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March 10, 2020

Ms. Mary B. Neumayr, Chairperson
Council on Environmental Quality
730 Jackson Place N.W.
Washington, D.C. 20503
Submitted via federal eRulemaking portal
https://www.regulations.gov

Re: Comments to Proposed Rulemaking
Docket No. CEQ-2019-0003

Dear Chairperson Neumayr:

On behalf of the undersigned organizations and individuals, Great Rivers Environmental Law Center respectfully submits the Council on Environmental Quality ("CEQ") with the following comments on the agency's proposed rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020) (to be codified at 40 C.F.R. Chapter 1500) ("Proposed Regulations").

Missouri Confluence Waterkeeper ("MCW") is a nonprofit organization focused solely on clean water with the goal of providing drinkable, fishable, and swimmable water to all residents of the State of Missouri. MCW is a member of the Waterkeeper Alliance which is an international nonprofit organization that serves and protects waters by connecting local Waterkeeper Organizations and Affiliates worldwide with the goal of drinkable, fishable, swimmable water everywhere. Its members enjoy boating, canoe racing, kayaking, paddle-boarding, wildlife observation, and other recreational activities on Missouri's waterways; have aesthetic, recreational, and professional interests in protecting and maintaining the water quality of Missouri's waterways; and share the interests of MCW in protecting and restoring Missouri's waters. MCW and its members are concerned that CEQ's proposed regulations will negatively

impact Missouri's waterways without federal agencies taking a hard look at water quality impacts from federal actions and by preventing the public, including itself, from fully participating in government decision making that impacts Missouri's waterways.

The Missouri State Conference of the National Association for the Advancement of Colored People ("NAACP") is the Missouri affiliate of the nation's foremost, largest and most widely recognized civil rights organization. Its more than half-million members and supporters are the premier advocates civil rights in their communities. Environmental justice is one of the NAACP's current, core issues. Environmental injustice has a disproportionate impact on communities of color and low-income communities in Missouri and throughout the United States.

Missouri Coalition for the Environment ("MCE") is a nonprofit independent, citizen's environmental organization advocating for clean water, clean air, clean energy and a healthy environment. MCE works to preserve and enhance the scenic, scientific, educational, historical, wilderness, wildlife, open space, outdoor recreation and public health values of the physical environment, and to coordinate, encourage and assist efforts of others to maintain and enhance environmental quality for Missouri's people and their environment. MCE is a membership organization composed of more than 1,000 individual members.

Great Rivers Environmental Law Center is a public interest law firm that provides free and reduced-fee legal services to individuals, organizations and citizen groups working to protect the environment and public health.

Great Rivers and the undersigned organizations have extensive experience and expertise with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), the CEQ's regulations and guidance promulgated thereunder, and the body of federal case law interpreting the statute and federal agencies' obligations under the law. This experience and expertise offers Great Rivers and the undersigned organizations unique insights into the pros and cons of the Proposed Regulations.

The Proposed Regulations are severely flawed, violate the letter and intent of NEPA and will not satisfy the objectives of this exercise as articulated in the preamble. The Proposed Regulations are, therefore, arbitrary and capricious, were issued in excess of the CEQ's statutory authority, in violation of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"), and otherwise not in accordance with the law. Further, the Proposed Regulations would immediately eliminate important procedural rights on which Great Rivers, the undersigned organizations and other members of the public rely. As such, the undersigned organizations and their members will be adversely affected by the Proposed Regulations if enacted. Further, the Proposed Regulations, if enacted, will have far-reaching damaging effects on the places and people Great Rivers and its clients advocate for and help to protect.

I. The CEQ Lacks the Legal Authority to Remove Cumulative and Indirect Impacts From the Definition of "Effects or Impacts" as it has Proposed in 40 C.F.R. § 1508.1(g).

The definition of "effects and impacts" proposed by 40 C.F.R. § 1508.1(g) would completely remove cumulative and indirect effects from the definition. Further, the Proposed Regulations include a direction to agencies that "[a]nalysis of cumulative effects is not required."[1] Finally, CEQ is actively soliciting comment on whether the final rule should also "affirmatively state that consideration of indirect effects is not required."[2] These proposed changes would allow agencies to avoid undertaking any NEPA review for projects that would result in such effects or impacts. It would also allow agencies to avoid any consideration of such effects in their NEPA analysis. The CEQ appears to presume that it has the authority to make such substantive changes to NEPA's scope. However, an examination of the clear language of NEPA, its legislative history, and early case law interpreting the statute all make it clear that the CEQ lacks such authority, because the statute mandates that cumulative and indirect effects clearly fall within NEPA's scope. As such, the proposed rule amounts to a clearly improper attempt by the agency to make a power grab – an effort to usurp control over the operation of an important environmental statute from the legislature that enacted the law and the judiciary that subsequently construed it.[3]

A. Statutory Language

The clear language of the Act requires that agencies "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment."[4] In order to properly undertake such a systemic and interdisciplinary approach, agencies must consider the cumulative and indirect effects of their actions. Further, section 102(1) of the Act, which directs that agencies interpret and administer the laws of the United States in accordance with the policies set forth in section 101 of the law, mandates the inclusion of such impacts.[5] Among the policies set forth in section 101 is "the continuing responsibility of the Federal Government to use all practicable means … to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations…."[6] Agencies cannot possibly act as trustees for the environment on behalf of future generations without considering the cumulative and indirect effects of their proposed actions. Accordingly, by proposing to remove any requirement to consider indirect and cumulative impacts, the proposed regulations disregard and contradict the clear edict of the statute, to ensure that its actions do not negatively impact the environment for future generations. In that way, the

[1] Proposed Regulations at § 1508.1(g).
[2] Preamble to Proposed Regulations at 1708.
[3] *Patchak v. Zinke,* 138 S. Ct. 897, 904-5 (2018).
[4] 42 U.S.C. § 4332(2)(A).
[5] 42 U.S.C. § 4332.
[6] 42 U.S. C. § 4331(b)(1).

proposed regulation amounts to an improper attempt by the CEQ to usurp the legislature's power to legislate.

B. Legislative History

The legislative history of the statute confirms that Congress intended NEPA to be broadly interpreted and applied. The Conference Committee Report for the final version of the statute provides that:

> [I]t is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authority to avoid compliance.[7]

Similarly, the Senate Report indicates their concurrence:

> [I]t is the continuing policy and responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal planning and activities to the end that certain broad national goals in the management of the environment may be attained.[8]

In describing NEPA's reach, the Senate explained that:

> Wherever planning is done or decisions are made which may have an impact on the quality of man's environment, the responsible agency or agencies are directed to utilize to the fullest extent possible a systematic, interdisciplinary, team approach. Such planning and decisions should draw upon the broadest possible range of social and natural scientific knowledge and design arts. Many of the environmental controversies of recent years have, in large measure, been caused by the failure to consider all relevant points of view in the planning and conduct of Federal activities. Using an interdisciplinary approach that brought together the skills of the landscape architect, the engineer, the ecologist, the economist, and other relevant disciplines would result in better planning and better projects. Too often planning is the exclusive province of the engineer and cost analyst.[9]

It is clear from this language that NEPA's requirements are intended to be broadly construed, so as to ensure that agencies consider the "broadest possible range" of environment impacts

[7] H.R. Rep. No. 91-765 at 9-10 (1969) (Conf. Rep.).
[8] S. Rep. No. 91-296 at 9 (1969).
[9] *Id.* at 20.

associated with government action. By excusing agencies from consideration of any cumulative and indirect impacts of agency actions, the proposed regulations would operate to limit the statute's scope, and directly contradict the letter and spirit of the statute's legislative history. In other words, Congress intended that agencies apply the statute broadly, and included the "to the fullest extent possible" language to ensure that happened.

Congress also endorsed the "action-forcing" approach of the statute:

> But, if goals and principles are to be effective, they must be capable of being applied in action. S. 1075 thus incorporates certain "action-forcing" provisions and procedures which are designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment.[10]

Taken together, these excerpts from NEPA's legislative history make it clear that Congress understood NEPA to obligate agencies to "use all practicable means" to "the greatest extent possible" to serve Congress' goals in managing the environment. The statute permits no agency to utilize a narrow construction of its authority. However, the proposed regulations run directly afoul of this requirement.

