

September 29, 2023

The Honorable Brenda Mallory
Chair, Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Re: Docket Number 2023-0003

Dear Chair Mallory:

This letter represents the collective comments of 88 organizations representing millions of members and supporters regarding the proposed Phase 2 regulations implementing the National Environmental Policy Act (NEPA). Our members care deeply about and participate in the environmental impact assessment process mandated by NEPA. Some of our organizations will also be submitting additional comments.

We are pleased to see the restatement of many core principles of NEPA compliance that had been deleted or diminished in the 2020 regulatory revisions. We applaud many of the new provisions, such as those related to climate change, environmental justice and tribal governments, alternatives, and mitigation. We recognize that certain provisions included in the proposed regulations are required by the Fiscal Responsibility Act of 2023 (FRA). We also have concerns about some of the proposed provisions and recommendations for improvements.¹

I. REGULATORY PROPOSALS THAT RECOGNIZE NEPA'S STATUTORY PURPOSE AND DIRECTION.

The Council on Environmental Quality's (CEQ) proposal to reinstate many of NEPA's core concepts throughout the implementing regulations is appropriate and welcome. Many of the changes made in the 2020 regulations reflected an erroneous view that the NEPA process is merely a paperwork exercise with minimal connection to substantive environmental protection. That flawed premise ignores the fundamental purpose of NEPA as clearly stated in the Act:

To declare a 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; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.²

¹ As our comments reference three sets of CEQ's NEPA regulations, we have identified them using the following format: proposed regulations: "Proposed Section 40 C.F.R. 1500.1;" existing regulations: "40 C.F.R. § 1500.1 (2020);" and original regulations: "40 C.F.R. § 1500.1 (1979)."

² 42 U.S.C. § 4321.

We commend CEQ for reinvigorating the regulations in a manner that educates both implementing agencies and the public about this bedrock law that articulates this country's national environmental policies and provides a process for achieving them. While the national goals that NEPA establishes are a long way from being realized, the proposed regulations generally do a good job of setting the stage for improved agency decisionmaking in a way that comports with the law's purpose.

In that regard, we support the proposed revisions to Part 1500, "Purpose and Policy." The proposed revisions make clear the linkages between our national environmental policies and the NEPA process,³ emphasize federal agencies' responsibilities to interpret and administer their policies and regulations and authorizing legislation in accordance with NEPA's policies and the CEQ regulations,⁴ and restore the mandate to comply with the Act "to the fullest extent possible."⁵ The linkage between NEPA's policies and process is further strengthened by proposed Section 1502.14(f) which would require agencies to identify the environmentally preferable alternative or alternatives in an EIS and by defining the environmentally preferable alternative(s) as the one that would best promote the national environmental policies set forth in Title 101 of NEPA.⁶

We also support the proposed repeal of several current provisions in that section, such as current § 1500.1, which states that the purpose and function of NEPA is satisfied if the agencies consider information that is presented through the environmental impact assessment process and if the public is informed of the process. In fact, the purpose of NEPA is not just to consider information – even good quality information – but to act on it. And the public wishes to participate in the process, not just be informed. Further, we support the proposed rescission of current § 1500.3 and the provisions throughout the current regulations that, in our collective view, inappropriately attempt to give direction to federal courts regarding causes of action and defenses, bonds, ripeness, and other issues associated with litigation.

II. CLIMATE CHANGE EFFECTS.

Climate change is the overarching environmental issue of our time. It has been clear for many years that federal agencies have an obligation to assess climate impacts under NEPA.⁷ Proposed Section 1500.2(e)'s direction to identify and analyze reasonable alternatives that would reduce climate change-related effects provides a much-needed linkage between the NEPA process and the statute's purpose. Similarly, the proposed revision to Section 1502.14(f), explaining that the

³ National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924, 49967-49968 (July 31, 2023).

⁴ *Id.*

⁵ *Id.* at 49968.

⁶ *Id.* at 49977.

⁷ See, e.g., *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017); *Wild Earth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008); *Mid-States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003); *City of Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478 (D.C. Cir. 1990).

environmentally preferable alternative or alternatives are those that would best promote NEPA's policies by, for example, addressing climate change is an important step in the right direction.

We also strongly support the proposed revision to the requirements for the description of the "affected environment" in Section 1502.15, identifying the requirement to include anticipated climate-related changes to the environment and steps to take when that information is not readily available. Analysis of proposed actions without including such information can no longer be considered adequate (or in NEPA parlance, a "hard look") given our rapidly changing environment and improved scientific capacity.⁸ Proposed Section 1502.16(a)(7)'s charge to agencies to analyze reasonably foreseeable climate change-related effects of both the proposed action and alternatives and on the proposed action and alternatives reflects long-standing law.⁹ We also support the references to climate change-related effects in the definition of "effects" and "extraordinary circumstances" in proposed Sections 1508.1(g), (m).

Finally, CEQ invited comment on whether it should codify any, or all, of its 2023 *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, issued in interim final form earlier this year.¹⁰ We urge CEQ to issue that guidance in final form as soon as feasible. We especially underscore the need to provide the recommended additional guidance on two climate issues and consider including relevant direction in the regulations themselves. Those two issues are perfect substitution analysis and comparisons to national and global greenhouse gas emissions (GHG).

In regard to perfect substitution analysis, despite CEQ's strong warning in its 2023 interim final guidance,¹¹ we continue to see agencies rely on this highly flawed theory to justify lack of an adequate analysis of climate effects. For a very current example, please consider the August 2023 Bureau of Land Management's draft supplemental EIS (DSEIS) for a draft Resource Management Plan in the Colorado River Valley planning area. In the DSEIS, the Bureau of Land Management (BLM) has proffered a "perfect substitution analysis" in the context of oil and gas demand, contending that supply will be met somewhere anyway (hence perfect substitution), so why not concentrate that supply in the United States and in this case, Colorado, because it has a stricter regulatory scheme than many other possible locations.¹²

⁸ For example, see Steven Amstrup and Cecila Blitz, *Unlock the Endangered Species Act to Address GHG Emissions*, 381 *Science* 949 (2023) for discussion of causal connection between current (as opposed to atmospheric) greenhouse gas emissions and polar bear recruitment.

⁹ *Supra* note 7.

¹⁰ National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023) [hereinafter *Interim Final Guidance*]; Letter from Ctr. for Biological Diversity et al to The Honorable Brenda Mallory (April 10, 2023) (**Attachment 1**).

¹¹ Interim Final Guidance, *supra* note 10, at 1205.

¹² See Bureau of Land Mgmt., Draft Resource Mgmt. Plan: Supplemental Environmental Impact Statement: Colorado River Valley Field Office and Grand Junction Field Office at 3-20, 3-21 (Aug. 2023), available at

https://eplanning.blm.gov/public_projects/2016085/200525292/20083156/250089338/CRVFO_GJFO_Draft_SEIS_2023_Aug.pdf

To address this continuing problem, we suggest that CEQ consider integrating the warning in the interim final guidance against “perfect substitution analysis” and the recommendation to “use models that accurately account for reasonable and available energy substitute resources, including renewable energy, . . . [to] compare the proposed action’s and reasonable alternatives’ energy use against scenarios or energy use trends that are consistent with achieving science-based GHG reduction goals, such as those pursued in the Long-Term Strategy of the United States”¹³ into the Phase II regulations and/or the preamble, as appropriate.

We also urge CEQ to incorporate into the regulations CEQ’s admonition in the 2016¹⁴ and 2023¹⁵ climate guidance that agencies should not compare a proposed action’s GHG emissions to national and global climate GHG emissions as that is not a useful comparison. Though CEQ’s guidance on this point has also been available for several years, we also continue to see agencies ignore that guidance. For example, the Forest Service approved a 1,700-acre clearcutting project in 2022, after CEQ effectively restored the 2016 guidance, that relied on just the type of conclusory statement that CEQ cautioned against, alleging that the project would have an “infinitesimal” impact on global carbon stores and emissions. Predictably, a federal court rejected this approach just last month stating that:

With all in agreement that climate change as a result of carbon emissions is an increasingly serious national and global problem, the USFS has the responsibility to give the public an accurate picture of what impacts a project may have, no matter how ‘infinitesimal’ they believe they may be. They did not do so here. Accordingly, the agency failed to take a ‘hard look’ at the Project’s carbon emissions, violating NEPA.¹⁶

Third, consistent with the administration’s recent announcement regarding actions to address climate change,¹⁷ we urge CEQ to include a regulation addressing the appropriate

¹³ Dept. of State and the U.S. Executive Office of the President, *The Long-Term Strategy of the United States: Pathways to Net-Zero Greenhouse Gas Emission by 2050* (Nov. 2021).

¹⁴ Council on Env’t Quality, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 11 (Aug. 1, 2016), available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf.

¹⁵ Interim Final Guidance, *supra* note 10, at 1205.

¹⁶ *Ctr. For Biological Diversity v. U.S. Forest Serv.*, 2023 U.S. Dist. LEXIS 144726, 31-37 (D. Mont. Aug. 17, 2023); *see also*, *350 Montana v. Haaland*, 50 F.4th 154, 1259 (9th Cir. 2022) (setting aside agency’s determination that proposed coal mine expansion would not have significant impacts in part because the determination relied “on the arbitrary and conclusory determination that the . . . project’s emissions will be ‘minor’ compared to global and domestic emissions.”)

¹⁷ *See* Press Release, President Joe Biden, The White House, Biden-Harris Administration Announces New Actions to Reduce Greenhouse Gas Emissions and Combat the Climate Crisis (Sept. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements->

use of Social Cost of Greenhouse Gases (SC-GHG). Agencies' utilization of SC-GHG should be placed in the context of relevant climate goals and commitments. An important part of that context would be analysis of the magnitude and severity of GHG emissions as compared to the remaining global carbon budget.

III. TRIBAL GOVERNMENTS AND INDIGENOUS COMMUNITIES.

We support the retention of the 2020 provisions that removed the original restrictions on Tribal governments' participation in the NEPA process and require the inclusion of Tribal governments and Indigenous communities in all stages of the NEPA process. Tribal governments' roles in scoping,¹⁸ as potential cooperating agencies,¹⁹ and as joint lead agencies²⁰ are properly affirmed throughout the proposed regulations. Consistent with the federal government's trust responsibilities to Tribal Nations, we urge CEQ to authorize Tribes to appeal a denial of a request to become a cooperating agency or joint lead agency to CEQ.²¹ We also recommend that CEQ include a definition of "Tribal Nations" in the regulations.

The preamble's acknowledgment that Tribal involvement in the NEPA process is separate from and is *in addition* to required government to government consultation is appropriate and welcome.²² But as President Biden's Memorandum on Uniform Standards for Tribal Consultation states, "[c]onsultation requires that information from Tribes be given meaningful consideration, and agencies should strive for consensus with Tribes or a mutually desired outcome."²³ We urge CEQ to explicitly reference this responsibility in the final regulations.

We support several proposed additions to the NEPA regulations that incorporate long overdue measures to address Tribal interests and concerns. Importantly, Tribal interests would be incorporated into the various factors that agencies must consider in determining whether a proposed action has a significant effect.²⁴

We urge CEQ to further address and incorporate requirements to recognize the interests of Indigenous communities and peoples. In particular, we recommend the following changes to ensure more complete identification of Indigenous interests in the context of determining the significance of a proposed action and alternatives and thus the level of appropriate NEPA compliance:

[releases/2023/09/21/fact-sheet-biden-harris-administration-announces-new-actions-to-reduce-greenhouse-gas-emissions-and-combat-the-climate-crisis/](https://www.whitehouse.gov/briefing-room/fact-sheets/2023/09/21/fact-sheet-biden-harris-administration-announces-new-actions-to-reduce-greenhouse-gas-emissions-and-combat-the-climate-crisis/).

¹⁸ Proposed Section 1502.4(c).

¹⁹ Proposed Section 1501.8.

²⁰ Proposed Sections 1501.7(d) 1501.8(a).

²¹ Proposed Section 1501.8(a).

²² Phase 2 Proposed Revisions, *supra* note 3, at 49930-49931.

²³ President Joe Biden, Memorandum on Uniform Standards for Tribal Consultation, Sec. 2. (Nov. 30, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/>.

²⁴ Proposed Sections 1501.3(d)(iv)(ix).

Use broader language concerning culturally significant sites. Proposed Section 1501.3(d)(2)(iii) directs agencies to consider the degree to which a proposed action may adversely affect unique characteristics of the affected geographic area, including Tribal sacred sites. We recommend broadening this language to include sacred and culturally significant sites of Native Hawaiians, Alaska Natives and Indigenous peoples in the U.S. and U.S. territories. Concomitantly, agencies should be directed to consult organizations that serve and represent the interests of Native Hawaiians, Indigenous peoples of the U.S. territories in the Pacific (American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands), Alaska Natives, and members of non-federally recognized Native American tribes.

Use ACHP criteria to identify appropriate organizations representing Indigenous peoples and non-federally recognized Tribes. The need to effectively integrate consultation with and analysis of effects of proposed federal actions and alternatives on both Tribal Nations and Indigenous peoples is underscored by the close relationship between implementation of NEPA and the National Historic Preservation Act (NHPA). CEQ regulations mandate the preparation and integration of NEPA analyses with other applicable laws and executive orders.²⁵ CEQ and the Advisory Council on Historic Preservation (ACHP) have provided specific agency guidance implementing the integration of compliance with the two statutes in their jointly published handbook.²⁶ The NHPA defines Native Hawaiian organizations as any organization that serves and represents Native Hawaiian interests, has as a primary and stated purpose the provision of service to Native Hawaiians, and has demonstrated expertise in aspects of historic preservation that are culturally significant to Native Hawaiians.²⁷ Those criteria should be applied to other Indigenous peoples and non-federally recognized Tribes in the context of the NEPA process.

