Comments on the Council on Environmental Quality NPRM
Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act
Docket No. CEQ-2019-0003

March 9, 2020

We, the undersigned ninety-five law professors, write to provide a broader context for evaluating the Notice of Proposed Rulemaking's (NPRM) regulations for streamlining NEPA procedures. While we support efforts to improve NEPA implementation, we have serious concerns that the exemptions, arbitrary time and length limits, and substantive omissions in environmental reviews that are proposed in the NPRM will circumvent or undermine NEPA's environmental review procedures. NEPA serves three important functions: (1) informing government decisionmakers and the public about the environmental consequences of proposed federal actions before an irretrievable commitment of resources is made; (2) enabling members of the public, as well as other federal and state agencies, to provide input on agency decisions that impact them or their community before those decisions are finalized; and (3) minimizing damage to the environment while protecting human health and welfare. On the whole, we believe that the time it takes to complete NEPA procedures and the costs of complying with them are reasonable in light of these goals.

We will begin by discussing Congress's objectives in enacting NEPA and then turn to NEPA compliance data, which, in our view, do not support limiting the scope of NEPA reviews or weakening NEPA procedures. After commenting on specific elements of the proposed regulations, we will offer our own recommendations for improving NEPA procedures. The proposed changes of greatest concern and weakest legal grounding include the following:

- Eliminating consideration of cumulative and indirect impacts from environmental reviews.
- "Segmentation" of projects and further limiting the scope of NEPA reviews by the jurisdictional authority of the acting federal agency.
- Narrowing the range of alternatives that must be considered in environmental reviews to those closely tied to the "proposed action" and explicitly within the jurisdictional authority of the federal agency.
- Expanding "functional equivalence" to allow environmental reviews outside the NEPA framework to substitute for NEPA compliance, despite the weaker procedural safeguards of these alternatives.
- Relaxing criteria for use of "categorical exclusions," which create broad exemptions to NEPA procedures for specific classes of federal actions, even when "extraordinary circumstances" exist that would otherwise preclude reliance on them.

- Eliminating the conflict of interest disclosure requirements for contractors preparing EISs and allowing applicants seeking federal permits, approvals, or funding to prepare EISs themselves.
- Placing limits on judicial review through enhanced exhaustion requirements, restrictions on the timing of judicial review, and limits on the remedies (most notably injunctive relief) available to plaintiffs. These regulations plainly violate provisions of the Administrative Procedure Act and constitutional separation of powers.

One irony of the proposed regulations is that they create exemptions to NEPA where environmental reviews are most needed—that is, where irreplaceable natural resources are at stake and where public concern is greatest. The proposed changes directly contravene the intent of Congress when it voted almost unanimously to enact NEPA. In particular, consideration of cumulative and indirect impacts, as well as a careful formulation of reasonable alternatives, is often of heightened importance in the context of energy projects approved or permitted by federal agencies, construction of major infrastructure supported or permitted under federal programs, and management of public lands. These types of federal actions are the ones that most frequently prompt preparation of environmental impact statements (EISs) and are at the greatest risk of being exempted from NEPA procedures or undermined by substantively deficient environmental reviews.

Congress passed NEPA in 1969 because the complexity and the scale at which human development was impacting the environment were not well understood. Those same concerns have only escalated with the advent of climate change, which is associated with the types of environmental impacts—cumulative and indirect—that Congress believed federal agencies would be least likely to consider despite their importance to human and environmental health and welfare. The CEQ's proposed regulations represent a wholesale repudiation of Congress' intent with NEPA—namely, that effective decision-making requires adequate information and holistic analysis—and the strict procedural mechanisms on which NEPA's legal framework is premised. Through gerrymandered exemptions and indefensible substantive omissions in environmental reviews, the proposed CEQ regulations elevate short-term myopia over the most basic principles of reasoned decision-making and wise governance.

I. Any Revision to NEPA's Implementing Regulations Must Advance the Congressional Purpose and National Policy that are Declared in the Act

Congress was clear and unequivocal when it created NEPA through a unanimous vote in the Senate and a nearly unanimous vote in the House. NEPA represented a new:

> national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health

> and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation[.][1]

In furtherance of this national policy, Congress and the President specifically directed federal agencies 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, and fulfill the social, economic, and other requirements of present and future generations of Americans.[2]

As the Supreme Court has recognized, "NEPA announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by 'all practicable means, consistent with other essential considerations of national policy.'"[3] Advancing these statutory purposes must be at the core of any rulemaking under NEPA.[4]

The CEQ's proposed regulatory changes are unprecedented—not just in their scope, but also in terms of the threats they pose to effective implementation of statutory directives and well-established national policy. They represent a sea change in the philosophy that underlies the Magna Carta of federal environmental law, taking a statute enacted with the core goal of environmental protection and turning it into a neutered instrument of formulaic, minimal, and empty paperwork. CEQ cannot cast aside the mandate imposed upon it by a nearly unanimous Congress and signed into law by the President. NEPA's procedures must advance, not thwart, NEPA's environmental and human health and welfare objectives.

II. The Empirical Record of NEPA Compliance Does Not Support the Radical Reforms Reflected in CEQ's Proposed Regulations

The common denominator of the proposed regulations is a misplaced belief that NEPA reviews are overly burdensome and a major obstacle to federal actions of broad economic and social value. The empirical record of NEPA compliance does not support the CEQ's implicit assumptions about pervasive and systemic regulatory delays associated with NEPA procedures. Moreover, while opportunities exist for refining and improving NEPA's environmental reviews, the proposed regulations emphasize overbroad substantive exclusions and categorical exemptions where enhanced institutional capacity, agency accountability, and transparency are what is often most needed.

---

[1] 42 U.S.C. § 4321.
[2] 42 U.S.C. § 4331.
[3] Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976) (quoting 42 U.S.C. § 4331).
[4] *See* Gresham v. Azar, __ F.3d __ (D.C. Cir. 2020).

The proposed rules ignore fifty years of experience implementing NEPA, including numerous studies of NEPA implementation and initiatives to streamline NEPA procedures across the federal government.[5] Experience with implementing NEPA shows that:

- Less than 1 percent of federal actions require an EIS; instead, most actions are addressed through expedited categorical exclusions (CEs) or less-rigorous environmental assessments (EAs).
- The small subset of actions that require an EIS represent significant decisions with lasting consequences that warrant rigorous agency analysis and public processes.
- While EISs take several years to complete, the timing is only partially attributable to NEPA procedures. Other factors, such as inadequate agency funding, public opposition, delays in obtaining other required (often non-federal) permits, mid-stream changes to proposals, and competing agency priorities often dictate the duration of NEPA reviews.
- Given that multiple factors can delay federal actions and increase costs, CEQ must be careful to ground any regulatory reforms on empirical studies of and representative experience with NEPA procedures; otherwise, proposed changes are likely to be ineffective or counterproductive.

Virtually all of the regulatory changes proposed in the NPRM appear intended to reduce the perceived burdens on federal agencies. Yet, prior studies have repeatedly found that the burden of NEPA compliance has been overstated.[6] Streamlining, moreover, should not come at the expense of taking a "hard look" at environmental impacts and public engagement that are the hallmark of NEPA procedures. Regulatory changes must be based on clearly identified problems with the NEPA process and be carefully tailored to address them. The NPRM fails, even under a deferential "arbitrary and capricious" standard of review, to provide adequate empirical grounding for either the rationales behind the proposed regulations or evidence that the proposed changes will improve NEPA procedures rather than, as we fear, seriously compromising or circumventing NEPA's statutory mandates.

A. The Vast Majority of NEPA Compliance Occurs Through Categorical Exclusions and Environmental Assessments

Under CEQ's current regulations, the amount of time and resources spent on environmental reviews is proportionate to the scale of the anticipated environmental impacts,

---

[5] Congressional Research Service, The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress (2012); U.S. Government Accountability Office, GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* (2014); Congressional Research Service, *The National Environmental Policy Act (NEPA): Background and Implementation* (2011); Department of Energy (DOE), *CEQ Chair Testifies on the Importance of NEPA*, 75 National Environmental Policy Act Lessoned Learned 2 (June 3, 2013); NAT'L ENVTL. POLICY ACT, AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 & NEPA, https://ceq.doe.gov/ceq-reports/recovery_act_reports.html.

[6] *See, e.g.*, CRS, *Role Environmental Review*, *supra* note 3, Summary; GAO, *Little Information*, *supra* note 3, at 8, 15, 19; Congressional Research Service, *The National Environmental Policy Act (NEPA): Background and Implementation* 2 (2011); DOE, *Lessoned Learned*, *supra* note 3, at 2.

and only a small number of the most environmentally damaging and controversial federal actions are subject to the searching analysis required in an EIS. While much attention has focused on the average time it takes to complete an EIS, it is critically important to recognize that the environmental reviews and procedures conducted under NEPA are typically circumscribed, lasting days or at most months, and rarely challenged in court.

According to a 2014 study conducted by the General Accounting Office (GAO),[7] almost 99% of the many thousands of federal actions with potentially significant environmental impacts are subject to an expedited review. CEs to NEPA procedures are available for roughly 95% of all NEPA actions, and EAs cover almost another 5%.[8] CEs and EAs typically take days to months, respectively, to complete.[9] By contrast, detailed EISs accounted for less than 1% of all NEPA reviews and the number of final EISs issued annually consistently falls below 190 across the entire federal government.[10]

If one includes draft, supplemental, and final NEPA documents government-wide, federal agencies prepare approximately 41,325 CEs, 1,740 EAs, and about 435 EISs annually.[11] For the period 2008 through 2015, EPA data reveal that the number of EISs issued each year is consistent with this estimate, averaging 224 draft and 211 final EISs per year; however, the number of final EISs declined by 39% from a high of 277 in 2008 to about 170 by 2019.[12] While

---

[7] GAO, *Little Information*, *supra* note 5, at 8.

[8] *Id*. at 8. These estimates are imperfect, because federal agencies typically do not record the number of CEs or EAs they issue, despite the fact that most agency compliance with NEPA is covered by them. *Id.* With respect to particular agencies, the GAO found, for example, "Department of Energy (DOE) reported that 95 percent of its 9,060 NEPA analyses from fiscal year 2008 to fiscal year 2012 were CEs, 2.6 percent were EAs, and 2.4 percent were EISs or supplement analyses." *Id*. Similarly, the FHWA also reported that 96% of FHWA-approved projects in 2009 "involve[d] no significant environmental impacts and, hence, require limited documentation, analysis, or review under NEPA." *Id*.

[9] From 2003 through 2012, EAs took an average of 13 months to complete (median 9 months), and most EAs were completed in 5 to 9.9 months; EISs took an average of 33 months to complete (median 29 months). NAT'L ASS'N OF ENVTL. PROF'LS, ANNUAL NEPA REPORT 2013, 33, 35 (2014). Programmatic EISs took, on average, 15 months longer to complete than project-specific EISs, though more comprehensive programmatic EISs were comparatively rare, accounting for just 14% of all EISs. *Id*. at 33.

[10] GAO, *Little Information*, *supra* note 5, at 8. EPA's data on draft and final EISs generates very similar results through 2019. EPA, Environmental Impact Database, https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.

