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December 21, 2020

RE: Notice of Proposed Rulemaking
[Docket No. DOT-OST-2020-0229] RIN 2105-AE97]

To whom it may concern:

The Environmental Protection Network (EPN) is pleased to submit the following comments in response to the Department of Transportation's (DOT) November 23, 2020, Notice of Proposed Rulemaking, seeking input on proposed revisions to the regulations on implementation of procedural requirements of the National Environmental Policy Act (NEPA) of 1969.

EPN is an organization comprised of over 500 U.S. Environmental Protection Agency (EPA) alumni volunteering their time to protect the integrity of EPA, human health and the environment. We harness the expertise of former EPA career staff and confirmation-level appointees to provide insights into regulations and policies proposed by the current administration that have a serious impact on public health and environmental protections. These comments reflect hundreds of years of experience implementing NEPA and EPA's independent review authority under the Clean Air Act.

We are on record as having strongly opposed the changes proposed by the Council on Environmental Quality (CEQ) in their revised NEPA implementing regulations that were finalized July 16, 2020 (see 85 FR 43304). Our comment letter of March 11, 2020, is "Attachment A" of this document. We now raise the same strong opposition to the proposed DOT revisions to its NEPA implementing regulations, which are designed to conform to the flawed CEQ regulations. Provisions in the CEQ and now in proposed DOT regulations completely eliminate consideration of cumulative and indirect impacts that are central to the very types of impacts of greatest concern for transportation projects, essential to the consideration of climate change and resilience we need in our infrastructure, as well as of environmental justice and social equity. The CEQ and now DOT proposed regulations also change the understanding of what makes an impact significant and imposes cookie cutter deadlines to the process. We previously cautioned that such changes are inconsistent with the NEPA law and likely to throw us into years of litigation and conflict.

The abandonment of consideration of cumulative and indirect impacts, major longer-term considerations for highway and other transportation-related projects is, in short, a fool's errand. It is simply unreasonable to put good money into projects that do not consider the reality of and need for climate resilience. Further, we should recognize the fact that transportation infrastructure is intimately linked to both economic prosperity and the shape of the built environment. The passage of NEPA came on the heels of a successful Interstate-Highway system that also, unfortunately, left in its wake an urban wasteland of bifurcated neighborhoods, dying small towns bypassed by the highways, and destruction of wetlands resulting in increased flooding and loss of wildlife. When we build infrastructure with all of the benefits and potential adverse impacts in mind, we serve a host of broader societal objectives. There is no reason to sacrifice our

economic, social, and environmental future while meeting our needs for enhancing transportation infrastructure.

The proposed changes would make NEPA a meaningless paper exercise instead of the balanced and responsible force it is for integrating broader environmental and social concerns into federal government decision-making to protect the prosperity of future generations.

To quote the March 11, 2020, EPN comment letter on the proposed (and now final) CEQ regulations upon which DOT's proposed changes are based:

> *At a time when the mandate and policy of NEPA is needed more than ever to address issues such as the climate resilience of our infrastructure, restoring vitality and prosperity to small towns bypassed and urban communities bifurcated by past practices of building interstate highways without considering the full range of benefits and impacts, habitat threatened, and resources challenged, all of which NEPA can best address in balancing and meeting our needs, the proposed CEQ NEPA implementing regulations is an all out assault on this national and international treasure, turning NEPA upside down.*

The CEQ and now proposed DOT regulations also impose uninformed time constraints that will certainly impede the consideration of alternatives that meet the broad needs of our population for a strong economy, social equity, and environmental protection. We proposed project-specific timeframes that will meet the needs of accountability and timeliness but reflect the realities of specific projects on the ground.

Finally, although agencies have until September of 2021 to revise their own regulations to conform with CEQ's new regulations, the timing of the proposed revisions to DOT's NEPA regulations, seeking comment by December 23 and finalizing before the change in administrations, is both meaningless and cynical. We urge you to take a sensible approach and delay the finalization of this rulemaking. Pushing forward with it at this time will be a waste of scarce government resources. If adopted, these changes will in all likelihood throw us into years of conflict, litigation, and confusion and create the very delays and uncertainties the proposed changes were intended to address.

Respectfully,

Michelle Roos
Executive Director
Environmental Protection Network

Comments submitted on behalf of the EPN NEPA/Infrastructure Team

Attachment A: EPN Comments on CEQ proposal to update regulations for implementing the procedural provisions of the National Environmental Policy Act

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

March 10, 2020

RE: Notice of Proposed Rulemaking 40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508 [Docket No. CEQ-2020-0001]

Dear Ms. Neumayr:

The Environmental Protection Network (EPN) is an organization comprised of almost 500 U.S. Environmental Protection Agency (EPA) alumni volunteering their time to protect the integrity of EPA, human health and the environment. We harness the expertise of former EPA career staff and confirmation-level appointees to provide insights into regulations and policies proposed by the current administration that have a serious impact on public health and environmental protections.

EPN is pleased to submit the following comments in response to the Council on Environmental Quality's (CEQ's) Notice of Proposed Rulemaking (NPRM) seeking input on proposed revisions to the 1976 regulations on implementation of procedural requirements of the National Environmental Policy Act of 1969 (NEPA). **These comments reflect hundreds of person-years of experience implementing NEPA and EPA independent review authority and mandate under the Clean Air Act (CAA).**

EPN strongly opposes the proposed changes to the existing NEPA implementing regulations. Most of the proposed revisions are entirely inconsistent with NEPA, Congressional intent, and years of practice. As discussed in our attached comments, the NPRM undermines rather than supports the stated purpose of reducing delay, cost, and uncertainty; oversteps any reasonable bounds for interpreting NEPA's implementation; and invites protracted litigation. The proposed changes would make NEPA a meaningless paper exercise, rather than the responsible force it was intended to be for integrating economic, environmental, and social concerns into federal government decision-making to protect the health and prosperity of future generations.

NEPA and CEQ's existing regulations establish a clear policy and efficient process for the federal government to provide leadership in balancing and meeting the needs of present and future generations. In contrast, the implementing regulations proposed by CEQ turn NEPA upside-down, removing from consideration and analysis the very types and scope of impacts that are needed to address some of our most pressing environmental challenges, such as building climate resilient infrastructure, stewarding resources, and restoring community economic prosperity, all of which require the very careful design, collaboration, interdisciplinary balancing, intergovernmental and public process that NEPA requires for agencies to use *"all practicable means and measures"* — not just their individual statutory authority.

The proposed regulation fails the American people by:

- Removing the NEPA policy and mandate and then limiting the application of NEPA's environmental review requirements (which should be ubiquitous but appropriate to the level of

significance of impacts). It does this largely by changing key definitions, for example, "major Federal action," "effects," "scoping," and "significance," and limiting alternatives, comments, and contributions based solely on federal agency statutory authority.

- Eroding the integrity of federal agency environmental reviews, limiting analysis to current information that is currently available, removing analysis of indirect and cumulative impacts, removing the word "assess" and using only "consider" when NEPA clearly asks for "study" and courts ask for a "hard look," and removing conflict of interest prohibitions while expanding who can carry out the analysis for federal agencies.
- Ignoring public and agency comments that do not come at the early stages of scoping by allowing adoption of other agency environmental impact statements (EIS), findings of no significant impact (FONSI), and Categorical Exclusions (CEs) to bypass stages during which comments are entertained, reducing both agency transparency and responsiveness to comments.
- Sacrificing quality for expediency by rigidly imposing one-size-fits-all page counts and schedules for both NEPA and authorizations.
- Weakening essential drivers for federal agencies to integrate environmental and long-term concerns into their decision-making. Referrals to CEQ for environmentally unsatisfactory or inadequate assessment would become a closed-door complaint forum on behalf of project proponents based on costs of delay. Limits to citizen group redress are predictable with a new agency self-certification of NEPA compliance to which the judiciary might defer, and new requirements for bonds and stays favor project proponents.

We stand to lose the value NEPA uniquely offers. The 50 years of progress NEPA has made has not come easily. It takes drivers to force consideration of diverse perspectives, expertise, and alternatives derived from other agencies, levels of government, and the public. Drivers for federal agencies to integrate environmental and social concerns into their decision-making are potentially rendered ineffective by these proposed regulations, making it easier to avoid NEPA's mandates than to comply with them in the first instance.

Further, CEQ has determined that the proposed rule 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. CEQ has not provided any analysis of the environmental impact of these proposed regulations nor of environmental justice impacts as required. We disagree that the NPRM will have no effect and, indeed, it will have major effects as it will significantly reduce the future benefits of NEPA implementation. The NPRM is likely to affect the quality of decision-making since "lack of funding" has been the major cause of project delay identified by previous studies, and this heightened level of coordination requires more, not less, funding at a time when budgets are being slashed. The preamble to CEQ's proposed rule also states: *"CEQ has analyzed this proposed rule and determined that it would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations."* CEQ needs to make the analysis that supports this statement public and available for review and comment. In the absence of compelling analysis, we must strongly disagree with the conclusion that this proposed rule will not cause disproportionately high and adverse effects on minority and low-income populations. Numerous studies[1] have shown that low-income and minority communities are more likely to

[1] Smythe, Robert, and Caroline Isber. "NEPA in the Agencies: A Critique of Current Practices." Environmental Practice, vol. 5, no. 4, Dec. 2003, pp. 290–297., doi:10.1017/s1466046603031284.;
U.S. Congressional Research Service, "The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress," R42479, April 11, 2012, Linda Luther; Horst, Toni, et al. 40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance. AECOM, 2016.;
United States, Congress, "National Environmental Policy Act, Little Information Exists on NEPA Analyses: Report to Congressional Requesters." National Environmental Policy Act, Little Information Exists on NEPA Analyses: Report to Congressional Requesters, GAO-14-369, United States Government Accountability Office, 2014.

be exposed to higher levels of environmental pollution[2] and certain aspects of the proposed rule will further contribute to already existing disproportionate impacts.

We urge CEQ to take these comments very seriously as it proposes changes to longstanding implementation regulations of one of our most important environmental laws. While we agree with the intent to make the NEPA process as efficient, focused, and collaborative as possible, we conclude that the CEQ proposals go about this task in a manner which runs counter to this very purpose. The proposed changes are consequential and require more than the limited time allotted to comment and the two public hearings for which tickets were sold out in under five minutes. CEQ should engage those with NEPA experience to explore how best to address legitimate concerns without losing the important role that NEPA can and should play in federal agency decision-making.

Respectfully,

Michelle Roos, Executive Director, Environmental Protection Network

Comments submitted on behalf of the EPN NEPA/Infrastructure Team

[2] Linking 'toxic outliers' to environmental justice communities available at: https://iopscience.iop.org/article/10.1088/1748-9326/11/1/015004 Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status, available at: https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2017.304297]

EPN COMMENTS ON CEQ's PROPOSED REVISIONS TO REGULATIONS ON IMPLEMENTATION OF PROCEDURAL REQUIREMENTS OF NEPA

Please note that these comments are not intended to be exhaustive given time constraints in reviewing wholesale changes to this important law within only 60 days; nor do they constitute a legal analysis. Although one of CEQ's stated intents was to clarify the regulations to facilitate more efficient, effective, and timely NEPA reviews by federal agencies in connection with proposals for agency action, implementation of the proposed regulations will fail to achieve these objectives and will instead do just the opposite, as we explain in the following comments.

PART 1500: PURPOSE AND POLICY

Part 1500 of the existing regulations addresses NEPA's purpose and policy, mandate, reduction of paperwork, reducing delay, and agency authority.

Proposed § 1500.1 Purpose and Policy

The proposed draft regulation replaces language drawn directly from NEPA section 101 describing the national environmental policy set forth in the law, and instead states: *"The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision making process. NEPA does not mandate particular results or substantive outcomes."* While the NPRM acknowledges that "*NEPA's purpose is not to generate paperwork or litigation, but to provide for informed decision making and foster excellent action,*" CEQ's revisions in this section and throughout the proposed regulation paint NEPA as merely a procedural requirement, failing to fully reflect the aspirational policy purpose and mandate behind NEPA's procedures.

The purpose and goals of NEPA reflect important American values: that our resources should be used in a manner that considers current and future generations, that we should seek balance and harmony between human and natural environments to achieve goals of both short- and long-term prosperity, that we should utilize the best science and design practices, as well as collaboration across government agencies to do so.

In the absence of the policy and broader mandates of NEPA, the revised regulatory language undermines well-established law that requires agencies to take a "hard look" at all the required elements of a NEPA analysis. CEQ's proposal appears to promote check-the-box exercises rather than satisfying the substantive concerns in NEPA. Without including this mandate, the NPRM eliminates cumulative and indirect impacts from the required assessments, essential if long-term productivity and irreversible and irretrievable commitments of resources are to be addressed, including climate change and environmental justice issues. Again, this constitutes a direct assault on NEPA's good-faith implementation. The NEPA admonitions to avoid harm in the first instance and to enhance beneficial impacts in the process of the required interdisciplinary and interagency collaboration would become meaningless. NEPA was never designed nor intended to be a paper exercise devoid of meaning, yet the proposed regulation would reduce it to just that, depriving the American people the improved outcomes that NEPA has delivered and need now more than ever.

Recommendation: Retain NEPA's Policy content.

§ 1500.2 [Reserved]

The NPRM completely removes current §1500.2 Policy, which states, among other things, that federal agencies "*shall to the fullest extent possible interpret and administer the policies, regulations, and public laws of the U.S. in accordance with the policies set forth in the Act and in these regulations.*" No replacement text is proposed. The rewrite of the statement of NEPA's Purpose and Policy emphasizes only the procedural aspects of NEPA, drawing from a Supreme Court of the United States (SCOTUS) decision describing NEPA as essentially a procedural statute which can only hold federal agencies accountable for "considering" "relevant" "environmental information" with only its consideration of the environmental impacts of its actions. The NPRM further describes obligations to the public as merely one of "informing" the public of "the decision-making process" rather than describing the public as participating in agency decision-making.

