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**By Electronic Submission to [www.regulations.gov](http://www.regulations.gov)**

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

**Docket ID No. CEQ-2019-0003**

**Re: COMMENTS ON PROPOSED RULE: UPDATE TO THE REGULATIONS IMPLEMENTING THE PROCEDURAL PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT, 85 FED. REG. 1,684 (JAN. 10, 2020)**

Dear Chairman Neumayr:

On behalf of itself and other environmental law clinics across the country,<sup>1</sup> the Emmett Environmental Law & Policy Clinic at Harvard Law School (the “Clinic”) respectfully submits these comments regarding the proposed Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (Jan. 10, 2020) (hereinafter, the “Proposed Regulation” or “Proposal”). For the reasons discussed herein, we urge the Council on Environmental Quality (“CEQ”) to withdraw the Proposal. It unlawfully narrows the scope of environmental review, public participation, and judicial review, is inconsistent with decades of precedent and practice, and is beyond the scope of CEQ’s authority under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*

The Proposal raises a plethora of issues, too many to address in a single comment. These comments focus on several aspects of the Proposal that are directly inconsistent with the administrative and environmental laws we teach our students, undermine the protections these laws afford, and are contrary to the basic principles of separation of powers between the branches of government. In brief, our comments explain how the following aspects of the Proposal are arbitrary and unlawful:

- Implying that the consideration of cumulative impacts and indirect impacts is optional or narrowed in scope;
- Restricting the consideration of alternatives;
- Introducing per-se limitations on what counts as “major Federal action;”
- Expanding the concept of “functional equivalence;”

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<sup>1</sup> The full list of signatories is at the end of this letter.

- Limiting the availability of judicial review of NEPA decisions;
- Making the regulation a “ceiling” that limits other agencies’ NEPA compliance; and
- Stating that agencies do not need to perform new scientific and technical research for NEPA reviews.

Moreover, CEQ has not complied with several prerequisites to the promulgation of this regulation, including performing a NEPA analysis and considering certain impacts as required by several Executive Orders. Finally, because the Proposed Regulation would suggest to agencies that they can do less than what is required by the statute, it would likely have the effect of *increasing* NEPA-related litigation. This is contrary to the Proposal’s supposed purposes of increasing efficiency and reducing delays.

## **I. MULTIPLE ASPECTS OF THE PROPOSED REGULATION ARE BEYOND CEQ’S AUTHORITY AND WOULD INTRUDE ON CONGRESSIONAL AUTHORITY**

“[I]t is ‘axiomatic’ that ‘administrative agencies may act only pursuant to authority delegated to them by Congress.’” *Clean Air Council v. U.S. Env’tl. Protection Agency*, 862 F.3d 1, 9 (D.C. Cir. 2017). However, the Proposed Regulation would re-interpret NEPA in a way that would limit the application of the statute. Such changes are not only inconsistent with the statute and decades of judicial precedent, regulations, and practical experience, but would also exceed CEQ’s authority and intrude on the role of Congress and the courts.

In drafting NEPA, Congress directed agencies to comply with its mandates “to the fullest extent possible,” 42 U.S.C. § 4332, and from the earliest days of the statute’s implementation courts have made clear that this language imposes a stringent duty on federal agencies. As the Supreme Court put it, the phrase “to the fullest extent possible” is a “deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle.” *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Oklahoma*, 426 U.S. 776, 787 (1976). More precisely, “[c]onsiderations of administrative difficulty, delay or economic cost will not suffice to strip [Section 102] of its fundamental importance.” *Calvert Cliffs’ Coordinating Committee, Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). The Proposal would allow federal agencies to circumvent NEPA by making drastic changes to CEQ’s long-standing treatment of the statute’s procedural mandates, “shunt[ing] aside” the duties Congress has imposed on the agencies for the sake of efficiency. CEQ’s Proposed Rule is thus not in accordance with the law as it ignores NEPA’s plain language and clear judicial precedent.

As an example, the statute’s mandate for agencies to act “to the fullest extent possible” applies to Section 102’s requirement for the preparation of “detailed statements,” *i.e.*, environmental impact statements (“EIS”), that analyze the environmental impacts of proposed actions and alternatives to such proposed actions. Courts have repeatedly interpreted this mandate as requiring a case-by-case determination of what constitutes sufficient analysis by an agency. Suggestions in the Proposed Regulation to limit consideration of environmental impacts and project alternatives (discussed below) are beyond the scope of CEQ’s authority. For instance, stating that consideration of cumulative impacts or indirect effects is not required or optional is

misleading because regulations cannot limit consideration of such effects. Presumptive standards of adequacy based on the number or type of issues reviewed is similarly impermissible. If Congress had intended to create bright-line tests to measure compliance with NEPA's mandates, it would have done so. In the face of Congress' decision not to do so, an agency may not take such action in its stead.

Looking beyond NEPA, CEQ has clearly not been delegated authority to administer the Administrative Procedure Act, as the Proposed Regulation attempts to do. Examples of such overreaches by CEQ are discussed in the following sections of these comments.

## **II. THE PROPOSAL UNLAWFULLY NARROWS THE CONSIDERATION OF CUMULATIVE AND INDIRECT IMPACTS**

### **A. The Suggestion that Consideration of Cumulative Impacts is not Required is Misleading and Contrary to NEPA's Text and Purpose**

NEPA requires agencies to consider the environmental impacts of "major Federal actions significantly affecting the quality of the human environment" "to the fullest extent possible." 42 U.S.C. § 4332. The words "direct," "indirect," and/or "cumulative" do not appear in the text of NEPA, but the *concept* and requirement to consider such impacts originate in the statute. NEPA is clear on its face: agencies must consider environmental impacts "to the fullest extent possible." As the early case law interpreting NEPA makes clear, this includes consideration of indirect and cumulative effects. While there may be limits for remoteness, the Proposed Regulation cannot try to artificially create limits and should not even suggest that the consideration is optional. For instance, the Proposal's assertion that analysis of cumulative effects is not required (§ 1508.8) is contrary to both the language and purpose of the statute, and thus beyond CEQ's authority. Similarly, the Proposal's deletion of the existing § 1508.7, which defines a cumulative impact 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," is misleading to the extent that it suggests to agencies that consideration of cumulative impacts is not required.

Consideration of cumulative impacts is crucial to promoting the congressional purpose behind NEPA, which includes using "all practicable means and measures" to "foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony," 42 U.S.C. § 4331(a), and, to the ability of agencies, to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surrounding," *id.* § 4331(b)(2).<sup>2</sup> This relationship is described in *Hanly v. Kleindienst*:

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<sup>2</sup> This is just one of the purposes of NEPA that require consideration of cumulative impacts. Examples of other purposes and directives that also require consideration of cumulative impacts include the objective of attaining "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences," 42 U.S.C. § 4331(b)(3), and the requirement for agencies to identify "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," *id.* § 4332(2)(C)(iv).

It must be recognized that even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel. Hence the absolute, as well as comparative, effects of a major federal action must be considered.

