August 10, 2018

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

RE: Advance Notice of Proposed Rulemaking
40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508
[Docket No. CEQ-2018-0001]

Dear Ms. Neumayr:

The Environmental Protection Network (EPN) is pleased to submit the following comments in response to CEQ's Advanced Notice of Proposed Rulemaking seeking input on possible revisions to the 1976 regulations on implementation of procedural requirements of the National Environmental Policy Act of 1969.

EPN harnesses the expertise of former EPA career staff and confirmation-level appointees from multiple administrations to preserve and advance the nation's bipartisan legacy of progress towards clean air, water and land and climate protection for all Americans. It is committed to providing relevant facts and objective analysis in support of:

- preserving the science-based, cost-effective environmental protections that most Americans enjoy today;
- ensuring the capacity of public agencies to conduct independent scientific research and analysis, and to supply critical environmental information to federal and state decision-makers and the public; and
- promoting public understanding of scientific, legal, policy and economic issues raised by new Executive Orders or proposals to change current environmental laws and regulations.

We hope that CEQ considers these comments as it completes its evaluation of whether the NEPA regulations should be revised. In our comments, EPN's assessment is that the existing regulations provide for the efficiency, interagency coordination and focus on significant issues CEQ is seeking. Instead of modifying the existing regulations, we urge CEQ to exercise its leadership role to: 1) identify and apply lessons learned from current and past efforts to better streamline and coordinate federal agency actions, 2) ensure the existing regulations coupled with Executive Orders and CEQ guidelines are implemented as intended, and 3) secure the resources needed to do so. We believe that changing the regulations will be counterproductive, leading to delays and confusion from the likely litigation and adjustments to follow. The regulations have stood the test of time delivering important benefits to the nation with proven potential and have supported numerous efforts to improve its implementation by past and present Administrations.

Sincerely,

Michelle Roos, Executive Director, Environmental Protection Network
Submitted on behalf of the EPN NEPA & Infrastructure Team and Save EPA

EPN comments on CEQ's Advance Notice of Proposed Rulemaking regarding potential revisions to NEPA implementing Regulations

GENERAL COMMENTS

We support the goals of efficiency and avoiding unnecessary delay but believe that these goals will not be achieved by changing the existing NEPA implementing regulations. Greater efficiencies can and should be achieved through more effective implementation of the existing regulations and applying lessons learned from years of efforts to improve the process. We have several general comments in addition to our response to the specific set of 20 questions raised concerning the need or desirability to amend the 1976 NEPA implementing regulations:

1- Implementation of NEPA law through implementing regulations and guidelines has been both effective and efficient in delivering countless benefits to our nation over the forty years it has been in place. We cannot afford to lose the important benefits this has provided to our nation. There have been numerous studies by independent sources such as the Congressional Research Service and General Accounting Office on NEPA's effectiveness,its impact on federal government decision making, and the improvements that have resulted from a careful multidisciplinary review of both potential impacts and opportunities to avoid, mitigate, and reduce adverse impacts as well as enhance beneficial impacts of federal actions. NEPA's effectiveness often delivers monetary savings as well as other benefits in the process of exploring alternatives and engaging in a process to include all stakeholders. To quote from a 2014 study of the General Accounting Office (GAO): "According to studies and agency officials, some of the qualitative benefits of NEPA include its role in encouraging public participation and in discovering and addressing project design problems that could be more costly in the long run" (https://www.gao.gov/products/GAO-14-369).

   Efficiency and effectiveness often go hand in hand. The small subset of projects experiencing delays due to NEPA implementation alone, and not to other factors such as financing delays, are usually those which are not cost-effective to begin with or for which further information and consideration of alternatives result in new ways to achieve "productive harmony" between the natural and built environments. Best practices developed through the application of NEPA, when adopted elsewhere, speed the decision making process and deliver greater results for our investments. This cycle of benefits from NEPA must be considered and not just a singular and shortsighted focus on efficiency alone.

