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RE: Comments on CEQ-2019-0003 — Proposed Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (submitted via regulations.gov and certified mail #7016 2140 0000 3900 3332)

I. Introduction

The following comments are intended to express the vehement opposition of Blue Mountains Biodiversity Project, the Greater Hells Canyon Council, and Friends of the Clearwater (collectively, "BMBP") to regulatory changes for the implementation of the National Environmental Policy Act ("NEPA") proposed by Council on Environmental Quality ("CEQ"). Though couched in seemingly innocuous policy goals, the proposed regulations are nothing less than an attempt by CEQ to abrogate the responsibilities entrusted to it under NEPA. These responsibilities include the duty to develop policies "to foster and promote the improvement of environmental quality to meet the conservation, social economic, health, and other requirements and goals of the Nation."[1] Moreover, CEQ's mandate is to facilitate review and appraisal of Federal activities in light of NEPA's purposes, which are: (1) "to encourage productive and enjoyable harmony between man and his environment;" (2) "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of [all people];" and (3) "to enrich the understanding of the ecological systems and natural resources important to the Nation."[2] The proposed regulations are a far cry from these worthy goals. In fact, CEQ's proposal would substantially increase the likelihood that Federal actions will unwittingly contribute to significant environmental harm without the benefit of

[1] 42 U.S.C. § 4344(4).
[2] *Id.* § 4321.

meaningful public participation and agency consideration of and disclosure of environmental impacts ahead of time.

When NEPA was introduced on the floor of the United States Senate in 1969, Senator Henry "Scoop" Jackson announced that the purpose of the legislation was to "insure that present and future generations of Americans will be able to live in and enjoy an environment that is not fraught with hazards to mental and physical well-being."[3] The Senate Interior and Insular Affairs Committee unanimously recommended adoption of NEPA to address the "shortsighted, conflicting, and often selfish demands and pressures on the finite resources of the earth," and to remedy the nation's practice of making important decisions in "small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."[4] In passing NEPA, Congress sought to create "intelligent long-range public policies on environmental quality and on the administration of the environment."[5]

But, despite Congress' explicit direction that all Federal laws be interpreted and administered in accordance with NEPA's policies,[6] NEPA has never been fully implemented. Instead, unwilling to accept that laws of man and nature often require industry interests to give way to environmental conservation, judicial and administrative decisions alike have spread the false conclusion that "NEPA does not mandate particular results or substantive outcomes." Nevertheless, even partial compliance with NEPA has resulted in significant environmental victories across the country: halting the parade of hundreds of snowmobiles through Yellowstone National Park,[7] mandating mitigation to protect rare ecosystems in Back Bay National Wildlife Refuge,[8] repeatedly stalling road-building that would serve coal mines in Colorado's Rocky Mountains,[9] and stopping a huge timbersale in Oregon's beautiful Wallowa Mountains that

[3] 113 Cong. Rec. 36849.
[4] 115 Cong. Rec. 19010.
[5] 113 Cong. Rec. 36849.
[6] 42 U.S.C. § 4332(1).
[7] *Greater Yellowstone Coalition v. Kempthorne*, 577 F. Supp. 2d 183 (D.D.C. 2008).
[8] *Friends of Blck Bay v. Army Corps of Engineers*, 681 F.3d 581 (4th Cir. 2012).
[9] *High Country Conservation Advocates v. U.S. Forest Serv.*, No. 1:17-cv-03025-PAB (10th Cir. 2020).

would have destroyed critical wildlife habitat.[10]None of these victories would be possible to recreate if CEQ's proposed regulations were to go into effect.

Though BMBP takes issue with many of the proposed regulations, the most egregious and harmful of these is the elimination of indirect and cumulative impacts from the definition of "effects." This absurd change would obliterate crucial considerations from NEPA analyses and seriously impede the government's ability to make informed and well-reasoned decisions. For instance, according to CEQ's own interpretation, the climatic effects of greenhouse gas emissions are "inherently a global cumulative effect."[11] Loss of carbon storage through logging and deforestation also fall into this imperiled classification. Thus, CEQ—an agency created specifically to study and recommend ways to live in harmony with nature—is proposing that the entire Executive branch turn a collective blind eye to the most pressing existential threat the human race has ever faced: climate change.

Despite CEQ's previous statement that cumulative impacts comprise some of the "most devastating environmental effects," the agency now claims consideration of cumulative impacts "can divert agencies from focusing their time and resources on the most significant effects."[12] This and other significant changes are unjustified and illegal reversals of prior NEPA policy interpretation and implementation by both CEQ and the Federal judiciary. Although an agency is entitled to change its policy positions and interpretation of statute, when a change "rests upon factual findings that contradict those which underlay its prior policy," the agency must: (1) "display awareness that it is changing position," (2) show the new policy is permissible under the statute, (3) believe the new policy is better, and (4) provide good reasons for the new policy, including a reasoned explanation for disregarding facts and circumstances the agency previously found compelling.[13] Here, CEQ has failed to acknowledge or adequately explain numerous deleterious changes it wishes to implement. CEQ frequently frames these proposed changes as

[10] *LOWD v. Connaughton,* 2014 WL 6977611 (D.Or. 2014).
[11] 84 Fed. Reg. 30098.
[12] COUNCIL ON ENVIRONMENTAL QUALITY, *Considering Cumulative Effects Under the National Environmental Policy Act* at 1, (Jan. 1997). 85 Fed. Reg. 1708.
[13] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009).

modernizations undertaken to promote efficiency. But, this vague excuse fails to adequately acknowledge the drastic policy changes reflected in the proposed regulations. In most instances, these policy changes are not permissible under NEPA, not within CEQ's realm of authority, and unlikely to achieve the desired advances in efficiency. These comments detail how the various changes are arbitrary, capricious, and contrary to law under both NEPA and the Administrative Procedure Act ("APA").

Full consideration of the environmental impacts attributable to Federal action is more important now than ever. With our natural resources and livelihoods imperiled by climate change, the only alterations that should be made to NEPA's regulatory scheme are those that strengthen environmental protections and ensure the voices of all Americans are accounted for in decision-making processes. To this end, we submit the following comments for CEQ's consideration. In the spirit of constructive participation, these comments contain not only criticism of the proposed changes, but also suggestions for additional measures that would promote efficient and thorough analysis of environmental consequences.

II. General Objections

The current regulations require detailed consideration of all aspects of an action, and have generally been successful in ensuring citizens can access information about how government decisions will affect public trust resources like our forests, waters, and air. While compliance with NEPA can be time-consuming depending on the size of the Federal action, NEPA forbids sacrificing thorough and transparent analyses in the name of efficiency. Disregarding this long understood statutory mandate, the proposed CEQ regulations do just that.

As previously mentioned, Supreme Court precedent requires that CEQ acknowledge any changes in position and justify those changes with good reasons.[14] But, while CEQ's Notice of Proposed Rulemaking ("NOPR") admits some changes, it is silent about others. For instance, without conducting a thorough side-by-side comparison of the proposed and existing regulations, the public would have no way of knowing the proposed regulations would eliminate the requirement that contractors preparing environmental documents have no financial interest in the

[14] *Id.*

project they are evaluating.[15] These unacknowledged changes are detailed further throughout this comment, but BMBP objects as a general matter to CEQ's attempt to hide the ball by sneaking provisions that would weaken NEPA past public review.

For those policy shifts that *were* acknowledged in the NOPR, CEQ sweepingly justifies these extensive and inappropriate changes by declaring its proposed changes would "modernize and clarify the regulations to facilitate more efficient, effective, and timely NEPA reviews." The agency goes on to state that the proposed amendments "advance the original goals of the CEQ regulations to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA." Subsequent discussion within the Notice of Proposed Rulemaking ("NOPR") also indicates that CEQ considers avoiding litigation to be an aspect of its noted efficiency concerns. Although such goals may be taken into account when interpreting NEPA, they cannot be given primacy over the actual purposes of NEPA or the directives the statute aims at all agencies. NEPA does not instruct agencies to reduce paperwork, increase the speed of decision-making, or avoid litigation. To the contrary, NEPA instructs agencies to ensure that "appropriate consideration" is given to "major Federal actions significantly affecting the quality of the human environment."

The natural environment is the foundation for the continued existence of human civilization. Thus, giving the environment "appropriate consideration" necessarily entails spending more time to develop alternatives that minimize environmental harm and promote good stewardship practices that will regenerate ecosystems. To the extent that these regulations attempt to subjugate or frustrate the purpose and directives of NEPA, BMBP objects and calls upon the CEQ to correct these proposed errors. CEQ may not sacrifice the integrity of the NEPA process in the name of efficiency, nor stymie public participation in the name of reduced paperwork. Litigation in particular is a valuable tool that allows the public to hold the government accountable for following Congress' instructions. If CEQ is concerned about the rate at which agencies are being sued, it should focus its energies on facilitating thorough and meaningful environmental review. Rather than closing the avenues for public participation and reducing agency responsibilities, CEQ should be compiling research databases for use in NEPA

[15] 40 C.F.R. 1506.5(c).

reviews and creating procedures to guide analyses of the most pervasive environmental effects such as climate change and loss of biodiversity.

CEQ also states the proposed regulations "would codify longstanding case law in some instances, and, in other instances, clarify the meaning of the regulations where there is a lack of uniformity in judicial interpretation."[16] But, CEQ's methodology for choosing which judicial interpretations to follow and attempting to justify those decisions is deeply flawed. After cherry-picking opinions that espouse narrow interpretations and afford fewer environmental protections, CEQ relies on language from these opinions to prop up the regulatory changes at issue. This approach skips the important step of explaining why *these* opinions were chosen for codification while other, more well-reasoned opinions and widely accepted opinions were not. "[R]easonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole."[17] Thus, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference."[18] CEQ is not entitled to undertake "interpretive gerrymanders under which an agency keeps part of the statutory context it likes while throwing away parts it does not."[19] Accordingly, if CEQ wishes to endorse one judicial interpretation of NEPA over another, it must explain how that interpretation is consistent with the statutory scheme, especially in light of NEPA's purposes[20] and CEQ's mandate.[21]

In the Rulemaking Analyses and Notices section of the NOPR, CEQ asserts the proposed regulations "would not have a significant effect on the environment because it would not authorize any activity or commit resources to a project that may affect the environment."[22] For this reason, CEQ declares it will not conduct NEPA analysis to determine how the rule change would impact the environment. This is preposterous. CEQ felt NEPA analysis was necessary

[16] 85 Fed. Reg. 1688.
[17] *Util. Air Reg. Group v. Envtl. Prot. Agency*, 573 U.S. 302, 321 (2014) (internal quotes omitted).
[18] *Id.* (internal quotes omitted).
[19] *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2708 (2015).
[20] 42 U.S.C. § 4321.
[21] 42 U.S.C. § 4344.
[22] 85 Fed. Reg. 1711.

when it adopted the current regulations in 1978.[23] This conclusion also implies that NEPA and its implementing procedures in fact make little or no difference regarding the environmental impacts of the decisions agencies make when following those procedures. That can only be true if NEPA is, as CEQ now suggests in proposed Section 1500.1 merely a set of procedural hoops and is not the "action forcing" law that the current version of Section 1500.1 correctly says it is. As the proposed changes represent a substantial rollback of environmental oversight, they are even more likely to engender significant and adverse environmental impacts. Through these regulations, CEQ would not only authorize but also *require* agencies to conduct fewer environmental reviews and assess fewer impacts in the reviews they do conduct. If agencies do not even consider how their actions will impact the environment, how can they possibly ensure environmental values are given appropriate weight in the decision-making process? How can agencies hope to avoid the worst environmental impacts without robust analyses that include indirect and cumulative effects? How will agencies uphold their affirmative duties to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings" when the only options on the table are those that satisfy the needs of industrial actors whose business models are founded on exploitation of the very resources NEPA is designed to protect? This is a commitment of agency resources not to a single project, but to countless decision-making projects that will undoubtedly affect every aspect of the environment. Thus, NEPA demands an environmental impact statement ("EIS") be used to evaluate these effects and determine whether adoption of these regulations is justified and warranted.[24]

The logic underlying CEQ's decision not to conduct NEPA analysis for the proposed changes also puts the cart before the horse. CEQ acknowledged that the current regulations apply to this rulemaking by explaining that the existing regulations do not require preparation of NEPA analyses before agencies establish internal procedures for implementing NEPA.[25] Under the

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[23] 43 Fed. Reg. 55980-55981 (describing the EA CEQ used to analyze the impact of the existing regulations).

[24] *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007) (holding NEPA review was required for programmatic changes to rules implementing the National Forest Management Act).

[25] *Id.* This point is as irrelevant as it is misleading. Of course the current regulations do not explicitly flag regulations implementing NEPA as subject to NEPA, just as they do not explicitly flag regulations implementing *any* statute as subject to NEPA. Doing so would be both tedious and arbitrary in light of the sheer number of statutes requiring regulatory implementation and the many

current regulations, CEQ must consider the indirect and cumulative effects of the proposed regulations to determine whether significant environmental impacts are likely to result. As explained more specifically in the comments below, the indirect and cumulative impacts associated with these regulations will be far-reaching and significant. Because the proposed regulations forbid agencies from enacting more protective policies, adoption would certainly preclude agencies from considering the true environmental cost of their decisions. The only possible outcome of this lack of foresight is that the government will make less-informed decisions, skewed by improper focus on applicant interests and likely to significantly and adversely affect the environment. Thus, CEQ must create an EIS to assess and disclose these impacts.

CEQ's position with regard to its duty to conduct environmental analysis of the proposed regulations, although misguided, was at least made clear in the NOPR. Nowhere, however, does CEQ admit or attempt to justify its failure to comply with Section 7 of the Endangered Species Act ("ESA"). Under the ESA, agencies must confer with the appropriate agency (the U.S. Fish and Wildlife Service or National Marine Fisheries Service, depending on which species are at issue) on any agency action likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any critical habitat.[26] Consultation is part of each Federal agency's duty to "insure that any action authorized, funded, or carried out by such agency… is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[27] Many of the changes CEQ proposes in these NEPA regulations—such as eliminating the requirement that agencies consider a less environmentally deleterious alternative and discarding indirect and cumulative impacts from the required scope of analysis—are likely to jeopardize listed species and result in the destruction of critical habitat. Therefore, it is arbitrary, capricious, and contrary to both the APA and ESA for CEQ to forego consultation, especially without even explaining the decision not to consult.