471 F.2d 823, 831 (2d Cir. 1972). Environmental impacts do not occur in isolation, and the significance of a project must be understood in the context of related actions. Otherwise, agencies could underestimate the environmental effects of major federal actions by ignoring the ways in which the actions incrementally exacerbate existing environmental problems created by related actions.

As a long line of cases interpreting NEPA and CEQ guidance make clear, consideration of cumulative impacts is relevant both when (i) determining if a project has significant impacts, such that an EIS is required, and (ii) preparing an EIS so that agencies can make informed decisions. The Proposal's suggestion that consideration of cumulative effects is optional undermines these two pieces of the required NEPA analysis. *See, e.g., Cross-Sound Ferry Services, Inc. v. United States*, 573 F.2d 725, 731 (2d Cir. 1978) (“[A]n agency’s threshold determination that an EIS is or is not required should ordinarily be based on consideration of two 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 that cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.’”). If agencies do not consider the cumulative impacts of proposed actions, they could avoid NEPA’s mandate to prepare EISs for projects whose impacts appear insignificant in isolation, but are in fact significant given their context.

The statutory mandate to consider environmental impacts “to the fullest extent possible” is not a boundless requirement and the Proposal implicitly overstates the administrative burden that such consideration imposes. Consideration of cumulative impacts has never been impracticable or unreasonable. For example, in *Kleppe v. Sierra Club* the Supreme Court recognized that NEPA requires consideration of comprehensive and cumulative impacts, but also explained that “determination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competencies of the appropriate agencies.” 427 U.S. 390, 413 (1976). Courts have also recognized that agencies are not bound by NEPA to consider cumulative impacts that are so remote or speculative that agencies could not reasonably be expected to ascertain them. *See, e.g., Nucleus of Chicago Homeowners Ass’n v. Lynn*, 524 F.2d 225, 230 (7th Cir. 1975). The Proposed Regulation thus overstates the administrative burden that cumulative impact analysis actually imposes, because agencies are already able to limit consideration of cumulative impacts when such analysis would be unreasonable.

As courts have made clear, determinations as to when and how to consider cumulative impacts is frequently a fact-specific determination that cannot be subject to a bright-line test. Suggesting now that consideration of cumulative impacts is not required is contrary to decades of judicial interpretation of the statute. Courts have routinely determined that consideration of cumulative

impacts is required. Thus, it is clear that such consideration is both feasible and reasonable and therefore required to meet the statutory mandate to consider environmental impacts to the “fullest extent possible.” For example, courts have interpreted NEPA as requiring agencies to evaluate how a project’s greenhouse gas emissions incrementally contribute to the large-scale, cumulative environmental impacts of similar projects.<sup>3</sup> There is no foundation or basis for the Proposed Regulation’s sharp turn away from decades of statutory interpretation.

B. To the Extent that it Suggests Consideration of Indirect Impacts is Not Required, the Proposal is Misleading and Contrary to NEPA’s Statutory Requirements

NEPA’s mandate to consider environmental impacts “to the fullest extent possible,” 42 U.S.C. § 4332, requires that agencies consider the full scope of their environmental impacts. As noted above, the categorization of effects as direct, indirect, and/or cumulative is not explicit in NEPA’s text, but the *concept* and requirement to consider such impacts originates in the statute. While CEQ’s implementing regulations do not have to define or explicitly refer to indirect impacts in order for them to be required in an agency’s NEPA review process, changing the regulation’s existing, long-held definitions will create confusion that may lead agencies to believe that consideration of indirect impacts is no longer required. Like cumulative impacts, consideration of indirect impacts is required as a logical consequence of the statutory language of NEPA itself.

The Proposed Regulation’s failure to explicitly require consideration of indirect impacts is not only contrary to the statute itself, but also to the earliest cases interpreting NEPA, as well as a long line of CEQ guidance. For example, the Eighth Circuit Court of Appeals recognized in *Jackson County, Mo. v. Jones* that NEPA’s robust statutory purposes require consideration of indirect, as well as direct environmental impacts. 571 F.2d 1004, 1013 (8th Cir. 1978) (“Under NEPA, indirect, as well as direct, costs and consequences of the proposed action must be considered.”). From the earliest years of NEPA’s implementation, courts have widely recognized that allowing agencies to overlook indirect impacts would frustrate NEPA’s central purposes. *Id.* at 1007. Following this precedent, agencies’ internal regulations in the decades of NEPA’s implementation have reflected this recognition that indirect impacts must be considered.

Many environmental impacts are not immediate and easily observable direct consequences of agency actions; rather, they may be removed in time or space. These effects may nevertheless be severe in magnitude and foreseeable at the time the agency is evaluating project alternatives. For example, a major construction project may indirectly impact the environment by changing traffic patterns, which may drastically increase air pollution. *See, e.g., City of Rochester v. U.S. Postal Service*, 541 F.2d 967, 974 (2d Cir. 1976) (recognizing that NEPA required an agency to

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<sup>3</sup> *See, e.g., Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) (“The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”); *see also Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (holding that the Surface Transportation Board could not approve a proposal to construct a new rail line without considering the impacts that might reasonably follow from increased coal consumption, like increased GHG emissions); *Border Power Plant Working Group v. U.S. Dep’t of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003) (holding that an environmental assessment was insufficient for its failure to consider GHG emissions).

consider the less immediate, indirect impacts of its construction project like urban decay, unemployment, and increased traffic). Indeed, an action's contributions to significant, large-scale environmental problems may be indirect. If an agency does not consider potentially severe indirect environmental impacts, it will drastically underestimate the environmental significance of federal actions, which would frustrate NEPA's central mandate to incorporate environmental considerations into federal decision-making "to the fullest extent possible." 42 U.S.C. § 4332.

The Proposed Regulation offers no basis for disturbing this longstanding interpretation of NEPA. Much like consideration of cumulative impacts, consideration of indirect effects is neither impractical nor unreasonable, and the Proposed Regulation overstates the administrative burden that such a requirement imposes. Even from the earliest years following NEPA's enactment, courts have recognized that this mandate does not require agencies to predict overly speculative or remote impacts that the agency could not reasonably ascertain. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974) (holding that "an environmental impact statement need not discuss remote and highly speculative consequences"). The implicit fear that consideration of indirect impacts would impose undue administrative burdens on agencies is entirely overstated, as this mandate is construed according to a rule of reason.

The Proposal's elimination of any explicit mention of indirect impacts in § 1508.8 is contrary to the statute and may lead agencies to impermissibly underestimate less direct or immediate impacts. This in turn could lead to additional litigation and orders by courts to revise EISs, thus defeating the Proposal's asserted goal of increasing efficiency in the NEPA process. The Proposed Regulation should instead explicitly require agencies to consider the indirect impacts of actions, along with direct and cumulative impacts. Otherwise, agencies risk underestimating the environmental impacts of federal actions and frustrating NEPA's mandate and statutory purposes.