NEPA represents the highest aspirations of our society and declares the federal government's continuing policy to use all practicable means and measures to:

a) foster and promote the general welfare;
b) create and maintain conditions under which man and nature can exist in productive harmony;
c) fulfill the social, economic, and other requirements of present and future generations of Americans;
d) include multiple agencies at all levels, to work together across institutions, boundaries, sometimes divergent goals and purposes, disciplines and expertise, and across laws and legal mandates, to explore better ways to plan and execute their mandates to avoid significant adverse impacts, and to enhance beneficial impacts on behalf of the public good.

While it is true that SCOTUS defined NEPA as essentially a procedural statute, that statement was made in reference to judgments about SCOTUS's role in holding federal agencies accountable for compliance with NEPA under the Administrative Procedures Act (APA). SCOTUS held that compliance does not mandate a specific decision nor outcome and could be achieved with the requisite analysis, identification, and consideration of alternatives and mitigation that would, in the first instance, avoid and, if not, mitigate adverse impacts. It also requires a process that involves a wide scope of stakeholders with interests and expertise. The SCOTUS decisions cite long-standing views that NEPA's requirements are procedural in nature, that the premise is that by leading the horse to water, it will drink. This view that NEPA is merely procedural in nature does not direct federal agencies to ignore the policy direction and content of the law. Further, courts have reinforced the substantive aspects of NEPA compliance by holding federal agencies to a "hard look" standard for the policy content NEPA describes so well. So, in every other sense, it is not merely a procedural statute, as the NPRM describes. The treatment of this issue in the draft regulations is that going through the motions and paperwork is all that is required.

CEQ's removal here of the policy and mandates of NEPA reflects a failure to recognize how the NEPA mandate is holistically and efficiently infused throughout federal decision-making, from CEs to environmental assessments (EAs) to EISs, each of which, with a combination of policy, procedure, and individual mitigation and prevention, meet NEPA's high standards. Therefore, when an EIS is required, it is the tip of the iceberg that is the vanguard and source of better ways of making decisions and ensuring outcomes that are sustainable. Instead, the NPRM reduces NEPA to a procedure of limited scope and consequence.

Recommendation: Retain NEPA's Policy content.

§ 1500.3 NEPA Compliance

Implications of Removing NEPA Policy for NEPA Compliance

The NPRM changes the title for 1500.3 from "Mandate" to "NEPA compliance" and makes "Mandate" the first subpart (a). Although the revisions retain most of the original language on NEPA's mandate, it specifically removes the language that the regulations must be read together as a whole in order to comply with "the spirit and letter of" the law.

By ignoring the provisions of NEPA and any language that suggests NEPA includes policy and/or mandates for federal agencies and describes NEPA as merely a procedural requirement these regulations will leave NEPA compliance as a hollow exercise. There are two different mandates in NEPA. One applies to all federal agency actions, including the coordination of planning and the attention to use of resources for current and future generations, and the other comprises the specific mandates in Section 102 when federal agencies are required to develop what is now called the EIS and to explicitly consider alternatives to proposed actions. For both mandates, agencies are to use all practicable means and measures.

The NPRM goes on to eliminate cumulative and indirect impacts from the required assessments, which are essential if long-term productivity and irreversible and irretrievable commitments of resources are to be addressed, including climate change and environmental justice issues. Once again, this constitutes a direct assault on NEPA's good faith implementation. The NEPA admonitions to avoid harm in the first instance, and to enhance beneficial impacts in the process of the required interdisciplinary and interagency collaboration would become meaningless.

Self-Certification of NEPA Compliance Will Contribute to Shallow Assessments

Further, the draft regulations creates a self-certification of NEPA compliance at § 1502.18: *"Based on the summary of the submitted alternatives, information, and analyses section, the decision maker for the lead agency shall certify in the record of decision that the agency considered all of the alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement."*

This self-certification or assertion of NEPA compliance coupled with removal of the NEPA policy and limits on its mandate language from the existing regulations would make NEPA environmental reviews a hollow, shallow paper exercise to be carried out in the absence of the clear goals of the statute. In the absence of the policy elements of NEPA that were removed from § 1500.1 and mandates removed from § 1500.2, this revised regulatory language undermines well-established law that NEPA compliance requires agencies to take a "hard look" at all the required elements of a NEPA analysis. CEQ's proposal appears to promote check-the-box exercises rather than satisfying the substantive concerns in NEPA that are clearly listed in both the law and existing regulations.

Limits to Full NEPA Application Within Agency Procedures

The NPRM further limits the application of NEPA in new language that states that agency NEPA procedures "*shall not impose additional procedures or requirements beyond those set forth in these regulations, except as otherwise provided by law or for agency efficiency.*" Repeated at § 1507.3(a). CEQ's rationale in the preamble is that "*this provision will prevent agencies from designing additional procedures that will result in increased costs or delays.*" This appears to be an unnecessary solution to a contrived problem, as the preamble does not provide evidence that taking away agencies' flexibility to include procedures appropriate to enhancing their specific program goals (e.g., enhanced public involvement) has resulted in increased costs or delays over the past several

decades, nor that it would necessarily increase costs or delays in the future. While avoiding unnecessary costs and delays is desirable, CEQ should not take away agency flexibility in this regard at the expense of meeting the intent of NEPA.

Undermines the Drivers of NEPA Compliance

Federal agency compliance with NEPA is challenging given the commitment to coordination, cooperation, openiness to alternatives and considered decision-making that NEPA demands. There are many opposing pressures in the direction of taking a decision or action in a manner which gives only superficial attention to identifying alternatives, avoiding harm, expanding benefits and considering long term use of resources. As a result, NEPA compliance does not and will not happen on its own; it has been and must continue to be driven by: the threat of escalation using the CEQ referral process, judicial review when stakeholders might sue under the Administrative Procedures Act (APA), transparency with opportunities for public participation, each of which the NPRM undermines. Drivers of compliance are important because they force federal officials to comply with NEPA. So it is that much more impactful that the NPRM would make significant changes to undermine the drivers of NEPA compliance: CEQ referral process (see comments in "PART 1504" of this document), public participation, and citizen access to the courts.

Limits to Judicial Review

Judicial review, especially citizen access to the courts, would be undermined by the NPRM in several important ways.

First, the self-certification of compliance might severely undermine pursuit of NEPA compliance, depriving stakeholders of the right to question through the courts whether important and valid information has been ignored, alternatives dismissed without merit, etc. Courts under the APA generally show deference to federal agencies unless their actions are found to be arbitrary and capricious. With the addition of the self-certification, courts may accept the new certification at face-value, i.e., that senior officials merely assert they have considered submitted alternatives, environmental information and studies, and public comments. As a result, the courts might no longer take action to ensure federal officials take the "hard look" that courts previously have sought from federal officials.

Second, the timing of judicial review affects whether the courts can prevent irreparable harm. The NPRM changes current CEQ regulations, which state that it was CEQ's intention that judicial review not occur before an agency issues a final EIS or final FONSI *"or takes action that will result in irreparable injury,"* to its proposed intention that judicial review not occur before issuance of *"the Record of Decision or other final agency action."* This would limit citizens' and other stakeholders' ability to stop damage to resources before the agency has fully complied with NEPA. Since the NPRM also would require that federal authorizations be made within the same time envelope as the NEPA process, it is more likely that a project issued a permit would move ahead with construction before rights of appeal have been exhausted. The right of stakeholders to pursue judicial review must be maintained for cases in which they believe the agency is taking action that will result in irreparable injury inconsistent with § 1506.1.

Third, the NPRM states that agencies may now structure decision-making to allow agency NEPA regulations to include provisions for private parties to seek agency stays pending administrative/judicial review, including imposition of bond or other security requirement. This creates a large financial burden on stakeholders with legitimate concerns and is intended to impede them from seeking fair remedies through the courts.

Limits to Public and Stakeholder Participation and Transparency

Public and agency opportunities for comment and consideration of alternatives, studies, mitigation, and other commitments are substantially cut back. In the proposed regulations, the concept of "exhaustion" is introduced, whereby both the public and other federal, state, tribal, and local agencies must comment based upon the information in the Notice of Intent (NOI) to prepare a draft EIS, and if they have not done so, they are further forfeited from making later comments on those issues: *"To ensure informed decision making and reduce delays, agencies shall include a request for comments on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment in the notice of intent to prepare an environmental impact statement (§ 1501.9)….For consideration by the lead and cooperating agencies, comments must be submitted within the comment periods provided and shall be as specific as possible (§ 1503.1 and §1503.3). Comments or objections not submitted shall be deemed unexhausted and forfeited."*

CEQ proposes to put the onus on the public and other agencies and tribes to know the unknown within the short scoping comment period because information developed and submitted after the comment period closes would be disqualified from consideration in the EIS, even though there may still be much that is not yet known or understood at this early stage. This would not ensure informed decision-making. It would do just the opposite. See also our discussion of public participation under § 1506.6.

Limits to the CEQ Referral Process

CEQ's proposed changes also undermine NEPA compliance by weakening the referral process, as explained in our comments on Part 1504, below.

> **Recommendations:** Restore the sections on policy and mandate and eliminate new requirements for bonds, stays, and exhaustion. Restore departmental and agency flexibility to impose additional procedures or requirements in their NEPA implementing procedures. The required summary of comments should include all comments including those from federal, state, local, and tribal officials. Further, remove the new requirement for a federal official certification of NEPA compliance or make it clear that it should not be used to shield agency actions from challenges that the agency failed to comply with NEPA's "hard look" standard for judicial review.

§ 1500.4 Categorical Exclusions

In addition to this section, CEs are also addressed in the definitions section, § 1508.1(d), and in § 1501.4. Each of the proposed changes is problematic. In this section, the changes would allow smaller actions which have a significant cumulative impact on the environment to be considered for CEs. If smaller actions have a significant cumulative impact, it is incumbent on a federal agency to explore means of avoiding the adverse impacts. If that can be done, it would require a mitigated FONSI which has legally binding measures to ensure that the adverse impacts are addressed so as to make them below the significance threshold. Such was the case with the licensing of gas wells in Colorado when it was found that the thousands of wells operating at the magnitude of the boom would exceed air quality standards. Specific controls were recommended for the generators to solve this problem. But without attention to the cumulative impact of the enormous surge in well-licensing applications, this problem could not have been identified, averted, and monitored.

In the current regulatory approach, agencies are required to propose CEs through their regulations and in that process provide analysis that justifies a CE. Exceptions to the application of a CE are supposed to be delineated and applied on a case-by-case basis. This NPRM would now allow federal agencies to mitigate a

CE determination instead of carrying out an EA for proposed actions that no longer fall within the established criteria. This not only removes the opportunity for public comment, but it also removes the requirement that such mitigation be incorporated in legally binding instruments as they would be if there were an EA and a FONSI to address adverse impacts through required mitigation.

> **Recommendation**: See our recommendations for sections § 1501.4 and § 1508.1(d).

§ 1500.6 Agency Authority

This new language appears to narrow direction to agencies by characterizing full compliance with NEPA as being interpreted by these regulations (as opposed to broader current language that speaks to the entire Act's mandate).

> **Recommendation:** Maintain existing language, which makes it clear that NEPA's mandate applies to all agency actions.

This revision also states: *"These regulations create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm. These regulations do not create a cause of action or right of action for violation of NEPA, which contains no such cause of action or right of action. It is the Council's intention 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."*

> **Recommendation:** Rephrase current CEQ intent regarding trivial violations not giving rise to an independent cause of action to "minor, non-substantive errors that have no effect on agency decision making."

PART 1501 NEPA AND AGENCY PLANNING

This Part covers NEPA threshold applicability; timing; and appropriate levels of NEPA review including CEs, EAs, FONSIs, the roles of lead and cooperating agencies, scoping, and time limits. Proposed revisions misrepresent the applicability of NEPA.

§ 1501.1 Applicability of NEPA

The draft regulations address the "application of NEPA" in a manner which is fundamentally flawed and inconsistent with the statute and Congressional intent. The introduction to the Preamble recognizes that NEPA establishes national environmental policy, but it is also the case that the very national environmental policy referenced applies to all proposed federal actions.

The implementation of this policy involves the application of an appropriate level of environmental review to meet the requirements of NEPA in the most efficient manner, reducing paperwork and potential delay to the extent possible while achieving NEPA's goals in a practical manner.

The NPRM presents § 1501.1 as if NEPA only applies when an EIS is required by directing federal agencies, first and foremost to start with a determination whether a proposed federal action is a "major action." The significance of an action being a "major action" is that NEPA law requires the federal agency to prepare and publicly disseminate a "statement." Because NEPA pertains to *all* federal actions and decisions, however, its implementation is a matter of *how* NEPA applies rather than *whether* NEPA applies. Furthermore, the term "major Federal action" does not stand in isolation as it is followed by *"significantly affecting the human environment."* It is the latter that is determinative of how NEPA will be applied; the former

is subject to lists of project types, which might not relate to the significance of their impact either individually or cumulatively.

It is for the very reason that any and all federal actions are covered by NEPA that, in order to reduce paperwork and achieve efficiency in the application of national environmental policy, CEQ's NEPA implementing regulations created three categories of proposed actions. CEQ regulations created CEs to enable federal agencies to identify, supported by analysis, entire categories of proposed actions that would fail to pose a significant impact on the environment. Moreover, CEQ regulations created case-by-case applicability determinations for CEs to identify specific circumstances under which such CEs would *not* apply. Those circumstances parallel the very sorts of national environmental policy concerns that NEPA's national environmental policy singles out. The CEQ implementing regulations also created a middle category, the EA, subject to broadly applicable analysis, which is neither categorically excluded nor obviously subject to EIS requirements, in order to ensure that NEPA's environmental policy prescriptions are applied, short of having to develop an EIS.

