



March 10, 2020

Council on Environmental Quality  
Attn: Edward A. Boling  
722 Jackson Place NW  
Washington, DC 20503  
*VIA Regulations.gov*

**SUBJECT: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (January 10, 2020)**

The American Petroleum Institute (“API”), the Association of Oil Pipe Lines (“AOPL”), and IAGC (collectively, “Associations”) respectfully submit the following comments on the Council on Environmental Quality’s (“CEQ”) January 10, 2020 Notice of Proposed Rulemaking (“NPRM”) entitled “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act [“NEPA”],” 85 Fed. Reg. 1,684. As we did in our August 20, 2018 comments on the related Advance Notice of Proposed Rulemaking (“ANPRM”),<sup>1</sup> the Associations welcome CEQ’s efforts to streamline the NEPA review process, reduce unnecessary regulatory burdens, and clarify longstanding CEQ regulations.

## **I. Interests of Associations**

API represents more than 600 member companies involved in all aspects of the natural gas and oil industry, including exploration and production, refining, marketing, and transportation of petroleum and petroleum products in the United States. Together with its member companies, API is committed to ensuring a strong, viable U.S. natural gas and oil industry capable of meeting the energy needs of our nation in an efficient and environmentally responsible manner. Representing the interests of the natural gas and oil industry in regulatory and judicial proceedings, including those related to NEPA, is part of

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<sup>1</sup> “Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act,” 83 Fed. Reg. 28,591 (June 20, 2018).

API's overall purpose, and API has on numerous occasions in recent years submitted comments on CEQ regulatory documents and intervened as a party in NEPA litigation affecting the interests of its members.

AOPL is a national trade association that represents owners and operators of oil pipelines across North America before regulatory agencies, in judicial proceedings, and on legislative matters. AOPL members transport approximately 97 percent of the crude oil and refined petroleum products transported through pipelines throughout the United States, over pipelines that extend approximately 215,000 miles in length. AOPL members safely, efficiently and reliably transport approximately 21 billion barrels of crude oil and petroleum products each year. AOPL educates all branches of government and the public about the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable and most cost-effective method.

Founded in 1971, the IAGC is the global trade association for the geophysical and exploration industry, the cornerstone of the energy industry. With more than 80 member companies in 50 countries, our membership includes onshore and offshore survey operators and acquisition companies, data and processing providers, exploration and production companies, equipment and software manufacturers, industry suppliers and service providers. The IAGC focuses on advancing the geophysical and exploration industry's freedom to operate. The IAGC engages governments and stakeholders worldwide on issues central to geophysical operations and exploration access, including prioritizing timely, accessible data acquisition throughout the life of the asset; providing predictability and competition; promoting regulatory and fiscal certainty and promulgating risk- and science-based regulations.

## **II. General Comments**

The Associations' members engage in a wide variety of activities that require Federal actions triggering NEPA reviews, including exploration and production of oil and gas resources on Federal lands and the Outer Continental Shelf ("OCS"), construction of interstate natural gas pipelines and oil and natural gas pipelines that cross Federal lands or international borders, and construction and operation of petroleum refineries and liquefied natural gas terminals, to name just a few. Accordingly, our member companies are directly impacted by the NEPA review decisions and consultations made by, among other agencies, the Bureau of Land Management ("BLM"), the Bureau of Ocean Energy Management ("BOEM"), the Department of Energy, the Environmental Protection Agency ("EPA"), the Federal Energy Regulatory Commission, the Department of State, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the U.S. Army Corps of Engineers, and the U.S. Forest Service ("USFS"). With this backdrop, the Associations offer several general comments related to the NPRM and NEPA reform before discussing specific provisions of the proposed rule beginning in Section III.

### **a. NEPA is a Procedural and Process Statute Only**

As CEQ rightly acknowledges, “NEPA is a procedural statute”<sup>2</sup> that requires the identification and analysis of a proposed action’s impact to environmental resources.<sup>3</sup> It does not mandate that certain outcomes be achieved or prohibit any impacts to environmental resources.<sup>4</sup>

### **b. NEPA Reform is Long Overdue**

Since NEPA was enacted over fifty years ago, and particularly over the past decade, it is the collective experience of the Associations and their members that the scope of NEPA reviews have expanded dramatically. This has in turn lengthened review times, created confusion among project sponsors, and resulted in divergent court decisions. These relatively recent developments have compounded regulatory uncertainty and chilled trillions of dollars of investment in vital infrastructure and other projects that would otherwise bear significantly more timely benefits in the form of job creation, economic activity, and Federal, State, and local tax revenue. This cannot be what the original drafters of NEPA intended, and the status quo that many industries find today is completely unmoored from the principle above – that NEPA is a procedural and process statute only.

Despite decades of development of CEQ guidance and related case law, the NEPA review process overall remains complex, time-consuming, and uncertain, which in turn reduces investment in the nation’s energy resources and infrastructure. Recent examples where significant uncertainty has clouded actual or potential NEPA reviews (in terms of timing, scope of review, and whether any programmatic review was required, among many other issues) that affect the natural gas and oil industry include proposed leasing on Federal lands, drilling and construction of production facilities, construction and expansion of interstate natural gas pipelines, construction of cross-border liquids pipelines, geological and geophysical surveying activities on the OCS, and the construction of liquefaction facilities to export liquefied natural gas.

Moreover, a vast cross-section of the public, governmental entities, and regulated communities believe NEPA reform is critical to site and construct more wind, solar, and other renewable energy capacity, as well as natural gas infrastructure. Natural gas is clean-burning, uniquely able to ramp up and down to complement renewable sources, and abundantly and affordably produced across the United States. For these and other reasons, the Associations have long supported programmatic NEPA reform at the CEQ and individual agency levels, and this proposed rule is a vital next step in that ongoing process.

NEPA reform has been a priority of both Democratic and Republican administrations for decades.<sup>5</sup> This NPRM is plainly not the result of a single administration’s policy preferences. It is a logical result of

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<sup>2</sup> 85 Fed. Reg. 1,686.

<sup>3</sup> See 42 U.S.C. § 4332(2)(C) (agency obligation under NEPA is only to prepare detailed statement on “adverse environmental effects which cannot be avoided”); 40 C.F.R. § 1502.16 (same); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 551 (1978).

<sup>4</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

many years' worth of guidance, analysis, public input, and thoughtful scholarship. The findings of the National Petroleum Council's recent report on energy infrastructure<sup>6</sup> make the case for reform clear:

- “Overlapping and duplicative regulatory requirements, inconsistencies across multiple federal and state agencies, and unnecessarily lengthy administrative procedures have created a complex and unpredictable permitting process.”<sup>7</sup>
- “Demands on energy infrastructure are continuously changing, requiring modifications and additions.”<sup>8</sup>
- “Existing infrastructure has been modified and adapted to near-maximum capacity. To connect America’s abundant energy supplies with domestic and global demand, significant public and private investment in new and existing pipelines, ports, rail facilities, and inland waterways will be essential.”<sup>9</sup>
- “Although originally expected to be concise, NEPA environmental assessments and environmental impact statements have grown in length and corresponding agency review time. ... There is an opportunity for simplification[.]”<sup>10</sup>
- “Litigation consumes public and private resources, can delay the construction, maintenance, and operation of sited and approved projects, creates uncertainty for communities and project developers, and can reduce the resiliency of U.S. energy infrastructure.”<sup>11</sup>

On August 15, 2017, the President signed Executive Order 13807, which seeks to improve federal infrastructure permitting decisions for infrastructure projects. This EO and related work by the Administration are important to the natural gas and oil industry both as developers of infrastructure (including renewable energy) and users of infrastructure such as highways, roads, and bridges, the development of which has been hampered by the NEPA process in recent years. We are pleased to see CEQ’s efforts to increase the efficiency and timeliness of the NEPA process, especially through better alignment across agencies. The Associations believe that finalizing this proposed rule would decrease unnecessary regulatory burdens while continuing to protect, restore, and enhance the environment. We strongly urge CEQ to finalize this rule as soon as possible and help put our nation to work building the clean energy economy of the future.