### **III. THE PROPOSAL UNLAWFULLY NARROWS AGENCIES' CONSIDERATION OF ALTERNATIVES**

#### **A. The Proposed Regulation Places Limitations on the Consideration of Alternatives That Are Inconsistent with NEPA**

NEPA requires that the preparation of "detailed statements" for proposed legislation and other major Federal actions significantly affecting the quality of the human environment include "alternatives to the proposed action." 42 U.S.C. § 4332(C), (C)(iii). This requirement is yet another aspect of NEPA that is not conducive to bright-line tests or limitations. Had Congress wished to qualify the scope of alternatives that must be considered, it could have done so. For example, in the same section of the statute, Congress required that federal agencies "study, develop, and describe appropriate alternatives" to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. 42 U.S.C. § 4332(E). Nonetheless, the required consideration of alternatives in EISs is not unbounded. Rather, the requirement is subject to a "reasonableness" standard. Such a standard cannot be pre-determined but instead requires flexibility to address situations on a case-by-case basis.

The consideration of alternatives is not without limits. Rather, the statute requires such consideration “to the fullest extent possible.” 42 U.S.C. § 4332. This standard is interpreted by courts under a “reasonableness” standard. As CEQ explained in 1978 when promulgating its first NEPA-implementing regulations, the phrase “all reasonable alternatives” was already “firmly established in the case law interpreting NEPA.” National Environmental Policy Act – Regulations, 43 Fed. Reg. 55,978, 55,983 (Nov. 29, 1978). In one such case, the D.C. Circuit Court of Appeals emphasized that the legislative history of NEPA reflects the crucial role that the analysis of alternatives plays in carrying out the statute’s central function of providing full information to relevant decision makers on the potential environmental impacts and possible ways to avoid them.<sup>4</sup> *NRDC v. Morton*, 458 F.2d 827, 833 n.12 (D.C. Cir. 1972). It is well-settled law that NEPA demands inclusion of all reasonable alternatives. Both this legal precedent, and the functional value of discussing all reasonable alternatives, demonstrates that a bright-line rule, such as a presumptive maximum of alternatives to consider, would frustrate the design of NEPA. An EIS is highly dependent on the particular project involved, and the facts or context of a given project or proposal will inform how many alternatives must be considered for an agency to make a reasoned choice. *See, e.g., Iowa Citizens for Env’tl. Quality, Inc. v. Volpe*, 487 F.2d 849, 852 (8th Cir. 1973) (“The extent of detail required [in an environmental statement] must necessarily be related to the complexity of the environmental problems created by the project.”) (internal quotation marks omitted).

The Supreme Court explained this dynamic in a seminal administrative law case, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, writing “that the concept of ‘alternatives’ is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood.” 435 U.S. 519, 552–53 (1978). Given that the alternatives analysis NEPA requires “must be construed in the light of reason,” the requirement is neither “rubber” nor “iron,” meaning that while courts are aware of limited administrative resources, agencies may not ignore reasonable alternatives. *NRDC v. Morton*, 458 F.2d at 837 (holding that an EIS was inadequate due to a “critical omission” of an alternative).

The “rule of reason” that courts use to interpret NEPA’s requirement to consider alternatives already addresses the Proposed Regulation’s alleged concern that compliance with NEPA places an unfair burden on an agency’s time and resources. *NRDC v. Morton*, 458 F.2d at 837. For example, the Supreme Court has held that “[t]ime and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative,” 435 U.S. at 551. Similarly, the “reasonable” consideration of alternatives need not extend to alternatives that would have environmental impacts that “cannot be readily ascertained” or would require “an overhaul of basic legislation.” *NRDC v. Morton*, 458 F.2d at 837, 838. Nor does consideration of all reasonable alternatives mean consideration of “every extreme possibility which might be conjectured.” *Carolina Env’tl. Study Group v. United States*, 510 F.2d 796, 801

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<sup>4</sup> Ten former heads of CEQ, who served under Presidents Nixon, Ford, Carter, Reagan, George H.W. Bush and Clinton, described the “analysis of alternatives to an agency’s proposed course of action” as “the heart of meaningful environmental review” in a joint letter to the Honorable Cathy McMorris (Sept. 19, 2005). *See NEPA: Lessons Learned and Next Steps: Oversight Hearing Before the H. Comm. on Resources*, 109th Cong. 39 (Nov. 17, 2005) (statement of Robert Dreher, Deputy Executive Director, Georgetown Environmental Law & Policy Institute).

(D.C. Cir. 1975). Rather, consideration of alternatives must allow the agency to come to a reasoned choice.

Given the language and purpose of NEPA, and the well-settled case law recognized by CEQ, the Proposed Regulation's narrowing of § 1502.14(a) is problematic and inconsistent with the statute for several reasons. First, in describing the alternatives that an agency must consider, the Proposal would change the requirement from "all reasonable alternatives" to "reasonable alternatives." Proposed § 1502.14(a). This change directly contradicts case law that explicitly interprets NEPA as requiring consideration of "all reasonable alternatives," and is a stark departure from CEQ's own history of setting NEPA guidelines. *See Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 825 (D.C. Cir 1976) ("NEPA is premised on the assumption that *all* reasonable alternatives will be explored by the agency.") (citing *NRDC v. Morton*, 458 F.2d at 837) (emphasis added); 43 Fed. Reg. at 55,983 (interpreting NEPA as requiring consideration of "all reasonable alternatives"); *see also Iowa Citizens for Env'tl. Quality, Inc.*, 487 F.2d at 853 ("The question to be asked is whether all reasonable alternatives to the project have been considered, even if some were only briefly alluded to or mentioned.") (citation and internal quotation marks omitted). Thus, it is well-settled law that NEPA requires consideration of all reasonable alternatives, and the Proposed Regulation should not suggest that anything less may be acceptable by omitting the word "all" from § 1502.14(a).

Second, the Proposed Regulation would remove the requirement for agencies to "rigorously explore and objectively evaluate" alternatives. Proposed § 1502.14(a). This change is inconsistent with the purposes of NEPA and the mandate for agencies to consider alternatives "to the fullest extent possible." 42 U.S.C. § 4332. It is precisely such rigorous exploration of alternatives that allows an agency to make a reasoned decision in light of environmental impacts, which is NEPA's central function. The Proposed Regulation's suggestion that a subjective or less than rigorous review of alternatives could meet the statutory requirements could lead to courts remanding EISs to agencies for further review, a result that would be contrary to the Proposal's purported interest in improving efficiency.

Finally, the Proposed Regulation asked for comment concerning the possibility of setting a "presumptive maximum number of alternatives for evaluation of a proposed actions." 85 Fed. Reg. at 1702. Such a presumption would be impermissible under the NEPA statute, which does not allow for such bright-line rules. The facts surrounding a major Federal action under review will determine the breadth of alternatives an agency must consider in light of the known environmental impacts. A presumptive maximum of alternatives to consider in an EIS would likely set an artificial rubber stamp of sufficiency that could allow agencies to produce an EIS that does not seriously engage with all reasonable alternatives as NEPA requires. Because NEPA does not allow for such limitations on what alternatives an agency must consider, such a presumption could result in the preparation of EISs that fail to comply with statutory requirements and risk judicial challenge and remand for further analysis. Thus, a rule allowing for a presumptive maximum number of alternatives could have the perverse effect of creating inefficiencies by costing agencies time and resources in re-doing EISs.