Additionally, the draft regulations would remove from the application of NEPA proposed actions for which the federal government has only a small impact on the whole. A federal action is a federal action, and when it will influence a larger undertaking, it still does not remove it from federal responsibility for carrying out NEPA. See our comments on the definition of "major Federal action" in regard to the small handle regarding what we believe are more appropriate criteria for determining small federal handle. If the federal action determines the viability of the proposed action, it will have an outsized role, and in those circumstances, even a small part of the project should require an assessment of the project as a whole. Under the proposed rule, such projects would no longer require a NEPA analysis, and there would no longer be an opportunity for public involvement, modifications to the project to reduce impacts, or mitigations for these projects. As a result of this proposed change, including determining a small handle based on the cost of the proposed project, it is likely that the regulations are exempting major linear projects like transmission lines, roads, and oil and gas pipelines that propose to traverse federal lands. It is critical that NEPA be fully applied to such projects as these lands are stewarded by federal agencies for future generations and decisions as to their use must be carefully weighed. Exempting major linear projects also can potentially cause environmental justice impacts by disproportionately impacting low-income, minority, and indigenous communities.

NEPA Threshold Applicability Analysis

The NPRM introduces the following new tests for determining whether NEPA applies to a proposed federal action:

- Whether the proposed action is a "major Federal action."
- Whether the proposed action is an action for which compliance with NEPA would be inconsistent with Congressional intent due to the requirements of another statute.
- Whether the proposed action is an action for which the agency has determined that other analyses or processes under other statutes serve the function of agency compliance with NEPA.

Federal agencies may make these determinations in their agency NEPA procedures or on an ad hoc basis.

The NPRM confuses a determination of when an EIS must be prepared with the application of NEPA. NEPA sets national environmental policy and creates a mandate for every federal agency. The operative element of requiring an EIS involves both a major Federal action and the second part of the phrase — significantly affecting the quality of the human environment. In contrast, the NPRM, under the headline "NEPA application determinations," begins with a determination of whether an action is a "major action,"

which turns NEPA on its head. It undermines the purpose of NEPA by implying that the law only applies when an EIS must be prepared and leaves the definition of "major Federal action" without its accompanying phrase: *"significantly affecting the quality of the human environment."* This limitation cannot be reconciled with NEPA's directive that federal agencies use "all practicable means" to fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations.

The law clearly conveys a mandate that federal agencies should consider and try to avoid the adverse impacts listed in the statute and to meet the goals of the national environmental policy. The implementing regulations create three levels of review for efficient implementation of both the policy and procedural elements of NEPA. You need only go into the "needs an EIS" box if it involves a major Federal action significantly affecting the quality of the human environment. In creating the two lesser levels of environmental review, it has been important for agencies to assess carefully the impacts of those defined categories, as they have the potential for removing from NEPA's mandates large categories of projects, which would normally pose the potential for significant adverse impacts, thus avoiding NEPA's procedural requirements. That is why in the Congressional record[3] it was clearly stated that federal agencies should not attempt to use the phrase *"all practicable means and measures"* to *limit* the application of NEPA, when the preferred formulation was more directive that they shall use all means necessary to implement the national environmental policy without adding what could possibly be used as an excuse if an action was deemed to be impracticable. It is therefore particularly important that CE and EA decision-making be transparent and publicly available. Further, it is critical that any mitigating or compensatory measures adopted by federal agencies to *avoid* significant adverse impacts be made as legally binding commitments, or they are meaningless.

Because NEPA is also based upon sound science and analysis, even when a category of actions is deemed to be a CE by virtue of agency findings that they would not normally pose a significant impact on the human environment, per NEPA regulations or statute, it would be incumbent upon a federal agency to assess whether factors that were the basis for and assumed in those determinations are still relevant and whether there are site-, process-, or material-specific concerns that warrant further examination.

The proposed regulations weaken the purpose of creating the spectrum of review by removing the accountability that goes with it. CEs and EAs can help to focus NEPA implementation resources where it matters most, but when left in the shadows, it can also shield actions from the scrutiny and sound decision-making that NEPA requires.

Further, the third new category of action, which is termed functional equivalent, should not be used to remove a set of proposed actions from NEPA compliance. We oppose this proposal. NEPA is intended to be integrated into decision-making processes and only needs to be identified as such without deeming these circumstances as situations when NEPA does not apply. Indeed it does apply but as part of another process, much as the Bureau of Land Management (BLM) planning integrates NEPA. It is very important that this be made clear so that the mandate is fulfilled.

Segmentation

Most critical, the NPRM should explicitly prohibit agencies from avoiding NEPA's requirements by segmenting proposed projects or allowing project proponents to do so. The preamble indicates that the original language of § 1508.27(b)(7) prohibiting segmentation of projects to avoid "significance" is not incorporated in this section because it is addressed in the criteria for scope in § 1501.9(e) and § 1502.4(a). However, nothing in § 1501.9(e) prohibits segmentation, and the language of § 1502.4(a) will not prohibit

[3] United States, Congress, Cong. House, Committee of Conference, and Edward Garmatz. "National Environmental Policy Act of 1969." National Environmental Policy Act of 1969, 91AD. 91st Congress, 1st session, report 91-765.

segmentation either. These sections address the scope of an EIS once it has been deemed necessary, thereby side-stepping a provision that this should not be used as a means of avoiding NEPA.

> **Recommendation:** This important language defining and prohibiting segmentation needs to be explicitly stated in both § 1501.1 "NEPA applicability and threshold analysis" as well as § 1501.9 "Scoping."

§1501.3 Significance

The proposed regulations strike the definition of "significantly" from § 1508.27, and move the discussion of significance to § 1501.3. Under existing regulations, significance *"must be analyzed in several contexts such as society as a whole…, the affected region, the affected interest, and the locality"* (40 CFR § 1508.27(a)). The proposed new § 1501.3(b)(1) and § 1501.3(b)(2) replace the existing text at § 1508.27, which defined significance in terms of "context and intensity." We note here that this is one additional means that CEQ is employing to remove cumulative impacts as well as international concerns from consideration, and which taken together points to a directed effort to remove climate change as a concern under NEPA.

- "Context" becomes "the potentially affected environment" at proposed § 1501.3(b)(1). It limits what is to be considered as the potentially affected environment to "national, regional, or local." This narrowing of context is contrary to the intent of NEPA, which is intentionally broad so as to allow for the consideration of effects wherever they might occur.
- The NPRM also replaces "world as a whole" with "Nation as a whole," in describing context. This is clearly a signal to agencies to limit the consideration of extraterritorial effects.
- "Intensity" becomes "degree of the effects" at § 1501.3(b)(2).

Proposed § 1501.3 provides, "*In considering the degree of the effects, agencies should consider the following, as appropriate to the specific action:*

(i) Effects may be both beneficial and adverse.
(ii) Effects on public health and safety.
(iii) Effects that would violate Federal, State, Tribal, or local law protecting the environment."

CEQ has excised seven other considerations from the list in the existing regulations, including § 1508.27(b)(3) through (9). It appears that, under this proposal, only effects to public health and safety or effects that would violate environmental laws would be significant, but impacts to resources that do not violate laws would not be. Nor would impacts that may be highly uncertain or involve unique or unknown risks; may set a precedent for future actions; are cumulatively significant; involve significant scientific, cultural or historical resources or threatened or endangered species or their habitats; or are highly controversial. This clearly is not what is intended by NEPA § 102(2)(B), which requires agencies to *"insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations."* Nor is this consistent with the threshold of significance established over the decades through case law.

Furthermore, the NPRM explains CEQ's rationale for not requiring consideration regarding controversy in determining significance (40 CFR § 1508.27(b)(4)) *"because this has been interpreted to mean scientific controversy."* This appears to be a contrived argument by this administration to avoid any discussion in EISs of climate science and the significance of climate change. CEQ does not make clear who has interpreted it to refer to scientific controversy, but degree of controversy has been considered in determining significance for decades, and rather than being about whether people believed the scientific findings, it was most often based on how strongly the public felt about the projected potential impacts to their own quality of life or to important environmental, economic, or cultural resources. NEPA § 102(2)(B) requires agencies to ensure

"that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations."

> **Recommendation**: We urge CEQ to restore the existing definition of "significantly" in § 1508.27(b)(3) through (9) to proposed § 1501.3(b)(2) to ensure that agencies give due consideration to these important factors in determining the significance of impacts.

§ 1501.4 Categorical Exclusions

The NPRM amends the definition of "Categorical Exclusion"to drop reference to cumulative effects and is inconsistent with NEPA. The current definition states that CEs are categories of actions that individually *and* cumulatively do not have a significant effect. Our recent experience with the exponential growth of oil and gas fields in Colorado, for example, showed that individually they were not a concern but that cumulatively they would cause the national ambient air quality standards to be violated, leading to controls that avoided this problem.

> **Recommendation**: Retain the original definition of "Categorical Exclusion" in this section.

The NPRM adds the concept of "mitigated CEs." We believe it is more appropriate that such determinations be a result of an EA with mitigation and finding of no significant impact, a FONSI. Coupled with the lack of public scrutiny afforded by other agencies when agency regulations propose and seek comment on what is categorically excluded and the introduction by the NPRM of opportunities for one agency to borrow another agency's definition of CE, the mitigated CE would provide an open door for abusing the required levels of environmental review. In addition, a mitigated CE would only be acceptable if the mitigation is legally binding and there is a way to monitor its appropriate use. The actions should also be transparent to the public if new mitigation measures are being proposed and should be done through rulemaking that makes it clear that this will set a precedent for other similar projects, and that required mitigation is to be programmatic and applied throughout the implementation of the relevant program. Furthermore, because federal agencies have different statutory mandates and authorities and different constituencies, one agency's CE should not be automatically adopted by another without going through this process.

> **Recommendation**: Eliminate mitigated CEs and do not allow agencies to adopt other agency CEs. They should be part of an agency's rulemaking.

§ 1501.5 Environmental Assessments

EAs shall be no more than 75 pages, excluding appendices, unless a senior agency official approves a longer limit. See our comments on page limits pertaining to EISs.

> **Recommendation:** Maintain current language.

§ 1501.6 Finding of No Significant Impact

This section addresses enforcement of commitments for avoidance, mitigation, and compensation that would be found in FONSIs.

One of the major shortcomings in NEPA decision-making has been the lack of enforceability of measures that formed the basis for either a FONSI or a Record of Decision (ROD) for an EIS. Enforceability and follow-up ensures the results and effectiveness of the entire process.[4]

In the case of FONSIs, the proposed revisions at § 1501.6(c) specifically call for an agency to state the means of and authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions, and specifically note those enforceable mitigation requirements or commitments that are undertaken to avoid significant impacts. Proposed § 1505.2(c) requires that the ROD for an EIS state whether the agency adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and if not, why the agency did not. The ROD must also adopt and summarize, where applicable, a monitoring and enforcement program for any enforceable mitigation requirements or commitments.

The proposed language appears to limit mitigation to that for which a specific authority can be cited, and it does not make clear that any mitigation commitments should be enforceable, making the EIS or EA a work of fiction. If mitigation or a selected alternative accomplishes the NEPA policy of avoiding in the first instance and, if not, minimizing harm to below the threshold of significance, it should be enforceable as a commitment. If it is outside the control of the project proponent or any federal agency through statutory mechanisms available to it, the FONSI should specify a legally binding mechanism and a responsible party for ensuring the appropriate actions are taken, even if that means there is a supplemental contract.

The introduction of "mitigated FONSIs" into the NPRM is important given that it is such common practice, but it was not designed to limit mitigation to those actions within an agency's statutory authority nor to avoid preparation of an EIS when warranted.

The only reason a commitment to mitigation or an alternative should not have enforceable provisions is if the relevant information is to be used for planning purposes by an entity outside of the federal government or proponent, and it is not critical to either the decision or the FONSI but to be used and referred for action outside of the context of the specific proposal.

Recommendation: Change the language in proposed § 1501.6(a) in regard to FONSIs:

FROM: *"The finding of no significant impact shall state the means of and authority for any mitigation that the agency has adopted, and any applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts."*

TO: The finding of no significant impact shall ensure ~~state the means of and authority for~~ any mitigation that the agency has adopted~~, and any~~ is enforceable, i.e. legally binding and accompanied by an applicable monitoring and enforcement program, specific mechanism and party responsible for enforcement. If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken specifically to avoid significant impacts.

[4] United States, Executive Office of the President Center on Environmental Quality, "Memorandum for Heads of Federal Departments and Agencies: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact." January 14, 2011.

§ 1501.7 Lead Agency

The NPRM proposes to codify and make generally applicable a number of key elements from expedited procedures and the One Federal Decision (OFD) policy, including development by the lead agency of a joint schedule and a two-year goal for completion of environmental reviews.

Schedules

At § 1501.7(4), the NPRM proposes to modify the existing regulations to insert the following new language:

"(i) The lead agency shall develop a schedule, setting milestones for all environmental reviews and authorizations required for implementation of the action, in consultation with any applicant and all joint lead, cooperating, and participating agencies, as soon as practicable."

"(j) If the lead agency anticipates that a milestone will be missed, it shall notify appropriate officials at the responsible agencies. The responsible agencies shall elevate, as soon as practicable, to the appropriate officials of the responsible agencies, the issue for timely resolution."

And at § 1501.10(b)(2), the NPRM states that EISs will be completed: *"…within 2 years unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. Two years is measured from the date of the issuance of the notice of intent to the date a record of decision is signed."*

As noted in the NPRM, there have been multiple efforts undertaken by Congress and previous administrations to facilitate more timely environmental reviews and permitting, and to coordinate and set time schedules that can be relied upon by project proponents and hold agencies accountable for prompt action. These efforts include this administration's Executive Order (E.O.) 13807 that set a two-year goal as an *average* performance target with explanations for when that goal is exceeded. The NPRM's presumptive and concurrent two-year schedule for both NEPA and all project authorizations would not be possible in most instances without compromising NEPA, the authorizations or both. There is a natural tension between the goal of implementing NEPA as early as possible in project planning to allow for consideration of alternatives, avoid harm and enhance benefits, and the specificity of project design details required for most federal and state regulatory authorizations. We urge CEQ to consider tailored schedules to provide the project proponents with sufficient certainty to pursue necessary financing and approvals without compromising the integrity of either NEPA or authorizations.

Additionally, the proposed time limit is largely inadequate to resolve complex issues in the small subset of proposed projects that pose the significant and complex issues to be addressed in the NEPA process. These unrealistic deadlines might fuel rather than prevent conflict. The timeline also 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 that 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.