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facets of each individual statute, only some of which may engender environmental consequences. Besides, designating particular statutes as subject to NEPA is unnecessarily duplicative of the broad mandate that NEPA analysis be conducted for any major Federal action significantly affecting the environment.

[26] 16 U.S.C. § 1536(a)(4).

[27] *Id.* § 1536(a)(2).

Finally, BMBP opposes CEQ's decision to close the public comment period and move ahead with finalization of new NEPA regulations without first responding in full to all public records requests related to the development of these regulations. BMBP is just one of the organizations that sought government records pertaining to this rulemaking process through the Freedom of Information Act ("FOIA"). In response to these requests, CEQ points to its website, where the agency has posted and continues to post additional records that are supposedly responsive to the various requests.[28] Unfortunately, these documents are so heavily redacted that it is impossible to glean anything informative about the process that led to the proposed regulations.

The purpose of FOIA is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."[29] "[D]isclosure, not secrecy, is the dominant objective of the Act."[30] CEQ's excessive redactions and failure to fully respond to FOIA requests about the proposed NEPA regulations are certainly not designed to reach this objective, and are in fact the subject of at least one pending lawsuit.[31] By refusing to give the public meaningful access to these documents, CEQ has prejudiced all interested parties whose comments would have greatly benefitted from insight as to what information was before the agency at the time it was making its decisions. Access to a transparent administrative record would have afforded the public the opportunity to offer perspectives the agency may not have considered, point out inconsistencies or oversights, and engage generally in a fair and open rulemaking process. CEQ's excessive redactions, unlawful withholding of documents, and determination to speed through rulemaking while throwing up roadblocks to civic engagement in its wake are contrary to both FOIA and NEPA.[32]

III. Specific Comments and Objections

A. 1500.1 — Purpose

[28] *CEQ FOIA Responses*, https://www.whitehouse.gov/ceq/foia/.
[29] S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965).
[30] *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).
[31] *Southern Envtl. Law Ctr. v. Council on Envtl. Quality*, No. 3:18-cv-00113 (W.D. Va. 2020).
[32] *See* 5 U.S.C. § 552(a)(3)(A) (requiring agencies to produce records); 42 U.S.C. § 4332(2)(G) (requiring agencies to make information useful in restoring and enhancing the environment available to the public).

In the first provision of the generally applicable NEPA regulations, CEQ purportedly endeavors to convey the purpose of the statute and concomitant regulations. CEQ justifies the proposed changes to existing section 1500.1 by saying they are intended to "align" the section with NEPA and certain judicial opinions. During the course of this effort, however, CEQ managed to both seriously misread NEPA and to abrogate its duty to recommend policies that will "foster and promote improvement of environmental quality."[33]

While the Supreme Court may have interpreted NEPA as strictly procedural, there can be no question that was not Congress' intent when it passed the statute. The honorific "action-forcing"—which CEQ now calls a "vague reference"—originated in Congress, where supporters of the law believed it would in fact achieve the policy goals laid out in Section 101 of the Act. These goals represent some of the most fundamental responsibilities of a functioning government. Now, despite NEPA's insistence that it is the "continuing responsibility of the Federal government to use all practicable means" to achieve these policy goals,[34] CEQ has gutted the heart of the regulations that are supposedly intended to protect our vulnerable ecosystems and foster a livable environment for the citizens of this country. This gutting is evident in CEQ's decision to revoke its previous endorsement of accurate scientific analysis and public scrutiny before decisions are made. It is not CEQ's role to weaken NEPA by condoning conservative interpretations of the very statute the agency was created to promote and implement.

The changes proposed for this section are not only an affront to the spirit of NEPA, they are illegal. While CEQ cites a need to update this section consistent with case law, this vague acknowledgment does not suffice as justification for its complete reversal of position. In existing section 1500.1, CEQ stated the purpose of the regulations was to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." Like the rest of the proposed changes, proposed section 1500.1 eliminates any indication that agencies should focus on precluding environmental harm or promoting environmental restoration. This unexplained change is arbitrary, capricious, contrary to NEPA, outside the scope of CEQ's power, and most importantly, reflects the hard

[33] 42 U.S.C. § 4344(4).
[34] 42 U.S.C. § 4331(b).

truth that this rule change, along with the vast majority of actions undertaken by the current administration, is intended to profit a select few people to the detriment of the rest of life on Earth.

B. 1500.2 — Policy

CEQ justifies the removal of §1500.2 by stating that it is duplicative of other sections and the removal is an act of simplification. While one relevant subsection is indeed relocated (to proposed part 1502.25) while retaining the important introductory language that agencies "shall" undertake such acts "to the fullest extent possible,"[35] others are sprinkled throughout the proposed regulations without retaining this language (proposed parts 1502.1, 1502.14, etc.), or swapping out the term "possible" with the weaker and less inclusive term "practicable" (proposed parts 1502.9(b), 1506.2, 1506.4). At least one section did not survive this regulatory transplant (§1500.2(f)), and no reference at all is found in the proposed regulations to that section's mandate that "agencies shall to the fullest extent possible" use all practicable means to "restore and enhance" the quality of the human environment. While "restore" made one appearance in CEQ's explanation of why Environmental Assessment ("EA") alternatives should be more narrow than those for an EIS, the directive to "enhance" is entirely absent—the first of many instances where CEQ strikes wording that implies a positive duty to not only prevent environmental decay, but to strive to improve it.

Additionally, although the general topics of current §1500.2(d) (public involvement) and §1500.2(e) (reasonable alternatives) appear elsewhere in proposed regulations, they do not include the "to the fullest extent possible" language that lends the existing sections their impact, nor do they retain other modifying language that clarifies the scope and purpose of these provisions. It is insincere and inaccurate to claim that these anemic offerings are in any way duplicative of the existing provisions and thus warrant their elimination from §1500.2. Sections 1500.2(d) and (e) have in fact been deleted in the proposed NEPA regulations These deletions in fact omit important agency directives that safeguard public participation and the process of identifying reasonable alternatives that will avoid or minimize adverse effects, and which would be entirely absent from the proposed regulations should this section be eliminated.

[35] 40 C.F.R. § 1500.2

The wholesale elimination of §1500.2 without more than a dismissive hand-wave as duplication is unreasonable, arbitrary and capricious, contrary to NEPA's overall purpose, and the section should be retained in its entirety.

C. 1500.3 — NEPA Compliance

i. 1500.3(a) — Mandate

"CEQ proposes to amend the discussion of paragraph (a), "Mandate," to clarify that agency NEPA procedures to implement CEQ regulations, as provided for in §1507.3, shall not impose additional procedures or requirements beyond those set forth in CEQ regulations except as otherwise provided by law or for agency efficiency." NOPR 1693. Despite branding this as a "clarification," this provision in fact introduces a new and completely unwarranted restriction upon agency processes in completing NEPA reviews. Under the existing regulations, agencies can impose additional internal procedures to help effectuate NEPA's purposes. For example, the Forest Service currently submits draft EAs for public review and comment. This engages public participation at an early stage, and allows the agency to identify potential issues and correct errors at an earlier point in the NEPA process. Without this practice, a number of concerns will likely go unaddressed—at least until a lawsuit is filed—rather than being addressed and potentially resolved prior to escalation. This new mandate would forbid such a process. While this prohibition may lead to NEPA documents being completed faster, the overall effect would be to delay agency actions by stifling avenues for public participation and inviting avoidable litigation. This outcome would directly contravene CEQ's proclaimed desire for increased efficiency and is therefore arbitrary and capricious under the APA.

Presumably, preventing agencies from adding more requirements or procedures is intended to avoid additional "delay" by disallowing processes that would extend the NEPA timeline. Although the proposed regulation offers a relief valve exception for procedures or requirements "otherwise provided by law or for agency efficiency,"[36] this does not contemplate situations where a procedure or requirement may not *accelerate* the production of NEPA documents, but does in fact streamline the process as a whole by protecting against potential drawn-out litigation. Agencies are the most familiar with their own NEPA implementation

[36] NOPR 1713, Proposed Part 1500.3(a)

processes and are better positioned to be aware of these opportunities than CEQ operating from an arms-length. Therefore, individual agencies should be allowed to implement additional procedures and requirements if they feel that doing so will facilitate a thorough environmental evaluation as directed by the statute.[37] This would be consistent with NEPA's overall purpose, unlike CEQ's proposed treatment of the regulations as a ceiling rather than a floor. By affording agencies autonomy to implement workable procedures, CEQ would avoid unnecessary litigation and further the goals that "[a]ny allegation of noncompliance with NEPA and these regulations should be resolved as expeditiously as possible,"[38] and that the regulations result in "better outcomes that avoid litigation."[39]

Because this prohibition on additional agency procedures and requirements may hinder public involvement—a crucial aspect of BMBP's ability to engage with the NEPA process—BMBP objects to and will be harmed by this new and unsupported restriction.

ii. 1500.3(b) — Exhaustion

CEQ's proposed new section, "Exhaustion," "further proposes to provide that comments not timely raised and information not provided shall be deemed unexhausted and forfeited. This reinforces that parties may not raise claims based on issues they did not raise during the public comment period." NOPR 1693. There are several issues with this proposed addition.

First, this inflexible standard, combined with the inflexible public comment period CEQ has proposed (addressed further below), will preclude many parties from submitting detailed "comments on potential alternatives and impacts and identification of any relevant information, studies, or analysis of any kind concerning impacts affecting the quality of the human environment"[40] with the level of specificity that CEQ demands from commenters.[41] This is the case because commenters will not have sufficient time to respond in a meaningful and well-

[37] 42 U.S.C. § 4332 (imposing upon "[a]ll agencies of the Federal Government" the duty to "identify and develop methods and procedures" to ensure various aspects of the environments are valued appropriately, consider the long-range effects of an action, and make data available to the public in a useful manner).
[38] NOPR 1713 Proposed Section 1500.3(c).
[39] NOPR at 1698.
[40] NOPR 1693
[41] NOPR 1713, Proposed Part 1500.3(b)(3)

considered way. As CEQ recognizes in the context of agency analysis,[42] the public, too, may need additional time to process the proposed information, evaluate the impacts of the proposal, and locate appropriate supporting documentation.

The proposed exhaustion rule is particularly distressing for parties seeking documentation through Freedom of Information Act ("FOIA") requests to inform and support well-considered, meaningful comments. Parties who experience delays in the FOIA process—an issue entirely outside of that requestor's control—are prejudiced when they do not receive complete FOIA responses before the close of the comment period. Without this requested documentation, parties lack a clear picture of the decision-making process, including input from agency experts who are in the best position to identify the environmental impacts projected to result from an action and steps that would avoid or mitigate adverse impacts. This prevents parties from submitting constructive comments before an agency finalizes its decision—in direct contravention of NEPA's policy of fostering cooperative decision-making[43]—and leads to litigation that wastes agency resources.[44] For this reason, CEQ's regulations should include a pathway through which commenters can request an extension of the comment period, and should require that all relevant FOIA requests have been responded to before a party can be precluded from raising new comments. Maintaining open comment periods until all relevant FOIA responses have been issues is consistent with both E.O. 13807's directive to increase efficiency and CEQ's directive that agencies "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures."[45] Further, this policy would have the additional benefit of incentivizing agencies to response to FOIA requests in a timely manner.

Second, even if CEQ were to declare "parties may not raise claims based on issues they did not raise during the public comment period," the ultimate issue of administrative exhaustion lies with the court, not CEQ. In fact, the courts have already carved out "exceptions" to this proposed rule. For example, a flaw may be "so obvious there is no need for a commenter to point them out specifically in order to preserve" their appeal. *U.S. Dep't of Transp. v. Public Citizen,* 541 U.S. 752, 764-65 (2000). Additionally, if an agency has "independent knowledge of the very

[42] NOPR 1717. Section 101.10
[43] 42 U.S.C. § 4331(a).
[44] *See, e.g., Food & Water Watch v. U.S. Dep't of Agric.*, 1:19-cv-00362 (D.D.C. 2019).
[45] Current 40 C.F.R. 1506.6(a), Proposed Part 1506.6(a)

issue that concerns [petitioner] in this case, . . . 'there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.'" *Del. Riverkeeper Network v. United States Army Corps of Eng'rs*, 869 F.3d 148, 156 (3d Cir. 2017).