[11] GAO, *Little Information*, *supra* note 5, at 9 (the calculation is based on an extrapolation from the percentages for each NEPA process using the number of EISs issued by federal agencies in 2011). For further comparison, CEQ was required to collect and issue a report on NEPA compliance in 2009. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1609(c), 123 Stat. 115, 304 (2009); NAT'L ENVTL. POLICY ACT, AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 & NEPA, https://ceq.doe.gov/ceq-reports/recovery_act_reports.html; *see also CEQ Chair Testifies on the Importance of NEPA*, 75 National Environmental Policy Act Lessoned Learned 2 (June 3, 2013) (quoting CEQ Chair Nancy H. Sutley, "[i]n the case of the 275,000 projects funded under the Recovery Act, only four-tenths of a percent required a full EIS. Ninety-six percent of projects used categorical exclusions").

[12] EPA data were downloaded from the EIS Database for the period January 1, 2012 through December 31, 2015, which is available at: https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search. *See also* NAEP, ANNUAL NEPA REPORT 2016 OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PRACTICE 4-5 (2017). These results are roughly consistent with other work finding that EPA reported 253 (standard deviation of twenty-six) EISs annually during

the volume of NEPA decisions is high, federal agencies have options for expediting decision-making for all but the largest projects, and the CEQ has demonstrated neither that further streamlining is needed nor that such efforts will not undermine NEPA's substantive goals.

NEPA compliance is also unevenly distributed across federal agencies, as a small number of agencies account for most of the environmental reviews. Indeed, only five federal agencies normally issue more than 10 final EISs per year, and most issue fewer than 5, if they issue any at all.[13] According to EPA and CEQ data for the period 1998 through 2015, four federal agencies issued more than 50% of the EISs published nationally: the U.S Forest Service (USFS) accounted for 24%, the Bureau of Land Management (BLM) accounted for 8%, the U.S. Army Corps of Engineers (USACE) accounted for 10%, and the Federal Highway Administration (FHWA) accounted for 12%.[14] The EPA data also reveal that thirty-six other federal agencies issued at least one EIS per year from 2012 through 2015, with the National Park Service (NPS) and the U.S. Fish and Wildlife Service (FWS) accounting for another 10% of the EISs issued, and the Federal Energy Regulatory Commission (FERC) issuing roughly the same number of EISs as the FWS (about 7 each year).[15] By contrast, recent studies find that infrastructure projects, which are often cited as casualties of NEPA procedures, are often exempted under CEs or subject to foreshortened EAs, which are typically completed in 1-18 months.[16]

The limited impact of NEPA procedures is particularly notable in the oil and gas sector. A recent study evaluated every EIS completed by the BLM for oil and gas development projects in Colorado, Montana, Utah, or Wyoming from January 2004 through October of 2014.[17] During this period, the BLM, which administers all of the federal government's oil and gas leases, prepared just 13 EISs across this energy-rich region. Moreover, each of these projects involved approval, on average, of more than 3,600 wells.[18] To put this in perspective, the BLM annually leased an average of over 668,000 acres per year in these states from 2009 through 2014 (the period of available data),[19] and the BLM annually approved an average of over 2,600 applications for permits to drill oil and gas wells.[20] The low number of EISs, particularly given the scale of development in the region, illustrates how rarely agencies prepare EISs.

---

the period 1987 through 2006. Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement*, 10 ENVTL. PRAC. 164, 171 (2008).

[13] The five agencies are USFS (~40/year), BLM (~20/year), USACE (~15/year), FHWA (~13/year), and NPS (~10/year). Derived from the EPA, Environmental Impact Database, *supra* note 10.

[14] GAO, *Little Information*, *supra* note 5, at 11; EPA EIS database, *supra* note 12.

[15] The U.S. Navy, Nuclear Regulatory Commission, Federal Transit Administration, Bureau of Reclamation, National Oceanic & Atmospheric Administration, and Department of Energy each accounted for between 2% and 3% of the EISs issued from 2012 through 2015 according to the EPA data. EPA EIS database, *supra* note 12.

[16] GAO, *Little Information*, *supra* note 5, at 11

[17] John Ruple & Mark Capone, *NEPA—Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 39 (2016).

[18] *Id*.

[19] Calculated from U.S. Dept. of the Interior, Bureau of Land Management, Table 4, Acreage in New Leases Issued (last visited January 16, 2020).

[20] *Id*.

Furthermore, the study found that the number of jobs created and wells drilled was essentially unaffected by the level of environmental oversight.[21]

The findings of this study are also consistent with more recent agency data. According to NEPA documents completed by BLM from FY 2016 through FY 2019, just 2 out of 4,600 proposed oil and gas development projects, or 0.04%, required an EIS. From this total, fifty-three percent of the projects were evaluated under an EA, 1,373 were covered by a CE (30%), and almost 200 more proceeded under a Determination of NEPA Adequacy (17%).[22] If anything, these data raise questions about whether federal agencies are overusing NEPA's existing streamlining mechanisms.

Collectively, the data on NEPA reviews demonstrate that the number of EISs issued annually is strikingly low relative to the number of projects being approved or permitted by federal agencies.[23] Yet, NEPA's critics focus disproportionately on the burdens imposed by EIS preparation. While we recognize that EIS completion can take several years, fixating on this alone without considering the prominence of CEs and EAs creates a misleading picture of the NEPA reviews typically required and the prevalence of delays associated with them.

B. Completion Times for Environmental Reviews are Often Dictated by Factors External to NEPA Procedures

Preparation times for completing EISs vary widely across the federal government. A 2018 CEQ assessment of completion times for 1,161 EISs issued from January 1, 2010, through December 31, 2017, found that the median and mean completion times were 3.6 and 4.5 years, respectively.[24] However, completion times for EISs at the USFS, which issued more EISs than any other agency,[25] averaged 3.35 years, whereas the mean BLM and FHWA completion times were 4.41 and 7.30 years, respectively.[26] In fact, the CEQ data do not exhibit an association between the number of EISs an agency issued and the average (or median) time for completing them. Moreover, these estimates, as we discuss further below, are often impacted by external factors unrelated to the NEPA process itself. Data from the National Association of Environmental Professionals (NAEP), for example, finds that from 1997 through 2016, most EIS documents were completed within 1 to 2 years.[27]

The persistence often cited of long completion times for EISs may be a byproduct of rising thresholds for triggering their preparation. NEPA compliance has evolved over time with federal agencies becoming more selective about the actions that require an EIS. This trend is

---

[21] John Ruple & Mark Capone, *NEPA, FLPMA, and Impact Reduction: An Empirical Assessment of BLM Resource Management Planning in the Mountain West*, 46 ENVTL. L. 953, 977 (2016).
[22] Data obtained from U.S. Dept. of the Interior, Bureau of Land Management, ePlanning Project Search.
[23] Completion times for CEs are typical a few days and EA completion time can vary from 1-18 months.
[24] GAO, *Little Information*, *supra* note 5, at 15-16. *See also*, NAT'L ASS'N OF ENVTL. PROF'LS (2014), *supra* note 9.
[25] The USFS issued 276 EIS from 2010 through 2017. *Id*.
[26] BLM (128 EISs) and FHWA (114 EISs) were the only other agencies that completed more than 100 EISs over the eight-year study period. *Id*.
[27] NAEP, 2017 ANNUAL NEPA REPORT OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PRACTICE 12 (2018).

reflected both in the number of EISs prepared nationally, which has fallen by almost 40 percent over the last decade, and the corresponding rise in CEs and EAs.[28] These heightened thresholds are likely to be associated with a concurrent rise in the average complexity of the underlying environmental issues, which in turn will often require more time to complete consistent with NEPA's "hard look" mandate. In addition, completion times may have been impacted by the recognition, among federal agencies and courts, that the climate change impacts of federal actions must be evaluated in environmental reviews.[29]

Irrespective of such structural changes over time, data on completion times for environmental reviews must be interpreted with care. For example, the U.S. Forest Service has acknowledged that during 2012 and 2013, NEPA reviews of projects in Idaho, Illinois, Michigan, Minnesota, Montana, New Hampshire, New Mexico, Pennsylvania, and Utah were delayed by agency resources being redirected to wildfire-related programs.[30] And redirection of agency resources away from NEPA compliance continues to be a problem[31]—even though federal agencies are not relieved of their statutory obligations under NEPA when Congress fails to provide adequate funding.

Interpreting completion-time data is complicated further by the multiple roles that NEPA procedures play. The Congressional Research Service (CRS) and the GAO have both recognized that NEPA often functions as an "umbrella" statute, such that studies, reviews, or consultations required under other environmental laws are integrated into the NEPA process.[32] Most EISs, for example, discuss air quality impacts as a means of coordinating NEPA's alternatives analysis with permitting under the Clean Air Act. This blurring of statutory requirements makes it difficult to single out the costs, including time delays, and benefits of NEPA procedures on their own.[33] The CRS has highlighted the confusion caused by these overlapping roles.[34] It has cautioned that "[t]he need to comply with another environmental law, such as the Clean Water Act or Endangered Species Act, may be identified within the framework of the NEPA process, but NEPA itself is not the source of the obligation. If, hypothetically, the requirement to comply with NEPA were removed, compliance with each applicable law would still be required."[35]

---

[28] *See footnote* 12.

[29] *See e.g.*, Wildearth Guardians v. Zinke, 368 F.Supp.3d 41 (D.D.C. 2019) (holding that the BLM's failure to quantify greenhouse gas emissions that were reasonably foreseeable effects of oil and gas development on public land, during the leasing stage of the development process, was arbitrary and capricious); *see also* San Juan Citizens Alliance v. BLM, 326 F.Supp.3d 1227 (D. N.M. 2018) (same).

[30] U.S. Forest Service, Fire Impact [by] State (June 9, 2014).

[31] *See e.g.*, Forest Service Prosed NEPA Rules, 84 Fed. Reg. 27544 (June 13, 2019) (justifying regulation changes in part because of reduced agency resources).

[32] GAO, *Little Information*, *supra* note 5, at 19; Congressional Research Service, *The National Environmental Policy Act (NEPA): Background and Implementation* 2 (2011).

[33] GAO, *Little Information*, *supra* note 5, at 18-19. CRS, *supra* note 5, at 8-9.

[34] CRS, *supra* note 5, at 8.

[35] *Id*.

Former CEQ Chair Nancy H. Sutley raised a similar concern that "delays in project implementation are inaccurately attributed to NEPA process delays when other factors are relevant," such as securing project funding, local opposition to a project, project complexity, changes in project scope, and requests by state or local officials.[36] Likewise, in a 2012 study of EISs prepared by the FHWA, CRS found that the causes of delay were "more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope."[37] The CRS concluded that "when environmental requirements have caused project delays, requirements established under laws other than NEPA have generally been the source. This calls into question the degree to which the NEPA compliance process is a significant source of delay in completing either the environmental review process or overall project delivery."[38] More recently, NAEP has identified inadequately trained staff, vacancies in relevant agency positions, and the inexperience of senior-level agency officials as reasons for NEPA delays.[39]

Further, contrary to CEQ's efforts to minimize NEPA compliance or circumvent it altogether, recent scholarship finds that the coordination achieved through NEPA procedures can expedite rather than delay project approval. A 2019 study took advantage of a circuit split on NEPA's applicability to critical habitat designations made pursuant to the Endangered Species Act. Reviewing 607 critical habitat designation rules, it found that those that underwent NEPA review were actually completed faster than those that were exempt from NEPA.[40] While this finding does not imply that the time spent on NEPA compliance was inconsequential, it demonstrates the constructive role NEPA can play in coordinating federal and state permitting efforts and reducing the time required for agencies to act.