Any forced effort to make all NEPA reviews concurrent with permit authorizations is doomed to failure. EPA has led many efforts to try to make procedures more concurrent, and in every case, it became clear that doing so might in some cases be possible for some types of permits (notably National Pollutant Discharge Elimination System 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 NEPA-related planning). 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 only be possible for a subset of authorizations. 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. Again, 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.

Given the emphasis in the NPRM on aligning with the OFD policy, we would also highlight that the OFD policy is specifically targeted at improving permitting efficiency and coordination on major infrastructure projects (as defined in E.O. 13807) and has not been applied to other types of NEPA planning processes. Additionally, the policy implementing OFD is still in its nascency with the signatories to the memorandum of understanding (MOU) continuing to work through a series of implementation issues. As such, it is appropriate to have a policy such as OFD, which may need refinement over time, framed by a living document such as an MOU rather than fixed into regulation.

Finally, it appears in § 1501.7(g) that if there is a difference between a lead and cooperating agency as to whether an EIS is required, then the lead agency can decide to develop a single EA instead and issue a joint FONSI. This appears to apply the lesser standard for NEPA compliance rather than the higher standard, and one would think that if there is a difference, that an EIS would be prepared.

> **Recommendation:** Language at § 1501.7(4)(i) and (j) and § 1501.10(b)(2) should be stricken from the final rule. It should also be made clear that if any of the cooperating or participating agencies decide that an EIS is required under their program, and not an EA, then the lead will defer and pursue an EIS.

§ 1501.8 Cooperating Agencies

We have similar concerns with the language proposed in the NPRM at § 1501.8(b), as we did with section § 1501.7 for Lead Agencies in regard to timing, which states that each cooperating agency shall:

"(6) Consult with the lead agency in developing the schedule (§ 1501.7(i)), meet the schedule, and elevate, as soon as practicable, to the senior agency official of the lead agency relating to purpose and need, alternatives or any other issues any issues that may affect that agency's ability to meet the schedule.

(7) Meet the lead agency's schedule for providing comments and limit its comments to those matters for which it has jurisdiction by law or special expertise with respect to any environmental issue consistent with § 1503.2."

As noted above, we are concerned that the driver in this language seems to be unrealistic expectations about schedule over analytical rigor, which is inconsistent with the intent of NEPA. As stated above, NEPA is intended to help federal agencies focus on improvement of their environmental performance, not on their permitting timelines.

Of crucial importance, the proposed language would appear to limit agency comments to the confines of their statutory authority. Participating and cooperating agencies often have expertise to offer the NEPA process that goes beyond their statutory authority, and many critical environmental concerns are not explicitly addressed in agency statutory authority, such as climate change resilience, noise, environmental justice, etc. This would be particularly concerning in cases where agencies (such as the EPA) possess special expertise but do not have a jurisdictional or permitting role and would be in direct opposition with the role

envisioned for the EPA by Congress in the implementation of NEPA through the CAA mandating an EPA independent review.

Finally, we note that agency budgets have been slashed, and it may be difficult for an agency to comply with a request by the lead agency to participate as a cooperating agency or to participate as early as possible in the NEPA process.

> **Recommendation**: Strike language at § 1501.8(b)(6) and (7) from the final rule.

§ 1501.9 Scoping

We appreciate the addition of early scoping in the language for part (a), prior to issuance of the NOI, which starts the processing clock. We also appreciate the ability of agencies to combine scoping with the EA process so that it can be used as a basis for deciding whether an EIS is required to be prepared. However, the NPRM proposes requiring in an NOI *"a request for comments on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment."* Note that at an early stage, the description of the proposed action might not be sufficiently detailed to allow commenters to identify issues with potential alternatives and impacts and the timeframes might be too limiting to identify relevant studies or analyses.

CEQ proposes to move the criteria for determining scope from the existing definition of "scope" at § 1508.25 to § 1501.9(e) and strike existing § 1508.25(a)(2) on cumulative actions, which are described as *"when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement."* The preamble indicates that this change is *"for consistency with the proposed revisions to the definition of 'effects.'"* We object to this further narrowing of the scope of the EIS analysis, as it is inconsistent with NEPA.

> **Recommendation:** Include identification of deficiencies or lack of detail in the description of the proposed action that would prevent commenters from fully addressing potential impacts or alternatives or mitigation. This is important if CEQ retains the limitations it proposes on future opportunities to comment when the commenter has been silent on these questions when previously asked.
>
> Further, it is important that the public commenters and others be asked how they currently use resources that might be impacted by a proposed action. This is important in the analysis of potential impacts and the type of information that is critical if there are competing uses of resources in time and space.
>
> We strongly recommend retaining all of the existing requirements to consider and evaluate cumulative impacts and cumulative actions in the regulations.
>
> Segmentation Prohibitions

Most critical, § 1501.9(e) in the NPRM is characterized as a substitution for the provisions in § 1508.27(b)(7) of the existing regulations. The existing provisions hold that projects cannot be considered temporary or segmented in order to evade significance. The problem is that the language at § 1501.9(e) relates to actions undergoing scoping (and have therefore already been determined to be significant). The NPRM therefore doesn't address projects where significance is still being determined.

Therefore, because the language concerning segmentation of projects and the like for purposes of coverage in the scope of analysis for NEPA is not incorporated in § 1501.9 as was alluded to in the preamble, it needs to be included. By moving that language to the scoping section, it side-steps a determination that this is not a means of avoiding NEPA. This important language needs to be addressed in the section on NEPA applicability.

> **Recommendation:** It should be made clear that actions cannot be segmented or considered temporary for the purposes of evading significance. This language should be included in § 1501.3 or retained at § 1508.

§ 1501.10 Time Limits

Proposed § 1501.10, Time limits (current 40 CFR § 1501.8), would establish presumptive time limits of one year for EAs and two years for EISs and provides that a senior agency official may approve a longer time period in writing. In rationalizing this revision, the NPRM (p. 1687) discusses CEQ's findings regarding the length of time it takes for agencies to prepare EISs. While, on average, EISs take longer than CEQ has advised, the Council also recognizes that EIS timelines vary widely, and many factors influence the timing of the document, including variations in the scope and complexity of the actions, variations in the extent of work done prior to issuance of the NOI, and suspension of EIS activities due to external factors. We note that a 2016 report published by the Government Accountability Office (GAO) found that the length of time it took agencies to complete the environmental review process and approve 68 mine plans for hard rock mines on Forest Service and BLM land averaged 2.2 years.[5] Where delays occurred, most were attributable to the quality of the information coming into the agencies (which is outside of agency control); changes to the proposed projects by the mine operator (also outside agency control); and limited staffing and resources at the field office level. We also 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.

We support agencies developing project-specific schedules and timeline goals, and most already employ this good management practice at the start of each project, but we strongly recommend against presumptive time limits. It is both unnecessary and indeed inadvisable to introduce a fixed timeframe in the implementing regulations. The current NEPA regulations already address time limits (§ 1501.8 and § 1506.10) in a sensible manner. 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. Furthermore, while the 45-day public comment period is a minimum, it should not preclude agencies from using good judgment as to whether a proposal is sufficiently complex or controversial to allow, when appropriate, longer public comment periods without fear that this will cut into a strict time limit.

Furthermore, CEQ's proposed time-extension process would create an undue burden for most agencies. Any extension request would need to be vetted regionally before being forwarded to the national office and ultimately to the "assistant secretary level or higher." Each vetting step would require time on one or more executive calendars and agency staff time to conduct the necessary briefing. It is reasonable to assume that any elevation would require more than two weeks, particularly if the executives being briefed are responding to multiple extension requests or are unfamiliar with the project in question. Given the resource burden this would create, we are concerned that the tendency would be to avoid seeking a time-limit extension, even

[5] United States Government Accountability Office. January 2016. HARDROCK MINING BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More. GAO-16-165. https://www.gao.gov/assets/680/674752.pdf

when it would be beneficial to the NEPA process. While we strongly recommend against presumptive time limits, should this provision remain, we strongly encourage the CEQ to defer to the agencies to determine the most appropriate level at which to approve or disapprove time-limit extension requests.

§ 5(e)(i) of E.O. 13807 directs CEQ to issue such regulations as it deems necessary to: (1) Ensure optimal interagency coordination of environmental review and authorization decisions; and (2) Ensure that multi-agency environmental reviews and authorization decisions are conducted in a manner that is concurrent, synchronized, timely, and efficient.

However, any effort by the administration to force-fit a timetable for both NEPA reviews and authorization decisions is deeply flawed. As we have noted above, 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. Originally, the administration's E.O. 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 would hinder agencies' ability to take a "hard look" at the environmental consequences of proposed actions. This will lead to tie-ups in endless litigation for projects that do not meet the intent of NEPA as declared in § 101 and the requirements of NEPA as directed in § 102. Furthermore, any such timelines need 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.

CEQ recognizes that agency capacity, including those of cooperating and participating agencies, may affect timing, and that agencies should schedule and prioritize their resources accordingly to ensure effective environmental analyses and public involvement. Many federal and state regulatory authorizations 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. 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 for individual projects 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. Tailored schedules will better meet the needs of both project proponents/investors and agencies at all levels. The State of Alaska has an outstanding system for coordinated federal and state action but requires additional resources to achieve this outcome.

> **Recommendation**: Instead of one-size-fits-all time limits, CEQ should require federal agencies to provide individual projects with 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. CEQ should recognize the need for additional resources to support coordination, collaboration, and harmonization. Schedules should reflect elapsed time for project proponents to acquire missing information and allow stopping the clock when there is a snag unrelated to NEPA.

§ 1501.11 Tiering

The most important concerns about tiering, which theoretically can make for more efficient decision-making, is that any decisions made at a programmatic level that will be applicable at a more site-specific project level should be very clearly identified as such and, explicitly for information gathered

during the tiering process, whether and how it will be used in site-specific decision-making as well as adopted mitigation and avoidance measures.

Proposed changes to "tiering" also include several edits to the existing text, most notably the addition of EAs in the first and second sentences and the encouragement to *"exclude from consideration issues already decided or not yet ripe at each level of review."* The application of decisions made during an EA used for tiering should ensure that the public opportunity for comment and participation is not foreclosed because it is not an EIS.

Also, excluding issues from review because it is considered "not yet ripe" would have to include a commitment that it be thoroughly considered at a subsequent stage of review as is done here and § 1502.4(d). This would address our concern that agencies may decide that project-level evaluations are not needed and rely solely on such programmatic assessments. Flagging issues in programmatic documents for further consideration in project-level documents might help to ensure that issues are not completely overlooked just because they are "not ripe" at the programmatic stage. The basis for any determinations that an issue is "not yet ripe" should also be clearly communicated to avoid a slippery slope toward segmenting.

> **Recommendation:** The application of decisions made during an EA used for tiering should ensure that the public opportunity for comment and participation is not foreclosed because it is not an EIS. This is also a concern if agencies are permitted to consider plans or programs as CEs. Also, excluding an issue from review because it is considered "not yet ripe" would have to include a commitment that it be thoroughly considered at a subsequent stage of review.

PART 1502 ENVIRONMENTAL IMPACT STATEMENTS

This section addresses the content and format of EISs required under NEPA section 102. It includes a discussion of their purpose; implementation,;statutory requirements; definition of "major Federal actions"; timing; interdisciplinary preparation; page limits; writing draft, final, and supplemental EIS; recommended format including the cover, summary, purpose and need; and alternatives including the proposed action, affected environment, environmental consequences, list of preparers, appendix, and dissemination. Changes focus on the application of EIS requirements flowing from the definition of "major Federal action" significantly affecting the quality of the human environment, and additional sections on incomplete or unavailable information, cost-benefit analysis, methodology and scientific accuracy and environmental review and consultation requirements. Nearly all of the proposed changes weaken the integrity, content, and scope of required analyses under NEPA.

§ 1502.1 Purpose

The NPRM would change the EIS purpose from serving as *"an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government"* to: *"The primary purpose of an EIS prepared pursuant to § 102(2)(c) is to ensure agencies consider the environmental impacts of their actions in decision making."*

This change simply is inconsistent with the goals of NEPA and again turns it into a rote and paper exercise devoid of the purposes of NEPA. Making agencies commit to transparent documentation of their decision-making process and exploration and analysis of alternatives is not just to consider environmental impacts but to find ways to avoid harmful impacts and advance beneficial impacts.

> **Recommendation:** Retain existing language.

§ 1502.4 Major Federal Actions Requiring the Preparation of EISs

The NPRM changes the focus from the current direction to *"make sure the proposal which is the subject of an EIS is properly defined"* using the criteria for scope, to proposing that agencies define the proposal *"based on the statutory authorities for the proposed action."*

This is again an effort to restrict the evaluation of a proposed action and underlying purpose and need and, subsequently, alternatives to the statutory authority of the lead agency or project proponent. This leads to self-justifying actions with little room to consider a range of reasonable alternatives that better meet the goals of NEPA.

Recommendation: Retain existing language.

§ 1502.7 Page Limits

At § 1502.7 the existing regulations state that, *"the text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages."*

We see no reason to alter the existing language in the regulation. The NPRM seeks to reinforce those page limits by modifying the language at § 1502.7 to state that the text of final EISs *"shall be 150 pages or fewer and, for proposals of unusual scope or complexity, shall be 300 pages or fewer"* (emphasis added). The NPRM also seeks to set enforceable page limits on EAs at § 1501.5(e), where it stipulates that EAs shall be no more than 75 pages. The NPRM would allow for EISs and EAs to exceed those page limits if a page-limit exception is approved in writing by a senior agency official (§ 1501.5(e); § 1502.7). According to Section II of the NPRM (Summary of Proposed Rule), "senior agency official" would be defined as *"an official of assistant secretary rank or higher who is responsible for agency compliance."*

The NPRM states that this revision is intended to *"ensure that agencies develop EISs focused on significant effects and on the information useful to the decision makers and the public to more successfully implement NEPA."* We support this goal in theory; however, we argue that enforcing page limits will not achieve this intended purpose and may in fact result in less successful implementation of NEPA.