Use broader references when speaking of “rights”. Proposed Section 1501.3(x) identifies adverse effects on the rights of Tribal Nations that have been reserved through treaties, statutes or Executive Orders as another factor that should be considered in the determination of significance. Some Indigenous peoples and Indigenous communities that are not denominated as “Tribes” have been

²⁵ 40 C.F.R. § 1502.4(a).

²⁶ See Council on Env’t Quality and Advisory Council on Hist. Pres., *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106* (March 2013), available at https://www.achp.gov/sites/default/files/2017-02/NEPA_NHPA_Section_106_Handbook_Mar2013_0.pdf.

²⁷ 54 U.S.C. § 300314(a); 36 C.F.R. § 800.16 (s)(1).

recognized and granted certain rights through treaties, statutes and Executive Orders and those rights should also be included in significance determinations.²⁸

We also note a proposed exclusion from the definition of “major federal action” that is specific to Tribal interests. Specifically, “[a]ctivities or decisions for projects approved by a Tribal Nation that occur on or involve land held in trust or restricted status by U.S. for the benefit of that Tribal Nation or by the Tribal Nation when such activities or decisions involve no Federal funding or other Federal involvement” would be excluded from the definition of “major federal action.”²⁹ We assume the phrase “other federal involvement” in the latter provision dealing with actions on Tribal lands includes any proposed federal permits or other federal approvals but we recommend that the final regulation clarify what the phrase “other federal involvement” refers to in this context.

Finally, we note the incorporation of Indigenous Knowledge into the definition of “special expertise.”³⁰ CEQ noted that the joint guidance document issued last year on Indigenous Knowledge does not define Indigenous Knowledge.³¹ CEQ now invites comment on whether it should include such a definition in the context of these NEPA regulations.³²

With deference to Indigenous peoples and communities and with appreciation for the work of the Kawerak organization, an Alaska Native Tribal Consortium for the Bering Strait region of Alaska, we suggest consideration of this definition:

Traditional Knowledge (TK) is a living body of knowledge which pertains to explaining and understanding the universe, and living and acting within it. It is acquired and utilized by indigenous communities and individuals in and through long-term sociocultural, spiritual and environmental engagement. TK is an integral part of the broader knowledge system of indigenous communities, is transmitted intergenerationally, is practically and widely applicable, and integrates personal experience with oral traditions. It provides perspectives applicable to an array of human and non-human phenomena. It is deeply rooted in history, time, and place, while also being rich, adaptable, and dynamic, all of which keep it relevant and useful in contemporary life. This knowledge is part of, and used in, everyday life, and is inextricably intertwined with peoples' identity, cosmology, values, and way

²⁸ See, e.g., 42 U.S.C. § 11701 (setting forth numerous findings affirming the trust relationship between the United States and Native Hawaiians and identifying numerous statutes that recognize particular rights accorded to Alaska Native, Eskimo, and Aleut communities as well as Native Hawaiians).

²⁹ Proposed Section 1508.1(u)(2)(x).

³⁰ Proposed Section 1501.8(a).

³¹ Council on Env'tl Quality and Off. of Sci. and Tech. Policy, Memorandum on Guidance for Federal Departments and Agencies on Indigenous Knowledge (Nov. 30, 2022), available at <https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf>.

³² Phase 2 Proposed Revisions, *supra* note 3, at 49941.

of life. Tradition – and TK – does not preclude change, nor does it equal only 'the past'; in fact, it inherently entails change.³³

Indigenous Knowledge is a cornerstone of our global intellectual legacy and is integral to understanding the complex dynamics within our ecosystems. Born out of centuries of intimate interaction with the land, it encompasses valuable insights that have the potential to significantly impact justice, sustainability, and cultural preservation. Through the lens of rigorous investigation, it becomes imperative to appreciate the inherent value of our unique knowledge systems and their role in shaping sustainable futures.

IV. ENVIRONMENTAL JUSTICE.

We applaud the long overdue proposed integration of environmental justice issues into essential components of the NEPA process. The draft regulations make it clear that the NEPA process should be appropriately utilized to identify and assess reasonable alternatives that will avoid and minimize adverse effects that disproportionately affect communities with environmental justice concerns.³⁴ Further, the proposed regulation on alternatives incorporates environmental justice concerns into the identification of the environmentally preferable alternative or alternatives.³⁵ The proposed regulations would also require agencies to factor in the degree to which a proposed action and alternatives may have “disproportionate and adverse effects on communities with environmental justice concerns,”³⁶ analyze the potential for disproportionate, adverse human health, and environmental effects on communities with environmental justice concerns,³⁷ include disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative in the definition of effects,³⁸ and in the definition of “extraordinary circumstances” that may indicate that a normally categorically excluded proposed action subject to NEPA may have a significant effect.³⁹

We are incorporating by reference the comments from GreenLatinos and WE ACT for Environmental Justice addressing environmental justice issues in the proposed regulations.⁴⁰ We also recommend that CEQ specifically identify the incorporation of multi-language models in the NEPA process is one of the responsibilities of agencies Chief Public Engagement Officers.⁴¹

³³ Julie Raymond-Yakoubian, et al., *The Incorporation of Traditional Knowledge into Alaska Fisheries Management*, 78 *Marine Policy* 132, 133 (April 2017), <https://doi.org/10.1016/j.marpol.2016.12.024>.

³⁴ Proposed Section 1500.2(e).

³⁵ Proposed Section 1502.14(f).

³⁶ Proposed Section 1501.3(d)(ix).

³⁷ Proposed Section 1502.16(a)(14)

³⁸ Proposed Section 1508.1(g)(4)

³⁹ Proposed Section 1508.1(m).

⁴⁰ Comments from GreenLatinos and WE ACT for Environmental Justice on Docket ID No. CEQ-2023-0003 National Environmental Policy Act Implementing Regulations Revisions Phase II (Sept. 29, 2023) (**Attachment 2**).

⁴¹ Proposed Section 1507.2(a).

V. MITIGATION (Proposed Sections 1505.2, 1505.3, 1508.1(w)).

We commend CEQ for several excellent additions to the current regulations regarding monitoring and mitigation. While regrettably, NEPA as currently interpreted does not require agencies to mitigate adverse effects, most agencies adopt some mitigation measures for actions requiring environmental impact statements (EIS) and often for actions subject to environmental assessments (EA). However, once the decision has been made, agencies seldom disclose to the public whether those measures actually occur and, if they do, whether they have been effective. Mitigation and especially monitoring have long been weak points in the NEPA process.

The proposed provision requiring agencies that rely on mitigation measures in their analysis of reasonably foreseeable effects to ensure that such mitigation measures are enforceable is particularly critical. While the proposed formulation should cover most mitigation measures in NEPA analyses, we urge CEQ to consider broadening this requirement to all mitigation measures identified in the final decision document.

We are pleased to see the inclusion of a requirement that agencies prepare a monitoring and compliance plan when an EA or EIS relies on mitigation. Monitoring is a key piece of an adaptive management cycle. Given that the NEPA process predicts environmental consequences, agencies should be required to monitor the implementation of projects to assess the actual consequences of project implementation to better predict similar or other effects in the future, and to mitigate actual consequences in real time if they prove to extend beyond those predicted (or, alternatively, to prepare new or supplemental NEPA analysis if such impacts cannot be mitigated and there is continuing federal action).

While we are cognizant of the definition of “mitigation” in Proposed Section 1508.1(w), we point out that some agencies, particularly the Forest Service and BLM, routinely rely on EA “project design criteria,” “project design features,” and other formulations to escape the obligation to enforce such measures during project implementation. Although these measures are described as “part of” the project and therefore not “mitigation,” they can still serve to limit the extent or duration of adverse effects and thus to support a finding of no significant impact. However, the agencies frequently waive many of these measures in project implementation (for example, a provision to replace failing culverts to offset sediment input to streams from upland vegetation removal is waived if receipts from timber harvest are inadequate to fund culvert upgrades).

We recommend that in the final rule, CEQ either define “relies on” as utilized in Proposed Section 1501.6(c), 1505.3(c) or revise the definition of “mitigation” to include any measure that reduce the effects of an action to below the level of significance. We also recommend that CEQ include a requirement in the final rule that agencies make monitoring data publicly available on an agency website and through other mechanisms to increase the transparency around the effects of agency actions.

Finally, we support the proposed change to the definition of mitigation in proposed Section 1508.1(w) to clarify that the various types of mitigation are listed in general order of priority.

VI. PROGRAMMATIC ANALYSIS AND TIERING (Proposed Section 1501.11(a) and Preamble).

We recognize that programmatic analysis and tiering have potential for improving the efficiency of the environmental review process. Improved efficiency and effectiveness is important across the board and highlighted by the need to expeditiously transition into new types of energy production and usage. We agree that a good programmatic analysis that remains timely and accurate can avoid duplicative analysis at a later stage. However, agencies often struggle with appropriate compliance at the right levels of analyses. We have three recommendations regarding programmatic analysis.

1. We recommend that CEQ provide additional clarity and guidance, in the preamble and text as appropriate, regarding the proper implementation of programmatic analysis. The history of agency NEPA compliance demonstrates a tendency for agencies to overestimate how much they can rely on an earlier programmatic analysis to the detriment of adequate site-specific analysis. Unfortunately, despite the fact that it is at the programmatic level of analysis where cumulative effects may be most effectively and usefully analyzed, we continue to see agencies defer that analysis to a tiered down level and then, at times, not do the analysis even at that point. As one court pointed out:

NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done. [cites omitted] If it is reasonably possible to analyze the environmental consequences in an EIS for an RMP, the agency is required to perform that analysis. The EIS analysis may be more general than a subsequent EA analysis, and it may turn out that a particular environmental consequence must be analyzed in both the EIS and the EA. But an earlier EIS analysis will not have been wasted effort, for it will guide the EA analysis and, to the extent appropriate, permit “tiering” by the EA to the EIS in order to avoid wasteful duplication.⁴²

Commonly referred to as a “shell game”, this practice is often observed in federal agency compliance for oil and gas leasing and development.⁴³

Given our experience with this problem, we are concerned about the statement in the preamble in relationship to proposed Section 1501.11(a) that says that, “[a] sufficiently detailed programmatic analysis with such project descriptions can allow agencies to rely upon programmatic environmental documents for further actions *with no or little additional environmental review necessary.*”⁴⁴ This statement will sound encouraging to many agency personnel and project proponents, but in practice, it is very hard to achieve, especially in the context of public land management. A programmatic EIS would have to be so detailed that it would be quite voluminous not to mention so far-sighted as to anticipate proposed site-specific actions 10-15 years in the future. Forest Service attempts to do this in the late 1970’s and early

⁴² *Kern v. U.S. Bureau of Land Mgt.*, 284 F.3d 1062, 1072-73 (9th Cir. 2002).

⁴³ *See, e.g., N. Mex. ex rel Richardson v. Bureau of Land Mgt.*, 565 F. 683 (10th Cir. 2009).

⁴⁴ Phase 2 Proposed Revisions, *supra* note 3, at 4994 (emphasis added).

1980's failed.⁴⁵ While programmatic EISs can be very useful for addressing cumulative effects, developing programmatic or policy guidance for future actions and in fact eliminating the need to repeat some analysis, this CEQ language seriously overpromises the possibilities inherent in programmatic NEPA analyses and if it remains, is highly likely to lead to flawed process and disappointment.

Instead, we recommend that CEQ direct agencies in the final regulations to take the following steps:

a) Where a category or type of site-specific impacts or particular site-specific actions are reasonably foreseeable as a result of the proposed programmatic action(s) covered by a PEIS, agencies should include that analysis in the PEIS rather than deferring the analysis to a later stage.

b) Agencies should be clear that the effects of site-specific actions not analyzed in a PEIS must be analyzed in a subsequent NEPA analysis.

c) Agencies should be reminded that mitigation measures included in a Record of Decision for a PEIS comply with the mitigation provisions established by the final regulations.

Each of these points reflects current law and CEQ's guidance "Effective Use of Programmatic NEPA Reviews."⁴⁶ However, agencies would benefit from specific direction in the regulations.

2. We urge CEQ to restore CEQ's original regulatory language stating that EIS are sometimes required for proposed decisions regarding new agency programs or regulations.⁴⁷ This important direction was removed from the 2020 regulations "to focus the provision on the discretionary use of programmatic EISs in support of clearly defined decisionmaking purposes."⁴⁸ Yet the proposed Phase 2 regulations include the adoption of official policy, such as rules, regulations and interpretations under the Administrative Procedure Act, as well as adoption of formal plans and programs as "major federal actions" under NEPA.⁴⁹ Clearly, not every proposed plan, program or policy interpretation requires preparation of an EIS, but just as clearly, some do, and EISs on plans, programs and policy interpretations and are most commonly programmatic. CEQ could better serve the implementing agencies and the public by acknowledging that programmatic EISs "are sometimes required."

⁴⁵ See, *California v. Block*, 690 F.2d 753 (1982).

⁴⁶ Council of Env't Quality, Memorandum on Effective Use of Programmatic NEPA Reviews (Dec. 18, 2014), available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Effective_Use_of_Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf

⁴⁷ 40 C.F.R. § 1502.4(b) (2019).

⁴⁸ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, 43328 (July 16, 2020).

⁴⁹ Proposed Section 1508.1(u)(ii)-(iv).

3. Finally, in regards to the reevaluation of programmatic analysis required in proposed Section 1501.11(c)(2) for analysis that is more than five years old, CEQ should require that agencies make that analysis publicly available. We are aware that the Forest Service, for example, often prepares “supplemental information reports” (SIRs) to evaluate whether supplemental NEPA analysis is required.⁵⁰ If a SIR concludes that no NEPA supplementation is required, the agency simply files the report away, and affected tribes, communities and the public at large are left uninformed of the fact of the agency’s evaluation or the basis for its conclusions. The CEQ regulations should ensure that such reports are made available to the public in the same manner as EAs.