Thus, even if CEQ had the power to make rules about judicial exhaustion—which it does not—its failure to address these widely accepted exceptions in the agency's attempt to bring regulations into compliance with case law is arbitrary and capricious under NEPA. If CEQ is in fact attempting to overturn such case law, it would be in direct contrast to CEQ's stated purpose for other proposed updates to Part 1500 to "update the policy and mandate sections of the regulations to reflect statutory, *judicial*, policy, and other developments…"[46]

This "Exhaustion" provision not only hinders public participation, but also purports to instruct the judicial branch on what issues it may consider. As such, it should be stricken from the proposed rules. To further the goal of public participation and reduce delay, CEQ should instead require agencies to request public comments on EAs to help "ensure informed decision making and reduce delays" so they can have the benefit of public input on "potential alternatives and impacts, and identification of any relevant information, studies, or analysis of any kind concerning impacts affecting the quality of the human environment."[47]

iii. 1500.3(c) — Actions Regarding NEPA Compliance

CEQ devotes quite a bit of space to explaining why it believes injunctive relief is not appropriate as a general matter for NEPA violations and pivots the reader's attention to the possibility for an agency stay:[48] "Consistent with their organic statutes, agencies may structure their procedures to provide for efficient mechanisms for seeking, granting and imposing conditions on such stays, consistent with 5 U.S.C. 705. Such mechanisms may include the imposition of an appropriate bond requirement or other security requirement as a condition for a stay."[49]

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[46] NOPR 1693 (emphasis added).
[47] NOPR 1713, Proposed Part 1500.3(b)(1)
[48] Despite CEQ's attempt to make injunctive relief seem like an inappropriate manner of addressing a NEPA violation, it shall remain up to the court when to grant such relief in circumstances which it finds appropriate to do so.
[49] NOPR 1713, Proposed Part 1500.3(c)

While bond requirements may be appropriate to other areas of law, they are not appropriate here and are a direct affront to public participation in NEPA processes. Prospective environmental plaintiffs are often grass-roots organizations and individuals who do not have the financial capability of meeting potential bond requirements. As noted by Executive Order 12898 and as acknowledged by CEQ in its NOPR, minority and low-income populations are disproportionately impacted by adverse human health and environmental effects of agency decisions.[50] Requiring these types of groups to pay bonds to halt harmful actions would be incongruous with agency directives to consider impacts to these groups. It would also render useless other provisions set in place to protect these populations. For example, CEQ proposes to update public notice requirements, which CEQ notes is for the purpose of "address[ing] environmental justice concerns and ensur[ing] that the affected public is not excluded from the NEPA process due to a lack of resources[.]"[51]

CEQ justifies its elevation of agency stays by noting that "agency stays of their decisions and appropriate conditions on such stays may further the purposes of NEPA, which provides that all Federal agencies shall identify and develop methods and procedures, in consultation with CEQ, *to ensure that environmental amenities and values are given appropriate consideration*."[52] This ignores the fact that placing a bond requirement on injunction requests does not further the purposes of NEPA, but actually hinders them. Environmental amenities and values are far more likely to be ensured appropriate consideration when an injunction allowing time for and directing such consideration is readily available. Requiring a bond before an organization can seek an injunction excludes a large segment of the public from participating by erecting a financial wall around relief pending review. As grassroots organizations of limited financial means, public interest environmental organizations such as those represented by these comments are precisely the demographic of groups that would be directly inhibited from accessing relief. Because a bond requirement would be in direct contravention of NEPA's public participation policy and because of the serious environmental justice concerns this regulation would create, the recommended pivot to heavy reliance on agency stays and bonds should be stricken from the proposed

[50] NOPR 1711
[51] NOPR 1710
[52] NOPR 1694 (emphasis added).

regulations. Besides, this is yet another example of CEQ attempting to take an *ultra vires* action that improperly infringes upon the powers of the judiciary.

iv. 1500.3(d) — Remedies

CEQ purports to clarify that its NEPA implementing regulations do not create an independent cause of action for violation of NEPA. While this may be true, this statement obscures the fact that a violation of NEPA procedural standards (as interpreted by the regulations) is a basis for an APA claim. CEQ cannot wish away this avenue of action merely by ignoring the role of CEQ's regulations in this process.

CEQ "proposes to state that any actions to review, enjoin, stay, or alter an agency decision on the basis of an alleged NEPA violation be raised as soon as practicable to avoid or minimize any costs to agencies, applicants, or any affected third parties."[53] BMBP agrees that such issues usually should be raised as quickly as possible, but there is already a well-developed judicial doctrine called laches that address such issues. Once again CEQ appears to be seeking to change or limit long-established judicial precedent regarding what claims are justiciable, an issue that is clearly beyond its jurisdiction. Moreover, CEQ's own proposed regulations hinder this goal. For example, allowing an agency to designate its own "final agency action"[54] effectively lets the agency decide when its actions will become subject to APA challenge. This may result in an agency declaring a later act to constitute its "final" action, despite that fact that a prior discrete agency action may have determined rights or obligations or implicated other legal consequences.[55] Allowing an agency to determine its own "final" action will delay the point at which an action may be challenged by a disapproving party, thus inhibiting the proposed regulations' stated efficiency goal.

v. 1500.3 — Severability

[53] NOPR 1694

[54] "[A]n agency may designate any of these actions [issuing a ROD, publishing the final EIS, issuing a FONSI, or making the determination to categorically exclude an action] as its final agency action." NOPR 1693-94.

[55] This is, of course, how the Supreme Court characterized a "final agency action" in *Bennett v. Spear*. "First, the action must mark the consummation of the agency's decisionmaking process — it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154,178 (1997).

Although CEQ asserts that the individual sections and portions of sections are "separate and severable" that is simply not true. Both the current NEPA regulations and CEQ proposed revisions and in fact not a series of stand alone, independent regulatory provisions. They are a series of interrelated regulations clearly intended (or that should be intended) to establish a comprehensive set of procedures for applying NEPA and to further its overall purposes (although many of the CEQ's proposed revisions fail to do that). This is illustrated by the fact that many of the current and proposed rules cross-reference each other and depend on the requirements of and/or definitions in other related provisions. Any remedy for one or more of the proposed provisions being declared invalid (if they are finalized) will have to consider the interrelated nature of those provisions rather than blindly adopting the CEQ's incorrect assertions in this section

D. 1500.4 — Reducing Paperwork

CEQ cites as a concern raised in CEQ's 1997 NEPA effectiveness report[56] the fact that NEPA documents may become over lengthy and that agencies may seek to "litigation-proof" documents[.]"[57] In that same report CEQ "acknowledged that NEPA has ensured that agencies adequately analyze the potential environmental consequences of their actions and bring the public into their decision-making process[.]"[58] Despite complaints about document length this implies the process was working as intended.

The majority of changes to section 1500.4 are limited to reorganization of existing provisions. We do not object to the attempt to make this section more clear and readable, and does not object to the desire to reduce unnecessary paperwork. That said, we do object to the extent that attempts to implement this goal interfere with the ability of an agency to fully and adequately address issues regarding the extent of potential significant impacts to the environment resulting from agency actions. Reduction of paperwork is a valid goal, but must not be pursued at the expense of fulfilling the very objective of NEPA.

E. 1500.5 — Reducing Delay

[56] *The National Environmental Policy Act: A Study of its Effectiveness After Twenty-five Years*. https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf
[57] NOPR 1686
[58] NOPR 1686

Similar to 1500.4 above, the content of this section is directed at the goal of increasing efficiency in the NEPA process. Also similar to the above, changes to this section are mainly limited to reorganization (with the exception of striking the reference to cumulative effects, addressed further below). We do not object to the goal of reducing delay, and in fact welcome this goal. But, we do object to the extent that implementation of this goal thwarts the purpose of NEPA to conduct thorough reviews of environmental impacts of agency actions or reduces the ability of the public to participate in this process. Most delays are in fact not caused by NEPA's public participation process, but rather agency delays in the preparation of environmental documents. Such delays should be addressed through allocation of additional agency resources to NEPA reviews rather than to attempts to shortcut the review process. Similar to the reduction of paperwork, reducing delay may be a valid goal, but should not be elevated above the need to fulfill the purposes set out by NEPA.

F. 1500.6 — Agency Authority

To the extent that CEQ's proposed regulations are unreasonable arbitrary, capricious, or contrary to law, BMBP objects to this section's directive for agencies to update their regulations in compliance with the illegal portions of this proposed rule.

G. 1501.3 — Determine the Appropriate level of NEPA review

CEQ states that revisions to this section will provide "direction and clarity"[59] to agencies in evaluating the appropriate level of NEPA review, whether Categorical Exclusion ("CE"), EA, or EIS. The changes are characterized as adding two sections, renaming two sections, and renumbering the sections. Part of this change includes "mov[ing] and simplify[ing] the operative language from 40 C.F.R. 1508.27, 'Significantly.'"[60] CEQ fails to mention that this "simplification" involves extensive changes by removing 70% of the prior "intensity" consideration factors and the narrowing of the scope of project impacts. Although CEQ does flag the change from "context" to "potentially affected environment" and "intensity" to "degree," it does not discuss the significant negative implications of these changes on the validity of the NEPA review process. Rather than providing direction and clarity for agency evaluation, this

[59] NOPR 1695
[60] NOPR 1695

revised section offers little guidance to agencies and encourages an unfocused and weakened level of review.

The current CEQ regulations require consideration of an action such that "the significance of an action must be analyzed in several contexts such as *society as a whole (human, national), the affected region, the affected interests, and the locality*."[61] The proposed regulations, however, limit this analysis to "the affected area (national, regional, or local)."[62] It is difficult to see how the removal of clearly relevant considerations—impacts on society and other affected interests—to focus on purely geographical dimensions provides "direction and clarity" to agencies. Removing these relevant context considerations is incompatible with NEPA's directive for governments to act in a manner "calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[63] By removing impacts on society and other affected interests from agency consideration, CEQ promotes a myopic view that ignores the reality that agency actions may cause impacts beyond the narrowly tailored geographic zone directly involved in a project. Consequently, CEQ is acting contrary to its statutory mandate to "analyze and interpret [information concerning the conditions and trends in the quality of the environment] for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act."[64] It is difficult to see how these conditions and trends can be adequately evaluated if agencies are not required to gather adequate relevant information in the first place. This change is, however, consistent with CEQ's new and drastic attempt to strip the concept of cumulative and indirect impacts from consideration under NEPA analyses. This irresponsible and illegal approach to NEPA analysis is discussed more fully in the portion of BMBP's comments addressing proposed section 1508.1(g).

While the replacement of "intensity" with "degree" may seem like a relatively innocuous synonym swap, CEQ glosses over its proposal to eliminate 70% of the factors an agency

[61] 40 C.F.R. 1508.27(a) (emphasis added).
[62] Proposed 1501.3(1), NOPR 1714
[63] 42 U.S.C § 4331(a).
[64] *Id.* § 4344(2).

currently must review when evaluating the intensity of an action. With the exception of two factors, CEQ provides no explanation for these omissions and ignores the instrumental role consideration of these factors plays in implementing the core purposes of NEPA. Omitting these consideration factors without explanation is arbitrary and capricious under the APA. For the omissions that *are* mentioned, CEQ notes that one factor ("significance cannot be avoided by terming an action temporary or by breaking it down into small component parts")[65] was relocated to consideration at the scoping stage of the process.[66] CEQ also explains that the "controversy" factor was dropped because "this has been interpreted to mean scientific controversy."[67] However, CEQ does not—and likely could not—provide any logical reason that scientific controversy surrounding an action should not weigh in favor of a significance finding. Omitting an important consideration just because it has been interpreted a certain way is arbitrary and capricious and contrary to CEQ's stated mission to bring the regulations into compliance with case law. A more appropriate response would be to include scientific controversy in the regulations, and cite the basis for this interpretation, rather than delete the reference entirely.

Of the three consideration factors that do survive, two are substantially weakened. First, while the proposed regulations retain the guidance that "[e]ffects may be both beneficial and adverse," they delete the instruction that "[a] significant effect may exist even if the federal agency believes that on balance the effect will be beneficial."[68] Second, whereas the existing regulations imply that an action tends toward significance if it "threatens to violate" a law, the proposed regulations only consider whether an action "violates" a law, thereby lowering the threshold of applicability.[69] Without an adequate explanation of these changes, they are arbitrary and capricious.

These proposed changes and omissions from the determination of "significance"—one of the primary threshold matters which decides the applicability of NEPA—are an entirely inappropriate and egregious. They effectively neuter NEPA, and contradict extensive case law that used these factors to accurately determine the existence of significant impacts. By

[65] NOPR 1695 citing 40 C.F.R. 1508.27(b)(7)
[66] NOPR 1695
[67] NOPR 1695
[68] Current §1508.27(b)(1), omitted from proposed Part 1501.3(B)(2)(i).
[69] Current §1508.27(b)(10), omitted from proposed Part 1501.3(B)(2)(iii).

eliminating such an extensive number of routes to a finding of significant impacts, CEQ would substantially reduce the proportion of actions that are subject to environmental review. This shift would increase the likelihood that significant impacts will fall through the cracks, undermining NEPA's policy goals and violating the statutory mandate that each agency implement NEPA to the fullest extent possible.[70] Thus, the elimination and bastardization of the significance factors is a dangerous change in position, and one CEQ has entirely failed to justify or explain. CEQ's characterization of this shift as a mere "simplif[ication]" clearly does not acknowledge this drastic change in policy, much less demonstrate the change is permissible under NEPA or provide a good reason for it, as required by the Supreme Court in *FCC v. Fox*.[71] As such, this drastic change is illegal.

We vehemently oppose any changes to the factors that influence agency determinations of significance. The significance factors as presently codified in 40 C.F.R. § 1508.27 are sufficiently clear and encapsulate the various ways in which a proposed action may "significantly" impact the environment.[72] Therefore, the proposed changes should be abandoned and significance factors left as they are. However, we do not oppose relocation of the factors to proposed part 1501.3, as long as the content is not modified.

H. 1501.4 — Categorical Exclusions

The proposed "consolidated" section pertaining to categorical exclusions ("CE") incorporates CEQ's suggestion to alter the definition of CE. If promulgated, the new definition of CE would include actions that "*normally* do not have a significant effect on the human environment," and exclude explicit mention that an action might be cumulatively significant, even if it is not individually significant.[73] Objections to this revised definition are outlined in further detail later in these comments, but for now it is important to broadly note that these changes allow agencies to more easily conclude that any given action does not meet the "significance" threshold

[70] *See generally* 42 U.S.C. §§ 4331, 4332.
[71] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009)
[72] See *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) ("The statutory phrase "actions significantly affecting the quality of the environment" is intentionally broad, reflecting the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency.).
[73] Proposed 1508.1(d), NOPR 1728, and current regulation 40 C.F.R. 1508.4

requiring a heightened NEPA analysis (EA or EIS). The proposed regulations not only narrow the criteria of what constitutes an "extraordinary circumstance" by implementing a stricter causal link, but they also encourage agencies to brush aside those extraordinary circumstances and avoid a more rigorous NEPA review. CEQ fails to acknowledge or justify this change in position, instead framing this impermissible shift in policy as a "clarification."[74] "An agency may not… depart from a prior policy *sub silentio*[,]" but must display awareness that it is changing position and demonstrate why there was a good reason for the change.[75]

The purpose of the "extraordinary circumstance" language in the CE provision is to clarify when the agency must take a closer look and in what circumstances it is *not* appropriate to apply a CE.[76] The proposed provision essentially creates an exception to an exception, removing that extra layer of scrutiny for a situation that, by law, necessarily requires a closer look. The extraordinary circumstances consideration was intended to require a more searching review on the part of agencies that would otherwise be excluded under a CE.[77] This is consistent with the directive that an "EA should focus on whether the proposed action (including mitigation) would "significantly" affect the quality of the human environment. EAs are required to undertake this analysis, as should issues that meet the "extraordinary circumstances" standard. If agencies do not undertake to properly evaluate the effect of extraordinary circumstances, it is possible that they will fail to recognize situations in which the impact will push an action into the threshold of significance. By failing to recognize this, and thus failing to prepare either the requisite EA or EIS, the agency would be in direct violation of NEPA § 102(2)(C).