In laying out the rationale for this proposed change, the NPRM cites a July 2019 report[6] prepared by the CEQ on the length of EISs between 2013 and 2017. The CEQ report demonstrates that the NEPA documents analyzed are on average longer than 150 pages. The report does not, however, conclude that document length can be correlated to longer review or permitting times. In fact, available data do not support the assertion that document length negatively affects the successful implementation of NEPA. As we noted in our comments on Timing, above, GAO's 2016 report regarding the environmental review process for hard rock mines on Forest Service and BLM land found the length of time it took the agencies to approve mine plans averaged approximately two years. Agency managers interviewed for the report did not identify document length as a barrier to successful or efficient NEPA implementation.

Rather than streamline the NEPA process, the establishment of arbitrary page limits would create confusion, complexity, and legal vulnerability for the lead agency. Due to the time and resource burden associated with seeking a page-limit extension, we anticipate that most agencies would seek to comply with the proposed page limits. In order to meet those page limits, agencies would often have to determine whether to leave information out or to move that information into an appendix. In order to avoid legal

[6] Council on Environmental Quality, Length of Environmental Impact Statements (2013–2017). July 22, 2019. https://ceq.doe.gov/nepa-practice/eis-length.html.

liabilities associated with providing inadequate NEPA documentation, most agencies would elect to push information beyond 150 pages into an appendix. Rather than streamlining the analysis, this would have the unintended consequence of making information more difficult to find and to analyze for the agency decision maker and interested stakeholders. This in turn would create more questions, which would need to be addressed by the lead agency, potentially extending rather than streamlining the NEPA process.

As noted above, the proposed extension process would create an undue burden for most agencies. Any extension request would need to be vetted regionally before being forwarded to the national office and ultimately to the "assistant secretary level or higher." Each vetting step would require time on one or more executive calendars and agency staff time to conduct the necessary briefing. It is reasonable to assume that any elevation would require more than two weeks, particularly if the executives being briefed are responding to multiple extension requests or are unfamiliar with the project in question. Given the emphasis on NEPA timelines, we are concerned that the tendency would be to avoid seeking a page-limit extension, even when it would be beneficial to the NEPA process. We strongly encourage the CEQ to not pursue the proposed page limits. Should this provision remain, however, we strongly encourage the CEQ to defer to the agencies to determine the most appropriate level at which to approve or disapprove page limit extension requests.

Finally, in our experience, documents often become longer when they are subject to time pressure. NEPA staff often need to refer to the same background information for different portions of the analysis. If teams are not well coordinated, that information can end up being presented repeatedly in the front matter of different sections. It is not uncommon to see background information repeated throughout an EIS. If teams are afforded the time to do careful coordination and editing, that information can be consolidated. However, because it is easier to repeat information than to pull it out and reformat a section, it is often left in, thereby lengthening the document. We support agencies encouraging their NEPA staff to edit their documents for clarity and brevity; however, we would argue that doing so will require more staff and additional time.

> **Recommendation:** Retain existing language.

§ 1502.9 Draft, Final, and Supplemental Statements

The proposed new language would require a supplemental EIS rather than a revised draft if the first version is so inadequate as to preclude meaningful analysis. We believe this is a problem, as a supplemental EIS would be difficult to read as a whole if the original was so inadequate. It would only be appropriate to make corrections through the preparation of a supplemental if the deficiency were in a specific subject area, which would not impede the readability of the document.

> **Recommendation**: Retain existing language, but add that if the deficiency is in a specific subject area where the deficiency can be addressed without making the document unreadable, then it can be addressed in a supplemental.

§ 1502.11 Cover

Proposed changes would add a requirement to include on the cover *"the estimated total cost of preparing the EIS, including the costs of agency full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs."* This is one-sided costing of the effort without similarly including the proposed benefits of any proposed changes to a proposed action or selection of a preferred alternative. The costs are also not put into perspective of the federal costs and staff hours involved in implementing, enforcing, and monitoring the actual proposed project, or the value of the threatened resources.

Recommendation: We recommend that CEQ begin to collect this information and prepare guidance on how to cost out the information as well as the other values and information that provides perspective on this question before putting it in a regulation.

§ 1502.13 Purpose and Need

Proposed § 1502.13, Purpose and need, is revised to state: *"When an agency's statutory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency's authority."* In cases where project proponents are applying for permits, the underlying purpose of and need for the project itself (a metal mine, a transmission line, a port expansion) are frequently not based on the permitting agency's authority.

We object to limiting the statement of purpose and need to be defined solely by the project proponent or lead agency. Alternatives flow from how a purpose and need is defined. In all cases, alternatives need to be reasonable, which means economically and technologically feasible ways of achieving a purpose and goal; however, a poorly crafted statement of purpose and need can foreclose consideration of important alternatives to meet those underlying needs. We agree that in most instances stated purpose and need can be accepted at face value. However, if the potential impacts are sufficiently high and contrary to the policy mandates of NEPA, then another examination of underlying justification is essential to decision-making, and those questions are, in our experience, coming from outside the proponent or lead agency.

The goals of the applicant, or a single federal agency, rather than the underlying purpose and need for the project, may improperly foreclose reasonable alternatives simply because, for instance, they cost more than the applicant wishes to spend, or the applicant desires the project be built on a very specific site. This would hamstring the lead agency in developing reasonable alternatives to the proposed action. We believe existing §1502.13 does not need revision and strongly recommend against revising it. This restrictive language also appears to be another way for CEQ to limit the range of reasonable alternatives by not considering alternatives outside the agency's jurisdiction, which is contrary to the intent of NEPA.

Recommendation: Leave existing regulatory language unchanged.

§ 1502.14 Alternatives

While the current implementing regulations (§ 1502.14(c)) require EISs to include *"reasonable alternatives not within the jurisdiction of the lead agency,"* the proposed rule strikes this provision as a requirement for all EISs *"because it is not efficient or reasonable to require agencies to develop detailed analyses relating to alternatives outside the jurisdiction of the lead agency"* (NPRM, p. 1702). It also omits the statement that *"this section is the heart of the EIS";* modifies the requirement to *"[r]igorously explore and objectively evaluate all reasonable alternatives"* to *"evaluate reasonable alternatives to the proposed action"*; revises direction to *"[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits"* to *"[d]iscuss each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits"*; and deletes entirely the requirement to include reasonable alternatives not within the jurisdiction of the lead agency.

These proposed changes must be read in conjunction with the proposed changes to purpose and need and the changes in the definitions in Part 1508. Alternatives emanate from a proposed action's purpose and need, and if the purpose and need is only within the perspective of a project proponent and the lead agency, Federal agencies cannot carry out their NEPA Mandate to consider both short- and long-term implications for the prosperity of future generations. One reason NEPA pulls together all relevant Federal agencies to work together in a collaborative fashion is to broaden the perspective and consideration of activities beyond

that of a single project or agency proponent. This is completely lost if only alternatives within the purview of the lead agency are deemed reasonable.

We strongly object to these proposed changes. For the reasons discussed in the definitions Part 1508, it is both efficient and reasonable for agencies to thoroughly analyze feasible alternatives outside the agency's jurisdiction if they would meet the underlying purpose and need of the project. What is neither efficient nor effective is for a federal agency to ignore relevant information and alternatives outside their jurisdiction when considering the broader public good. The proposed King William Dam, for example, would have destroyed many wetland acres, and tribal and other communities would have been flooded to meet a purpose and need stated by the US Army Corps of Engineers (USACE) and its demand projections for drinking water. Upon closer examination, the needs were overstated and a far less costly, more efficient, and a less damaging alternative was developed. That is but one example.

This proposed approach would limit consideration of alternatives that might better avoid in the first instance or minimize adverse impacts, particularly those which are irreparable or would be irretrievably lost to future generations. Limiting the consideration of alternatives to those available to the lead agency alone is contrary to NEPA. Empowering only the project proponent and lead agency to define purpose and need fails to allow for the exploration of alternatives that can better achieve NEPA's goals of avoiding significant adverse impacts.

> **Recommendation:** Leave existing language in the regulations.

§ 1502.16 Environmental Consequences

This revised section deletes references to direct and indirect effects and adds to the types of issues to be analyzed in an EIS: *"Where applicable, economic and technical considerations, including the economic benefits of the proposed action."* The first change is unacceptable, as discussed in our comments on § 1508.1(g) "Effects" below.

> **Recommendation:** Maintain the current language in the existing regulation and add cumulative impacts.

§ 1502.17 Summary of Submitted Alternatives, Information, and Analyses

This is a new section that would be required in EISs (not included in page limits) that would summarize alternatives, information, and analyses submitted by "public commenters" and would be the subject of an explicit invitation to comment on the completeness of the summary in the draft EIS. This is potentially helpful, but problematic if used to close out future comments on the alternatives considered and attention to analysis submitted by public commenters. It also appears to exclude making agency comments available and summarized in such a summary, which is contrary to established practice.

> **Recommendation**: Include in any such summary the recommendations for both alternatives and mitigation submitted by federal, state, local, or tribal officials.

§ 1502.18 Certification of Submitted Alternatives, Information, and Analyses Section

This new section requires the decision maker for the lead agency to certify in the ROD that the agency has considered all of the alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the EIS. *"Agency EISs certified in accordance*

with this section are entitled to a conclusive presumption that the agency has considered the information included in the submitted alternatives, information, and analyses section." While this action might force a senior official to verify the accuracy of the statement, we are concerned that the certification, in and of itself, might create sufficient administrative record of compliance with NEPA that the courts will not support further examination of reasonable alternatives that were submitted but ignored, which may have avoided significant adverse impacts or had beneficial impacts anticipated by the passage of NEPA. Further, it limits the certification to public commenters without acknowledging federal, state, local, and tribal commenters. Singling out public commenters appears to be a blatant attempt to diminish citizens' remedies in court.

> **Recommendation**: Exclude wording about "conclusive presumption" and include wording that this is not intended to exclude judicial review of the underlying basis for the certification. Also exclude wording that limits this certification to public commenters.

§ 1502.22 Incomplete or Unavailable Information

(a) Omits the word "always" in this sentence: *"When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an EIS and there is incomplete or unavailable information, the agency shall [always] make clear that such information is lacking."*
(b) In reference to information that cannot be obtained because of costs, terminology is changed from "exorbitant" to "unreasonable" costs.

Neither of these changes is warranted. NEPA already promotes the use of "all practicable means," and this would be a determination of the agency if an effort is not practicable. The word "exorbitant" signals that the emphasis is on acquiring information needed to make a decision. There will always be pushback on required expenditures by parties who are unwilling to explore the environmental and social consequences of their actions, and it is important to retain action forcing mechanisms to the contrary.

> **Recommendation**: Keep the original language.

§ 1504.24 Methodology and Scientific Accuracy

Proposed § 1502.24 states: *"Agencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents. Agencies shall make use of reliable existing data and resources and are not required to undertake new scientific and technical research to inform their analyses."*

We strongly recommend that CEQ delete the second sentence. An explicit provision that new research is not required contravenes the very concept of scientific integrity, which is required in the first sentence of this section in both the proposed and existing regulations. It is also inconsistent with NEPA § 102(2)(A) and case law. In many cases, existing information may not be adequate to support the analyses, and some new scientific or technical research will indeed be required to ensure the professional and scientific integrity of the environmental document. Necessary information often does not exist until it becomes relevant to an agency or applicant for a specific proposed project. Only then does it become reasonable for the project proponent to spend resources to obtain and analyze it. Information that already exists may also be out of date, incomplete for purposes of an accurate analysis, or otherwise not meet the standard of scientific integrity. Rather than promoting informed decision-making, this proposed provision reflects this administration's demonstrated disregard for science and scientific integrity and illustrates a fundamental misunderstanding of the need for adherence to scientific principles to produce honest, accurate analyses.

As experienced NEPA practitioners, we are aware of numerous cases in which important analyses and conclusions in EISs were incorrect because they were based on poor quality information, such as assumptions made from inappropriate proxies, or information that was substantively outdated or did not otherwise meet standard scientific protocols or rigor.

Examples of standard research and information critical to informed decision-making, but which usually does not exist until someone decides to pursue a particular project include:

Hardrock mines and coal mines:

- Geochemical characterization and modeling to understand how acid rock drainage from the waste rock, tailings, and pit lakes will affect groundwater, surface water, biological resources, and local communities for hundreds of years or more;
- Hydrogeological modeling to determine how the pumping of groundwater from open pit and underground mines will potentially deplete area groundwater and surface water supplies for hundreds of years or more;
- Meteorological data collection through several seasons at the project site to understand wind patterns, and air pollutant emissions modeling to determine effects on downwind communities.

Dams:

- Geotechnical data collection and analysis at the dam and reservoir site to understand whether the site is appropriate for a dam and to conduct risk analyses;
- Collection and modeling of up-to-date meteorologic and hydrologic data to ensure the dam and reservoir are properly sized for a changing climate.

Highways:

- Traffic pattern and air emissions modeling to apply to public health analyses.

Furthermore, it appears from the preamble (p. 1690) that CEQ is adding the affirmative requirement to make use of reliable existing data and resources in response to E.O. 13807, which directs CEQ to issue such regulations as it deems necessary to, among other things, *"provide for use of prior Federal, State, Tribal, and local environmental studies, analysis, and decisions."* This requirement is unnecessary because in our experience, when agencies are preparing an EA or EIS, they always look first at the existing data and resources to determine whether they are relevant, reliable, and sufficient for the purposes of the discussions and analyses in the document. They then determine what additional information is needed for an accurate, reliable analysis and how to obtain that information.

> **Recommendation:** Revise proposed § 1502.24 to delete sentence 2. If, for purposes of responding to E.O. 13807, CEQ wishes to keep the first half of sentence 2, we strongly recommend deleting "shall" and inserting "may."

In the preamble (p. 1703), CEQ also invites comment on whether "overall costs" of obtaining incomplete or unavailable information warrants further definition to address whether certain costs are or are not "unreasonable." We recommend against further defining "unreasonable cost," as reasonableness would depend on a number of factors in different situations, including the potential for significant adverse impacts and irreparable harm or irretrievable loss of resources. NEPA is all about balancing, and you should not prejudge these factors.

