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via Regulations.gov

Mary B. Neumayr
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503
request.schedule@nara.gov

Re: COMMENTS ON Proposed Updates to 40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1507, and 1508 [CEQ-2019-0003]
RIN 0331–AA03

Dear Chairman Neumayr:

Public Employees for Environmental Responsibility ("PEER"), on behalf of itself and current and former public employees with professional experience with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* ("NEPA"), who have asked PEER to comment on their behalf to avoid retaliation by their employers, respectfully submits these comments on the Council on Environmental Quality's ("CEQ") above-captioned notice of proposed rulemaking.

I. Overview and General Comments

The proposed rules intentionally undermine the nation's foundational environmental statute and the policy it advanced: that the federal government should "to the fullest extent possible" elevate environmental considerations to the same level as technical and economic

factors which have historically dominated agency decisionmaking.[1] This proposal is par for an era of compulsory abdication of duty to uphold the law to appease the whimsy of a President who is hostile to the notion of government, scientific fact, and informed decisionmaking. It reflects an ethos of uninformed knee-jerk deregulation that has proven fatal for an overwhelming majority of similar deregulatory efforts.[2]

The CEQ has also determined that all prior guidance documents, regardless of the degree to which they substantively conflict with the proposed rule, shall be voided.[3] This means that the current Administration priorities the only thing that matters, and 50 years of combined government experience, expertise, and perspective is being unilaterally culled. The CEQ has made no effort to explain how the purging of this administrative precedent will do anything but add to confusion about how to implement NEPA, as the agencies undergoing NEPA processes will no longer be able to rely on the practices and expertise they have familiarized themselves with for five decades.

Despite its professed interest in reducing paperwork and wasted time, the proposal in its current state is so lacking in reasoned justification and legal basis that it will only waste the time of the agency, the commenters who have participated in the rulemaking process, and the litigants who will inevitably be challenging it in court. To avoid this consequence we urge the CEQ to withdraw the proposal and reissue a new notice of proposed rulemaking keeping the few positive elements of the proposal and reconsidering the many transparent efforts to shield the government from any unpleasant knowledge about the environmental consequences of its actions.

The instant NPRM is not a rulemaking document that is meant to invite honest comment through the rulemaking process. CEQ has gone out of its way to minimize public comment, holding only two information sessions with limited seating, refusing to respond to a request to extend its comment period until six days before the end of the 60 day period, and providing few if any explanations for its actions. CEQ has little apparent concern for whether the assertions it is making about the statute and caselaw are true or false, and has no evidenced intention of

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[1] House of Representatives, Conference Report [to accompany S. 1075, National Environmental Policy Act of 1969], Dec. 17, 1969, Report No. 91-765, at 9-10

[2] The Trump Administration's current record of defending rulemaking actions against legal challenges under the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"), is 5 victories and 66 defeats. *See* ROUNDUP: TRUMP-ERA AGENCY POLICY IN THE COURTS, INSTITUTE FOR POLICY INTEGRITY, https://policyintegrity.org/trump-court-roundup ((last visited Mar. 4, 2020).

[3] 85 FR 1710.

defending them all in good faith. If it did then the agency would have spent the last 18 months preparing more than a sentence fragment of legal justification, if that, to defend each of the seismic changes to the NEPA regulations that it has offered. By providing only a token effort towards its duty to justify why the agency has made the incomprehensible decisions that it has, it forces the inevitable overwhelming response of commenters to issue dozens of pages of responses which have to speculate as to the agency's actual reasoning for the changes put forward. The disproportionately detailed response that the CEQ's proposal necessitates is a modern example of a principle described by Johnathan Swift:

> Falsehood flies, and truth comes limping after it, so that when men come to be undeceived, it is too late; the jest is over, and the tale hath had its effect: like a man, who hath thought of a good repartee when the discourse is changed, or the company parted; or like a physician, who hath found out an infallible medicine, after the patient is dead.[4]

The CEQ's "hazy effort to communicate a stand or position that doesn't have the stamina of the truth" is seemingly designed to take advantage of the asymmetric responsibilities placed on agencies and the public by the Administrative Procedure Act's ("APA")[5] rulemaking process.[6] CEQ has issued its proposed rules with dozens upon dozens of identified legal, factual, and even simple grammatical errors, each of which must be responded to in an order of magnitude more detail than CEQ has provided in the first instance.[7] In formal debate theory this is known as the "Gish gallop," a technique used during debating that focuses on overwhelming an opponent with as many arguments as possible, without regard for accuracy or strength of the arguments. The term was named after the creationist Duane Gish, who used the technique frequently against proponents of evolution.[8] The technique wastes an opponent's time and may cast doubt on the opponent's debating ability for an audience unfamiliar with the technique, especially if no

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[4] Jonathan Swift, *A review of THE ART OF POLITICAL LYING* (1731)
[5] 5 U.S.C. § 553.
[6] Jack Shafer, *The Limits of Fact-Checking*, POLITICO (Dec. 24, 2015), https://www.politico.com/magazine/story/2015/12/the-limits-of-the-fact-checker-213461.
[7] In fact, this is the second instance, as CEQ has already had one opportunity to account for the paucity of its legal analysis after receipt of largely similar comments in response to its advance notice of proposed rulemaking.
[8] Eugenie Scott, *Challenging Creationist Debaters*, 24 REPORTS OF NATIONAL CENTER FOR SCIENCE EDUCATION 23 (2004).

independent fact-checking is involved or if the audience has limited knowledge of the topics.[9] Of course, in this instance, a judge will ultimately serve as an impartial fact checker of sorts, but only as to the process followed by CEQ in reaching the rule it ultimately promulgates, and it will require an immense expenditure of time and energy by the courts and litigants to finally disprove every assertion made by CEQ in promulgating this rule. As other commenters have explained at greater length:

> Given the emphasis in the ANPRM on efficiency, it is particularly startling to see that the proposal contains several stunning reversals of long-held CEQ positions and decades of practice and case law. While an agency can change its position, it must show awareness of the change, give a reasoned explanation for it, and explain how the change is permissible under the relevant statute. In this instance, some changes are not even acknowledged in CEQ's preamble. For example, there is no acknowledgment that the proposed revision would eliminate all systematic public involvement in the referral process. There is also no acknowledgment that CEQ is eliminating the rule that EISs must be available for 15 days prior to a hearing on the EIS. Other changes are acknowledged but brushed off with a broad reference to providing "more flexibility" or stating that provisions in the current regulations are "unnecessarily limiting" but lack a reasoned explanation and supporting rationale. For example, CEQ states in the preamble that NEPA does not contain the terms "direct indirect, or cumulative effects." It proposes to simplify the definition by simply eliminating those terms and eliminating the requirement to analyze cumulative effects altogether, referencing excessively lengthy documentation and irrelevant or inconsequential information. But CEQ never explains the basis on which it reached these conclusions, let alone acknowledge the fundamental importance of cumulative effects in meeting NEPA's mandate. Nor, given that fleshing out statutory commands and providing guidance for complying with them is an, and perhaps the, essential function of regulations, is absence of a term from the statute a rational basis for excluding it from an implementing body of rules. CEQ cannot cure these deficiencies by providing a new rationale in a preamble to final regulations.
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> [. . .]
> The short ANPRM process was not a well-designed outreach effort but merely a list of broad and often repetitive questions, much more friendly to NEPA specialists than the public. The breadth of the questions provided no real focus on what CEQ's intentions really were in terms of its proposed rulemaking.
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> The process for the proposed revisions is considerably worse. We have identified over 80 issues that warrant comment in the proposed regulations, including the 23 extra questions CEQ poses in the NPRM. However, given the limited time, we are

[9] JOHN GRANT, DENYING SCIENCE: CONSPIRACY THEORIES, MEDIA DISTORTIONS, AND THE WAR AGAINST REALITY 74 (2011).