B. Agencies Have an Obligation to Consider Alternatives Outside Their Jurisdiction and Include Them in Environmental Impact Statements.

NEPA requires agencies to consider alternatives that are beyond their own jurisdiction or legislative mandate in order to advance the statute's goals and function. For example, the statute directs the Federal Government to "improve and coordinate Federal plans, functions, programs, and resources" to achieve the purposes of NEPA. 42 U.S.C. § 4331(b). In issuing its first NEPA-implementing regulations in 1978, § 1502.14(c), which required agencies to consider alternatives outside their jurisdiction, CEQ noted that such a requirement was "declaratory of existing law." 43 Fed. Reg. at 55,984. Therefore, the Proposed Regulation's suggestion to exclude such alternatives from analysis by eliminating the current § 1502.14(c) is impermissible.

Consideration of alternatives outside the agency's jurisdiction is required to meet NEPA's objectives, including informing the public and decision makers in other areas of government about potential alternatives that may diminish environmental impacts. The D.C. Circuit Court of Appeals discussed this issue in *NRDC v. Morton*, which involved agency action related to oil and gas leases in submerged lands in Louisiana. 458 F.2d at 829, 834–35. The court noted that these leases would be part of "[t]he Executive's proposed solution to a national problem or set of inter-related problems, [which] may call for each of several departments or agencies to take a specific action." *Id.* at 835. Therefore, an EIS must address alternative courses of action outside the preparing agency's jurisdiction because the broader policy involves other offices and will be sent to them for review:

The impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers, and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration along with the various other elements of the public interest.

*Id.*; see also *Sierra Club v. Lynn*, 502 F.2d 43, 47, 62 (5th Cir. 1974) (applying the rule of considering alternatives "outside [an agency's] jurisdiction or control" when evaluating an environmental impact statement for the issuance of a bond by the Department of Housing and Urban Development to a private developer). This analysis serves an important role in advancing governmental cohesion with respect to policies that significantly impact the environment. The Proposed Regulation's removal of § 1502.14(c) would contradict this well-settled interpretation of NEPA.

**IV. THE PROPOSAL'S PER-SE LIMITATIONS ON WHAT CONSTITUTES "MAJOR FEDERAL ACTION" ARBITRARILY CONSTRAIN NEPA'S APPLICATION AND CONTRAVENE NEPA'S COMMITMENT TO CASE-BY-CASE ANALYSIS**

The Proposal would impose categorical limitations on what constitutes a "major Federal action" such that agencies could circumvent NEPA's procedural mandates in violation of the statute's requirement that agencies comply "to the fullest extent possible." 42 U.S.C. § 4332(2)(C). The Proposed Regulation defines "major Federal action" to exclude "non-Federal projects with minimal Federal funding or minimal Federal involvement such that the agency cannot control the outcome on the project." Proposed § 1508.1(q). The Proposal requested comment on whether

there should be an explicit threshold for “minimal Federal funding,” and also proposes per-se exclusions for certain projects. 85 Fed. Reg. at 1709. This categorical approach does not accord with NEPA’s statutory commitment to individual analysis.

NEPA mandates “individualized consideration and balancing of environmental factors—conducted fully and in good faith.” *Calvert Cliffs’ Coordinating Committee, Inc.*, 449 F.2d at 1115. Courts have also made clear that the determination “[w]hether a project is a ‘major federal action’ is, of course, a question which can only be resolved through a careful case-by-case analysis.” *Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm’n*, 464 F.2d 1358, 1366 (3d Cir. 1972). This case-by-case approach gives more complete effect to NEPA’s requirement that agencies comply with its mandates “to the fullest extent possible.” 42 U.S.C. § 4332. The Proposal’s categorical approach contravenes clear precedent and statutory text by establishing bright-line limits as to what constitutes “major Federal action.”

Courts have found that a broad range of projects fall within NEPA’s conception of “major Federal actions.” For example, any grant of federal funds may federalize a project, even if that grant is minimal. *See Homeowners Emergency Life Protection Committee v. Lynn*, 541 F.2d 814, 817 (9th Cir. 1976). And, federal approval of land use is often sufficient to subject a project to NEPA’s procedural mandates. *See, e.g., Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975). Even federal enablement of a project through a land exchange may convert the project to a “Federal action.” *See Nat’l Forest Preservation Group v. Butz*, 485 F.2d 408, 411 (9th Cir. 1973). CEQ mischaracterizes decades of precedent by treating federal control over a project’s outcome as the deciding factor. A federal agency may bear the burden of preparing an EIS even where “it does not plan, design or construct [the projects]” because it is in “the best position to weigh the costs to the environment” as the “initial decision maker.” *Conservation Soc. of Southern Vermont, Inc. v. Secretary of Transp.*, 508 F.2d 927, 931 (2d Cir. 1974). Actions such as granting a permit or being involved in the approval process, even for an otherwise private project, render the agency responsible for the project’s environmental consequences and subject it to NEPA’s procedural mandates. *See Save Our Sonoran, Inc., v. Flowers*, 408 F.3d 1113, 1121 (9th Cir. 2004); *Southwest Williamson County Community Ass’n, Inc. v. Slater*, 243 F.3d 270, 279 (6th Cir. 2001).

The Proposal justifies its departure from prior practice by asserting that “[i]n such circumstances, there is no practical reason for an agency to conduct a NEPA analysis because the agency could not influence the outcome of its action to address the effects of the project.” 85 Fed. Reg. at 1709. CEQ also indicates that “[t]his change would help to reduce costs and delays.” *Id.* However, this explanation is not responsive to the concerns that courts have pointed out in defining a broad scope of “federal action” in the cases cited above. Even where an agency is merely approving a project at its initial stages, its approval is necessary for the project to continue. The federal government bears clear responsibility for the environmental effects of such projects and must therefore prepare an EIS so that it adequately considers these effects before continuing. The Proposal ignores this key nuance.

The Proposed Regulation imports bright-line restrictions into a statutory scheme that depends on flexibility and individualized consideration. Such categorical restrictions do not accord with the statute’s explicit mandate that agencies comply “to the fullest extent possible.” 42 U.S.C. §

4332. This aspect of the Proposal restricts NEPA's application and undercuts Congress' broad intent in enacting the statute.

**V. THE PROPOSAL'S EXPANSION OF THE CONCEPT OF "FUNCTIONAL EQUIVALENCE" IS INCONSISTENT WITH NEPA'S MANDATE THAT AGENCIES COMPLY "TO THE FULLEST EXTENT POSSIBLE"**

Under Section 102(2)(C) of NEPA, agencies must prepare an EIS for any "major Federal action significantly affecting the quality of the human environment." The Proposed Regulation would give agencies broad leeway to circumvent this requirement if they determine that they have functionally complied with NEPA's mandates. Proposed § 1506.9. Allowing agencies to unilaterally limit NEPA's application is unprecedented and unlawful.