Further, the Senate confirmed NEPA's forward-looking nature, and its need to address impacts that might only be felt by future generations. It explained that:

> [a]s the evidence of environmental decay and degradation mounts, it becomes clearer each day that the Nation cannot continue to pay the price of past abuse. The costs of air and water pollution, poor land-use policies and urban decay can no longer be deferred for payment by future generations. These problems must be faced while they are still of manageable proportions and while alternative solutions are still available.[11]

In addition, the Senate declared that NEPA imposes upon each generation the "responsibility to improve, enhance, and maintain the quality of the environment to the greatest extent possible for the continued benefit of future generations."[12] In other words, Congress believed NEPA to be concerned with more than the direct environmental effects of Federal Government action. Congress understood it to be equally concerned with the indirect and cumulative effects. The CEQ's proposal to completely remove such effects from consideration by the statute completely flies in the face of this congressional intent.

C. Analysis of Case Law

It is also significant that early federal case law, decided before the CEQ issued its 1978 regulations, unanimously determined that the statute is triggered by indirect and cumulative

[10] *Id.* at 9.
[11] *Id.* at 5.
[12] *Id.* at 18.

impacts, and in addition, requires that such impacts be evaluated along with direct impacts. Perhaps the first federal higher court to rule on the subject, the Court of Appeals for the Second Circuit, determined that NEPA reaches cumulative and indirect environmental effects of agency action in addition to direct effects:

> In deciding 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.[13]

In that case, the Court determined that a jail construction project was subject to NEPA because of the cumulative effects the jail would have on the surrounding environment.[14] A few years later, the United States Supreme Court concurred in *Kleppe v. Sierra Club.* There, the Court determined that statute (and not the regulations) requires federal agencies to consider the cumulative impacts of multiple proposals for major federal action "that will have cumulative or synergistic environmental impact upon a region" in order to comply with the "action forcing" requirements of section 102(2)(C) of NEPA.[15] Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.[16] Virtually all of the Courts of Appeals considering NEPA's applicability in its early years concurred with this view.[17]

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[13] *Hanly v. Kleindienst,* 471 F.2d 823, 830–31 (2nd Cir. 1972), *cert. denied,* 412 U.S. 908, (1973).
[14] *Id.*
[15] *Kleppe v. Sierra Club*, 427 U.S. 390, 409–10 (1976).
[16] *Id.*
[17] *See, e.g., Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2nd Cir. 1975) (Explaining that "NEPA was, in large measure, an attempt by Congress to instill in the environmental decision making 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."); *City of Davis v. Coleman*, 521 F.2d 661, 677 (9th Cir. 1975) (Confirming that "[w]hile the analysis of secondary effects is often more difficult than defining the first-order physical effects, it is also indispensable."); *Swain v. Brinegar*, 517 F.2d 766, 775 (7th Cir. 1975) (Determining that "[NEPA] recognizes that each 'limited' federal project is part of a large mosaic of thousands of similar projects and that cumulative effects can and must be considered on an ongoing basis."); *Minnesota Pub. Interest Research Grp. v. Butz,* 498 F.2d 1314, 1322 (8th Cir. 1974) (Concluding that "NEPA is concerned with indirect effects as well as direct effects."); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n,* 481 F.2d 1079, 1086–88 (D.C. Cir. 1973) (Establishing that an agency must undertake a NEPA that considers the "overall effects of broad agency programs," and not "an unnecessarily crabbed approach" limited only to the consideration of impacts on a particular facility); *Jones v. Lynn*, 477 F.2d 885, 891 (1st Cir. 1973) (Calling an agency's proposed piecemeal approach to evaluating the environmental impacts of a project "a perversion of NEPA"). Further, even more current Supreme Court cases cited by the CEQ in the preamble to the rule acknowledge the necessity of considering indirect and cumulative impacts of agency action in deciding NEPA's scope. *See, e.g., Dep't of Transp. v. Public Citizen,* 541 U.S. 752, 763 (2004).

Finally, CEQ's own guidelines, issued in April of 1971, long before the original CEQ regulations were codified in 1978, set out the CEQ's understanding that NEPA mandates the preparation of an environmental statement when "it is reasonable to anticipate a cumulatively significant impact on the environment from Federal Action."[18] Similarly, the 1971 Guidelines require agencies to consider primary and secondary significant consequences in environmental impact statements, explaining that "[t]his in essence requires the agency to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations."[19] In publishing these guidelines, the CEQ confirmed that it shared the view espoused by the legislature in the statute's legislative history, as well as the view of the federal courts interpreting the statute, that NEPA requires agencies to consider indirect and cumulative impacts. This position was endorsed and expanded upon with the current version of the CEQ regulations, enacted in 1978.[20]

While agencies are permitted to rescind or change a regulatory position, they must display awareness of the change in position, and articulate "good reasons" for the change in policy.[21] Further, an agency may sometimes need to account for prior fact finding or certain reliance interests created by a prior policy that conflict with the current policy position. [22]The proposed regulations clearly constitute a reversal of the CEQ's position on consideration of indirect and cumulative impacts – the proposed regulations will expressly remove any requirement to consider such effects.[23] However, the CEQ utterly fails to acknowledge this change in position. Instead, the agency appears to assert the proposed rule does not constitute a change in position, suggesting instead that the change will merely "clarify the meaning of effects," and "reduce confusion and unnecessary litigation.[24] Further, the agency has not articulated any "good reason" for the rule change consistent with the twin aims of NEPA – "consideration of every significant aspect of the environmental impact of a proposed regulation" or "ensuring "that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."[25] In fact, the proposed change will serve only to excuse federal agencies from consideration of environmental impacts, and deprive the public of information concerning those impacts. As such, the CEQ has failed to properly justify its change in regulatory position. The proposed rules, if enacted, would constitute an arbitrary and capricious agency action.

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[18] CEQ Guidelines, 36 Fed. Reg. 7724, 7725 (April 23, 1971).
[19] *Id.*
[20] *See, e.g.* 40 C.F.R. §§ 1508.7 and 1508.8.
[21] *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).
[22] *Id.*
[23] *See, e.g.,* proposed section 1508.1(g) ("Analysis of cumulative effects is not required").
[24] Preamble to Proposed Rule, 85 Fed. Reg. at 1707.
[25] *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97 (1983).

II. The CEQ Lacks the Legal Authority to Remove from NEPA's Scope Any Effects That the Agency Has No Ability To Prevent Due To Its Limited Statutory Authority or That Would Occur Regardless of the Proposed Action

The definition of "effects and impacts" proposed by 40 C.F.R. § 1508.1(g) provides 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." However, this proposed change is directly contradicted by the language of the statute and the legislative history, and is not even supported by the caselaw cited by the CEQ as authority. As a result, this proposed rule change also amounts to an improper attempt by the CEQ to usurp control from the legislature and the courts.[26]

As outlined above, the Act requires 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 in decision making which may have an impact on man's environment."[27] Rather than restricting agencies to environmental impacts falling only within their own purview, this provision contemplates agencies taking a broad, interagency view to decision making. In order to properly undertake such a systemic and interdisciplinary approach, agencies must consider the cumulative and indirect effects of their actions. Further, the detailed statement mandated by (2)(C) requires consideration of "*any* adverse environmental effects which cannot be avoided should the proposal be implemented."[28] This language does not contemplate any limitation on the scope of the considered effects, instead it requires a consideration of *any* such effects. The CEQ's proposal to limit the scope of NEPA to any individual agency's purview directly conflicts with this provision, and amounts to an improper attempt by the CEQ to usurp the legislature's power to legislate.

This proposed change to the statute is also directly contradicted by the legislative history for the statute. The Senate report for the statute specifies that NEPA "establishes a number of operating procedures to be followed by all Federal agencies as follows:"

> (a) Wherever planning is done or decisions are made which may have an impact on the quality of man's environment, the responsible agency or agencies are directed to utilize to the fullest extent possible a systematic, interdisciplinary, team approach. Such planning and decisions should draw upon the broadest possible range of social and natural scientific knowledge and design arts. Many of the environmental controversies of recent years have, in large measure, been caused by the failure to consider all relevant points of view in the planning and conduct of Federal activities. Using an interdisciplinary approach that brought together the skills of the landscape architect, the engineer, the ecologist, the economist, and other relevant disciplines would result in better planning

[26] *Patchak v. Zinke,* 138 S. Ct. 897, 904-5 (2018).
[27] 42 U.S.C. § 4332(2)(A) (emphasis added).
[28] 42 U.S.C. § 4332(2)(C) (emphasis added).