> still not confident that we identified every issue of concern. Most of the issues raised involve complex legal issues and decades of case law; some involve other areas of the law entirely, such as tort law and constitutional law. CEQ took 18 months to develop this proposal behind closed doors. Any expectation that the public can comprehensively respond to this proposal in 60 days is appallingly wrong at best, and highly cynical at worst.[10]

The conclusion that this extensive explanation moves towards, but does not ultimately reach, is that the proposed rule is procedurally insincere and designed to attract just the kind of outrage it has garnered in the public. The CEQ should withdraw this NPRM and follow rulemaking procedures in good faith to resolve the few legitimate procedural issues identified in the proposal.

II. 40 C.F.R. Part 1500—Purpose and Policy

CEQ has proposed that the title of Part 1500 be changed to remove the word "mandate" because it does not consider NEPA to be a statute which imposes *any* mandates or has any purpose beyond the imposition of procedure. NEPA is not a purely procedural statute, however. The APA, the quintessential procedural statute, establishes a system of processes which must be followed in order to justify the delegation of legislative authority to non-democratic institutions. The procedures in question serve as a means of bringing democratic principles into agency decisionmaking through the notice and comment process, ensure fair decisionmaking, and guide agencies in legally permissible ways to implement the decisions that they reach about how to enforce the statutes that they are entrusted by Congress.

NEPA, on the other hand, is a statute about how to make decisions. It acknowledges that, absent some substantive requirements to bring environmental considerations into government policymaking, they would continue to be sidelined. As such, Congress *mandated* that agencies fully consider the environmental impacts of their actions before they decide to act. The explanation offered by CEQ for this fundamental diminution in the importance of its organic statute is hollow, and its specific changes to the language of Part 1500 are equally baseless.

1500.1(a): Purpose and policy

CEQ's proposed revisionist history would change the very purpose of NEPA review. The original regulation states that NEPA is "our basic national charter for protection of the

[10] Comments of EarthJustice and co-signed organizations, this docket.

environment" and contains "action-forcing" provisions. It states that "The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment." The proposed rule would relegate NEPA to the back of the line. CEQ believes that "NEPA is a procedural statute" and nothing more, deleting all references to action forcing or allowing for any purpose beyond burdening agencies. CEQ's contempt for its foundational statute, evident throughout the NPRM, is most clear in this section which emphasizes that NEPA compliance is not tied to substantive outcomes.

Despite CEQ's dislike of the words "action forcing," they have roots in the original legislative history of the statute, which provides a clearer and less biased interpretation of NEPA's purpose and mandate than CEQ has offered. Senator Henry Jackson, the sponsor of NEPA, emphasized this point on the Senate floor when he explained that "To insure [sic] that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government, the act also establishes some important 'action-forcing' procedures."[11] As the current form of the regulations makes clear, the purpose is to positively influence the ultimate decisionmaking of the agency, which must be informed about environmental impacts which should be weighed "before decisions are made and before actions are taken."[12]

1500.1(b).

This subsection eliminates the requirement that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." It also eliminates the requirement that "the information must be of high quality. Accurate scientific analysis, expert agency comments and public scrutiny are essential to implementing NEPA." The elimination of this language not only continues to eviscerate the purpose of NEPA, gathering and disseminating important environmental information both to decisionmakers and the public, but also the objective that NEPA be a process of high quality or even value to the agency.

Taken in conjunction with the striking of old 1500.2 "Policy," CEQ's proposed revision eliminates the requirement to "use all practicable means, consistent with the requirements of the

[11] 115 Cong. Rec. 40416 (1969). See also S. REP. No. 91-296, 91st Cong., 1st Sess. (1969).
[12] 40 C.F.R. § 4332

Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."

CEQ provides one sentence on this proposed change, merely stating that the word "practicable' is the more commonly used term in regulations to convey the ability for something to be done, considering the cost, including time required, technical and economic feasibility, and the purpose and need for agency action."[13] This is both a non sequitur and, to the extent it explains the agency's decision, makes NEPA analysis conditional on the agency's determination that it is practicable to do so, and by using the term "practicable" potentially imports an entire body of exceptionally complex APA law under 553(b)(B)'s "good cause" exception for rulemaking requirements.[14]

1500.3(b): NEPA compliance—*Exhaustion.*

The justification for including this attempt to artificially limit the jurisdiction of reviewing courts by defining exhaustion of administrative remedies focuses on preventing litigation based on issues the agency believes the commenter did not raise during the public comment period. This purely defensive rule change forecloses the possibility that claims related to new issues created by changes to NEPA documents that occur after the comment period may be brought. It also reinforces CEQ's clear position that its rulemaking is aimed at preventing the public and the courts from enforcing the requirements of NEPA, not at increasing efficiencies in the process or enhancing decisionmaking. This is not a valid reason to promulgate this regulation, and to the extent that the agency has a valid reason for seeking this new section, it is beyond the statutory powers of the agency to define the jurisdiction of federal courts by interpreting NEPA. For these reasons this section should not be adopted.

1500.3(c) Actions regarding NEPA compliance & 1500.3(d) Remedies.

CEQ has also inserted a new § 1500.3(c), ''Actions regarding NEPA compliance,'' which it asserts is necessary "to reflect the development of case law since the promulgation of the CEQ

[13] 45 FR 1692.

[14] NPRM unnecessary "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

regulations" in 1979. This long section describing the limits on agency liability for non-compliance with NEPA is another unlawful attempt to wrest the jurisdiction of Article III courts away through administrative rulemaking, which is not a power conferred to CEQ by NEPA or any other statute., and the limits on what anyone can do about it if they feel damaged by an agency action which was analyzed through NEPA.