A. The Proposal Departs from Decades of Precedent Limiting Functional Equivalence to Extremely Narrow Circumstances

The Proposal unlawfully expands the concept of "functional equivalence" from a narrow exception into a broad license for agencies to ignore their duties under the statute. The Proposed Regulation departs from decades of precedent to extend the concept of functional equivalence to agencies other than the Environmental Protection Agency ("EPA"), including agencies without environmental mandates. CEQ provides no justification for this departure, simply acknowledging that it is departing from prior practice. 85 Fed. Reg. at 1707. This departure is contrary to NEPA's plain language, Congress' intent in passing NEPA, and judicial precedent.

NEPA instructs agencies to comply with their duties "to the fullest extent possible." 42 U.S.C. § 4332. Therefore, courts, while recognizing that under some circumstances a NEPA analysis might be duplicative or unnecessary, have applied the "functional equivalence" exception narrowly, effectively limiting the exception to projects undertaken by the EPA. As these courts have explained, while there might be "little need in requiring a NEPA statement from an agency whose raison d'être is the protection of the environment and whose decision . . . is necessarily infused with the environmental considerations so pertinent to Congress in designing the statutory framework," *Amoco Oil Co. v. U.S. Env'tl. Protection Agency*, 501 F.2d 722, 749–50 (D.C. Cir. 1974), NEPA must still "be accorded full vitality" by non-environmental agencies, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973). Courts have held the "functional equivalence" concept inapplicable even to agencies that must take environmental considerations into account, unless their "sole responsibility" is "to protect the environment." *Texas Comm. on Nat. Res. v. Bergland*, 573 F.2d 201, 208 (5th Cir. 1978) (finding that Forest Service was not exempt from preparing an EIS despite statutory environmental review requirements because it "must balance environmental and economic needs in managing the nation's timber supply").

The Proposal departs from this long-established understanding by extending functional equivalency to all "other agencies." 85 Fed. Reg. at 1707. It transforms functional equivalency into a broad alternative to NEPA over which agencies have considerable discretion without adequate justification. CEQ asserts that this expansion is justified because "courts have found that NEPA is inapplicable where . . . environmental review and public participation procedures under another statute are functionally equivalent to those required by NEPA." 85 Fed. Reg. at

1695. However, the Proposal does not cite any specific cases in support of this claim. Furthermore, even for EPA, Congress has made clear in subsequent amendments when it intends to create an exemption from NEPA's mandates. *See, e.g.*, 15 U.S.C. § 793(c)(1); *see also* 33 U.S.C. § 1371(c)(2).

Making functional equivalence available to non-environmental agencies does not accord with Congress' intent in enacting NEPA. Congress carefully outlined a procedure that would infuse environmental considerations into decision-making for all agencies, but especially those that would not be required otherwise to take such considerations into account. The Proposed Regulation would effectively allow agencies to design their own procedures to facilitate environmental review. Agencies whose primary mission falls outside the environmental sphere are more likely to overlook environmental impacts without strict procedural requirements. Allowing such circumvention of NEPA's procedures eviscerates NEPA's effect and directly contravenes Congress' purpose in enacting the statute.

B. Agencies Cannot Produce the Functional Equivalent of an EIS without Consulting Other Agencies with Expertise in Environmental Issues

The Proposal's expansion of the concept of "functional equivalency" is also inconsistent with NEPA's mandate that agencies "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(C). The Proposal would allow agencies to determine they have produced the functional equivalent of an EIS without any consultation with other agencies. Instead, agencies would only need to that:

- (1) There are substantive and procedural standards that ensure full and adequate consideration of environmental issues;
- (2) There is public participation before a final alternative is selected; and
- (3) A purpose of the analysis that the agency is conducting is to examine environmental issues.

Proposed §§ 1506.9, 1507.3(b)(6). There is no requirement that agencies affirmatively seek outside input in making these findings.

Without a consultation requirement, agencies are likely to underestimate or inadequately define environmental impacts. Agencies with jurisdiction over or special expertise in environmental issues are in the best position to determine and assess these impacts. Circumventing consultation could lead to systematic failures to recognize the full scope of potential environmental effects in direct opposition to Congress' intent in enacting NEPA. NEPA mandates full consideration of the environmental effects of agency actions—the Supreme Court has made clear that an agency must take a "hard look" at environmental consequences. *Kleppe v. Sierra Club*, 427 U.S. at 410 n. 21. The Proposal dilutes this requirement and would allow agencies to unilaterally conclude that they have adequately considered the relevant scope of environmental effects without input from agencies in the best position to assess such compliance.

C. The Proposal Unlawfully Encourages Agencies to Substitute Regulatory Impact Analyses for Environmental Impact Statements Despite their Unsuitability

The Proposal's expansion of the concept of functional equivalency to include documents prepared by agencies that do not allow for adequate consideration of environmental effects violates NEPA's mandate that agencies comply "to the fullest extent possible." 42 U.S.C. § 4332. The Proposed Regulation's suggested expansion is particularly broad in the context of rulemakings, where the Proposal provides that "analyses prepared pursuant to other statutory or Executive order requirements may serve as the functional equivalent of the EIS and be sufficient to comply with NEPA." Proposed § 1506.9. One example of such an analysis is a Regulatory Impact Analysis ("RIA") prepared pursuant to Executive Order 12,866. Such RIAs do not adequately substitute for an EIS because they do not focus on environmental impacts and because they do not provide the same opportunities for public participation.

Further, the Proposal explicitly encourages agencies to substitute RIAs for an EIS, despite their unsuitability. The preamble specifies that, in preparing an RIA, agencies "must anticipate the advantages and disadvantages of the preparation of a separate EIS." 85 Fed. Reg. at 1705. By requiring agencies to consider these advantages and disadvantages, the Proposal necessarily skews an agency's determination as to whether a separate EIS is required. Such considerations place time and resource costs at the forefront, rather than the question of whether there has been a sufficiently rigorous consideration of environmental impacts. Agencies confronted with the administrative costs of preparing an EIS may be more likely to conclude that a separate EIS is unnecessary. This directly contravenes NEPA's mandate that agencies comply "to the fullest extent possible." 42 U.S.C. § 4332. If Congress wanted to allow such exceptions to NEPA's requirements, it could have written such exceptions into the statute. CEQ cannot do so in Congress' stead.

**VI. THE PROPOSED REGULATION ARBITRARILY LIMITS THE LENGTH OF EISs AND THE TIME AN AGENCY HAS TO PREPARE AN EIS**

The Proposal's imposition of presumptive limits on the length and timing of agencies' EISs encourages agencies to curtail their analyses in violation of NEPA's mandate that agencies comply "to the fullest extent possible." 42 U.S.C. § 4332. The Proposal requires that an EIS "shall be 150 pages or fewer" except where there are "proposals of unusual scope or complexity" or where "a senior agency official of the lead agency approves in writing" a longer document. Proposed § 1502.7. In addition, the Proposal requires that an EIS be completed "within 2 years unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit." Proposed § 1501.10(2). Together, these measures artificially constrain an agency's consideration of environmental impacts and will prevent agencies from taking the required "hard look" at environmental consequences in their decision making processes. *Kleppe v. Sierra Club*, 427 U.S. at 410 n. 21.