2- We strongly urge the Administration to begin this undertaking with a bias toward avoiding changes to the NEPA implementing regulations since they are unnecessary to achieve the goal of efficiency. Any changes are likely to be litigated thus creating more delay. The fact that, as noted in the request for comments in the ANPRM, the regulations have only been amended once since they were first issued in 1976 is an indicator of the enduring value of these groundbreaking regulations and the flexibility they offer, not a reason to change them. The question here is not whether, for example, time limits and fostering multi-agency cooperation are worthy objectives, but whether the NEPA regulations need to be revised to achieve the Administration's goals. In fact, the existing regulations call for the very kind of efficiencies and

cooperation implied by the questions, and the ANPRM does not demonstrate any specific reason that they need to be changed.

Unfortunately, the questions in the ANPRM are designed to solicit positive comments in favor of revising the regulations, leaving the reader and commenter with the impression that amendments are needed rather than inviting a considered response as to whether the existing regulations are adequate. For example, the three questions posed on the NEPA process seek comment on whether the regulations should be revised: (1) to achieve the desired efficiency, (2) to make the most use of previous studies and (3) to optimize coordination, implying that such goals cannot be achieved under current rules. In fact, the current regulations do just that.

Any effort to revise the regulations should take into account the fact that the regulations and their implementation have been well litigated and the interest of the Administration in accelerating investment in infrastructure would be undermined by the inevitable lawsuits and uncertainty such regulatory changes doubtless would engender. Also, all of the agencies at every level of government and the involved private sector participants are familiar with the process and any changes will create confusion and delay. Therefore, we urge that any changes in these regulations carefully consider the negative effects of regulatory changes on both government and the private sector. CEQ could miss opportunities to achieve desired results by creating unwarranted confusion, delay and uncertainty with unnecessary regulatory changes.

3- CEQ should prepare and provide to the public an analysis of how the current regulations address the questions asked in the ANPRM before embarking upon any changes to the rules. Currently the ANPRM leaves the analysis of the existing regulations to the commenters, some of whom may not be well informed of over forty years of settled legal interpretation. Given the importance of NEPA in ensuring our government is responsive to long term consequences of its actions, and that it duly considers the best scientific information and methods for making its decisions, it is essential that the analysis supporting any suggested changes in regulations be provided to the public.

4- The goals of efficiency and improved decision making require an investment in the infrastructure that government agencies have for managing and sharing information and for ensuring its accountability to stakeholders and the public. We urge the administration to both request and provide the essential human, fiscal, and technological resources to achieve its goals of efficient implementation and accountability. The experience of the State of Alaska in this regard is informative. It charges an extra fee for coordinating all the respective federal, state, and local permits and environmental review because such coordination, while important, has a cost. At this juncture CEQ has not been funded at levels requested by the Administration to implement the Federal Permitting Improvement Steering Council (FPISC) established by the FAST-41. In addition, the individual federal agencies should likewise be funded to meet their commitments to better coordinate actions. Any analysis of the effects of the proposed changes to these regulations must include the projected costs of adequately supporting the information exchange and staff requirements needed to achieve the goals of such changes.

5- The regulations should be viewed in conjunction with: a) existing guidance and FAQs from CEQ; b) litigation on NEPA regulations, c) FAST-41 and FPISC, the entity established under 42 U.S.C. 4370m-1, and d) Executive Order 13807 "Establishing Discipline and Accountability in the Environmental Review of Infrastructure Projects." Note that the following comments also try to consider draft infrastructure legislation prepared by the Administration, in order to inform us of the kinds of practices the Administration most likely is advocating in considering changes to the NEPA implementing regulations.

RESPONSES TO QUESTIONS

NEPA Process

1. Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?

The Administration's interest in coordinating the actions of multiple agencies to provide timely reviews and authorization decisions through streamlined procedures and synchronization of both NEPA reviews and permitting in the most efficient manner is a worthy goal and one many previous Administrations also have sought to achieve. It is also the goal of FAST–41 legislation passed in 2017, which created FPISC. Further, this is an important goal of the existing NEPA implementing regulations.