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<sup>5</sup> See, e.g., 85 Fed. Reg. 1,686-88. See also 43 Fed. Reg. 55,978 (Nov. 29, 1978) (“[The final regulations’] purpose is to provide all Federal agencies with efficient, uniform procedures for translating the law into practical action.”); 51 Fed. Reg. 15,619 (Apr. 25, 1986) (NEPA regulations revisions necessary “[b]ecause of complaints about paperwork and delays in projects caused by the NEPA process ...”); 77 Fed. Reg. 14,473 (Mar. 12, 2012) (“NEPA encourages straightforward and concise reviews and documentation that are proportionate to potential impacts and effectively convey the relevant considerations to the public and decisionmakers in a timely manner while rigorously addressing the issues presented.”).

<sup>6</sup> “Dynamic Delivery: America’s Evolving Oil and Natural Gas Transportation Infrastructure” (Dec. 12, 2019).

<sup>7</sup> *Id.*, Exec. Summary, at 2.

<sup>8</sup> *Id.* at 16.

<sup>9</sup> *Id.* at 17.

<sup>10</sup> *Id.* at 38-39.

<sup>11</sup> *Id.* at 47.

**c. The Record to Date Meets and Exceeds the Legal Standard CEQ Must Satisfy to Revise its Regulations, if they Are Challenged**

“An agency’s construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.”<sup>12</sup> Because NEPA itself required the establishment of CEQ and expressly charged it with the duty to oversee the implementation of the statute’s requirements, there is no question that CEQ’s interpretations of NEPA should be afforded substantial deference should they be reviewed under the Administrative Procedure Act (“APA”).<sup>13</sup>

The longstanding nature of CEQ’s current regulations do not diminish the deference courts should afford CEQ in reviewing the new regulations.<sup>14</sup> The APA “makes no distinction ... between initial agency action and subsequent agency action undoing or revising that action.”<sup>15</sup> There is therefore “no basis in the Administrative Procedure Act ... for a requirement that all agency change be subjected to more searching review.”<sup>16</sup> Rather, the same arbitrary and capricious standard applies to both an agency’s initial decision to issue a regulation and its later decision to rescind or modify the regulation.<sup>17</sup> As such, CEQ’s new regulations, once enacted, are likely to be entitled to substantial deference if there is “good reason for the change.”<sup>18</sup>

In order to meet this standard, CEQ “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.”<sup>19</sup> Indeed, an agency’s reasoned explanation for its shift can be that, with a change of administrations, the agency’s view as to the public interest has changed. The D.C. Circuit has held that “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”<sup>20</sup> So long as “the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”<sup>21</sup> That evaluation may include a determination that a new statutory interpretation is “more consistent with statutory language” than the previous interpretation.<sup>22</sup>

<sup>12</sup> *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985).

<sup>13</sup> *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004); see *Methow Valley*, 490 U.S. at 355 (“CEQ regulations are entitled to substantial deference”); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (same).

<sup>14</sup> See *id.* at 354–55 (regulation in effect for nearly ten years) and 356–57 (regulation in effect for eight years).

<sup>15</sup> *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>16</sup> *Id.*; See also *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016) (“[N]o specially demanding burden of justification ordinarily applies to a mere policy change.” (citations omitted)).

<sup>17</sup> See *Fox Tel. Stations*, 556 U.S. at 515 (citations omitted).

<sup>18</sup> *Methow Valley*, 490 U.S. 332, 355 (1989) (quoting *Andrus*, 442 U.S. at 358); see also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). It is “enough for an agency to give “a reasoned explanation for [its] change.”

<sup>19</sup> *Fox Tel. Stations*, 556 U.S. at 515 (2009) (emphasis in original).

<sup>20</sup> *National Ass’n of Homebuilders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (Garland, J.).

<sup>21</sup> *Id.*; see also *Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) (“[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”).

<sup>22</sup> *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007).

The preamble to the proposed rule and the ANPRM that preceded it are replete with discussions about the proposed changes, the justifications for the proposed changes, the length of time that has elapsed since the regulations were last changed, and exceptionally granular details about each individual proposed change to past practices. Such acknowledgment is more than sufficient to meet the standard described above.

If finalized, CEQ's new rule will not contradict the factual underpinnings of CEQ's prior regulations. The underpinnings of CEQ's existing regulations are both statutory and policy-driven, and those same underpinnings provide the foundation for CEQ's proposed new regulations. CEQ's rationales for proposing to amend its NEPA regulations are expressly set forth in the preamble, and include: "to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies"; "to advance the stated objectives of the current regulations, . . . [t]o reduce paperwork, to reduce delays, and at the same time to produce better decisions [that] further the national policy to protect and enhance the quality of the human environment"; and "to align the regulations with the text of the NEPA statute, including revisions to reflect the procedural nature of section 102(2) of NEPA."<sup>23</sup>

None of these policy rationales contradict the underlying rationale of CEQ's prior regulations. These same policy rationales underlie CEQ's existing regulations and, in virtually all respects, the NEPA statute. Further, as CEQ notes in the preamble to the proposed rule, prior administrations have stated these same goals for the implementation of NEPA, and have set forth these same goals in guidance, memoranda, directives, and procedural changes.<sup>24</sup>

The Supreme Court has considered an analogous situation already. In *Andrus v. Sierra Club*, CEQ took contrasting positions on whether section 102(2)(C) of NEPA applied to appropriation requests.<sup>25</sup> At first, in 1970, CEQ's advisory guidelines took the position that it did apply.<sup>26</sup> Eight years later, in 1978, the CEQ promulgated its first set of regulations and reversed its prior position, concluding that section 102(2)(C) did not apply to appropriation requests.<sup>27</sup> The court concluded that CEQ's new regulations were valid and entitled to substantial deference because the changes occurred during a detailed and comprehensive process, were ordered by the president to transform the guidelines into mandatory regulations, and were consistent with traditional distinctions between legislation and appropriation.<sup>28</sup> CEQ's present proposal and its preceding ANPRM reflect such a comprehensive and detailed process, rest on an interest in transforming guidelines into regulatory requirements, and were similarly ordered by the president.

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<sup>23</sup> 85 Fed. Reg. 1,691 (internal citations and quotations omitted).

<sup>24</sup> See *supra* n.5.

<sup>25</sup> 442 U.S. 347, 356–57 (1979).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 357.

<sup>28</sup> *Id.* at 358–61.