The point of this change is to limit the power of the courts to invalidate agency actions not taken in accordance with law under 5 U.S.C. § 706 by limiting the remedies that a judge can order to a re-do of the NEPA process. In the event that an action is taken without complying with NEPA and permanent harm is inflicted upon a plaintiff by a decision made before considering its environmental impacts that may have been made differently if those impacts had been considered, the harm would be remedied by doing a retroactive NEPA analysis. This proposed rule reverses the intent of the statute to achieve litigation advantage. Preventing the action or decision from being made without consideration of environmental consequences in the first instance is the entire and only point of the exercise. It is impossible to achieve the aims of NEPA by conducting an EIS after the decision is already made. By definition such an analysis would not comply with the letter or spirit of the law. CEQ's proposal eliminates any possibility of accountability for compliance with NEPA and signals an intention to functionally end all NEPA compliance by removing the consequences for violating the statute. This unlawful and preposterous rule is beyond the powers of CEQ to promulgate and should be withdrawn.

1500.4 Reducing Paperwork & 1500.5 Reducing delay.

These unenforceable sections further emphasize CEQ's singular focus on box-checking over actual informed decisionmaking. CEQ has evidently decided that the statute it is entrusted to implement is not a valuable check on uninformed decisionmaking, but a burden to be lessened. The presumption is that any action which might have environmental consequences, and as such be subject to NEPA review, is by definition good, and that any consideration of the environmental impacts of that action or decision is either "excessive paperwork" or "delay" or both, which are bad. This is a grotesque misreading of the statute and an abdication of the duty of the CEQ. NEPA is not a burden to agencies but a mechanism for enhancing their decisionmaking. For these reasons this proposed change should be rejected. This discussion is expanded upon in response to Part 1502 regarding time and page limits and the content of NEPA document covers.

1500.6: Agency Authority

The change to this section interprets the phrase "to the fullest extent possible" in section 102 of NEPA to be a default in favor of other statutory duties over NEPA. CEQ states that nothing in the law or regulations "is intended to or should be construed to limit an agency's other authorities or legal responsibilities." This falls squarely in opposition to the legislative intent of NEPA's drafter, as December 17, 1969 House Conference Report on this directly states that "fullest extent possible" language in Section 102 is meant to apply to both clauses (1) and (2) of this Section. As such, the drafters stated:

> … it is the intent of the conferees that the provision "the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in Section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.[15]

Use of an unnecessarily narrow construction of NEPA to avoid NEPA responsibilities is precisely what the CEQ is seeking to accomplish in this rulemaking. By essentially exempting agencies from complying with NEPA where it might interfere with any of its other responsibilities would functionally erase the statute, as presumably any activities which would necessitate a NEPA review are activities carried out pursuant to the agency's statutory authority, or else they would be *ultra vires*. This subsection also applies to the use of the language "fullest extent practicable" in sections 1502.9, 1502.25, and 1506.4, when describing ways in which agencies should attempt to minimize work carried out under NEPA.

III. 40 C.F.R. Part 1501—NEPA and Agency Planning

1501.1: NEPA threshold applicability analysis.

CEQ proposes that environmental considerations only need to be taken into account for "major federal actions" as a threshold matter before environmental impacts are considered, ignoring almost 50 years of judicial interpretations and successful environmental policy implementation. In effect, CEQ has proposed that the clock on environmental decisionmaking be

[15] House of Representatives, Conference Report [to accompany S. 1075, National Environmental Policy Act of 1969], Dec. 17, 1969, Report No. 91-765, at 9-10. [emphasis added]

rolled back to the early 1970s when the nation was still debating the impacts of lead in gasoline and constant environmental crises, such as burning rivers, choking clouds of smog, and catastrophic floods caused by negligent strip mining established the need for rigorous environmental laws.

The reinterpretation of the phrase "major Federal actions significantly affecting the environment" to require a two-step analysis in which an action is not subject to NEPA even if it significantly affects the environment is an arbitrary decision intended flatly to disregard environmental harms by making their consideration conditional. An agency acting in bad faith could easily exploit this new interpretation by segmenting its actions into smaller component steps that, even if they have a catastrophic effect on the environment, are not individually "major." Further, by redefining a "major federal action" to exclude projects which an agency does not control the *outcome* of[16] CEQ has written off *any* consideration of private actions subject to federal approval, such as mining or oil and gas exploration on public lands which may carry the greatest potential environmental impacts. This is nothing more than an illegal handout of public resources to private interests.

Further, the changes to § 1501.1(a)(4) would eliminate compliance with NEPA where it would be inconsistent with "congressional intent" as imagined by the agency from its interpretations of the requirements of another statute. Agencies interested in carrying out congressional mandates with a minimum of fuss to ensure the flow of future appropriations are in the worst position to make objective determinations about whether Congress intended a particular action to comply with NEPA where it is not made explicit. Congress has already spoken explicitly on whether agency actions should comply with NEPA, it did so when it passed the statute. As the Supreme Court has observed, "NEPA's instruction that all federal agencies comply with the impact statement requirement – and with all the other requirements of § 102 – 'to the fullest extent possible,' 42 U.S.C. § 4332, is neither accidental nor hyperbolic."[17] The Court concluded that the only time when an agency may avoid compliance with NEPA due to another statute is where that statute "expressly prohibits or makes full compliance with one of the directives impossible."[18] That a subsequent statute advances a competing policy interest is not

[16] See discussion of § 1508 *infra*.
[17] Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1976)
[18] Id.

justification for ignoring NEPA. In fact it makes sound NEPA documentation even more important to ensure that congressional objectives are carried out in a way which is environmentally sound. When passing NEPA Congress was explicitly concerned that ""all agencies and all Federal officials with a legislative mandate . . . consider the consequences of their actions on the environment."[19]

If Congress has expressed the intent to increase approvals of certain types of projects to meet some objective (e.g. "energy dominance" or "economic stimulation"), discretion must be taken in the selection of individual projects to meet this intent, and there is still a need to prioritize them based on potentially negative environmental consequences, which need to be discovered and analyzed through the NEPA process. Also, where a project with significant impacts goes forward due to a Congressional priority, the impacts still need to be disclosed to the public. The NEPA analysis is the opportunity to disclose the reasons for choosing to approve the project despite the impacts.

Finally, § 1501.1(a)(5) permits an agency to avoid NEPA analyses where "the agency has determined that other analyses or processes under other statutes serve the function of agency compliance with NEPA." In current practice, in this situation, the "other analyses" would simply be incorporated by reference, or by tiering to them in the NEPA document, thus enabling the production of a brief, efficient NEPA document. The need to enable the public to clearly see how the government is protecting their interests is still needed, and NEPA is our mechanism for doing that. There is no basis for jettisoning NEPA in this way when current practice already accounts for the perceived harm of compliance, and the lack of standards for functional equivalence is an invitation for every agency and affected community to argue that NEPA is no longer applicable to land management planning, permitting, fisheries management, mining claims, etc., with none of the public participation or information-seeking purposes that NEPA seeks to uphold.

1501.2: Apply NEPA early in the process & 1506.1(b) Limitations on Actions during the NEPA process.

CEQ proposes to amend the introductory paragraph of § 1501.2, ''Apply NEPA early in the process,'' to change ''shall'' to ''should'' and ''possible'' to ''reasonable.''