Unfortunately, while synchronization and an integrated schedule are both desirable and achievable, there are inherent problems in seeking a concurrent schedule for NEPA and all federal authorizations. This is because there is a natural tension between the NEPA process needing to be carried out as early as possible in project planning and the specificity required for many federal and state regulatory authorizations which require detailed information on project design and construction plans. During the planning process alternatives are considered to avoid adverse and unintended effects as well as opportunities to enhance beneficial impacts. Detailed project design information is limited at that stage. This means that it may not be possible for many NEPA and federal authorizations to be carried out concurrently as opposed to a process which is *synchronized* and which provides the project proponent with sufficient certainty to pursue necessary financing and approvals.

Further, any effort by the Administration to force fit a timetable for both NEPA reviews and authorization decisions is deeply flawed (e.g. the two year timeframe proposed in the draft infrastructure legislation). Such a fixed time limit is unrealistic for certain types of permit authorizations and largely inadequate to resolve complex issues in the small subset of proposed projects that pose significant and complex issues to be addressed and might fuel rather than prevent conflict. Originally, the Administration's Executive Order set a two year goal as an average performance target with explanations for when that goal is exceeded,which is far more realistic. Forcing decisions in the face of inadequate information would not enable the Administration to achieve its goals as it will lead to tie ups in endless litigation. It also will prevent some projects from meeting the letter and spirit of NEPA. Furthermore, any such timeline needs to be relative rather than absolute in terms of elapsed time. The timeline must take into account the time that a project proponent takes to provide information essential to support federal agency decision making as well as any required action on the part of state, tribal or local governments.

An approach used in many other countries, and could be adopted here, is a provision that "stops the clock" for purposes of counting time for which the government is accountable during which the onus shifts to the project proponent.

As a general matter, it would be very desirable to have draft permits available for review at the same time a draft Environmental Impact Study was available for review, but that is not always possible. Indeed NEPA often provides information needed to make informed permitting decisions and once a preferred alternative is identified, permitting can proceed in a more efficient manner. As such, in some cases it might even make sense to carry out NEPA analysis of alternatives before proposing a permit and the flexibility to make this kind of determinations needs to be left to case by case assessments. EPA has led many efforts to try to make procedures more concurrent, and in every case it became clear that doing so was possible for some types of permits (notably NPDES water discharge permits) but difficult if not impossible for others (such as air permits which require more engineering design specifics that are unavailable at the early stages of planning that are involved the NEPA process). One approach that was proposed in the past was to issue a kind of umbrella permit to provide greater certainty until those specifics were available to enable the subsequent permit to be issued. That too might be possible for only a subset of authorizations. Therefore, any forced effort to make all NEPA reviews concurrent with permit authorizations is doomed to failure. Synchronization efforts that do not account for legitimate requirements to support effective decision making by federal, state, local and tribal entities can lead to greater delay from litigation and uncertainty. What is needed is a rationalized schedule of actions by multiple agencies at the federal, state and local levels that serves as a guidepost for action by all concerned, and an approach which accounts for delays that are the responsibility of project proponents or unforeseen circumstances.

2. Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?

Existing CEQ NEPA implementing regulations Section 1506.2 on elimination of duplication with state and local procedures, Section 1506.3 on adoption, and Section 1506.4 on combining documents explicitly address the issue of efficiency and avoiding duplication of effort. In particular, the language in these Sections stresses the need to avoid duplication, to utilize other relevant studies and documents by combining documents, adopting by reference, and the like. Of course, it is essential to review independently whether the information is still relevant and accurate for this purpose. We see no reason to alter this language.

In addition, Section 1502.2 on tiering enables agencies to address certain issues in one NEPA document that would not be repeated in subsequent documents. It enables federal agencies to address actions that are covered by an earlier study, such as those prepared for a particular policy, plan or program off of which a subsequent project is proposed.

3. Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

CEQ's NEPA regulations already call for interagency coordination of environmental reviews in support of decision making including those related to authorization decisions. The regulations require agencies with jurisdiction by law or expertise to contribute to the NEPA analysis and the lead agency is responsible for carrying out this coordination.