#### **d. A Facial Challenge to Final Regulations Presents Potential Justiciability Issues**

If CEQ's proposed NEPA regulations are finalized, the Associations believe potential parties intending to facially challenge the final regulations would face significant justiciability issues. In particular, we believe that putative litigants would have difficulty demonstrating that they satisfy the elements of Article III standing.

An entity seeking to challenge CEQ's new regulations would likely bring an action under the APA because NEPA does not provide a private cause of action.<sup>29</sup> The APA provides a cause of action to persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute."<sup>30</sup> However, no cause of action is bestowed if: (1) a statute precludes judicial review;<sup>31</sup> (2) the agency action is not a "final agency action for which there is no other adequate remedy in a court,"<sup>32</sup> or (3) the "agency action is committed to agency discretion by law."<sup>33</sup> The Associations do not believe that the NPRM as currently drafted can readily be shown to adversely impact or aggrieve potential litigants. As such, any parties seeking to challenge CEQ's final rule would likely have difficulty demonstrating standing. The Associations urge CEQ to explain that a final rule, standing alone, cannot adversely impact or aggrieve any potential party because it is purely procedural – just as is the statute from which it flows.

#### **e. The NPRM's Proposed Severability Provision**

The APA permits a court to sever a rule by setting aside only the offending parts of the rule.<sup>34</sup> Two conditions limit the exercise of this power. First, the court must find that "the agency would have adopted the same disposition regarding the unchallenged portion [of the regulation] if the challenged portion were subtracted."<sup>35</sup> Second, the remaining parts of the regulation must be able to "function sensibly without the stricken provision."<sup>36</sup> If finalized, CEQ's proposal would likely satisfy both of these elements.

There is no doubt that CEQ intends that unchallenged portions of the proposed regulations be allowed to remain if other parts of the regulation are vacated or remanded by a reviewing court. As the preamble explains, CEQ proposes to add a "new § 1500.3(e), 'Severability' provision to address the possibility that this rule, or portions of this rule, may be challenged in litigation."<sup>37</sup> The preamble goes on to

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<sup>29</sup> *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993) ("In drafting NEPA, however, Congress did not create a private right of action. Accordingly, [plaintiff] must rest its claim for judicial review on the [APA]").

<sup>30</sup> 5 U.S.C. § 702.

<sup>31</sup> *Id.* § 701(a)(1).

<sup>32</sup> *Id.* § 704.

<sup>33</sup> *Id.* § 701(a)(2).

<sup>34</sup> *See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988); *Carlson v. Postal Regulatory Com'n*, 938 F.3d 337, 351 (D.C. Cir. 2019); *Virginia v. EPA*, 116 F.3d 499, 500-01 (D.C. Cir. 1997).

<sup>35</sup> *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017).

<sup>36</sup> *Carlson v. Postal Regulatory Com'n*, 938 F.3d at 351; *Sorenson Commc'ns. Inc. v. FCC*, 755 F.3d 702, 710 (D.C. Cir. 2014).

<sup>37</sup> 85 Fed. Reg. 1,694.

expressly state that it is “CEQ’s intent that the individual sections of this rule be severable from each other, and that if any sections or portions of the regulations are stayed or invalidated, the validity of the remainder of the sections shall not be affected and shall continue to be operative.”<sup>38</sup>

The Associations are not aware of any one provision of the proposed rule that could undermine the functionality of the remaining portions of the rule.<sup>39</sup> Indeed, CEQ’s proposal is intended to address a wide variety of NEPA implementation issues and reforms, and to pull together and update a number of sources of law and policy into a single rulemaking. These actions are clearly related but not intertwined. No single provision of this proposal, if removed, would impair the remaining portions of the proposed regulations or render them meaningless.<sup>40</sup> CEQ’s severability provision is a prudent measure that should remain in the final rule.

### III. The Definition of “Effects”

#### a. Removal of the Requirement to Assess “Cumulative Effects”

In general, the Associations support the removal of the requirement for agencies to assess “cumulative effects.” That term does not appear in the NEPA statute; is not independently incorporated by courts; and has led to confusion, duplication of efforts, and waste of agency resources.

As an initial matter, and as CEQ correctly points out, even determining what is a cumulative effect has led to “confusion,” “been interpreted expansively[,]” and “result[ed] in excessive documentation about speculative effects[.]”<sup>41</sup> The Associations believe that cumulative effects generally defy definition without reasonable time bounds, observable scale, and modeling that can hold all other relevant variables constant. It simply makes no sense to attempt to define what may be undefinable in the abstract, absent express direction from Congress to attempt to do so.

Opponents of the NPRM may point to the U.S. Supreme Court’s decision in *Kleppe v. Sierra Club*<sup>42</sup> to argue that the NEPA statute itself requires agencies to assess cumulative effects.<sup>43</sup> Such a reading of *Kleppe* is misplaced for several reasons. First, while the Court found that the existence of cumulative effects required the preparation of an Environmental Impact Statement (“EIS”), it noted that “determination of the extent and effect of [cumulative impacts] ... is a task assigned to the special competency of the appropriate agencies.”<sup>44</sup> The same remains true under the NPRM: even though

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<sup>38</sup> *Id.*

<sup>39</sup> See *MD/DC/DE Broadcasters Ass’n v. FCC*, 253 F.3d 732, 740 (D.C. Cir. 2001) (examining “whether a statute’s function would be impaired if, after invalidating a portion of an implementing regulation, the Court left the rest of the regulation in place”).

<sup>40</sup> See *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 72 (D.C. Cir. 2017) (“Thus we have severed provisions when ‘they operate[d] entirely independently of one another.’”).

<sup>41</sup> 85 Fed. Reg. 1,707.

<sup>42</sup> 427 U.S. 390 (1976).

<sup>43</sup> See, e.g., Comments of Kevin Cronin, available at <https://www.regulations.gov/contentStreamer?documentId=CEQ-2019-0003-0463&attachmentNumber=1&contentType=pdf>, at 2 (posted Jan. 21, 2020).

<sup>44</sup> 427 U.S. at 413-14.



agencies would not be strictly required to assess cumulative effects, nothing would prevent them from exercising their “special competency” to determine “the extent and effect” of particularly relevant cumulative effects, provided that they otherwise satisfy the causation analysis required under *Dep’t of Transportation v. Public Citizen*<sup>45</sup> and related provisions of the proposed rule. Second, even assuming *Kleppe* found an independent statutory basis to assess cumulative effects, that portion of its holding is superseded by *Chevron*.<sup>46</sup> CEQ’s 1978 regulations addressed cumulative effects, but *Chevron* clarified that deference will be afforded to action that does not conflict with statute and that is otherwise not arbitrary and capricious. CEQ is therefore permitted to remove from its regulations requirements that do not appear in the NEPA statute, as supported by the robust record compiled to date. Finally, the Associations are aware of no decision since *Kleppe* that has ever found an independent textual source in the NEPA statute requiring agencies to assess cumulative effects.

