sup> Greenlighting any "'irreversible and irretrievable commitment of resources" before conducting an environmental assessment flouts NEPA's purposes by ensuring that "any environmental assessment prepared by the agency subsequently . . . would be 'subject to at least a subtle pro-[development] bias.'"<sup>510</sup>

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<sup>504</sup> See 42 U.S.C. § 4332(C).

<sup>505</sup> *Id.* (emphasis added).

<sup>506</sup> *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983).

<sup>507</sup> 40 C.F.R. § 1501.2.

<sup>508</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 350-51 (1979).

<sup>509</sup> *Port of Astoria, Or. v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979)

<sup>510</sup> *Defs. of Wildlife v. U.S. Dep't of Navy*, 733 F.3d 1106, 1117 (11th Cir. 2013) (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1144 (9th Cir. 2000)).

**B. The proposed rule would allow an agency to authorize irreversible and irretrievable commitments of resources before an EIS is prepared**

CEQ has offered no non-arbitrary rationale for bypassing NEPA's textual bar on irreversible resource commitments, or for discounting the policy interests, discussed above, that the statutory bar protects. Nonetheless, the proposed rule would allow project proponents to acquire interests in land and purchase equipment necessary for the proposed project prior to any environmental review.<sup>511</sup> The proposed rule would thus authorize the precise type of activity that NEPA forbids.

CEQ suggests that its unlawful attempts to authorize irreversible and irretrievable commitments of resources are justified by a desire for "efficien[cy] and flexib[ility]."<sup>512</sup> This is nonsensical. There is nothing "efficient" about committing resources before making a decision, unless the agency has already made the decision before completing its environmental review – and that is precisely what NEPA prohibits. Likewise, it is the opposite of "flexible" to commit resources irretrievably to a path that cannot lawfully be committed to, in advance of environmental reviews. These are not "good reasons" for CEQ's policy change,<sup>513</sup> they are slogans unsupported by logic or evidence.

Nor does the proposed rule attempt to explain how this change "is permissible under the statute."<sup>514</sup> Authorizing the irreversible and irretrievable commitment of resources before the conclusion of the NEPA process would set off a "bureaucratic steam roller" that is difficult to stop once launched.<sup>515</sup> Once "acquisitions of property" occur, "flexibility in selecting alternative plans has to a large extent been lost."<sup>516</sup> At that point, "[e]ither the [project proponent] will have to undergo a major expense in making alterations in a completed [plan] or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass."<sup>517</sup>

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<sup>511</sup> 85 Fed. Reg. at 1724.

<sup>512</sup> *Id.* at 1704.

<sup>513</sup> *See Fox Television Stations*, 556 U.S. at 515.

<sup>514</sup> *See id.*

<sup>515</sup> *See Colorado Wild, Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007).

<sup>516</sup> *Lathan v. Volpe*, 455 F.2d 1111, 1121 (9th Cir. 1971).

<sup>517</sup> *Id.* (citation omitted).

The impacts of the proposed rule's changes to § 1506.1 become clear in light of other changes proposed in the NPRM. For example, the proposed rule seeks to redefine "reasonable alternatives" to include only those alternatives that are "technically and economically feasible."<sup>518</sup> By allowing a project proponent to commit its resources to acquire interests in land before the NEPA process is concluded, the proposed rule opens the door to a scenario where the acquisition of a different parcel becomes economically infeasible for the project proponent.<sup>519</sup> This would, in turn, foreclose consideration of a number of alternatives deemed "unreasonable" for economic reasons – a clear marker of an impermissible irreversible commitment of resources under NEPA.<sup>520</sup>

Further, by allowing the acquisition of property rights prior to the conclusion of the NEPA process, the proposed rule could set off a chain of events that would directly result in adverse impacts to the environment. For example, even if a project has yet to be approved for construction, the acquisition of land and equipment for the project may have a signaling effect, prompting landowners to move or to change their use of their property to the detriment of the environment. Similarly, this could also function as a signal for local decisionmakers to rezone associated areas, inviting less environmentally harmonious uses of the land. Under either circumstance, the speculative commitment of resources occurring before the completion of an EIS results in the degradation of the environment, regardless of the final outcome of the NEPA process.

"Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the "hard look" be incorporated as part of the agency's process of

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<sup>518</sup> 85 Fed. Reg. at 1730.

<sup>519</sup> When a project proponent spends "most or all of its limited budget on preparations useful for only one alternative, it may well have taken action 'limiting the choice of reasonable alternatives.'" *WildWest Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008) (quoting 40 C.F.R. § 1506.1(a)).

<sup>520</sup> See *Port of Astoria*, 595 F.2d at 478; *Massachusetts v. Watt*, 716 F.2d 946, 952-53 (1st Cir. 1983) (citing *W. Rodgers, Environmental Law* §7.7 at 767 (1977)) (NEPA's "purpose is to require consideration of environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete").

deciding *whether* to pursue a particular federal action.”<sup>521</sup> Allowing premature commitment of resources contravenes that congressional intent, and places a thumb on the scales of an approach that is consistent with the premature resource commitment. That could be considered “efficient” only if the agency’s mind were already made up. NEPA does not countenance such an approach.

## **XI. CEQ’s regulation proposal will not solve the problems CEQ identifies**

### **A. CEQ’s proposed presumptive time and page limits are arbitrary, capricious, and counterproductive**

CEQ proposes updating its NEPA regulations in the name of efficiency – supposedly to achieve “effective, and timely NEPA reviews” with “reduced paperwork and delays.” 85 Fed. Reg. at 1684. What this really means is that CEQ is encouraging faster, abbreviated environmental reviews. CEQ offers no evidence that this approach would serve either CEQ’s professed goals or Congress’s mandate, and as explained below, it would not.

As a threshold matter, CEQ’s stated objective of “effective, and timely reviews” is too vague to provide a metric against which to measure CEQ’s proposal to impose artificial, default page and time limits. CEQ certainly does not provide evidence that such shorter, faster reviews will be effective at achieving Congress’s goals in adopting NEPA. Nor does it provide any evidence that these limits would achieve CEQ’s apparent goal of hastening project approvals that are either not litigated or survive judicial review. Put another way, CEQ provides absolutely no justification for its implicit premise that a legally compliant environmental review can, with any frequency, be prepared within the proposed presumptive page and time limits. Concision takes time; accuracy under time pressure takes resources. Particularly at a time when the Administration is proposing to slash the environmental compliance budgets of multiple federal agencies,<sup>522</sup> it is entirely arbitrary to assume that federal

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<sup>521</sup> *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 100 (1983) (emphasis added).

<sup>522</sup> For example, the Administration’s FY21 budget proposal for BLM’s Resource Protection and Maintenance activity, for which the administration is seeking a \$30.1 million cut. See <https://www.doi.gov/sites/doi.gov/files/uploads/fy2021-blm-budget-justification.pdf> at V-101. The budget justification notes that “[t]he Resource

agencies will be able to complete better (less legally vulnerable) environmental reviews, in less time, with fewer pages.