For the reasons discussed above, completion times and page limits are, in and of themselves, narrow and unreliable metrics for evaluating the efficiency of NEPA reviews.[41] Due to the wide variation in the scope and complexity of the environmental impacts associated with federal actions, little can be inferred from the mere fact that the review time of one project was less than that of another, even if the same lead agency conducts both reviews. Indeed, the evidentiary basis provided in the proposed regulations is remarkably thin on these limits and, to

---

[36] *CEQ Chair Testifies on the Importance of NEPA*, 75 National Environmental Policy Act Lessoned Learned 2 (June 3, 2013). The GAO has also highlighted the importance of sources of delay outside of NEPA procedures, such as engineering requirements and holdups associated with obtaining nonfederal approvals. GAO, *Little Information*, *supra* note 5, at 15, 19.

[37] CRS, *Role Environmental Review*, *supra* note 5, at Summary.

[38] *Id*. These findings are consistent with an earlier study by CEQ, which concluded that project delays and cost overruns on projects were typically the result of midstream decisions to change scope or content of a project, funding delays, or lags in agency decision-making unrelated to NEPA procedures. CEQ, THE NATIONAL ENVIRONMENTAL POLICY ACT, A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (1997).

[39] NAT'L ASS'N OF ENVTL. PROF'LS, *supra* note 9, at 33.

[40] John C. Ruple, Michael J. Tanana, and Merrill M. Williams, *Does NEPA Help or Harm ESA Critical Habitat Designations? An Assessment of Over 600 Critical Habitat Rules*, 46 ECOLOGY L. Q. ___ (2019). A pre-publication draft of this paper is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399734.

[41] *See* Alejandro E. Camacho, *Bulldozing Infrastructure Planning and the Environment through Trump's Executive Order 13807,* 91 U. COLO. L. REV. 513, 539-41 (2020).

the extent that it exists, has been discredited by independent researchers and the CRS.[42] Setting presumptive time and length limits also poses a serious risk that agencies will feel compelled to compromise the quality of NEPA reviews to satisfy them.

CEQ's proposed regulations fail altogether to address external sources of delay and cost increases, or to consider the coordinating role of NEPA procedures.[43] As a consequence, they also fail to explain how the changes proposed would address the actual causes of the delays that typically occur during the NEPA process. Absent adequate consideration of these factors, there is no basis to conclude that the proposed changes will improve NEPA procedures; to the contrary, they appear more likely to undermine NEPA's statutory requirements that agencies take a hard look at and seek to minimize the environment impacts of federal actions without any countervailing benefits.

C. The Volume and Nature of Litigation Under NEPA Do Not Provide Grounds for Limiting Judicial Review

Concerns about the volume of and delays associate with litigation under NEPA is another source of criticism that appears to be misinforming the proposed regulations that seek to govern the timing, availability, and remedies associated with judicial review. Once again, the proposed revisions are unmoored from the evidence. On average, roughly 100 NEPA cases are filed in district court annually, about half of which involve challenges to EISs.[44] The rate at which NEPA decisions are challenged has also fallen significantly from about 145 cases before 2005 to roughly 90 by 2010.[45] By one estimate, just one in every 450 NEPA reviews, roughly 0.22% of the total, result in litigation.[46] For EISs, the litigation rate is 15-20%,[47] and it should come as no surprise that the most significant 1% of projects (*i.e.*, those requiring EISs) draw the most scrutiny. To put these figures in perspective, during the 12-month period ending March 31, 2017, 9.8% of all federal court civil decisions were appealed.[48] In addition, while environmental organizations are more likely to file NEPA cases, they prevail at a higher rate than other classes of plaintiffs filing NEPA suits and above the national average for administrative proceedings

---

[42] *Id*. at 542-44.

[43] *See also, id*. at 35, listing six basic questions about NEPA's implementing regulations that are totally ignored by "streamlining" proposals.

[44] GAO, *supra* note 3, at 20. *See also*, NAT'L ASS'N OF ENVTL. PROF'LS, ANNUAL NEPA REPORT[S] from 2010 through 2018, noting that the Federal Courts of Appeal issued, on average just 23 opinions each year involving NEPA. This is despite estimates of that federal agencies complete over 43,000 final NEPA determinations each year. *See* John C. Ruple & Kayla M. Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50:2 ENVTL. L. __ (2020). A draft of this paper is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433437.

[45] Ruple & Race, *supra* note 44.

[46] Ruple & Race, *supra* note 38.

[47] *See* J. Clarence Davies & Jan Mazurek, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM 163 (2014) ("The *percentage* of EISs challenged in court has remained relatively stable, . . . fluctuating between 15 and 20 percent of all EISs filed.").

[48] Based on 287,115 civil case terminations and 28,071 civil appeals. *See* Office of the U.S. Courts, Federal Judicial Caseload Statistics 2017.

generally, which suggests that their lawsuits are judiciously chosen and well-grounded relative to other plaintiffs and administrative challenges.[49]

The CEQ has proffered no hard data to indicate that NEPA litigation in anyway necessitates a reduction in NEPA's procedural requirements, let alone the dilution in judicial oversight that would occur under the proposed rules. Concerns about the burden of NEPA litigation, therefore, appear to be exaggerated, or more reflective of extreme risk aversion by developers and financing entities. In either case, the volume of litigation does not provide a ground for limiting either the availability or scope of judicial review. Moreover, as we note in section III.E., CEQ lacks the legal authority to limit judicial review through its regulations.

Throughout the NPRM, CEQ's focus on the perceived burdens of NEPA compliance overlooks and marginalizes the many ways in which NEPA procedures enhance agency decision-making. Two recent studies illustrate these benefits. The first study reviewed sixteen EISs prepared by BLM for Resource Management Plans in Colorado, Montana, Utah, and Wyoming. The Plans each covered, on average, more than two million acres (almost 3,200 square-miles) and thus were both large in scale and technically complex. The authors found that the EISs contributed to statistically significant enhancements in surface use stipulations without causing statistically significant changes in either the number of jobs created or the number of oil and gas wells drilled.[50] The second study found that EISs prepared for oil or natural gas development similarly reduced all indicators of environmental impacts.[51] Critically, for the oil and gas projects, job creation and state and local tax revenue *increased* in the face of enhanced environmental protections.[52] These studies show that environmental reviews can advance NEPA's statutory purpose without negatively impacting the principal objectives of project development.

In summary, the empirical case for reforming NEPA regulations is either absent, given that the vast majority of NEPA compliance already falls under CEs and EAs, or misplaced because factors outside of NEPA procedures determine the preparation times for EISs. CEQ has not made any attempt to assess the benefits that NEPA compliance provides. Nor has it demonstrated the need for regulations that dramatically broaden exemptions to NEPA compliance or that narrow the scope of what remains of environmental reviews. Absent an adequate empirical grounding, the proposed revisions will not address the true sources of delays and compliance costs. They will instead sacrifice the quality of environmental reviews and public engagement and contravene efforts to achieve NEPA's most basic requirement to improve decision making and reduce environmental harms.

---

[49] David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation,* 50 ARIZ. ST. L.J. 3, 22 (2018).
[50] Ruple & Capone, *supra* note 21.
[51] Ruple & Capone, *supra* note 17, at 39, 44.
[52] *Id*.

III. CEQ's Proposed Regulations Systematically Weaken Environmental Reviews and Expand Exemptions to NEPA Compliance

The proposed regulations have three principal impacts: (1) they narrow the circumstances under which NEPA reviews are required; (2) they limit the scope of NEPA reviews; and (3) they create barriers to judicial review and restrict the remedies available to plaintiffs. The NPRM makes little effort to explain how the proposed changes address specific administrative inefficiencies or the potential tradeoffs with the quality of the environmental reviews, level of public engagement, or the environmental impacts of federal actions. The proposed revisions instead assume that the weakened procedures and substantive omissions are justified because NEPA reviews are required when the environmental impacts are not significant or that the types of impacts considered are too marginal or indirect to warrant consideration. For similar reasons, the regulations reflect concerns about the frequency, timing, and disruptive impacts of judicial review.[53] The preceding section demonstrated that there is little or no evidence of systematic problems that could justify the dramatic changes reflected in CEQ's proposed regulations. In this section, we discuss the most important changes in the proposed regulations, focusing on the legal issues that each raises.

A. Indirect and Cumulative Impacts of Federal Actions Must Be Evaluated Holistically

CEQ's proposed regulations purport to "clarify" the meaning of the term "effects" in response to what CEQ regards as improperly expansive interpretations by courts and agencies that require agencies to consider "speculative effects."[54] According to CEQ, NEPA does not subdivide the term "effects" into direct, indirect, or cumulative effects. Therefore, to "reduce confusion and unnecessary litigation," and "to focus agency time and resources on considering whether an effect is caused by the proposed action rather than categorizing the type of effect," CEQ has proposed to strike all references to indirect (as well as cumulative) effects.[55]

CEQ's proposal to marginalize if not eliminate agency responsibilities to consider indirect effects is contrary to NEPA's text and purposes, CEQ's longstanding interpretation of the statute, decades' worth of NEPA practice, and a long string of judicial precedents. NEPA is premised on congressional recognition of "the profound impact of man's activity on the *interrelationship* of *all* components of the natural environment."[56] The statute's core operative

---

[53] We are not alone in noting the lack of empirical support for aggressive "streamlining" efforts. The National Association of Environmental Professional notes:

> The seemingly constant interest to streamline environmental reviews is tied to the desire to accelerate decision-making, to reduce project delays, and ultimately to save money. This interest implies that timely project outcomes are not happening; at least not happening with enough regularity that agency staff, decision-makers, and elected officials are dissatisfied and continue to convey a need to streamline NEPA environmental processes. *But the reality within NEPA practice is that there is little substantive data to support these claims*.

NAT'L ASS'N OF ENVTL. PROF'LS, *supra* note 9, at 28 (emphasis added).

[54] 85 Fed. Reg. 1684, 1707 (Jan. 10, 2020).

[55] *Id*. at 1707-08. *See also id*. at 1728-29 (proposed § 1508.1(g)'s definition of effects or impacts).

[56] 42 U.S.C. § 4331(a) (emphasis added).

provision requires agencies to include in an EIS detailed discussion of "*any* adverse environmental effects which cannot be avoided should the proposal be implemented."[57] It also requires agencies to "recognize the worldwide and long-range character of environmental problems."[58] Congress clearly intended that agencies engage in a comprehensive assessment of *all* of the environmental effects of agency proposals. Congress did not want agencies to artificially constrain such assessments by ignoring effects that are not the immediate consequence of a proposal or that may occur beyond the immediate vicinity of the action area.