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

Who decides what is reasonable? Without a 'shall' requirement for agencies, the applicability of this section is merely advisory rather than true enforcement of the mandate of NEPA that environmental considerations should be considered at the point of inception of a policy decision. Prior to NEPA, agencies decided to undertake actions because of the policy or economic benefits which would be gained, then undertook a decisionmaking process to justify that action before it could ultimately be taken. The goal of NEPA was and has been to place the environmental implications of an agency's action or inaction on the same level as those economic and policy considerations from the earliest possible time, and before groupthink has set in. By giving agencies the discretion to wait to consider environmental concerns until it is "reasonable," in the agency's view, to do so, NEPA is made explicitly an afterthought. No agency decision can be properly informed if the information is only gathered and considered after the agency has already substantially committed to a course of action. This is one of many are many such changes to the NEPA regulations which serve only to make the implementation less vulnerable to any form of judicial accountability.

The current regulation states that *applicants* are not precluded from developing plans or other work necessary to support an application for government permits or assistance, but does not permit agencies themselves to lock themselves into a decision before appropriately considering environmental impacts. The proposed 1506.1(b) would authorize agencies to engage in "such activities, including, but not limited to acquisition of interests in land while the NEPA process is still underway." It is impossible that spending sums necessary to acquire real property interests to support a specific goal will not bias the agency's decisionmakers towards achieving that goal. That CEQ considers this a codification of "existing practice" is simply a self-defeating admission that encourages agencies to ignore NEPA and, by extension, CEQ. This may be the first time in U.S. history that an agency has advocated so strongly for its own irrelevance.

1501.3: Determine the appropriate level of NEPA review.

Section 1501.3(b)(1), though phrased in the permissive terms "agencies *may* consider, as appropriate, the affected area (national, regional, or local)," dictates that the potential significance of environmental effects, and the according level of NEPA action, should vary directly with the type of setting.[20] The proposed section states that "short-term and long-term effects are relevant,"

[20] 85 FR 1714

but the definition of "effects" advanced by the agency excludes almost categorically any consideration of long-term effects. For further discussion of the inconsistent, confusing, and unlawful interpretations of the phrase "effects" and the factors which underlie agency consideration of the appropriate level of NEPA review for different types of federal actions, see discussion at §§ 1501.1, 1508.1(g) and 1508.1(q).

§ 1501.6: Findings of no significant impact.

The term "mitigated FONSI" comes from a CEQ memo from 2011, which stated that "use of mitigation may allow the agency to comply with NEPA's procedural requirements by issuing an EA and a Finding of No Significant Impact (FONSI), or 'mitigated FONSI,' based on the agency's commitment to ensure the mitigation that supports the FONSI is performed, thereby avoiding the need to prepare an EIS."

It is unclear if this is to be used to limit mitigations to those already explicitly required by law. Otherwise this seems irrelevant, since the true use of a mitigated FONSI is just to show under how the impacts are to be kept beneath a threshold of significance. This could be an entirely novel design feature incorporated into the action, or it could be established Best Management Practices which may or may not be described by any law or regulation

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

1501.7: Lead Agencies.

Section 1501.7(g), which would require that Federal agencies evaluate proposals involving multiple Federal agencies in a single EIS and issue a joint ROD or single EA and joint FONSI when practicable, seeks to codify the current administration's "Streamlining" guidance. Early efforts to implement this have yet to be shown to be successful, as interagency conflicts on drafting, environmental impacts to be considered, and other considerations concerning research

and procedure have caused considerably more delay and strife than having two agencies conduct separate NEPA documentation would. Current and former public employees who have been involved in proposed or ongoing joint NEPA processes have identified numerous structural deficiencies in implementation and, based on their experience and expertise, believe that this is an experiment that is doomed to further delay and mismanagement without greater clarity about division of responsibilities and specific guidance. This regulation, by providing nebulous goals for cooperation while eliminating all preexisting guidance issued by CEQ on this or any other NEPA matters, will have the opposite effect. While cooperation between federal agencies is a laudable goal, the complexities involved necessitate an entire separate rulemaking process with much more input from affected federal agencies based on experience implementing this goal. Including this section without further information is doomed to repeat and exacerbate mistakes which are already ongoing. CEQ should withdraw this proposed section and reissue it as a new NPRM of its own to allow focused discussion on this issue without the innumerable other concerns raised by the public in response to this expansive rulemaking.

1501.8: Cooperating agencies.

Section 1501.8(a) changes "federal agency" to "agency" This is an expansion of the possible pool of cooperating agencies. Does this open up the possibility of using questionable groups as "cooperating agencies"? This change would seem prosaic were it not for the numerous other concerns in these comments, and merits particular consideration given that the definition of "federal agency" in § 1508.1(k) includes "States, units of general local government, and Tribal governments." By changing "federal agency" to "agency" in this section, CEQ has added confusion to the scope of the regulation. CEQ should use the original language or clarify what is meant by "agency," which is a term not specifically defined apart from "federal agency."

More importantly, this seems to contradict the specifications of NEPA Section 102(D), which only allows incorporation of findings of State agencies, and only when certain important conditions are met.

1501.9 Scoping.

CEQ's proposed changes reduce or eliminate proper scoping of issues and front-loading proposed actions with mitigation. Without front loading mitigation through scoping, issues are discovered further into the NEPA process and causes problems setting timelines back

due to other law requirements (ESA, NHPA, PRA, CWA, CAA, MBTA, and BGEPA). This is the reason there is complexity and delay. Specialists are not allowed to scope properly and avoid delay because they are not being included in proposed action development.

Most concerning for this section is the limitation on revisions to the scoping process based on the uncovering of new information. In § 1501.9(g), formerly § 1501.7(c), determinations made by an agency may be revised in response to new information *except* as to subsections (a) and (d). For part (d) this makes sense, as it only applies to public notice of an agency's intent, which presumably would only issue in the first instance. It does not make sense for an agency to refuse to reconsider the determinations made under subsection (a), however, because that section adds new language which mandates that agencies should "eliminat[e] from further study non-significant issues." As the very point of the NEPA process is to obtain new information which the agency would not otherwise have before making a decision which may have environmental impacts, agencies should not apply *ex ante* blinders based on incomplete information at the beginning of the scoping process. This would eliminate any value to new information discovered beyond the initial scope determined by the agency and prevent parties from bringing new information to the agency's attention. The new language added to section 1501.9(a) beginngin with "eliminating" to the end of the first sentence should be stricken, and section 1501.9(g) should apply to all other subsections of § 1501.9.

1501.10 Time Limits.

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

There are several problems with this proposed regulation. First, the measurement of time for EISs is glaringly wrong. An accurate assessment of how long an EIS takes should begin with the NOI and end with the publication of the final EIS. The time period between publication of a final EIS and a Record of Decision is not driven by NEPA, but rather by a variety of factors that the decision maker may or may not even control.