As for CEQ's professed goal of improving efficiency, an *inadequate* environmental review is the height of inefficiency. A short-and-sloppy EIS or EA would not adequately inform decisionmakers or the public – and therefore wouldn't satisfy Congress's decision to require agencies to take "a 'hard look' at the environmental effects of their planned action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). To the contrary, rushed, abbreviated environmental reviews are likely to be challenged in court and, when challenged, overturned. An environmental review that is so rushed that it is overturned will lead to projects being enjoined, not to "effective, timely" project approvals.

In any event, CEQ provide no evidence that presumptive page- and time- limits are needed.<sup>523</sup> CEQ cannot conclude that existing environmental reviews are *too*

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Protection and Maintenance activity funds land use planning and compliance processes required by [NEPA] and [FLPMA]." *Id.* Within that activity, the Administration's budget proposal would cut \$19.73 million to "Focus on Highest Priority RMPs." *Id.* at IV-4. The budget justification explains, "The 2021 budget request reflects actions the Bureau has taken to date to support Secretarial Order 3355, Streamlining National Environmental Policy Act Reviews, to streamline environmental analysis." *Id.* at V-103. In other words, the Administration is proposing to do less, with less.

Similarly, the Administration's FY21 budget proposal for the Forest Service proposes to cut the budget for Land Management Planning, Assessment, and Monitoring. The justification explains, "The reduced funding request assumes implementation of significant National Environmental Policy Act (NEPA) regulatory reform, rule-making, and streamlining." See <https://www.doi.gov/sites/doi.gov/files/uploads/fy2021-blm-budget-justification.pdf>, at 50. Again, the Administration is proposing to cut environmental review resources.

<sup>523</sup> CEQ identifies several legislative amendments and Presidential directives that, it says, demonstrate a desire to "facilitate more efficient environmental reviews," 85 Fed. Reg. at 1688-90. This history indicates, if anything, Congress's desire *not* to establish wholesale revisions to existing CEQ regulations; Congress could have adopted across-



lengthy, or *too* time consuming, merely by pointing to the length of present environmental reviews, or the amount of time those reviews take. Put another way, CEQ presents no evidence that reviews are longer than they need to be to get Congress's job done, or that they could be sped up without either a loss of quality or a concomitant influx of new resources that this Administration has never proposed. Put another way, to prove that existing environmental reviews are *too* long or slow, CEQ would have to demonstrate that the quality of existing reviews could be maintained *if prepared under tighter time and page limits*. Commonsense and experience indicate otherwise, as do the numerous judicial decisions that have overturned federal agency decisions because those decisions were supported by environmental reviews that did not cover enough.

Thinking carefully before acting is not inefficiency. Under NEPA, it is the law of the land. CEQ should not establish presumptive page or time constraints that push federal agencies to violate Congress's mandate by rushing through inadequate environmental reviews.

**1. The record does not support CEQ's suggestion that NEPA reviews are too long**

In determining that the length of NEPA documents and the time it takes to complete NEPA review must be dictated in order to reduce paperwork and delays, CEQ relies primarily on opinions and impressions rather than fact. But anecdotes about the NEPA process are just that: anecdotes. One can certainly find contrary anecdotes.<sup>524</sup> And the *data* that is available counters CEQ's asserted rationales.

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the-board changes, including across-the-board, presumptive time or page limits, but has not.

<sup>524</sup> Congressional Review Service, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, at 1-2 (Apr. 11, 2012). ("Available evidence regarding potential causes of project delays associated with environmental compliance is largely anecdotal and specific to unique, individual projects."). John Ruple & Heather Tanana, *Debunking the Myths Behind the NEPA Review Process*, 35 Nat'l Res. & Env't \_\_, at 3 (Draft Jan. 31, 2020) (forthcoming) ("we found ourselves searching for the data and studies to support conventional wisdom. Finding

Most projects require minimal environmental review. Only approximately 1 percent of projects result in an EIS and only approximately 3 percent result in an EA.<sup>525</sup> Importantly, the tiny percent of projects that reach the EIS stage “are likely to be high-profile, complex, and expensive.”<sup>526</sup> Those few projects that require environmental review may garner more attention, leaving an impression that the NEPA process regularly gets in the way of project implementation. But it is a misimpression.

Yet even the studies on NEPA that tend to rely on impression and anecdote do not support CEQ’s proposed changes. For example, CEQ relies heavily on a 1997 report “The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years.” In completing this report almost a quarter-century ago, CEQ interviewed people involved in environmental review for their personal opinions on how NEPA is functioning. “Overall, what [the report] found is that NEPA is a success,”<sup>527</sup> the report concluded, even though, it noted a few complaints about the length of NEPA documents and the timeline of the NEPA process. The report did not suggest those occasional complaints were sufficient to outweigh the benefits of the existing process of NEPA implementation, however. Instead, the report “identified five elements of the NEPA process’ collaborative framework (strategic planning, public information and input, interagency coordination, interdisciplinary place-based decision making, and science-based flexible management) as critical to effective and efficient NEPA

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little beyond anecdotes, we set out to answer a very basic question: does rhetoric reflect reality? We conclude that it does not.”).

<sup>525</sup> Government Accountability Office, Highway and Transit Projects, Evaluation Guidance Needed for States with National Environmental Policy Act Authority, GAO-18-222, at 38 (Jan. 2018).

<sup>526</sup> Government Accountability Office, Highway and Transit Projects, Evaluation Guidance Needed for States with National Environmental Policy Act Authority, GAO-18-222, at 38-40 (Jan. 2018). See also Government Accountability Office, National Environmental Policy Act, Little Information Exists on NEPA Analyses, GAO-14-370, at 7 (Apr. 2014).

<sup>527</sup> CEQ, The National Environmental Policy Act, A Study of Its Effectiveness After Twenty-five Years, at iii (Jan. 1997).

implementation.”<sup>528</sup> CEQ’s proposed rulemaking would undermine at least several of these elements by, for example, reducing the availability to the public of information about the environmental impact of federal projects, and establishing presumptive time limits that would make it more difficult to engage in science-based management.

Other reports on NEPA implementation also fail to support the changes CEQ proposes to make in the name of efficiency. A 2003 report by CEQ, “The NEPA Task Force Report to the Council on Environmental Quality: Modernizing NEPA Implementation,” reflected a split in opinions on whether NEPA documents are too long and cumbersome or whether agencies don’t adequately consider the environmental information.<sup>529</sup> And the Government Accountability Office found that “while Corps, FWS, and NMFS officials believe that [statutory provisions aimed at streamlining the environmental review process for highway and transit projects] have helped streamline their permit reviews and consultations, the lack of data hinders quantification of any trends in the duration of those reviews.”<sup>530</sup> At best, these reports indicate a mix of opinions, which may reflect differences in goals exogenous to NEPA, rather than an understanding of what NEPA actually requires. For example, observers who belittling the “litigation proofing” of NEPA documents are criticizing efforts taken to ensure compliance with the law – and ultimately criticizing that law; they are not showing that legally sufficient NEPA documents could be prepared faster, and shorter, with existing resources. CEQ has not offered any explanation for why it found one set of opinions reported in these studies more persuasive, or more indicative of what NEPA compliance actually requires, than other, contrary reported opinions.