Further, there are other mechanisms available within the federal government to coordinate agency authorization decisions and actions. For example, the FAST-41 legislation creates a federal permitting council to coordinate federal permit decisions, create harmonized schedules that rationalize decision making processes, and provide greater certainty for infrastructure project proponents. Authorizations cover a range of circumstances, some involve siting, site preparation and pre-construction review, others involve approvals for operations, and still others involve closure. A good example of coordination is the Federal Leadership Forum which was formed in the Rocky Mountain region with federal land management agencies and EPA in the1990's. Proposed large scale oil and gas development in 2008-2011 threatened regional air quality and as a result s eemed to be headed for delay and uncertainty in subsequent environmental decisions under NEPA and agency authorizations. Additional air quality monitoring and data sharing among federal agencies and affected states was put in place to aid in developing NEPA and permitting decisions. This made a more effective process for these projects and decreased rework and delays for air quality analyses.

The group, along with affected states, also developed protocols, information and project level mitigation to speed decision making and finalized an 'MOU on the Air Quality Analyses and Mitigation for Federal Oil and Gas Decisions' in 2011. The MOU detailed how to conduct air modelling and mitigation for these projects that would allow them to proceed efficiently while protecting public health and the environment.

Scope of NEPA Review

4. Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?

The current NEPA regulations already address format (Section 1502.10), page length (1502.7) and time limits (1501.8 and 1506.10) in a sensible manner which directs agencies to prepare brief, concise, focused and useful documents which avoid duplication and support decision making. Unfortunately, in practice, clarity, brevity and focused information to support decision making are too often not followed. We believe that leadership from CEQ can help in this regard more than changing the regulations. The regulation calls for a short summary usually of no more than 15 pages. It focuses on a succinct description of purpose and need and a comparison of alternatives in a succinct fashion that avoids duplication and supports decision making. The requisite discussion of the affected environment calls for avoidance of encyclopedic information with only the salient features being described. The discussion of environmental consequences focuses on specific policy areas set forth in the NEPA legislation; for example:direct effects and their consequences; indirect effects and their consequences; possible

conflicts among levels of government; energy requirements and conservation potential; natural or depletable resources and conservation potential; urban quality; historic and cultural resources; and the design of the built environment including reuse and conservation potential, and means to mitigate potential adverse impacts.

In terms of time limits, although the regulations call upon the lead agency to set time limits "if requested by a proponent" there is no reason agencies could not be required under existing rules to set such time schedules consistent with the purposes of NEPA. In addition, the limitations on agency actions allowing 30 days for either appeal within an agency's procedures or a 30-day period during which a commenter might appeal a final decision reflected in a final impact assessment is not unreasonable and is consistent with existing legal practice.

It has been our experience that when an agency takes the necessary time to do a thorough review with appropriate public input, the process usually moves smoothly and in a timely manner. If time limits force inadequate reviews and analysis of the type contemplated by the statute, the process will likely be slowed not expedited due to public demands for complete information and ultimately litigation. The NEPA analysis done for the Tappan Zee bridge (crossing the Hudson River just north of New York City) is an example of where an agency did a good upfront analysis with sufficient public input and ultimately was able to achieve permitting and project initiation in a very efficient manner.

5. Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decision-makers and the public, and if so, how?

The existing NEPA implementing regulations seek to focus resources on significant issues in two ways. First, the creation of a screening process aligning proposed actions with one of three categories or levels of review (i.e. Categorical Exclusions, Environmental Assessment and Environmental Impact Statements) result in focusing requirements for Environmental Impact Statements on the 1% of projects and proposals that pose significant adverse impacts which have not otherwise been avoided or mitigated through consideration of alternatives and measures. Second, for those proposed actions with the potential for significant impact,

Section 1501.7 sets forth requirements for scoping during which every federal agency is directed to "(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere."

In addition, Section 1500.4 on reducing paperwork requires federal agencies "(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§1501.7)."

6. Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?