I. 1501.5 — Environmental Assessments

[74] NOPR 1696

[75] *FCC v. Fox TV Stations, Inc.,* 556 U.S. 502, 515 (2009)

[76] In the context of proposing new or revising agency CEs, CEQ guidance states "Federal agencies should consider the extraordinary circumstances described in their NEPA procedures to ensure that they adequately account for those situations and settings in which a proposed categorical exclusion should not be applied." CEQ Guidance Document *Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act* at 6 (Nov. 23, 2010), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf (last visited March 5, 2020)

[77] *Id.* at 3-5 ("[W]hen evaluating whether to apply a categorical exclusion to a proposed activity, an agency must consider the specific circumstances associated with the activity and may not end its review based solely on the determination that the activity fits within the description of the categorical exclusion; rather, the agency must also consider whether there are extraordinary circumstances that would warrant further NEPA review… Extraordinary circumstances are appropriately understood as those factors or circumstances that help a Federal agency identify situations or environmental settings that may require an otherwise categorically-excludable action to be further analyzed in an EA or an EIS.").

CEQ describes its revision to the Environmental Assessment section of the regulations as "continu[ing] to provide that an EA may be prepared *by* and with other agencies, *applicants*, and the public."[78] While this contention is not reflected in the wording of the current EA section 1501.4(b) (which has substantially survived in the new EA section 1501.5(d)), it is outlined in section 1506.5(b) which contemplates a situation where "an agency permits an applicant to prepare an environmental assessment."[79] Regardless of the history of allowing an applicant to prepare an EA (or sections thereof), it remains an ill-conceived idea on policy grounds. Allowing applicants to take charge of a major step in the NEPA process only invites abuses, no matter whether or not an agency will, at some point, look over the applicant's shoulder. The ability of non-neutral parties to put their thumb on the scale will inevitably result in more favorable reviews for industry and commercial interests, while relegating impacted communities and environmental concerns to the sidelines. Put another way, how would applicants react to the prospect of a regulation allowing an affected environmental organization or community to prepare an EA for the agency's review? The answer is obvious—applicants would strenuously object for the same reasons environmental organizations object to the current and proposed system: there is a high likelihood of bias. CEQ is facilitating agencies' abrogation of the duty to ensure significant environmental impacts are disclosed and environmental values are given appropriate consideration. Thus, this regulation is arbitrary and capricious. Moreover, this unlawful delegation contravenes NEPA, which puts the onus on the *agency* to conduct such reviews.[80]

Proposed section 1501.5(d) states "agenc[ies] shall *involve* [relevant] agencies, applicants, and the public, to the extent practicable, in preparing assessments[.]"[81] We do not disagree that input by all parties can be beneficial, but delegation of the responsibility to prepare the EA itself goes too far. In fact, allowing applicant preparation of EAs directly conflicts with the proposed part 1501.5(a), which states that the "*agency* shall prepare an environmental assessment[.]"[82] CEQ's reading of this regulation not only conflicts with its own proposed

[78] NOPR 1696 (emphasis added).
[79] NOPR 1725, Proposed 1506.5.
[80] 42 U.S.C. § 4332(2)(C).
[81] 40 C.F.R. 1501.4(b) (emphasis added).
[82] NOPR 1715

regulations, but it would continue to allow applicants to inappropriately influence outcomes of NEPA processes by submitting potentially biased EAs favorable to their positions.

CEQ tries to allay these fears by stating technology will allow for a "coordinated but independent evaluation" of the EA by the relevant agency.[83] While agency evaluation may catch some obvious indiscretions, there is no way for an agency to expunge the invidious taint of a biased EA without wholesale replicating the process to verify its integrity. This would of course be duplicative, leading to the conclusion that it is far more efficient for the agency to conduct the EA in the first instance. As noted by CEQ while promulgating the 1978 NEPA implementing regulations, "[t]he purpose of this provision [1506.5(b)] is to ensure the objectivity of the environmental review process."[84] It is difficult to see how an applicant could ensure objectivity in completing an EA that stands between itself and approval of a profitable project. As such, BMBP recommends that CEQ disallow applicants from completing EAs to help retain the objectivity of environmental reviews and to ensure that environmental impacts are properly addressed before major actions are taken.

Instead of weakening the EA process by abdicating agency authority to unquestionably biased parties, we suggest that CEQ strengthen the EA process by creating a mandatory notice and comment requirement for draft EAs to allow public participation and input at an earlier stage. This would help to further the goals of NEPA in improving transparency, increasing public involvement, and ultimately having a more considered outcome that is more likely to result in proper consideration of environmental impacts and less likely to result in costly litigation.

J. 1501.6 — Finding of No Significant Impact

This section incorrectly characterizes the circumstance in which a FONSI is to be prepared as when "the proposed action is *not likely* to have significant effects."[85] The correct definition is used in proposed part 1508.1(l) which clarifies that a FONSI is appropriate where an action "*will not* have a significant effect[,]" a higher and more appropriate threshold of

[83] NOPR 1696
[84] 43 FR 55987
[85] NOPR 1715 (emphasis added)

applicability.[86] CEQ should correct this erroneous characterization to restore the higher applicability threshold and avoid the confusion of endorsing two versions of this term. This section also seeks to significantly change extensive case law regarding this issue.[87]

K. 1501.10 — Time Limits

Similar to sections 1500.4 (reducing paperwork) and 1500.5 (reducing delay) above, BMBP is sympathetic to the goal of efficiency within the NEPA process. BMBP does, however, object to the extent that the pursuit of this goal may frustrate the ultimate purposes of NEPA to adequately analyze the environmental impacts of agency actions and allow for public participation in that analysis and agency decision-making. Competing demands for agency resources can make it difficult for agencies to predict how long it may take to complete any given environmental document. Implementing strict timelines may prompt agencies to forego the necessary analysis, in effect sacrificing quality for efficiency. BMBP supports and suggests that while there may be suggested timelines for the completion of environmental documents, agencies should not be constrained by required timelines and should not have to seek approval for extensions when, in the agency's expert opinion, it knows it needs more time. A best practice would be to allow for flexible target dates after consulting with all relevant parties.

L. 1501.11 — Tiering

Existing CEQ regulations allow agencies to tier EISs to existing environmental analyses through incorporation by reference, with the goal of allowing the agencies to avoid duplicative discussion and focus on issues specific to the proposed action. Tiering is appropriate, and is currently allowed, when the agency has prepared a programmatic analysis in an EIS and wants to incorporate that prior detailed analysis in a site-specific EIS. Although tiering cuts down on duplicative analysis it also comes at a cost, because the public must seek out and review two separate EISs in order to fully understand a proposal's impacts. CEQ now proposes to greatly expand on allowable tiering by allowing EAs to tier and to be tiered to. While tiering can be a helpful tool for an already detailed EIS, its use in EAs could result in the complete elimination of

[86]NOPR 1729 (emphasis added), 40 C.F.R. 1508.13

[87] *See, e.g., Native Ecosystems v. USFS,* 428 F.3d 1233, 1239 (9th Cir. 2005)*;BMBP v. Blackwood,* 161 F.3d 1208, 1212 (9th Cir. 1998)

detailed analysis at any stage in agency-decision-making and necessary site-specific analyses if an agency decides that additional analysis is not necessary in a site-specific EA because of analysis in a programmatic EA. Although some actions may be similar, they will still inevitably have differing variables than the document they may be tiered to.

EAs are intended to evaluate the impacts of actions that the agency either thinks may have a significant impact on the environment or for which it is unsure of the impact. By allowing EAs to tier without detailed review at any stage, it is possible that important issues will be overlooked and thus valuable and necessary analyses will not be conducted. Because EAs are already required to be shorter, more "concise" documents than EISs, allowing EAs to tier as well may result in this already abbreviated form being transformed into nothing more than an elevated CE. Agencies should have to consider whether new information is available, or whether circumstances have changed to a degree sufficient to warrant additional analysis. Without this consideration, agencies would be shirking their responsibility to ensure that potential significant effects are properly evaluated before agency actions are undertaken.

M. 1501.12 — Incorporation by Reference

The proposed rules move the incorporation by reference provision from 1502.21 to 1501.12. The content of this section largely survived transplant, but CEQ should take this opportunity to clarify that material incorporated by reference includes the lists of references often included with NEPA documents. Moreover all of those references should be made available to the public at the beginning of any comment period not simply "within the time allowed for comment." And those references should be available without requiring the public to request them pursuant to FOIA. Such changes are necessary to prevent the current practice of some agencies to initially post incorporated material near the end of the comment period or to insist that the public must request such materials pursuant to FOIA. Requiring a party to submit a FOIA request to obtain relevant documents inherently violates the requirement that materials be "reasonably available for inspection" because it is extremely unlikely that FOIA requests will be fulfilled in time for an interested party to inspect the materials before the comment period ends.

CEQ acknowledges the need to revise the current regulations to reflect changes in technology and increase public participation in its overview of proposed changes.[88] Updating this section would be an excellent opportunity to advance both of these goals by requiring that all materials incorporated by reference be available in a digital form to the interested public at the same time that each environmental document is submitted for public review and comment. Given the ability to post documents on agency websites, there is simply no barrier to making this change to promote efficiency in accordance with E.O. 13807.

N. 1502 — Environmental Impact Statements

This section of the CEQ regulations should in fact address the requirements for both an EIS and an environmental assessment ("EA"). Because federal agencies prepare far more EAs than they do EISs, to further NEPA's dual informational and public participation purposes, EAs should in fact be required to satisfy all or most the requirements for an EIS, albeit in a more abbreviated and/or less detailed form that focuses on the "significance" determination that is the most important question an EA must help an agency answer. Thus, rather than set out the requirements of an EA in an earlier, separate section, new proposed Section 1501.5, the subcomponents of Section 1502 should each address how or whether they apply to an EA, and in most cases each requirement should apply. It is especially problematic that proposed section 1501.5 claims to give discretion to federal agencies to apply some EIS requirements to an EA. Such discretion seems to be directly at odds with the CEQ's supposed goal of reducing NEPA delays since it will undoubtedly lead to more disputes, and likely litigation, about whether an agency has properly exercised that discretion. Clear guidance in a combined section that sets out the common requirements for both EISs and EAs, and the key differences, could help achieve the CEQs stated goals while also furthering NEPA's overall goals.

O. 1502.7—Page limits

Since the CEQ now seeks to make the page limits for an EIS mandatory, it should provide some factual basis and justification for those limits, but no specific facts are offered. If the CEQ believes current EISs are too long, it should explain why and where such excess

[88] NOPR 1691

analysis and disclosure is occurring. As it now stands, the page limits imposed by this rule are simply arbitrary.

P. 1502.8 — Writing

This section should expressly bar agencies from using unnecessary agency jargon and acronyms, which is by far one of the biggest hurdles for the public when attempting to review an EIS or EA.

Q. 1502.9 — Draft, Final, and Supplemental Statements

Subsection (b) should expressly prohibit agencies from completely or substantially omitting the analysis of an impact or impact(s) from a draft EIS and essentially postponing that analysis until the agency releases its Final EIS. This has become a common practice by certain agencies, including for example the Federal Energy Regulatory Commission ("FERC"). If the agency's desire to stick to its own arbitrary timetable for releasing a draft EIS is the primary basis for not including such analysis in the draft EIS, that should not be considered a sufficient reason for omitting that analysis. Avoiding delays is a worthy goal, but it cannot come at the expense of NEPA's actual statutory goals of fully disclosing impacts and allowing for meaningful public participation. If the public does not receive all of the required analysis in the draft EIS the public cannot meaningfully comment on it or fully participate in the agency's decision-making process as NEPA requires.

Subsection (d) adds the qualifier "if a major Federal action remains to occur" to each of the reasons for preparing a supplemental EIS, but applying that qualifier to subsection (d)(i) makes no sense.

Subsection (d)(4) should require agencies to expressly respond to requests from the public for the preparation of a supplemental EIS instead it substantially confuses this process by leaving it up to agency discretion and agency procedures, which is inconsistent with Section 1507.3's mandate that agency procedures cannot go beyond the requirements of the CEQ regulations. This proposed subsection also appears to allow for agencies to make such decisions without any kind of public involvement, which is contrary to NEPA's express purposes. The vague "if necessary" language for when such a decision should be documented in an EA seems

tailor made to encourage more litigation, which will lengthen NEPA review rather than expedite it.

R. 1502.10 — Format

Eliminating a required index ignores the fact that not all communities or members of the public have access to NEPA documents online or in electronic form. This change is thus inconsistent with NEPA's public participation purpose.

As discussed below combining the affected environment and environmental consequences sections will lead to inadequate discussions of the critical environmental baseline.

S. 1502.11 — Cover

Adding Subsection (g), which requires the cover to estimate the cost of preparing the EIS elevates this issue far beyond its importance in light of NEPA's express goals and purposes. If CEQ wants to include information about "costs" on the cover of the EIS it should require that this information be about the environmental costs of the proposal rather than the cost of identifying and disclosing such environmental harms. Including EIS preparation costs while not also including environmental costs is flatly inconsistent with NEPA's statutory purposes because it suggests that preparation costs are in fact more important or significant than the likely environmental harm and costs from a proposed agency action.