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<sup>528</sup> 85 Fed. Reg. at 1686 (discussing CEQ, The National Environmental Policy Act, A Study of Its Effectiveness After Twenty-five Years (Jan. 1997)).

<sup>529</sup> See Congressional Research Service, The National Environmental Policy Act (NEPA): Background and Implementation, at 27 (Jan. 10, 2011).

<sup>530</sup> Government Accountability Office, Highway and Transit Projects, Better Data Needed to Assess Changes in the Duration of Environmental Reviews, GAO-18-536 at 25 (July 2018).

“An understanding of *why* is useful in identifying a solution that directly addresses a problem’s underlying cause.”<sup>531</sup> CEQ has not shown *why* it believes that shorter, more rushed environmental review documents will, on balance, further rather than undercut NEPA’s purposes.

## 2. CEQ’s presumptive page limits are arbitrary and capricious

CEQ proposes presumptive page limits for environmental documents without providing any evidence that its presumptive limits are “right” for any particular projects, let alone most or all projects. CEQ fails to show that current environmental documents are not the length needed to comply with NEPA. CEQ fails to show why it chose the page limits it did. And CEQ fails to show that dictating shorter page limits will achieve the stated goal of efficiency.

Minimal analysis has been done on the current length of environmental documents. There are certainly opinions expressed that documents are sometimes longer than decisionmakers care to read. There is also considerable evidence that NEPA documents too frequently fail to adequately analyze information.<sup>532</sup> There are very few studies that scrutinize what causes some environmental documents to be longer than others, or how page length relates to either the utility of the document for decisionmakers or the sufficiency of the environmental review in that document.

The proposed rule’s preamble points to certain evidence in a 2019 report entitled “Length of Environmental Impact Statements (2013–2017),” which “presents information and statistical analysis on the length, by page count, of environmental impact statements.”<sup>533</sup> Perplexingly, however, CEQ ignores the full analysis presented in the 2019 study and instead only points to certain out-of-context information – the average page length reported by the study – that, CEQ claims, shows that

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<sup>531</sup> Congressional Review Service, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, at 4 (Apr. 11, 2012).

<sup>532</sup> Congressional Research Service, *The National Environmental Policy Act (NEPA): Background and Implementation*, at 27 (Jan. 10, 2011).

<sup>533</sup> CEQ, *Length of Environmental Impact Statements (2013–2017)*, at 1 (July 22, 2019) (hereinafter “CEQ Length Report”).

environmental documents are currently longer than CEQ's existing NEPA regulations recommend. CEQ does not ask *why* that is the case – e.g., whether the existing page-limit recommendation is too short for sufficient environmental review, given the wide range of complex environmental impacts many projects have.<sup>534</sup> Instead, CEQ simply asserts that the existing average length NEPA documents shows those documents must be shortened. The 2019 report does not support that conclusion.

The CEQ Length Report counts every single page of an EIS – including sections that currently are considered outside the scope of the “length” of an environmental document. Existing CEQ regulations suggest that an EIS generally should be shorter than 150 pages and, in unusual cases, should be shorter than 300 pages.<sup>535</sup> This standard, however, does not include the entire EIS document; rather, it only includes the purpose and need, alternatives, affected environment, and environmental consequences sections.<sup>536</sup> This leaves out a significant amount of an EIS, including the cover sheet, executive summary, table of contents, list of preparers, list of agencies, organization, and persons to whom the EIS was sent. Most tellingly, the CEQ Length Report did not differentiate when an EIS includes responses to comments in the document (and therefore counts that material toward the stated page length) and when an EIS puts comment responses in an appendix (which was then not counted in the page length).<sup>537</sup> But we know that responses to comments take up a significant number of pages.<sup>538</sup> The CEQ Length Report therefore cannot be used to show that the portion of EISs counted against CEQ's existing recommended page limits is, on average, regularly exceeded, or if it is, by how much.

There is also limited value in considering page length in isolation of other variables. CEQ acknowledges “that a number of factors may influence the length of EISs, including variation in scope and complexity of the decisions that the EIS is designed to inform, the degree to which NEPA documentation is used to document compliance with other statutes, and considerations relating to potential legal challenges. Moreover, variation in EIS length may reflect differences in management, oversight,

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<sup>534</sup> 85 Fed. Reg. at 1688.

<sup>535</sup> 40 C.F.R. § 1502.7

<sup>536</sup> 40 C.F.R. § 1502.7; 40 C.F.R. 1502.10(d)-(g).

<sup>537</sup> CEQ Length Report, at 2.

<sup>538</sup> CEQ Length Report, at fn.7.

and contracting practices among agencies that could result in longer documents.”<sup>539</sup> So, even if an environmental document has more pages than recommended, that does not mean the document can be shortened arbitrarily without compromising quality or appropriate completeness. Setting arbitrary, presumptive page limits has not been shown to be necessary, will not make the NEPA process more efficient, and will do nothing to ensure that environmental documents survive judicial review.

### 3. CEQ’s presumptive time limits are arbitrary and capricious

As with page lengths, CEQ proposes presumptive time limits for the NEPA process without any evidence to support this change. There are a multitude of variables that affect the time it takes for a project environmental review to be completed. CEQ’s proposed presumptive time limits fail to account for those variables. And CEQ provides no evidence that the amount of time it is proposing to allow is presumptively the *right* amount of time – *enough* time for a rigorous, “hard look” at the problem – given the complexity of environmental considerations, declining agency budgets, and other factors.

CEQ relies on the 2018 report “Environmental Impact Statement Timelines (2010–2017)” for the average time the NEPA process takes.<sup>540</sup> But while this report “presents information on the time that Federal agencies took to complete environmental impact statements,”<sup>541</sup> it recognizes that “EIS timelines vary widely, and many factors may influence the timing of the document, including variations in the scope and complexity of the actions, variations in the extent of work done prior to issuance of the NOI, and suspension of EIS activities due to external factors.”<sup>542</sup> The report goes on to list other factors influencing timing outside of the NEPA process itself, including “changes in the proposed action, funding, and community concerns.”<sup>543</sup> But the CEQ Timelines Report does not make any adjustments to account for these variables.<sup>544</sup> This

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<sup>539</sup> 85 Fed. Reg. at 1688.

<sup>540</sup> CEQ, *Environmental Impact Statement Timelines (2010–2017)* (Dec. 14, 2018) (hereinafter “CEQ Timelines Report”).

<sup>541</sup> CEQ Timelines Report, at 1.

<sup>542</sup> 85 Fed. Reg. at 1687 (discussing the CEQ Timelines Report).

<sup>543</sup> CEQ Timelines Report, at 1.

<sup>544</sup> CEQ Timelines Report, at 2.

report therefore does not show how long the NEPA process takes, or should take; it instead reflects how much time a project takes during which NEPA review can occur. Stating this another way, NEPA is not necessarily the cause of the time reported. The CEQ Timeline Report does not support CEQ's proposal to impose a mandatory, presumptive time limit on NEPA compliance.