VII. PROPOSED REPEAL OF FUNCTIONAL EQUIVALENCE PROVISION (Proposed Section 1501.1(a)(6)).

We strongly support the repeal of this provision that attempted to codify the “functional equivalence” doctrine in the current regulations. There was never a sufficient policy rationale nor a legal basis for this abandonment of NEPA in CEQ’s regulations. Further, its implementation would have led to serious inefficiencies if multiple federal agencies implemented a variety of pathways to purported NEPA compliance.

Congress, in passing the FRA, had before it a provision that would have codified functional equivalence, exempting from NEPA analysis proposed actions “for which [an] agency’s compliance with another statute’s requirements serve[s] the same or similar function as the requirements of [NEPA] with respect to such action.”⁵¹ However, in the FRA as signed into law, that provision was not included. Rather, the law now makes clear that agencies are excused from preparation of a NEPA document only “where compliance would *clearly and fundamentally conflict with the requirements of another provision of law*.”⁵² Congress clearly rejected codification of the functional equivalence doctrine and it should be abandoned all together.⁵³ Thus, we ask that CEQ’s final preamble it make it clear that no agency – whether an independent regulatory agency or the Environmental Protection Agency – can utilize the functional equivalence doctrine to avoid compliance with NEPA.

VIII. PROPOSED RESTORATION OF CONTEXT AND INTENSITY FACTORS FOR DETERMINATIONS OF SIGNIFICANCE (Proposed Section 1501.3(d)).

⁵⁰ See U.S. Forest Serv., National Environmental Policy Act Handbook FSH 1909.15, Ch. 18.1 (March 3, 2023), available at https://www.fs.usda.gov/im/directives/fsh/1909.15/wo_1909.15_10-Amend%202023-1.docx.

⁵¹ Bldg. U.S. Infrastructure through Ltd Delays and Efficient Rev. Act of 2023, H.R. 1577, 118th Cong. § 2(b) (2023) (proposed section 106(a)(6)).

⁵² 42 U.S.C. § 4336(a)(3) (emphasis added).

⁵³ *U.S. v. Johnson*, 529 U.S. 53, 58 (2000) (“When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions, and, in the end, limited the statute to the ones set forth.”).

We support the proposed reinsertion of several important factors that agencies should consider in the course of making their determinations about the significance of a proposed action and alternatives. These proposed provisions provide critical guidance to agencies and the public as consideration is being given to the appropriate level of NEPA compliance. As noted above, we commend the inclusion of factors relating to the interests of Tribal Nations and recommend broadening those provisions to other Indigenous communities.⁵⁴ We also support the inclusion of environmental justice concerns as an important factor.⁵⁵

We suggest that CEQ include the degree to which a proposed action and alternatives may adversely affect wildlife corridors (or alternatively, connectivity) as an addition to this section, perhaps as a specific example of ecologically critical areas in Proposed Section 1501.3(2)(iii). CEQ's recent guidance on ecological connectivity and wildlife corridors provides considerable support for the inclusion of these factors.⁵⁶

IX. PROPOSED CHANGE TO THRESHOLD REQUIREMENT FOR PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT (Proposed Section 1501.3(d)).

We oppose the proposed change to the long-standing statutory mandate that agencies prepare a detailed statement, now known as an EIS, for recommendations or reports on proposals for “legislation and other major Federal actions significantly affecting the quality of the human environment . . .” Proposed Section 1501.3(d)(2)(i), directing that, “only actions with significant adverse effects require an environmental impact statement” as well as the related proposed modifications to the “context and intensity” factors that lead to a determination of “significance,” also in Proposed Section 1501.3(d), would amend this standard so that proposed actions that an agency maintains would have only significant beneficial effects would not trigger the requirement to prepare an EIS .

We agree with the statement that agencies should consider both short-term adverse effects and long-term beneficial effects⁵⁷ and that both beneficial and adverse effects should be analyzed under NEPA.⁵⁸ To be clear, our concern is rooted in our collective years of experience in seeing federal agencies characterize proposed actions, and especially their preferred alternative, as beneficial when they are often not beneficial or at the least have serious harmful effects. We offer some examples below.

Further, the preamble is devoid of any explanation of why CEQ believes its proposed change to the most well-known statutory phrase in NEPA is either permissible or desirable. Rather, in

⁵⁴ *Supra* Sec. III.

⁵⁵ Proposed Section 1501.3(d)(ix).

⁵⁶ Council on Env't Quality, Memorandum on Guidance for Federal Departments and Agencies on Ecological Connectivity and Wildlife Corridors (March 21, 2023), available at <https://www.whitehouse.gov/wp-content/uploads/2023/03/230318-Corridors-connectivity-guidance-memo-final-draft-formatted.pdf>.

⁵⁷ Proposed Section 1501.3(d)(2)(i).

⁵⁸ *Id.*

circular fashion, the preamble language states that the modification is being made consistent with the proposed addition of the term “adverse” in Proposed Section 1501.3(d), in various factors that must be considered in an agency’s determination of significance. Justifying a change in the standard by pointing to the same change in the criteria does not provide a rationale for the underlying proposal. It simply points out that this change is being made consistently in two parts of the same regulation. Nor is this proposed change a “clarifying addition,” as CEQ suggests in the preamble;⁵⁹ rather, it is a significant change.

While not frequently litigated, a few courts have considered the issue of whether beneficial environmental effects trigger NEPA’s statutory language in Section 102(2)(C) requiring an EIS. The majority of courts have noted that the statute’s plain language is inclusive of all significant environmental impact and, accordingly, concluded that significant beneficial impacts do trigger preparation of an EIS. The earliest such case, *Hiram Clarke Civil Club v. Lynn*, observed that, “[a] close reading of Section 102(2)(C) in its entirety discloses that Congress was not only concerned with just adverse effects but with *all* potential environmental effects that affect the quality of the human environment.”⁶⁰

Other courts that have considered the argument have reached similar conclusions. In *Environmental Defense Fund v. Marsh*, the issue was whether the Army Corps was required to prepare a supplemental EIS (SEIS) in light of major project design changes for the proposed construction of the Tennessee-Tombigbee Waterway.⁶¹ The Corps’ argument was that “every change made in the waterway’s design and functioning after completion of the original 1971 project EIS would produce no significant *adverse* environmental effects, but would produce significant environmental and aesthetic *benefits*.”⁶² The Court observed that it found “no solid evidence that the Corps has ever asked the right question, much less answered it reasonably.”⁶³ In justifying 18 volumes of “Supplemental Environmental Reports” proffered in lieu of preparing a SEIS, the Corps noted that the standard that was the basis for the decision not to prepare a SEIS was that, “no significant deviations have been discovered or actions taken which were not in the best interest of the natural environment in the project area.”⁶⁴ But, as the Court stated, “that is simply the wrong standard. NEPA requires the discussion of all *significant* environmental impacts, not just adverse ones.”⁶⁵ Importantly, the Court explained that:

The proper question is not the intent behind the actions, but the significance of the environmental impacts. And even if the Corps was correct in deciding that the new

⁵⁹ Phase 2 Proposed Revisions, *supra* note 3, at 49936.

⁶⁰ *Hiram Clarke Civil Club v. Lynn*, 476 F.2d 421, 427 (5th Cir. 1973). The appellate court ultimately held that the proposed low- and moderate-income housing development did not trigger the requirement to prepare an EIS, deferring to the lower court’s holding after a full evidentiary hearing that plaintiffs had not shown the effects were significant.

⁶¹ *Env’t Defense Fund v. Marsh*, 651 F.2d 983 (5th Cir. 1981).

⁶² Lance D. Wood, *Proposed Revisions to Improve and Modernize CEQ’s NEPA Regulations*, 49 Env’t Law Rep. 10529, 10531 (June 6, 2019).

⁶³ 651 F.2d at 996.

⁶⁴ *Id.* at 997 996-997.

⁶⁵ 651 F.2d at 997.

land use will be beneficial in impact, a beneficial impact must nevertheless be discussed in an EIS, so long as it is significant. NEPA is concerned with all significant environmental effects, not merely adverse one.⁶⁶

The Corps' theory was also rejected by the Eleventh Circuit in *National Wildlife Federation v. Marsh*. This case involved federal funding for a controversial proposed man-made 1,400-acre lake and specifically the issue of whether a SEIS was required for a proposed mitigation plan for the proposed lake.⁶⁷

There are also sound policy reasons for not reversing CEQ's fifty-three-year interpretation that either significant adverse or beneficial effects can trigger the requirement to prepare an EIS. Frequently, agency officials sincerely believe that a proposed action will benefit the environment, as did apparently the Corps' representatives in the cases involving the changes in the Tennessee Tombigbee Waterway and Lake Alma. But, as was noted by the Fifth Circuit, "[i]n any event, the congressional mandate to develop alternatives would be thwarted by ending the search for other possibilities at the first proposal which establishes an ecological plus, even if such a positive value could be demonstrated with some certainty."⁶⁸ Adequate opportunities for the public (including outside experts) to provide input are vital to ensure that potentially significant impacts are not ignored in the agency decision-making process. Otherwise, agency officials may truly believe that their proposal would confer environmental benefits when, in fact, it would be an ecological disaster. History is littered with such examples.⁶⁹

That point is quite well illustrated by the important decision in *Center for Biological Diversity v. NHTSA*.⁷⁰ The case dealt with the National Highway Traffic Safety Administration's (NHTSA) NEPA compliance for proposed Corporate Average Fuel Economy standards (CAFE standards) for light trucks. NHTSA's original EA concluded that the proposed CAFE standard would result

⁶⁶ *Id.* at 993.

⁶⁷ *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767 (11th Cir. 1983). The Sixth Circuit Court of Appeals reached a different conclusion in *Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501 (6th Cir. 1995). The case involved proposed funding from the Farmers Home Administration for a proposed water impoundment and treatment project for the small town of Tracey City, Tennessee, following pollution, water shortages, a possible imminent collapse of a mine and a consent decree requiring the town to develop a solution to its water supply problem, with penalties attached if it did not do so. The Court, clearly sensing the urgency of the situation, reasoned that the statutory language had to be "read in the light of the implementing regulations" (which seems backwards as regulations as typically interpreted in the light of the statute) and discussed what it perceived as the advantages of an environmental assessment over an EIS. *Id.* at 504. In hindsight, it seems as though the situation could have been appropriately handled through alternative arrangements under CEQ's provision for emergencies.

⁶⁸ *Env't Defense Fund v. Marsh*, 492 F.2d 1123, 1135 (5th Cir. 1974).

⁶⁹ One of the most dramatic examples was the Atomic Energy Commission's "Project Chariot," which involved using nuclear blasts to construct a port near Port Hope, Alaska. See *Look before detonating nukes*, Univ. of Alaska Fairbanks, <https://www.uaf.edu/centennial/uaf100/ideas/project-chariot.php> (last accessed Sept. 28, 2023).

⁷⁰ *Ctr. For Biological Diversity v. NHTSA*, *supra* note 7.

in a small decrease in carbon emissions and thus, there would be no significant effect. But as the Ninth Circuit Court of Appeal's opinion pointed out, the EA's very narrow range of alternatives was unreasonable in light of NHTSA's discretion to consider a broader range of alternatives, including an alternative submitted during the relevant comment period that would have a considerably more significant effect on lowering carbon emissions.⁷¹ In other words, even though NHTSA's preferred option was beneficial in the context of climate change, the NEPA process revealed a reasonable alternative that was significantly superior in terms of its benefits. The holding underscores perhaps the most significant purpose of the NEPA process and, in particular, alternatives analysis: not just to avoid or avoid adverse environmental effects, but to develop information and ideas that can lead to better results even for a proposed action intended to benefit the human environment.

As another example, the Army Corps of Engineers believed that its proposed ecosystem restoration project for the ecologically rich Bolinas Lagoon in northern California would have beneficial effects.⁷² Bolinas Lagoon is a designated Wetland of International Importance under the Ramsar Convention and one of the most pristine tidal lagoons in California. However, the DEIS prepared by the Corps and the public comments on that draft made it clear that the Army Corps' proposed plan would cause significant harm to this incredible resource. The DEIS acknowledged that the so-called restoration project was not the environmentally preferable alternative—and in fact was the most ecologically damaging alternative evaluated.⁷³

“As a consequence of public concern related to the impacts of dredging and the need for intervention, [the project's non-federal sponsor] coordinated a rigorous scientific review of the ACOE plan and a study of the lagoon's ecological and hydrological evolution.” That review concluded that the Army Corps' proposal was based on a fundamental misunderstanding of the Lagoon's ecological processes and that the large-scale dredging proposed by the Corps “not justified” because there was “an absence of ecological problems that would be mitigated by such apparently unnecessary preventive actions.”⁷⁴ As a direct result of NEPA's important review

⁷¹ *Id.*, at 1217-1219.

⁷² U.S. Army Corps of Engineers, Draft Environmental Impact Statement/Report and Draft Feasibility Study, Bolinas Lagoon Ecosystem Restoration Project (2002), available at <https://babel.hathitrust.org/cgi/pt?id=uc1.31210025039817&seq=1>.

⁷³ *Id.*, at 2-27 and ES-6 (the “No Action Alternative would be environmentally superior” and the Corps' proposed “National Ecosystem Restoration Plan” was the most damaging plan evaluated).

⁷⁴ Marin County Open Space District, Bolinas Lagoon Ecosystem Restoration Feasibility Project (February 2006) at Peer Review Comments on Administrative Draft Reports I & II with Responses by Consultants at 2, 3, 11 (“The data from both reports indicate that two major conclusions can be drawn: the lagoon mouth is unlikely to close and the overall ecology of the lagoon is unlikely to change in significant ways during the foreseeable future . . . We find quite reasonable the consultants' conclusion that, since the lagoon is unlikely to close in the foreseeable future, no intercession in the evolution of the lagoon to prevent its closure is warranted . . . The greatest strength of the study is that all of its reports support the conclusion, to a greater or lesser degree, that the lagoon is unlikely to close and that dredging or any other action to prevent closure is not justified at this time. There is an absence of ecological problems that would be mitigated by such apparently unnecessary preventive actions.”)

process, the Army Corps' plan was abandoned and a locally-driven restoration initiative was developed for the Bolinas Lagoon ecosystem.