> and better projects. Too often planning is the exclusive province of the engineer and cost analyst.
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> (b) All agencies which undertake activities relating to environmental values, particularly those values relating to amenities and aesthetic considerations, are authorized and directed to make efforts to develop methods and procedures to incorporate those values in official planning and decision making. In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them in comparison with economic and technical factors. As a result, unless the results of planning are radically revised at the policy level and this often means the Congress-environmental enhancement opportunities may be forgone and unnecessary degradation incurred. A vital requisite of environmental management is the development of adequate methodology for evaluating the full environmental impacts and the full costs of Federal actions.
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> (e) In recognition of the fact that environmental problems are not confined by political boundaries, all agencies of the Federal Government which have international responsibilities are authorized and directed to lend support to appropriate international efforts to anticipate and prevent a decline in the quality of the worldwide environment.[29]

Through these words it is clear that the legislature understood and intended NEPA to require a broad, interagency approach. The CEQ's proposed regulations directly conflict with that intent and understanding. As a result, it lacks the authority to make the proposed change to the definition of effects and impacts.

The CEQ's justification for this change is a citation to the *Dept. of Transp. v. Public Citizen* case.[30] However, the CEQ appears to be attributing too much to the *Public Citizen* case. *Public Citizen* involved a challenge to an agency's failure to consider the environmental impacts resulting from the additional pollution caused by a proposed regulation that would have allowed the entry into the United States of additional vehicles from Mexico.[31] In rejecting the challenge, the Court cited the fact that the agency lacked any ability to overrule the President's action that made the regulation possible, and therefore could not "act on whatever information might have been contained in an EIS."[32] The case does not, as CEQ asserts, stand for the proposition that an agency never has to consider environmental effects outside of its jurisdiction. Instead, it merely limits NEPA's scope when the agency legally lacks any authority to undertake any different course of action than the one being considered.[33]

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[29] S. Rep. No. 91-296 at 20-21 (1969).
[30] Preamble to Proposed Rule at 1708.
[31] 541 U.S. 752, 766 (2004).
[32] *Id.* at 768.
[33] *Id.*

In light of the clear statutory language and legislative history, it is clear that the CEQ has exceeded the scope of its authority in proposing this change to the definition of "effects and impacts." Any attempt by the agency to implement the regulation as proposed would be arbitrary and capricious, would exceed the agency's statutory authority, and would not be in accordance with the law.

III. The CEQ Lacks the Legal Authority to Remove from NEPA's Scope Any Effects That Are Remote in Time, Geographically Remote, or the Product of a Lengthy Causal Chain

The definition of "effects and impacts" proposed by 40 C.F.R. § 1508.1(g) provides that "effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain." Further, the CEQ has proposed to remove the current requirement that "the significance of an action must be analyzed in several contexts such as a whole (human, national), the affected region, the affected interests, and the locality."[34] In its stead, the proposed 40 C.F.R. § 1501.3(b)(1) provides that "agencies *may* consider, as appropriate, the affected area (National, regional, or local)."[35] These changes are offered in direct contravention to the clear language of the statute as well as to applicable Supreme Court case law, and as a result, amount to another improper attempt by the CEQ to usurp control from the legislature and the courts.[36]

Included in NEPA's Congressional declaration of purpose is a comprehensive pledge to "prevent or eliminate damage to the environment and biosphere" through the requirement that federal agencies consider and bring to the public's attention the environmental effects of proposed agency actions.[37] The statute also directs agencies to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."[38] Further, the statute requires all federal agencies to "recognize the worldwide and long-range character of environmental problems and, where consistent with foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."[39] Clearly, this language expresses no Congressional intent to limit agency consideration of the time or geographical scope of environmental impacts. To the contrary, in enacting NEPA, Congress seemed much more concerned with ensuring federal agencies cast a broad net when considering the environmental consequences of their actions.

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[34] 40 C.F.R. § 1508.27(a).
[35] Proposed Regulations (emphasis added).
[36] *Patchak v. Zinke,* 138 S. Ct. 897, 904-5 (2018).
[37] 42 U.S.C. § 4321.
[38] 42 U.S.C. § 4331(b)(3).
[39] 42 U.S.C. § 4332(2)(F).

The legislative history for the statute further confirms Congress's intent. The Senate Report cites a number of negative environmental conditions being faced by both the Nation as well as the world.[40] Further, the report explains that "[t]he purpose of [NEPA] is, therefore, to establish a national policy designed to cope with environmental crisis, present or impending. The measure is designed to supplement existing, but narrow and fractionated, congressional declarations of environmental policy."[41] The report also clarifies that NEPA mandates "it is essential that the widest and most efficient use of the environment be made to provide both the necessities and the amenities of life."[42]

The Supreme Court agrees that NEPA requires a broad dissemination of information to the public and other governmental agencies.[43] The time and geographical scope limitations the proposed regulations would place on federal agencies' requirement to consider the environmental impacts of their actions would violate the twin aims of NEPA, and would directly contradict the letter and stated congressional purposes of the statute. If the CEQ implements the regulation as proposed, it would exceed its statutory authority, and violate its congressional delegation.

IV. The CEQs Proposed Revisions to 40 C.F.R. § 1502.14 Will Absolve Agencies of their Statutory Duty to Meaningfully Evaluate Alternatives to Agency Action in Clear Violation of NEPA.

Congress viewed the evaluation of alternatives as so essential to an agency's decision-making under NEPA that it expressly set out the requirement in two different sections of the statute. Section 102(2)(C) requires that an Environmental Impact Statement include an evaluation of alternative courses of action.[44] Section 102(2)(E) requires that the agency evaluate alternatives in "any proposal which involves unresolved conflicts concerning alternative uses of available resources."[45]

For approximately the past 40 years CEQ has characterized an agency's obligation to evaluate alternatives as "the heart of the environmental impact statement."[46]

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[40] S. Rep. No. 91-296 at 5-6 (1969).
[41] *Id.* at 9.
[42] *Id.* at 18.
[43] *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). These two goals are often referred to by the Federal Courts as the "twin aims" of NEPA. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97 (1983) ("NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.) (citations omitted). *See also, Robertson,* 490 U.S. at 356.
[44] 42 U.S.C. Sec. 4332(2)(C)(iii).
[45] 42 U.S.C. § 4332(2)(E).
[46] 40 C.F.R. §1502.14.

Before CEQ first promulgated its regulations, the courts had recognized that a meaningful evaluation of alternatives is at the heart of NEPA's decision-making process. For example, in an early and influential NEPA case, the DC Circuit held that an agency's evaluation of alternatives is not limited to measures the agency can adopt, and it rejected the contention that the only alternatives required for discussion are those that can be adopted and put into effect by the agency.[47] The court reasoned that, while the agency may have to weigh numerous matters such as economics, foreign relations, and national security, NEPA's purpose is to gather in one place a discussion of the relative environmental impact of alternatives.[48] Not long thereafter, the U.S. Supreme Court affirmed that the concept of alternatives is bounded by a notion of feasibility, and it is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood.[49]

In its proposed rule CEQ proposes to reject these holdings. It proposes that agencies no longer be required to evaluate alternatives not within the jurisdiction of the lead agency. It proposes that federal agencies no longer be required to evaluate "all" reasonable alternatives. It requests comment on whether it should establish a presumptive maximum number of alternatives. Finally, a reasonable alternative would only have to be technically and economically feasible to merit agency consideration.

Much of what CEQ proposes is contrary to what Congress intended. When Congress enacted NEPA, it expressly required federal agencies to evaluate alternatives to the proposed action. It did so without qualification. Congress did not require that alternatives be "technically" or "economically" feasible. Congress did not place an arbitrary limit on the number of alternatives an agency must consider. Congress did not limit alternatives to those an agency has the power to adopt. As a result, the proposed amendments are arbitrary and capricious and contrary to law.

V. The Proposed Amendments to the Definition of Major Federal Action Would Arbitrarily and Capriciously Exempt Projects That Significantly Affect the Environment in Violation of 42 U.S.C. § 4332.