Indeed, "the multi-year review process is often attributable to factors outside of the lead agency's control, such as: lack of funding, project complexity, higher agency priorities, changes in scope of the project, engineering requirements, and delays in obtaining nonfederal approvals."<sup>545</sup> The Congressional Review Service (CRS) has explained that "there is little data available to demonstrate that NEPA currently plays a significant role in delaying federal actions."<sup>546</sup>

Available information suggests that NEPA compliance is not the primary cause of project delay. An EIS is the NEPA document that takes the longest to produce, no EIS is prepared for approximately 96% of projects.<sup>547</sup> And CRS found that "factors 'outside the NEPA process' were identified as the cause of delay between 68% and 84% of the time."<sup>548</sup> Importantly, CRS stated that NEPA compliance can, in fact, "save" time by decreasing public opposition and requiring consideration of alternatives before

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<sup>545</sup> John Ruple & Heather Tanana, *Debunking the Myths Behind the NEPA Review Process*, 35 Nat'l Res. & Env't \_\_\_, at 3 (Draft Jan. 31, 2020) (forthcoming) (citing Government Accountability Office, *National Environmental Policy Act, Little Information Exists on NEPA Analyses*, GAO-14-370 at 15, 19 (Apr. 2014)).

<sup>546</sup> Congressional Review Service, *The National Environmental Policy Act (NEPA): Background and Implementation*, at 25 (Jan. 10, 2011). See also CRS, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress* (Apr. 11, 2012).

<sup>547</sup> Congressional Review Service, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, at 4-5 (Apr. 11, 2012).

<sup>548</sup> Congressional Review Service, *The National Environmental Policy Act (NEPA): Background and Implementation*, at 26 (Jan. 10, 2011) (discussing 2003 and 2004 survey by Tetra Tech, Inc. *Fast Tracking NEPA Documents – Tools to Overcome Schedule Delays*, for presentation at the 30th National Defense Industrial Association Environmental and Energy Symposium and Exhibition).

investment of resources.<sup>549</sup> And, the evidence shows that NEPA review is often already shorter than it should be because “the ‘NEPA process’ is often triggered too late to be fully effective.”<sup>550</sup> Thus, arbitrary timelines will only increase the public opposition – and attendant delays – based on a justified sentiment that “agencies make decisions before hearing from the public.”<sup>551</sup>

The proposed, presumptive time limits are not only unjustified by evidence, they also appear to count time not spent on EIS drafting toward the time limit on EIS drafting. Specifically, proposed section 1501.10(b)(2) states that “Two years is measured from the date of the issuance of the notice of intent to the date of the record of decision.” But the record of decision does not mark the completion of the NEPA analysis, but rather the date of the agency decision on the project. There are frequently considerable delays between completion of an EIS and the signing of a ROD. Those delays can be caused by many factors that have nothing to do with NEPA compliance. And yet, under the proposed rule, in any situation where such exogenous causes of delay exist, an EIS would have to be completed more quickly. Moreover, given that the length of the time an agency might take between finalizing an EIS and signing a ROD cannot be known in advance, staff working on an EIS would not know, in advance, how much time they have to complete that document. These factors renders the proposed EIS time limit, arbitrary, capricious, and ridiculous.

#### **4. The “senior official” exception to page and time limits is insufficient to ensure informed decision making**

CEQ’s proposed exception to the page and timeline limits – under which a “senior official” may waive these limits – would not cure the problems discussed above. Senior officials’ time is scarce (that’s partly why CEQ proposes shorter environmental documents, right?) and CEQ provides no standard for when a senior official should grant a waiver. A senior official may not have the time to fully understand why a

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<sup>549</sup> Congressional Review Service, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, at 4 (Apr. 11, 2012).

<sup>550</sup> CEQ, *The National Environmental Policy Act, A Study of Its Effectiveness After Twenty-five Years*, at 11 (Jan. 1997).

<sup>551</sup> CEQ, *The National Environmental Policy Act, A Study of Its Effectiveness After Twenty-five Years*, at 7 (Jan. 1997).



waiver should be granted – and indeed, probably has the *least* information about the reasons justifying any particular waiver – increasing the risk that waivers will be denied arbitrarily or incorrectly. Staff may not know that an extension is necessary until late in the process. Elevating the waiver decision to a senior official takes time – both staff time and senior official time – likely making staff reluctant to elevate such requests; that, indeed, would seem to be CEQ’s point in proposing to require a senior official approval of a waiver. Perhaps that might make sense if there were evidence that the proposed time and page limits were appropriate in the vast majority, or even “most,” circumstances, but there is none. (CEQ vaguely waives its own “experience” around, but CEQ’s experience with preparing EAs and EISs *itself* is quite limited, and since CEQ does not articulate what specific “experience” it is referring to, that word is little more than window dressing, here.)

Arbitrary time and page limits will discourage agencies from thoroughly considering significant effects of complex projects. Such limits will lead to less informed decision making. That, in turn, will lead to more EAs and EISs being invalidated in court.

#### **5. CEQ’s arbitrary limits will interfere with existing efficiencies**

Putting arbitrary limits on the NEPA process will conflict with 40 C.F.R. § 1502.25, which requires agencies to “prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies.” CEQ does not propose changing this requirement, nor should it.

Section 1502.25 has created the understanding that NEPA is an “umbrella” over environmental requirements – creating a one-stop “framework to coordinate or demonstrate compliance with any study, review, or consultation required by other environmental laws.”<sup>552</sup> And agencies have used this to streamline their review processes.<sup>553</sup> CEQ itself explained that “[t]he practice of integrating EISs with other

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<sup>552</sup> Congressional Review Service, *The National Environmental Policy Act (NEPA): Background and Implementation*, at Summary (Jan. 10, 2011).

<sup>553</sup> CEQ, *The National Environmental Policy Act, A Study of Its Effectiveness After Twenty-five Years*, at 9 (Jan. 1997) (discussing the “beneficial effect of coordinating

decision-making documents is intended to improve overall efficiencies.”<sup>554</sup> This overall increase in efficiency is achieved even though CEQ has also acknowledged that requiring this integration means that the *NEPA* process will take longer, and environmental documents will be longer.<sup>555</sup> CEQ should follow its own advice and not interrupt the integration of environmental documents with arbitrary limits on the *NEPA* process and on *NEPA* documents.

**B. The proposed regulations will increase litigation, vacatur of project approvals based on inadequate environmental documents, and attendant delay**

Although a stated goal of this rulemaking is to reduce litigation, if the proposal is finalized, it would likely do the opposite.