PART 1503 COMMENTING

This section addresses inviting comment, the duty to comment, specificity of comments, and response to comments. Both the existing regulations and proposed revisions address the roles of the Lead Agency, Cooperating Agencies, and Participating Agencies.

§ 1503.1 Inviting Comments and Requesting Information and Analyses

This section references inviting comments on the draft and final EISs. Proposed changes would add a specific requirement at § 1503.1(a)(3) for agencies to invite comment on the completeness of the submitted alternatives, information, and analyses section (§ 1502.17). Ordinarily this would be an entirely positive addition, but its purpose is less clear in the context of other provisions that would use this to close out further comment at a later date. This is important, as a comment on a draft can focus on the lack of adequate information provided in the EIS, and when that is corrected in the final, it might lead to recommendations for selected or analyzed alternatives.

> **Recommendation:** Add that missing a comment on completeness and alternatives on a draft EIS does not foreclose comment on the final EIS.

§ 1503.2 Duty to Comment

At § 1503.2, the NPRM proposes to modify the existing section to read: *"Cooperating agencies and agencies that are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority…"*

This is a substantive change from the existing language at § 1503.3(d), which reads: *"Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority."*

While the NPRM does not provide an explanation for this specific wording change, the proposed change is concerning because the language fails to recognize the critical role of agencies with special expertise but which are not permitting or cooperating agencies. This is contrary to the intent of NEPA, which specifically recognizes that there may be instances where an agency may have special expertise in the form of statutory responsibility, agency mission, or related program experience, but not approval authority with regard to a proposed action (40 CFR § 1508.26). As an example, the EPA may identify noise-related impacts associated with a project. Noise impacts can affect human health, which is at the core of EPA's mission. However, because noise pollution is currently unregulated at the federal level, the language in the NPRM would not identify EPA as having a duty to comment on those impacts unless the EPA served as a cooperating agency. This would be to the detriment of the lead agency as well as human health and the environment.

> **Recommendatio**n: In order to preserve the integrity and legislative intent of NEPA, we strongly urge the CEQ to retain the existing language at § 1502.2.

§ 1503.3 Specificity of Comments and Information

The NPRM also proposes to revise § 1503.3 to include the following new text at (e): *"When a cooperating agency with jurisdiction by law specifies mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences, the cooperating agency shall cite to its applicable statutory authority."*

This is a departure from existing regulations, which state at § 1503.3(d): *"When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences."*

The NPRM states that this change is intended to ensure that information about cooperating agency statutory authority is made known to the lead agency. The effect of this language change, however, would be to limit the role of agencies that do not have a direct permitting role. Notably, this has implications for how the EPA engages in the NEPA process. Due to the fact that the EPA has delegated the implementation of many of its permitting authorities to the states, it often does not have a direct permitting role to exercise on NEPA projects. It does, however, provide federal oversight for state permitting programs and is recognized as an agency with special expertise concerning environmental impacts of most federal proposals (40 C.F.R. § 1503.1(a)). EPA also has a Congressionally-mandated review role in the NEPA process. Pursuant to both NEPA and § 309 of the CAA, the EPA must review and comment in writing on every EIS prepared by a federal agency, considering public health, welfare, and environmental quality. If the EPA is constrained from identifying mitigation measures where they are not a permitting agency, that would be a loss of special expertise to the lead agency and in direct opposition to the role envisioned for the EPA by Congress under § 309 of the CAA.

Further, the proposed language shifts the focus of a cooperating agency's analysis away from identifying and mitigating for environmental impacts and instead focuses on the granting or approval of permits, licenses, or related requirements or concurrences. Again, this is inconsistent with the intent of NEPA, which is focused on informed decision-making and citizen involvement, not roadblocks to permitting.

> **Recommendation:** Add to section (e) "to the extent possible." In addition, there are several places within the NPRM in which NEPA is interpreted as limiting agency contributions, comments, and alternatives to existing statutory authority. This is contrary to NEPA and should be revised throughout as appropriate.

The NPRM adds requirements that comments should explain why the issue raised is significant to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts, and other impacts affecting the quality of the human environment. Comments should reference the corresponding section or page number of the draft EIS; propose specific changes to those parts of the statement, where possible; and include or describe the data sources and methodologies supporting the proposed changes.

The request for specificity is theoretically a good addition, but it is cast in a manner which would be a burden on the public and have an unintended chilling effect on their contributions. It also would seem to suggest that agencies can satisfy the requirement for being responsive to comments by merely accepting specific edits to the documents or rejecting them if they were not sufficiently specific. As worded, it also would be an impediment to broader comments, especially comments that might address major gaps in the draft EIS, which cannot be aligned with specific language.

> **Recommendation:** Encourage specificity for commenters to make it easier to be responsive, but indicate that any and all comments are welcome. Include requests for information on potentially affected physical, biological, and social-historic-cultural resources and how they are used by the commenter. Clarify that § 1503.3 applies especially to agency commenters.

§ 1503.4 Response to Comments

The NPRM makes several changes that would make federal agency response to comments less responsive.

- Changes "shall" to "should" when directing federal agencies to assess and consider.
- Directs that federal agencies need only consider "timely" comments.
- Directs that federal agencies need only "consider" comments, removing "assess."
- Changes current regulatory direction to agencies to assess and consider comments both individually and collectively and says agency *"may respond individually and collectively."*
- Drops the requirements to cite the sources, authorities, or reasons which support the agency's position that a substantive comment did not warrant a response, and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.
- Allows an agency to "publish" rather than append actual comments, in other words, make them available on the internet instead of distributed or circulated as part of a final EIS.

Recommendation: Retain the term "assess" and retain language which makes agencies responsive to the content of public comment, with a rationale as to why a response is not warranted.

PART 1504 PRE-DECISIONAL REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

The existing CEQ regulations create a process to seek to resolve potential conflicts between federal agencies before final decisions are made as redress for the EPA or other agencies with concerns that a proposed action was found to be environmentally unsatisfactory, or that the NEPA analysis is so deficient that it would not provide an adequate basis for decision-making required by NEPA. Rarely used formally, only 28 times, just the threat of a referral served as a forcing mechanism for resolution of decisions by federal agencies to better comply with NEPA and enabled CEQ to use its convening powers to seek a proper balance in resolving issues calling, when necessary, public hearings to obtain additional information and views.

In the NPRM, CEQ proposes to move the entire process in the direction of concerns by a project proponent, through the lead agency, about the cost of delay instead of concerns about the environmental impact. It changes the existing regulations by:

- Adding an additional criterion for agencies when considering whether to refer a matter to CEQ: *"Economic and technical considerations, including the economic costs of delaying or impeding the decision making of the agencies involved in the action."*
- Dropping direction to the referring agency to request that no action be taken to implement the matter until the Council acts upon the referral. This means that actions taken to move ahead on a project can create obstacles for avoiding adverse impacts, and also create costs that will now be weighed in favor of moving ahead with the project no matter how deficiently it avoided or mitigated adverse impacts.
- Dropping explicit possibility of holding public meetings or hearings to obtain additional views or information in favor of *"Obtain additional views and information."* This has the effect of narrowing the current § 1504.3(e) language that allows *"all interested parties (including the applicant)"* to submit comments on the matter to CEQ to allowing only the applicant to provide written views to CEQ.

What CEQ is now proposing turns the purpose of the referral process into a vehicle for private parties or advocating agencies to complain that another federal agency is causing delay in their action, when it was actually designed to be able to question significant adverse impacts on the environment. It further weakens the tool by allowing "explanations" without evidence, and efforts to obtain additional information that are not open to the public.

Recommendation: Retain current regulatory language.

PART 1505 AGENCY DECISION-MAKING

In § 1505.2(e) the NPRM adds a new requirement to include the decision maker's certification leading to conclusive presumption that the agency has considered the information included in the submitted alternatives, information, and analyses section. See our comments under § 1502.18 about the problem created by a conclusive presumption of NEPA compliance through the addition of the certification in § 1505.2(e).

Recommendation: Exclude wording about "conclusive presumption" and include wording that this is not intended to exclude judicial review of the underlying basis for the certification. Also exclude wording that limits this certification to public commenters.

PART 1506 OTHER REQUIREMENTS

This Part addresses limitations on actions during the NEPA process, eliminates duplication with state and local procedures, combining documents, agency responsibility, public involvement, proposals for legislation, filing requirements, timing of agency action, emergencies, and effective date.

§ 1506.1 Limitations on Actions During the NEPA Process

The existing regulation at § 1506.1(d) states: "T*his section does not preclude development by applicants of plans or designs or performance of other activities necessary to support an application for Federal, State [Tribal] or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long lead time equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration."* The proposed revision deletes the above language and substitutes the addition of: *"An agency considering a proposed action for Federal funding may authorize such activities, including, but not limited to, acquisition of interests in land (e.g., fee simple, rights-of-way, and conservation easements), purchase of long lead-time equipment, and purchase options made by applicants*."

Recommendation: Agencies should not be given carte blanche to approve actions which foreclose the selection of alternatives where those are in question. Only actions which do not prejudice or foreclose the choice of alternatives and which do not impose adverse impacts should be allowed to proceed.

§ 1506.2 Elimination of Duplication with State, Tribal, and Local Procedures

(d) Adds to existing text requiring identification of inconsistencies between a proposed action with any approved state [tribal] or local plan or law that, "*While the statement should discuss any inconsistencies, NEPA does not require reconciliation."*

Recommendation: Remove new language about reconciliation and replace with *"To the extent practicable, federal agencies should strive to resolve inconsistencies between a proposed action with any approved state, tribal or local plan or law potentially affected by the proposed action."*

§ 1506.3 Adoption

(b) Changes the requirement for adoption of a NEPA document so that if an agency is adopting a final EIS from another agency, it need only republish it as a final statement as opposed to recirculating it as a final statement.

(f) Adds a provision to allow an agency to adopt another agency's determination that a CE applies to a proposed action if the adopting agency's proposed action is substantially the same.

These proposed changes are particularly troubling for several reasons, as they deny the public the opportunity to comment in significant and potentially significant impact situations. Because the proposed changes limit introduction of new issues, information, and alternatives at the final EIS stage, adoption would forgo opportunities to comment on the draft. Further, agency CE determinations are available for public review when proposed as regulations. Adoption of another agency's CE with mitigation proposed when the CE was inadequate denies other agencies and the public an opportunity to comment on the sufficiency of the proposed mitigation or to even know of its existence. If the CE were mitigated ,then why wouldn't the use of a mitigated EA be sufficient to address these circumstances? Agencies have different constituencies and mandates, including balancing needs to meet their own mandates. These adoption expansions bypass opportunities for entire constituency groups to participate and comment.

> **Recommendation**: Retain existing regulatory language.

§ 1506.5 Agency Responsibility for Environmental Documents

The revised language completely omits direction to avoid a conflict of interest by the preparer of an EIS, including the existing requirement for contractors to execute a disclosure statement specifying that they have no financial or other interest in the outcome of the project.

While the current regulations allow the applicant to prepare an EA, the NPRM would now allow the applicant to prepare an EIS. There is no good reason why CEQ should allow such conflicts of interest to introduce the likelihood of intentional or unintentional bias into the EIS analysis and damage the public's confidence in the objectivity that NEPA promotes and the "hard look" which courts have demanded.

> **Recommendation**: Prohibitions on conflict of interest should be maintained, and project proponents should only be allowed to fund, but not to select or direct, parties preparing the EIS under the direction of the agency.

§ 1506.6 Public Involvement

Proposed Changes in the NPRM

- Drops the requirement in current regulation to make the draft EIS available to the public at least 15 days in advance of a public hearing on a published EIS.
- Drops the provision in current regulation that states that agencies should make EIS-related comments and documents available *"without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action in the Freedom of Information Act (5.U.S.C. § 552)."*

- Also drops current provision that materials shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other federal agencies.
- Drops specific criteria for when public hearings or public meetings should be held. *"Criteria shall include whether there is: (1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing. (2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful."*

Draft EIS documents are detailed and complex, and the public needs at least 15 days to review the document before a public hearing. EPN recommends the 15-day requirement be included in the final rule.

It is also important to continue to make the underlying documents, including the memoranda from federal agencies, available to the public and make them available at minimal cost to facilitate meaningful public involvement. Also because the proposed rule adds page limits to the EIS, to fully understand and provide meaningful comments the public will likely need access to underlying documents that might only be cross-referenced in the document to reduce its size. Charging the public for these documents will limit their access to them, especially for low-income, minority, and indigenous communities, and lead to disproportionate impacts and lack of meaningful participation.

CEQ's proposed rule states *"Agencies may conduct public hearings and public meetings by means of electronic communication except where another format is required by law."* The preamble to the rule discusses the digital divide. *"To address environmental justice concerns and ensure that the affected public is not excluded from the NEPA process due to a lack of resources (often referred to as the "digital divide"), the definition retains a provision for printed environmental documents where necessary for effective public participation."* The digital divide also needs to be considered when making the decision to potentially hold electronic public meetings. Low-income, minority, and indigenous communities may have resource or cultural barriers preventing them from meaningfully participating in electronic meetings.

> **Recommendation:** Retain existing language.

> <u>Specificity of Comments</u>

As we discuss in our comments on § 1503.3 "Specificity of comments and information," above, it is unclear whether the specificity requirement is intended to apply to only agency commenters or also to the public. The requirement that comments be as specific as possible; provide as much detail as necessary; explain why the issue is significant, as well as economic and employment impacts; provide page numbers; propose specific changes; and describe data sources and methodologies supporting the proposed changes is too huge of a burden to place on the public, especially for minority and low-income communities.

We note that taken together and with other proposed changes to the regulations, it will make it more difficult for public voices and contributions of information to be heard. This includes as well, lead agencies' ability to require a bond fee from stakeholders asking for an injunction to stop the project, which would also have a chilling effect on citizen suits if and when a federal agency has failed to properly comply with NEPA.

> **Recommendation**: Encourage specificity from commenters to make it easier for agencies to be responsive, but indicate that any and all comments are welcome. Include requests for information on potentially affected physical, biological, and social-historic-cultural resources and how they are used by the commenter. Clarify that § 1503.3 applies especially to agency commenters.