Second, the proposed regulation's use of the ROD as the end of the two-year period is arbitrary because it will put at particular disadvantage those agencies that provide by regulation

a pre-decisional period in which draft decisions may be protested or objected to. Both the Forest Service and the Bureau of Land Management have adopted such procedures as a way to identify areas of disagreement with stakeholders. By placing a two-year cap on the period between the Notice of Intent and the ROD, the proposed rule may thus have the perverse effect of compressing the time to prepare NEPA analysis for numerous BLM and Forest Service decisions when compared to other agencies who need not provide a pre-decisional protest or objection period.

A third problem is agency capacity. Today, many agencies lack sufficient capacity to competently execute their NEPA responsibilities, whether preparing their own analyses and conducting their own public involvement or overseeing contractors. In that context, forcing a "one size fits all" timeframe will likely result in longer time periods before compliance is actually completed

IV. 40 C.F.R. Part 1502—Environmental Impact Statement

1502.7 Page limits.

(why is page defined as 500 words and not a page of text?)

The length of documents is not an issue of real relevance to anybody in the NEPA process. It is unlikely there is anybody who reads the entirety of a NEPA Environmental Impact Statement cover to cover, under the original or this revised rule. The point is not to create a compelling piece of narrative prose, but to provide as much information as possible in a single, easily navigable location. By limiting the amount of information which can be included in a NEPA document, the CEQ is hamstringing the utility of an EIS or EA.

The total page length of documents is also not the issue or cause for lengthy time for environmental review. Reducing or limiting specialist input will cause and is currently causing micromanaging of specialist input by management and many iterations of back-and-forth reviews and editing to reach a certain arbitrary page limit. As any good writer will tell you, it is easy to write a long document, but considerably harder and more time consuming to keep as much information in a short one. Content removal also results in an inferior product. The removal of specialist input and the more inferior a product is, subsequently causes vulnerability in court review. Court losses, protests, and appeals set back projects even further, where the delay could have been avoided through the interdisciplinary team process of alternative development and inclusion of all relevant information in the first instance.

Also, because the page limits do not apply to appendices, the inevitable result of this rule is that more and more information will be moved to appendices from primary documents, making the EIS or EA itself an unusable document without having potentially thousands of pages of appendix available to cross-reference. The necessity of jumping back and forth between those documents will further undermine the utility of the single EIS and make their use more difficult.

Finally, the definition of "page" as 500 words will create confusion among agencies who follow CEQ's guidance to use a large number of charts, graphs, and figures,[21] which will occupy more page space but use fewer words. It is inevitable that agencies will face confusion as to how many actual "pages" should be included, and establishing a reliable word count of a document is more difficult than simply counting pages. If the CEQ insists on reducing EISs and EAs to the level of young adult fiction then they should apply a definition of "page" which is intuitive and easy to apply.

1502.11 Cover.

First, grammatically this section is inconsistent with § 1503.4 which still uses "cover *sheet*," as the word "sheet" is intentionally removed from this section. Either this section or § 1503.4 should be revised to account for the inconsistent language.

While setting normal stylistic requirements for the cover of a NEPA document, CEQ also attempts to sneak transaction cost analysis into the NEPA process, ordering agencies in § 1502.11(g) to stamp a pricetag for the "total cost of preparing the environmental impact statement, including the costs of agency full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs" prominently on the cover page. This would be a singular idea in federal governance, and a bad one for a number of reasons. Nobody is under the impression that government is a cheap or simple process. Civil servants are among the most highly specialized and trained persons in the American economy, entrusted with all matters of public goods which by their very nature cannot be accounted for in the private sector. Because environmental protection or degradation affects all Americans, it is entrusted to a government which ostensibly has the interests of all Americans at heart. Applying a cost to a process which inherently cannot have a quantified private or even public benefit is a transparent attempt to sabotage public

[21] See proposed § 1502.8.

perceptions of the NEPA process more than CEQ and the conservative think tanks who provided this section's central conceit[22] already have.

This will, of course, create a timekeeping nightmare, but more importantly will provide the basis for pressure for agencies to shortcut their analyses from regulated entities and conservative politicians. Cost-benefit analysis is not a relevant NEPA consideration, and this cheapens the value of the information by making it seem like a net loss to conduct the analysis. No environmental statute except the SDWA[23] explicitly considers costs when making environmental decisions. Going further than that statute (and by regulation, no less), CEQ is loading the dice against ambitious environmental protection, the value of which is *not* quantified, flying straight past cost-benefit analysis to "cost-nothing analysis" with costs considered in a vacuum. When only the negatives are examined, the outcome will always be negative.

> The benefits of environmental protection span an enormous range from protecting human life and health, to protecting ecosystems and species, to protecting crops and property, to protecting values like freedom, fairness, and community. In any given cost-benefit analysis, one will usually find that significant categories of benefits cannot be quantified. When they are not quantified, their effective value drops to zero in the resulting analysis. They become an afterthought.
> [. . .]
> "The only considerations of relevance to the agencies' regulatory budgets are the costs that regulations impose on regulated entities. Irrelevant to this analysis are the benefits of regulations. Thus has cost-benefit analysis mutated, by executive directive, into cost-nothing analysis. [24]

Agencies must explain their reasons for their regulatory actions, and may not ignore important aspects of the problems before them. And agencies must, according to the Supreme Court's decision in *Michigan v. EPA*,[25] consider both the advantages and disadvantages of the paths they propose to pursue. CEQ here attempts to extend the flawed decisionmaking process of this rulemaking into the substance of the rule they are promulgating: considering only benefits

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[22] *See, e.g.*, Kenny Stein, *The National Environmental Policy Act Belongs in a Museum*, REALCLEARENERGY (June 19, 2019), https://www.realclearenergy.org/articles/2019/06/19/the_national_environmental_policy_act_belongs_in_a_museum_110451.html (op-ed arguing for the abolition of NEPA by the Director of Policy and Federal Affairs for the American Energy Alliance)

[23] 42 U.S.C. § 300g-1(b)(3)(C)(i-iii) (2018).

[24] Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES., ENERGY, & ENVTL. L. REV. 287, 293-301 (2019).

[25] Michigan v. EPA, 135 S.Ct. 2699 (2015)

for this rulemaking, and ordering agencies to consider only costs of complying with NEPA by examining environmental impacts of proposed actions.

CEQ's proposed change is without any real analysis as to why it would be a good idea, disregards all of the benefits provided by environmental impact review, and incentivizes doing less work, which leads to fewer considered alternatives, shunting environmental protection to the side in pursuit of overall wealth for a handful of economically powerful interests. CEQ should strike proposed § 1502.11(g) or amend it so that the benefits of environmental review are equally considered and indicated on the cover in the form of protected natural resources, health impacts, and other co-benefits from environmental protection. Because this quantification and monetization is extraordinarily difficult, CEQ should prefer striking the proposed subsection.

1502.12: Summary.

This proposed section contains a floating close-parenthesis unpaired with an opening parenthesis. If CEQ proposes to otherwise completely undermine the stature which it supposedly seeks to implement then it should do so in the least confusing manner possible.