As a threshold matter, it’s not clear why CEQ seeks to reduce litigation by proposing roadblocks to litigating, rather than investing in better agency compliance with *NEPA*’s mandate. Indeed, CEQ assumes, but offers no evidence, that there is presently too much litigation. To the extent CEQ is asserting that litigation is delaying projects, such delays occur only when a court enjoins a project--and courts will enjoin projects only if the agency violated the law (or under the stringent standards for a preliminary injunction, if the court finds, among other things, that the agency likely violated the law and that the public interest favors an injunction).<sup>556</sup> CEQ offers no justification sufficient to obstruct litigation that enforces the law and vindicates the public interest.

In any event, despite high profile *NEPA* lawsuits, *NEPA* litigation is, on the whole, rare. Indeed, according to CEQ’s own data, the federal government prepares approximately 51,300 *NEPA* documents and 51,000 *NEPA* decisions annually – but, on

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environmental review” of the Federal Highway Administration, which “fully integrates public involvement with other project development and environmental procedures”).

<sup>554</sup> CEQ Length Report, at n.3.

<sup>555</sup> CEQ Timelines Report at n. viii; CEQ Length Report, at 2.

<sup>556</sup> *See Winter v. NRDC*, 555 U.S. 7, 20 (2008).

average, just 115 NEPA lawsuits are filed.<sup>557</sup> And, the Federal Highway Administration and Department of Energy (agencies responsible for infrastructure projects that the Administration seems intent on expediting) are sued even less often than peer agencies.<sup>558</sup>

The proposed rule would, if finalized, likely increase the number of projects challenged in court and enjoined for inadequate NEPA compliance. There are several, independent reasons to expect this result. CEQ offers no evidence or non-arbitrary explanation to the contrary.

First, as described in more detail throughout this letter, the proposal would unsettle a large and well-developed body of law. That body of law gives agencies and project proponents a clear set of guidelines to follow to comply with NEPA. That settled law will be unsettled by the proposed rule's attempt to radically revise existing precedent and regulations, and proposed elimination of existing CEQ implementation guidance.<sup>559</sup> Experience teaches that far less dramatic efforts to alter NEPA – likewise pursued in an attempt to improve efficiency or increase the speed of project approvals – instead prompted uncertainty, delays, and litigation.

For example, the Department of Transportation Inspector General has reported that repeated policy changes in recent Congresses have slowed and unsettled that Department's NEPA implementation.<sup>560</sup> Title 41 of FAST-41 mandated a new

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<sup>557</sup> John C. Ruple & Kayla M. Race, "Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases," at 23 (prepublication draft), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3433437](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433437).

<sup>558</sup> David E Adelman & Robert L. Glicksman, Presidential and Judicial Politics in Environmental Litigation, *Ariz. St. L.J.* 3, 30 (2018) (noting that the Federal Highway Administration faced only 30% of the EIS lawsuits that would be expected based on its share of EISs produced, while the Department of Defense faced only 60% of the EIS lawsuits expected, and the U.S. Army Corps of Engineers faced only 50% of the EIS lawsuits expected), [http://arizonastatelawjournal.org/wp-content/uploads/2018/05/Adelman\\_Pub.pdf](http://arizonastatelawjournal.org/wp-content/uploads/2018/05/Adelman_Pub.pdf).

<sup>559</sup> 85 Fed. Reg. at 1710.

<sup>560</sup> U.S. Dep't of Transp. Office of Inspector General, "Vulnerabilities Exist in Implementing Initiatives Under MAP-21 Subtitle C to Accelerate Project Delivery," at

interagency administrative apparatus called the Federal Infrastructure Permitting Improvement Steering Council – to set presumptive deadlines, push the resolution of interagency disputes, and allocate funding and personnel resources to support the overall decision-making process. The Council’s special rules for projects within its scope meant that some virtually identical projects are subject to different statutory requirements adding more complications to the administrative process. For example, Executive Order 13766<sup>561</sup> was intended to speed project approvals, but because it contradicted statutory authorities and responsibilities under FAST-41, project sponsors were caught between the FAST-41 statutory permitting board and Executive Order 13766’s requirement to coordinate eligible projects with the Chair of the Council of Environmental Quality.<sup>562</sup> Seven months later, President Trump issued a revised infrastructure executive order<sup>563</sup> to try to remove the inconsistencies created by his earlier executive order, and the Department of Transportation is now adjusting to that. Finalization of CEQ’s proposed rule promises significantly more confusion, disruption, and costs than the Executive Order 13766 debacle.

Second, many of CEQ’s proposed rule changes conflict with existing judicial precedent on the meaning of NEPA. CEQ issues rules under NEPA pursuant to Executive Order 11991, as amended, not pursuant to any statutory grant of authority to issue regulations with legislative effect. It may be “true that the statute before us” (here, NEPA) “contemplates” a role for CEQ,<sup>564</sup> but the statutory delegation of duties “is

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2 (March 2017),

<https://www.oig.dot.gov/sites/default/files/DOT%20Implementation%20of%20MAP-21%5E3-6-17.pdf>.

<sup>561</sup>“Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects,” Exec. Order 13766 (Jan. 24, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02029/expediting-environmental-reviews-and-approvals-for-high-priority-infrastructure-projects>

<sup>562</sup> Letter from Sen. Rob Portman to President Trump (June 8, 2017), <https://www.portman.senate.gov/newsroom/press-releases/portman-mccaskill-urge-trump-administration-use-permitting-reforms-recently>.

<sup>563</sup> Exec. Order 13,807 (Aug. 2017), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-discipline-accountability-environmental-review-permitting-process-infrastructure/>.

<sup>564</sup> See NEPA § 204, *codified at* 42 U.S.C. § 4344.

limited to precisely that subject [stated in the statute,] and does not extend by its terms or placement to any implication of authority to” any other matter.<sup>565</sup>

To be sure, the Supreme Court has given CEQ regulations “substantial deference,”<sup>566</sup> at least when those rules have a “well-considered basis.”<sup>567</sup> Under that standard, courts have repeatedly held federal agencies to compliance with the standards set out in CEQ’s existing regulations, as they both reflect and have guided judicial interpretations of NEPA. But CEQ points to no hint in the statutory language or history of NEPA that Congress gave CEQ *lawmaking* power.<sup>568</sup> True, *Department of Transportation v. Public Citizen* suggests that CEQ may interpret NEPA through regulations,<sup>569</sup> but that case does not address whether that interpretive authority derives from Congress or Executive Order, or whether this interpretive authority includes *legislative* authority – that is, amounts to anything more than the “substantial deference” recognized by the Supreme Court in *Andrus v. Sierra Club*.<sup>570</sup> The Supreme Court’s application of *Andrus*’s “substantial deference” standard does not conform to the Court’s application of so-called *Chevron* deference doctrine.<sup>571</sup>

Without *congressionally* delegated *lawmaking* authority, CEQ has no power, under existing Supreme Court precedent, to overturn the federal judiciary’s interpretations of NEPA.<sup>572</sup> Accordingly, to the extent federal agencies abide by CEQ’s proposed new rules, rather than established judicial precedent interpreting and applying NEPA, those agencies will be violating the statute. In other words, CEQ’s proposed rules invite, or perhaps purport to *require*, agencies to act unlawfully. Such action will, predictably, prompt litigation, injunctions, and delays.