The CEQ has proposed drastic changes to the definition of "Major Federal Action" that will seriously undercut and limit the scope of NEPA. The current definition, found in section 1508.18, provides:

> *Major Federal action* includes action with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27).[50]

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[47] *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972).
[48] *Id.*
[49] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551-53 (1978).
[50] 40 C.F.R. § 1508.18.

The Proposed Regulation would revise the definition to mean "an action subject to Federal control and responsibility with effects that may be significant."[51] By striking the second sentence of the current regulation and providing that major federal actions "may be significant," the Proposed Regulations would accord the term "Major Federal action" a meaning wholly independent from the term "significantly" in direct contrast to years of current procedure. The net effect of this change would exempt projects that are considered "minor" from NEPA's reach because they would no longer be classified as a major federal action. It is indisputable that "minor" projects can still have a major impact on the environment. Not only did Congress realize this fact, but they attempted to address it by clarifying that NEPA was intended to have a broad reach. The Courts have similarly held that NEPA casts a broad net. To add insult to injury, the Proposed Regulations do not make clear how federal agencies are to sort proposals into "major" or "minor" categories. Because these proposed changes are clearly contrary to NEPA law, and the CEQ has offered no reasoned analysis for the change, the Proposed Regulations are arbitrary and capricious and contrary to law.

The CEQ's proposed changes to the definition of "Major Federal action" is fundamentally contrary to the clear language of the statute. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the statute's purpose and context.[52] The CEQ's existing definition of "Major Federal action" is, moreover, more consistent with NEPA's "overall statutory scheme." That scheme starts with NEPA's ambitious directive that the Federal government should "use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources" to, for example, "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations," "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," and "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."[53] It would not have been consistent with that goal for Congress to exempt federal actions with significant adverse impacts on the environment from NEPA's action-forcing requirement simply because, by some non-environmental metric, an agency deemed the action not "major." By far the more compelling interpretation is the one CEQ has held for decades, that *any* federal action significantly affecting the environment is, for purposes of NEPA, a major action.

Further, the proposed change would be contrary to Congress's intent in enacting NEPA. The Conference Committee Report for the final version of the statute provides that:

> [I]t is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no

[51] Proposed Regulations at 1508.1(q).
[52] *Dolan v. U.S. Postal Service,* 546 U.S. 481, 486 (2006).
[53] 42 U.S.C. § 4331(b).

> agency shall utilize an excessively narrow construction of its existing statutory authority to avoid compliance.[54]

The Senate Report for NEPA explains that "it is essential that the widest and most efficient use of the environment be made to provide both the necessities and the amenities of life."[55] In addition, the Senate Report provides information as to the meaning Congress intended to accord to the term "major action," explaining that the term should include "any major actions, such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs…."[56] Congress certainly expressed no desire to limit the application of this term, or the statute in any way. To the contrary, Congress seemed in agreement that the purpose of the statute was to cast as broad a net as possible so as to maximize the statute's ability to protect the environment.

Years of clear legal precedent also cut against the changes the CEQ proposes to the definition of "major federal action." Courts have never classified projects as major or minor when determining if the project has a significant impact on the environment. In fact, whether an action is "major," in terms of government involvement, has typically received little attention in court determinations. Instead, courts analyze the scope of the project and its environmental impacts together when determining if the proposed project constitutes a Major Federal action.[57] In finding that the Corps failed to follow NEPA by failing to prepare an EIS, the Court of Appeals for the Seventh Circuit explained:

> No court has embraced the peculiar suggestion…that an action that might have a grievous impact on the environment would not require the preparation of an environmental impact statement if the action was in some sense minor. Indeed, the "minor" action (implying few benefits) that may cause major environmental harms is a prime candidate for requiring such a statement….[58]

Congress delegated to the CEQ the power to "recommend national policies to promote the improvement of the quality of the environment" and reinterpreting this important definition would be contrary to this clear legal precedent.[59]

The proposed amended definition of Major Federal action is also improper because it proposes to improperly absolve federal agencies of their duty to comply with NEPA in situations involving agency inaction. The Proposed Regulations strike the following sentence from the

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[54] H.R. Rep. No. 91-765 at 9-10 (1969) (Conf. Rep.).
[55] S. Rep. No. 91-296 at 18 (1969).
[56] Id. at 20.
[57] *See, e.g., River Road Alliance, Inc. v. Corps of Engineers,* 764 F.2d 445, 450 (7th Cir. 1985).
[58] *Id.* at 450.
[59] *See also, City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975); *Minnesota Public Interest Research Group v. Butz,* 498 F.2d 1314, 1321-22 (8th Cir. 1974); *Environmental Defense Fund v. Tennessee Valley Authority,* 468 F.2d 1164, 1178 (6th Cir. 1972).

current regulatory definition of "Major Federal action" – "[a]ctions include the circumstance where the responsible officials fail to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action."[60] The Preamble to the Proposed Regulations explains this sentence was removed to clarify that NEPA does not apply when an agency fails to act because "there is no proposed action and therefore no alternatives that the agency may consider."[61] In support of this about face in the definition of Major Federal action" the CEQ cites to *Norton v. Southern Utah Wilderness Alliance.* However, this case involved the question of whether supplementation of an EIS is necessary, not the issue of when agency inaction triggers NEPA.[62] As such, the CEQ has provided no justification for this change to the rule. Further, the issue of whether NEPA is applicable to agency inaction is currently the subject of dispute among the federal courts of appeals.[63] The Proposed Regulations attempt to resolve this circuit split by removing agency inaction from NEPA outright. However, only the United States Supreme Court has jurisdiction to resolve circuit splits, and any attempt by the CEQ to do so amounts to an improper usurpation of power from the judiciary and the legislature.[64]

Further, the CEQ has not provided appropriate "reasoned analysis" to support its drastic change in position with respect to the definition of Major Federal action. It is well established that agencies must give a clear reason for shifts in policy.[65] An agency altering course on its regulatory policy or interpretation not only must be aware of its change in position, but must also articulate "good reasons for the new policy."[66] The CEQ has failed to articulate a good reason for its drastic shift in policy that will seriously undercut NEPA if the Proposed Regulations are promulgated. The CEQ does acknowledge its change in position, suggesting that the change is necessary in order to correct the current statutory interpretation that renders the word major "virtually meaningless."[67] However, the CEQ fails to explain why it disagrees with years of legal precedent, and must make the proposed drastic change to the rule. In fact, in doing so, the CEQ is treading dangerously on the territory of the legislature and the judicial branch, both of which have made it clear that NEPA is to be broadly applied. It is clear that the Proposed Regulations are arbitrary and capricious, and contrary to law.

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[60] 40 C.F.R. § 1508.18.
[61] Preamble to Proposed Rule at 1709.
[62] 542 U.S. 55 (2004).
[63] *See, e.g., Ramsey v. Kantor*, 96 F.3d 434, 445 (9th Cir. 1996) (finding that a failure of the Secretary of Commerce to approve or disprove a fishing management plan on the Snake River constituted a major federal action subject to NEPA). *But see, Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244 (D.C. Cir. 1980).
[64] *Patchak v. Zinke,* 138 S. Ct. 897, 904-5 (2018).
[65] *Dillmon v. Nat'l Transp. Safety Bd.,* 588 F.3d 1085, 1089 (D.C. Cir. 2009).
[66] *See F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).
[67] Preamble to Proposed Rule at 1708-9.

VI. Proposed § 1500.3(b)(4) and § 1502.18 violate 42 U.S.C. § 4332 because the regulations do not require agencies to actually analyze environmental impacts as required by the statute and allow the agencies to obtain a conclusive presumption of compliance with NEPA without actually complying with NEPA.

Proposed § 1500.3 entitled "NEPA Compliance" sets forth a mandate applicable to and binding on all federal agency.[68] However, the mandate in §1500.3 does not actually require federal agencies to comply with NEPA. Instead, the mandate states that:

> These regulations apply to the whole of section 102(2) of NEPA. The provisions of the Act and of these regulations must be read together as a whole to comply with the law.[69]

This "mandate" is belied by the following subsections in § 1500.3(b), which demonstrate that federal agencies will not actually be required to meet their statutory duties to include a detailed statement for any major federal action significantly affecting the quality of the human environment prior to taking such action as required by 42 U.S.C. § 4332.