1502.14: Alternatives.

While this section has several other smaller concerns, the main thrust of the proposed modification is to remove the requirement to consider "all" reasonable alternatives, and allow a more limited range of alternatives to be considered sufficient for NEPA compliance. The point, which is acknowledged by CEQ, is to do less and consider far fewer potentially important alternatives.

PEER's federal employee clients have affirmed that NEPA has for fifty years been *the* mechanism to drive alternative development. The proposed changes would reduce alternative development which, for example, minimizes and ensures no unnecessary or undue degradation under FLPMA. Administrative changes to NEPA cannot remove the requirements of other federal law and organic acts which require rigorous alternative development, and it makes the most sense to leave the alternative consideration process intact in acknowledgment of the efficiencies which agencies have been able to identify in conducting NEPA processes in such a way to meet the demands of other statutes.

Ultimately, CEQ says the quiet part loud when it deletes the language establishing that consideration of alternatives is "the heart of the environmental impact statement." NEPA, under

CEQ's current view, is not about alternatives, but about justifying preordained actions enough to avoid judicial review. This is not only a revisionist approach to NEPA's purpose, but an act of gross disrespect to the judiciary which found that alternative consideration was a central purpose of NEPA prior to the CEQ's 1979 regulations which today's CEQ seeks to unmake.[26]

Two statutory provisions of NEPA clearly state that the required analysis must include: "a detailed statement by the responsible official on . . . alternatives to the proposed action"[27] and that agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[28] The thoughtful and through consideration of reasonable alternatives ensures that federal agencies have considered the information "before decisions are made and before actions are taken." As the D.C. Circuit observed in 1972:

> What NEPA infused into the decision-making process in 1969 was a directive as to environmental impact statements that was meant to implement the Congressional objectives of Government coordination, a comprehensive approach to environmental management, and a determination to face problems of pollution "while they are still of manageable proportions and while alternative solutions are still available" rather than persist in environmental decision-making wherein "policy is established by default and inaction" and environmental decisions "continue to be made in small but steady increments" that perpetuate the mistakes of the past without being dealt with until "they reach crisis proportions." S. Rep. No.91-296, 91st Cong., 1st Sess. (1969) p. 5.
>
> We reiterate that the discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned. **As to alternatives not within the scope of authority of the responsible official, reference may of course be made to studies of other agencies -- including other impact statements. Nor is it appropriate, as Government counsel argues, to disregard alternatives merely because they do not offer a complete solution to the problem. If an alternative would result in supplying only part of the energy that the lease sale would yield, then its use might possibly reduce the scope of the lease sale program and thus alleviate a significant portion of the environmental harm attendant on offshore drilling**.[29]

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[26] See *Monroe County Conservation Council, Inv. v. Volpe*, 472 F.2d 693 (2d Cir. 1972)(describing consideration of alternatives as the "lynchpin" of the EIS).
[27] 42 U.S.C. § 4332(C)(iii).
[28] 42 U.S.C. § 4332(E).
[29] *Nat. Res. Def. Council, Inc. v. Morton*, 148 U.S. App. D.C. 5, 458 F.2d 827, 836 (1972) (emphasis added).

It is clear then, that CEQ does not have the power under NEPA to interpret away requirements that alternatives be considered if they are beyond the scope of authority of the responsible official, if they are entrusted to other agencies, if they do not resolve the entire "problem" that an agency seeks to address by its proposed action, or simply because the agency thinks it has considered too many alternatives and has gotten tired. By eliminating all of these potential alternatives from consideration an agency would be once again blinding itself to potentially superior options in pursuit of justifying a preordained action, which perverts the purpose of NEPA and subordinates government interests to private economic interests. Further, CEQ has eliminated requirements from the regulatory text that discussion of alternatives "sharply defin[e] the issues and clear basis" for an agency's choice among alternatives, and that an agency "devote substantial treatment" to any discussion of why an alternative has been eliminated from consideration. Once again the CEQ is asking agencies to follow its lead in making important decisions without considering why they are being made the same way these regulations have woefully under-discussed their actual necessity or reasoning. The proposed changes to this section should be stricken from the final rule.

1502.16(a)(10): Environmental consequences

New subsection (a)(10) of § 1502.16 adds consideration of "economic and technical considerations, including the economic benefits of the proposed action" to a section on environmental impacts. This focus on economic benefits is unnecessary and pads analysis of environmental impacts with reiteration of economic and technical considerations which an agency will have already considered before beginning a NEPA analysis. No agency decides to undertake NEPA review of a project or action which they have not already considered the economic and technical benefits of. Those benefits, after all, are the impetus for the proposed action. NEPA was passed in order to force agencies to consider environmental impacts *in addition to* the economic and technical benefits which were being considered in the status quo. This proposal sandbags the NEPA documentation by tying up newly limited page space and resources, and also undermines the environmental consequences by presenting them in the same level of discussion as tertiary economic discussion.

It is unclear from which part of NEPA the CEQ proposes to draw a new requirement to consider economic impacts as an independent matter. Reviewing courts have established definitively that economic and social impacts occupy a lesser tier of importance in an

environmental impact statement than do purely environmental or ecological concerns. Without a primary impact on the physical environment, economic factors generally need not be examined in an environmental impact statement.[30] The aim of 42 U.S.C. § 4332 was not to abolish economic or technical progress but to have federal agencies balance environmental concerns against material gains of "progress."[31] Actions whose impact is solely economic do not warrant environmental assessment since only effects would be socioeconomic and such issues are generally outside the concern of NEPA.[32] The National Environmental Policy Act, requires narrowly focused, indirect review of economic assumptions underlying a federal project, but these impacts clearly occupy a lesser tier of importance in an EIS than do purely environmental or ecological concerns. Determinations of economic benefits and costs that are tangential to environmental consequences are within a wide area of agency discretion but should not be included in the primary EIS considerations of § 1502.16.[33]

1502.18 Certification of alternatives, information, and analyses.

This is a barefaced attempt at clawing back judicial review from Article III courts. direct agencies to self-certify compliance with the regulations with the notion that said certification would act as a shield from courts' traditional "hard look" at agency compliance by creating a "conclusive presumption" of compliance. CEQ lacks statutory authority to interpret the APA through the NEPA regulations in a manner that will bind other federal agencies or that will warrant judicial deference, let alone to limit by regulation judicial review of NEPA challenges

The proposed regulations are replete with instances where CEQ oversteps its bounds and intrudes on the authority of the judiciary to administer, interpret, and apply the APA's judicial review provisions. Proposed § 1500.3(c) states CEQ's "intention" that judicial review "not occur before an agency has issued the [ROD] or taken other final agency action." The federal judiciary,