X. DETERMINING THE APPROPRIATE LEVEL OF REVIEW (Proposed Sections 1501.3(a)(2), (3)).

These provisions state that as a threshold matter, agencies “shall assess whether NEPA applies to the proposed activity or decision” by, among other factors, determining:

- (2) Whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another provision of law;*
- (3) Whether statutory provisions applicable to the agency's proposed activity or decision make compliance with NEPA impossible;*

These two provisions appear highly duplicative. The first of these two provisions – whether “the preparation of such document would clearly and fundamentally conflict with the requirements of another provision of law” – reflects the language in Section 106(a)(3) of the FRA.

Subsection 1501.3(a)(3) is new. The preamble states that:

Third, CEQ proposes a new factor in paragraph (a)(3) to address circumstances other than those in which Congress or case law have exempted an activity from NEPA, to clarify that there must be an irreconcilable and fundamental conflict between complying with a statutory provision and complying with NEPA i.e., the other statutory provision must make NEPA compliance impossible. This factor would be consistent with case law and longstanding principles of statutory construction that requires statutes to be read in harmony when it is possible to do so. This approach also reflects the statutory requirement of section 102 of NEPA that agencies interpret and administer “the policies, regulations and public laws of the United States” in accordance with NEPA’s policies and is consistent with CEQ’s proposed revisions to § 1500.6, ‘Agency Authority.’ 42 U.S.C. 4332; see section II.B.5.⁷⁵

One of the problems with the preamble discussion is that the Supreme Court’s sole ruling on conflicts between NEPA and other statutes is perfectly captured in the first of these two provisions. In *Flint Ridge Dev. Co. v. Scenic Rivers Association*, the Court stated that:

Section 102 recognizes, however, that, where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As we noted in *United States v. SCRAP*, 412 U. S. 669, 412 U. S. 694 (1973), ‘NEPA was not intended to repeal by implication any other statute.’ And so the question we must resolve is whether, assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an

⁷⁵ Phase 2 Proposed Revisions, *supra* note 3, at 49934.

irreconcilable and fundamental conflict with the Secretary's duties under the Disclosure Act.⁷⁶

And the Court concluded by holding that:

In sum, even if the Secretary's action in this case constituted major federal action significantly affecting the quality of the human environment, so that an environmental impact statement would ordinarily be required, there would be a clear and fundamental conflict of statutory duty. The Secretary cannot comply with the statutory duty to allow statements of record to go into effect within 30 days of filing, absent inaccurate or incomplete disclosure, and simultaneously prepare impact statements on proposed developments. In these circumstances, we find that NEPA's impact statement requirement is inapplicable.⁷⁷

In short, subsection (2) perfectly reflects the law on this point. While the wording in subsection (3) similarly reflects the law, having two basically identical provisions is confusing and is apt to lead to attempts to parse differences between the two. If complying with NEPA and another law in any given situation is indeed impossible, that situation clearly and fundamentally conflicts with the provision of the other law. Having duplicative provisions here makes little sense and is likely to cause confusion as agencies try to distinguish between the two provisions. We recommend dropping subsection (3) and staying with the language that reflects the provision in the FRA.

XI. CATEGORICAL EXCLUSIONS.

We understand that a well-crafted categorical exclusion (CE) can serve the purpose of conserving agencies' resources to focus on proposed actions that involve unresolved conflicts concerning alternative uses of available resources⁷⁸ and/or have the potential for significant environmental effects.⁷⁹ That said, many of the undersigned organizations have experienced abuses of the use of CE under the 1979 regulations and are very concerned that the proliferation of many pathways to promulgating new CEs will multiply these problems. Further, we are concerned with the proposed language concerning "extraordinary circumstances." In regard to adoption of CEs, we acknowledge the need to incorporate the adoption provision passed in the FRA but question the need for additional adoption measures and some of the provisions in those proposed measures. In short, we believe the proposed effort to significantly expand the use of CEs is extremely troubling. We believe that CEQ's emphasis needs to be on better analysis and improved processes for proposed federal actions that require EAs or EISs, not on enabling multiple pathways for proposed CEs.

Importantly, we would like to see CEQ require agencies to notify the public of the proposed use of a CE and to keep documentation of its use of a CE for specific proposed actions so that the

⁷⁶ 426 U.S. 776, 788 (1976).

⁷⁷ *Id.* at 791.

⁷⁸ 42 U.S.C. § 4332 (H).

⁷⁹ 42 U.S.C. § 4332 (C).

public can access that information. When the public, other agencies, tribes and communities doesn't know that an agency is proposing to take an action under a CE, there is no one outside of the agency using the CE that can raise the existence of extraordinary circumstances for a particular action at a particular site. Some agencies – notably, the Forest Service and the Department of Energy – do make their use of CEs public, but most other agencies do not reveal their use of a CE unless and until there is litigation alleging a lack of compliance with NEPA.

a. Extraordinary Circumstances (Proposed Section 1501.4 (b)(1)).

The proposed regulation would authorize an agency to use a CE even if extraordinary circumstances exist if the agency conducts an analysis and determines that the proposed action does not have the potential to result in significant effects or if the agency modifies the action to address the extraordinary circumstances. We would agree that if an agency modifies an action such that the extraordinary circumstance originally identified simply no longer exists in relationship to the reconfigured proposed action, an applicable CE could be utilized. However, if the presence of one or more extraordinary circumstances remains relevant to the proposed action, such that the agency needs to conduct an analysis to determine the potential significance of the effects, the agency should prepare an EA. As the U.S. Court of Appeals for the Seventh Circuit held, “[i]t is not enough that the Forest Service has conducted an internal review to determine whether the extraordinary circumstance will cause the proposed action to have a significant impact on the environment. An [EA] is the process required to make that determination.”⁸⁰ In many circumstances, such an EA might be quite brief, but it should be done, and any such analysis must be made publicly available.

Additionally, the proposed language in this section currently states that an agency “should” publish analysis of extraordinary circumstances on its website or otherwise make it publicly available. We ask that “should” be changed to “shall.”

b. Promulgation of CEs in Planning or Programmatic Contexts (Proposed Section 1501.4(c)).

Purportedly as a way to increase flexibility and potentially the speed with which a new CE can be established, CEQ is proposing a new process by which agencies could establish a CE in the context of a land use plan or other equivalent planning or programmatic decision. Despite what CEQ no doubt sees as measures to allow for transparency and public involvement, we oppose this proposal. When we examine the proposal closely, we are puzzled about its purported benefits. The process CEQ proposes for this new pathway to CEs actually appears to be the same as the process for approval of CEs under the current regulations.⁸¹ Agencies frequently consult with CEQ about additional proposed CEs (without proposing revisions in the rest of their NEPA procedures). In such cases, as we understand the process, CEQ reviews and advises the agency, which subsequently provides for public notice and comment, substantiates its determination that the proposed category normally does not have significant effects individually

⁸⁰ *Rhodes v. Johnson*, 153 F.3d 785, 790 (7th Cir. 1998). See also, *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2nd 1059, 1090 (N.D. Cal. 2007).

⁸¹ 40 C.F.R. § 1507.3.

or cumulatively, provides for extraordinary circumstances and, after considering comments received on the proposal and making any needed modifications, publishes the CE in final form. This is the same process proposed in this section. We fail to see the procedural advantage in this “plan by plan” approach.

What we do see is that the proliferation of these multiple pathways to CE development through the regular process, this programmatic approach, and the various adoption provisions, including the provision passed by Congress and additional provisions added by CEQ in the draft regulations, will - despite CEQ’s intentions - result in considerably more confusion about the status of normal NEPA compliance for proposed actions. Bundling programmatic NEPA analyses with the promulgation of new CEs could easily cause new CEs to escape the public’s attention, frustrating public participation, and encouraging the proliferation of CEs on an ad hoc basis without adequate forethought and review. The agencies appear to have no difficulty in going through this same process under the current regulations. We believe CEQ’s emphasis needs to be on better analysis and improved processes for proposed federal actions that require EAs or EISs, not on managing multiple pathways for proposed actions that meet the requirements for a CE. We therefore request that this provision be removed from the final regulations.

c. Adoption of Other Agency Categorical Exclusions as a Class or for a Particular Actions (Proposed Sections 1501.4(e), and 1506.3(d)).

Proposed Section 1501.4(d) essentially incorporates new Section 109 of NEPA into the regulations. Though CEQ proposes to use the term “apply” rather than “adopt,” it appears to be a distinction without a real difference in that one agency would essentially be adopting another agency’s CE for use either for a particular category of actions or for a particular proposed action.

Proposed Section 1506.3(d) authorizes an agency to adopt another agency’s determination that a particular proposed action falls within a CE and the adopting agency’s proposed action is “substantially the same.” We recommend that Section 1506.3(d)(2) be modified to require an agency to both publish such a determination on its website *and* make it publicly available in other ways, as opposed to one or the other option.

The final regulation should also make it clear that federal agencies may only adopt other federal agencies’ CEs, whether the adoption is for a particular class of actions or a single proposed action.

d. Codification of Current Agency CEs (Proposed Section 1507.3(a)).

This proposed section would codify CEQ’s approval of all CE provisions as of the date of the final regulations’ publication. We recommend either deleting this provision or, alternatively, including the identification of actions normally requiring EISs and EAs in agency NEPA procedures. No rationale is provided in the preamble for giving CE categories preferential approval over EIS and EA provisions in agency regulations.

Further, not all CEs that are currently used are consistent with CEQ’s regulations. For example, the Federal Communications Commission current NEPA procedures, issued in 1986, use a CE as

the “default provision” for all agency actions that are not identified as requiring either an EIS or an EA.⁸² This was contrary to CEQ regulations at the time the CE went into effect,⁸³ under the current CEQ regulations,⁸⁴ and CEQ’s proposed regulations.⁸⁵ Further, several agencies NEPA procedures, like the FCC’s 1986 regulations, are badly outdated and do not address current mission activities well or at all.

e. Required Ten Year Review (Proposed Section 1507.3(c)(9)).

We recommend clarifying the requirement for each agency to review its CEs at least every 10 years by specifying that the 10 years begin with the date of a CE’s promulgation, not with the issuance of these final regulations. We also suggest that the results of each such review be filed with CEQ and be made public.

XII. ENVIRONMENTAL ASSESSMENTS.

a. Proposed Section 1501.5(e).

This proposed section states that an agency shall solicit public comments on an EA *if* it publishes a draft EA and consider those comments in preparation of a final EA. If this provision is finalized as drafted, agencies may be incentivized to avoid publishing a draft EA. We urge CEQ to simply require a 30-day review period for all EAs, even if an agency does not intend to publish a separate final EA following a comment period.

b. Proposed Section 1501.5 (h).

This proposed regulation states that agencies “may” supplement an EA and “may” reevaluate an EA to determine whether there is a duty to do so. CEQ should change the permissive voice of this regulatory language to make mandatory the duty to supplement EAs. CEQ provides no rationale for why EAs should not be supplemented when new information relevant to the effects of the action becomes available, just as EISs must be supplemented. Indeed, federal courts have held the supplementation requirement applies to EAs as well as EISs.⁸⁶ Of course, agencies are always free to prepare a completely new EA and, in some cases, that might be the wisest course of action. But absent preparation of a new EA, the same standard for supplementation applies.

Additionally, CEQ should consider giving additional guidance on the process that agencies should undertake when engaging in a reevaluation of a NEPA document, including directions to make such reevaluations public.

XIII. PRE-APPLICATION SCOPING (Proposed Section 1502.4(a)).

⁸² 47 C.F.R. § 1.1306(a) (1986).

⁸³ 40 C.F.R. § 1501.4(b) (1979).

⁸⁴ 40 C.F.R. § 1501.4(b)(2).

⁸⁵ Proposed Section 1501.4(b)(2).

⁸⁶ See, e.g., *Cascadia Wildlands v. U.S. Forest Serv.*, 791 F. Supp. 2d 979 (D. Or. 2011).

CEQ proposes a number of changes to the regulation on scoping that would appear to be sensible steps to improve the efficiency of the process, such as identifying precisely who agencies should contact during the scoping process (along with the general public) as well as including additional detail on information and actions that agencies should take during the process. However, we are concerned that CEQ is retaining from the 2020 regulation the provision that states that, “[s]coping may include appropriate pre-application procedures or work conducted prior to publication of the notice of intent” and urge that this language be eliminated in the final regulation.

The 2020 regulation on this point was a reversal of CEQ’s prior position that scoping begins with publication of the Notice of Intent (NOI). The term “pre-application procedures” generally refers to what an applicant needs to do to submit a complete application to a federal agency. Pre-application processes serve an important purpose for the applicant and the agency, but they do not serve the same purposes as scoping.

By retaining this 2020 pre-application scoping language, CEQ opens the door to agencies relying on communications that may not be available to the public (as confidential business information may be involved) and that do not serve the purposes as scoping comments to drive the scope of an EA or EIS. CEQ has previously stated that scoping can be a useful tool prior to publication of an NOI, “so long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.” Further, CEQ stated that

scoping that is done before the assessment, and in aid of its preparation, cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.⁸⁷

CEQ should not allow agencies to count communications between it and an applicant to be constitute scoping unless the public has notice and opportunity to also participate in scoping at the same stage.

XIV. ALTERNATIVES INCLUDING THE PROPOSED ACTION (Proposed 1502.14)

We strongly support the reinsertion of the statement that the alternatives section is the “heart of the environmental impact statement,” and the other proposed modifications to the current alternatives regulation. Without an objective exploration of reasonable alternatives, the NEPA process loses its potential to truly inform better decisionmaking. We also support the identification of the environmentally preferable alternative at an earlier stage, realizing, of course, that nothing in the proposed regulation requires a decisionmaker to select that alternative.