§ 1506.9 Proposals for Regulations

The NPRM codifies functional equivalence for proposed regulations and sets out criteria for other statutory or E.O. requirements that would be *"sufficient to comply with NEPA."* To do so, agencies are required to find that: 1) There are substantive and procedural standards that ensure full and adequate consideration of environmental issues; 2) there is public participation before a final alternative is selected; and 3) a purpose of the analysis that the agency is conducting is to examine environmental issues.

The Preamble references E.O. 12866 and the regulatory impact assessment prepared in compliance with that as a document that may serve this function. The preamble also states that the analyses must address the detailed statement requirements specified in § 102(2)(C) of NEPA, although those components are not specified in the regulation.

This is yet another means of reducing the applicability of NEPA and the interagency process and broad scope of interests it engenders. The NPRM reduces NEPA to its bare bones procedures rather than its policy and mandates, and would eliminate any means for a declaratory statement of functional equivalence to be determinative. There is no need for this step as NEPA encourages the integration of its policies and procedures with existing agency planning and other actions, and it need not be distinguished from those integrated processes but rather embraced by them as carrying out NEPA responsibilities at the same time.

> **Recommendation:** Remove new language exempting agencies from NEPA for "functional equivalence."

PART 1507 AGENCY COMPLIANCE

This part addresses agency compliance with NEPA, capability to comply, agency NEPA procedures, and program information.

§ 1507.3 Agency NEPA Procedures

New language provides for a process to combine scoping with the preparation of an EA**.** This should be a useful step toward focusing analysis and decision-making. Remaining language changes are problematic as they would all seem designed to limit NEPA's application in a manner that would not conform to the legislative intent.

(a) Repeats restriction that, *"Except as otherwise provided by law or for agency efficiency, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in these regulations."*

Given that the regulations indicate that existing information is to be used and it does not require additional information, it is unclear what would happen with requirements of agencies to develop that information for other statutory or regulatory purposes.

(b)(6) Authorizes the designation of analyses or processes that serve the function of agency compliance with NEPA and the regulations for any proposed agency action. Same criteria as in 1506.9 for proposed regulations.

(c) Authorizes agencies to identify in their NEPA procedures actions which are not subject to NEPA. Additions to actions currently considered as not being actions for purposes of NEPA are:

- *"Actions that are non-discretionary actions, in whole or in part"*
- *"Non-major Federal actions"*
- *"Actions for which compliance with NEPA would be inconsistent with Congressional intent due to the requirements of another statute."*

These all appear to be part of an effort to limit NEPA's application, which would eliminate the value that NEPA provides.

> **Recommendation:** Retain existing language and remove new language.

§ 1507.4 Agency NEPA Program Information

This is a new section: "(*a) To allow agencies and the public to efficiently and effectively access information about NEPA reviews, agencies shall provide for agency websites or other means to make available environmental documents, relevant notices, and other relevant information for use by agencies, applicants, and interested persons."*
This additional section is the only place in the NPRM which addresses modernization of access to the federal agency's process, documents, and information via web services. We support directing agencies to create searchable and accessible websites.

Agencies should be required to provide searchable websites with this information as well as other means to provide the information. Access to federal agency actions should be uniform, throughout government, as should GIS tools and mechanisms to integrate environmental information drawn from multiple agencies, as can be done with EPA's NEPAssist.

> **Recommendation**: We strongly urge CEQ and the Office of Management and Budget to take a leadership position in coordinating agency investments in information architecture to provide an integrated but decentralized platform for public and agency access to geographically integrated environmental information, notifications, project descriptions, contact information, status and schedule information, proximity of other proposed federal actions, and submission and view of all comments. A federal budget infusion is needed to meet additional demands of coordinated action and outreach to state, local, and tribal governments.

PART 1508 TERMINOLOGY AND DEFINITIONS

The draft regulations accomplish many of its proposed changes by changing definitions that result in severely limiting the scope of NEPA application, substance, and content. In general we strongly object to the changes as inconsistent with NEPA. The complete renumbering of the subsections makes commenting confusing, so we have indicated the NPRM numbering as well as the relevant section in the existing regulations. In addition, please note that we have addressed some of these terms elsewhere in our comments where they are addressed in other sections of the proposed regulations.

§ 1508.1(d) Proposed, §1508.4 (Existing) Categorical Exclusion

The proposed regulatory changes would eliminate within CEs consideration of smaller actions which cumulatively pose a significant effect on the human environment. See our concerns in our comments on § 1501.4.

The revised definition also eliminates the provision that agencies consider extraordinary circumstances in which a normally excluded action may have significant environmental effects and was not intended to be covered by the exclusion. Such circumstances might include, for example, the discovery of endangered species. Despite the fact that extraordinary circumstances are now addressed in § 1501.4(b), it should also be retained within the definition of "Categorical Exclusion" as an essential element of them.

Recommendation: Retain existing language.

§ 1508.1(g) Proposed, §1508.8 (Existing) Effects

Definition of Effects

The NPRM proposes amendments *"to simplify the definition"* of "effects" by consolidating the definition into a single paragraph and striking the specific references to direct, indirect, and cumulative effects in order to *"focus agency time and resources on considering whether an effect is caused by the proposed action rather than on categorizing the type of effect. CEQ's proposed revisions to simplify the definition are intended to focus agencies on consideration of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action."*

CEQ's proposed new definition of "effects or impacts" significantly departs from the definition in the existing regulations and flies in the face of both the intent and requirements of the NEPA statute and case law. The proposed definition would not provide clarification. Rather, it would create confusion and result in the reduced quality and integrity of environmental documents, causing project delays.

Proposed § 1508.1(g) defines "effects or impacts" as *"effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. Effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance."*

Close Causal Relationship and Relationship Between NEPA and Tort Law

CEQ seeks comment on whether to include in the definition of "effects" the concept that the close causal relationship is *"analogous to proximate cause in tort law,"* and if so, how CEQ could provide additional clarity regarding the meaning of this phrase.

We believe it is a mischaracterization of NEPA to suggest that its tests of reasonableness and scope should be akin to tort law. NEPA is in part a planning tool, and by making both adverse and beneficial potential impacts public and transparent, and by including all stakeholders in the process, it can help to avoid harm or enhance benefits over which an individual federal agency does not have jurisdiction. It makes it even more imperative that the lens that all this is viewed through is not solely the view of a project proponent, but of current and future generations. In contrast, tort law is liability law, seeking redress from individuals or institutions which are determined to be responsible for a consequence. That is not the purpose of NEPA. The reason we believe NEPA is so different from tort law is the very same reason that federal agencies' decision-making, alternatives, etc., should not be limited to their own statutory authority. NEPA is a statute that explores and analyzes issues in the greater public interest and has federal agencies make decisions based on the greater good, but not in isolation, such that agencies at all levels of government contribute their own statutory authorities as well as their ability to condition approvals and authorizations.

Lengthy Causal Chain

We also object to the statement in the NPRM at § 1508.1(g)(2): *"Effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain."*

This appears to also refer to CEQ's "new position" on cumulative impacts. Such impacts, however, can be legitimate indirect or cumulative impacts that are significant, such as cascading ecosystem impacts from an action, or perpetual contamination of a pit lake that takes a century to fill after the mine is closed. These effects would be caused by the project and must be disclosed and analyzed, along with means to mitigate them. We strongly recommend striking this provision from this section.

Relationship of the Definition of Effects to Agency Authority

The NPRM also states at § 1508.1(g)(2) that *"Effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action."* The NPRM notes that this is in response to some comments suggesting that impacts outside of an agency's control should not have to be accounted for. The NPRM also notes CEQ's intent to revise the definition of "effects or impacts" to: *"codify a key holding of Public Citizen relating to the definition of effects to make clear that effects do not include effects that the agency has no authority to prevent or would happen even without the agency action, because they would not have a sufficiently close causal connection to the proposed action. This clarification will help agencies better understand what effects they need to analyze and discuss, helping to reduce delays and paperwork with unnecessary analyses."*

Public Citizen addressed unique circumstances regarding determination of *whether to prepare an EIS* in the first place. We are concerned that CEQ appears to be trying to improperly apply *Public Citizen* to NEPA application as well as the types of effects that agencies must analyze once they have determined that an EIS is necessary. Whether NEPA applies to a proposed action, triggering an EA or EIS, is quite a different question from which effects must be analyzed in an EIS consistent with NEPA, including effects outside of the agency's jurisdiction and effects that would occur even without the action. NEPA § 102(2)(c)(ii) requires that the EIS include *"any adverse environmental effects which cannot be avoided should the proposal be implemented."* Lack of an agency's authority to prevent a particular impact of a project neither negates the impact nor relieves the agency of its responsibility to analyze and disclose the impact and appropriate mitigation measures. NEPA § 102(2)(c) requires that, prior to making any EIS, the lead agency consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. This consultation is meant to support the lead agency in analyzing and disclosing impacts outside its jurisdiction or expertise, including whether and how they could be avoided or mitigated, even if the agency is not responsible for mitigating them. Furthermore, if specific effects would occur even without the agency action, these are appropriately disclosed in the "Affected Environment" discussion and the "No Action" description in the EIS.

For example, for the USACE to issue a Clean Water Act section 404 permit for the filling of wetlands for a housing development or industrial park, the EIS must analyze the impacts to water and ecological resources associated with the filling of those wetlands. It must also analyze other impacts such as those related to increased traffic and air pollutant emissions, socioeconomics, and other resources that the new development will cause, during both the construction period to which the 404 permit applies, as well as the lifetime of the new neighborhood. Although USACE's responsibilities are completed after issuance and enforcement of the permit, USACE will have no authority to prevent impacts of the project outside its jurisdiction, such as air emissions from the increased traffic during the long lifetime of the neighborhood. Whether these effects are indirect or outside the jurisdiction of USACE, they are effects of the project, nonetheless, and must be analyzed consistent with NEPA § 102(2)(C)(ii).

Indirect Effects

CEQ also specifically invites comments on whether consideration of indirect effects is required. The second sentence in the proposed definition combines the current § 1508.8 definitions of "direct" and "indirect effects" into a generic definition of "effects." In the new definition, however, indirect effects (reasonably foreseeable, but later in time or farther removed in distance) may be included, but would no longer be required. The statute places no limiting qualifier on *"the environmental impact"* to suggest that only effects that occur at the same time and place as the action shall be considered. Specifically, NEPA Section 102(2)(F) requires that all agencies *"[r]ecognize the worldwide and long-range character of environmental problems…."* § 102(c)(iv) requires that EISs include *"a detailed statement"* on the *"relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity."* These provisions in the statute do not support the much narrower definition of impacts that CEQ is proposing.

A revised definition of "effects," which either allows (but does not require) indirect effects or explicitly excludes indirect effects, would have significant implications for both NEPA applicability and impact analyses. Indirect impacts would: (1) No longer be used in determining threshold of significance for purposes of determining whether NEPA applies to an action, which could place some major Federal actions below the level of significance that would have otherwise triggered NEPA; and (2) No longer be evaluated in EAs or EISs, or mitigated, even if they were substantively significant impacts.

Following the construction of the national interstate highway system, it was recognized that the indirect impacts of projects must be analyzed. In numerous instances, the siting of the highway system bifurcated or bypassed rural communities, contributing to their economic demise. Had these unintended and unattended consequences been considered during the planning stage, many of these impacts could have been avoided or mitigated. This was one of the many factors that gave impetus to NEPA. Removing the explicit inclusion of indirect and cumulative impacts will result in inadequate environmental analyses, litigation, and project delays.

> **Recommendation**: We strongly recommend striking this provision from this section and retaining all of the existing requirements to consider and evaluate indirect impacts.

Cumulative Effects

The proposed rule eliminates the existing regulatory provisions regarding cumulative actions and effects in contrast to § 1508.7 of the existing regulations and erroneously asserts that *"[a]nalysis of cumulative effects is not required."* [see existing § 1500.4(k), § 1500.4(p), § 1508.4, § 1508.7, § 1508.8, § 1508.25, and § 1508.27; and proposed § 1508.1(g)(2)]. This is contrary to the letter and spirit of NEPA, which establishes that it is the national policy *"to use all practicable means and measures…to …fulfill the social, economic, and other requirements of present and future generations of Americans."* § 102(C)(i) and (iv) of the statute explicitly require federal agencies to consider *"the environmental impact of the proposed action"* and "*the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity."* The statute places no limiting qualifier on *"the environmental impact"* to suggest that only immediate impacts should be considered. The explicit recognition of *"the relationship between local short-term uses"* and *"enhancement of long-term productivity"* directs attention to the connections between past, present, and future, as well as the opportunity for informed decision-making to improve upon current environmental conditions. Whether or not future generations' needs will be met depends on the impacts of today's actions in the context of prior, contemporaneous, and reasonably foreseeable impacts on the same resources. For this reason, the impacts of actions taken today cannot be viewed in isolation, devoid of temporal or areal context. To comport with NEPA, cumulative impacts must be evaluated in EIS.

A revised definition of "effects" which explicitly excludes cumulative effects would have the same significant implications for NEPA applicability and impact analyses as would the exclusion of indirect impacts, as discussed above: (1) They could no longer be used in determining threshold of significance for purposes of determining whether NEPA applies to an action; and (2) They would be neither evaluated in EAs or EISs nor mitigated. To comport with NEPA, cumulative impacts must be evaluated in EISs.

In determining whether a major Federal action will "significantly" affect the quality of the human environment, the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area. Where conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change.[7]

Many analyses have addressed cumulative effects on watersheds, fisheries, habitats, air pollution, and human health, including in the context of environmental justice. More recently, growing public concern has also focused on the cumulative implications of greenhouse gas emissions, climate change, and climate resilience associated with projects and plans.

Failure to require consideration and evaluation of cumulative impacts would result in federal agencies making willfully ignorant and short-sighted decisions, with potentially catastrophic results for the *"present and future generations"* the statute charges the federal government with protecting. For example, in the absence of a requirement to evaluate cumulative impacts, federal agencies could choose to ignore incremental emissions of greenhouse gases or incremental losses of carbon sequestration capacity that, in isolation, might not be viewed as significant, but which would contribute to the climate crisis that is recognized worldwide as an existential threat to much of Earth's biota and human health, infrastructure, and civil society. Failure to consider the cumulative impacts of incremental habitat loss, community disruption, demands on limited water resources, etc., could be similarly devastating.