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[30] See *Association Concerned About Tomorrow, Inc. (ACT) v. Dole*, 610 F. Supp. 1101 (N.D. Tex. 1985).
[31] *Trinity Episcopal School Corp. v. Harris*, 445 F. Supp. 204 (S.D.N.Y.), *rev'd*, 590 F.2d 39 (2d Cir. 1978), *aff'd*, 652 F.2d 54 (2d Cir. 1981).
[32] *Panhandle Producers & Royalty Owners Asso. v. Economic Regulatory Admin*., 847 F.2d 1168 (5th Cir. 1988).
[33] *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992 (S.D. Tex. 2004), *aff'd*, 420 F.3d 440 (5th Cir. 2005).

however, has developed an extensive body of caselaw on what constitutes final, reviewable agency action

1502.22: Incomplete or unavailable information

CEQ proposes two changes to this important section. First, it proposes to remove the word "always" from the first statement in the current regulation that reads, "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking."302 The sole reason given in the preamble for this proposed deletion is that the word "always" is "unnecessarily limiting".303 Indeed, the word "always" is supposed to be prescriptive and that is precisely why it should stay in the regulation. As the Court of Appeals for the D.C. Circuit made clear early in its consideration of NEPA's requirements, "one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown."[34]

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

The second proposed change to this regulation is to replace the term "exorbitant" with "unreasonable" in the portion of the regulation that excuses an agency from obtaining complete information relevant to reasonably foreseeable significant adverse impacts. In other words, under the current regulation, an agency has to obtain such information if that is possible unless the overall costs of obtaining it are "exorbitant"; the proposed amendment would change the criteria to "unreasonable costs." We oppose the change in terminology. "Exorbitant" is a term that is more objectively evaluated than "unreasonable".

1502.24: Methodology and scientific accuracy:

[34] Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm., 481 F.2d 1079, 1092 (D.C. Circ. 1973)

CEQ proposes to amend this regulation by adding the somewhat astonishing statement that "[a]gencies . . are not required to undertake new scientific and technical research to inform their analyses." The first mandate to agencies in NEPA is that "all agencies of the Federal Government shall . . . . utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment."[35] Judicial decisions reflect the importance of obtaining information prior to making a decision, even if that involves undertaking new scientific research. "NEPA requires each agency to undertake research needed adequately to expose environmental harms."[36] That agencies are now advised to *not* undertake any significant new research or factfinding is beyond irresponsible, it is an unlawful construction of NEPA. Because of its flagrant conflict with the text of the statute and as applied in court,[37] the proposed revisions to this section should be rejected.

V. 40 C.F.R. Part 1503—Commenting on Environmental Impact Statements

1503.3: specificity of comments

CEQ has offered no guidance for commenters about the sufficiency of "detail . . . necessary to meaningfully participate and fully inform the agency of the commenter's position" when commenters may not know all data relied upon by the agency, the internal process followed to generate a list of alternatives, which alternatives may not have been considered because there was an arbitrary cap on the number of alternatives submitted, etc. Commenters should not be under a duty to explain the significance of their comment when public comment is treated as inherently significant through the democratic nature of the public comment process.

The goal of this section is already met by § 1503.4, which states that "[a]n agency preparing a final environmental impact statement shall consider substantive comments timely submitted during the public comment period and may respond individually and collectively." The CEQ lacks the ability to mandate that members of the public "shall" provide any such details, and the

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[35] 42 U.S.C. §4332(2)(A).
[36] Our Ecosystems v. Clark, 747 F.2d 1240, 1248 (9th Cir. 1984).
[37] NPCA v. Babbitt, 241 F.3d 722, 733 (9th Cir. 2001) ("A part of the preparation process here could well be to conduct the studies that the Park Service recognizes are needed. The Park Service's lack of knowledge does not excuse the preparation of an EIS; rather it requires the Park Service to do the necessary work to obtain it.").

individual agencies are more than capable of determining which comments are sufficiently substantive to merit response in a final NEPA document.

Finally, the requirement that commenters shall reference the specific page number and section of a draft document and the specific changes sought is not practicable for average persons to comment. This rule serves to exclude most commenters as beneath consideration, not just unworthy of specific response. This is a fundamentally undemocratic practice and runs afoul of the basic principle at the core of administrative law that agencies possess rulemaking and administrative power subject to the quasi-democratic check of the public comment process. CEQ's clear preference is that only institutional and well-resourced entities be allowed to file comments, most of which will tend to reinforce the power structures that gave them the excess resources necessary to comply with the complex procedural hurdles that CEQ seeks to impose on members of the public interested in environmental protection. While CEQ may wish to make agencies' duties under NEPA as ephemeral as possible, this unreasoned license to ignore the public's concerns is yet another ground on which the proposed rule will be subject to litigation risk. PEER encourages the agency to withdraw this proposed revision.

VI. 40 C.F.R. Part 1506

1506.6: Public involvement (f) – FOIA

CEQ proposes to delete the provision in the current regulations that makes agency comments on EISs available to the public pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") "without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action."[38]

The preamble explains this deletion by stating that FOIA has been amended numerous times since NEPA was enacted. That is a true statement but it fails to explain the rationale for this deletion. The FOIA Improvement Act of 2016 in fact *increased* public access to information, imposing new requirements on agencies seeking to *withhold* information from the public. CEQ reads this as instead justification to spuriously withhold *more* information from the public, not less.

[38] 40 C.F.R. § 1506.6(f).

The proposed rule also deletes a sentence from 1506.6(f) which orders agencies to make materials available 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, including the Council." The elimination of this reproduction fee term has only one possible purpose: allowing agencies to sabotage public access to information about the interagency NEPA process by overcharging members of the public who wish to see it. The preamble claims that the elimination of this fee waiver language "align[s] paragraph (f) with the text of section 102(2)(C) of NEPA, including with regard to fees." There is no reasoning for how the language is more or less aligned other than a hollow assertion. This proposed amendment should be rejected.

VII. 40 C.F.R. Part 1508.1—Definitions

1508.1(g) Effects

CEQ has proposed to eliminate consideration of indirect or cumulative effects from NEPA analyses. Like many aspects of this proposed revision, this new definition will eviscerate the purpose and effectiveness of NEPA, and ignores the vast majority of environmental harms which are not flagrant at the time of action. The analysis of § 1501.9, *supra*, is also applicable to this discussion and incorporated by reference. Because the definition of effects has also been unlawfully limited to not apply to effects beyond an agency's "limited statutory authority," the discussion of jurisdictional limits of considerations under § 1502.14 is applicable to this section and incorporated by reference.

Any NEPA report must include "*any* adverse environmental effects which cannot be avoided should the proposal be implemented."[39] The statutory text orders that the federal government shall "recognize the worldwide and long-range character of environmental problems" when considering environmental harms under NEPA.[40]

This change also effectively eliminates the requirement that decisions should be based on science. What an ordinary person would "reasonably foresee" based on their unfounded beliefs can be very different from what the scientific community projects based on solid evidence or what NEPA professionals would foresee based on years of experience in applying the law. Cumulative and indirect effects consideration has been a fundamental part of the NEPA process since its

[39] 42 USC 4332(2)(C)(ii)
[40] 42 USC§ 4332(2)(F)

inception. Not coincidentally, this is also the major basis for NEPA challenges regarding climate change issues, the body of which have recognized that analysis of climate change, an indirect and cumulative effect, *is* required by the statute.