⁸⁷ Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 10830 (Mar. 23, 1981).

We have one recommendation related to alternative analysis. Based on Congress' recent amendment to NEPA in the FRA to add to the phrase "technically and economically feasible" to the requirement that agencies analyze reasonable alternatives to a proposed action, CEQ has followed with proposed amendments including "technically and economically feasible" in the proposed section on alternatives in EAs⁸⁸ and in the proposed definition of "reasonable alternative."⁸⁹ Consistent with its affirmation that alternatives are the "heart" of the environmental impact statement, CEQ should provide direction on interpretation of the phrase "technically and economically feasible." Without such safeguards, the phrase could be subject to inappropriately narrow interpretation. This is particularly important given the FRA's amendment to NEPA and CEQ's proposed conforming regulation to allow project sponsors to prepare EAs and EISs.⁹⁰ We urge that CEQ incorporate the following two principles into the final regulations.

First, CEQ should explain that before an agency can dismiss otherwise reasonable alternatives on the basis of not being "technically or economically feasible," it must include a discussion of these terms, including any definition it is using for those terms, in the draft EA or draft EIS to allow the public to understand the terms and comment on them as they apply to that particular project.

Second, CEQ should draw on language from its long-standing Forty Most Asked Questions memorandum to federal agencies that makes it clear that technical and economic feasibility shall be judged based on common sense, rather than the project proponent's preferences: "*Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.*"⁹¹

A rather recent judicial decision aptly demonstrates why this direction is necessary to ensure that alternatives remain the "heart" of the NEPA process. In 2019, a coalition of conservation organizations challenged an Office of Surface Mining (OSM)'s NEPA review of a proposed mine plan for the West Elk coal mine in Colorado.⁹² Among other deficiencies, conservation groups argued that OSM violated NEPA by failing to consider an alternative that would have required the mine to flare its methane emissions instead of venting methane directly into the atmosphere. The agency and the project proponent had utilized a definition of "economically feasible" that the coal company negotiated into its federal coal lease with a different agency (BLM) years earlier outside of the NEPA process with no public involvement. BLM's EIS, evaluating the environmental impacts of the lease, did not disclose or seek public input on the lease's one-sided definition of the term. Instead, the lease defined "economically feasible" in a way that constrained consideration of reasonable alternatives by requiring any methane flaring aspect of the mine to earn a specified internal rate of return on any flaring-related investments, before it could be required as a condition of mining publicly owned coal. Thus, in this instance,

⁸⁸ Proposed Section 40 C.F.R. 1502.7(g).

⁸⁹ Proposed Section 40 C.F.R. 1508.1(gg).

⁹⁰ Fiscal Responsibility Act of 2023, Pub. Law 118-5, §107(f), 137 Stat. 10, 42 (2023).

⁹¹ *Supra* note 88.

⁹² *WildEarth Guardians v. Bernhardt*, 423 F.Supp.3d 1083, 1094-1100 (D. Colo. 2019).

the coal company attempted to constrain OSM’s review of an otherwise reasonable alternative under NEPA based on a one-sided definition of economic feasibility that was negotiated and adopted by a federal agency outside the NEPA process, which applied economic feasibility not to the project as a whole but to one specific design aspect. The Court found that OSM’s reliance on this interpretation of “technically or economically feasible” was not supported by the record.⁹³ CEQ can steer agencies away from such errors by including the aforementioned recommendations in the final regulations.

XV. INCOMPLETE OR UNAVAILABLE INFORMATION (Proposed Section 1502.21).

The proposed text retains the change in the 2020 regulations that removed the word “always” from the first statement in the 1986 regulation that read:

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall **always** make clear that such information is lacking.⁹⁴

The sole reason that CEQ gave in the preamble to the final 2020 regulations for this proposed deletion was that the word “always” was “unnecessarily limiting.”⁹⁵ Indeed, the word “always” is supposed to be prescriptive and that is precisely why it should stay in the regulation. As the Court of Appeals for the D.C. Circuit made clear early in its consideration of NEPA’s requirements, “one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown.”⁹⁶ CEQ did not provide an adequate justification in the preamble as to why “always” should be deleted nor is there was any indication of what criteria an agency should use to determine in what instances incomplete or unavailable information about reasonably foreseeable significant adverse effects need not be identified. This change runs counter to CEQ’s avowed goal of efficiency by creating uncertainty over when an agency has to make clear that such information is lacking. The word “always” should be reinserted in the final regulation.

The proposed regulation also retains, as it now must because of a provision in the FRA, CEQ’s 2020 replacement of the term “exorbitant” with “unreasonable” in the portion of the regulation that excuses an agency from obtaining complete information relevant to reasonably foreseeable significant adverse impacts. Under the 1986 regulation, an agency has to obtain such information if that is possible unless the overall costs of obtaining it are “exorbitant”; the 2020 amendment changed the criteria to “unreasonable costs” and the unfortunate FRA provision states that agencies are only required to undertake new scientific or technical research if such work “is essential to a reasoned choice among alternatives, and the overall costs and time frame of

⁹³ *Id.*, at 1099.

⁹⁴ 40 C.F.R. § 1502.22 (1986) (emphasis added).

⁹⁵ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684, 1703 (January 10, 2020).

⁹⁶ *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

obtaining it are not unreasonable.”⁹⁷ To our knowledge, neither CEQ nor any other entity has provided an interpretation of “unreasonable costs” and we encourage CEQ to do so in the final regulation.

XVI. PUBLIC INVOLVEMENT ISSUES.

Again, we commend CEQ for removing many of the barriers to robust public involvement in the NEPA process and for the significant inclusion of environmental justice communities, Tribes and Indigenous populations. However, there are three provisions from CEQ’s original regulations that were removed in the 2020 regulations that should be restored in the final regulations. Those provisions are:

a. Availability of NEPA Documents (Proposed Section 1501.9(d)(3)).

CEQ’s original NEPA regulations included a provision at Section 1506.6(f) requiring agencies to “make EISs, comments received and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action.” Further, that provision required such materials to be made available to the public without charge to the extent practicable or at least at no more than the actual costs of reproducing copies required to be sent to other Federal agencies. These two provisions were dropped in the 2020 NEPA regulations, with no explanation provided regarding their deletion. The referenced FOIA amendments in the regulation do not appear to address the concerns regarding availability of agency comments or the costs of reproduction. While we appreciate the fact that most agency comments on EISs are included in an appendix to the final EIS, we suggest that it is best to codify that requirement so that agencies clearly understand their responsibilities. We also understand that most documents are now sent via electronic form. However, there are still individuals or organizations that lack the capacity to receive documents online and consistent with proposed Section 1501.9(c)(3) that directs agencies to “consider the ability of affected persons and agencies to access electronic media,” the original provision should be reinstated.⁹⁸

In addition, we recommend that agencies be directed to inform communities, Tribal governments, Indigenous peoples, and other affected parties about what information related to their interests will be kept confidential and what information will be published or available through FOIA.

Finally, while we appreciate the fact that there are (and should be) multiple pathways to making NEPA documents available to the public, at this point, it would seem that regular posting of all NEPA documents on agency websites should be a basic, common practice. We urge CEQ to

⁹⁷ FRA, *supra* note 91, at § 106(b)(3)(B), 137 Stat. at 40; 42 U.S.C. § 4336a (f).

⁹⁸ See, Michelle Cao and Rafi Goldberg, *Switched Off: Why Are One in Five U.S. Households Not Online?*, Nat’l Telecomm. and Info. Admin., Dep’t of Com. (Oct. 5, 2022), <https://www.ntia.gov/blog/2022/switched-why-are-one-five-us-households-not-online>.

include such a requirement in this section of the regulations to ensure consistency and transparency in all agencies.

b. Time Between Availability of Draft EIS and Public Hearing (Proposed Section 1501.9(e)).

In the original regulations, Section 1506.16(c) required that if an agency held a public hearing on a DEIS (which was not required but was an option and remains an option in proposed Section 1501.9(e), the DEIS had to be available to the public at least 15 days in advance of the hearing. The proposed regulations do not restore this provision. The rationale for requiring this minimal period of time prior to a public hearing has not changed simply because DEISs are typically now found online. Indeed, for some members of the public and especially those in environmental justice communities and in remote, rural locations, the switch from paper documents to online documents makes it more challenging than ever to access EISs and review them in a timely manner. Even for those having access to an electronic version, it is extremely difficult to review a DEIS and technical appendices and develop meaningful comments to share within 15 days. This is particularly true for people who have to juggle this review and commenting with jobs, family responsibilities and other claims on their time. At the very least, the 15-day mandate should be restored and perhaps expanded to 30 days.

c. Lack of Public Involvement Provisions in the Referral Process (Proposed Part 1504).

Some of us have had experience with CEQ's referral process as it was conceived under the 1979 regulations and found it to be a useful means of achieving better results. At times, the process can resolve problems that might otherwise be the subject of litigation in federal court. That process was enhanced by the involvement of non-federal entities and individuals interested in the proposed action (including an applicant, if relevant to the proposed action). Such involvement was explicitly provided for in two stages of the process: 1) CEQ's deliberations as to whether to accept a particular referral,⁹⁹ and 2) CEQ's recommendations for referrals that it accepted.¹⁰⁰

The 2020 NEPA regulations omit a specific role for any entity or individual outside of federal agencies other than a provision that permits an applicant for the proposed action to provide written views to CEQ no later than the lead agency's response to the referral.¹⁰¹

It is disappointing to see that CEQ has, in its proposed Section 1504, failed to restore a specific role for the public, Tribes, affected communities, states and local governments in this important process. We urge that at a minimum, the original provisions for such participation be restored to Section 1504.

XVII. LIMITATION ON ACTIONS DURING THE NEPA PROCESS (Proposed Section 1506.1).

⁹⁹ Proposed Section 1504.3(e).

¹⁰⁰ Proposed Section 1504.3(f)(3).

¹⁰¹ 40 C.F.R. § 1504.3(e).

We appreciate the proposed addition that would reinsert direction to agencies to not allow predecisional activities that would limit the choice of reasonable alternatives and would clarify an agency's responsibility for notifying the applicant that the agency retains discretion to select any reasonable alternative or the no action alternative regardless of any work completed by the applicant prior to the conclusion of the NEPA process. However, we oppose, and continue to be very concerned about the expansion of the types of actions that can be taken before completion of the NEPA process. The original CEQ regulation on this point was drafted both to minimize the possibility of biasing the decisionmaking process, including the possibility of foreclosing alternatives, and to address concerns that the limitations on pre-decisional action "would impair the ability of those outside the Federal government to develop proposals for agency review and approval."¹⁰²

The 2020 regulation loosened these protections by allowing agencies to engage in "such activities, including, but not limited to "acquisition of interests in land" while the NEPA process is still underway.¹⁰³ This addition is of deep concern. Even with the best of intentions, advance acquisition of land will almost certainly bias the analytical and decisionmaking process. The preamble to the draft 2020 regulations presented no justification for this dangerous addition other than a vague reference to making the process "more efficient and flexible"¹⁰⁴ We question how an applicant expending resources prior to the conclusion of the NEPA process achieves either efficiency or flexibility. In fact, it makes the process more efficient only if one assumes that the outcome is predetermined. The flexibility it affords runs only to the applicant, not to the public's interest in a fair and unbiased process.

Courts have made it clear, often in the context of deliberating on injunctive relief, that allowing action to proceed before the completion of an adequate NEPA process undermines the purposes of the law. As the Court of Appeals for the First Circuit has said, "[t]he way that harm arises may well have to do with the psychology of decision makers, and perhaps a more deeply rooted human psychological instinct not to tear down projects once they are built."¹⁰⁵ As the Court noted, there is great "difficulty in stopping a bureaucratic steam roller, once started . . ."¹⁰⁶

We believe that the CEQ regulations should explicitly limit project proponents to activities necessary to support applications for federal approval or assistance prior to completion of the NEPA process.

XVIII. ADOPTION OF EISs AND EAs (Proposed Section 1506.3(e)).

Proposed Section 1506.3(e) would require agencies to identify the adoption of another agency's EIS or EA that is not final, is the subject of a referral to CEQ, or is the subject of litigation. The

¹⁰² Implementation of Procedural Provisions of the National Environmental Policy Act, 43 Fed. Reg. 55978, 55986 (Nov. 29, 1978).

¹⁰³ 40 C.F.R. § 1506.1(b).

¹⁰⁴ Updated Regulations (Jan. 2020), *supra* note 96, at 1704.

¹⁰⁵ *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989).

¹⁰⁶ *Id.*

proposed requirements imply that it is acceptable for an agency to adopt another agency's EIS or EA for a particular proposed action under those three sets of circumstances. We urge CEQ to bar adoption of documents in these categories in the first place. To the extent there is useful analysis in such a document, that work could still be incorporated by reference into another NEPA document under the provisions of proposed Section 1501.12. However, documents that are still in draft form or the subject of formal dispute resolution or litigation should not be available for adoption."

**XIX. AGENCY RESPONSIBILITY FOR ENVIRONMENTAL DOCUMENTS
(Proposed Section 1506.5).**

a. Sponsor Preparation of EISs (Proposed Section 1506.5).

We believe new Section 107(f) of NEPA requiring agencies to allow project sponsors to prepare EAs and EISs is deplorable. However, we urge CEQ to include the agencies' proposed provisions implementing this mandate in its review of agency NEPA procedures to ensure adequate guidance and oversight. We commend CEQ for retaining the requirement for contractors to disclose financial or other conflicts of interest and for the addition of the requirement for agencies to include in an EA or EIS the names and qualifications of persons conducting the essential independent evaluation of any information submitted by or environmental documents prepared by a contractor. We urge CEQ to work with agencies to require a similar disclosure of reviewers of information and documents prepared directly by an applicant.

b. Allowing Contractors to Prepare Findings of No Significant Impact and Records of Decision (Proposed Section 1506.5(b)).