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<sup>565</sup> *Murphy Exploration & Prod. Co. v. U.S. Dep’t of Interior*, 252 F.3d 473, 479 (D.C. Cir.), modified on denial of petition for reh’g, 270 F.3d 957 (D.C. Cir.2001).

<sup>566</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

<sup>567</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355–56 (1989).

<sup>568</sup> Cf. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (“A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”).

<sup>569</sup> 541 U.S. 752, 757 (2004).

<sup>570</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

<sup>571</sup> *Robertson*, 490 U.S. at 355–56.

<sup>572</sup> Compare *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983–83 (2005).

Third, by demanding that agencies rush and abbreviate their NEPA documents, CEQ's proposed time and page limits would lead to rushed and abbreviated NEPA analyses. Such analyses are likely to be sloppier and less complete – particularly given this Administration seeks to cut rather than increase relevant agency budgets. And sloppier and less complete analyses are far more likely to be challenged in court, and when challenged, found to be arbitrary and capricious.

CEQ's proposed rule preamble fails to grapple with this problem. It presents no evidence, nor even a hypothesis, why shorter, faster NEPA reviews will better serve NEPA's requirement that agencies "take[] a 'hard look' at environmental consequences" of their actions.<sup>573</sup> Nor does it present any evidence of how environmental documents that cover less material, and are written in shorter amounts of time, could, counterintuitively, reduce litigation or reduce delays associated with environmental reviews being found unlawful.

## **XII. The distinctions drawn by the proposal's public notification provisions could leave many members of the public without access to relevant information**

The CEQ proposes to "give agencies greater flexibility" by allowing for electronic public notification<sup>574</sup> – namely, through "a project or agency website, email, or social media."<sup>575</sup> The proposed rule aptly acknowledges that electronic notification is inadequate "[f]or actions occurring in whole or part in an area with limited access to high-speed internet."<sup>576</sup> However, this exception fails to account for other factors that are more significant in determining access to high-speed internet, making it insufficient to provide for adequate public participation.

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<sup>573</sup> *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

<sup>574</sup> 85 Fed. Reg. at 1705.

<sup>575</sup> 85 Fed. Reg. at 1725. For the same reasons discussed below, the CEQ should not allow agencies to solely "conduct public hearings and public meetings by means of electronic communication." 85 Fed. Reg. at 1725.

<sup>576</sup> *Id.*

According to the Pew Research Center, 63 percent of rural households and 75-79 percent of urban and suburban households have home broadband access.<sup>577</sup> However, the sharpest disparity in terms of access to home broadband is not related to geographic areas, but rather to household income, race, and disability. Ninety-four percent of households earning \$100,000 or more per year have home broadband access; that number decreases to eighty-one percent for households with incomes between \$30-99,999, and plummets to 56 percent for households with earnings below \$30,000.<sup>578</sup> And while 79 percent of white households have access to home broadband, only 61-66 percent of Hispanic and black households have access to home broadband.<sup>579</sup> The same trend applies to disabled Americans, 57 percent of whom have access to home broadband as opposed to 76 percent of their non-disabled counterparts.<sup>580</sup>

The proposed rule offers no justification on CEQ's distinction between geographic unavailability of high-speed internet and other causes of unavailability, such as household income or disability. In fact, the proposed rule entirely fails to identify and discuss these factors. People without high-speed internet access have as much need to participate in the NEPA process as those with access. By requiring electronic-only notification, the proposed rule disproportionately burdens those populations without access to high-speed internet. This is particularly troublesome

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<sup>577</sup> Andrew Perrin, *Digital Gap Between Rural and Nonrural America Persists*, Pew Research Center (May 31, 2019), <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>.

<sup>578</sup> Monica Anderson & Madhumitha Kumar, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, Pew Research Center (May 7, 2019), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>.

<sup>579</sup> Andrew Perrin & Erica Turner, *Smartphones Help Blacks, Hispanics Bridge Some – But Not All – Digital Gaps with Whites*, Pew Research Center (August 20, 2019), <https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/>.

<sup>580</sup> Monica Anderson & Andrew Perrin, *Disabled Americans are Less Likely to Use Technology*, Pew Research Center (April 7, 2017), <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/>.

because low-income communities of color face disproportionate exposure to environmental harms.<sup>581</sup> The proposed rule altogether fails to analyze these factors.

In short, by allowing agencies to limit public notice dissemination to electronic media<sup>582</sup> and by allowing agencies to conduct public hearings and meetings only by means of electronic communication,<sup>583</sup> the proposed rule would have the effect of preventing a large swath of the public from participating in NEPA projects. This is directly at odds with NEPA's cornerstones: ensuring both informed decision-making and informed public participation,<sup>584</sup> and is thus unlawful.

### **XIII. CEQ's proposal to exempt agencies from NEPA's requirement to prepare an EIS when the agency prepares a "functional equivalent" analysis is unlawful**

#### **A. The proposed rule contravenes established caselaw**

The CEQ proposes to create a new loophole in the law by exempting agencies from NEPA's requirements when an agency "prepare[s] pursuant to other statutory or Executive order" an analysis that "serve[s] as the functional equivalent of [an] EIS."<sup>585</sup> This is an impermissible – and unlawful – extension of the "functional equivalence" doctrine.

While it is true that in some circumstances an agency need not prepare an EIS when another statutory requirement demands an analysis that is functionally equivalent to that required by NEPA, this exception is markedly narrow. Courts have found functional equivalency based on three criteria: First, "the agency's organic

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<sup>581</sup> See, e.g., Loma Linda University, Report, Project ENRRICH: A Public Health Assessment of Residential Proximity to a Goods Movement Railyard, [http://www.aqmd.gov/docs/default-source/clean-air-plans/clean-communities-plan/enrrich\\_final\\_report\\_29may2014.pdf](http://www.aqmd.gov/docs/default-source/clean-air-plans/clean-communities-plan/enrrich_final_report_29may2014.pdf); Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 Am. J. Pub. Health 480 (2018), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304297>.

<sup>582</sup> 85 Fed. Reg. at 1725.

<sup>583</sup> *Id.*

<sup>584</sup> See *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982).

<sup>585</sup> 85 Fed. Reg. at 1726, 1727-28.



legislation mandate[s] specific procedures for considering the environment that [are] functional equivalents of the impact statement process.”<sup>586</sup> Second, the agency must allow for meaningful public participation before final action occurs.<sup>587</sup> Third, and perhaps most importantly, is that the action must be undertaken by an agency “whose sole responsibility is to protect the environment.”<sup>588</sup>

CEQ’s proposal fails to meet the criteria articulated above. There is no requirement under proposed sections 1506.6 and 1507.3 that the “substantive and procedural standards” that purportedly deem some other analysis “functionally equivalent” to an EIS come from that agency’s organic statute. What’s more, the proposed rule would permit, by way of executive fiat, any agency to flout Congress’s mandate that all federal agencies prepare “detailed statements” on every proposal for major Federal action significantly affecting the quality of the environment. And the proposed rule would permit *any agency* to determine whether its analyses are the functional equivalent of an EIS. This unreasoned – and unlawful – expansion of the functional equivalency doctrine fails to grapple with the very limited circumstances under which an alternative analysis may be deemed functionally equivalent to an EIS.