Furthermore, we are concerned that excluding cumulative impacts from the definition of "effects" could remove the basis for programmatic EISs. SCOTUS, in discussing what we now call programmatic EISs, recognized this relationship in stating: *"Cumulative environmental impacts are, indeed, what require a comprehensive impact statement. But determination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.*"[8]

Timely evaluation of cumulative impacts provides the opportunity to, at minimum, avoid exacerbating existing environmental problems and to, potentially, bring about environmental and socioeconomic benefits. Ignoring cumulative effects would render the NEPA process a farce and preclude the informed decision-making that NEPA was enacted to require of federal agencies.

> **Recommendation:** We strongly recommend retaining the definition of "cumulative effects" and all of the existing requirements to consider and evaluate cumulative impacts and cumulative actions in the regulations.

[7] Hanley v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).
[8] Kleppe v. Sierra Club, 427 U.S. 390, 413-414 (1976).

§ 1508.1(q) Proposed, § 1508.18 (Existing) Major Federal Action

CEQ proposes to revise the definition of Major Federal Action (proposed section 1508.1(q)), which includes actions subject to Federal control and responsibility with effects that may be significant, but explicitly excludes non-discretionary decisions made in accordance with the agency's statutory authority, activities that do not result in final agency action under the Administrative Procedure Act, and non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project.

We strongly recommend against revision of the definition of Major Federal Action for several reasons:

- The current CEQ regulations already make it clear that the term "major federal action" includes agency control and responsibility and discretion to make a meaningful decision and to exercise its NEPA responsibilities. CEQ's current interpretation of "major Federal action" has stood the test of time and is well understood. The preamble offers no justification for reversing a decades old regulation and practice. It makes no sense whatsoever to go to a world in which there are "minor federal actions" that significantly affect the environment and therefore get no coverage under NEPA. The NPRM would separate the concept of "major Federal action" from the remaining phrase "significantly affecting the human environment" with the operative consideration being the impact of the action.

- We are concerned that exclusion of activities that do not result in final agency action under the APA may have implications for programmatic EAs and EISs, which evaluate decision frameworks. In particular if CEQ is promoting programmatic EAs and EISs to expedite federal decision making, it needs to ensure that decisions made within them are subject to the same level of scrutiny and public and judicial comment as a project level assessment which will rely upon them.

- The proposed exclusion for projects with *"minimal Federal funding or minimal Federal involvement"* will lead to significant confusion for the agencies and the public.

- Levels of funding should not be equated with environmental impact. The key is whether a federal agency has adequate authority to make a meaningful choice among alternatives and the level of potential impact. This provision should be struck.

- The proposed exemption of loans, loan guarantees and other forms of federal assistance is unwarranted. These are forms of federal assistance that can be used for major projects with significant effects, such as large animal feeding lots. Frequently, the agency in question has sufficient discretion to decide whether to grant the financial assistance and if so, what type of conditions it could impose. An agency's environmental responsibilities can be efficiently exercised through requirements for funding eligibility and other legally binding mechanisms.

- The proposed regulation would no longer define adoption of treaties and international conventions or agreements as major federal actions subject to NEPA. Only *implementation* of treaties and international conventions would be major Federal actions. A number of past EISs and EAs have been done on treaty ratification, but this would be eliminated. Impacts on US trade infrastructure and introduction of invasive species are but two types of impacts for which public disclosure and analysis of implications can be important to avoid harm and other unintended consequences.

- Proposed guidance documents are also listed as a potentially excluded major federal action. There are some guidance documents that have legal consequences and environmental effects. There should not be a blanket exemption for them.

Small Federal handle

The question whether and how NEPA applies when the federal handle or involvement is considered to be sufficiently "small" as to avoid the application of NEPA has been challenging. We believe that this is more a matter for the definition of major Federal action, than a question of NEPA applicability and so note because it seems to be addressed in both places within the NPRM. Consistent with clear Congressional guidance in the Congressional Record upon passage of NEPA, decisions on both regulatory definitions which influence how NEPA is applied, and NEPA applicability such as this should lean toward applying national environmental policy rather than excusing circumstances from its application. In this regard we turn to whether the Federal agency is in a position to consider impacts and alternatives, and whether there is a clear federal interest, such as whether the proposed project would use or alter federal or tribal lands held in trust by the federal government. Although the "but for" test is not fully determinative in this regard, it is a legitimate factor. The NPRM seems to remove the "but for" test entirely. From a policy perspective, aside from the longstanding exclusions of certain loans, guarantees and grant programs, the degree of federal funding should not be a factor, particularly in instances where a federal permit or license is issued, nor in cases where the federal funds make the difference between project viability and failure. This appears to be a blatant effort to remove linear projects from NEPA review where they cut across federal and/or tribal lands when NEPA is needed to ensure that environmental and related social impacts are considered and that national treasures and assets are preserved for their intended uses.

Additional Questions

CEQ also asks about whether the degree of federal funding should be a factor. We object strongly to the inclusion of this criterion. The criterion should not be a question of the degree of federal funding but rather the degree of impact of the federal action on the viability of the proposed action and whether federal agencies are in a position to carry out their NEPA mandate to consider the environmental impact of their actions.

Second, CEQ asks whether there should be a threshold (percentage or dollar figure) for "minimal Federal funding," and if so, what would be an appropriate threshold and the basis for such a threshold. We recommend against such an explicit provision in the regulation because neither factor takes into account the potential federal influence over the outcome nor the federal interests that might be involved in the proposed action and would, therefore, be arbitrary and capricious. As a practical matter, in both cases, there may be other federal involvement that would add to the agency's burden of responsibility for the action.

Third, CEQ asks whether the definition of "major Federal action" should be further revised to exclude other per se categories of activities or to further address what NEPA analysts have called "the small handle problem." We strongly object to any exclusion based on the small federal handle and think that the federal agency's responsibilities for sound decision making in the public interest should be determinative. Any issues of this nature should be considered in Agency rulemaking based upon the potential for environmental impacts open for public comment and supported by analysis.

Fourth, CEQ asks whether and how to exclude certain categories of actions common to all federal agencies from the definition. Again, explicit exclusions in the regulation are unnecessary because each agency already maintains its own list of categorical exclusions. We recommend against this revision. Perhaps in its

leadership and review capacity, CEQ can play a role in helping to identify such common issues across agencies and explore whether common treatment in their individual regulations is appropriate.

Finally, CEQ asks whether the regulations should clarify that NEPA does not apply extraterritorially. It is well established that NEPA applies to transboundary impacts as well as the global commons and impacts that affect the US environment. If the intention here is to exclude extraterritorial application of NEPA, we would want any such effort to reflect the provisions in EO 12114.

§ 1508.1(s) Proposed, § 1508.20 Mitigation (Existing)

The proposed definition of "mitigation" at (s) retains the five categories of mitigation in the current regulation and adds a characterization of them as being *"for reasonably foreseeable impacts to the human environment caused by a proposed action...and that have a nexus to the effects of a proposed action."* It also adds a statement that, *"While NEPA requires consideration of mitigation it does not mandate the form or adoption of any mitigation."*

There are several things about this definition of "mitigation" that are troubling. First, because it carries forward the limited definition of environmental effects, only mitigation with a nexus to the *"reasonably foreseeable impacts"* of a proposed action need be considered, thus exempting both the assessment of potential indirect and cumulative impacts as well as the need to seek to mitigate those impacts.

Proposed mitigation that forms the basis for federal agency decisions about a proposed action's desirability also should be legally binding and enforceable. The gratuitous statement that NEPA does not mandate the form or adoption of any mitigation sends the wrong signal in that regard.

> **Recommendation:** Retain original language and delete additional phrases and statements.

§ 1508.27 Significantly (from the existing § 1508.27)

The proposed regulations strike the definition of "significantly" from § 1508.27, and moves the discussion of significance to § 1501.3. Please see our comments on § 1501.3.

> **Recommendation**: We urge CEQ to restore the existing definition of "significantly" in § 1508.27 to the definitions section and proposed § 1501.3(b) to ensure that agencies give due consideration to these important factors in determining the significance of impacts.

§ 1508.1(z) Reasonable Alternatives

Reasonable Alternatives

CEQ proposes a new definition at § 1508.1(z): *Reasonable alternatives means a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant."*

We are concerned that the goals of the applicant, rather than the underlying purpose and need for the project, may improperly foreclose on reasonable alternatives simply because, for instance, they cost more than the applicant wishes to spend, or the applicant desires the project be built on a very specific site. This would hamstring the lead agency in developing reasonable alternatives to the proposed action.

Furthermore, this approach is inconsistent with CEQ's guidance in 40 Questions, #2.a., which states: *"§ 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."*

> **Recommendation**: We strongly recommend striking, *"and, where applicable, meet the goals of the applicant."*

Agency Jurisdiction

In § 5 of the preamble, the NPRM provides context for the definition at § 1508.1(z) stating, *"the proposed definition of 'reasonable alternatives' would preclude alternatives outside the agency's jurisdiction because they would not be technically feasible due to the agency's lack of statutory authority to implement that alternative."*

This is a complete departure from the interpretation of reasonable alternatives over the past five decades. NEPA § 102(2)(e) requires that all agencies: *"Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."* The statute places no limiting qualifier on "appropriate alternatives" to suggest that only alternatives within the agency's jurisdiction are appropriate for consideration, and 40 Questions #2.b provides guidance on this issue: *"An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable although such conflicts must be considered."* Alternatives need not include those that are remote and speculative, but do include reasonable alternatives not within the power of the agency to adopt and put into effect itself. *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

Narrowing the definition of "reasonable alternatives" such that only alternatives within the agency's jurisdiction are analyzed would, in many cases, leave decision makers and the public with an uninformed false choice among alternatives, sometimes among only objectionable alternatives and the no-action alternative. Disclosure and rigorous analysis of the options that are actually feasible to accomplish the underlying purpose and need for a proposed action are critical to informed decision-making, consistent with NEPA § 102(2)(E).

Innumerable projects with alternatives outside the lead agency's jurisdiction have been analyzed over the decades, consistent with the intent of NEPA § 101. For example, although a mining company applies to the U.S. Forest Service for a permit to build a 5,000-acre tailings impoundment on a specific parcel of Forest Service land, other technically and economically feasible site alternatives may exist nearby outside the Forest Service land, including on federal lands managed by BLM or the Bureau of Reclamation, or State- or privately-owned lands. In this example, it is critical that the affected public, including a downstream community, and decision makers are made fully aware that sites on Forest Service land are not the only options for such a large and potentially risky facility, and that less environmentally damaging and less risky sites may exist, which are farther from population centers or critical resources or are able to accommodate safer designs.

Furthermore, CEQ's interpretation of "technical feasibility" for the purpose of determining reasonable alternatives lies completely outside of common usage and understanding of this term, as well as how it has been used in existing NEPA guidance. Its use as a qualifier of what is reasonable appears to be purposely misleading. To most people, a "technically infeasible" alternative would be one that is not substantively possible for the lead agency or anyone else to implement (e.g., because the technology does not exist or is

far too expensive, the site cannot accommodate the project, the resource to be extracted does not actually occur in a given site, etc.).

CEQ's rationale also contravenes NEPA § 102(2)(C) as well as the Council's own promotion of coordination and cooperation among agencies with jurisdiction by law. Often these agencies, including other agencies with NEPA responsibility, as well as tribal, state, and local agencies without NEPA responsibility, have jurisdiction over alternatives outside the lead agency's jurisdiction, as in the mine tailings example above. Under this definition, however, without first exploring which other appropriate alternatives may exist outside its jurisdiction, a lead agency could move ahead with a limited range of alternatives (sometimes including only go/no-go options) without such coordination. In cases where an arbitrarily limited range of alternatives leaves the agency with no choice but to select a highly objectionable alternative, the project would likely be delayed by litigation. Where this arbitrarily limited range of alternatives leaves the agency with no choice but to select the "No Action" alternative, project proponents would need to subsequently shop around other alternatives with other agencies and prepare new environmental analyses, needlessly delaying the project. Either way, purposely ignoring other feasible alternatives would be more likely to result in project delays.

The NPRM continues, *"However, an agency may discuss reasonable alternatives not within their jurisdiction when necessary for the agency's decision-making process such as when preparing an EIS to address legislative EIS requirements pursuant to § 1506.8 and to specific Congressional directives."* While CEQ singles out legislative EISs here, NEPA § 102(2)(e) requires that all agencies: *"Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."* This includes other "major Federal actions," as required in NEPA § 102(2)(c).

CEQ also states that striking § 1502.14(c) is consistent with proposed § 1501.1(a)(2), which states that, in assessing whether NEPA applies, federal agencies should determine *"[w]hether the proposed action, in whole or in part, is a non-discretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process."*

This provision, however, appears to apply to the agency's determination of whether NEPA applies to a project in the first place, not to which types of alternatives are required for analysis. If NEPA applies, even in part, to the project, the agency must apply the implementing regulations to determine which level of assessment to pursue.

Presumptive Number of Alternatives

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

We strongly oppose any inclusion of a presumptive number of alternatives of any kind as both unnecessary and inconsistent with NEPA. CEQ's 40 Questions #1.b already provides guidance on this question and concludes: *"What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case."* We are unaware of any evidence that analyzing too many alternatives in an EIS is even an issue needing a remedy. More importantly, for many proposed actions, especially for more complex actions, a more complex range of reasonable alternatives that would avoid significant impacts may exist, including

different project locations, a smaller or reconfigured footprint, other technologies or designs, or a combination of these. If these were all reasonable alternatives to a particular proposed action, an arbitrary restriction on the number of alternatives analyzed could "game the system" by posing a false choice among alternatives and precluding informed decision-making, which is inconsistent with NEPA.

> **Recommendation**: Do not include a presumptive number of alternatives, but only provide the minimum as including the baseline projected without the proposed action, the proposed action, and reasonable alternatives which might better serve the purpose and goals while reducing harm and/or increasing benefits.