This proposed provision would allow an agency to authorize a contractor to prepare not only an EA or EIS under the supervision of the agency but would go further by authorizing a contractor to draft a finding of no significant impact or record of decision.

We oppose this proposal.

Determining whether the environmental effects identified in an EA and deciding what alternative should ultimately be chosen by an agency are quintessential government functions and should never be outsourced to a contractor. Giving these tasks to a contractor further separates the NEPA process from actual agency decisionmaking, no matter how much review takes place. Agency personnel *should* be wrestling with Findings and RODs.

XX. INNOVATIVE APPROACHES TO NEPA REVIEWS (Proposed Section 1506.12)

We have multiple concerns with the entirety of this provision. While we agree that climate change and other ecological stressors such as increasing wildfire risk are existential crises that urgently need comprehensive solutions, we do not support the open-ended invitation to federal agencies to "get creative" with their NEPA compliance. Not only does this cut the public, Tribes, and others out of that "creative process" in terms of assessing what is and is not acceptable NEPA compliance, but also the agencies have already proven themselves adept at using existing

authorities to expedite their NEPA compliance. For example, the Forest Service has already deployed a number of emergency NEPA authorities to combat what it calls “the Wildfire Crisis,” including limiting the consideration of a robust range of alternatives, eliminating the administrative review process for projects it defines as wildfire risk reduction activities, utilizing alternative arrangements to undertake ground-disturbing activities prior to completing NEPA analysis, exempting CE projects from documentation with a decision memorandum, and other emergency authorities.¹⁰⁷ It remains to be seen – if any monitoring of these projects occurs – whether this approach in fact achieves the agency’s desired outcomes, or if it in fact exacerbates the underlying causes for concern of climate change-driven ecological collapse. What is clear is that the Forest Service’s efforts described here limit the ability of interested groups, environmental justice communities, Tribes, and other members of the public to meaningfully participate in the NEPA process and deprive the agency of important information in making its decision.

While it is reasonable to encourage constructive innovation in NEPA compliance, we are dismayed that CEQ would essentially give federal agencies a blank check without any public accountability. We strongly urge that CEQ abandon this provision in the final rule.

XXI. DEFINITION OF “REASONABLY FORESEEABLE” (Proposed Section 1508.1(gg)).

CEQ should amend the 2020 regulation’s definition of “reasonably foreseeable.” We preface our explanation by noting that generally, like CEQ, we oppose the integration of tort law into the NEPA process.¹⁰⁸ However, “reasonably foreseeable” is a term long enshrined in NEPA law and practice.

The 2020 Rule defined “reasonably foreseeable” to mean “sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”¹⁰⁹ The preamble to the 2020 Rule,¹¹⁰ stated that this was “consistent with the ordinary person standard—that is what a person of ordinary prudence in the position of the agency decision maker would consider

¹⁰⁷ Decision Memorandum on Proposed Emergency Response, R5 Giant Sequoia Groves Fuels Reduction and Restoration Projects – Sequoia and Sierra National Forests (July 22, 2022), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd1078189.pdf; [Letter from Randy Moore, Chief, Nat’l Forest System, to Regional Foresters, Station Directors, IITF Director, Deputy Chiefs, and WO Directors \(July 19, 2023\) \(copy available at https://www.dropbox.com/scl/fi/f6zl41fn19w1qpl3ki313/USDA-FS-Emergency-Authorities-Memo-July-2023.pdf?rlkey=fwvka19wk67t5qf243x3cdo0l&dl=0\)](#).

¹⁰⁸ As CEQ stated in its Phase 1 rulemaking, “CEQ no longer deems it necessary to import principles of tort law into the NEPA regulations. Environmental review under NEPA serves different purposes, such as guiding sound agency decision making and future planning, that may reasonably entail a different scope of effects analysis than the district tort law context.” Implementing Regulations Revisions on National Environmental Policy Act, 87 Fed. Reg. 23453, 23465 (May 20, 2022).

¹⁰⁹ 40 C.F.R. 1508.1(aa); Updated Regulations (July 2020), *supra* note 48, at 43376.

¹¹⁰ *Id.* at 43351

in reaching a decision.” CEQ provided no additional justification in the 2020 Notice of Proposed Rulemaking.¹¹¹

The definition adopted in 2020, without further explanation, leaves unnecessary ambiguity as to who this “person of ordinary prudence” is. An agency decisionmaker has access to knowledge and skills, and an agency’s resources and responsibilities, that an ordinary person on the street would not. And it would not be prudent, or consistent with general principles of law, to hold an agency decisionmaker to a standard that ignores these specialized knowledge, skills, and resources.

The First Circuit case that the 2020 Rule preamble cited for the “person of ordinary prudence” standard, *Sierra Club v. Marsh*, appears to have recognized this, noting that the point of reference for the “person of ordinary prudence” standard is not an ordinary person on the street, but a “person of ordinary prudence *in the position of the decisionmaker at the time the decision is made.*”¹¹² A person of ordinary prudence in that position has access to all the agency’s specialized knowledge, skills, and resources, and is subject to the agency’s particular responsibilities. A portion of *Marsh*’s language is referenced in the preamble to the 2020 Rule, but not repeated in the regulatory definition. And that preamble language is insufficiently explicit to eliminate unnecessary ambiguity

But background principles of law can inform this standard. *Marsh* explicitly drew its “person of ordinary prudence in the position of the decisionmaker” standard from the law of torts, *id.*, and the law of torts makes clear that “[i]f an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.”¹¹³

The 2020 Rule’s definition of “reasonably foreseeable” also neglects to state explicitly—and thus arguably leaves ambiguous—the obligation that agencies preparing NEPA documentation engage in a degree of reasonable forecasting—something not every “person of ordinary prudence” on the street would necessarily do, but that agencies, with their expertise and modeling resources, are expected to do.¹¹⁴ We believe that defining “reasonable foreseeability” from the perspective of a prudent agency decisionmaker would better reflect the principles underlying *Scientists’ Institute for Public Information*.

For these reasons, we urge CEQ to amend and clarify the definition of “reasonably foreseeable.” One important goal of the Phase 2 rule should be to reduce ambiguity and eliminate uncertainty where possible. Here that’s possible. The 2020 Rule’s “person of ordinary prudence” standard could be misinterpreted as referring to a person of ordinary prudence who lacks the specialized knowledge, skills, and resources of a federal agency. That would be inconsistent with

¹¹¹ Updated Regulations (Jan. 2020), *supra* note 96, at 1710.

¹¹² *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992) (emphasis added).

¹¹³ *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 12 (2010).

¹¹⁴ See *Scientists’ Inst. for Pub. Info., Inc.*, *supra* note 96, at 1092; *Wildearth Guardians v. Zinke*, 368 F.Supp.3d 41, 67-68 (D.D.C. 2019); *High County Conservation Advocs. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1196 (D. Colo. 2014).

background principles of law and appellate precedent. To help eliminate that possibility, we urge CEQ to more clearly define “reasonably foreseeable” to mean “sufficiently likely to occur such that a prudent agency decisionmaker would take it into account in reaching a decision.”

XXII. “MAJOR FEDERAL ACTIONS” (Proposed Section 1508.1(u)).

The FRA defined a major Federal action as one that is subject to “substantial Federal control and responsibility,” as determined by the action agency.¹¹⁵ The FRA excluded certain types of financial assistance, including loans and loan guarantees, from that definition only where the agency “does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action.”¹¹⁶

In the Proposed Rule, CEQ includes the FRA’s definition of a major Federal action verbatim, including the exemption for financial assistance where the agency does not exercise the requisite level of control and responsibility.¹¹⁷ Although Congress did not further define “sufficient control and responsibility” in the FRA, CEQ interprets the phrase to at least include circumstances where the agency “has authority and discretion over the financial assistance in a manner that could address environmental effects from the activities receiving the financial assistance.”¹¹⁸ The Proposed Rule reflects this interpretation, as CEQ provides that major Federal actions generally include financial assistance such as loans or loan guarantees in the following circumstances:

where the agency has the authority to deny in whole or in part the assistance due to environmental effects, impose conditions on the receipt of financial assistance to address environmental effects, or otherwise has sufficient control and responsibility over the subsequent use of the financial assistance or the effects of the activity for which the agency is providing the financial assistance.¹¹⁹

Given the potential for federally assisted programs to cause significant environmental effects, CEQ should provide additional guidance to agencies to aid in their determinations as to whether an action is “subject to substantial Federal control and responsibility.” Additional guidance would clarify the statutory and regulatory language, promote consistency in agency determinations, and discourage agencies from skirting their NEPA obligations. In providing additional guidance, CEQ should use examples to further expand on the concept of substantial control and responsibility. Both Department of Energy (DOE) Title XVII loan guarantees and Department of Agriculture Farm Service Agency (FSA) financial assistance for factory farms are apt choices for this purpose because it is well-established that these programs already are, and should continue to be, subject to NEPA. Indeed, the presence of required ongoing monitoring, reporting and auditing requirements would also indicate substantial Federal control and responsibility.

¹¹⁵ 42 U.S.C. § 4336e(10)(A).

¹¹⁶ 42 U.S.C. § 4336e(10)(B)(iii).

¹¹⁷ Phase 2 Proposed Revisions, *supra* note 3, at 49987 (proposed 1508.1(u)).

¹¹⁸ Phase 2 Proposed Revisions, *supra* note 3, at 49962.

¹¹⁹ Phase 2 Proposed Revisions, *supra* note 3, at 49987 (proposed § 1508.1(u)(1)(vi)).

Federal financial assistance is a powerful driver of many polluting industries and as such, additional guidance regarding the level of control and responsibility necessary to trigger NEPA is critical. The purported benefits and many potential adverse environmental effects associated with federally assisted projects deserve continued scrutiny. For example, applicants for DOE Title XVII loan guarantees may include entities constructing carbon capture, utilization, and storage (CCUS) projects, carbon dioxide transportation infrastructure, mine processing facilities, and hydrogen infrastructure,¹²⁰ which have adverse environmental effects that must be considered and evaluated alongside any purported benefits.

Applications for FSA financial assistance are also properly subject to scrutiny for environmental impacts because applicants may include heavily polluting factory farms.¹²¹ Concentrated Animal Feeding Operations (CAFOs) and other factory farms that are otherwise eligible for FSA assistance contribute to climate change and generate enormous amounts of waste that contaminate local air, water, and soil.¹²² CAFOs are particularly harmful to frontline communities that are disproportionately comprised of Black, Latino, Indigenous, and low-income people.¹²³ These communities deserve to understand the impacts of projects funded by their tax dollars and their voices should be heard during the decision-making process. Accordingly, FSA-assisted CAFO projects are properly subject to NEPA review.

It is well-established that DOE Title XVII loan guarantees and FSA financial assistance for CAFOs are major federal actions. DOE already subjects loan guarantees to NEPA, as expressly

¹²⁰ Loan Guarantees for Clean Energy Projects, 88 Fed. Reg. 34,421 (May 30, 2023).

¹²¹ See, e.g., *Dakota Rural Action v. U.S. Dep't of Agric.*, No. 18-2852, 2023 LEXIS 59678 (D.D.C. April 4, 2023) at *5 (confirming that FSA provides loan services to CAFOs).

¹²² See generally Nat'l Risk Mgmt. Research Lab'y, *Risk Assessment Evaluation for Concentrated Animal Feeding Operations* EPA/600/R-04/042, U.S. Env't Prot. Agency (May 2004) [hereinafter *EPA CAFO Risk Assessment*], available at <https://nepis.epa.gov/Exe/ZyPDF.cgi/901V0100.PDF?Dockey=901V0100.PDF> (describing the various risks of environmental harms from CAFOs). See also National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7,176, 7,181 (Feb. 12, 2003) (“[p]ollutants in animal waste and manure can enter the environment through a number of pathways.”); JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 Env't Health Persp. 308 (Feb. 2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1817674/>; Matthew N Hayek & Scot M Miller, *Underestimates of Methane from Intensively Raised Animals Could Undermine Goals of Sustainable Development*, 16 Env't. Res. Lett. 1 (2021), <https://iopscience.iop.org/article/10.1088/1748-9326/ac02ef/pdf> (“[a]nimal agriculture has been reported to represent 15.6% of total annual greenhouse gas (GHG) emissions globally.”).

¹²³ See generally, e.g., Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 Env't Health Persp. A182 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3672924/pdf/ehp.121-a182.pdf>.

stated in the agency’s regulations,¹²⁴ which were clarified through DOE’s recent Interim Final Rule on Loan Guarantees for Clean Energy Projects.¹²⁵ DOE further discusses how loan guarantees are subject to NEPA in its program guidance,¹²⁶ its current loan guarantee solicitation announcement,¹²⁷ and its website.¹²⁸ Nothing in the FRA or the Proposed Rule affects this determination. Similarly, FSA regulations have long required the agency to prepare an environmental assessment prior to acting on an application for financial assistance for CAFOs.¹²⁹ DOE Title XVII loan guarantees and FSA financial assistance are both instructive, not only because they are already subject to NEPA, but because they are squarely within the circumstances that CEQ generally recognizes as major federal actions as well. Both DOE and FSA have the authority to deny applications for their respective financial assistance programs due to environmental effects, and both agencies otherwise exercise control and responsibility

¹²⁴ 10 C.F.R. § 609.7(b)(5) (stating that prior to closing, DOE will ensure that it has “completed all necessary reviews under [NEPA].”).

¹²⁵ Loan Guarantees for Clean Energy Projects, 88 Fed. Reg. 34419 (May 30, 2023) (codified at 10 C.F.R. Part 609) (revising DOE’s regulations to clarify that NEPA review is required for loan guarantees prior to closing).