The courts recognized that agencies must consider indirect effects from the very beginning, and did so before CEQ issued regulations in 1978 codifying that duty. Sitting *en banc*, the Eighth Circuit in 1974 stated that "[w]e think NEPA is concerned with indirect effects as well as direct effects. There has been increasing recognition that man and all other life on this earth may be significantly affected by actions which on the surface appear insignificant."[59] Another court concluded that "it is necessary at the outset to note that the sweep of NEPA is extraordinarily broad. NEPA mandates that *any and all types of potential environmental impact* be considered by the agency involved. Further, the environmental considerations mandated by NEPA to be considered by federal agencies include both the direct and indirect effects of federal action."[60]

CEQ itself has consistently recognized the importance of considering indirect effects and the duty of agencies to include such effects in their NEPA analyses. In a report it issued in 1974, CEQ stated that:

> Impact statements usually analyze the initial or primary effects of a project, but they very often ignore the secondary or induced effects. A new highway located in a rural area may directly cause increased air pollution as a primary effect. But the highway may also induce residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth. *For many projects, these secondary or induced effects may be more significant than the project's primary effects. While the analysis of secondary effects is often more difficult than defining the first-order physical effects, it is also indispensable*.[61]

The regulations issued by CEQ in 1978 explicitly require consideration of indirect effects by defining effects to include both direct and indirect effects. The latter are effects "which are caused by the action and are later in time or farther removed in distance, but are still

---

[57] *Id*. § 4332(a)(C)(ii).
[58] *Id*. § 4332(2)(F).
[59] Minnesota Pub. Interest Research Grp. v. Butz, 498 F.2d 1314, 1322 (8th Cir. 1974).
[60] McDowell v. Schlesinger, 404 F. Supp. 221, 244 (W.D. Mo. 1975) (citing Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); EDF v. TVA, 468 F.2d 1164 (6th Cir. 1972)) (emphasis added).
[61] Fifth Annual Report of the Council on Environmental Quality, 410-11 (December 1974) (emphasis added).

reasonably foreseeable."[62] This has been CEQ's consistent position for more than forty years—until now. In 1981, CEQ published in the Federal Register its answers to frequently asked questions about its regulations. In doing so, it stated that "[t]he 'environmental consequences' section [of an EIS] should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives. It forms the analytic basis for the concise comparison in the 'alternatives' section."[63] CEQ added that the NEPA process is designed "to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions."[64] Further, CEQ explained that EISs "must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are 'reasonably foreseeable.' . . . The agency cannot ignore these uncertain, but probable, effects of its decisions."[65]

The courts have since consistently emphasized the duty to consider indirect effects. One court, for example, stated that "[t]he indirect impact of a project and the cumulative effects thereof are equally as important as the direct or primary effects of the proposed action."[66] More recently, the Third Circuit held that "when the *nature* of the effect is reasonably foreseeable but its *extent* is not, we think that the agency may not simply ignore the effect."[67] Similarly, the D.C. Circuit has declared that "[a]n agency conducting a NEPA review must consider not only the direct effects, but also the indirect environmental effects, of the project under consideration."[68] The D.C. Circuit has also rejected the conclusion that the holding in *Dep't of Transp. v. Public Citizen*,[69] upon which CEQ relies in proposing to curtail the kinds of effects agencies are required to consider, excused FERC from considering the effects of using natural gas that would be transported from a proposed natural gas pipeline to a power plant that would burn the gas to produce electricity. It reasoned that "[b]ecause FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves."[70] Nevertheless, CEQ cites *Dep't of Transp. v. Public Citizen* repeatedly and mistakenly in the NPRM as providing a legal basis for circumscribing the obligation of federal agencies to consider indirect effects.[71]

[62] 40 C.F.R. § 1508.8(b).
[63] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18028 (Mar. 23, 1981).
[64] *Id*. at 18029.
[65] *Id*. at 18031.
[66] *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1433 (C.D. Cal. 1985).
[67] Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 549 (8th Cir. 2003) (emphasis in original).
[68] *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1371 (D.C. Cir. 2017).
[69] 541 U.S. 752 (2004).
[70] *Id*. at 1373.
[71] *See, e.g.,* 85 Fed. Reg. 1704, 1708.

The proposed regulations also remove all references to "cumulative impacts" apart from the statement that "[a]nalysis of cumulative effects is not required."[72] Yet, the requirement to consider cumulative impacts follows directly from NEPA §102(2)(A), which requires agencies to "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."[73] Similarly, §101(1) states that "it is the continuing responsibility of the Federal Government to use all practicable means . . . [to] fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[74] These provisions mandate holistic assessments of environmental impacts, whether direct, indirect or cumulative, in recognition of "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 advance."[75] Cumulative impacts are also central to environmental justice issues, where disadvantaged communities are impacted by numerous federal decisions that are collectively of great significance. to CEQ cannot sweep aside NEPA's statutory mandate in an effort to "reduce paperwork."

The omission of cumulative impacts from NEPA reviews and assessment of whether NEPA procedures are required similarly upends more than 40 years of CEQ regulations and guidance as well as federal case law. From the early years of NEPA's implementation, CEQ guidelines have required agencies to consider cumulative impacts. For example, the 1971 Guidelines required agencies to take cumulative impacts into account when determining whether the environmental impacts of a proposed federal action would be significant:

> bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. . . . The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action.[76]

The 1971 Guidelines also single out consideration of cumulative impacts when describing what is required in an EIS:

> The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This in essence requires the

[72] *See* proposed §1508.1(g)(2). The proposed regulations also delete the terms "cumulative" and "cumulatively" from 40 CFR §§1500.4(p) ("reducing paperwork"), 1500.5(k) ("reducing delay"), 1508.4 ("categorical exclusion"), 1508.7 (definition of "cumulative impact"), 1508.8(b) ("effects"), 1508.25(a)(2) & (c)(3) ("scope"), and 1508.27(b)(7) ("significantly").
[73] 42 U.S.C. § 4332(2)(A).
[74] 42 U.S.C. § 4331(1),
[75] 42 U.S.C. § 4331.
[76] CEQ Guidelines, 36 Fed. Reg. 7724-29 (Apr. 23, 1971).

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.[77]

The importance and centrality of considering cumulative impacts also figured prominently in subsequent CEQ Guidelines and reports. CEQ Guidelines issued in 1973 and that have been consistently applied since that time contain the following provisions:

> 1500.6(a) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. . . . [A]n environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment . . . .
>
> 1500.8(a)(1) . . . . The interrelationships and cumulative environmental impacts of the proposed action and other related Federal projects shall be presented in the statement.[78]

Indeed, entire CEQ reports have focused on the proper assessment of cumulative impacts.[79] The CEQ Guidelines and reports reflect the importance it has placed on assessing cumulative impacts. As CEQ recognized in a handbook issued more than twenty years ago, "[t]he passage of time has only increased the conviction that cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment. The purpose of cumulative effects analysis, therefore, is to ensure that federal decisions consider the full range of consequences of its actions."[80] The CEQ handbook explained why cumulative effects analysis is so integral to the entire NEPA process:

> The process of analyzing cumulative effects can be thought of as enhancing the traditional components of an environmental impact assessment: (1) scoping, (2) describing the affected environment, and (3) determining the environmental consequences. Generally it is also critical to incorporate cumulative effects analysis into the development of alternatives for an EA or EIS.
> Only by reevaluating and modifying alternatives in light of the projected cumulative effects can adverse consequences be effectively avoided or minimized. Considering cumulative effects is also essential to developing appropriate mitigation and monitoring its effectiveness.[81]

---

[77] *Id*. *See also* statement of Senator Henry Jackson during Congress' debate on NEPA: "The future of succeeding generations in this country is in our hands." 115 Cong. Rec. 40417 (1969).
[78] CEQ Guidelines, Preparation of Environmental Impact Statements, 38 Fed. Reg. 20549, 20551, 20553 (Aug. 1, 1973).
[79] *See, e.g.*, CEQ, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), https://ceq.doe.gov/publications/cumulative_effects.html.
[80] *Id*. at 3.
[81] *Id*. at v.

It also further acknowledged that "[e]vidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time."[82] Allowing agencies to ignore or deemphasize consideration of cumulative effects would therefore cause fundamental legal and substantive gaps in environmental reviews under NEPA.

CEQ's interpretation of NEPA and the importance it has placed on cumulative impacts have been mirrored in numerous judicial opinions. Early on, the court in *Hanly v. Kleindienst* held that the term "significantly" as it is applied to "environmental impacts" encompassed "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."[83] Several years after this case, the Supreme Court identified "cumulative impacts" as the reason that "comprehensive," or what are now called "programmatic," EISs are required.[84] And by the mid-1980s, courts were holding that "[n]ot to require this would permit dividing a project into multiple "actions," each of which individually has an insignificant environmental impact, but which collectively have a substantial impact."[85] Courts have therefore long recognized that "the consistent position in the case law is that . . . the agency's [environmental reviews] must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum."[86]

The NPRM claims that the purpose of omitting references to cumulative impacts is to "reduce confusion and unnecessary litigation" by limiting NEPA's coverage to effects that are "reasonably foreseeable and have a reasonably close causal relationship to the proposed action," analogous to tort law principles of liability.[87] Yet, there is no evidence of such confusion in the case law, and foreseeability has long been an important element of judicial opinions and CEQ regulations.[88] Courts have made it clear that a "meaningful cumulative impact analysis must identify" five elements: "(1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate."[89] Thus, far from reducing confusion, the proposed regulations would

[82] *Id*. at 1.
[83] 471 F.2d 823, 830-831 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).
[84] *Kleppe v. Sierra Club*, 427 U.S. 390, 413-14 (1976).
[85] *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985).
[86] *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002).
[87] 85 Fed. Reg. 1707-1708.
[88] *See Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005) (citing CEQ regulations); 40 C.F.R. 1508.7 (defining cumulative impact as that "which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.").
[89] *Grand Canyon Trust v. FAA*, 290 F.2d at 345.

erase decades of case law in which the meaning of cumulative impacts, along with their relation to indirect impacts and project segmentation, have been clarified and refined.[90]

CEQ's proposal to omit consideration of cumulative and indirect effects flies in the face of the statute, its consistent judicial interpretation, and CEQ's own position for more than four decades. In its final rules, CEQ should restore the terms "indirect effects" and "cumulative impacts" to the definition of effects and reaffirm that agencies are required to engage in a fulsome analysis of indirect effects and cumulative impacts associated with other actions that, together with the federal action at issue, could rise to the level of significant impacts for purposes of compliance with NEPA.