At CEQ’s public hearings on the NPRM and elsewhere, opponents of the proposed rule have claimed that eliminating the requirement to assess cumulative effects will put an end to agency assessment of the impacts of global climate change. This is false. The Associations are only aware of a single district court decision that has ever held that the impacts of global climate change must be assessed as a cumulative effect of agency decisionmaking.<sup>47</sup> But as the D.C. Circuit has explained, “NEPA cumulative-impact analysis need only consider the effect of the current project along with any other past, present or likely future actions in the same geographic area as the project under review.”<sup>48</sup> This would preclude any global assessment of cumulative impacts, climate related or not.<sup>49</sup> And no Court of Appeals has ever affirmed the reasoning of *WildEarth Guardians v. Zinke*, while some have explicitly rejected it.<sup>50</sup> Moreover, nothing in the proposed rule would appear to preclude an agency’s attempt to assess cumulative impacts in an appropriate context, provided that such impacts satisfied the requisite causation analysis and were firmly based in sound science and not speculative.

This argument also ignores other requirements outside of NEPA for agencies to consider cumulative environmental effects that will continue to apply regardless of whether or not the NPRM is finalized. For example, under section 404 of the Clean Water Act, the Army Corps of Engineers must determine that proposed dredge and fill activities “will have only minimal cumulative adverse effects on the environment” before issuing a permit.<sup>51</sup> In addition, the FAST Act contemplates review of “cumulative

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<sup>45</sup> 541 U.S. 752 (2004).

<sup>46</sup> See *supra* n.21 and accompanying text.

<sup>47</sup> *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41 (D.D.C. 2019). While several other cases have addressed this question, the agencies at issue had already considered climate-related cumulative effects. See *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013) (BLM properly considered cumulative climate change impacts of proposed coal mine); *WildEarth Guardians v. BLM*, 8 F.Supp.3d 17 (D.D.C. 2014) (same for oil and gas lease sale). Cf. *Indigenous Env. Network v. U.S. Dep’t of State*, 347 F.Supp.3d 561 (D. Mont. 2018) (agency conducted separate cumulative greenhouse gas emission impacts for two different pipeline authorizations, but was required to assess the cumulative impacts of both pipelines together).

<sup>48</sup> *Sierra Club v. FERC*, 672 F. App’x 38, 39 (D.C. Cir. 2016). See also 40 C.F.R. § 1508.7 (a “[c]umulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”) (emphasis added).

<sup>49</sup> See also Sec. VIII *infra*.

<sup>50</sup> See, e.g., *EarthReports, Inc. v. FERC*, 828 F.3d 929 (D.C. Cir. 2016); *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016)

<sup>51</sup> 33 U.S.C. § 1344(e)(1).

effects” for federal highway projects.<sup>52</sup> When Congress seeks to require agencies to conduct cumulative impact analyses, it does so clearly and directly.

To bring all agency materials and practice in accord with a final rule, the Associations further recommend that CEQ revoke existing guidance on cumulative effects if this provision of the NPRM is finalized, and consider issuing revised guidance that is more realistic and practical, recognizing the inherent limits of determining cumulative effects, boundaries set out by existing case law, and appropriate scenarios where agencies may want to consider assessing cumulative effects, even though they would not be required to do so under NEPA and its regulations. For example, CEQ could through new guidance recommend that agencies review, consider, and summarize conclusions of appropriate examples or scenarios of cumulative effects evaluations and related documents by utilizing the new searchable NEPA databases<sup>53</sup> in order to consider potential cumulative impacts.

**b. Agencies Should Only Assess Effects When a Reasonably Close Causal Relationship Exists Between the Proposed Action and the Effect**

As the Associations wrote in response to the ANPRM, and as API wrote in its comments on CEQ’s draft guidance on “Consideration of Greenhouse Gas Emissions,”<sup>54</sup> agencies should only assess effects when a reasonably close causal relationship exists between a proposed action and the effect, and that a “but for” causal relationship is not sufficient. For the reasons previously submitted in those comments, and for the reasons below, the Associations support these proposed revisions to the definition of “effects.”<sup>55</sup>

The U.S. Supreme Court has compared the relevant test for “effects” that must be considered to the tort principle of “proximate cause.”<sup>56</sup> The action under review must be “the legally relevant cause” of such effects.<sup>57</sup> Thus, for example, an agency need not consider environmental effects of actions over which the agency has no control.<sup>58</sup>

The Associations offer one proposed revision to new proposed section 1508.1(g)(2), which is to remove the word “significant” from the second sentence. Again, while CEQ has accurately captured the holding of *Public Citizen* in new proposed section 1508.1(g), the Associations believe there will be greater clarity in a definition that excludes effects that are not reasonably foreseeable or which lack close causal connections, rather than one that excludes effects that are not “significant.” Moreover, we believe this revision is more consistent with CEQ’s longstanding approach to define “effects,” and then separately

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<sup>52</sup> 23 U.S.C. § 168(c)(2)(G).

<sup>53</sup> 85 Fed. Reg. 1,728 (new § 1507.4(a)(5)).

<sup>54</sup> 84 Fed. Reg. 30,097 (June 26, 2019).

<sup>55</sup> 85 Fed. Reg. 1,728-29.

<sup>56</sup> *Pub. Citizen*, 541 U.S. at 767 (citing W. Keeton, et al., *Prosser and Keeton on Law of Torts* 264, 274-75 (1983) for proximate cause standard). See also *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

<sup>57</sup> *Pub. Citizen*, 541 U.S. at 769.

<sup>58</sup> *Id.* at 770 (“We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”); *National Ass’n of Home Builders*, 551 U.S. at 667 (2007) (same).

clarify which of those effects are “significant” for purposes of triggering NEPA. No effect, significant or not, should be considered if it is “remote in time, geographically remote, or the product of a lengthy causal chain.”<sup>59</sup>

Notwithstanding this modest recommended change, the revised definition of “effects” faithfully reflects decades of case law. Revising the definition will thus enhance public understanding of the governing principles of law and help reduce issues in litigation. For these reasons, the Associations also support the new definition of the related term “reasonably foreseeable.”

### **c. Eliminating the Distinction Between “Direct” and “Indirect” Effects**

The Associations further support eliminating the distinction between “direct” and “indirect” effects, terms similarly not found in the NEPA statute. As discussed above, the concept of causation is central to understanding an agency’s obligation under NEPA to consider any effect, regardless of whether it is deemed direct or indirect. While an effect may bear some relationship to a Federal action, that is not the test for inclusion in a NEPA review, and we are concerned that one of the reasons for the expansion of scope of reviews and mission creep in recent agency practice is simply confusion over the meaning of an “indirect” effect. By clarifying that effects must only be considered when there is a “reasonably close causal relationship” that would satisfy a proximate cause analysis under tort law, this aspect of the revised definition will enhance agency and public understanding of the scope of review, eliminate issues in litigation, and conserve limited agency resources.

It bears mentioning what this revision will not do. It will not eliminate any requirement that agencies consider greenhouse gas emissions when conducting NEPA reviews. The NPRM retains the requirements in the current rule for agencies to consider all “ecological ..., aesthetic, historic, cultural, economic ..., social, [and] health effects.”<sup>60</sup> The Associations support retaining this language. While some courts have required agencies to consider greenhouse gas emissions beyond the footprint of a project, finding such emissions to be reasonably foreseeable and reasonably related to the project,<sup>61</sup> others have declined to do so.<sup>62</sup> The proposed rule does nothing to alter that case-by-case analysis that lies at the heart of NEPA and furthers its major purpose to aid in informed government decision-making. However, as we have commented previously, the Associations urge CEQ to provide specific examples of effects that ordinarily should not be assessed.