NEPA regulations address public involvement in three sections: 1501.4(e), section 1503.4(a)(e), and especially in 1506.6. The range of actions to engage the public is well covered in 1506.6. The regulations are admittedly silent in several respects including: a) lack of explicit mention of the use of digital communications, b) reference to tribal interests only with regard to actions on reservations (see question 18 below) and, c) absence of explicit reference to the best practices widely accepted for effective public engagement, namely engagement as early as possible, engagement throughout the process, responsiveness to comments, use of methods tailored to the audience, and early and frequent communications with the concerned agencies and the public.

Nevertheless, the regulations do not "need" to be changed to address these shortcomings. Recent discussions to improve the efficiency of the NEPA process have included making the documentation digital and improving access over the internet. There are legitimate concerns about the potential for excluding those without internet access, and over-specificity in regulations when flexibility is required. The distribution of documents to public libraries and universities or even at gas stations and local government or tribal offices with concurrent notice in local publications with general circulation have been used to serve this segment of the population. It is not necessary to change the regulations to proscribe this process as it should be as flexible as possible to allow for whatever is necessary to ensure the public is well informed.

Any changes under consideration should preserve an agency's authority to extend public comment periods which is often done for large, complex projects with a high level of impact.

Finally, we believe that what is needed is CEQ leadership to ensure that the federal agencies are implementing best practices for effective public involvement and that the regulations are implemented as intended.

7. Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?

a. Major Federal Action;
b. Effects;
c. Cumulative Impact;
d. Significantly;
e. Scope; and
f. Other NEPA terms.

We do not believe the NEPA regulations need to be changed to clarify definitions of these terms. These terms are well defined by years of best practices and by court decisions.

8. Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?

a. Alternatives;
b. Purpose and Need;
c. Reasonably Foreseeable;
d. Trivial Violation; and
e. Other NEPA terms.

These potential new terms for which definitions might be introduced in the regulations do not add anything to the regulations. There is already a significant discussion and indeed there are separate sections devoted to alternatives and purpose and need. Defining "trivial violation" is not helpful because it defeats the purpose of coordinating agency authorizations with the NEPA process during which such matters are considered. There is already a focus on what are significant issues in the NEPA regulations and the term reasonably foreseeable is addressed in Section 1502.22.

9. Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?

a. Notice of Intent;
b. Categorical Exclusions Documentation;
c. Environmental Assessments;
d. Findings of No Significant Impact;
e. Environmental Impact Statements;
f. Records of Decision; and
g. Supplements.

It is difficult, and creates a significant risk of litigation, to redefine words that have accepted definitions, which are commonly relied upon by the courts and in other statutes. Each and every provision above includes such words.

10. Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?

In 1976 CEQ recognized that "prescribed universal limits for the entire NEPA process are too inflexible" (Section 1508.1). However, the Lead agency is required to set time limits. In addition, although the CEQ regulations are focused on the NEPA process and not on related authorizations, the regulations refer in subsection (vii) to include "decisions on the action based in part on the environmental impact statement" which would cover permit authorizations as well. The Executive Order creates a 2 year goal on average for completion of the NEPA process and authorizations as is done in the Executive Order.

> *the time for the Federal Government's processing of environmental reviews and authorization decisions for new major infrastructure projects should be reduced to not more than an average of approximately 2 years, measured from the date of the publication of a notice of intent to*

prepare an environmental impact statement or other benchmark deemed appropriate by the Director of OMB.

We support setting performance goals as good management practice, but they should not be set as firm inflexible deadlines in regulations. Further, CEQ should preserve the setting of a schedule for individual projects in a flexible manner that reflects the specific set of decisions and information required for decision making on a specific set of actions. To do this it would be both unnecessary and indeed inadvisable to introduce a fixed timeframe as either a goal or a limit in the implementing regulations. Further, in contrast, the draft legislation proposed by the Administration sets a hard two year limit on both NEPA and authorizations and this would neither be feasible nor advisable for the reasons already stated.