T. 1502.13 — Purpose and Need

The proposed version of this regulation improperly eliminates language linking the purpose and need statement with the range of alternatives analysis. This is a huge change from 40 years of CEQ practice and extensive applicable case law interpreting this sensible and well-established connection. The agency provides nothing to justify this change and thus fails to provide the reasoned explanation for such a significant change in how the CEQ interprets NEPA. Moreover the CEQ now attempts to limit the scope of the purpose and need statement based on a private applicant's goals. This new limitation, when read together with the new, improper definition of reasonable alternatives, see discussion of section 1508.8(z), below, that is also limited to a private applicant's goals, and the elimination of the requirement in current section

1500.2 (e) that an agency must consider reasonable alternatives that avoid or minimize adverse impacts, will fundamentally change the scope of NEPA's requirement to consider alternatives. Alternatives that reduce or minimize impacts are often in conflict with some or even all of a private applicant's goals. Eliminating the consideration of such alternatives is directly at odds with NEPA's overall goals and purposes, and improperly elevates private goals over the public interest. CEQ offers no factual or legal basis and no reasoned explanation to justify such a fundamental change in the current, required definition of purpose and need and the resulting alternatives analysis under NEPA that requires agencies to disclose and consider reasonable alternatives that, while not meeting a private applicant's purpose, meet NEPA's fundamental purpose of encouraging agencies to reduce impacts from agency actions.

U. 1502.14 — Alternatives

CEQ proposes to make drastic changes to this section, which, along with other related changes to Section 1500.2, 1502.13 and the new definition of reasonable alternative, Section 1508.8(z), will fundamentally alter and significantly narrow the range of alternatives considered, and the environmental impacts overall that future EAs and EISs must consider and disclose.[89] None of these changes are supported by a reasoned explanation for such a drastic departure from 40 years of interpreting NEPA to provide for a wide range of reasonable alternatives and the full disclosure and comparison of the impacts from those alternatives.

CEQ provides no explanation whatsoever, much less any justification for eliminating much of the initial language in current Section 1502.14 regarding how important the consideration and comparison of alternatives is to achieving NEPA's goals and purposes. This language should be retained in its current form.

CEQ justifies the elimination of the word "all" from before "reasonable alternatives" by explaining that the consideration of a "spectrum of alternatives" is sufficient. The problem with this explanation is that the revised text in fact includes no obligation to consider a "spectrum" of alternatives; it just requires the consideration of "reasonable alternatives." The failure to include

[89] Although Section 1502.14 only technically applies to EISs, EAs also must consider alternatives, *see* § 1501.5, and if this section reduces the number, type and range of alternatives that must be considered in an EIS, it follows that EAs will also consider fewer alternatives.

such language in fact infers that agencies need not consider "the full spectrum of alternatives." Moreover, CEQ appears to be intentionally avoiding the "wide range of reasonable alternatives" language from the large body of case law interpreting this provision.[90] CEQ offers no explanation for why it refuses to adopt or follow this case law.[91]

Far from simply eliminating the word "all" CEQ in fact, without explanation, eliminates an entire clause from Section 1502.14(a)—the requirement to "rigorously explore and objectively evaluate all reasonable alternatives." In subsection (b), CEQ, again without any explanation, eliminates the requirement to "devote substantial treatment to each alternative." When these changes are read together with the elimination from Section 1500.2(e) of the requirement to consider reasonable alternatives that avoid or minimize adverse impacts, the changed definition of "reasonable alternative" that focuses on the goals of applicants, and the elimination of the requirement to consider alternatives that go beyond the jurisdiction of the lead agency, it is apparent that CEQ is proposing to dramatically reduce the range of alternatives that agencies must consider and to fundamentally change the current requirement that the consideration of reasonable alternatives, including alternatives that reduce impacts, is the "heart of the environmental impact statement."[92] This new interpretation of NEPA turns its back on more than 40 years of CEQ guidance and case law under the current version of Section 1502.14 and is wholly inconsistent with NEPA's fundamental purposes. CEQ offers nothing close to a reasoned explanation for this dramatic change.

BMBP also objects to CEQ's proposal to eliminate the current requirement in Section 1502.14(c) that agencies must consider reasonable alternatives not within the jurisdiction of the lead agency. CEQ claims that this requirement "is not efficient or reasonable" but offers not one fact to back up this conclusory assertion. What is in fact unreasonable is to allow something as artificial as the jurisdiction of one agency to limit what is in fact a reasonable alternative. An agency's jurisdiction can be changed if necessary to allow it to adopt an alternative that is better for the environment. However, the actual environmental harm from ignoring an alternative that is better for the environment and allowing a more harmful proposal to go forward often cannot be

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[90] *See, e.g., California v. Block,* 690 F.2d 753, 766-67 (9th Cir. 1982); *Wetlands Water Dist. v. Dept. Of Interior,* 376 F.3d 853, 871 (9th Cir. 2004).

[91] We also object to related changes to 1502.1 and 1502.16. See page NOPR 1702.

[92] 40 C.F.R. § 1502.14.

undone. One of the key goals of NEPA is to help agencies make better decisions that protect the environment.[93] This change directly undermines that goal in the name of "efficiency," which is not one of NEPA's fundamental purposes.

Finally, CEQ's solicitation of comments on its desire to even further undermine NEPA's requirement to consider alternatives by artificially and arbitrarily capping the number of alternatives that an agency can consider is outrageous, and serves as more evidence of CEQ's actual agenda, which appears to be to eviscerate the consideration of alternatives requirement. This change should be summarily rejected.

V. 1502.15 — Affected Environment

This required section provides the environmental baseline for evaluating the environmental consequences of agency proposals. In order to properly conduct that evaluation it is essential that both the public and agency know what the current state of the environment is. Establishing this baseline requires a separate and distinct discussion of data that is completely different from the analysis and data that must be used to determine the environmental impacts of the proposal on the existing, affected environment.[94] Thus CEQ's proposal to allow agencies to combine the discussion of the affected environment/baseline with the environmental consequences discussion required by Section 1502.16 does nothing to improve or clarify the environmental analysis and disclosures that NEPA requires. In fact this change is likely to make such disclosures and analysis far less clear by allowing agencies to blur the distinction between the current state of the environment and how their proposed action will impact that environment. The fact that this is a "common practice" by some agencies does not mean it is a practice that is consistent with NEPA's goals. It also appears that CEQ's goal is to make the analysis and disclosures required by both section 1502.15 and 1502.16 significantly narrower, which is flatly inconsistent with NEPA's overriding purposes and goals regarding the full public discourse and consideration of a proposal's environmental consequences in a "detailed statement."

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[93] *See* current version of 40 C.F.R. Sec. 1500.1(c); NEPA Section 2 and 101.
[94] *See, e.g., Great Basin Resource Watch v. BLM,* 844 F.3d 1095, 1101 (9th Cir. 2016).

W. 1502.16 — Environmental Consequences

This revised section, when read together with the new, arbitrary limitations regarding causation and elimination of the requirement to include indirect effects in proposed 1508.1(g), will lead to far less disclosure and consideration of the actual environmental impacts of agency proposals. This is contrary to NEPA's most fundamental purpose and goals and inconsistent with over 40 years of contrary interrelation of NEPA by the CEQ under the existing regulations. CEQ offers no reasoned explanation for such a significant cut back in the scope of the discussion and analysis required by the current version of this regulation.

The CEQ also proposes to add new subsection (10) which requires, "where applicable," a discussion of economic and technical considerations, including the economic benefits of the proposed action." CEQ insists this is consistent with section 102(2)(B) of NEPA.[95] In fact this new subsection's requirements turn Section102(2)(B) on its head. Section 102(2)(B) is clearly concerned about imposing a **new** requirement on agencies to give "presently unquantified environmental amenities and values…appropriate consideration." The reference to "technical and economic considerations" is meant to describe things that agencies already, without NEPA, were and are considering when they make decisions. Moreover there is nothing in this section of NEPA that supports requiring an EIS to include the "economic benefits of the proposed action." Adding this subsection to 1502.16 allows agencies to once again elevate technical and economic considerations and to include them in an EIS which should focus on "presently unquantified environmental amenities and values."

X. 1502.17 & 1502.18 — Alternatives, Information, and Analyses

In these new proposed additions to the NEPA regulations CEQ proposes to require a summary of scoping comments in each draft EIS and to then allow each agency to simply "certify" that it has in fact those scoping comments when developing the draft EIS. These sections are a huge step backward from the practice of many agencies to include an appendix that includes, lists or at least summarizes individual scoping comments and responds to those individual comments. The certification allowed by section 1502.18 allows agencies to

[95] NOPR1702

completely avoid actually responding to scoping comments and the conclusive presumption created by the "certification" prevents any meaningful review by the public or courts regarding whether and how the agency has actually considered scoping comments. Far from being an "improvement" for the scoping process, these sections directly undercut the public participation goals and requirements of NEPA and give second class status to scoping comments from the public.

Y. 1502.22 — Incomplete or unavailable information

The CEQ proposes to eliminate the word "always" from the current version of this regulation and to reduce the threshold for not obtaining "essential" information from "exorbitant" costs to "unreasonable" costs. Although CEQ insists the word "always" is "unnecessarily limiting," [96] it fails to explain when and why an agency should not be required to "always" include disclose that there is unavailable or incomplete information. Indeed allowing agencies the discretion to not always disclose such missing information totally undercuts NEPA's public disclosure requirements. As for the new proposed term "unreasonable" CEQ clearly intends for that term to increase the number of situations where agencies can refuse to obtain "essential" information, which again is not consistent with NEPA overall purpose. Allowing agencies to expand the situations where they choose not to obtain "essential" information is itself unreasonable. If the CEQ were to attempt to define what are "unreasonable costs" that definition must take into account that the information at issue is essential to making a reasoned choice among alternatives and the overall cost to the environment of making such a choice without such essential information. Any such definition should suggest that, consistent with NEPA's purpose of requiring agencies to fully value harms to the environment, the appropriate choice in most circumstances would be to choose the no action alternative.

Z. 1502.24 — Methodology and Scientific Accuracy

The proposed revisions to this section in fact significantly undermine the existing requirement that agencies must ensure the scientific integrity of the analysis in NEPA

[96] NOPR 1703

documents. The revisions do this by adding a completely new sentence that not only allows, but in fact requires agencies to use existing data and resources and excuses them from ever being required to undertake new science and technical research. It also expressly allows agencies to rely on "remotely gathered information or statistical models." Although the CEQ insists this new language is consistent with Section 1502.22, that section in fact requires agencies to obtain new information in certain circumstances and is thus flatly inconsistent with the new language proposed for this section. Accurate science in fact often requires that scientists acquire new information and this section appears to completely excuse agencies from ever having to do that. Monitoring of prior or similar or ongoing actions can often provide critical data regarding the impacts of future proposed actions. This section appears to allow agencies to avoid such monitoring even when the costs of doing so are not unreasonable.

AA. 1502.25 — Environmental Review and Consultation Requirements

By retaining the "to the fullest extent possible" language in this regulation, the CEQ misses an opportunity to correct the fact that many agencies fail to comply with this directive and routinely wait to complete ESA and other required consultations until after NEPA documents are finalized and all opportunity for public comment has passed. These agency practices seem intended to prevent the public from commenting on ESA consultation documents and the requirements of this section should have been made mandatory since there appears to be no valid reason for why many agencies are not in fact doing their NEPA analysis and ESA consultations concurrently.

BB. Section 1503 — Public Commenting

The CEQ's proposed changes to the commenting provisions of Section 1503 are clearly intended to, on the one hand impose significant additional burdens on the public when submitting comments-see Section 1503.3(a) and (b), while on the other hand changing agencies' current mandatory duty to respond to public comments into a discretionary action-"may respond." Although the CEQ describes this latter change as a proposal to "clarify," it is in fact a

significant change from the current requirements and CEQ offers no reasoned explanation for this significant change. [97]

CEQ clearly views public comments as a nuisance and a source of delay rather than an essential part of the NEPA process that they are and have been for more than 40 years. Not all members of the public are scientists and engineers and many do not have the expertise to offer the kind of comments that CEQ appears to demand in its revised version of Section 1503.3. Nevertheless all members of the public should have the right to comment and have their comments considered. The changes to Section 1503.3 do nothing to encourage public comment and in fact seem designed to discourage it by intimidating prospective commenters. CEQ does thus while at the same time eliminating agencies current mandatory duty to respond to comments. If the CEQ is truly interested in facilitating meaningful public participation it should not have made the changes it did to 1506.6(f), see discussion below, and should instead have created a duty for agencies to respond to requests from the public for the technical and analytical records underlying the analysis in NEPA documents before the agencies close public comment periods. Increasingly agencies are failing to respond to requests for such underlying information, submitted via FOIA or pursuant to specific written requests to an agency's NEPA coordinators in a timely fashion, and are forcing the public to comment without such specifically requested information. CEQ cannot consistently insist on more detailed and technically or scientifically supported comments from the public without also requiring agencies to provide the public with necessary and specifically requested information and agency records.

CEQ shows its true colors when it slips into the list of things comments should address "economic and employment impacts." Such impacts of course have little or nothing to do with the environmental impacts that are the required focus of NEPA analysis and disclosure. Agencies have always considered economic and employment impacts, both before and after NEPA was enacted, and it is NEPA's purpose to elevate the consideration of environmental impacts for "appropriate consideration." 42 USC Sec. 4332(2)(B).

The change to section 1503.1(c) should be clarified and strengthened to ensure that members of the public without access to the internet and computers or smart phones are always

[97] NOPR 1704

able to comment. Indeed some agencies now refuse to allow the public to incorporate into their comments supporting technical or scientific information by reference and require then to provide copies of such materials to the agency. It is often impossible to submit such supporting materials electronically. Therefore this rule should clearly require agencies to always also accept comments by mail or hand delivery.

CC. Section 1504 — Pre-Decisional Referrals

This section acknowledges that EPA is required to comments "publicly" on environmental impacts of Federal activities. The section needs to be clarified to require that agencies publicly disclose such EPA comments regardless of when they are made during the NEPA process. Moreover the section needs to state that all records regarding the referral process described by Section 1504 are public. Finally the CEQ provides no explanation for its inclusion of a completely revised version of 1504.3(h).

DD. Section 1505 —NEPA and Agency Decision Making

The CEQ does far more than move current section 1505.1 and we address the unacceptable and significant changes to new section 1507.3(b), below.