Proposed § 1500.3(b)(1) requires the agency to request comments on potential alternatives and impacts, identification of relevant information, or analyses of any kind concerning impacts. All the federal agency must do is request these items from the public in a notice of intent to prepare an EIS. Next, § 1500.3(b)(2) requires an EIS to include a summary of comments received, including all alternatives, information, and analyses submitted by public commenters. Then, the proposed regulations place heavy burdens on the public to provide "specific as possible" comments or such comments are deemed unexhausted and waived.[70] Up until this point in the process in the proposed regulations on "NEPA Compliance," the federal agency has not been required to actually analyze or consider potential impacts from the proposed action. Shockingly, proposed § 1500.3(b)(4) states:

> 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 (§ 1502.18).[71]

Rather than adopting a "mandate" that requires a federal agency consider by way of analysis in a detailed statement all the environmental impacts, alternatives, and irretrievable and irreversible commitments of resources of a proposed action as required by 42 U.S.C. § 4332(C)(i)-(v), proposed § 1500.3(b)(4) requires a federal agency to merely "certify" that such statutory requirements have been met, even if they have not! The NEPA-mandated detailed

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[68] Proposed § 1500.3(a).
[69] *Id.*
[70] *Id.*
[71] (Emphasis added).

statement itself must demonstrate that an agency has considered relevant information, alternatives, environmental impacts, irretrievable and irreversible commitments of resources, and the agency must provide the analyses on which the agency relies to the public to ensure NEPA compliance.

A "rubber stamp" certification under the proposed regulations about NEPA compliance is a far cry from the "hard look" standard that courts have held is required of federal agencies under the statutory duties imposed on them by NEPA. CEQ regulations cannot alter this statutory obligation. This superficial process in the proposed regulations that skirts the true statutory requirements of NEPA is arbitrary, capricious, in excess of statutory authority and not in accordance with the law and violates NEPA and the APA.

This "rubber stamp" certification is especially egregious in light of § 1502.18 which states that:

> Agency environmental impact statements 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.[72]

The attempt by CEQ to provide federal agencies a "conclusive presumption" that they have complied with NEPA simply by certifying that they have done so is preposterous and violates every tenet of federal administrative law and judicial review of agency decision making. Under NEPA and the APA, agencies must take a "hard look" at the impacts of their proposed actions and a reviewing court must look at the entire administrative record of a challenged decision to determine whether such action is arbitrary and capricious or in accordance with the law. Proposed §1502.18 attempts to abrogate established precedent regarding judicial review of administrative action and violates the doctrine of separation of powers by allowing an executive agency, CEQ, to usurp the legislature's authority to set the standard for judicial review of agency actions under the APA and the judiciary's authority to interpret and implement such standard when reviewing agency decisions.

VII. The proposed amendments to 40 C.F.R. § 1502.24 will absolve agencies of their statutory duty to undertake appropriate scientific or technical research where necessary.

The Proposed Regulations add a new provision that would excuse agencies from any obligation to undertake new scientific or technical research to inform their analyses where none exists, providing that "agencies should use reliable existing information and resources and are not required to undertake new scientific and technical research to inform their analyses…."[73] This revision would potentially eliminate any requirement that an agency conduct field work as a

[72] Proposed § 1502.18 (Emphasis added).
[73] Proposed § 1502.24.

method of evaluating proposed projects, as such field work could be considered new research. These proposed revisions are contrary to NEPA's clear language and purpose, and would be arbitrary and capricious.

In enacting NEPA, Congress intended for the agencies to be at the cutting-edge of scientific research and technology in order to "prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man…"[74] The statute further obligates federal agencies to "study…appropriate alternatives" and to "initiate and utilize ecological information in the planning and development of resource-oriented projects."[75] The federal courts agree that NEPA obligates federal agencies to conduct their own research where none exists in order to properly evaluate proposals for action. See, e.g., *Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019) (research and fieldwork conducted as part of project evaluation identified four new cultural sites that would have otherwise been destroyed by the proposed project); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir. 1984) (concurring with *Foundation for North American Wild Sheep* that scientific and technical information must be gathered before decision making in order to serve the purpose of NEPA); *Foundation for North American Wild Sheep v. U.S. Dep't of Agriculture*, 681 F.2d 1172, 1179 (9th Cir. 1982) (determining that "[t]he very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for such speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action."). The CEQ is simply not at liberty to ignore this legal precedent and the statutory language on which courts have based this requirement. To the extent it does so and promulgates the proposed changes, the regulations will be arbitrary and capricious, improper and contrary to law.

VIII. The proposed amendments to 40 C.F.R. § 1500.3 will absolve agencies of their statutory duties to comply with NEPA in violation of 42 U.S.C. § 4332 and will place too great of a burden on the public to ensure that agencies meet their statutory duties under NEPA.

Proposed 40 C.F.R. §1500.3(b)(1) mandates that agencies "shall include a request for comments" in the notice of intent to prepare an EIS. Proposed 40 C.F.R. §1500.3(b)(3) states that:

> 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.** Any objections to the submitted alternatives, information, and analyses section (§ 1502.17) shall be submitted within 30 days of the notice of availability of the final environmental impact statement.

[74] 42 U.S.C. § 4321.
[75] 42 U.S.C. § 4332(2)(E) and (F).

(Emphasis added).

The proposed regulations blur the concept of administrative exhaustion, which refers to two related but distinct doctrines of exhaustion.[76] The first doctrine is issue exhaustion, which requires that an issue be before an agency during the administrative process, prior to any litigation on the issue. The second doctrine is exhaustion of available administrative remedies, which requires that a party first follow all available appeal or reconsideration procedures before the agency when such procedures are mandated by a statute or regulation prior to filing a lawsuit for claims arising under the APA. The proposed regulations fundamentally conflate these distinct issues regarding the public's right to challenge NEPA actions by federal agencies under the APA. Proposed §1500.3 attempts to overturn court precedent regarding issue exhaustion and transform the requirement to comment on an EIS into a defense of failure to exhaust administrative remedies for federal agencies to skirt their statutory duties to comply with NEPA.

Under proposed § 1500.3(b)(1), failure of a specific member of the public to comment on an EIS would automatically, and in every instance, bar any judicial review of agency action by that specific member. The proposed regulation would turn NEPA on its head and make the public primarily responsible for NEPA compliance in violation of 42 U.S.C. § 4332, which obligates federal agencies to comply with NEPA. Current case law regarding the differences between issue exhaustion and exhaustion of administrative remedies, and the ability of the public to pursue judicial review of NEPA decisions provides a better balance between the public's obligation to inform the agency of its specific concerns about the federal action and the primary statutory duties of federal agencies to comply with NEPA when taking federal actions.

Courts apply the principles of issue exhaustion in the context of National Environmental Policy Act ("NEPA") claims.[77] Generally, the agency must be "alert[ed]" to or be aware of the issue "in order to allow the agency to give the issue meaningful consideration."[78] The issue or concern must be adequately raised by a party (not necessarily the plaintiff) in a manner that gives the agency "sufficient notice [that] afford[s] it the opportunity to rectify the violations that the plaintiffs alleged."[79] The purpose of this doctrine is to ensure that the agency has the opportunity to consider objections to its actions before there is a legal challenge in court.[80] As "long as the

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[76] William Funk, *Exhaustion of Administrative Remedies – New Dimensions Since* Darby, 18 PACE ENVTL. L. REV. 1, 1, 11 (2000). In referring to exhaustion of administrative remedies and issue exhaustion, courts often use the words *exhaustion* and *administrative exhaustion* interchangeably or refer to issue exhaustion as an offshoot of exhaustion of administrative remedies, even though they are two distinct doctrines.
[77] *Or. Natural Desert Ass'n v. McDaniel*, 751 F. Supp. 2d 1151, 1158 & n.5 (D. Or. 2011). The Ninth Circuit reviews issue exhaustion under a notice and waiver framework. *Id.* at 1158 n.5.
[78] *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978)).
[79] *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1065 (9th Cir. 2010). (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002)).
[80] *See Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010).

agency properly had the opportunity to consider the objection, it has no reason to challenge the bringing of such objection before a court by another party."[81]