As the courts have reasoned, there may be “little need in requiring a NEPA statement from an agency whose *raison d’être* is the protection of the environment and whose decision . . . is necessarily infused with the environmental considerations so pertinent to Congress in designing the statutory framework.”<sup>589</sup> It is precisely for these

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<sup>586</sup> *Tex. Comm. on Nat. Res. v. Bergland*, 573 F.2d 201, 207 (5th Cir.1978); *see also Env’tl Def. Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

<sup>587</sup> *See, e.g., Env’tl Def. Fund* 489 F.2d at 1256; *Maryland v. Train*, 415 F. Supp. 116, 122 (D. Md. 1976).

<sup>588</sup> *Tex. Comm.*, 573 F.2d at 208 (stating that the “functional equivalent” exception does not apply to the Forest Service, even though the National Forest Management Act requires the agency to balance environmental needs in managing the nation’s timber supply).

<sup>589</sup> *Amoco Oil Co. v. EPA*, 501 F.2d 722, 749-50 (D.C. Cir. 1974) (quoting *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973)); *see also State of Ala. ex rel. Siegelman v. U.S. EPA*, 911 F.2d 499, 504 n. 11 (11th Cir. 1990).

reasons that “[c]ourts have declined to apply the doctrine to *any agency other than the EPA*, including departments that have substantial environmental responsibilities.”<sup>590</sup>

The CEQ proposed rule’s attempt to extend the “functional equivalency” doctrine to every agency, including those whose core missions have little or perhaps nothing to do with environmental protection,<sup>591</sup> does not seek to “strike a workable balance between some of the advantages and disadvantages of full application of NEPA.”<sup>592</sup> It would instead stretch beyond recognition a narrow exception created by the courts. It is contrary to the law, and it even contradicts the CEQ’s own legal analysis.<sup>593</sup>

**B. The proposed rule’s “functional equivalence” standards are vague and unenforceable**

CEQ’s proposed rule would establish three criteria to determine whether an analysis “prepared pursuant to other statutory or Executive order requirements may serve as the functional equivalent of the EIS and be sufficient to comply with NEPA.”<sup>594</sup>

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<sup>590</sup> Council on Environmental Quality, Major Cases Interpreting the National Environmental Policy Act 25 (1997) (emphasis added), [https://ceq.doe.gov/docs/laws-regulations/Major\\_NEPA\\_Cases.pdf](https://ceq.doe.gov/docs/laws-regulations/Major_NEPA_Cases.pdf); see *Tex. Comm.*, 573 F.2d at 207; *W. Nebraska Res. Council v. U.S. EPA*, 943 F.2d 867, 871-72 (8th Cir. 1991); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1051-52 (D.C. Cir. 1978) (“In essence, Congress was convinced that EPA’s internal dynamics and procedures were the ‘functional equivalent’ of the NEPA duties imposed on other agencies.”).

<sup>591</sup> For example, the U.S. Department of Transportation describes its mission as “ensur[ing] our Nation has the safest, most efficient and modern transportation system in the world, which improves the quality of life for all American people and communities, from rural to urban, and increases the productivity and competitiveness of American workers and businesses.” U.S. Dep’t of Transp., *About DOT*, <https://www.transportation.gov/about> (last updated January 29, 2020).

<sup>592</sup> *Env’tl. Def. Fund*, 489 F.2d at 1256.

<sup>593</sup> Council on Environmental Quality, Major Cases Interpreting the National Environmental Policy Act 25 (1997), [https://ceq.doe.gov/docs/laws-regulations/Major\\_NEPA\\_Cases.pdf](https://ceq.doe.gov/docs/laws-regulations/Major_NEPA_Cases.pdf).

<sup>594</sup> 85 Fed. Reg. 1726, 1727-28.

First, CEQ's test would require "substantive and procedural standards that ensure the full and adequate consideration of environmental issues."<sup>595</sup> Second, it would require "public participation before a final alternative is selected."<sup>596</sup> And third, it would require that "a purpose of the analysis that the agency is conducting is to examine environmental issues."<sup>597</sup> These requirements are vague and unenforceable, and do not ensure the *actual* functional equivalence of the alternative analyses.

The first required finding, that there be "substantive and procedural standards that ensure the full and adequate consideration of environmental issues," is wholly undefined and subjective. The proposed rule in no way defines what "full and adequate consideration" is, or whether this is synonymous with the "detailed statement" required under § 102 of NEPA and its caselaw. Similarly, the proposed rule provides no definition for the term "environmental issues," which creates significant uncertainty as to whether this includes any of the "five core NEPA issues" that must be analyzed and considered: "the environmental impact of the action, possible adverse environmental effects, possible alternatives, the relationship between long- and short-term uses and goals, and any irreversible commitments of resources."<sup>598</sup> Lastly, the proposed rule calls for the full and adequate *consideration* of "environmental issues," but does not expressly require full *analysis* of environmental impacts. It is axiomatic that any "detailed statement" under NEPA must both fully and adequately analyze *and* consider the environmental impacts of the proposed action.<sup>599</sup>

The second required finding, that there be some undefined "public participation before a final alternative is selected," does not ensure the public has sufficient opportunity to bring relevant information and concerns to the action agency's attention. The proposed rule does not mention the extent of public participation that an agency must provide to deem an alternative analysis "functionally equivalent" to an EIS, nor the timing for any such public involvement. This is deeply problematic from a public

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<sup>595</sup> *Id.*

<sup>596</sup> *Id.*

<sup>597</sup> *Id.*

<sup>598</sup> See *Env'tl. Def. Fund, Inc. v. Env'tl. Prot. Agency*, 489 F.2d 1247, 1256 (D.C. Cir. 1973); see also 42 U.S.C. § 4332(C).

<sup>599</sup> See *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1117-18 (D.C. Cir. 1971).

policy perspective, and inconsistent with one of NEPA's core purposes. An EIS has an "'informational role' of 'giv[ing] the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process,' and, perhaps more significantly, provid[ing] a springboard for public comment' in the agency decisionmaking process itself. The purpose here is to ensure that the 'larger audience' can provide input as necessary to the agency making the relevant decisions."<sup>600</sup> After all, "NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action."<sup>601</sup> Yet, under the proposed rule, an agency could apparently self-certify its own analysis as "functionally equivalent" to an EIS by inviting the public's participation at a time in which public input would no longer influence and strengthen the environmental review process. If the public lacks sufficient opportunity to bring relevant issues and concerns to the acting agency's attention, that circumstance would not only undermine NEPA's purposes, but also frustrate one of the CEQ's main justifications for proposing to amend its regulations – avoiding protracted litigation over an EIS's (or a "functionally equivalent" analysis's) adequacy.