According to the Proposal, "[f]or final EISs, the mean document length was 669 pages" across all federal agencies. 85 Fed. Reg. at 1688. Nevertheless, the Proposal imposes a presumptive page limit of less than 25% this average length. The Proposal assumes that the average length indicates inefficiencies, arguing that page limits will "ensure that agencies develop EISs focused on significant effects and on the information useful to the decision makers and the public to more

successfully implement NEPA.” *Id.* at 1700. But courts have made it clear that “[t]he sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action.” *Calvert Cliffs’ Coordinating Committee, Inc.*, 449 F.2d at 1122. Such length may be necessary to accommodate NEPA’s broad sweep and ensure full and fair consideration of relevant environmental challenges. The Proposed Regulation’s presumptive page limit is a powerful disincentive to agencies to surpass this page limit, even if doing so is necessary for a complete analysis of environmental impacts as required by the statute.

This disincentive is made worse by CEQ’s presumptive time limit of two years. Arbitrarily imposing presumptive time and page limits overlooks NEPA’s commitment to a “case-by-case balancing judgment,” *Calvert Cliffs’ Coordinating Committee, Inc.*, 449 F.2d at 1123, in favor of a one-size-fits-most approach. NEPA requires agencies to consider a broad range of impacts and alternatives. 42 U.S.C. § 4332(2)(C). These considerations are necessarily complex, and the scope will vary for different projects. CEQ previously recognized, when promulgating the existing regulations, that for “precise time limits to apply uniformly across the government would be unrealistic” because “[t]he factors which determine the time needed to complete an environmental review are various [and] may differ significantly from one proposal to the next.” 43 Fed. Reg. at 55,983. The Proposal does not even address, much less rebut, this prior finding.

CEQ justifies its departure from prior practice by stating that it wishes “to promote timely reviews,” 85 Fed. Reg. at 1699, and asserting that page limits “ensure that agencies develop EISs focused on significant effects and on the information useful to the decision makers and the public to more successfully implement NEPA.” *Id.* at 1700. However, this explanation is not responsive to the problems CEQ previously recognized or that courts have pointed out in applying such limitations. As CEQ itself acknowledges, “there can be many factors affecting the timelines and length of EISs.” *Id.* at 1688. Courts have made clear that “[c]onsiderations of administrative difficulty, delay or economic cost will not suffice to strip [Section 102] of its fundamental importance.” *Calvert Cliffs’ Coordinating Committee, Inc.*, 449 F.2d at 1115. But the Proposal does precisely what courts have warned against, allowing concerns about administrability to constrain agencies’ analyses of environmental effects. This approach is inconsistent with precedent, with CEQ’s prior factual findings, and with NEPA’s mandate that agencies comply “to the fullest extent possible.” 42 U.S.C. § 4332.

Allowing agencies to extend these limits does not alleviate the concern, as agencies may be reluctant to do so. Having a safety valve for extraordinary circumstances is not sufficiently protective and in no way prevents agencies from cabining their obligations under NEPA for the sake of efficiency.

## **VII. CEQ LACKS AUTHORITY TO LIMIT JUDICIAL REVIEW**

The Proposal in several places unlawfully attempts to limit judicial review of agencies’ NEPA compliance under the Administrative Procedure Act (“APA,” 5 U.S.C. §§ 551 *et seq.*). Some provisions would limit the availability of judicial review. For example, Proposed §§ 1500.3 and 1503.3(b) establish exhaustion requirements. Others would change the standards that federal courts apply when reviewing agency NEPA compliance. Thus Proposed § 1502.18 would have an agency’s certification that it has considered analyses submitted in public comments create “a conclusive presumption” that it adequately considered the comments. Still others purport to

affect the availability of remedies in court. Proposed § 1500.3(c) purports to allow agencies to establish bonding requirements for the imposition of a stay pending judicial review. Proposed § 1500.3(d), a section entitled “Remedies,” states that “[h]arm from the failure to comply with NEPA can be remedied by compliance with NEPA’s procedural requirements,” that “[t]hese regulations create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm,” and that “minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action.”

CEQ does not have statutory authority to interpret the judicial review provisions of the APA or otherwise to limit the availability or scope of judicial review or courts’ ability to impose remedies. As the D.C. Circuit has explained, “an agency has no interpretive authority over the APA.” *Sorenson Comm. Inc. v. Federal Comm. Comm’n*, 755 F.3d 702, 706 (D.C. Cir. 2014).<sup>5</sup> “Interpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.” *Ramey v. Bowsher*, 9 F.3d 133, 136 n. 7 (D.C. Cir. 1993). In *Nagahi v. Immigration and Naturalization Service*, 219 F.3d 1166, 1171 (10th Cir. 2000), the 10th Circuit held that the Immigration and Naturalization Service did not have the authority to define the length of time considered “timely” to file an appeal to a denial of naturalization because the agency may not regulate the scope of the judicial power vested by statute absent an express delegation from Congress. Here, CEQ’s error is compounded because it does not purport to interpret the APA for purposes of judicial review of its own actions, but for review of NEPA compliance by other federal agencies.

Aside from CEQ’s lack of authority to make these changes, the substance of several of the provisions is inconsistent with current law. For example, the suggested bonding requirement would apparently apply to all plaintiffs. The federal courts have recognized for decades, however, that “plaintiffs in many NEPA cases would be precluded from effective and meaningful appellate review” by excessive bonding requirements and that “such bonds would seriously undermine the mechanisms in NEPA for private enforcement.” *Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975). The “conclusive presumption” attached to an agency’s certification that it has considered comments is also contrary to case law establishing that an agency’s response to comments is entitled only to “a *rebuttable* presumption that it has considered and answered the commenter’s concerns,” and that this presumption attaches only when “an agency clearly responds to comments.” *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 849 (9th Cir. 2013) (emphasis added). A mere “conclusory statement that [the agency] had ‘considered all views that have been expressed’” is not entitled to even a rebuttable presumption. *Id.* at 848.

The requirement that the public make comments on the “alternatives, information, and analyses section” mandated by Proposed § 1502.17 within 30 days after the publication of a *final* EIS, contained in Proposed § 1500.3(b)(3), is especially burdensome and pointless. The requirement that members of the public comment not only on the draft EIS but also on the final EIS imposes a double burden. This burden is amplified by the fact that 30 days is too short a period of time in

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<sup>5</sup> *Cf. Prof'l Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm’n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (“The Supreme Court has indicated . . . that reviewing courts do not owe the same deference to an agency’s interpretation of statutes that, like the APA, are outside the agency’s particular expertise and special charge to administer.”) (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648-51 (1990)).

which to comment on a complex document like an EIS. Moreover, this burden serves no purpose, because such comments would come too late to inform the agency and an agency is unlikely to change its decision after the publication of the final EIS. Instead, the sole function of this requirement appears to be to block judicial review.

### **VIII. CEQ MAY NOT LIMIT OTHER AGENCIES' NEPA COMPLIANCE**

The Proposal unlawfully attempts to make CEQ's NEPA regulations a ceiling for other agencies' compliance with their procedural duties under the statute. Specifically, Proposed § 1507.3(a) provides that "[e]xcept as otherwise provided by law or for agency efficiency, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in these regulations." The only justification that CEQ provides for this aspect of the Proposal is that it "intends that this provision will prevent agencies from designing additional procedures that will result in increased costs or delays." 85 Fed. Reg. at 1693.