The issue exhaustion doctrine is also subject to certain exceptions. For example, courts have indicated that, even where no one has brought a particular issue to the agency's attention, the issue may still be "so obvious" that "there is no need for a commenter to point [the issue] out specifically in order to preserve its ability to challenge a proposed action."[82] This exception stems from the fact that "the primary responsibility for NEPA compliance is with the agency."[83] Because the agency has this primary responsibility for NEPA compliance, when it has "independent knowledge of the issues that concern" the challenger, there is no need for NEPA to impose a bar to the public from challenging an agency's decision under the issue exhaustion doctrine.[84]

Proposed §1500.3 will severely limit the public's ability to ensure that federal agencies are meeting their NEPA obligations by preventing one member of the public to use another member's comments and simultaneously obviate the need for the agency to consider environmental impacts that are obvious and statutorily required to be considered. To place the government's NEPA obligations solely in the hands of whether the public is able to comment on an EIS absolves federal agencies from having to analyze issues that are so obvious that they should be considered under 42 U.S.C. § 4223. In instances where interested members of the public were as not aware of an agency action, they would be without recourse for agency violations of NEPA, even when such issues are so obvious that the agency should have analyzed them and even when another member of the public has raised the issue to the agency but did not independently challenge the action.

Non-profit organizations often do not have the time and resources to review every federal action within its geographic scope of influence and may need to rely on the comments submitted by other concerned citizens in the NEPA commenting process. There is no reason why regulations are necessary to prevent judicial review of agency decisions when such issues are before the agency. Similarly, individuals may comment on an EIS, but not have the resources to

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[81] *Kern v. U.S. Bureau of Land Mgmt.*, 38 F. Supp. 2d 1174, 1180 (D. Or. 1999), *rev'd on other grounds*, 284 F.3d 1062 (9th Cir. 2002); s*ee also Wyo. Lodging & Rest. Ass'n v. U.S. Dep't of the Interior*, 398 F. Supp. 2d 1197, 1210 (D. Wyo. 2005) ("[S]o long as the agency is informed of a particular position and has a chance to address that particular position, any party may challenge the action based upon such position whether or not they actually submitted a comment asserting that position."); *Benton County v. U.S. Dep't of Energy*, 256 F. Supp. 2d 1195, 1198–99 (E.D. Wash. 2003) ("[A] plaintiff, *or another*, must bring sufficient attention to an issue to stimulate the agency's attention and consideration of the issue during the environmental analysis comment process." (emphasis added)); *cf. Conservation Cong. v. U.S. Forest Serv.*, 555 F. Supp. 2d 1093, 1106 (E.D. Cal. 2008) (rejecting the argument that plaintiffs did not raise an issue at the administrative level because "[t]here is no need for a litigant to have personally raised the issue, so long as the issue was raised by another party and the agency had the opportunity to consider the objection").

[82] *Barnes v. U.S. Dep't of Transp.*, 655 F.3d at 1132 (9th Cir. 2011) (quoting *Pub. Citizen*, 541 U.S. at 765).

[83] *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006).

[84] *Id*.

challenge such decision under NEPA and the APA. In this instance, other similarly situated individuals or groups should be able to challenge the government's decision when such issues were known to the agency despite the fact that the specific commenter and the specific plaintiff are not the same entity or person. To disallow the public to challenge an agency action only because they did not independently comment on a proposed action violates the statutory mandates of NEPA that federal agencies must consider the environmental impacts of a proposed action, alternatives, and irreversible and irretrievable commitments of resources. But this is what proposed §1500.3 attempts to do—overturn the doctrine of issue exhaustion in favor of a rule that amounts to an across-the-board exhaustion of administrative remedies requirement that applies to all federal agencies.

Distinct from issue exhaustion, the APA requires that parties "exhaust available administrative remedies before bringing their grievances to court."[85] The U.S. Supreme Court in *Darby v. Cisneros*, the seminal case on this matter, held that, when the APA applies, exhaustion of administrative remedies "is a prerequisite to judicial review *only* when expressly required by statute or . . . rule . . . *and* the administrative action is made inoperative pending that review."[86] In other words, under the first prong of *Darby*, the relevant statute or regulation must explicitly require administrative appeal.[87] Under the second prong, appeal is a prerequisite to judicial review only when the challenged action is automatically stayed pending appeal.[88] Unless the two-part test from *Darby* is met, "[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration."[89] Proposed § 1500.3 is an attempt to transform issue exhaustion to a federal government-wide requirement for the public to exhaust administrative remedies by submitting comments on a NEPA decision. However, courts reviewing proposed §1500.3 would be hard pressed to find that the ability to comment on an EIS is equivalent to an administrative appeal under the first prong of *Darby* even if prescribed by the new rule. And, certainly, § 1500.3 does not in any way require stay of an agency action pending review and response to comments—in fact, quite the opposite, it only provides that an agency may provide separate requirements for a stay when the public is seeking judicial review of its decision, which does not satisfy the second *Darby* prong.[90]

Whether in the context of issue exhaustion or exhaustion of administrative remedies, proposed §1500.3 cannot withstand judicial scrutiny. The attempt by CEQ to implement a regulation that absolves federal agencies of NEPA compliance by stamping out the public's right

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[85] *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002); *see also* 5 U.S.C. § 704. Under the APA, the phrase "administrative remedies" refers to "any form of reconsideration" by the agency or an "appeal to [a] superior agency authority." *See Darby*, 509 U.S. at 146–47 (1993); 5 U.S.C. § 704.
[86] 509 U.S. at 154 (second emphasis added).
[87] *Id*.
[88] *Id*.
[89] *San Juan Citizens' Alliance v. Babbitt*, 228 F. Supp. 2d 1224, 1232 (D. Colo. 2002). Courts are also "not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under [the APA]." *Darby*, 509 U.S. at 154.
[90] *See* §1500.3(c).

to seek judicial review violates 42 U.S.C. § 4332 and is arbitrary, capricious, exceeds statutory authority and is not in accordance with the law.

IX. Proposed 40 C.F.R. § 1500.3(a) will prevent agencies from utilizing their own NEPA regulations that require more public involvement than the current regulations, which will contravene one of the twin aims of NEPA to involve and inform the public of governmental actions affecting the environment.

The preamble to the proposed regulations states:

> Consistent with the current CEQ regulations, the proposed rule would not specifically require publication of a draft EA for public review and comment.[91]

While this statement is supported by existing case law interpreting the current regulations, proposed 40 C.F.R. § 1500.3(a) attempts to limit existing agency regulations that do require publication of a draft EA for public review and comment. Proposed 40 C.F.R. § 1500.3(a) states that:

> Agency NEPA procedures to implement these regulations shall not impose additional procedures or requirements beyond those set forth in these regulations, except as otherwise provided by law or for agency efficiency.

Proposed 40 C.F.R. § 1504.1(d) regarding public participation for EAs only requires that:

> Agencies shall involve relevant agencies, applicants, and the public, to the extent practicable in preparing environmental assessments.

The combined effect of Proposed 40 C.F.R. §1500.3(a) with Proposed 40 C.F.R. § 1504.1(d) is that any agency with regulations which require the publication of a draft EA for public review and comment would be subject to challenge for "imposing additional procedures or requirements beyond those set forth" under the proposed regulations because neither 40 C.F.R § 1504.1(d) nor any other section of the proposed regulations (such as 40 C.F.R. § 1506.6) require publication of a draft EA for public review and comment.

Thus, the continued existence of various agency regulations that require such publication of a draft EA and public notice and comment to better involve and inform the public of agency actions affecting the environment, such as the United States Army Corps of Engineers, 33 C.F.R. § 651.35(b) and 651.36(e), are seriously questioned under the public participation ceiling imposed by 40 C.F.R. §1500.3(a). If the purported justification for many of the amendments is agency efficiency (such as with 40 C.F.R. §1500.3(a) which allows deviation from this ceiling

[91] 85 Fed. Reg. 1697.

for the explicit purpose of agency efficiency[92]), proposed 40 C.F.R. §1500.3(a) will have the opposite effect by forcing all agencies to determine compliance of their own regulations with this ceiling (undermining agency efficiency) and providing a platform for judicial challenges to agency regulations that may exceed this arbitrary ceiling (also undermining agency efficiency). Most importantly, this public participation ceiling violates one of the twin aims of NEPA to promote "active public involvement and access to information" by arbitrarily limiting an agency's ability to meet its statutory obligation to provide such public involvement and information to the vague standards that CEQ proposes in 40 C.F.R § 1504.1(d).[93] Based on the foregoing, proposed § 1500.3(a) is arbitrary and capricious and not in accordance with the law and violates NEPA and the APA.