## **IV. Categorical Exclusions**

In response to CEQ’s request,<sup>63</sup> the Associations would support proposed revisions to allow agencies to use categorical exclusions (“CXs”) that other agencies use for similar activity. As we have commented

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<sup>59</sup> 85 Fed. Reg. 1,729.

<sup>60</sup> 40 C.F.R. § 1508.8 (proposed to be recodified as § 1508.1(g)(1)).

<sup>61</sup> *Sierra Club v. FERC*, 867 F.3d 1357.

<sup>62</sup> 85 Fed. Reg. 1,696.

<sup>63</sup> *Id.* at 1,707.

previously, we believe that some agencies are not fully utilizing CXs as a tool to satisfy NEPA obligations. For this reason, we support CEQ's revisions to the definition of "categorical exclusion" and the reorganization of the regulations,<sup>64</sup> which will provide greater clarity to agencies and promote efficient NEPA reviews, and the new requirement that CXs be made available in a publicly searchable database.<sup>65</sup> Despite criticism of these proposed changes, the Associations do not expect that they will result in new exemptions for major energy infrastructure projects as a whole, including cross-border pipelines or interstate natural gas pipelines.

The Associations further recommend that as CEQ proposes to do for environmental assessments ("EAs") and EISs,<sup>66</sup> CEQ should also impose a time limit on agencies to determine whether or not a CX applies to a project application. We recommend adding a six month time limit to determine applicability of CXs in new 40 C.F.R. § 1501.10. Such a limitation will minimize delays, conserve agency resources, and provide greater certainty and predictability to project sponsors, especially sponsors of smaller projects.

## V. Mitigation

The Associations support the proposed new requirements for agency mitigation to include an express legal basis.<sup>67</sup> It is worth clarifying that this legal basis should flow from "statutory authority"<sup>68</sup> and not agency guidance or practice. This will help ensure agency compliance with law, which will reduce litigation risks, and aid in informing the public. For similar reasons, we also support the proposed changes to the definition of mitigation to make clear that mitigation must have an actual nexus to the proposed action and be limited to those actions that have an environmental effect while excluding those that do not.<sup>69</sup>

CEQ may also consider adding text that every mitigation measure identified in an EIS need not ultimately be implemented. As the Supreme Court has noted, "one important ingredient of an EIS is the discussion of the steps that can be taken to mitigate adverse environment consequences." *Methow Valley*, 490 U.S. at 351. The Court went on to explain that "[t]here is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted on the other." *Id.* at 352. As a result, the Court reversed an appellate court ruling requiring each EIS to include "a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts." *Id.* at 353 (emphasis in

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<sup>64</sup> Proposed revised § 1508.1(d) and recodified §§ 1501.4 and 1501.5(a), respectively.

<sup>65</sup> *See supra* n.53.

<sup>66</sup> 85 Fed. Reg. 1,717, new §§ 1501.10(b)(1) and (2).

<sup>67</sup> *Id.* at 1,722, new § 1503.3(e).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1,729, new § 1508.1(s). CEQ should consider adding language from the preamble to the text of the revised definition to clearly delineate that mitigation is limited to actions that have an environmental effect.

original). Citing *Methow Valley*, appellate courts have routinely confirmed that there is no substantive obligation to adopt mitigation measures identified in an EIS.<sup>70</sup>

While the preamble favorably cites CEQ's existing "Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying Appropriate Use of Mitigated Findings of No Significant Impact,"<sup>71</sup> the Associations renew our previous request that CEQ expressly revoke this guidance. We are concerned that the guidance is being used and will continue being used to justify activity outside the scope of a reviewed federal action rather than to maintain affected resources. Neither the NEPA statute nor CEQ guidance can be used as the sole justification for an agency to require mitigation or to mandate a net gain on mitigation, and CEQ should make this clear, as it does in other parts of the proposed rule. Such mandates must flow from other statutory authority.

## VI. Other Definition Revisions

### a. "Coordinating Agency"

CEQ proposes to redefine "coordinating agency" to expand the role of non-Federal actors as part of the NEPA review process.<sup>72</sup> The new definition as currently drafted is vague. A clear standard on when a non-federal entity should be consulted is necessary to inform lead agencies regarding consultation obligations.

To ensure consistency and predictability in the NEPA review process, a final rule should specify that State, Tribal, and local entities can participate as cooperating agencies when a proposed action impacts an area or activity over which such entities have jurisdiction. This standard ensures that only the parties with decision making authority are elevated to the status of a cooperating agency. Such a limitation helps ensure a streamlined NEPA review process and prevents delays in review that result from the participation of multiple unnecessary consulting agencies. A limitation would not preclude the lead agency from considering the interests of a State, Tribal, or local agency, as the proposed regulations require an agency to solicit comments from such entities that may have an interest in the area or be impacted by a decision. Additionally, other laws such as the National Historic Preservation Act serve to protect interests in historic properties beyond a coordinating agency's jurisdiction.

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<sup>70</sup> See, e.g., *Westlands Water Dist. v. Dep't of Interior*, 376 F.3d 853, 873 (9th Cir. 2004); *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 176-77 (5th Cir. 2000). In contrast to EISs, CEQ allows agencies to include appropriate mitigation measures in EAs to avoid an action rising to the level of a significant impact to the environment. See *Akiak Native Community v. U.S. Postal Serv.*, 213 F.3d 1140, 1147 (9th Cir. 2000) ("We must keep in mind that NEPA does not require that Environmental Assessments include a discussion of mitigation strategies."). Promoting voluntary adoption of mitigation measures in the EA context is a helpful tool that agencies can use to ensure that a proposed action's environmental effects will not reach a level of significance. By adopting such measures in a "mitigated FONSI," an agency can avoid the added cost and burden of preparing a full EIS while ensuring that environmental impacts are minimized.

<sup>71</sup> 76 Fed. Reg. 3,843 (Jan. 21, 2011).

<sup>72</sup> 85 Fed. Reg. 1,728, new § 1508.1(e).

The failure to set specific limits could subject future NEPA reviews to challenges on the basis that the lead agency failed to include a State, Tribal, or local agency that may have had an interest in the review as a cooperating agency. Such challenges would unnecessarily delay NEPA reviews and should be discouraged.

**b. “Human Environment”**

The Associations urge CEQ to remove the redefinition of “human environment.”<sup>73</sup> While this proposed revision aligns with the statutory text of 42 U.S.C. § 4331(a), for that reason alone, it is an unnecessary change.

**c. “Major Federal Action”**

We support the changes to the definition of “Major Federal action,” which are in accord with our previous comments, and further support including in the NEPA database a list of actions that have been found not to meet either definition. And as we have previously commented, we would also support a final rule’s establishing monetary thresholds (*e.g.*, Federal project spend or other disbursement under a certain threshold)<sup>74</sup> or other workable materiality tests.

**d. “Reasonable alternatives”**

We recommend that the NPRM’s new definition of “reasonable alternatives” exclude consideration of alternatives outside the jurisdiction of an agency.

**e. “Tiering”**

CEQ proposes to revise the definition of “tiering” to clarify that agencies may produce a programmatic environmental assessment and tier subsequent site-specific decisions to that document. We recommend that the definition clarify that the ability of agencies to tier is not inherently limited to situations where the agency has produced an EIS. Tiering is an important regulatory tool for land planning agencies, and it is important for CEQ to promote its use and remove existing ambiguities.