¹²⁶ Loan Programs Office, *Program Guidance for Title 17 Clean Energy Program* OMB No. 1910-5134, U.S. Dep’t of Energy, 47-48 (May 19, 2023), available at <https://www.energy.gov/lpo/articles/program-guidance-title-17-clean-energy-program> (stating that “[p]rior to financial close of a Title 17 loan guarantee, projects must complete the appropriate environmental review subject to NEPA.”).

¹²⁷ Loan Programs Office, Loan Guarantee Solicitation Announcement: Federal Loan Guarantees for Innovative Clean Energy DE-SOL-0007154, U.S. Dep’t of Energy, 8 (Apr. 18, 2022), available at <https://www.energy.gov/lpo/articles/innovative-clean-energy-loan-guarantee-solicitation-current> (stating that “DOE must complete a NEPA review before it makes a decision to provide a loan guarantee. Compliance is integrated into LPO’s decision-making procedures to ensure that a Project’s environmental impacts are properly considered.”); *id.*, at 36-38 (Attachment D – National Environmental Policy Act Compliance).

¹²⁸ Loan Programs Office, Environmental Compliance, U.S. Dep’t of Energy, <https://www.energy.gov/lpo/environmental-compliance> (last accessed Sept. 28, 2023) (stating that “[l]oans and loan guarantees issued under LPO’s program are considered major Federal actions and are subject to [NEPA] review. NEPA compliance is integrated into LPO’s decision-making procedures to ensure that environmental impacts are considered throughout the loan guarantee process. The NEPA review must be completed before a loan or loan guarantee can be issued.”).

¹²⁹ See *Buffalo River Watershed All. v. U.S. Dep’t of Agric.*, No. 4:13-cv-450-DPM, 2014 LEXIS 168750 (E.D. Ark. Dec. 2, 2014) (describing FSA’s pre-2016 NEPA regulations and their treatment of CAFO loan guarantees). See also 7 C.F.R. §§ 799.31(b)(1)(vii) (noting that loans for livestock are not categorically excluded from NEPA); 799.32(d)(1)(ii) (explaining that extraordinary circumstances may exist that make loans for livestock subject to NEPA); 799.32(e) (requiring “additional environmental review and consultation” for loans to projects that include construction or ground disturbance); 799.33(a)(1) (describing extraordinary circumstances—such as harm to wildlife, waterways, aquifers, and important landscapes—that require heightened environmental review); 799.41(a) (mandating an EA for CAFO construction, refinancing of new CAFOs, and activities like land clearing and irrigation development that are typical to CAFOs).

over the activities undertaken using Federal dollars. Eligible projects for Title XVII loan guarantees must “avoid, reduce, utilize, or sequester air pollutants or anthropogenic emissions of greenhouse gases,” or have controls or technologies to do so.¹³⁰ Applicants must describe how their projects meet those eligibility requirements¹³¹ and DOE denies applications for ineligible projects.¹³² Even if a project is eligible, DOE still considers environmental factors—namely, “[e]nvironmental impacts, review and compliance”—in the application process.¹³³ DOE exercises subsequent control and responsibility over loan guarantees through its authority to, *inter alia*, monitor the performance of the borrower and the eligible project,¹³⁴ access records related to the project and perform audits,¹³⁵ and authorize deviations from program requirements.¹³⁶

Likewise, FSA farm ownership loan guarantees are only authorized for projects that “promote soil and water conservation and protection.”¹³⁷ No FSA loans can be made to any project that “contributes to excessive erosion of highly erodible land or to the conversion of wetlands.”¹³⁸ Further, FSA exercises ongoing control over and responsibility for financed projects because the agency must “seek to mitigate potential adverse environmental impacts resulting from Agency actions” like loan guarantees and other forms of financial assistance to CAFOs and other factory farm operations.¹³⁹ FSA must include any environmental mitigation measures the agency relies upon in reaching their decision in the agency’s commitment documents, plans, construction contracts, and anywhere else necessary to make the mitigation legally binding.¹⁴⁰ Crucially, FSA retains this control and responsibility beyond the decision to issue the financial assistance. The agency must monitor implementation of mitigation measures throughout the design, construction, and future servicing of the project.¹⁴¹ Moreover, if the applicant fails to comply with the agreed upon mitigation, FSA must suspend all advancements and reimbursements, and the agency is broadly authorized to take other measures to redress the failed mitigation.¹⁴² All of these factors indicate sufficient agency control over a financially assisted project and could inform additions to proposed section 1508.1(u)(1)(vi) in the final rule.

¹³⁰ 42 U.S.C. §§ 16513, 16517; 10 CFR § 609.3.

¹³¹ Loan Guarantee Solicitation Announcement, *supra* note 128, at 22-23.

¹³² 10 C.F.R. § 609.5(b)(1)

¹³³ Loan Guarantee Solicitation Announcement, *supra* note, at 9 (breaking down the weight of various criteria in the application process, including environmental factors which account for 20%).

¹³⁴ 10 C.F.R. § 609.8(b)(13).

¹³⁵ *Id.*, at § 609.17.

¹³⁶ *Id.*, at § 609.18.

¹³⁷ 7 C.F.R. § 762.121(b)(3).

¹³⁸ *Id.*, at § 762.121(d).

¹³⁹ 7 C.F.R. § 1970.16(a).

¹⁴⁰ *Id.*, at § 1970.16(a)-(b).

¹⁴¹ *Id.*, at § 1970.16(c).

¹⁴² *Id.*

In short, CEQ must provide guidance to agencies to inform determinations regarding financial assistance. Such guidance is necessary to ensure clarity and consistency across agencies and to ensure that federally-assisted projects receive the appropriate level of NEPA review.

In conclusion, we appreciate the opportunity to comment on these proposed revisions to CEQ's NEPA regulations. If you have you any questions about these comments, please contact Stephen Schima, Senior Legislative Council, Earthjustice, at sschima@earthjustice.org or (503) 830-5753.

Sincerely,

Animal Welfare Institute
Black Hills Clean Water Alliance
Black Millennials 4 Flint
Center for Biological Diversity
Chaco Alliance
Citizens Caring for the Future
Citizens for a Healthy Community
Clean Water Action
Clean+Healthy
Climate Hawks Vote
Coalition to Protect America's National Parks
Connected Conservation Foundation
CURE
Defenders of Wildlife
Earth Action, Inc.
Earthjustice
Earthworks
Endangered Species Coalition
Environmental Health Trust
Environmental Justice Health Alliance for Chemical Policy Reform (EJHA)
Environmental Law & Policy Center
Environmental Protection Information Center (EPIC)
Food & Water Watch
Footloose Montana
FracTracker Alliance
Friends of the Earth
Great Old Broads for Wilderness
GreenLatinos
Idaho Conservation League
Information Network for Responsible Mining
Interfaith Power & Light
Just Solutions Collective
Klamath Forest Alliance
Living Rivers
League of Conservation Voters

Los Jardines Institute
Los Padres ForestWatch
Maryland Pesticide Education Network
Montana Environmental Information Center
Naeva
National Community Reinvestment Coalition
National Parks Conservation Association (NPCA)
National Trust for Historic Preservation
National Wildlife Federation
Native Movement
Native Organizers Alliance
Natural Resources Defense Council
New Hampshire Audubon
New Mexico & El Paso Interfaith Power and Light
New Mexico Climate Justice
New Mexico Sportsmen
New Mexico Wild
Norbeck Society
Northeastern Minnesotans for Wilderness
Northern Plains Resource Council
Nuclear Information and Resource Service
Nuclear Watch New Mexico
Oceana
Ocean Conservation Research
Ocean Defense Initiative
Operation HomeCare, Inc.
Oxfam America
Powder River Basin Resource Council
Prairie Hills Audubon Society
Predator Defense
Progressive Democrats of America - Central New Mexico
Project Eleven Hundred
Public Employees for Environmental Responsibility (PEER)
Rio Grande Indivisible, NM
Santa Fe Forest Coalition
Science and Community Action Network_EJ (SciCAN)
Seven Circles Foundation
Sheep Mountain Alliance
Sierra Club
Silvix Resources
Southern Environmental Law Center
Southern Utah Wilderness Alliance
Tanka Fund
The Wilderness Society
Waterkeeper Alliance
WE ACT for Environmental Justice

Western Colorado Alliance
Western Environmental Law Center
Western Organization of Resource Councils
WildEarth Guardians
Wilderness Workshop
Winter Wildlands Alliance
Wyoming Wilderness Association

ATTACHMENT 1

April 10, 2023

The Honorable Brenda Mallory
Chair, Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

RE: *National Environmental Policy Act Guidance on Consideration of
Greenhouse Gas Emissions and Climate Change*
CEQ-2022-0005

Dear Chair Mallory:

Thank you for the opportunity to comment on the Council on Environmental Quality (CEQ)'s interim National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change (hereinafter "Interim Guidance") on analyzing greenhouse gas (GHG) emissions and climate change effects in the course of agency implementation of the National Environmental Policy Act (NEPA). The Interim Guidance is an important step forward in CEQ's direction on this most critical issue. Since issuance of CEQ's 2016 guidance on climate change in the NEPA context, our understanding and experience with climate change and how to assess its effects has evolved. We appreciate the substantial work that has gone into incorporating some of this new understanding. That said, we offer a number of recommendations below for improving the guidance. These suggested changes will make the final guidance a more useful tool for complying with NEPA, will provide a more accurate assessment of how projects will impact climate mitigation efforts, and will better ensure that potential climate-related impacts to communities and natural resources from projects are appropriately considered.

GENERAL ISSUES

CEQ's Final Guidance Should Direct Agencies to Quantify Methane Emissions Using both 100-Year and 20-Year Methane Global Warming Potential.

Our organizations urge CEQ to bolster its recommendations around the disclosure of methane's global warming potential (GWP) by instructing agencies to affirmatively disclose both the 100-year and 20-year methane GWP. Adding this requirement will ensure compliance with recent case law regarding such disclosures and ensure alignment with NEPA regulations that require agencies to consider "[b]oth short-term and long-term effects" of their actions.¹ Adding this requirement would not put undue burdens on the NEPA review process as GWPs for non-carbon dioxide greenhouse gasses are commonly used in NEPA documents to allow the agency to provide a total GHG calculation that factors in carbon dioxide, methane, nitrous oxides, and other relevant GHGs and converts

¹ 40 C.F.R. § 1501.3(b)(2)(i).

them all to carbon dioxide equivalent (CO_{2e}) (with carbon dioxide assigned a GWP of 1). The Interim Guidance instructs agencies to quantify a project's direct and indirect GHG emissions "individually by GHG, as well as aggregated in terms of total CO₂ equivalence by factoring in each pollutant's global warming potential (GWP), using the best available science and data."²

Methane has substantially different GWPs depending on whether one considers its short-term or long-term warming influence. As CEQ explains, "over a 100-year period, the emissions of a ton of methane contribute 28 to 36 times as much to global warming as a ton of carbon dioxide. Over a 20-year timeframe, methane is about 84 times as potent as carbon dioxide."³ That is accurate, useful information. But when guiding agencies on how to use methane's GWPs in their NEPA analyses, the Interim Guidance falls short of what the relevant case law requires. The Interim Guidance states "[t]o avoid potential ambiguity, CEQ encourages agencies to use the 100-year GWP [of methane] when disclosing the GHG emissions impact from an action in their NEPA documents."⁴ Following that guidance would frequently omit a substantial amount of GHGs from a project's total CO_{2e} calculation, particularly where methane makes up a meaningful portion of the project's GHG emissions, thus underrepresenting both the short-term disproportionate impact of such emissions on climate change and the near-term benefits of methane emission reductions if such projects were not approved.

As explained by the United States District Court for the District of Montana, which invalidated BLM's NEPA review for two resource management plans where BLM relied exclusively on the 100-year GWP for methane, "BLM's unexplained decision to use the 100-year time horizon, when other more appropriate time horizons remained available, qualifies as arbitrary and capricious under these circumstances."⁵ At a minimum, agency NEPA analyses must disclose both the 100-year and 20-year GWP for methane.⁶ In the final guidance, CEQ should update its recommendations on methane GWPs to better reflect the mandates in NEPA's regulations and the relevant case law.

In the final guidance, CEQ should strengthen this direction by instructing agencies to use both the 100-year and 20-year GWP of methane. Agencies can avoid any "ambiguity" by explaining why they use both GWPs to calculate a project's total GHG emissions. Doing so would add very minimally to an agency's workload, improve the disclosure of GHG emissions "using the best available science and data,"⁷ and align with

² CEQ, NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. at 1201.

³ 88 Fed. Reg. at 1199.

⁴ 88 Fed. Reg. at 1199.

⁵ *W. Org. of Res. Councils v. BLM*, 2018 WL 1475470 at *15 (D. Mont. 2018).

⁶ The Tenth Circuit Court of Appeals recently upheld a NEPA analysis that disclosed both the 100- and 20-year methane GWP. *See Dine Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016 (10th Cir. 2023) (holding that "because BLM discussed both the one hundred-year and twenty-year time horizons ... BLM did consider the short-and long-term effects of the GHG emissions.").

⁷ 88 Fed. Reg. at 1201.

NEPA regulations that require agencies to consider “[b]oth short- and long-term effects” of their actions.⁸

The Final Guidance Should Include Additional Ocean and Coastal Issues and Examples.

We urge CEQ to include additional ocean-related concerns and examples throughout the final guidance. Rapidly accelerating climate change and ocean acidification driven by greenhouse gas emissions are some of the most imminent threats to functional marine ecosystems and healthy coastal communities, with clearly foreseeable and enormously significant environmental consequences for the American public. Approximately 42% of the United States population (over 133 million people) lives near the coast.⁹ Coastal communities and the marine ecosystems on which they depend are experiencing extreme weather events, sea level rise, ocean acidification, and changing abundance and distribution of fish stocks. Extreme events associated with the ocean are projected to become more common and severe as these conditions intensify and intersect.¹⁰

It is critically important that oceans are explicitly included in the final guidance. NEPA applies to a wide range of ocean-related activities under federal management jurisdiction including management of fisheries, offshore energy production, vessel traffic, ocean dumping, military activities, and other actions. Climate change and federal actions resulting in GHG reductions have a significant impact on ocean-related federal proposals and actions that otherwise would be single resource-driven decisions. CEQ’s GHG NEPA guidance plays a vital role in ensuring that climate change impacts are part of these analyses.