NEPA's legislative history is replete with references to the complexity of environmental impacts, the consequences of "letting them accumulate in slow attrition of the environment" and the "ultimate consequences of quiet, creeping environmental decline" - all of which pointed to the need for an analysis of proposed impacts beyond the immediate, direct effects of an action.[41]

Federal courts recognized the importance of cumulative effects analysis long before CEQ's 1979 regulations. In 1975, the Court of Appeals for the Second Circuit reversed a lower court decision in part on the grounds that the analysis in the EIS at issue evaluated only the effects of the particular proposed action, a proposal for dumping two million cubic yards of polluted spoil in Long Island Sound, and disregarded the cumulative impacts of other related projects.[42]

As in so many other proposed amendments, this proposed redefinition is unlawful and will inevitably be ruled illegal by a reviewing court. CEQ is encouraged to withdraw this proposed redefinition to save time for litigants and reviewing courts. If CEQ believes that those decisions were reasoned incorrectly, it should state as much in its NPRM instead of baiting litigation this way.

1508.1(q) Major federal action

The proposed rule exempts from NEPA any action which would otherwise be defined as a major federal action but only include "minimal federal funding or minimal federal involvement where the agency cannot control the outcome of the project." The language of this section exempts regulated activity that takes place on public lands by private parties, such as oil and gas leasing, mineral exploration for hard rock mining, and similar activities which generate enormous

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[41] 115 Cong. Rec. 29070 (October 8, 1969); see also, report accompanying S. 1075, National Environmental Policy Act of 1969, Senate Committee on Interior and Insular Affairs, July 9, 1969.

[42] Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2nd Cir. 1975)(" a good deal of our present air and water pollution has resulted from the accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources. NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration.").

environmental impacts in the form of toxic pit lakes, habitat destruction, roadbuilding, etc. All of these "outcomes" are potentially beyond the "control" of a federal agency, because the agency is often only granting a permit or lease for commercial activity which may or may not ultimately take place. The word "control" is not defined, but under generally accepted agency law[43] may be as restrictive as to only apply to direct actions by federal employees and contractors or as broad as to apply to any range of actors. Given the current CEQ's hostility to enforcing NEPA it is not unreasonable to assume that the CEQ will adopt the least restrictive definition, but regardless this interpretation is unlikely to withstand judicial scrutiny as a reasonable interpretation of the requirements of NEPA.

Further, the exception of acts such as permitting, financial assistance, or technical assistance from NEPA is in direct conflict with the statute's policy aims, which explicitly apply to "all practicable means and measures, including financial and technical assistance."[44]

1508.1(z): Reasonable alternatives

CEQ proposes to add a definition of "reasonable alternatives" to the regulations.

The proposed definition would, among other things, state that reasonable alternatives "meet the purpose and need for the proposed action, and, where applicable meet the goals of the applicant". Similar to our position on the insertion of the applicant's into the definition of purpose and need, we oppose including an applicant's goals as an intrinsic criteria for the definition of "reasonable alternatives".

Agencies must independently assess whether an alternative is reasonable alternative to meeting the purpose and need and not rely solely on the assessment of the applicant. For example, in *Southern Utah Wilderness Alliance v. Norton*, the Bureau of Land Management's "unquestioning acceptance" of the project proponents for oil and gas leasing inappropriately limited the agency's alternative analysis.[45] Requiring alternatives to meet the purpose and need of an applicant also overlooks the importance of alternatives developed outside of the agency but which must be considered by the agency.

§ 1508.1(aa) - Definition of "reasonably foreseeable"

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[43] *See generally* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF AGENCY (2006).
[44] 42 U.S.C. § 4331(a).
[45] 237 F. Supp. 2d 48 (D.D.C. 2002).

CEQ proposes to adopt a definition of "reasonably foreseeable" as being "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision." CEQ also 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.

The CEQ has made it clear that they don't know how to define the terms that they're proposing to include to define effects, and their attempt will massively increase ambiguity. The definition of "proximate cause" in tort law revolves around "foreseeability"

In this proposed rule, "CEQ proposes to define ''reasonably foreseeable'' consistent with the ordinary person standard—that is what a person of ordinary prudence would consider in reaching a decision." In the context of tort law, however, the appropriate definition would specifically reference a "reasonably prudent decision maker" and not an "ordinary person". Under the Restatement 2d of Torts, "[i]f an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person."[46]

When most people think of "probable" or "reasonably foreseeable" outcomes they don't think in terms of mathematical probabilities but base it on their own experience, with all the logical flaws inherent to that experience. The ambiguity effect causes people to be less likely to make comments or avoid options for which the probability of a favorable outcome is unknown.[47] The base rate fallacy leads decisionmakers to ignore general information and focus on information only pertaining to the specific case, even when the general information is more important.[48] Further, as regards indirect or cumulative impacts, the institutionalization of probability neglect will lead decisionmakers to neglected entirely things they perceive as small or distant risks, whose perceptually low likelihood of occurrence is rounded down to zero.[49] These are a small sample of the innumerable biases that infect "reasonable person" oriented legal

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[46] Restat 2d of Torts: Liability for Physical and Emotional Harm

[47] BORCHERDING, KATRIN; LARIČEV, OLEG IVANOVIČ; MESSICK, DAVID M., CONTEMPORARY ISSUES IN DECISION MAKING (1990).

[48] Kahneman, Daniel; Amos Tversky, On the psychology of prediction, 80 Psych. Rev. 237 (1973).

[49] *See* DANIEL KAHNEMAN, THINKING FAST AND SLOW 143 (2011).

standards, which taken collectively demonstrate the extraordinary risks inherent in its adoption by the CEQ.

The doctrine of proximate cause is *notoriously* confusing. The doctrine is phrased in the language of causation, but in most of the cases in which proximate cause is actively litigated, there is not much real dispute that the defendant but-for caused the plaintiff's injury. The doctrine is actually used by judges in a somewhat arbitrary fashion to limit the scope of the defendant's liability to a subset of the total class of potential plaintiffs who may have suffered some harm from the defendant's actions. Even the American Law Institute has accepted that the proximate cause standard is unworkable in individual conflicts,[50] and its importation into environmental regulatory law for the scope of environmental effects that an agency must consider is not just a stumble, but a leap into an unknown abyss.

VIII. Conclusion

For the above reasons, the CEQ should withdraw its notice of proposed rulemaking and either reissue it with a serious discussion of the many sweeping changes it wishes to implement, along with a reference to the statutory or other powers it relies upon for each change, or accept that the changes it wants to impose are, for the most part, illegal.

Sincerely,

Kevin H. Bell

Staff Counsel, Public Employees for Environmental Responsibility

[50] Restatement (Third), Torts: Liability for Physical and Emotional Harm (2010).