B. The Alternatives Considered in Environmental Reviews Cannot Be Limited on Jurisdictional Grounds or Excluded By Narrowing a Project's Purpose

The NPRM proposes radical revisions to the heart of the NEPA review process: the consideration of project alternatives. Proposed §1502.14, along with proposed §1508.1(z), would so narrow the scope of alternatives that the end result would merely certify the pre-conceived financial and programmatic interests of the project proponent. While some NEPA detractors complain about having to consider alternatives, studies have shown that the requirement does, in fact, lead to improved decisions, and helps to reduce conflicts—which, in turn, may lessen litigation filed by opponents and ultimately save scarce agency resources.[91] The proposed revisions to the "linchpin" of the NEPA process violate both the statute's purpose and design.[92]

Before discussing concerns with the proposed revisions to the consideration of project alternatives, it is important to understand why NEPA requires a review of alternatives to begin with, and why that review remains vitally important today. Prior to NEPA's enactment, decision-making by federal agencies was uncoordinated, and agencies pursed single-purpose actions without consulting officials in other agencies. This siloed approach often led to unforeseen consequences, such as introductions of invasive species that threatened entire ecosystems and destruction of minority communities under the mantle of "urban renewal."[93] NEPA was enacted to overcome these problems, to "[revolutionize] the way we approach problems and make decisions,"[94] "to reorient national environmental policy,"[95] and "[to force the] restructuring of the uses of information—notably scientific information—in the process of

---

[90] *See, e.g.*, *Coal. On Sensible Transp., Inc. V. Dole*, 826 F.2d 60, 70-71 (D.C. Cir. 1987).
[91] *See* Oliver A. Houck, *The U.S. House of Representatives' Task Force on NEPA: The Professors Speak*, *Apdx A, "The Role of NEPA Alternatives*," 35 ELR 1095 (Dec. 2005).
[92] *See Monroe County Conservation Council, Inc. v. Volpe,* 472 F.3rd 693, 697 (2d Cir. 1972).
[93] *See, e.g.,* Lynton K. Caldwell, "Science and the National Environmental Policy Act: Redirecting Policy through Procedural Reform," Chapter 1 (University of Alabama Press, 1982). Lynton Caldwell worked closely with Senator Jackson, the primary architect of NEPA, throughout the process leading to NEPA's enactment.
[94] *Id.* at 5.
[95] *Id.* at 6.

agency planning and decisionmaking."[96] The required consideration of *alternative*s for achieving an agency's ends is the heart of the NEPA process.[97]

To achieve NEPA's mandate of taking a "hard look" at the consequences of an action *before* making an irretrievable commitment of resources, the review process takes time and coordination.[98] This may be more true now than when NEPA was enacted, as modern society has a more sophisticated understanding of ecological processes and better tools for conducting analyses. Many projects are also complex, involving air quality, greenhouse gas emissions and climate change, water quality, wetlands, floodplains, public health, endangered species, environmental justice, and historic properties. Coordinating the evaluation of potential impacts across different natural resources and societal interests is therefore inherently interdisciplinary. No one agency or group can know everything, and considering multiple perspectives is often the only way to diffuse conflict and reach an effective decision.

1. *Arbitrary Restrictions on the Number of Alternatives Considered Will Defeat NEPA's Purpose*

Proposed §1502.14 would delete the current regulatory requirement to evaluate "all" reasonable alternatives to the proposed action. While no rationale is provided for this change, its intent is clearly to reduce the number of alternatives that must be considered in any given project. CEQ's request for comment on whether to impose a maximum number of alternatives, suggesting a mere three (proposed action, no action, and one other),[99] makes CEQ's intent unmistakable. This proposal is antithetical to the role played by alternatives in ensuring that the comparative merits of reasonably available options are considered and trade-offs adequately understood. It is also unnecessary. No agency or project applicant, to our knowledge, has ever been compelled to examine an unreasonable range of alternatives. To the contrary, from the beginning of NEPA's implementation, courts have confirmed that alternatives need not include those that are remote and speculative.[100]

When CEQ first adopted §1502.14(c), it explained that it was codifying existing NEPA case law on alternatives.[101] Since then, courts have upheld agency determinations of a reasonable range of alternatives guided by the project's underlying purpose and need along with the severity of potential impacts.[102] Most agencies report they have no problems

[96] *Id.* at 10.
[97] *Id.*
[98] *Nat'l Audubon Soc'y v. Dep't of the Navy,* 422 F.3rd 174, 185 (4th Cir. 2005) (a "hard look" demonstrates to the public that the agency has reached its decision carefully, through a reasoning process that emphasizes environmental concerns and deliberately weights those concerns against other interests).
[99] 85 Fed. Reg. 1702.
[100] *See, e.g., NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551-553 (1978).
[101] 43 Fed. Reg. 55984 (1978).
[102] *See, e.g., Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 432 (10th Cir. 1996) ("which alternatives to consider is necessarily bound by a rule of reason and practicality").

generating and reviewing alternatives to proposed projects.[103] Consistent with this understanding, a 2003 NEPA Task Force report concluded that "concerns regarding which alternatives to review in detail are best left to individual agencies on a project-by-project basis."[104]

As CEQ does throughout the NPRM, it overlooks or discounts the benefits of NEPA procedures. For example, when the U.S. Navy recently decided to pursue a new training field to practice simulated take-offs and landings on aircraft carriers, it first examined existing military infrastructure. There were dozens of potential sites, each of which might be suitable for the project's purpose and need and posed different economic considerations and environmental impacts. In such circumstances, artificially limiting the number of alternatives the Navy could consider would waste tax payer dollars and allow it to "reverse engineer" a final decision with remarkable ease.[105]

The review of a reasonable range of alternatives is also often essential to resolving disputes.[106] In many cases, the review of alternatives can lead to identification of safer routes for transportation corridors that save taxpayers money over the long-term, or the use of energy efficiency to lower peak load demands that can extend the life of existing powerplants, thereby increasing the profitability of local utilities, saving customers money, and increasing returns for shareholders. In *Davis v Mineta,* the court determined that the DOT should have considered "cumulative alternatives," i.e., a combination of various alternatives that, standing alone, would not have met the project's purpose and need, but together may have better met the project's goals at lower expense and impact to the environment.[107] Such creative solutions would be sacrificed and lost under CEQ's proposed changes.

Other examples abound that demonstrate the folly of CEQ's proposal. In the late 1990s, for example, the South Carolina Ports Authority sought a permit from the Corps to construct a massive shipping terminal on Daniel Island in Charleston Harbor. The Draft EIS revealed major environmental impacts. Local interest groups submitted extensive comments to the agency that addressed the substantive inadequacies of the review and identified possible alternatives. Ultimately, the Ports Authority dropped the proposal for Daniel Island and instead moved forward with a new facility at an abandoned naval base. Through considering a broad range of alternatives, including those proposed by the public, the Ports Authority was able to select a location that had fewer environmental impacts, saved taxpayer dollars, and resolved public opposition.

---

[103] NEPA Task Force, *Report to the Council on Environmental Quality: Modernizing NEPA Implementation* 82 (2003).
[104] *Id*.
[105] *See Washington Co., et al. v. U.S Dep't of the Navy,* 357 F.Supp. 2nd 861 (E.D.N.C. 2005), *aff'd, Nat'l Audubon Soc'y v. Dep't of the Navy,* 422 F.3rd 174 (4th Cir. 2005).
[106] Memorandum from James Connaughton, Chair, CEQ, to The Heads of Federal Agencies, regarding Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002).
[107] 302 F.3rd 1104 (10th Cir. 2002).

2. *Restricting Agency Review of Alternatives to Those Within Its Statutory Jurisdiction Threatens a Return to Siloed Agency Decision-Making*

Proposed §1502.14 would also delete existing subsection (c), which requires agencies to "include reasonable alternatives not within the jurisdiction of the lead agency." Consistent with this change, CEQ further proposes to redefine the term "reasonable alternatives" (proposed §1508.1(z)) to preclude consideration of alternatives outside the agency's jurisdiction. Despite decades of case law ruling that "reasonable alternatives" may include those beyond the authority of an agency to implement, limited by a "rule of reason," the proposed regulations would preclude such alternatives.[108] CEQ now claims, without any supporting evidence, that "it is not efficient or reasonable to require" federal agencies to consider alternatives that include measures beyond an agency's statutory authority.[109] Even more troubling, CEQ's proposal for limiting the number of alternatives in environmental reviews would seriously and arbitrarily impair the capacity of agencies to make fully informed decisions and further sacrifice public engagement.[110]

CEQ's assertion that alternatives outside the agency's jurisdiction are "not [] technically feasible due to the agency's lack of statutory authority to implement that alternative"[111] is simply inaccurate.[112] Legally, jurisdictional limits on the alternatives considered in environmental reviews would violate Congress' intent with NEPA to change agency culture and democratize federal decision-making processes.[113] In doing so, it risks returning federal decision-making to the 1960s and recurrence of the very problems NEPA was designed to overcome.[114] Further, such jurisdictional limits are inconsistent with an agency taking "a sufficient 'hard look' when it obtains opinions from its own experts, obtains opinions from experts ***outside*** the agency … and responds to ***all*** legitimate concerns that are raised."[115]

A hypothetical scenario illustrates the problem CEQ's proposal presents. Under CEQ's current regulations, the Corps of Engineers would be required to consider alternative configurations of a proposed project to limit adverse effects to the maximum extent practicable. This could include considering modifications to a development plan that would

---

[108] S*ee, e.g., NRDC v. Morton*, *supra* note 100.
[109] 85 Fed. Reg. 1702.
[110] *See* NAT'L ASS'N OF ENVTL. PROF'LS, ANNUAL NEPA REPORT 2018 36 (2019).
[111] 85 Fed. Reg. 1702.
[112] *See Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA*, 684 F.2d 1041 (1st Cir. 1982).
[113] *Dep't of Trans. v. Public Citizen,* 541 U.S. 752, 756 (2004) (NEPA "was intended to reduce or eliminate environmental damage"); *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989) (NEPA's "procedures are almost certain to affect the agency's substantive decision").
[114] *See, e.g., Davis v. Mineta,* 302 F.3rd 1104 (10th Cir. 2002) (state defendants "'jumped the gun' on the environmental issues by entering into contractual obligations that anticipated a *pro forma* result"); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 2001 WL 1739458 (10th Cir. Nov. 16, 2001) (holding that state was at fault for its harm when it was aware of controversial nature of the project and chose to enter into contractual obligations nonetheless).
[115] *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (emphasis added); *see also Western North Carolina Alliance v. N.C. DOT,* 312 F.Supp. 2nd 765, 769 (E.D.N.C. 2003).

eliminate the need to fill wetlands or develop in a floodplain, or moving the route for a transmission line to avoid a river crossing that would harm essential fish habitat and threaten an area of national historic importance. CEQs proposed revisions would prohibit the Corps from considering upland alternatives altogether because it lacks jurisdiction over disturbances to the terrestrial environment. Such limits on the alternatives considered would produce absurd results and conflict with its regulatory obligations under the Clean Water Act.

Action agencies must also be empowered to examine alternatives that go beyond a project's purpose and need. Decades of experience with environmental reviews demonstrate the ease with which project proponents can manipulate a statement of purpose and need to achieve a pre-determined outcome. The circularity that this creates has been avoided by not subordinating the alternatives in environmental reviews to the "purpose or needs" of project proponents or the action agency. Instead, alternatives must be identified by reference to a project's *general* purpose, as opposed to a *narrow* reading of its objectives.[116] If the proposed regulations went into effect, a new highway project could, for example, be reviewed without adequately considering the level of demand for the highway, alternative options for meeting transportation needs (*e.g.*, mass transit, transportation demand management), or alternative routes that could protect vulnerable communities or unique natural resources.