X. The Proposed Regulations will create unnecessary confusion in regard to the timing of when agencies must perform an EIS, and are contrary to existing law.

The CEQ proposes numerous changes to the NEPA regulations that have the potential to alter the timing of when an agency must prepare an EIS. Specifically, CEQ proposes to change the term "possible" to "practicable" in proposed §§ 1501.7(h)(1) and (2), 1501.9(b)(1), 1502.5, 1502.9(b), 1504.2, and 1506.2(b) and (c). Similarly, CEQ proposes to change "no later than immediately" to "as soon as practicable" in § 1502.5(b). Finally, the CEQ proposes to remove the second sentence of the definition of "proposal," which currently provides "[p]reparation of an environmental impact statement on a proposal should be timed (§1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal." 40 C.F.R. § 1508.23. The CEQ attempts to explain these changes as follows:

> "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.

Preamble to Proposed Regulations at 1692. The preamble does not address its rationale for eliminating the second sentence of the definition of "proposal," other than to indicate that it is already addressed in § 1502.5. *Id*. at 1710. At best, these changes are confusing, as the required timing of preparation of an EIS is well-established through Supreme Court precedent. At worst, these changes amount to an attempt to overturn nearly a half-century of practice and precedent. In either case, the changes are arbitrary and capricious and should be abandoned.

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[92] It should also be noted that it is nonsensical that CEQ regulations place a ceiling on additional procedures and requirements that an agency can impose on itself, yet at the same time allow an agency to implement additional procedures and requirements for agency efficiency. Agency efficiency and additional procedures and requirements are fundamentally at odds, and it is the duty of CEQ to strike the appropriate balance in light of the congressional policies and intents of NEPA.

[93] *Price Road Neighborhood Ass'n v. U.S. Dept. of Transportation*, 113 F.3d 1505, 1511 (9th Cir. 1997).

In *Kleppe v. Sierra Club* the Court determined that an EIS must be prepared when a proposed project would be considered a major Federal action. *See, Kleppe v. Sierra Club*, 427 U.S. 390, 401 (1976). In other words, as soon as a proposal for major federal action significantly affecting the environmental is at the project stage, an EIS must be prepared. Further, the CEQ has endorsed the *Kleppe* approach in its regulations which have stood since 1978. 40 C.F.R. § 1502.5. It is unclear from the proposed changes whether the CEQ actually intends to overturn this practice and precedent. To the extent it does not intend to do so, the proposed revisions are confusing and should be withdrawn. More problematic, if the CEQ does intend to amend the timing of when federal agencies must prepare impact statements, the proposed changes are arbitrary, capricious and contrary to law.

While agencies are permitted to rescind or change a regulatory position, they must display awareness of the change in position, and articulate "good reasons" for the change in policy.[94] Further, an agency may sometimes need to account for prior fact finding or certain reliance interests created by a prior policy that conflict with the current policy position. *Id*. Here, the CEQ has articulated no reason for the proposed change. As outlined above, it is not even clear whether they intend to change the timing of EIS preparation. In that way alone, the Proposed Regulations are improper. In no event has the CEQ articulated a "good reason" for the change consistent with the twin aims of NEPA – "consideration of every significant aspect of the environmental impact of a proposed regulation" or "ensuring "that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."[95] In fact, the proposed change will serve only to excuse federal agencies from timely preparation of impact statements, which would directly conflict with those aims. As a result, the Proposed Regulations are arbitrary and capricious and should be abandoned.

XI. The CEQ's GHG Guidance Should Not be Codified in the NEPA Rules and Should be Withdrawn because It Does Not Comply with NEPA.

Greenhouse gases threaten the human environment by destabilizing the climate. The Federal Government has acknowledged the gravity of climate change since the 1970s.[96]

CEQ intends to withdraw all current NEPA guidance.[97] "However, CEQ invites comments on whether it should codify any aspects of its proposed GHG guidance in the regulation, and if so, how CEQ should address them in the regulations."[98] The NEPA rules should not codify the guidance, and the guidance should be withdrawn, because it falls short of satisfying the requirements of NEPA.

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[94] *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009).
[95] *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc*., 462 U.S. 87, 97 (1983).
[96] *Massachusetts v. EPA,* 549 U.S. 497, 507–9 (2007).
[97] 85 Fed. Reg. at 1710 Part K.
[98] 85 Fed. Reg. at 1711 Part L.

The guidance, 84 Fed. Reg. 30097 (June 26, 2019), dwells largely on what agencies are *not* required to do in considering greenhouse gas emissions. It generally encourages lax analysis and in particular instances directly contravenes the statute.

A. Consideration of GHG Emissions in NEPA Analyses.

"Agencies preparing NEPA analyses need not give greater consideration to potential effects from GHG emissions than to other potential effects on the human environment."[99] Allowance should be made for the possibility that greater consideration is warranted.

The guidance will result in failures, both deliberate and inadvertent, to take the requisite "hard look" at environmental effects that is the core of NEPA. It leaves agencies an easy way out by making a "categorical explanation that such an analysis is impossible," in violation of NEPA.[100] It does this by listing ways for agencies to predetermine the outcome:

- They may "project" emissions as a "proxy for assessing potential climate effects;"
- They may then determine in a factual vacuum that there is an insufficiently close causal relation;
- They should "attempt" to quantify emissions only if they have already somehow determined that they are "substantial enough to warrant quantification;"
- They are encouraged to cut corners by finding that analysis is not practicable or would be "overly speculative;" to incorporate by reference or decide that adequate information is lacking; and by not developing procedures to deal specifically with GHG emissions.

Cumulative effects. The most glaring deficiency in the guidance is its conclusion that "local, regional, national, or sector-wide emission estimates to provide context for understanding the relative magnitude of a proposed action's GHG emissions," combined with "a qualitative summary discussion of the effects of GHG emissions based on an appropriate literature review," eliminate the need to consider cumulative effects "because the potential effects of GHG emissions are inherently a global cumulative effect."

NEPA requires EISs and EAs to **"**recognize the worldwide and long-range character of environmental problems," 42 USCA § 4332(F); and discuss "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[101]

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[99] 85 Fed. Reg at 30098.
[100] *High Country Conservation Advocate v. U.S. Forest Service,* 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014).
[101] 42 USCA § 4332(2)(C)(iv) and (v).

NEPA made it "the continuing policy of the Federal Government… to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans," 42 USCA § 4331(a), and to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[102] In *Kleppe v. Sierra Club,* the United States Supreme Court determined that agencies must consider the cumulative impact of multiple proposals for major federal action "that will have cumulative or synergistic environmental impact upon a region" in order to comply with the "action forcing" requirements of section 102(2)(C) of NEPA.[103]

Global warming, because it is indeed global, affects every region of the world, albeit not always in the same ways. Direct and indirect effects are more limited both temporally and spatially. GHG emissions are worldwide in their effects, not geographically confined, yet they are the result of billions of daily human actions of burning and release of gases. Climate change will have lost its place in NEPA analysis if it is not considered in the way that cumulative effects have been defined in 40 CFR § 1508.7, as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." "The cumulative impact requirement ensures that agencies consider effects that result from 'individually minor but collectively significant actions taking place over a period of time.'"[104]

"[L]ocal, regional, national, or sector-wide" emissions fail to capture the incremental yet global effect of greenhouse gases and thus miss the point entirely. An agency must, for example, consider whether "substantial progress may have been made in assessing the potential *global* and regional effects of climate change."[105]

Mitigation. "NEPA does not require agencies to adopt mitigation measures," says the guidance. 84 FR at 30098. Yet NEPA's requirement to consider "any adverse environmental effects which cannot be avoided should the proposal be implemented," 42 USCA 4332(2)(C)(ii), implies the need to consider ways of curing such adverse effects.[106] Mitigation may reduce a project's impacts below the level of significance that would trigger an EIS.[107] The courts require a reasonably complete discussion of mitigation measures as part of the "hard look" required by NEPA.[108]

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[102] 42 USCA § 4331(b)(1).
[103] 427 U.S. 390, 409–10 (1976),
[104] *Sierra Club v. DOE,* 867 F.3d 189, 197 (D.C. Cir. 2017).
[105] *San Juan Citizens Alliance v. BLM,* 326 F.Supp.3d 1227, 1249 (D. N.M 2018) (emphasis added).
[106] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 352 (1989); *Protect Our Communities Foundation v. Jewell,* 825 F.3d 571, 581–2 (9th Cir. 2016).
[107] *O'Reilly v. U.S. Army Corps of Engineers,* 477 F.3d 225, 231 (5th Cir. 2007).
[108] *Neighbors of Cuddy Mountain v. U.S. Forest Service,* 137 F.3d 1372, 1380–81 (9th Cir. 1998); *Holy Cross Wilderness Fund v. Madigan,* 960 F.2d 1515, 1522–3 (10th Cir. 1992).