On the other hand, CEQ is correct in its proposed revisions that there should be no presumption that programmatic NEPA assessment is required.<sup>75</sup> The current regulatory language may lead to agencies’ combining completely different projects or industries into a single programmatic NEPA document,

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<sup>73</sup> *Id.* at 1,729, new § 1508.1(m).

<sup>74</sup> *See, e.g., Twp. of Ridley v. Blanchette*, 421 F.Supp. 435 (E.D. Pa. 1976) (major projects are usually those with Federal funding over \$1 million, while other projects do not involve sufficiently serious effects to justify costs of completing NEPA review documents, or have potential effects which appear to offset the costs of completing NEPA review documents).

<sup>75</sup> *See, e.g.,* proposed new § 1504.2(c)(3).

causing practical and legal concerns.<sup>76</sup> It may also compound delays and costs, and both Federal agencies and regulated parties could face prolonged litigation risks that drain resources from effective regulation and private economic investment. NEPA case law also counsels in favor of a more limited reading of any programmatic NEPA requirements. For example, in *Kleppe*, the U.S. Supreme Court held that the Department of the Interior and other federal agencies “responsible for issuing coal leases, approving mining plans, and taking other actions to enable private companies and public to develop coal reserves on Federally owned or controlled land”<sup>77</sup> were not required to issue a programmatic EIS for the entire Northern Great Plains region. *Kleppe* reflects skepticism by the Court regarding programmatic reviews even for projects that share a number of factors in common, including location and type of activity.<sup>78</sup>

Finally, the NPRM appears to leave a determination of the lifespan of a programmatic NEPA document open to individual agency interpretation. We therefore recommend that the definition of “tiering” or related provisions be revised to require agencies to indicate how and when new or better information will be incorporated into tiered project or site specific EAs or EISs when there is an existing programmatic NEPA document in place.

## VII. Exhaustion and Public Input

The Associations strongly support the new provisions in §§ 1500.3(b) and 1502.18 governing exhaustion and the public comment process, including allowing agency decisionmakers to certify consideration of all of the alternatives, information, and analyses submitted by public commenters.<sup>79</sup> These proposed changes will result in more informative public comments, conserve agency resources, and cut down on speculative claims in litigation. Many agencies commonly deem comments not timely raised and information not provided to be forfeited,<sup>80</sup> and this change will reaffirm and encourage this basic, orderly concept of administrative law. It will also help commenters know what is required of them in order to preserve their litigation rights, and help agencies remedy potential issues before they need to be litigated.

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<sup>76</sup> For example, current guidance suggests that proximity in geographic space should be a factor accorded significant weight in deciding whether to perform a programmatic review. Combined with the Federal Land Policy and Management Act’s multiple-use mandate, this would seem to suggest that BLM is required to perform a programmatic assessment for any and all permitted activities on particular Federal lands simply because they may be close geographically, a plainly absurd result.

<sup>77</sup> 427 U.S. at 393.

<sup>78</sup> See also *Nat’l Wildlife Federation v. Appalachian Regional Comm’n*, 677 F.2d 883 (D.C. Cir. 1981) (promulgating factors for consideration of programmatic assessment).

<sup>79</sup> 85 Fed. Reg. 1,713, 1,720.

<sup>80</sup> Certain statutory provisions, such as § 4(b) of the Endangered Species Act, require agency actions to be proposed and finalized on strict schedules that necessarily limit the time period for public comment. See also *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 733 (D.C. Cir. 1988) (holding a 15-day comment period not unreasonable under the circumstances). Agencies are generally free to ignore late filings. See, e.g., *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1059 (D.C. Cir. 2001) (“An agency is not required to consider issues and evidence in comments that are not timely filed.”) (citing *Personal Watercraft Indus. Ass’n v. Dep’t of Commerce*, 48 F.3d 540, 543 (D.C. Cir. 1995)). See also *Pub. Citizen*, 541 U.S. at 764 (“Persons challenging an agency’s compliance with NEPA must structure their participation so that it ... alerts the agency to the [parties’] position and contentions, in order to allow the agency to give the issue meaningful consideration.” (internal quotation and citation omitted)).

The Associations also support the proposed changes to the scope of public commenting on EAs in new § 1501.5(d). While some have argued that this change will limit public input under NEPA, for the reasons stated above, we believe it will actually enhance the quality of public comments and serve to protect the litigation rights of any parties adversely affected. Moreover, it is our experience that, at least with respect to the agencies listed in Section II, *supra*, a typical EA tends to run less than fifty pages in length, and can even be as short as several paragraphs. For this reason, some agencies already limit an expansive public comment process on such EAs. It is hard to see a major informational or public benefit to unlimited comments on shorter documents, particularly when balanced against the agency resources needed to solicit, compile, analyze, and respond to them. We believe this is a common sense modification, and assertions that CEQ is limiting public input are exaggerated.

### VIII. Extraterritoriality

In response to CEQ's question regarding extraterritoriality,<sup>81</sup> and as we have commented previously, any final rule should explicitly affirm that NEPA does not require consideration of international and global impacts, consistent with established law that agencies are only required to examine impacts within the United States. Congress' purpose in establishing NEPA was to "foster and promote the general welfare ... of Americans."<sup>82</sup> Thus, to the extent CEQ is suggesting that projects outside the jurisdiction of the United States do not trigger NEPA's environmental review requirements, we believe that is the correct result under the NEPA statute and prevailing case law. Alternatively, if CEQ is suggesting that NEPA reviews for domestic projects do not need to consider potential extraterritorial impacts (*i.e.*, foreign environmental impacts from a purely domestic federal action), the Associations believe that NEPA does not apply extraterritorially.

The plain language of 42 U.S.C. § 4332(2)(C) does not require NEPA to be applied outside the United States. As noted by the D. C. Circuit, "[b]ecause the decisionmaking processes of federal agencies take place almost exclusively in this country and involve the workings of the United States government, they are uniquely domestic."<sup>83</sup> In addition to the absence of any evidence of extraterritorial application in the text of the statute, "NEPA's legislative history illuminates nothing in regard to extraterritorial application."<sup>84</sup> Given this lack of guidance in the text and legislative history, courts have been reluctant to interpret the statute as controlling conduct outside the United States, particularly where doing so would risk foreign policy consequences not clearly intended by Congress. For instance, in *NEPA Coal. of Japan v. Aspin*, the presumption against extraterritoriality was extended to preclude NEPA's applications to Department of Defense actions on military installations in Japan.<sup>85</sup> And in *Greenpeace*

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<sup>81</sup> 85 Fed. Reg. 1,709.

<sup>82</sup> 42 U.S.C. § 4331(a).

<sup>83</sup> *Env't'l Def. Fund v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993).

<sup>84</sup> *Nat'l Res. Def. Council v. NRC*, 647 F.2d 1345, 1367 (D.C. Cir. 1981).

<sup>85</sup> 837 F. Supp. 466, 467 (D.D.C. 1993).