The third required finding, that "[a] purpose of the analysis" be to examine environmental issues, also misunderstands the nature and purpose of the statute. NEPA processes ensure that agencies squarely consider environmental impacts early in the process and before making decisions. That focus could be lost if the alternative analysis considers environmental issues along with a myriad of other issues. It is precisely for this reason that the courts, in applying the functional equivalency doctrine, limit its reach to only those agencies whose "sole responsibility is to protect the environment."<sup>602</sup> Although other statutes may call for certain analyses of environmental impacts, that does not necessarily make such analyses actually "functional equivalent" of the analysis required by NEPA. For different statutes "involve different processes that measure different kinds of environmental impacts."<sup>603</sup>

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<sup>600</sup> *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768–69 (2004) (citations omitted).

<sup>601</sup> *Id.* (quoting 40 C.F.R. § 1500.1(c)).

<sup>602</sup> *Tex. Comm.*, 573 F.2d at 207.

<sup>603</sup> *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 651 n. 51 (9th Cir. 2014).

**C. Regulatory Impact Analyses are not functionally equivalent to the “detailed statements” of environmental impacts that NEPA requires**

The proposed rule offers regulatory impact analyses (RIAs) conducted pursuant to Executive Order 12866 as an example of a document that CEQ deems “functionally equivalent” to a detailed statement under NEPA.<sup>604</sup> RIAs are nothing of the kind, for their overarching purpose is to consider costs and benefits of proposed regulations.<sup>605</sup> Notably, Executive Order 12866’s subsection titled “*The Principles of Regulation*,” which establishes the framework to which RIAs must adhere, fails even to mention the role that environmental concerns play in the regulatory impact assessment process.<sup>606</sup> Additionally, OMB Circular A-4 – the agency’s “guidance to Federal agencies on the development of regulatory analysis as required under . . . Executive Order 12866” – makes it clear that the purposes of RIAs are to “(1) learn if the benefits of an action are likely to justify the costs or (2) discover which of various possible alternatives would be the most cost-effective.”<sup>607</sup> Further, the core analytical approaches employed in RIAs – benefit-cost analysis and cost-effective analysis – are wholly inadequate for purposes of analyzing environmental impacts under NEPA.<sup>608</sup> Indeed, NEPA itself recognizes that environmental costs and benefits are often difficult to quantify, but should nonetheless be considered in the “detailed statements” demanded by that statute.<sup>609</sup> Thus, even if a RIA may, to some extent, include considerations of the “regulatory impacts to air and water quality, ecosystems, and animal habitat,”<sup>610</sup> these analyses are categorically not functionally equivalent to a detailed statement under NEPA, because RIAs “involve different processes that measure different kinds of . . . impacts.”<sup>611</sup>

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<sup>604</sup> 85 Fed. Reg. at 1705.

<sup>605</sup> See Exec. Order No. 12866 (1993).

<sup>606</sup> *Id.*

<sup>607</sup> OMB Circular A-4.

<sup>608</sup> Cf. *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 430 (4th Cir. 2012) (stating that “it would be improper” for an agency to present a cost-benefit analysis comparing project alternatives “when there are important qualitative considerations”).

<sup>609</sup> 42 U.S.C. § 4332(B).

<sup>610</sup> 85 Fed. Reg. at 1705.

<sup>611</sup> *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 651 n. 51 (9th Cir. 2014).

**D. CEQ’s request for comments on additional analyses that would be “functionally equivalent” to EISs is too vague to allow meaningful public input**

CEQ’s NPRM invites “comments on additional analyses agencies are already conducting that, in whole or when aggregated, can serve as the functional equivalent of the EIS.”<sup>612</sup> According to the 2019 Federal Register index, there are hundreds federal agencies, sub-agencies, and departments within the federal government.<sup>613</sup> Each one of those entities may itself regularly conduct a vast array of analyses that, to some extent or another, consider the environmental implications of that entity’s actions. We are not aware of any alternative regular type of analysis by any of these many agencies that would adequately serve NEPA’s functions and that has not already been recognized by the courts as the functional equivalent of an EIS. Yet we cannot comment on each of the literally thousands, or tens of thousands, of potential analyses that might be evaluated in response to CEQ’s invitation to public comment.

CEQ’s vague comment solicitation therefore does not provide sufficient information to allow us, or other members of the public, to comment on any specific analysis’s inadequacy as a “functionally equivalent” analysis. Should CEQ identify any such alternative analysis, whether on its own or in response to public comments, which CEQ believes would be functionally equivalent to an EIS, we request that CEQ provide the public an opportunity to comment on the particular type of analysis at issue, the reasons why such analyses meet NEPA’s functions, and solicit additional public comments to evaluate whether those analyses are in fact functionally equivalent to EISs.

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<sup>612</sup> 85 Fed. Reg. 1705.

<sup>613</sup> See Office of the Federal Register, Federal Register Index (2019), <https://www.govinfo.gov/content/pkg/GPO-FR-INDEX-2019/pdf/GPO-FR-INDEX-2019.pdf>.

**E. No label given to a document can shield it from compliance with NEPA's "hard look" requirements**

NEPA holds that "environmental protection [is] part of the mandate of every federal agency and department."<sup>614</sup> Although NEPA's requirements are essentially procedural in nature, Congress did not intend the Act to be treated as a "paper tiger."<sup>615</sup> Indeed, NEPA requires that agencies contemplating major action comply with the statute's procedural requirements "to the fullest extent."<sup>616</sup> "Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process.'"<sup>617</sup> In considering these concerns, the statute's sweeping policy goals "require that agencies take a 'hard look' at environmental consequences."<sup>618</sup> This is not a low threshold, and an agency's duties under section 102 "are not inherently flexible."<sup>619</sup> Instead, NEPA "mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties."<sup>620</sup>

By proposing a rule that would allow agencies to meet their NEPA obligations by relying on other analyses, either on their own or aggregately, CEQ opens the door to the type of perfunctory analysis that fails to take a "hard look" at the environmental consequences of federal action. Regardless of any agency determination of "functional equivalency," an analysis that gives "insufficient weight to environmental values" or which lacks "individualized consideration and balancing of environmental factors" falls short of Congress's mandate.<sup>621</sup> CEQ's proposed functional equivalency standard therefore invites unlawful avoidance of NEPA's "detailed statement" requirements, and should not be adopted.

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<sup>614</sup> *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

<sup>615</sup> *Id.* at 1114.

<sup>616</sup> *Id.* at 1115.

<sup>617</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (quoting *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983)).

<sup>618</sup> *Id.* at 350.

<sup>619</sup> *Calvert Cliffs*, 449 F.2d at 1115.

<sup>620</sup> *Id.*

<sup>621</sup> *Id.* at 1115-16.

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To all appearances, this rulemaking is not designed to improve federal decision making, better engage the public, or protect the environment. It is instead a cynical attempt to expedite federal project approvals by bypassing or truncating environmental analyses, limiting the public's role, and restricting the ability of the judiciary to ensure agency compliance with the law. Those apparent intentions are fundamentally at odds with NEPA's aims. They are also unlawful. We urge CEQ to change course.

Respectfully,

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