It took Congress more than a decade to reach consensus on NEPA's language.[117] Senator Henry Jackson, one of NEPA's architects and champions, explained why the statute was so important: "The survival of man, in a world in which decency and dignity are possible, is the basic reason for bringing man's impact on his environment under informed and responsible control."[118] The evaluation of project alternatives is the heart of the NEPA review process. CEQ's proposals to restrict agency review of alternatives "would limit the effectiveness of the statute. Indeed, it would defeat it."[119]

C. NEPA Procedures Must be Adhered to Strictly and Cannot Be Supplanted by Procedures Under Other Statutes That Are Not Equivalent

The proposed regulations contravene long-standing case law by allowing agencies to determine that their regulatory processes are "functionally equivalent" to NEPA procedures if: (1) they utilize "substantive and procedural standards" to ensure full and adequate consideration of environmental issues; (2) "public participation" is required for adoption of a

---

[116] *Van Abbema v. Fornell*, 807 F.3d 633, 638 (7th Cir. 1986 ("evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals"); *accord Simmons v. U.S. Army Corps of Engineers*, 120 F. 3rd 664, 669 (7th Cir. 1997) (agencies must not allow an applicant to "contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)").
[117] Ray Clark, "Introduction: The History, the Hope, and the Reality," *The Bill Cohen NEPA Summit Report* (May 2015), *available at* https://www.naep.org/bill-cohen-nepa-summit-report-and-updates (checked March 2, 2020).
[118] Joint House-Senate Colloquium to Discuss a National Environmental Policy, p. 115 (July 17, 1968).
[119] Houck, *supra,* note 1*,* 35 ELR at 10901.

final "alternative"; and (3) "a purpose" of the analysis is "to examine environmental issues."[120] CEQ's proposed regulations utilize the same three criteria to support an agency's substitution of other processes as functional equivalents.[121] These criteria reflect a substantially lower standard than is found in the governing case law with respect to both the specific procedures and the statutory purposes.

The functional equivalence doctrine is interpreted narrowly by courts[122] and applies only when "all of the five core NEPA issues were carefully considered: the environmental impact of the action, possible adverse environmental effects, possible alternatives, the relationship between long-and short-term uses and goals, and any irreversible commitments of resources—all received attention during the hearings and decision-making process."[123] Courts have observed further that "the [functional equivalence] doctrine reflects the judicial awareness that in situations where Congress has commissioned an agency with an environmental mission and the agency conducts major federal activity to enforce its defined responsibilities, not only is there no need for rigid enforcement of NEPA, strict adherence to NEPA may actually interfere with other, more explicit, statutory mechanisms for addressing environmental concerns."[124] Thus, the functional equivalence doctrine applies only "where an agency is engaged primarily in an examination of environmental questions, [and] where substantive and procedural standards ensure full and adequate consideration of environmental issues."[125]

Consistent with these holdings, the functional equivalence doctrine has been applied in a small number of cases in which "the agency's organic legislation mandated specific procedures for considering the environment that were 'functional equivalents' of the impact statement process."[126] Similarly, the Fifth Circuit has characterized the "functional equivalence" doctrine as a narrow one that "has generally been limited to environmental agencies themselves."[127] However, at least one court has circumscribed it further by holding that "[t]he

---

[120] Proposed § 1506.9.

[121] Proposed §1507.3(b)(6).

[122] *Environmental Defense Fund, Inc. v. EPA,* 489 F.2d 1247, 1257 (D.C. Cir.1973) (holding that "[w]e are not formulating a broad exemption from NEPA for all environmental agencies or even for all environmentally protective regulatory actions of such agencies. Instead, we delineate a narrow exemption from the literal requirements for those actions which are undertaken pursuant to sufficient safeguards so that the purpose and policies behind NEPA will necessarily be fulfilled"); *see also Portland Cement v. Ruckelshaus*, 486 F.2d 375, (D.C. Cir. 1973); A. Berlowe & A. Ferlo, Litigating NEPA Cases, in THE NEPA LITIGATION GUIDE,245-47 (American Bar Assn., A. Ferlo et al. eds., 2d. ed. 2012).

[123] 489 F.2d at 1256.

[124] *Foundation on Economic Trends v. Heckler*, 587 F. Supp. 753, 765 (D.D.C. 1984).

[125] 489 F.2d at 1257; *see also State of Md. V. Train*, 415 F. Supp. 116, 122 (D. Md. 1976) (holding that the functional equivalence doctrine is limited to circumstances in which "federal regulatory action is circumscribed by extensive procedures, including public participation, for evaluating environmental issues and is taken by an agency with recognized expertise.").

[126] *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201, 207 (5th Cir. 1978).

[127] 573 F.2d at 208; *see also State of Wyoming v. Hathaway*, 525 F.2d 66, 71-72 (10th Cir. 1975) (holding that [A]n organization like EPA whose regulatory activities are necessarily concerned with environmental consequences need not stop in the middle of its proceedings in order to issue a separate and distinct impact statement just to be issuing it. To so require would decrease environmental protection activity rather than increase it.").

mere fact an agency has been given the role of implementing an environmental statute is insufficient to invoke the 'functional equivalent' exception. To extend the doctrine to all cases in which a federal agency administers a statute which was designed to preserve the environment would considerably weaken NEPA, rendering it inapplicable in many situations."[128]

The case law on the functional equivalence doctrine uniformly interprets it narrowly and restricts it to instances in which the procedures and substance of the analysis meet the high standards set by NEPA. None of the three criteria in the proposed regulations provide the strict safeguards found in the governing case law. They fall far short of providing equivalent standards for the substantive analysis, the procedures, or mandates for taking a "hard look" at environmental impacts. Where courts have set out specific substantive requirements for environmental reviews, the proposed regulations merely refer generically to "substantive and procedural standards"; where courts impose strict requirements for public participation, the regulations have none and refer obliquely to alternatives; and where courts require equivalent environmental mandates, the regulations require only that "a purpose" be to "examine environmental issues." The proposed regulations drastically expand the functional equivalence doctrine and weaken the protection again its misuse in direct contravention of the case law and NEPA procedures.

D. Categorical Exclusions Should Be Used Cautiously and Strictly Limited to Federal Actions That Fall Clearly Within the Class of Actions Contemplated

The NPRM proposes to weaken the existing requirement that agencies relying on CEs determine that the excluded actions "normally do not have an *individually or cumulatively* significant effect on the human environment" by eliminating the proviso "individually or cumulatively" from the proposed §1508.1(d), §1500.4(a), §1500.5(a), §1501.4(a), and §1507.3(d)(2)(ii). This liberalization of the standard for utilizing CEs is compounded by proposed §1507.3(d)(2)(ii), which would authorize agencies to apply mitigation or other conditions to reduce the environmental impacts of "extraordinary circumstances" below the level of significance that triggers more rigorous NEPA procedures. In effect, this change would allow agencies to rely on what is essentially a "mitigated CE," but without the added procedural protections and substantive analysis required under an EA. These changes are inconsistent with the procedural mandates of NEPA and long-standing case law. They are also unnecessary in light of the modest burdens of undertaking CE rulemaking.

Categorical exclusions are rules that replace project-specific environmental reviews and procedures under NEPA when a federal action falls within a well-defined class of actions that has been demonstrated through the rulemaking process not to have significant environmental impacts either "individual or cumulatively."[129] As a consequence, CEs are not exemptions from

[128] *Jones v. Gordon*, 621 F. Supp. 7, 13 (D. Alaska 1985), judgment aff'd in part, rev'd in part on other grounds, 792 F.2d 812 (9th Cir. 1986).

[129] 40 C.F.R. § 1508.4 (defining categorical exclusions as covering classes of actions that an agency has determined do not "have a significant effect on the human environment.").

NEPA procedures; they are a form of NEPA compliance via rulemaking, albeit one that requires much less analysis than either an EIS or EA. Consistent with this role, courts have held that even where a federal action is covered by a CE, agencies must determine whether "extraordinary circumstances" exist, such that the action, though "normally excluded" under a CE, may have a significant environmental effect.[130] If such extraordinary circumstances are present, the agency may not rely on a CE and must instead prepare a EA or EIS.

Courts have relied on this framework to hold that an agency's assessment of whether a CE is applicable does not, unlike an EA, require consideration of cumulative impacts or potential alternatives.[131] The "individually or cumulatively" proviso that the proposed regulation would omit plays an integral role in these judicial opinions: "By definition, then, a categorical exclusion does not create a significant environmental effect; consequently, the cumulative effects analysis required by an environmental assessment need not be performed. That assessment has already been conducted as a part of the creation of the exclusion, which [the plaintiff] does not challenge in this action."[132] This understanding is also a central reason that courts have held that "[i]n many instances, a brief statement that a categorical exclusion is being invoked will suffice.[133]

The qualification for "extraordinary circumstances" in the current CEQ regulations plays a similar role insofar as it provides a safeguard against misuses of CEs.[134] Accordingly, courts have observed that "it may be conceptually possible for a large number of small projects to collectively create conditions that could significantly effect the environment. But the [CEQ] regulation itself contains a provision to address that concern, namely the extraordinary circumstances exception. And the extraordinary circumstances safety-valve is more than capable of addressing specific harms allegedly created by specific projects."[135] Indeed, courts

---

[130] *Trust for Historic Preservation v. Dole,* 828 F.2d 776, 781 (D.C.Cir.1987) (noting that "[b]y definition, [categorical exclusions] are categories of actions that have been predetermined not to involve significant environmental impacts, and therefore require no further agency analysis absent extraordinary circumstances"); *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1097 (9th Cir. 2013).

[131] 706 F.3d at 1097; *Utah Environmental Congress v. Dale Bosworth*, 443 F.3d 732, 742 (10th Cir. 2006) (holding that "an action first may produce a significant effect before a federal agency engage in further analysis. This is only logical given the substantial analytical and evidentiary burdens triggered when a project is ineligible for categorical exclusion.").

[132] *Utah Environmental Congress v. Dale Bosworth*, 443 F.3d 732, 741 (10th Cir. 2006).

[133] *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) (further observing that it would be "difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision"). Courts are deferential to agency determinations of whether an CE is applicable for similar reasons. *See Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.,* 297 F.3d 1012, 1023 (10th Cir.2002) ("When reviewing an agency's interpretation and application of its categorical exclusions under the arbitrary and capricious standard, courts are deferential.").

[134] *Utah Environmental Congress v. Dale Bosworth*, 443 F.3d 732, 743 (10th Cir. 2006) ("Considering the purpose of categorical exclusions in light of these factors and affording the agency's interpretation substantial deference, we conclude that an extraordinary circumstance is found only when there exists a potential for a *significant* effect on a resource condition.").

[135] 443 F.3d 741.

have placed an affirmative burden on agencies "[w]here there is substantial evidence in the record that exceptions to the categorical exclusion may apply, [to] at the very least explain why the action does not fall within one of the exceptions."[136] For example, in *Jones v. Gordon* the court held that a federal agency improperly relied on a categorical exclusion where the record revealed "the arguable existence of public controversy based on potential environmental consequences."[137]

The case law reveals that the legitimacy of CEs rests on their applicability to federal actions that fall squarely within the class of actions they cover. If the CEQ regulations were to omit the "individually or cumulatively" proviso, this would not (as demonstrated by the case law) obviate the need to consider cumulative impacts. Unlike today, it would require agencies to consider separately the cumulative impacts of federal actions covered by CEs for which such analyses were not conducted; importantly, if cumulative impacts were found to be significant, the CE could no longer be relied upon. The proposed regulations, intentionally or otherwise, are therefore likely to diminish the effective utility of issuing CEs. In short, simply omitting references to cumulative impacts from CEQ regulations governing CEs cannot override the statutory mandate of NEPA to consider them.