*USA v. Stone*, the Court found that “extraterritorial application of NEPA ... would result in a lack of respect for [Germany’s] sovereignty, authority and control over actions taken within its borders.”<sup>86</sup>

The Associations believe the same rationale would apply to consideration of extraterritorial impacts. Congress gave no indication that it contemplated assessment of foreign impacts, despite including statutory “language that indicates that Congress was concerned with the global environment and the worldwide character of environmental problems[.]”<sup>87</sup> Thus, while Congress understood that federal actions could cause environmental effects in foreign jurisdictions, it did not include a requirement to assess them. Moreover, an otherwise expert domestic agency may not be an expert on foreign environments or effects, especially “aesthetic, historic, cultural, economic ..., [and] social” effects. Attempting to impose purported expertise over issues purely under the control of foreign sovereigns may lead to the same lack of respect and foreign policy consequences that courts have expressed concern about.<sup>88</sup> For these reasons, the Associations urge CEQ to include in a final rule a clear statement that NEPA should not apply extraterritorially, both to projects outside the United States and to assessment of the foreign effects of domestic projects.<sup>89</sup>

## IX. Other Specific Comments

### a. No Presumption of Irreparable Harm

The new § 1500.3(d)<sup>90</sup> regarding a lack of presumption of irreparable harm as it relates to potential NEPA remedies, represents another prudent change that simply codifies existing case law holding that injunctive relief is an extraordinary remedy not commonly granted in NEPA litigation. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008) (NEPA does not alter required showing for injunctive relief). Recent NEPA cases in lower courts reflect this principle. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357; *Diné Citizens Against Ruining our Env’t v. Jewell*, (10th Cir. 2016) (“any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible.”). Instead, CEQ’s proposed revisions rightly suggest that NEPA deficiencies can be remedied quickly by remands for curative agency NEPA analyses. *WildEarth Guardians v. Zinke*, 368 F.Supp.3d at 84 (remanding NEPA analysis to agency “in light of the serious possibility that the agency would be able to substantiate its prior conclusions” (internal citation and modifications omitted)).

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<sup>86</sup> 748 F.Supp. 749, 760 (D. Haw. 1990).

<sup>87</sup> *Id.* at 759.

<sup>88</sup> *See also* 42 U.S.C. § 4332(F) (agencies shall only address “worldwide ... environmental problems [] *where consistent with the foreign policy of the United States* ....) (emphasis added).

<sup>89</sup> In either situation, any potential injuries stemming from extraterritorial NEPA reviews may not be justiciable. *See, e.g., Ctr. for Biological Diversity v. Ex-Im Bank*, 894 F.3d 1005 (9th Cir. 2018) (Endangered Species Act and National Historic Preservation Act claims related to financing for liquefied natural gas project in Australia were not justiciable).

<sup>90</sup> 85 Fed. Reg. 1,713.

### **b. Administrative Stays or Bonding Requirements**

The Associations are seriously concerned with CEQ's proposal to allow agencies to permit affected parties to seek a stay of final agency action pending judicial review or to impose bond or security requirements or other conditions in the context of NEPA reviews.<sup>91</sup> Such procedural avenues could become standard practice for litigants and would tie final decisions up in less transparent agency processes and impose burdensome requirements on small businesses, including contractors to project sponsors, that do not exist in current standard litigation where agency action is not judicially stayed.<sup>92</sup>

While the preamble merely provides citations to arguably analogous provisions of the APA and the Federal Rules of Appellate and Civil Procedure, CEQ has offered no policy rationale for this proposed change. More importantly, nowhere in the NEPA statute does Congress direct CEQ or agencies to stand up dozens of varying and potentially conflicting procedures to administratively stay, or impose possibly onerous financial requirements on,<sup>93</sup> final agency action. Rather, CEQ has been directed to ensure that NEPA reviews "are conducted in a manner that is concurrent, synchronized, timely, and efficient" and "that reduces unnecessary burdens and delays as much as possible, including by using CEQ's authority to interpret NEPA to simplify and accelerate the NEPA review process."<sup>94</sup> We recommend striking the text in proposed § 1500.3(c) after the sentence "Any allegation of noncompliance with NEPA and these regulations should be resolved as expeditiously as possible."

### **c. Economic and Technical Analyses**

The Associations support proposed revised § 1501.2(b)(2), which expressly incorporates economic and technical analyses into assessment of environmental effects. *See* 42 U.S.C. § 4332(B). It is fundamental that any reasonable and non-arbitrary agency decision-making necessarily includes considerations of technical feasibility; thus, if an effect of a decision is technically unavoidable, reviewers should consider and note that in their reviews. The need for economic analysis is similarly well supported, and other environmental statutes require such consideration. For example, under the Clean Air Act's assessment of best available control technologies for purposes of New Source Review, Congress has directed the consideration of emission limitations "taking into account ... economic impacts and other costs[.]"<sup>95</sup>

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<sup>91</sup> *Id.*, new § 1500.3(c).

<sup>92</sup> Indeed, subsection 1500.3(c) appears to be internally in tension with subsection 1500.3(d), which presumes that no irreparable harm required to support a stay flows from NEPA decisions.

<sup>93</sup> In theory, some agencies may be able to set financial assurance requirements so high that no project sponsor could provide them, a plainly absurd result.

<sup>94</sup> E.O. 13807, §§ 5(e)(i)(B), (D).

<sup>95</sup> 42 U.S.C. § 7479(3). *See also Alaska Dep't of Env't Conserv. v. EPA*, 540 U.S. 461, 475-76 (2004) (technology applicant must demonstrate "that technical considerations ... or economic impacts justify a conclusion that the most stringent technology is not 'achievable' in that case" (quoting EPA's Draft New Source Review Workshop Manual (Oct. 1990), at B2)).

#### d. Functional Equivalence<sup>96</sup>

CEQ proposes in new § 1507.3(b)(6) to allow agencies to identify in their NEPA procedures documents prepared pursuant to other statutory requirements or Executive Orders that meet the requirements of NEPA. We believe this aspect of the proposal has the potential to improve the speed and efficiency of NEPA reviews and outweighs any potential complexities associated with identifying “functionally equivalent” environmental review requirements in other statutes.

While the “functional equivalence” doctrine is not found in NEPA, it has been recognized by courts for decades.<sup>97</sup> It is based on an argument originally advanced by EPA that various statutes enacted after NEPA contained environmental review requirements that rendered NEPA reviews redundant. Under the doctrine, when a statute requires an agency to conduct an analysis that is functionally equivalent to an environmental review under NEPA, the action reviewed by the agency is exempt from NEPA.

In determining that an agency’s review under another statute is the functional equivalent of NEPA, courts have looked to three primary criteria: (1) the agency’s organic statute must provide “substantive and procedural standards that ensure full and adequate consideration of environmental issues;”<sup>98</sup> (2) the agency must afford public participation before a final alternative is selected;<sup>99</sup> and (3) the action must be undertaken by an agency engaged primarily in the examination of environmental issues.<sup>100</sup> As such, courts have generally found that only EPA’s analyses are the functional equivalent of NEPA reviews. Statutes that courts have found to have environmental review processes functionally equivalent of NEPA include the Clean Air Act,<sup>101</sup> the Ocean Dumping Act,<sup>102</sup> FIFRA,<sup>103</sup> the Resource Conservation and Recovery Act (“RCRA”),<sup>104</sup> and the Safe Drinking Water Act (“SDWA”).<sup>105</sup>

CEQ’s proposal seeks to expand recognized “functional equivalent” analyses. Under the proposed § 1507.3(b)(6) – which is broadly consistent with the case law interpreting the functional equivalence doctrine – agencies may document any agency determination that compliance with the environmental review requirements of other statutes or Executive Orders serves as the functional equivalent of NEPA

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<sup>96</sup> CEQ should clarify that while these changes encourage the reduction of duplicative environmental reviews, they do not stand for the proposition that agencies should conduct additional analyses additive to NEPA reviews that may bear some relationship to other types of environmental reviews. For example, BLM’s approach to programmatic air quality analyses generally involves third-party reviews outside the scope of NEPA, as have BOEM’s requirements to assess emissions from mobile offshore drilling units. This clarification would simplify NEPA reviews, improve the technical content of NEPA documents, and save time. NEPA documents should also not be delayed pending the promulgation of new air quality standards, which may change during the course of longer reviews.