CEQ lacks authority to limit other agencies' NEPA compliance. To the contrary, NEPA mandates that *all* federal agencies comply with their duties under the statute "to the fullest extent possible." 42 U.S.C. § 4332. Should another federal agency determine that it can and should provide additional procedures beyond the minimum standards identified by CEQ, nothing in the statute allows CEQ to prohibit that agency from doing so. In fact, the Proposal has matters exactly backwards: it provides that agencies can go beyond the CEQ regulations only "as otherwise provided by law," when in fact "[t]he effectiveness of Section 102(2) depends upon compliance with procedural duties 'to the fullest extent possible,' i.e., a compliance, the completeness of which is *only limited by the agency's statutory obligations*." *Sierra Club v. Froehkle*, 534 F.2d 1289, 1299 (8th Cir. 1976) (emphasis added); *see also Atlanta Gas Light Co. v. Federal Power Comm'n*, 476 F.2d 142, 150 (5th Cir. 1973) ("[T]he legislative history of the NEPA interprets 'to the fullest extent possible' to mean compliance unless compliance would give rise to a violation of statutory obligations.").

This attempted limitation on other agencies' NEPA compliance is particularly problematic given that other provisions in the Proposed Regulation—such as those suggesting that review of cumulative and indirect impacts is optional or narrowed, and limiting the scope of alternatives to be analyzed—are themselves contrary to the statute. In effect, not only is CEQ adopting regulations that are contrary to law, but it is also mandating that other agencies do so, thereby compounding its error. By setting up other agencies for failure in court, CEQ is not advancing its purported goal of increasing efficiency; instead, it is creating a formula for decision-making gridlock.

### **IX. THE PROPOSED LANGUAGE REGARDING "NEW SCIENTIFIC AND TECHNICAL RESEARCH" IS AMBIGUOUS AND POTENTIALLY CONTRARY TO LAW**

The Proposal's amendment to § 1502.24 provides that "[a]gencies . . . are not required to undertake new scientific and technical research to inform their analysis." CEQ claims that this language is consistent with the requirement that agencies must "obtain incomplete or unavailable information regarding significant adverse effects" in § 1502.22, while promoting the use of



existing data. 85 Fed. Reg. at 1703. CEQ further purports to allow agencies to use their “experience and expertise” in deciding when new information is needed. *Id.*

Proposed § 1502.24, however, is ambiguous and does not clearly maintain the requirement recognized in § 1502.22 that NEPA will at times require an agency to conduct new research to arrive at an informed decision. The statement that agencies “are not required to undertake new scientific and technical research,” is broad and unqualified. Additionally, the Proposal does not define “new scientific and technical research,” which creates further ambiguity. All the Proposal has provided as an explanation of “new scientific and technical research” is that it is “beyond existing scientific and technical information available in the public record or in publicly available academic or professional sources.” 85 Fed. Reg. at 1703. It is not clear what CEQ is telling agencies they need not do in preparing an EIS. Nor is it clear what purpose this restriction is supposed to serve.

Because every project subject to NEPA is unique, every EIS requires at least some original study and analysis. Proposed § 1502.24 invites agencies to limit their analysis in contradiction of the statute. The central function of NEPA is to require agencies to study and disclose the potential environmental impacts of their proposed projects. The only clear reading of NEPA’s statutory command is that a proposed project’s location and surrounding environment must be taken into account. Thus, new research may very well be required if the project involves a location that has never been studied or for which the ecological features are presently unknown, as CEQ’s current regulations in § 1502.22 recognize. The statutory text anticipates this need by requiring agencies to set up methods and procedures to ensure that “presently unquantified environmental amenities and values” are given consideration in agency decision-making. 42 U.S.C. § 4332(B). This language acknowledges that at the outset, the agency may not have all of the information needed to compile an EIS, and therefore must use procedures and methods to collect that “presently unquantified” information about environmental impacts. *See id.* If that information cannot be found in existing reports, then surely the agency must use such procedures and methods to get the information itself. It would be absurd if an agency could extrapolate data from a distant location with different environmental and ecological features to evaluate the environmental impacts of its proposed project. An EIS based on such irrelevant data would be meaningless and would frustrate NEPA’s goal of ensuring that agencies proceed with proposed projects only after considering the environmental impacts.

In enacting NEPA, Congress placed great emphasis on the use of science in describing the statute’s goals. For example, the Senate Committee Report stated:

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 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.

COMM. ON INTERIOR AND INSULAR AFFAIRS, REPORT ON S. 1075, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. Report No. 91-296, at 20 (July 9, 1969) (emphasis added).

This rule also contradicts CEQ's past interpretation of NEPA. CEQ has previously identified the importance of location-specific information for carrying out NEPA's command that agencies must "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 decisionmaking which may have an impact on man's environment." 42 U.S.C. § 4332(A). In *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years*, CEQ emphasized the importance of place-based information and study using the interdisciplinary approach mandated by NEPA.<sup>6</sup> In this report, CEQ found that "NEPA's interdisciplinary approach helps balance and integrate competing goals by focusing on all the environmental, economic, and social factors affecting *a single place*." *Id.* (emphasis added). The location-specific nature of NEPA's interdisciplinary approach that CEQ describes in the report relies on the assumption that an agency needs data related to the specific location of the proposed project, rather than simply rely on general, existing information.

There are many examples of cases where courts have recognized that NEPA will at times require agencies to conduct new or original research where none currently exists. As the Ninth Circuit explained:

Federal agencies routinely either do their own studies or commission studies of the particular area in which a proposed project is to be located. *Almost every EIS contains some original research*. And, almost every time an EIS is ruled inadequate by a court it is because more data or research is needed. The Forest Service does not, and indeed cannot, cite any case which holds that an agency is not obliged to do research to comply with NEPA.

*Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1249 (9th Cir. 1984) (emphasis added), *abrogated on other grounds by Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531 (1987). For example, in a case involving a permit to allow an oil company to construct "an addition to its existing oil refinery dock in Cherry Point, Washington," the court held that the agency's environmental assessment was insufficient for failing to study the potential impacts of increased traffic. *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 855, 870 (9th Cir. 2005). There, the court noted the essential role of an EIS as "obviate[ing] the need for speculation," while describing data collection as part of the agency's obligation to prepare an EIS when relevant information is unknown. *Id.* at 870, 871 (citation and internal quotation marks omitted). The court stated:

The amount that tanker traffic might increase in relation to the dock extension was largely unknown. Presumably, data collection or projection analysis could have determined the likely increase in tanker traffic, considering market forces, the dock extension, and the cumulative impact of the existing and pending facilities in the area. No such analysis is evident in the [environmental assessment], nor is there a justification regarding why more definitive information could not be provided.

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<sup>6</sup> CEQ, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 25 (1997), available at <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf>.