The allowance of "mitigated CEs" is even more problematic because it is incompatible with the definition of CEs as being limited to federal actions without significant environmental impacts. Moreover, whereas "mitigated EAs" are permissible given the procedures and analysis associated with EAs, the same logic and protections do not apply to CEs, which are typically invoked with little or no public processes and accompanied by only "brief statements" by agencies. Absent adequate procedures, once significant environmental impacts are identified, NEPA's procedural requirements cannot be circumvented in this manner—either they are address adequately in a rulemaking upon which the CE was based or the agency conducts the required analysis for the specific federal action when it falls outside the scope of the available CEs. A mitigated CE achieves what CEs were specifically designed to avoid—it bypasses essential NEPA procedures by applying a rule where a specific determination pursuant to NEPA's procedures is required.

E. CEQ Does Not Have The Authority to Place Limits on the Availability or Scope of Judicial Review

In several places, the proposed regulations would limit the availability or scope of judicial review of agency compliance with NEPA. Specifically, proposed § 1500.3 purports to allow agencies to establish bonding requirements, and proposed §§ 1500.3 and 1503.3 purport to establish exhaustion requirements. The phrasing of §§ 1500.3 and 1503.3 is unclear, but the most plausible reading is that the bonding requirements would preclude litigants from raising any arguments that were not raised during the comment period and within thirty days after final certification of the EIS. In addition, § 1503.3(b)(4) requires agencies to certify that they

[136] 311 F.3d at 1177.
[137] *Jones v. Gordon,* 792 F.2d 821 (9th Cir.1986).

have considered "analyses submitted by public commenters" and § 1502.18 purports to give such certifications "a conclusive presumption" that the comments were adequately considered and that this presumption is binding on federal courts.

More broadly, § 1500.3(d) purportedly establishes a bar against CEQ regulations "create[ing] a cause of action or right of action for violation of NEPA." The proposed regulations further purport to limit judicial authority to enjoin NEPA violations when courts find that they have occurred. According to §1500.3(d), CEQ regulations also do not create a presumption that a NEPA violation is a basis for either injunctive relief or a finding of irreparable harm; and the same provision specifies the violations that courts should treat as harmless error. Each of these provisions limits public access to judicial review and remedies in unprecedented ways.

CEQ does not identify the sources of statutory authority for these regulations, and in fact no such authority exists. Nothing in NEPA authorizes an agency to establish bonding requirements or to create exhaustion requirements. Nor does the Administrative Procedure Act, which supplies a cause of action and standards of review under which courts review NEPA claims.[138] The proposed regulations are similarly inconsistent with basic separation of powers principles. It is a basic tenet of constitutional law that the exclusive power vested in the federal courts by Article III precludes federal agencies from erecting non-statutory barriers to judicial review of their rules and decisions, as well as from placing constraints on judicial authority to determine the appropriate relief for agency failures to conform with the law.[139] Congress may limit or enhance the availability of judicial remedies, but where Congress has chosen to make judicial review available, declined to create hurdles like bonding or exhaustion requirements, and vested in the federal courts the discretion to determine the circumstances in which injunctive relief is appropriate, agencies do not have the authority to revisit these choices.

F. Allowing Permittees to Prepare NEPA Documents Creates an Unacceptable Conflict of Interest and Risk of Bias

In the NPRM the CEQ asks whether "the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants [should] be revised, and if so, how?"[140] While we agree that contracting may provide opportunities for improving NEPA efficacy, the regulations proposed in § 1506.5(c) are likely to compromise agencies' ability to meet NEPA's stated objectives and to undermine public confidence in the NEPA process.

Proposed section 1506.5(c) states that "[e]xcept as provided in §§ 1506.2 and 1506.3, the lead agency, a contractor or applicant under the direction of the lead agency, or a cooperating agency, where appropriate (§ 1501.8(b)), may prepare an environmental impact

[138] The APA creates a cause of action for any person who has been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The standards of review appear in 5 U.S.C. § 706.
[139] *See, e.g.*, *Oesteretch v. Selective Serv. Sys*. 393 U.S. 233, 237 (1968) (holding that agency action is presumptively subject to judicial review).
[140] 83 Fed. Reg. 28591, 28592 (June 20, 2018).

statement pursuant to the requirements of NEPA." Involving applicants in the preparation of NEPA documents raises significant concerns about conflicts of interest and bias. Potential conflicts are likely to be most acute where the stakes are highest, namely, the consideration of alternative means of achieving the purpose and need for a proposed action. Under these circumstances, even a scrupulous and objective applicant-prepared analysis is likely to be perceived as biased and to undermine the legitimacy of the NEPA process and final agency decision. These perception may, in turn, require agencies to expend more of their limited time and resources reviewing applicant-authored materials, responding to public comments, and resolving administrative challenges to environmental reviews and NEPA procedures.

The heightened public concern could also prompt higher rates of litigation, which would increase agency expenses and delay. These concerns are not merely hypothetical. In 2018, the D.C. Circuit Court of Appeals observed the following:

> First, the [Federal Energy Regulatory Commission's] only cited evidence for the amount of fish deaths was a more-than-decade-old-survey of fish entrainment studies and estimates provided by the license applicant itself, Alabama Power. No updated information was collected; no field studies were conducted. Nor was any independent verification of Alabama Power's estimates undertaken. Assuming Alabama Power's good faith, its estimates were entirely unmoored from any empirical, scientific, or otherwise verifiable study or source . . . . The Commission's acceptance, hook, line, and sinker, of Alabama Power's outdated estimates, without any interrogation or verification of those numbers is, in a word, fishy. And it is certainly unreasoned.[141]

The court's strong language exposes the perils of giving applicants effective control over the environmental reviews of their projects. Applicant-prepared NEPA documents, as a general rule, are inconsistent with ensuring the objectivity and legitimacy of NEPA reviews and present significant countervailing practical and litigation risks.

While applicants clearly should be afforded an opportunity to participate in the NEPA process, the best way to do so is through a frontloaded project design process that involves federal, state, and tribal agencies that have relevant expertise. Once a proposed action is submitted for NEPA review, the lead agency should have the authority to interact with applicants as necessary to resolve questions about the proposed action and viable alternatives. Beyond this, applicant engagement should occur through the scoping and public comment processes. This will ensure that applicant involvement is open and transparent and thus will protect the integrity of the NEPA process.

Rather than granting applicants an unprecedented role in environmental reviews of their own actions, the CEQ should consider creating options to responsibly outsource portions of the NEPA analysis to qualified independent contractors. This would expedite document

[141] *American Rivers v. Federal Energy Regulatory Commission*, 895 F.3d 32, 50 (D.C. Cir. 2018).

preparation without compromising the integrity of the NEPA process. In fact, several federal agencies already utilize similar procedures for using contractors to expedite NEPA document preparation. Incorporating these types of procedures into CEQ's regulations would improve consistency and contracting efficiency without sacrificing the legitimacy of NEPA procedures.

Responsible outsourcing would have three principal elements. First, lead agencies would be required to prepare a roster of qualified independent NEPA contractors. Contractors could establish their qualifications based on their prior work on environmental reviews, the expertise and training of their employees, and their demonstrated capacity to address the types of issues likely to arise in the proposed federal action. Second, applicants would be limited to choosing contractors from the agency's approved roster of contractors. Third, the selected contractor(s) would work with the lead agency, cooperating agencies, and an interdisciplinary team to develop study plans, approve and oversee subcontractors, and allocate tasks during the pendency of the NEPA review. While the applicant would cover the costs of hiring the contractor(s), the lead agency direct and supervise their work and have final authority over reviewing and approving the contractor's work.

This framework would protect the integrity of the NEPA process and promote faster environmental reviews. As noted elsewhere in this letter, shrinking agency staffs and budgets are a major cause of NEPA delays. Clarifying the rules governing contractor qualifications and the contracting process would mitigate these challenges without requiring an increase in federal agency funding.

G. CEQ's Proposed Rules are Likely to Increase Litigation That Delays Projects

The regulatory streamlining proposed in CEQ's draft regulations poses a significant risk for agencies because they elevate arbitrary completion-times and page-limits over analytical quality. The time limits for NEPA procedures in proposed § 1501.10 and the page limits in proposed §§ 1501.5(e) and 1502.7 are legally unsupported and will increase litigation risks if they are strictly enforced. With less time to conduct environmental reviews and limited space to explain their work, agency officials will be compelled to adopt procedures and to draft documents in which corners are cut and grounds for legal challenge are heightened.

During judicial review of NEPA compliance, courts evaluate compliance with NEPA's procedures and assess whether the agency took the requisite "hard look" at any associated environmental impacts.[142] Importantly, the hard look standard articulated in *Robertson v. Methow Valley Citizens Council* is based on § 101 of NEPA—not CEQ's implementing regulations. According to the Supreme Court, "[t]he sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences."[143] CEQ's regulations are therefore subservient to the Supreme Court's interpretation of NEPA in *Methow Valley*.

[142] *Robertson v. Methow Valley Citizens Council*, *supra* note 113, at 350.
[143] *Id*.

The question thus becomes whether the time- and page-limits of the new CEQ regulations are compatible with a "hard look" level of judicial review. In many cases, we expect that agencies will simply develop administrative measures—appendices excluded from page counts, delayed initiation of the NEPA process—that circumvent the proposed page and time limits. Where this is not possible, these arbitrary limits will inevitably impact the quality of NEPA procedures and environmental reviews, which will expose agencies to heightened litigation risk and the potential for much more significant delays in agency decision-making. Given that litigation under NEPA averages 23 months to complete,[144] reductions in preparation times—particularly in the case of large-scale or complex federal actions—may be more than offset by litigation-driven delays. Court-ordered requirements for additional environmental reviews would cause further delays on the order of months or longer. These risks must be balanced and a realistic assessment of the benefits, which we expect will be modest to negligible, of imposing default time and page limits on NEPA reviews.

The litigation risks of foreshortening environmental reviews under NEPA are not merely hypothetical. In a recent study of the association between litigation rates and EIS preparation times, Ruple and Race found that shorter EIS preparation times were associated with an increased the risk of litigation.[145] Specifically, BLM on average takes 3.8 years to prepare an EIS, which is roughly the mean for all federal agencies, whereas the USFS average is about 15% shorter (7 months). The authors found that the frequency of challenges to EISs issued by USFS was about 40% higher than those issued by BLM. Conversely, the FHWA and Army Corps of Engineers take, on average, 40 and 90% more time than BLM to prepare an EIS and are subject to litigation 50 and 70%, respectively, less frequently.[146] While these findings do not control for other factors that influence litigation rates, they suggest that arbitrary limits on environmental reviews could raise litigation risks substantially. As a consequence, strict limits on preparation times and page limits are likely to be ineffective because agencies will circumvent them administratively or because they will be offset by increased litigation risks.