Furthermore, we note that the Congressional authorizations for Federal project funding are often provided in phases and these steps cause much of the delay in the implementation of both the specific action and the NEPA process.

11. Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?

Agency responsibility is set forth in §1506.5 of the existing NEPA regulations. In subsection (a) an agency is allowed to ask a project proponent to develop environmental information for use by the agency in preparing an EIS, must in such instances outline specific types of information required but also must exercise independence in evaluating the information submitted and is responsible for its accuracy. The regulations specifically state that the purpose of independence is not to duplicate prior work. There is a presumption in subsection (b) that an applicant may also prepare an environmental assessment but the agency remains responsible for its own evaluation of environmental issues, and the scope and content of the environmental assessment. Subsection (c) allows an agency to hire a contractor to prepare an EIS when the contractor is chosen solely by the lead agency or in cooperation with other cooperating agencies with an emphasis on avoiding a conflict of interest. A disclosure statement is required to ensure there are no financial or other interests in the outcome of the project. The regulations emphasize that this does not prevent the agency or others to submit information to the contractor for consideration.

We see no reason to alter these provisions. We believe they provide sufficient flexibility as well as important protections against conflict of interest on the part of those preparing the EIS.

12. Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?

The relevant sections of the CEQ regulations are contained in Subsection 1520.20: “an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and

incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available." Tiering may also be appropriate for different stages of actions. (Section 1508.28). We do not believe this section requires any changes to make it more efficient and indeed conveys the intention of the original regulations to achieve desired efficiencies through the use of programmatic and policy level EISs against which project level EISs are tiered.

13. Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

The relevant section of the CEQ regulations is Section 1502.14. Alternatives including the proposed action. This section does not need to be revised**.** As noted in this Section, and by federal courts, alternatives are the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), the environmental impact statement should

(a) present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public.

(b) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(c) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(d) Include reasonable alternatives not within the jurisdiction of the lead agency.

(e) Include the alternative of no action.

(f) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in

(g) Include appropriate mitigation measures not already included in the proposed action or alternatives.

This section enables an agency to identify alternatives not considered along with a rationale. For efficiency agencies are able to group alternatives with similar impacts to compare to others thus limiting the individual alternatives that must be considered.

This section also serves to address:

a. Consideration of an environmentally preferred alternative where it is reasonable to do so, and it must be identified in the record of decision
b. Best practices and sustainable practices in the section on environmental consequences highlighting for energy and natural resources as well as historic, cultural and other attributes of the built environment conservation and reuse approaches
c. Low probability high impact events such as Fukushima in the discussion of low probability and high risk situations that can reasonably be forecast.

General

14. Are any provisions of the CEQ's NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.

There are some instances where minor technical corrections could be made such as substituting references to the EPA publications in the Federal Register for the 102 Monitor, however this and other minor outdated references are not getting in the way of implementation. While there are a few provisions that might be considered obsolete (e.g. in regard to EIS filings) we note that there have been workarounds that have served us well to enable the introduction, for example, of new technologies, thereby making the need for revisions insignificant.

15. Which provisions of the CEQ's NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?

There are several aspects of the NEPA implementation process which need to be updated to reflect new technologies that can make the process more efficient. However, the regulations are not holding back the use of these new technologies. The leadership of CEQ and OMB, and the Presidential and Congressional commitment to the investments, is needed to make the reforms work. These include:

a) Having a single portal with GIS and integrated access to environmental, economic and social data across multiple agencies mapping federal projects under review. NEPAssist is a tool developed by USEPA that provides that kind of assistance, but each federal agency does this differently, often duplicating resources that should be consolidated to bring this capability consistent across all federal agencies.
b) Having a digital tracking system that is consistent across the federal government.
c) Requiring digital submission of NEPA documents
d) Allowing digital submission of comments on NEPA documents with exceptions

16. Are there additional ways CEQ's NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?

NEPA is intended to provide an umbrella decision support document integrated into and in support of agency decision processes wherever possible. The best example of this is the integration of NEPA into regional planning documents for the Bureau of Land Management. In regard to authorizations, to the extent that the information available during the planning phase of a project is sufficient to make decisions on regulatory authorizations, the same documentation can serve both. However, that will not be the case for all types of authorizations. For example, it is sometimes possible to prepare a draft NPDES water discharge permit for public review at the same time as a draft Environmental Impact Statement and offer them for public comment at the same time. However, it has proven to be extremely difficult if not impossible to do the same with a Clean Air Act pre-construction permit which typically requires detailed engineering designs unavailable during the NEPA process. Nonetheless, Agencies have some inherent flexibility to coordinate overlapping regulatory processes and should continue to do so whenever practicable.

17. Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

Effectiveness of the NEPA process depends upon compliance with promised mitigation and ensuring that important characteristics of the selected alternative are implemented. The current regulations were augmented on the issue of auditable and enforceable conditions which are made legally binding through CEQ guidance on "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact." The existing regulations have not proven to be an impediment to making these improvements to the process. What is needed is CEQ leadership to ensure agencies are implementing the guidelines.

18. Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?

The NEPA implementing regulations do not reflect the full range of tribal relationships it should and indeed have an error in regard to tribal interests that can be corrected with a simple technical correction. The language in the regulations focuses solely on impacts on reservations thereby ignoring tribal interests through treaty rights when actions may affect, for example, hunting and fishing rights. This can be corrected with a simple technical correction by merely deleting the reference to reservations so that the regulations generally reference impacts on tribes. Elsewhere the regulations treat tribes as state and local governments that may serve as cooperating agencies which properly reflects the important sovereign status of tribal governments.

19. Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?

NEPA regulations already emphasize the importance of reducing unnecessary burdens and delays as much as possible. They include page limits on the summary, emphasis on detailing only what is significant for decision making minimizing information that is not important for decision making, and enabling projects to proceed with uncertainties as long as they are not critical to the decision and that the uncertainties are discussed openly in a transparent manner. In addition, the regulations emphasize collaboration with state and local governments.

There had been some signaling in the Administration's draft legislation on infrastructure and the FAST Act that providing additional opportunities for states to implement NEPA through delegation would speed the process. The Department of Transportation already has been granted authority to assign, and the State to assume, the DOT's responsibilities under NEPA for highway, railroad, public transportation, and multimodal projects. Assuming such states have been determined to have the capabilities and procedures that are demanded by NEPA, there is no reason to believe that State implementation would be any more efficient than that implemented by a Federal agency which has

access to the expertise and resources of the entire federal government. In the end it has been proven time and again that when an agency diligently carries out its NEPA responsibilities it avoids rather than causes delays. Delays increase when conflicts remain unresolved and/or information is not collected and presented publicly and transparently. In addition, studies by GAO conclude that there is little duplication of effort between federal and state officials when both implement their NEPA-State environmental reviews. See https://www.gao.gov/products/GAO-15-71. Further, in the context of highway planning and approvals the GAO found that: "*State or local decision makers have the most significant influence on project delivery in their capacity to establish and change project priorities, allocate available funds and be influenced by local controversy or project opposition."*

20. Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how? (Authority: 42 U.S.C. 4332, 4342, 4344 and 40 CFR parts 1500, 1501, 1502, 1503, 1505, 1506, 1507, and 1508)

There are three important attributes of mitigation of adverse impacts that should be reflected in the CEQ NEPA implementing regulations. First, regulations should reflect the hierarchy of first avoiding, and then minimizing, and if not possible then compensating or offsetting adverse impacts. Second, any mitigation should be auditable and be incorporated into legally binding commitments, and third to the extent possible mitigation should be integrated into relevant permits and legally binding instruments. Such agreements and compliance with their terms should be transparent and accessible in information provided to the public. These elements are handled in separate CEQ guidance on "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact."

The mitigation hierarchy is reflected throughout the regulations and indeed agencies are required explicitly to identify and address adverse impacts that cannot be avoided. Section 1505.2 includes a requirement for mitigation measures: "A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation." These provisions coupled with the new guidance suggests that regulatory change is not required to address mitigation.