The CEQ should clarify section 1505.3 by stating that agency must undertake the mandatory duties under this section while the agency action authorized by its decision is being carried out and must be completed before the authorized agency action is completed. This section should also be revised to clarify that any failures to perform the mandatory provisions of Section 1503.3 (all provisions prefaced by the word "shall") are enforceable as illegal failures to act under 5 USC Sec 706(1).

EE. Section 1506 — Other Requirements

The change to current section 1506.1(d), by adding language to proposed section 1506.1(b) that allows for "acquisition of interests in land" before a ROD or FONSI is final is NOT a clarification, as suggested by the CEQ. [98] The CEQ needs to truly "clarify" what it is authorizing here-the use of eminent domain to force private property owners to involuntarily sell

[98] NOPR 1704

their property before the NEPA process is complete. This is in fact a significant expansion of allowable, pre-decisional activities that represent significant changes in the status quo, has huge adverse impacts on the current landowners, and does in fact limit the choice of reasonable alternatives. The exercise of eminent domain powers is an extraordinary action that should only be allowed after the NEPA decision-making process is complete. At least one agency, FERC, has a history of abusing its eminent domain authority, using it to allow its permittees to obtain private property before it makes a final decision that property owners can challenge in court.[99]

CEQ should not even be considering, much less inviting comments on, whether it should allow other irreversible and irretrievable commitments of resources before the NEPA process is complete. Doing so is completely at odds with NEPA's fundamental purposes.

FF. 1506.2 — Elimination of Duplication

Although CEQ claims the changes to this section "promote efficiency and reduce duplication,"[100] they are in fact quite inconsistent in that regard. The change to 1506.2(a) does do that by clearly authorizing cooperation. But in Section 1506.2(c) the CEQ does the opposite by changing "shall cooperate to the fullest extent possible," to "to the fullest extent practicable," which the CEQ admits is less mandatory and gives agencies "greater flexibility. These inconsistent changes are arbitrary and capricious and contrary to CEQ's actual explanation for them.

GG. 1506.3 — Adoption

The revisions to this regulation should require that adopting agencies issue their own decision document, such as a ROD, that is the equivalent of the decision document, and subject to the same public participation requirements, as it would have been if the agency had prepared its own EIS or EA. By not requiring this the regulations exclude the public from the adopting agencies' decision-making process.

Allowing agencies to adopt another agencies' CE, as proposed new section 1506.3(f) does, is completely unwarranted and contrary to NEPA. Each agency is required to establish its

[99] *Allegheny Defense Project v. FERC,* 932 F.3d 940, 945-48 (Millet, J. concurring).
[100] NOPR 1704

own CEs by rule, 40 C.F.R. Sec. 1508.4**,** based on each agency's own experiences regarding the environmental impacts of actions. The process authorized here allows adopting agencies to avoid this rule making process. Moreover the use of CEs excludes the public from significant participation in the NEPA analysis and decision-making process and expanding such use, as this proposed change would do, is contrary to NEPA's public participation purpose and goals.

HH. 1506.4 — Combining Documents

The elimination of the phrase "in compliance with NEPA" from the current version of this section is unexplained and unwarranted.

II. 1506.5 —Agency Responsibility for Environmental Documents

CEQ insists it is proposing to revise this section to provide "greater flexibility,"[101] but in fact they have eliminated the language and specific requirement from current 1506.5(c) intended to prevent conflicts of interest. This is an outrageous change that has nothing to do with "flexibility" and should have been specifically disclosed in the NOPR and fully explained. Since it was not there is no reasoned explanation for this change and its is arbitrary.

The CEQ should have clarified and stated that communications between any contractor or the applicant and the agency are not deliberative.

JJ. 1506.6 — Public Involvement

Although there several proposed changes to this section that enhance public participation, the addition of (b)(3)(ii) for example, most of the proposed changes in fact do, and appear intended to, reduce opportunities for public involvement, which is contrary to one of NEPA's core purposes. For the most part the NOPR either fails to mention these changes or offers misleading information about them.

The elimination of the mandatory notice requirement to national organizations in Section 1506.6(b)(2) is entirely unwarranted and cannot be justified based on giving the CEQ "greater flexibility."

[101] NOPR 1705

Although the authorization of the use of electronic media in (b)(3)(x) is a good addition, the limitations on such use should not be based solely on whether high-speed access is limited in an area. In fact many individuals and groups cannot afford such access even when it is technically available. Thus notices should never be distributed solely by electronic means and notices must be designed to reach environmental justice communities and individuals without access to electronic communication.

The elimination from section (c) of the criteria to be used for deciding whether to hold public hearings is not mentioned in the NOPR and is also unwarranted. This change appears to be designed to hinder the public's ability to request such hearings, and intent completely at odds with NEPA's public participation purpose and goals.

The changes to 1506.6(f) are far broader and significant than suggested by the NOPR. The CEQ is proposing to eliminate the current language that creates an exception to FOIA's deliberative process exemption for agency comments. The NOPR does not mention this very significant change. Comments by other agencies on all NEPA documents in draft or final form should be available to the public and not treated as "deliberative." Allowing federal agencies to shield such agency comments from public disclosure is flatly inconsistent with NEPA's public disclosure requirements regarding environmental impacts. The CEQ is also proposing to eliminate the current requirement that NEPA documents, comments and underlying documents be made available without charge to the public or at a reduced fee. Although the NOPR suggests this change "aligns" paragraph (f) with the text of NEPA, see NOPR 1706, that is misleading and simply not true. Nothing in the text of NEPA supports allowing agencies to charge fees for providing NEPA documents, comments and documents underlying the NEPA analysis to the public. Such fees are in fact directly contrary to NEPA's public disclosure and public participation requirement and CEQ offers no basis and no reasoned explanation for this very significant change to the current version of 1506.6(f).

KK. 1506.8 — Proposals for Legislation

We object to the changes to this section, which do far more than "revise for clarity." NOPR 1705. They in fact appear to significantly redefine and narrow when an EIS for legislative proposal is required.

The comments CEQ seeks regarding constitutionality of this section appear to be based on the legal fiction that all legislative proposals come from the president, as opposed to agencies. This section should not be eliminated and in fact is expressly required by Section 102(2)(C) of NEPA.

LL. 1506.9 — Proposals for Regulations

The addition of this new section is unwarranted. Rather than using other agency analysis to replace required NEPA documents, the other analyses referenced should be combined with the required NEPA document, which is usually subject to greater procedural requirements to guarantee adequate disclosure and public participation.

MM. 1506.13 — Effective Date

Although this provision uses language similar to existing regulation 1506.12 regarding "ongoing" NEPA reviews, applying these new regulations to ongoing reviews is not warranted when, unlike the situation in 1978, there would be comprehensive regulations in effect when those reviews were begun. Allowing agencies to switch procedures after reviews have begun under the existing regulations will only cause confusion and could discourage public participation. Agencies should be required to complete reviews under the same regulations they were following when they began those reviews.

NN. 1507.3 — Agency NEPA Procedures

In section 1507.3(a), the proposed regulations instruct other Federal agencies to develop or revise their NEPA regulations, "including to eliminate any inconsistencies with these regulations." The regulation also states that "[e]xcept as otherwise provided by law or for agency efficient, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in [the proposed regulations]."

Where other agencies desire to maintain regulations, policies, or practices that demand more stringent environmental analyses, CEQ cannot interfere with these increased protections. Congress imposed on *all* agencies the obligation to "bring their authority and policies into conformity with the intent, purposes, and procedures [of NEPA]."[102] Similarly, NEPA instructs *all* agencies to "identify and develop methods and procedures in consultation with [CEQ]" to ensure environmental values are given appropriate consideration in decision-making processes.[103] Legislative history shows that NEPA was explicitly designed to "make the quality of the environment everyone's responsibility," and that lawmakers considered it "a statutory enlargement of the responsibilities and the concerns of all instrumentalities of the Federal Government."[104] Thus, CEQ's proposal to constrain agency autonomy to implement NEPA is contrary to law.

Accordingly, while CEQ can certainly provide feedback on other agencies' NEPA procedures, it would be beyond the limits of CEQ's authority (and contrary to its function) to restrict an individual agency's reasonable, though perhaps different, interpretation of its NEPA obligations. This is especially true if an agency's interpretation would result in added protections for the environment, which is one of the underlying goals of NEPA. For instance, CEQ cannot and should not interfere with the autonomous decisions of other agencies to require more thorough investigation into and disclosure of potential environmental impacts. Likewise, should other agencies interpret NEPA as authorizing or demanding more opportunities for public participation, CEQ does not have the power to prohibit or impede those agencies in providing such opportunities.

Additionally, section 1507.3(b)(6) should be eliminated from the proposed regulations. If enacted, this section would codify a loophole allowing agencies to avoid conducting the environmental analysis NEPA demands.[105] As evidenced by the length and detail of the regulations that control preparation of NEPA documents, ensuring NEPA compliance requires that agencies follow specific procedures. The three vague elements that would allow a document to serve as the "functional equivalent" of an EIS are too open to interpretations that would skirt

[102] 42 U.S.C. § 4333.
[103] *Id.* § 4332(2)(B).
[104] 115 Cong. Rec. 14347, 19009.
[105] *See id.* § 4332(2)(C).

full consideration of all environmental impacts at issue. Further, section 1507.3(b)(6)(iii)'s highly generalized requirement that there be public participation before a decision is made does not safeguard the public's right to have their comments meaningfully considered and addressed. Allowing agencies to satisfy NEPA with functional equivalents is also confusing to members of the public who are used to procedures working in a systematic manner. The public should be able to look at an agency's regulations and be assured that the protocols outlined will be those used for all projects with the potential to impact the environment. Thus, proposed section 1507.3(b)(6) is contrary to the letter and spirit of NEPA.

Moreover, section 1507.3(b)(6) should be eliminated because it does not comport with CEQ's professed purpose for updating the rules: to increase efficiency. Because the elements of a functional equivalent in section 1507.3(b)(6)(i)–(iii) are so ambiguous, agency claims that a document amounts to the functional equivalent of an EIS are likely to be challenged in administrative proceedings and litigation that will draw out decisions and create unnecessary costs. If agencies must conduct additional analyses to satisfy other legal obligations, the regulations could specify that these may be included with or completed simultaneously with NEPA analyses. However, the regulations should also clarify that under no circumstances are agencies to forego any requirements otherwise applicable to EAs or EISs. Cutting corners around environmental analyses is not aligned with the purpose or spirit of NEPA. For these reasons, proposed section 1507.3(b)(6) and its counterpart in proposed section 1501.1(a)(5) should be eliminated.

As to section 1507.3(c), while it may be appropriate for agencies to designate activities within their purview that do not constitute major Federal actions for purposes of NEPA (understanding that these designations themselves may be challenged in court), the remainder of this subsection is ultra vires and should therefore be removed from the final rule. Nowhere does NEPA use the term "non-discretionary" or its antonym. Thus, CEQ is not authorized to define this term or delegate that power to any other agency. Likewise, NEPA does not grant CEQ authority to interpret any other statutes. Accordingly, neither CEQ nor any other agency has the power to decide in its NEPA regulations whether any other statute precludes compliance with NEPA. As the roles envisioned by proposed section 1507.3(c)(2)–(5) belong to the judiciary, these should be excluded from CEQ's new rules.

Section 1507.3(d)(2)(ii) instructs agencies to provide for categorical exclusions in their NEPA regulations. The last sentence of that provision allows agencies to determine whether documentation of a categorical exclusion is necessary. But, allowing agencies to apply categorical exclusions without explaining their decisions is contrary to both the letter and spirit of NEPA. Specifically, affording agencies this discretion contravenes section 102(B)'s mandate that agencies should adopt procedures "which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking."[106] Permitting agencies to forego environmental analyses of entire categories of actions without the slightest documentation on why a particular action will not engender significant environmental consequences does not ensure our invaluable natural resources are given appropriate consideration. Moreover, as the application of categorical exclusions is often contested, documentation would allow the public to scrutinize the agencies reasoning and could forestall costly litigation. If CEQ is truly interested in promoting efficiency, it should require at least some documentation of an agency's determination that an action is categorically excluded from NEPA. Similarly, decisions to apply categorical exemptions identified by other agencies, proposed section 1507.3(e)(5), should be accompanied by a brief written explanation detailing why significant environmental impacts will not result.

In section 1507.3(e)(1), the proposed regulations permit agencies to make special exceptions to their NEPA procedures for "classified proposals." While Congress may certainly label certain proposals as classified and instruct agencies to refrain from disclosing such proposals to the public, the President is not authorized to unilaterally carve out exceptions to NEPA's public disclosure requirements via Executive Order. Thus, the portion of this subsection pertaining to Executive Orders should be eliminated.

CEQ has also suggested that agencies be allowed to combine their scoping and EA processes. This proposal, section 1507.3(e)(4), is problematic due to CEQ's failure to require draft versions of EAs be put out for public comment. By CEQ's count, the number of EAs prepared each year is approximately 100 times greater than the number of EISs prepared each

[106] *Id.* § 4332(2)(B).

year.[107] As such, EAs are the primary means by which the environmental implications of Federal actions are examined. Combining scoping and environmental assessments without requiring consideration of public comments on EAs would deprive the public of a way to participate in numerous decisions that implicate invaluable public trust resources. While it may be appropriate to combine scoping with the EA process for some actions, CEQ's regulations should ensure the public is always afforded an opportunity to comment on proposed actions that may significantly impact the environment, and that those comments are addressed in a meaningful way.

More fundamentally, though consolidation of the scoping and commenting opportunities is suggested as a means of facilitating "effective and efficient procedures," the move is more likely to create inefficiency and engender delays. As CEQ itself said in 1978, scoping is intended to "encourage affected parties to identify the crucial issues raised by a proposal before [NEPA documents are] prepared in order to reduce the possibility that matters of importance will be overlooked" and "to ensure that agency resources will not be spent of analysis of issues which none concerned believe are significant."[108] Indeed, the whole purpose behind scoping is to "set the stage for a more timely, coordinated, and efficient Federal review."[109] By engaging the public at multiple intervals in the decision-making process, agencies increase the odds that issues will be addressed, thereby reducing the likelihood of litigation. Without scoping, agencies risk wasting time on non-issues and adding unnecessary bulk to NEPA documents. In some cases, addressing public concerns may require substantial and time-consuming edits to an EA that could change the agency's decision about whether an EIS is necessary. Besides, scoping periods comprise only a small fraction of the time agencies spend on NEPA analyses. Thus, requiring a brief scoping period at the outset of the NEPA process is beneficial and likely to save time in the long run.