IV. NEPA Reforms That Merit Consideration

Changes in CEQ's regulations should, above all, be grounded on agency experience, rigorous studies conducted by CEQ, GAO, CRS, as well as experts in academia and the private sector. However, one of the ironies of NEPA given that it is an information-forcing statute is that our understanding of its implementation and benefits is at best fragmentary. CEQ should use its oversight authority to require agencies to report data on the number and types of environmental reviews they conduct annually, along with basic information on completion times (including delays unconnected to NEPA procedures), essential elements (e.g., alternatives considered), and any legal challenges. Collection of comprehensive and reliable data would provide insights into opportunities for regulatory reforms and, of equal importance, it would

[144] Adelman & Glicksman, *supra* note 49, at 3, 38.
[145] Ruple & Race, *supra* note 44.
[146] Ruple & Race, *supra* note 44.

allow agencies to assess the efficacy of regulatory changes empirically. Further, given the large gaps in the administrative record for this rulemaking identified above, we urge CEQ to withdraw the proposed rules. This would allow CEQ to assemble and analyze data on NEPA compliance and to develop more tailored and effective regulatory reforms.

Another critical oversight of the proposed regulations is that they ignore the often overriding impact of resource constraints in federal agencies for conducting environmental reviews under NEPA. In its preamble to a parallel set of proposed NEPA regulations, the Forest Service highlights the delays associated resource shortages:

> An increasing percentage of the Agency's resources have been spent each year to provide for wildfire suppression, resulting in fewer resources available for other management activities, such as restoration [and environmental reviews under NEPA]. In 1995, wildland fire management funding made up 16 percent of the Forest Service's annual spending, compared to 57 percent in 2018. Along with a shift in funding, there has also been a corresponding shift in staff from non-fire to fire programs, with a 39 percent reduction in all non-fire personnel since 1995.[147]

Reduced staffing and inadequate budgets are not unique to the Forest Service. Returning agencies to full strength would improve the quality of their work and reduce the time for its completion. While this is not a problem that the CEQ can resolve alone, the CEQ and the Trump Administration can advocate much more forcefully for adequate funding of federal agencies. Moreover, enhanced funding would not require a lengthy rulemaking process and, unlike arbitrary limits on environmental reviews, it would mitigate litigation risks. If the Administration is truly committed to expediting NEPA compliance, providing agencies with the resources they need to do their job is the single most important measure that it could take.

CEQ's proposed regulations represent a clear and dramatic step backwards from NEPA's statutory mandate. They upend more than four decades of CEQ regulations and guidance, and many of the most significant changes proposed in the NPRM are incompatible with long-standing judicial interpretations of NEPA. Beyond these legal deficiencies, the proposed rules reflect assumptions about NEPA compliance that are inconsistent with prominent studies and government reports. Further, simple reflection on how several of the proposed reforms are likely to operate in practice reveals countervailing factors that are overlooked or dismissed in the NPRM. In short, the proposed regulations suffer from legal and factual deficiencies that will not withstand judicial review and thus warrant CEQ withdrawing them and restarting the rulemaking process.

[147] 84 Fed. Reg. 27544.

Sincerely,

(All of the following are signatories in their personal capacity only. Institutional affiliations are included for identification purposes only.)

Robert H. Abrams
Professor of Law
Florida A & M University College of Law

David E. Adelman
Harry Reasoner Regents Chair in Law
The University of Texas School of Law

William L. Andreen
Edgar L. Clarkson Professor of Law
The University of Alabama School of Law

Hope Babcock
Georgetown University Law Center
Professor of Law

Reed D. Benson
Dickason Chair and Professor of Law
University of New Mexico School of Law

Michael C. Blumm
Jeffrey Bain Faculty Scholar & Professor of Law
Lewis and Clark Law School

John E. Bonine
B.B. Kliks Professor of Law
University of Oregon

Karrigan S. Bork, JD, PhD
Acting Professor of Law
UC Davis School of Law

Dr. Warigia M. Bowman
Assistant Professor
University of Tulsa College of Law

William Boyd
Professor
UCLA School of Law

Maxine Burkett, Global Fellow Environmental Change & Security Program, Woodrow Wilson International Center for Scholars

Wil Burns, Co-Director & Professor of Research
Institute for Carbon Removal Law & Policy
American University

Cinnamon P. Carlarne
Visiting Fellow, Wadham College
University of Oxford

Ann Carlson
Shirley Shapiro Professor of Environmental Law
UCLA School of Law

David W. Case
Professor of Law
University of Mississippi School of Law

Kim Diana Connolly
Professor of Law
University at Buffalo School of Law

Robin Kundis Craig, James I Farr
Presidential Endowed Professor of Law
University of Utah S.J. Quinney College of Law

Mark S. Davis, Eugenie Schwartz Professor of River & Coastal Studies
Tulane University

Myanna F Dellinger
Associate Professor
University of South Dakota

John C. Dernbach, Commonwealth Professor of Environmental Law & Sustainability
Widener University Commonwealth Law School

David M. Driesen
University Professor
Syracuse University College of Law

Michael C. Duff
Professor of Law
University of Wyoming College of Law

Heather Elliott
Alumni, Class of '36 Professor of Law
The University of Alabama

Daniel Farber
Sho Sato Professor of Law
University of California, Berkeley

Victor B. Flatt
Dwight Olds Chair and Professor of Law
University of Houston Law Center

Richard M. Frank
Professor of Environmental Practice
School of Law, University of California Davis

Josh Galperin
Visiting Associate Professor of Law
University of Pittsburgh School of Law

Michael B. Gerrard
Andrew Sabin Professor of Professional Practice
Columbia Law School

Lauren E. Godshall
Clinical Instructor
Tulane Environmental Law Clinic

Robert L. Glicksman, J.B & Maurice C. Shapiro
Professor of Environmental Law
The George Washington University Law School

Steve C. Gold, Professor of Law &
Judge Raymond J. Dearie Scholar
Rutgers Law School

Carmen G. Gonzalez
Professor of Law
Seattle University School of Law

Sara Gosman
Associate Professor
University of Arkansas School of Law

Emily Hammond, Jeffrey and Martha Kohn
Senior Associate Dean for Academic Affairs
The George Washington University Law School

Jacqueline P. Hand
Professor of Law
University of Detroit Mercy School of Law

Kelly L Haragan
Clinical Professor
Director - Environmental Law Clinic

Lin Harmon-Walker, Interim Director of
Environment & Energy Law Program
George Washington University Law School

Michael P. Healy
Charles S. Cassis Professor of Law
University of Kentucky College of Law

Sean B. Hecht
Evan Frankel Professor of Policy and Practice
UCLA School of Law

Oliver A Houck, Professor &
David Boies Chair in Public Interest Law
Tulane University

Blake Hudson
A.L. O'Quinn Chair & Professor of Law
University of Houston Law Center

David Hunter
Professor of Law, American University
Washington College of Law

Sharon Jacobs
Associate Professor of Law
University of Colorado Law School

Stephen M. Johnson
Professor of Law
Mercer University Law School

Lisa Jordan
Director, Tulane Environmental Law Clinic
Professor of the Practice

Seema Kakade
Assistant Professor
University of Maryland School of Law

Bradley C Karkkainen
Professor of Law
University of Minnesota Law School

Alexandra B. Klass
Distinguished McKnight University Professor
University of Minnesota Law School

Douglas A. Kysar, Deputy Dean & Joseph M. Field '55 Professor of Law
Yale Law School

Albert Lin
Professor of Law
UC Davis School of Law

Maxine I. Lipeles
Professor of Law Emerita
Washington University School of Law

Ryke Longest
Clinical Professor
Duke School of Law

Grant B. MacIntyre, Clinical Assistant Professor & Director of Environmental Law Clinic
University of Pittsburgh School of Law

Jennifer Marlow, Assistant Professor, Dept. of Environmental Science & Management
Humboldt State University

Martha McCluskey, Professor Emerita & Senior Research Scholar, State University of New York, Buffalo Law School

Thomas O McGarity, Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law
The University of Texas School of Law

Nina A. Mendelson
Joseph L. Sax Collegiate Professor of Law
University of Michigan Law School

Joel A. Mintz, C. William Trout
Senior Fellow in Public Interest Law
Nova Southeastern University College of Law

Anthony Moffa
Associate Professor
University of Maine School of Law

Dr. Felix Mormann
Professor of Law
Texas A&M University School of Law

Kenneth M. Murchison
Emeritus Professor
LSU Law Center

Michelle B. Nowlin
Clinical Professor of Law & Co-Director
Duke Environmental Law & Policy Clinic

Ramon Ojeda-Mestre PhD
President of the Integral Studies Center of Territory & Innovation

Larisa de Orbe
Mexican Academy of Environmental Law

Dave Owen
Professor of Law
UC Hastings College of Law

Patrick Parenteau, Professor of Law, Senior Counsel, Environmental Advocacy Clinic
Vermont Law School

Edward A. Parson, Dan & Rae Emmett Professor of Environmental Law
UCLA School of Law

Heather Payne
Associate Professor
Seton Hall University School of Law

Justin Pidot, Professor of Law & Co-Director of the Environmental Law Program, University of Arizona, James E. Rogers College of Law

Claudia Polsky, Assistant Clinical Professor of Law & Director, Environmental Law Clinic
UC Berkeley Law

David Raack
Professor of Law
Ohio Northern University Pettit College of Law

Daniel J. Rohlf, Professor of Law, Of Counsel, Earthrise Law Center
Lewis and Clark Law School

Carol M. Rose, G.B. Tweedy Professor Emerita of Law & Organization
Yale Law School

John Ruple, Professor of Law (Research) & Wallace Stegner Center Fellow, S.J. Quinney College of Law, The University of Utah

Professor Irma S. Russell, Edward A. Smith/ Missouri Chair in Law, the Constitution, and Society, University of Missouri-Kansas City

Professor Jim Salzman, Donald Bren Distinguished Professor of Environmental Law
UCLA Law

Shelley Ross Saxer
Laure Sudreau Chair in Law
Caruso School of Law

Amy Sinden
Professor of Law
Temple University Beasley School of Law

William J. Snape, III, Assistant Dean & Professor, American University
Washington College of Law

Karen C. Sokol
Associate Professor of Law
Loyola University New Orleans College of Law

David Spence, Baker Botts Chair in Law & Professor of Business, Government and Society
The University of Texas School of Law

Mark Squillace
Associate Dean for Faculty Affairs & Research
University of Colorado Law School

Amy L. Stein, Professor of Law & University Term Professor
University of Florida Levin College of Law

Julia E. Stein, Clinical Supervising Attorney
Frank G. Wells Environmental Law Clinic
UCLA School of Law

Steph Tai
Professor of Law
University of Wisconsin-Madison

Dan Tarlock, Professor of Law Emeritus
Chicago-Kent College of Law
Illinois Institute of Technology

Melinda E. Taylor
Senior Lecturer
The University of Texas School of Law

Joseph P. Tomain, Dean Emeritus & Wilbert & Helen Ziegler Professor of Law, College of Law
University of Cincinnati

Katherine Trisolini
Professor of Law
LMU/Loyola Law School

Achinthi Vithanage, Visiting Associate Professor of Law & Environmental & Energy Law Fellow
The George Washington University Law School

Wendy Wagner
Richard Dale Endowed Chair
The University of Texas School of Law

Shelley Welton
Assistant Professor of Law
University of South Carolina School of Law

David A Westbrook , Del Cotto Professor
Co-Director, UB NYC Program in Finance & Law, University at Buffalo School of Law

Hannah Wiseman, Attorneys' Title Professor & Associate Dean for Environmental Programs
Florida State University College of Law

Tseming Yang
Professor of Law
Santa Clara University Law School