While the guidance stops short of forbidding agencies from considering mitigation measures, it discourages such consideration and fails to comply with the intent of Congress.

B. Considerations Relating to the Affected Environment

In this section the guidance states, "When relevant, agencies should consider whether the proposed action would be affected by foreseeable changes to the affected environment under a reasonable scenario." This looks like NEPA in reverse; NEPA normally examines the effect of the project on the environment, not vice versa. Some indication of when the opposite would be relevant would be helpful. At first glance it would seem that, if a piece of fossil fuel infrastructure were adversely affected by its own greenhouse gas emissions, that would be a sure sign of a significant impact.

C. Use of Cost-Benefit Analyses

The guidance actively discourages the use of cost-benefit analyses for project-level uses, saying they are only appropriate for rulemakings or similarly broad applications. Nevertheless, it finds monetization appropriate for other effects and, in part A of the guidance, says that economic considerations can help differentiate between alternatives. This seems inconsistent and may reflect criticism of the Social Cost of Carbon tool, which commenters in some cases have urged upon the courts. Room should be left for the possibility that valid use can be made of cost-benefit analysis even if the right tool does not yet exist.

XII. Proposed § 1508.1(q) Violates NEPA Because it Unlawfully Exempts Loans, Loan Guarantees and Other Forms of Financial Assistance From NEPA's Reach.

The Proposed Regulations would exempt from the definition of "Major Federal action" "farm ownership and operating loan guarantees by the Farm Service Agency…." In other words, no project involving such federal funds will ever need be the subject of an EIS or public review. These types of loans have aided in the construction and expansion of concentrated animal-feeding operations ("CAFO"), which are widely known to have significant environmental effects.[109] Granting a broad exemption to an entire category of federal loans is directly contrary to the clear language of NEPA, which provides:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and

[109] Peter Thorne, *Environmental Health Impacts of Concentrated Animal Feeding Operations: Anticipating Hazards—Searching for Solutions,* 115 Environmental Health Perspectives, 296-97 (2007); John Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations or Water Quality*, 115 Environmental Health Perspectives, 308-12 (2007).

> development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including **financial and technical assistance**, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony….[110].

The proposed change to 1508.1(q) would directly contradict this provision of the statute. Further, it is contrary to Congress' intent in enacting the statute. In authorizing NEPA, Congress cited a plethora of environmental concerns that motivated the enactment:

> The inadequacy of present knowledge, policies, and institutions is reflected in our Nation's history, in our national attitudes, and in our contemporary life. We see increasing evidence of this inadequacy all around us: haphazard urban and suburban growth; crowding, congestion, and conditions within our central cities which result in civil unrest and detract from man's social and psychological well-being; the loss of valuable open spaces; inconsistent and, often, incoherent rural and urban land-use policies; critical air and water pollution problems; diminishing recreational opportunity; continuing soil erosion; the degradation of unique ecosystems; needless deforestation; the decline and extinction of fish and wildlife species; faltering and poorly designed transportation systems; poor architectural design and ugliness in public and private structures; rising levels of noise; the continued proliferation of pesticides and chemicals without adequate consideration of the consequences; radiation hazards; thermal pollution; an increasingly ugly landscape cluttered with billboards, powerlines, and junkyards; and many, many other environmental quality problems.[111]

Farm Service loan projects such as CAFOs will most definitely trigger several of these concerns. Accordingly, the proposed exemption would contradict the statute and the intent of its drafters. The CEQ does not have the authority to rewrite NEPA or to undermine Congress' clear intent.

Further, the proposed exemption for Farm Service loans runs contra to relevant case law. Courts have found that Farm Service Agency related loans and other forms of financial assistance warrant the application of NEPA.[112] In *Buffalo River Watershed Alliance,* C & H Hog Farms applied for a 3.6 million dollar loan under the Farm Service loan program to expand their swine production near the Buffalo National River.[113] Not only did the court conclude that the project fell within the purview of NEPA, but it also determined that the environmental assessment failed to adequately address the project's environmental impact.[114] This case is not unique – other courts have held that FSA loan sponsored CAFOs fall within the purview of

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[110] 42 U.S.C. § 4331.
[111] S. Rep. No. 91-296 at 4-5 (1969).
[112] *Buffalo River Watershed All. v. Dep't of Agriculture,* 2014 WL 6837005, *1 (E.D. Ark. Dec. 2, 2014).
[113] *Id.* at 2.
[114] *Id.*

NEPA.[115] It would be arbitrary and capricious for the CEQ to exclude outright an entire type of federal loan from NEPA.

XIII. The Proposed Regulations Violate Title VI Because They Fail to Address Environmental Justice Concerns.

The preamble to the proposed regulation indicates that the CEQ anticipates "withdrawing all of the CEQ NEPA guidance that is currently in effect and issuing new guidance as consistent with Presidential directives." Preamble to Proposed Regulations at 1710. Presumably, this would also rescind Environmental Justice: Guidance under the National Environmental Policy Act (Dec. 10, 1997). However, the Proposed Regulations do not propose to enact any directives concerning environmental justice issues, leaving the Proposed Regulations in violation of Title VI and Executive Order 12898.

Section 601 of Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C.A. § 2000d. Similarly, section 602 requires that:

> [e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C.A. § 2000d-1. Further, E.O 12898 requires "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations…."

The Proposed Regulations fail to address Title VI or environmental justice issues in any way. Further, as outlined in the CEQ's Environmental Justice Guidance, such issues have been addressed in the past through agency consideration of cumulative and indirect effects. *See, e.g.,* Environmental Justice: Guidance under the National Environmental Policy Act at 23 (Dec. 10, 1997). However, the CEQ is also proposing to remove any requirement that agencies identify or consider the impact of such effects. Accordingly, the Proposed Regulations will have a

[115] *See generally, Food & Water Watch v. U.S. Dep't of Agriculture*, 325 F. Supp. 3d 39 (D.D.C. 2018).

significantly increased negative impact on Environmental Justice populations. If in fact the CEQ intends to promulgate the Proposed Regulations and to withdraw its Environmental Justice Guidance, the Proposed Regulations should be revised to address environmental justice concerns in compliance with Title VI and E.O. 12898. Any failure to do so will render the regulations arbitrary and capricious, would exceed the agency's statutory authority, and would not be in accordance with the law.

XIV. Conclusion

We urge CEQ to withdraw the entire regulatory proposal and work to enforce the sensible and lawful provisions of the current CEQ regulations. We remind CEQ again that studies conducted to determine the cause of delay in federal actions coming under NEPA have consistently found that NEPA is not the primary driver of delay.[116] Further, we believe that the outcome of upending five decades of NEPA law and attempting to redesign the process will actually result in more, not less, time spent on NEPA. But most urgently, the consequences of finalizing these proposed revisions will be to do lasting damage to the quality of our human environment.

[116] USDA Forest Service, *Environmental Analysis and Decision Making: The Current Picture* (Phoenix, Az. Sept. 2017), Department of Treasury report by Toni Horst, et al., *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*, (December, 2016)Congressional Research Service, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, R42479, (April 11, 2012).

Sincerely,

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On behalf of:

The Missouri State Conference of the National Association for the Advancement of Colored People

Missouri Confluence Waterkeeper

And

Missouri Coalition for the Environment