OO. Part 1508

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[107] COUNCIL ON ENVIRONMENTAL QUALITY, *Considering Cumulative Effects Under the National Environmental Policy Act* at 4, (Jan. 1997). *See also Kern v. BLM*, 284 F.3d 1062, 1076–77 (9th Cir. 2002) (citing the extensive use of EAs in determining that EAs must fully consider cumulative impacts).

[108] 43 Fed. Reg. 55982.
[109] *Id.*

Some of the most alarming changes in the proposed rule can be found in the new definitions section. The following subparts address the various illegalities and unexplained changes in proposed section 1508.

i. "Effects"

In particular, proposed changes to section 1508.1(g) are not only contrary to NEPA, but also shortsighted to the point of foolishness. At present, the scope of NEPA analyses must include not only the direct effects of an action, but also indirect effects and cumulative impacts.[110] Indirect effects are those effects, which although further removed from the major Federal action in either time or space, are still reasonably foreseeable. Cumulative impacts are the sum of effects from individual past, present, and future actions. By requiring cumulative impacts analyses, the existing regulations recognize that even small actions often have collectively significant ramifications for natural resources and ecological systems. Moreover, demanding that NEPA documents include a broad scope of effects honors the reality that Federal actions do not occur in a vacuum. Because producing truly informative documents requires a holistic approach that considers the multiple and varied stressors acting on the natural world, CEQ's attempt to make indirect effects analyses discretionary and to eliminate cumulative impacts from the required scope of NEPA is contrary to law, arbitrary, capricious, and irresponsible.

As a preliminary matter, it should be noted that CEQ's proposed definition of effects is contradictory and confusing. While proposed section 1508.1(g) says effects "may include reasonably foreseeable effects that are later in time or farther removed in distance," subsection (g)(2) goes on to say "[e]ffects should not be considered if they are remote in time [or] geographically remote." The regulations do not define "remote," leaving readers to ponder what span of land or time is sufficient to render an effect so attenuated that NEPA analysis is unnecessary. The difficulty in drawing this line underscores the arbitrary and illegal nature of such a distinction. NEPA is aimed at protecting the environment for all Americans, including

[110] 40 C.F.R. § 1508.25(c).

future generations and those who are not currently within our borders.[111] If the reasonably foreseeable result of a major Federal action is one or more significant environmental impacts, NEPA demands that those impacts be studied and disclosed.[112] Furthermore, abandoning analysis of future effects is expressly forbidden by each agency's statutory duty to report on "the relationship between local short-term uses of [the] environment and the maintenance and enhancement of long-term productivity." CEQ's regulations should make this plain, as an ambiguous regulation is unlikely to facilitate efficient agency action or reduce litigation.

CEQ claims this rule change is designed to bring the regulations into compliance with the current NEPA case law. But, numerous judicial opinions have chronicled the potential for indirect effects and cumulative impacts to cause significant and adverse environmental harm.[113] Rather than addressing this precedent, CEQ's summary of the rule offers several generic rationales for the decision to discourage indirect effects and cumulative impacts analyses. First, CEQ claims curtailing the scope of effects is intended to allow agencies to focus on only those actions that are reasonably foreseeable. Then, CEQ says agencies need not include cumulative impacts because "determining the geographic and temporal scope of [cumulative impacts] has been difficult."[114] Finally, CEQ claims cumulative impacts analyses "can divert agencies from focusing their time and resources on the most significant effects."[115] However, none of these reasons is sufficient to justify foregoing analysis of indirect effects or cumulative impacts prior to taking an action that may significantly and adversely impact the environment through precisely these ends.

First, CEQ's claim that ending compulsory indirect effects analysis will allow agencies to focus on reasonably foreseeable impacts is illogical. This position completely ignores the fact that "reasonably foreseeable" is *already* part of the definition of indirect effects. Presumably, the proposed alteration to the definition is meant to clarify which effects qualify as reasonably

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[111] 42 U.S.C. § 4331(b)(1) (affirming Federal government's role "as trustee of the environment for succeeding generations"); *id.* § 4332(2)(F) ("[A]ll agencies of the Federal Government shall… recognize the worldwide and long-range character of environmental problems.").
[112] Id. § 4332(2)(C).
[113] E.g., *Kern v. BLM,* 284 F.3d 1062 (9th Cir. 2002); *Ocean Advocates v. U.S. Army Corps,* 402 F.3d 846 (9th Cir. 2005).
[114] 85 Fed. Reg. 1708.
[115] 85 Fed. Reg. 1708.

foreseeable. But, as CEQ's proposed definition of "reasonably foreseeable" acknowledges, courts across the country have already adopted a logical and workable definition of reasonably foreseeable: "the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[116] and CEQ's confusing new effects definition does little to improve the standard. Rather than enact the suggested changes, CEQ should simply state that effects include all reasonably foreseeable impacts of an action and adopt the proposed definition of reasonably foreseeable. This move would be consistent with CEQ's professed intention to codify well-established NEPA case law.

Next, while it may be fair to clarify that "but-for" causation alone does not make an effect reasonably foreseeable, CEQ's conclusion that "[e]ffects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain" is dangerous overkill. The judicial opinions CEQ cites as the basis for this change certainly do not amputate the scope of NEPA effects in such a manner.[117] Besides, in a previous NEPA rulemaking, CEQ acknowledged the potential for remote effects to have severe environmental consequences.[118] Assessing indirect effects ensures that NEPA documents amount to more than superficial and misleading accounts of localized and immediate consequences. Thus, CEQ's illogical justification and misreading of Supreme Court precedent do not sufficiently explain the agency's change in position about the importance of indirect impacts analysis. Moreover, removing reasonably foreseeable impacts from mandatory analysis under NEPA simply because they are remote in time or space would unravel existing environmental

[116] *See, e.g.*, *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992) (cited approvingly by the Fifth Circuit, *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005), Tenth Circuit, *Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 853 (10th Cir. 2019), and D.C. Circuit (*Sierra Club v. Fed. Energy Reg. Comm'n*, 827 F.3d 36, 47 (D.C.C. 2016)).
[117] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772–76 (1983) (holding that fear and anxiety suffered by residents near nuclear facility were too attenuated from the physical environment to be considered effects under NEPA); *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004) ("We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions… the agency need not consider these effects in its EA when determining whether its action is a 'major Federal action.'").
[118] *National Environmental Policy Act Regulations*, 50 Fed. Reg. 32237 (1985).

protections in contravention of CEQ's statutory mandate to develop "national policies to foster and promote the *improvement* of environmental quality."[119]

As to CEQ's explanation for the removal of cumulative impacts, courts have repeatedly acknowledged that neither difficulty nor delay excuses statutory noncompliance,[120] and eliminating mandatory consideration of cumulative impacts undoubtedly violates multiple statutory provisions in NEPA. Consider, for instance, how removing cumulative impacts analyses would alter an agency's treatment of greenhouse gas emissions attributable to a Federal action. Ignoring cumulative impacts would allow agencies to disregard how predicted emissions will contribute to climate change—an environmental emergency created by countless small acts, each of which incrementally increases greenhouse gas emissions, decreases carbon storage, or both. Climate change has already caused catastrophic, long-lasting environmental effects.[121] But, as global temperatures continue to climb, so too will sea levels, ocean acidification, the spread of infectious disease, and the extinction rate,[122] as well as instances of droughts, severe storms, and crop failures.[123] Americans are already being harmed by these trends, but with each decision to increase emissions or destroy another fraction of our carbon stores, we increase the risk that these adverse impacts will persist into the coming generations. Thus, at the very least, NEPA unambiguously demands that the potential for Federal actions to contribute to climate change be disclosed to the public, regardless of difficulty.[124]

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[119] 42 U.S.C. § 4344(4) (emphasis added).
[120] *Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C.C. 1971) ("Considerations of administrative difficulty, delay, or economic cost will not suffice to strip [Section 102] of its fundamental importance."); *Greene County Planning Bd. v. Fed. Power Com'n*, 455 F.2d 412, 422–23 (2nd Cir 1972) ("Delay is a concomitant of the implementation of the procedures prescribed by NEPA.").
[121] *See generally* IPCC Global Warming of 1.5°C, https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf.
[122] Mark C. Urban, Accelerating Extinction Risk From Climate Change, Science v. 348 i. 6234 May 2015 (https://science.sciencemag.org/content/348/6234/571.full).
[123] IPCC Global Warming of 1.5°C, at 9-12, https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf.
[124] 42 U.S.C. § 4331(b)(1) ([I]t is the continuing policy of the Federal Government to use all practicable means… to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may fulfill the responsibilities of each generation as trustee of the

CEQ deems greenhouse gas emissions and the concomitant climate effects a "single category of impacts," undeserving of specific attention in the regulations.[125] This perfunctory dismissal of greenhouse gas emissions and climate change impacts as issues that should be addressed specifically by the NEPA regulations is arbitrary and capricious for a number of reasons. First, greenhouse gas emissions and climate change impacts cannot seriously be classified as falling within a "single category." Both greenhouse gas emissions and climate impacts more broadly are common consequences of a variety of different Federal actions. Thus, regulations addressing these issues would be applicable to many agencies as they consider a multitude of decisions. Second, by definition, climate refers to long-term weather patterns. Weather encompasses a variety of complex environmental factors—such as temperature, precipitation, wind, and cloud cover—and NEPA analyses would benefit from a uniform agency approach to each of these measures. Finally, as previously explained, the impacts of climate change are many, varied, and touch on almost every aspect of the human environment. In sum, greenhouse gas emissions and climate change are the biggest and most pervasive threats to the environment humanity has ever faced. CEQ's refusal to deal with this threat in the regulations on the basis that agencies need to focus on the "most significant effects" is therefore oxymoronic, as well as illegal under both NEPA and the APA.[126]

Accounting for climate change and other cumulative impacts is consistent with CEQ's previous approach to NEPA. In fact, prior to the proposed regulations, CEQ had long espoused the danger inherent in ignoring "the tyranny of small decisions."[127] In a guidance document on cumulative impacts published to its website, CEQ previously stated "[e]vidence is increasing that

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environment for succeeding generations."); *id.* § 4332(F) ("[A]ll agencies of the Federal Government shall…recognize the worldwide and long-range character of environmental problems."); *id.* § 4332(G) ("[A]ll agencies of the Federal Government shall…make available to [the public] advice and information useful in restoring, maintaining, and enhancing the quality of the environment.").

[125] 85 Fed. Reg. 1710.

[126] CEQ also points to its "Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions" as evidence that the agency need not provide additional direction on this subject in the regulations. 85 Fed. Reg. 1710. What CEQ neglects to mention is that this Guidance acknowledges "the potential effects of GHG emissions are inherently a global cumulative effect." 84 Fed. Reg. 30098. Thus, under the new regulations, the Guidance would be of little use in ensuring climate impacts are disclosed in any meaningful way.

[127] COUNCIL ON ENVIRONMENTAL QUALITY, *Considering Cumulative Effects Under the National Environmental Policy Act* at 1, (Jan. 1997).

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."[128] Now, despite this unequivocal stance on the importance of cumulative impacts, CEQ proposes to afford agencies the discretion to exclude this analysis from the NEPA regulations. But, it will take more than complaints of difficulty and vague implications that agencies are skimming over "more significant effects" to justify CEQ's complete reversal of opinion on the need for cumulative impacts analyses.

CEQ's assertion that conducting cumulative impacts analyses has been "difficult" to the extent that the entire process must be removed from NEPA procedures is belied by the fact that agencies have been successfully determining the appropriate scope for these analyses for over forty years. In fact, in the principle case CEQ cited to substantiate the idea that cumulative impacts analyses are too difficult for agencies to successfully undertake, the court *upheld* an agency's cumulative impacts analysis under the current regulation.[129] Additionally, as previously cited, CEQ has issued ample guidance instructing agencies on how to conduct cumulative impacts analyses.[130] If CEQ feels further guidance specific to the issue of scope is necessary, the prudent response is to publish additional guidance or to publish regulations delineating the appropriate scope. Abandoning cumulative impacts analyses because they are too difficult at a moment in history when the cumulative effects of human actions comprise the single greatest threat to humanity is arbitrary, capricious, contrary to NEPA, and wildly irresponsible.

While defining the appropriate methodology for assessing cumulative climate impacts may be difficult, making difficult environmental policy decisions is what CEQ was created to do.[131] One hurdle the agency must clear to satisfy its statutory duty to "develop and recommend… policies to foster and promote the improvement of environmental quality,"[132] is dealing with the uncertainty inherent in predicting climate impacts. Though creating policy in the

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[128] *Id.*
[129] *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 769–70 (2004).
[130] *See* COUNCIL ON ENVIRONMENTAL QUALITY, *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997); COUNCIL ON ENVIRONMENTAL QUALITY, *Guidance on the Consideration of Past Actions in Cumulative Effects Analysis* (June 2005).
[131] 42 U.S.C. § 4344.
[132] *Id.* § 4344(4).

face of uncertainty is a challenge, persevering to this end is unequivocally required by NEPA.[133] With CEQ's statutory mandate in mind, the policy goal of these regulations should be to prevent catastrophic impacts to human health and the economy. Consensus among the international community indicates that limiting global temperature rise to 1.5°C will soften many of the most dangerous impacts of climate change.[134] Converting discrete quantities of emissions into specific environmental impacts is indeed complex, but fortunately, this work has *already been done*, at least in the context of temperature.[135] The NEPA regulations present an unparalleled opportunity for CEQ to begin providing contextualized information about climate change in a way that allows decision-makers to understand the true effects of their actions.