<sup>97</sup> See, e.g., *Env’t Def. Fund v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973) (holding that EPA’s compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) was the functional equivalent of NEPA compliance).

<sup>98</sup> *Id.* at 1257.

<sup>99</sup> *Maryland v. Train*, 415 F. Supp. 116, 122 (D. Md. 1976).

<sup>100</sup> *Warren Cty v. North Carolina*, 528 F. Supp. 276, 286 (E.D.N.C. 1976).

<sup>101</sup> *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349, 359 (3rd Cir. 1972)

<sup>102</sup> *Maryland v. Train*, 415 F. Supp. 116, 122 (D. Md. 1976).

<sup>103</sup> *Env’t Def. Fund, Inc. v. EPA*, 489 F.2d at 1256; *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986).

<sup>104</sup> *Alabamians for a Clean Env’t v. EPA*, 871 F.2d 1548 (11th Cir. 1989); *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990).

<sup>105</sup> *Western Nebraska Res. Council v. EPA*, 943 F.2d 867 (8th Cir. 1991).

compliance by identifying that: (1) there are substantive and procedural standards that ensure full and adequate consideration of environmental issues; (2) there is public participation before a final alternative is selected; and (3) a purpose of the review that the agency is conducting is to examine environmental issues.<sup>106</sup> We believe this change could therefore extend recognition to reviews conducted under, for example, the Federal Land Policy and Management Act, the Forest Service Organic Act, and the Marine Mammals Protection Act, all of which require comprehensive environmental plans and analyses to protect a wide range of environmental resources. Federal permits issued by BLM, USFS, BOEM, and other agencies address the same environmental concerns as NEPA reviews. As such, this revision will significantly streamline approval of projects sponsored by the Associations' members.

#### e. Page and Time Limits

The Associations strongly support CEQ's proposal to reincorporate and impose new presumptive limits on the time and length of EAs and EISs.<sup>107</sup> We also support the related new definition of "page."<sup>108</sup> These limits, related definitions, and process for agencies to use to exceed these presumptive limits are reasonable, align with agency practice, and will ensure that most reviews are completed in a timely and efficient manner.<sup>109</sup>

These presumptive limits are also entirely consistent with longstanding CEQ and agency guidance. For example, in August 2017, the Department of the Interior issued Order 3355 requiring Interior agencies to adhere to current thresholds of 150 pages, or not more than 300 pages for complex projects. Most importantly, however, CEQ's proposed page limits are also consistent with the second of NEPA's "twin goals" "to promote informed public participation by requiring full disclosure of and opportunities for the public to participate in governmental decisions affecting environmental quality."<sup>110</sup>

In many respects, analyses required under NEPA are akin to other government notice requirements, many of which recognize that promoting an informed public can require disseminating information in a manner that is concise, clear, easy-to-read, and capable of being understood.<sup>111</sup> Public notices from federal agencies under other environmental statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act, SDWA, and RCRA are required to be clear and concise. With few exceptions, where important notices are required to be provided to the public, the federal government has recognized that brevity and clarity are key considerations. These revisions further such considerations.

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<sup>106</sup> 85 Fed. Reg. 1,707.

<sup>107</sup> *Id.* at 1,715, 1,717, 1,719, new §§ 1501.5 (e), 1501.10, 1502.7.

<sup>108</sup> *Id.* at 1,720, new § 1508.1(v).

<sup>109</sup> *See also* E.O. 11514, "Protection and Enhancement of Environmental Quality," 35 Fed. Reg. 4,247 (Mar. 5, 1970) (CEQ shall "require impact statements to be concise, clear, and to the point ....").

<sup>110</sup> *Methow Valley*, 490 U.S. 332, 349-50 (1989). *See also* 40 C.F.R. § 1500.1(b)-(c).

<sup>111</sup> Presidential Memorandum, "Plain Language in Government Writing," 63 Fed. Reg. 31,884 (June 10, 1998); Federal Plain Language Guidelines, OMB Guidance on Implementing the Plain Writing Act (1999); E.O. 12,866 (Oct. 4, 1993), E.O. 12,988 (Feb. 5, 1996); E.O. 13,563 (Jan. 18, 2011).

The Associations also request that a final rule clarify the interaction of the deadlines for the issuance of a record of decision and the issuance of new National Ambient Air Quality Standards under the Clean Air Act. Specifically, revised § 1506.11 should reflect that the issuance of a record of decision should not be delayed pending final promulgation of proposed new Standards. If new Standards are proposed but not finalized, conditional NEPA approval should be given upon a commitment by project sponsors that they will demonstrate compliance later in the development cycle.

#### **f. EIS Costs and Contractors**

We strongly support the new requirement to include estimated total costs in EIS documents.<sup>112</sup> This would substantially further the informational goals of NEPA, and would likely encourage greater efficiency in conducting reviews. While the proposal seeks disclosure of the costs of agency personnel hours, contractor costs, and other direct costs, the Associations recommend consideration of additional costs, including the estimated costs of project delay associated with prolonged EIS preparation, opportunity costs associated with use of agency resources, and potential litigation costs in the event of administration or judicial challenges.

In addition, as we have commented previously, we support the clarifications regarding agency use of third-party contractors to prepare EISs.<sup>113</sup> These revisions are consistent with current 40 C.F.R. § 1506.5(c), and the experience of the Associations' members is that while many agencies have already adopted this practice, it is not consistent across the federal government today. This revision will help ensure uniformity, potentially save costs, and reduce and prevent protracted project review backlogs.

#### **g. Timing of Judicial Review**

The Associations support the clarification on the timing of judicial review of NEPA documents that reviewable final agency action occurs on the issuance of the Record of Decision in proposed § 1500.3. This revision accords with the body of case law and administrative law principles on finality and ripeness.

#### **h. CEQ's Draft Guidance on "Consideration of Greenhouse Gas Emissions"**

In order to minimize confusion and finalize this proposed rule as soon as possible, the Associations support CEQ's proposal to review the draft guidance for consistency with this proposed rule after a rule is finalized.<sup>114</sup>

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<sup>112</sup> 85 Fed. Reg. 1,720, new § 1502.11(g).

<sup>113</sup> *Id.* at 1,725, new § 1506.5(c).

<sup>114</sup> *Id.* at 1,710-11.

**22**

API, AOPL & IAGC comments

Thank you for the opportunity to provide comments. If you have any questions, please contact Ben Norris at (202) 682-8251, or [norrisb@api.org](mailto:norrisb@api.org).

Sincerely,

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