*Id.* at 870 (citation and internal quotation marks omitted); *see also State of Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir.), *vacated in part sub nom. W. Oil & Gas Ass’n v. Alaska*, 439 U.S. 922 (1978) (“As a preliminary matter, we note that NEPA does, unquestionably, impose on agencies an affirmative obligation to seek out information concerning the environmental consequences of proposed federal actions. . . . And prediction or, at least, informed prediction is only possible after an agency has conducted a thorough inquiry into all aspects of the contemplated project and the area to be affected.”). These cases demonstrate that a blanket rule allowing agencies to avoid original research would directly contradict NEPA. If the proposed amendments to § 1502.24 are interpreted as allowing agencies to avoid original research even when a lack of knowledge about potential environmental impacts could be readily redressed by the agency, the Proposed Regulation would contradict existing law. This inappropriate interpretation is all too likely, given the potential breadth and vagueness of the definition of “new scientific and technical research” that agencies would not be required to undertake. This provision therefore contradicts the statute and should be withdrawn.

## **X. CEQ HAS NOT FOLLOWED REQUIRED AND CUSTOMARY PROCEDURES FOR ISSUING DRAFT REGULATIONS**

The statutory requirements that Congress established for the process by which agencies develop regulations—while often described as “procedural” in nature—assure that agencies reach substantively valid and informed outcomes. These statutory and other rulemaking procedures were put in place for a reason; failing to follow them suggests a lack of informed analysis and undermines the basis of and credibility for the substance of the Proposal. Here, the Proposed Regulation violates multiple procedural requirements, including, but not necessarily limited to, NEPA and application of Executive Orders regarding the Protection of Children from Environmental Health Risks and Safety Risks, and Environmental Justice in Minority Populations and Low-Income Populations.

### **A. Failure to Comply with NEPA**

NEPA requires that *all* federal agencies identify and assess the environmental impacts of “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). As explicitly noted in CEQ’s existing regulations, the adoption of agency regulations, whether new or revised, is an action subject to NEPA. 40 C.F.R. § 1508.18(a). As the Proposed Regulation would significantly alter how NEPA is implemented, the Proposal clearly falls within the scope of actions that are subject to the statutory requirements.

In explaining why a NEPA analysis was not conducted, the Proposal asserts that it would “not make any final determination of what level of NEPA analysis is required for particular actions” and “would not have a significant effect on the environment because it would not authorize any activity or commit resources to a project that may affect the environment.” 85 Fed. Reg. at 1711. However, these conclusory statements are inconsistent with, if not directly contradicted by, provisions in the Proposed Regulation that, while ambiguous, have the potential to limit the scope of projects that would be subject to NEPA review in the first place. As just one example, the proposed revised definition of “major federal action” would narrow the scope of projects

subject to NEPA review.<sup>7</sup> A project or action that is not subject to NEPA review is by default authorized by NEPA. Therefore, by removing categories of actions from NEPA review entirely, the Proposed Regulation has the effect of authorizing, from the perspective of NEPA, activities that may affect the environment. The Proposed Regulation is subject to NEPA analysis and should have been accompanied by an environmental impact statement as required by 42 U.S.C. § 4332(C).

B. Failure to Appropriately Interpret and Apply Executive Orders Applicable to Rulemaking Proceedings

As acknowledged by CEQ, the Proposed Regulation is a “significant regulatory action” as that term is defined by Executive Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). 85 Fed. Reg. at 1711. Although not explained, this position is presumably based, at least in part, on the conclusion that the Proposal will have “an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”<sup>8</sup> As such, the material available for the public’s review and comments should include (i) CEQ’s “assessment” and the “underlying analysis” of the anticipated benefits and costs of the Proposed Regulation, and (ii) a Regulatory Impact Analysis for the Proposed Regulation.<sup>9</sup> However, the Proposal contains no serious attempt at assessing either the benefits or costs of the Proposed Regulation. With respect to benefits, the Proposal notes that it would “facilitate more efficient, effective, and timely NEPA reviews by Federal agencies,”<sup>10</sup> but provides no support for such an assertion. Nor does the Proposal suggest that there are benefits in line with the purposes of NEPA (as outlined in 42 U.S.C. § 4321). Also missing from the rulemaking docket and CEQ’s website is any underlying analysis for or copy of a Regulatory Impact Analysis.

Executive Order 13,045: Protection of Children from Environmental Health Risks and Safety Risks, directs agencies to “make it a high priority to identify and assess environmental health risks and safety risks that may disproportionately affect children.” Exec. Order No. 13,045, 62 Fed. Reg. 19,885, at § 1-101(a)–(b) (Apr. 21, 1997). Agencies proposing regulatory actions

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<sup>7</sup> Proposed Regulation 40 C.F.R. § 1508.1(q), (q)(1) (including application to: projects with minimal Federal funding; projects with minimal Federal involvement where the agency cannot control the outcome of the project; actions that do not result in final agency action under the Administrative Procedure Act; loans, loan guarantees and other forms of financial assistance; and guidance documents.).

<sup>8</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) at section 3(f)(1)–(3). The alternative bases for a “significant regulatory action” are that a proposed regulation would: “create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in [Executive Order 12,866].”

<sup>9</sup> Exec. Order No. 12,866 at § 6(a)(3)(B)–(C), (E)(i) (“After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall: (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C).”).

<sup>10</sup> 85 Fed. Reg. at 1685.

subject to Executive Order 13,045 must develop, and provide to the Office of Information and Regulatory Affairs (“OIRA”), (a) an evaluation of the environmental health or safety effects of the planned regulation on children; and (b) an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency. *Id.* at 19,887, § 5-501(a)–(b); *see also* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 at § 6(a)(3)(A) (describing which regulatory actions must be submitted to OIRA). Covered regulatory actions include those that are likely to be “economically significant” under Executive Order 12,866 and concern “an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children.” 62 Fed. Reg. at 19,885, § 2-202(a)–(b).

Children are often at greater risk of harm from pollution than healthy adults. When performed in accordance with NEPA’s statutory mandates, the analysis informing an EIS can identify public health risks to children. For example, the analysis of a proposal to build a power plant in a neighborhood with high child asthma rates should identify how such a plant would contribute to existing air pollution, thus creating disproportionate effects on young children. Armed with such information, an agency could evaluate whether an alternative to the project, such as a different location or additional technology, could reduce negative impacts. To the extent the Proposed Regulation suggests that an agency can forego considering cumulative and indirect impacts, such an analysis would underestimate impacts on public health, including the health of children. Thus, the Proposal itself should be construed as an action subject to the review requirements of Executive Order 13,045. This would not present a double-bite at the apple in terms of review under Executive Order 13,045; rather it presents the only meaningful opportunity to consider the impact of the Proposal on the protection of children. Once the Proposal is adopted, it would alter an agency’s analysis under NEPA, so that any analysis of feasible alternatives under Executive Order 13,045 would already be limited in a way that precludes consideration of the impacts of the Proposal.

Similarly, the Proposal triggers the review requirements of Executive Order 12,898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which requires agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their programs, policies and activities on minority and low-income populations. Exec. Order No. 12,898, 59 Fed. Reg. 7,629, at § 1-101 (1994).

## CONCLUSION

For the reasons stated throughout this letter, we urge CEQ to withdraw this unlawful and unjustified proposal. Thank you for your consideration.

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