According to a 2019 United Nations report, limiting the climate change and its catastrophic impacts requires "staying within a total carbon budget."[136] A carbon budget is the maximum amount of emissions we can emit while maintaining global temperature below a particular threshold. The temperature threshold agencies must adopt in order to meet their statutory duty under 42 U.S.C § 4332(2)(F)[137] is 1.5°C. Accordingly, the NEPA regulations should instruct agencies to provide data on the estimated carbon budget remaining at the time an action is being evaluated, as well as the portion of that budget that would be used up by a that action. This methodology would not impose unreasonable burdens on agencies already accustomed to calculating emissions estimates for projects as part of their cumulative impacts analyses. However, contextualizing the cost of emissions as a proportion of a carbon budget

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[133] *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) ("[O]ne 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.").

[134] IPCC Global Warming of 1.5°C at 9–13, https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf

[135]United Nations Emissions Gap Report https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?sequence=1&isAllowed=y

[136] IPCC Global Warming of 1.5°C at 14.

[137] 42 U.S.C. § 4332(2)(F) instructs all agencies to "lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."

would greatly improve the decision-making process. While agencies understand that emissions should be minimized, they currently have no way to measure the degree to which each emitting action moves the world closer to an unreasonable end. A carbon budget provides agencies with a scale for this crucial measure and allows decision-makers to more fully comprehend the opportunity costs of various actions. Moreover, providing agencies with a uniform and internationally accepted approach to assessing climate change impacts from emissions would make the NEPA process more efficient by eliminating unnecessary strategizing and research over how to handle the analysis.

Although some uncertainty is inherent to climate science, this must not prevent CEQ from setting a carbon budget. Current agency "best practice" is to provide an estimate of a project's emissions, and to contextualize these estimates with local, regional, national, or sector-wide emissions estimates.[138] But, when project-level estimates are contextualized with unbridled, large-scale emissions, all projects are easily dismissed as diminutive. Allowing agencies to contextualize a project's emissions with current emission rates is not a policy that will "foster and promote the improvement of environmental quality" [139] in a way that meets our Nation's goals because current emission rates are not on track to meet those goals.[140] Thus, compliance with NEPA demands that CEQ take additional steps to address climate change impacts from greenhouse gas emissions. Adopting a scientifically sound carbon budget would help CEQ fulfill its various duties and functions under 42 U.S.C. 4344, and would be consistent with the agency' previous position that "[t]he language of [NEPA] and its legislative history make clear that Federal agencies must act in an environmentally responsible fashion and not merely consider environmental factors."[141]

Accordingly, BMBP requests that CEQ amend its proposed definition of effects to include not only those reasonably foreseeable effects that occur at the same time and place as the action being considered, but also all reasonably foreseeable effects that are later in time or

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[138] 84 Fed. Reg. 30098.
[139] 42 U.S.C. 4344(4).
[140] Emissions Gap at 18–19, https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?sequence=1&isAllowed=y; IPCC Global Warming of 1.5°C at 8, 14.
[141] 43 Fed. Reg. 55986.

further removed in distance. Further, NEPA demands that the definition of effects include a robust discussion of an action's cumulative impacts, especially impacts related to climate change.

ii. "Categorical exclusion"

As mentioned in BMBP's comments pertaining to proposed section 1501.3, CEQ essentially suggests two changes to the definition of categorical exclusion. First, CEQ wants to delete the portion of the categorical exclusion definition that makes contribution to a cumulatively significant impact sufficient to bar an action from being categorically excluded from NEPA.[142] However, as explained above, CEQ's attempt to remove cumulative impacts from NEPA is arbitrary, capricious, and contrary to law. As both CEQ and federal courts have acknowledged, cumulative impacts can be significant. If an action will contribute to a cumulatively significant impact, NEPA requires evaluation of that action in either an EA or EIS.[143] Therefore, allowing cumulatively significant actions to be categorically excluded is illegal under NEPA and the APA.

Second, CEQ proposes to change the definition of categorical exclusion from those actions that "do not" have a significant environmental impact to those that "normally do not" have a significant environmental impact.[144] While proposed section 1501.4 does order agencies to consider whether there are any extraordinary circumstances surrounding an action that falls within a categorical exclusion that may cause significant effects, the addition of "normally" to the definition nevertheless strips away a layer of environmental protection by making it easier for agencies to categorically exclude actions from review. Because CEQ's mandate instructs the agency to suggest policies that will improve the environment,[145] this change is both *ultra vires* under NEPA, and arbitrary and capricious under the APA.

iii. "Major Federal action"

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[142] Currently, 40 C.F.R. § 1508.4 defines categorical exclusion as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found [by agency regulations] to have no such effect."
[143] 42 U.S.C. § 4332(2)(C).
[144] *Compare* 40 C.F.R. § 1508.4 *with* 85 Fed. Reg. 1728.
[145] 42 U.S.C. § 4344(4)

CEQ's proposed rule also substantially changes the definition of "major Federal action," a triggering provision that determines whether NEPA analysis is necessary. When CEQ published the current NEPA regulations, the agency stated:

> "the term 'major' reinforces but does not have a meaning independent of the term 'significantly' in NEPA's phrase 'major Federal action significantly affecting the quality of the human environment.'... The Council determined that any Federal action which significantly affects the quality of the human environment is 'major' for purposes of NEPA."[146]

Now, however, CEQ proposes a change in position that interprets "major" as indicating the level of Federal involvement an action must entail to trigger NEPA review.[147] Specifically, the proposed regulation would "make clear that [major] does not include non-Federal projects with minimal Federal funding or minimal Federal involvement such that the agency cannot control the outcome on the project."[148] The regulations then go on to explicitly classify two categories of Federal action—loan guarantees provided by the Farm Service Agency and Small Business Administration—as non-major.

While CEQ may be correct that Congress intended major to indicate the magnitude of Federal action at issue, this revision clearly goes too far. In fact, in its summary of the proposed rule, CEQ cites the legislative history that invalidates the proposed definition.[149] To illuminate the meaning of major Federal action, Congress provided several examples, including "project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs."[150] Federal funding for a private project, regardless of the portion of total funding involved or an agency's ability to control the project after the funding is dispersed, requires an agency

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[146] 43 Fed. Reg. 55989.
[147] *See* 85 Fed. Reg. 1707–08.
[148] *Id.* at 1708.
[149] 85 Fed. Reg. 1709.
[150] S. Rep. No. 91-296, at 20 (1969).

decision on a project proposal. Thus, categorically removing these actions from the major classification is contrary to explicit congressional intent, and therefore arbitrary and capricious.

CEQ's attempt to delineate between major and non-major federal actions by looking at the proportion of Federal funding versus non-Federal funding is also arbitrary because it improperly blurs the line between government and private actions. As the term "major Federal action" indicates, the proper subject of the determination of magnitude for NEPA purposes is the *Federal* action—not the combination of Federal and private actions that comprise a completed project. Consider, for instance, the example CEQ itself uses in its summary of the proposed rule: a farm ownership and operating loan guarantee from the FSA.[151] In this scenario, the agency action at issue is whether to approve the application for a loan guarantee, and if so, what restrictions to place upon that guarantee. This commitment of taxpayer money is a Federal decision on a project proposal, and therefore a "major Federal action" within the meaning Congress intended to give that term.

CEQ's claims that FSA "does not control the bank, or the borrower," "does not control the subsequent use of such funds," and "does not operate any facilities" are both seriously misleading and irrelevant to the inquiry at hand. Federal courts have determined on multiple occasions that FSA *does* retain control over loan guarantees and loan recipients' farming operations.[152] And besides, if allowed to stand, CEQ's claim that agencies cannot control what private parties do with grants of Federal money, permits, or other permissions could be applied to myriad decisions that are undoubtedly major Federal actions. Just because the Federal government is not the only or final actor on a project or permitted activity does not mean NEPA is inapplicable to discrete agency actions that precede that project or activity.[153] CEQ's definition of major Federal action

[151] 85 Fed. Reg. 1709.
[152] *Buffalo River Watershed All. v. U.S. Dep't of Agric.*, No. 4:13-cv-450-DPM, at *3–4 (E.D. Ark 2014); *Food & Water Watch v. U.S. Dep't of Agric.*, 325 F.Supp.3d 39, 49–51.
[153] *Scientists' Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) ("[T]here is 'Federal action' within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits

arbitrarily combines government actions with private actions to justify conducting fewer NEPA analyses. Moreover, asking agencies to determine what constitutes minimal versus non-minimal Federal involvement is fodder for litigation, and therefore not likely to achieve the efficiency goal of this rulemaking. For all these reasons, the proposed definition is invalid under the APA.

The definition of major Federal action is also contrary to NEPA itself. NEPA mandates that to the fullest extent possible, agencies must publicly disclose "advice and information useful to restoring, maintaining, and enhancing the quality of the environment."[154] The statute also declares:

> "it the policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist and productive harmony."[155]

These statutory excerpts highlight several points that render CEQ's proposed definition of major Federal action contrary to law. First, interpreting major as having no meaning independent of significantly is certainly possible: agencies have been reading the statute this way since 1978. Requiring that agencies weed out activities with minimal Federal funding or involvement from the scope of NEPA will necessarily result in fewer NEPA documents and less public disclosure of information that could be used by outside parties to restore, maintain, and enhance the environment. This contravenes section 102 of NEPA. Second, NEPA's declaration of policy makes clear that Congress envisioned the statute's reach as extending not only to Federal agencies, but also "State and local governments, and other concerned and private organizations." Drawing a hard line that

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actions by other parties which will affect the quality of the environment."). *See also* 115 Cong. Rec. 19012 (legislative history indicating Congress's intent was for NEPA to apply to "the licensing functions of independent agencies as well as the ongoing activities of the regular Federal agencies").
[154] 42 U.S.C. § 4332(2)(G).
[155] *Id.* § 4331(a).

would exclude actions involving these parties from NEPA analysis just because the Federal government plays more of a supporting role infringes upon this statutorily imposed policy. Finally, as is the case with many of the proposed revisions, the new definition of major Federal action does not "foster and promote the improvement of environmental quality."[156] Thus, this change infringes upon the duties and functions assigned to CEQ by NEPA.

iv. "Reasonable alternatives"

The final change CEQ must reconsider is the new language used to define what constitutes a reasonable alternative. In particular, BMBP requests that CEQ clarify the requirement that a reasonable alternative be technically and economically feasible, and delete the requirement that alternatives meet an applicant's goals.[157] As these comments have already explained, CEQ's inclusion of applicant goals in the purpose and need statements of NEPA documents is improper. The purpose of NEPA documents is to help agencies make informed decisions that comport with NEPA.[158] Specifically, these documents are a tool to help agencies "improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may," *inter alia*, effectively serve as a trustee for future generations, "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," and "attain the widest range of beneficial uses of the environment *without degradation*."[159] Thus, reasonable alternatives are those that are possible and designed to achieve these ends.

Requiring that alternatives be technically and economically feasible is not inherently wrong or contrary to NEPA. However, this mandate is made problematic by CEQ's aforementioned penchant for confusing the government's purpose and need with that of the applicant. An agency's purpose and need in conducting NEPA review for a project proposal or permit application submitted by an outside party is to make an informed decision about how to

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[156] *Id.* § 4344(4).
[157] 85 Fed. Reg. 1730.
[158] *See* 43 Fed. Reg. 55979 (calling improved decision-making the "fundamental purpose of the NEPA process").
[159] 42 U.S.C. § 4331 (emphasis added).

respond to that proposal or application. In addition to any statutory mandate Congress has given a particular agency, the agency's ultimate decision must be informed by the policy directives imposed on all agencies by NEPA.[160] Thus, while it makes good sense to limit alternatives to those that are technically and economically feasible in a general sense, that does not mean alternatives considered should be technically and economically feasible for a particular applicant. If alternatives were limited to such an extent, there may be no alternatives considered that avoid environmental degradation. Executive Order 13807, one of the catalysts for this rule change, specifically aimed to make the NEPA process more efficient for decisions pertaining to infrastructure projects.[161] However, unless these projects are designed to include sufficient environmental protections and mitigation, they could engender precisely the environmental harms NEPA was enacted to avoid. If an applicant cannot afford to implement measures necessary to maintain environmental integrity in congruence with NEPA, that applicant should not be allowed to move forward with that project. Indeed, NEPA is designed to weed out these projects and reserve our resources for the most beneficial uses. Thus, it is imperative that alternatives not be tailored to applicants. Technological and economic feasibility judgments must be considered in light of what is generally practicable. To do otherwise would be arbitrary, capricious, and contrary to NEPA.

IV. Conclusion

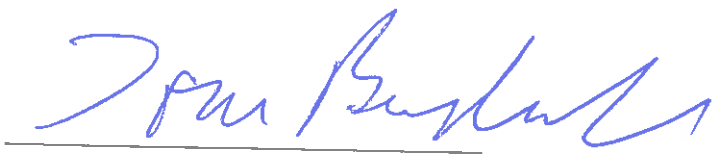
These comments establish that CEQ's proposed regulations suffer from a number of serious defects. As such, BMBP believes a complete rewrite of the NOPR is necessary to bring the proposed regulations in line with NEPA, the ESA, the APA, various Federal judicial opinions, the requirements imposed by the Supreme Court in *Fox v. FCC*, and common sense. Having provided an exhaustive list of issues with the proposal, BMBP requests that CEQ respond to these comments point-by-point in their entirety. To conclude, we leave you with a prescient warning from the United States Senate of 1969:

> "The survival of man, in a world in which decency and dignity are possible, is the basic reason for bringing man's impact on his environment under informed and

[160] *Id.* §§ 4331, 4332.
[161] 82 Fed. Reg. 40463.

responsible control. The economic costs of maintaining a life-sustaining environment are unavoidable. We have not understood the necessity for respecting the limited capacities of nature in accommodating itself to man's exactions, nor have we properly calculated the cost of adaption to deteriorating conditions. In our management of the environment we have exceeded its adaptive and recuperative powers, and in one form or another we must now pay directly the costs of maintaining air, water, soil, and living space in quantities and qualities sufficient to our needs… 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."[162]

Respectfully Submitted,



Tom Buchele, Counsel for Blue Mountains Biodiversity Project, Friends of the Clearwater, and Greater Hells Canyon Council

[162] S. Rep. 91-296, at 17.