As a start, the background section should include an additional section (Section C) on ocean acidification. Just as methane, as a particularly potent GHG, is called out for the specific attention necessary to reducing emissions and concentrations, carbon dioxide concentrations are uniquely responsible for ocean acidification. Ocean acidification acts together with other climate-driven ocean changes like warming temperatures and oxygen loss to place variable, and sometimes difficult to predict, pressures on marine life that can affect species’ survival, reproduction, geographic range, and interactions with other species.¹¹

Additionally, we ask that the reference to “land and resource management” in the background section be modified to read “land, ocean and coastal resource management actions under NEPA.”¹² This change should be made throughout the guidance where similar language appears including in the discussions of “Special Considerations for

⁸ 40 C.F.R. § 1502.3(b)(2)(i).

⁹ U.S. Global Change Research Program, Fourth National Climate Assessment (NCA4), Chapter 8: Coastal Effects (2018), available at <https://nca2018.globalchange.gov/chapter/8/>.

¹⁰ IPCC, 2022, pp. 420–433, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, <https://www.ipcc.ch/report/ar6/wg2/>.

¹¹ IPCC, 2022, pp. 379-550, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, <https://www.ipcc.ch/report/ar6/wg2/>,

¹² 88 Fed. Reg. 1196, 1198.

Biological GHG Sources and Sinks,”¹³ and “Programmatic or Broad-Based Studies and NEPA Reviews.”¹⁴ We also recommend adding marine heat waves to the list of real world effects in the examples of issues that agencies should address, citing available scientific literature, to help explain effects, including local effects.¹⁵

DIRECT AND INDIRECT EFFECTS

CEQ’s Final Guidance Should Provide Considerably More Assistance, Including Additional Limits on and Clarity Around, Agencies’ Use of Substitution Analysis.

CEQ’s Interim Guidance provides a useful starting point in addressing substitution analysis as it pertains to the climate impacts of federal projects undergoing NEPA review. Substitution analysis refers to the practice of assessing the impacts of a particular project on energy markets as a whole. In the context of major fossil fuel infrastructure or development projects, substitution analysis seeks to compare project emissions with those that might occur if the project is not developed. Agencies often conclude that some other source of fossil fuel will perfectly substitute for the project in question, or that the fuel will be transported through other means, leading to the counter-intuitive result that the project will have net zero or even negative GHG emissions. For example, in its NEPA review for the Wright Area coal mines, BLM assumed “that there was no real world difference between issuing the Wright area leases and declining to issue them” because, it asserted, even if BLM denied the leases, “third party sources of coal would perfectly substitute for any volume lost on the open market.”¹⁶ The result of BLM’s arbitrary perfect substitution assumption -- which the Tenth Circuit rejected as illogical -- was that there would be no difference between the action and no action alternatives in terms of coal mined, coal burned, or greenhouse gasses emitted. Given the centrality of these findings to the NEPA process and substantive decisions around fossil development, we urge CEQ to provide more specific guidance to agencies in order to promote greater certainty, consistency, and accuracy in NEPA analyses across federal agencies.

NEPA requires agencies to provide a clear basis for choice among considered alternatives,¹⁷ and CEQ’s Interim Guidance correctly notes that substitution analysis related to fossil fuel proposals has proven particularly challenging for agencies. Given the wide disparity among federal agencies with regard to whether and how to analyze substitution effects, and the variety of economic models available to assist with this analysis,¹⁸ CEQ should provide additional clear direction and clear sidebars to the agencies regarding the use of substitution analysis in NEPA analyses.

¹³ *Id.* at 1207.

¹⁴ *Id.* at 1210.

¹⁵ *Id.* at 2203.

¹⁶ *WildEarth Guardians v. United States Bureau of Land Management*, 870 F.3d 1222, 1233 (10th Cir. 2017) (emphasis added).

¹⁷ 42 U.S.C. §§ 4332(C)-(E), 40 C.F.R. 1502.14.

¹⁸ For example, EIA uses the National Energy Modeling System in its Annual Energy Outlook; EPA uses ICF’s Integrated Planning Model; BOEM developed and uses its own model known as MarketSIM; BLM has no standard analytic method for evaluating substitution effects. As

As CEQ notes, agencies tasked with providing the public and decisionmakers with a useful comparison between the climate impacts of action and no action alternatives understandably seek to identify not just direct and indirect emissions from a project, but also net changes in GHG emissions. This, in turn, frequently entails forecasting changes in energy markets based on whether a particular proposal is approved (as it is in action alternatives) or rejected (as it typically is the no action alternative). However, evaluating changes in energy markets across alternatives – specifically the mix of coal, oil, gas, wind, and solar, etc. used to generate electricity – and the extent to which changes to this mix increase or decrease GHG emissions is often not within the scope of many agencies’ traditional expertise. The results of these efforts have been consistently flawed, with many comparisons concluding that major fossil fuel investments would have no or even negative GHG emissions. Perhaps in part because of federal agencies’ lack of familiarity with the subject, federal courts have overturned NEPA reviews based on arbitrary climate analyses stemming from flawed consideration of substitution effects from the Bureau of Land Management,¹⁹ Office of Surface Mining Control Reclamation and Enforcement,²⁰ Bureau of Ocean Energy Management,²¹ U.S. Forest Service,²² Federal Energy Regulatory Commission,²³ and Surface Transportation Board.²⁴ Plainly, there is a need for greater clarity from CEQ on this subject.

In short, substitution analysis as practiced by most agencies today is fraught with error, undermines the central goal of NEPA to present a clear picture of GHG emissions, and is an obvious litigation risk for agencies. While CEQ’s Interim Guidance provides a useful starting point for agencies analyzing climate and market substitution effects, it is critical that the final guidance provide additional specificity and limits to agencies in order to provide the most useful, instructive guidance for future NEPA reviews. We ask CEQ to incorporate the following principles and examples in its final guidance.

1. Substitution modeling should never assume fixed market demand for fossil fuels.

CEQ’s final guidance should instruct agencies that market analyses in NEPA reviews must acknowledge: (a) that energy proposals and policies may affect levels of consumption and (b) that agencies must not treat demand for commodities such as coal, oil, and gas as fixed. In 2003 the Eighth Circuit rejected the notion of fixed coal demand

discussed further below, some of the models have deep flaws—for example, by assuming constant demand for fossil fuels for many decades, in contravention to both U.S. and global policies as well as the facts on the ground.

¹⁹ *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1236 (10th Cir. 2017).

²⁰ *Montana Environmental Information Center v. OSM*, 274 F.Supp.3d 1074, 1098 (D. Mont. 2017).

²¹ *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 736 (9th Cir. 2020).

²² *High Country Conservation Advocs. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1197–98 (D. Colo. 2014).

²³ *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357, 1375 (D.C. Cir. 2017).

²⁴ *Mid-States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).

in analyzing a Surface Transportation Board’s analysis of a proposed coal rail line, concluding that “the proposition that the demand for coal will be unaffected by an increase in the availability ... is illogical at best.”²⁵ Even where agencies do not fully rely on perfect substitution, their analyses have implausibly assumed that economic demand for a specific commodity, such as coal, oil, or gas, will remain unchanged in the face of new supply.²⁶ More than one commentator has noted that BOEM’s MarketSim model “assumes near constant oil and gas demand domestically for up to 70 years into the future.”²⁷ These assumptions are squarely at odds with the facts and with our climate goals: plainly, both the nation and the world need to be – and are – moving aggressively away from fossil fuels in the years ahead and agencies cannot simply project today’s fuels uses over decades to make useful predictions. Indeed, it is the comparison of project emissions to this unrealistic future that lays at the heart of misleading conclusions that major fossil fuel projects will have no climate impacts.

Analyzing substitution effects is a complicated exercise that is particularly challenging when fossil fuel projects impact both domestic and international markets. CEQ’s final guidance should follow instructive D.C. Circuit case law rejecting agency attempts to dodge meaningful analysis based on vague statements related to market substitution. In its NEPA review for the Sabal Trail gas pipeline, the Federal Energy Regulatory Commission (“FERC”)’s assessment of market impacts was that the project’s GHG emissions “might be partially offset” by the market replacing the project’s gas with either coal or other gas supply.²⁸ The D.C. Circuit rejected FERC’s failure to study this issue, stating, “[a]n agency decision maker reviewing this EIS would thus have no way of knowing whether total emissions, on net, will be reduced or increased by this project, or what the degree of reduction or increase will be. In this respect, then, the EIS fails to fulfill its primary purpose.”²⁹ *Id.* CEQ’s final guidance should make clear that similarly vague assertions of market effects are insufficient where modeling tools would allow the agency to provide the public and decisionmakers with a more informed understanding of a project’s climate impact.

Moreover, this principle applies to both domestic and international consumption of fossil fuels that agencies should account for in their market and climate analyses. As the Ninth Circuit has made clear, despite modeling uncertainties, agencies must attempt to account for all reasonably foreseeable market changes, including changes internationally. CEQ’s final guidance should make this obligation clear to agencies. In analyzing the effects of the Liberty oil and gas drilling project, the Bureau of Ocean Energy Management (“BOEM”) concluded initially that the no action alternative – rejecting the Liberty project

²⁵ *Mid-States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).

²⁶ Peter Howard and Max Sarinsky, *Best Practices for Energy Substitution Analysis*, Institute for Policy Integrity, at 3 (Dec. 2022).

²⁷ Jan Hasselman and Peter Erickson, *NEPA Review of Fossil Fuel Projects – Principles for Applying a “Climate Test” for New Production and Infrastructure* (2022); Howard & Sarinsky, *supra* note 23, at 5 (noting EIA’s reference case baseline “assumes near-constant demand for oil and gas for the next 70 years.”).

²⁸ *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357, 1375 (D.C. Cir. 2017).

²⁹ *Id.*

– would, counterintuitively, increase greenhouse gas emissions by shifting production to foreign sources with comparatively weaker environmental protections.³⁰ But BOEM’s model assumed “foreign consumption of oil will remain static” were the Liberty project approved; crucially, this assumption ignored “basic economic principles” that are key to understanding climate impacts. As the Ninth Circuit explained, increasing the supply of fossil fuels such as oil (*i.e.*, approving the Liberty project) reduces prices; as price drops, foreign consumers will buy and consume more oil. *Id.* Thus, the Court concluded, emissions from predictable market responses, whether domestic or foreign, “are surely a ‘reasonably foreseeable’ indirect effect” that must be analyzed and disclosed under NEPA.³¹ *Id.*

Finally, as CEQ notes, some agencies have engaged in substitution analysis and modeling for many years. Others, like the Bureau of Land Management (“BLM”), spent years relying on the myth of perfect substitution in its NEPA reviews for coal mines and other fossil fuel related projects. While courts have roundly rejected perfect substitution assumptions³² and CEQ appropriately instructs agencies not to rely on perfect substitution, additional instruction would assist agency analyses that need to quit utilizing their flawed approaches to market and climate analysis. Specifically, when agencies that formerly relied on perfect substitution to discount the climate impacts of their choices now engage in substitution modeling, they must acknowledge the change in agency practice and explain why the prior approach was wrong.³³ This is particularly important where project proponents in the fossil fuel industry still cling to perfect substitution while advancing their proposals. Unless agencies that formerly relied on perfect substitution acknowledge and address the issue head on in their NEPA reviews, those reviews may be vulnerable to industry challenges under the Administrative Procedure Act. In the final guidance, CEQ should include a reminder to federal agencies that they must explain departures from prior agency positions, including misguided assertions of perfect substitution.

CEQ should provide additional instruction to agencies on these points, as set out below. Doing so will improve agency analyses, foster more informed decisions, and reduce the likelihood of litigation. CEQ’s final guidance should instruct agencies not to treat demand for fossil fuels as a fixed commodity, to take foreign consumption into account

³⁰ *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 736 (9th Cir. 2020).

³¹ *Id.*

³² *E.g.*, *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1236 (10th Cir. 2017); *Montana Environmental Information Center v. OSM*, 274 F.Supp.3d 1074, 1098 (D. Mont. 2017); *High Country Conservation Advocs. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1197–98 (D. Colo. 2014).

³³ *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014) (agencies “cannot depart from [prior] rulings without provid[ing] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”); *Wis. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (“an agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so”).

where applicable, and to acknowledge where the agency's substitution analysis departs from past reliance on perfect substitution.

2. No action / baseline comparisons should align with international climate commitments and state and national climate policies rather than presume continued reliance on fossil fuels decades into the future.

In addition to directing agencies to analyze changes to market demand as a result of agency decisions that open up additional supply of fossil fuels, the final guidance should amplify the importance of the requirement for agencies to consider long-term changes to fossil fuel consumption anticipated to be occasioned by state, federal, and international policies as part of their substitution analysis. Assuming a future reliant on fossil fuels—often done as part of a no action alternative in NEPA reviews—can lead to skewed climate analysis by making it appear that a proposed fossil fuel project will primarily displace other fossil fuel sources over the coming decades and thus have an insignificant climate impact. By contrast, in a future energy market comprised primarily of renewable resources, a proposed fossil fuel project would be more likely to compete for market-share against wind, solar, or geothermal projects with far fewer GHG emissions. Thus, an agency's projections about the future energy market in which a project would operate years or decades into the future can affect its assessment of the difference in GHG emissions between the action and no action alternatives under consideration.

CEQ's final guidance should more clearly instruct agencies to adopt an approach to future energy markets that more clearly reflects an anticipated trajectory toward meeting climate goals when comparing action and no action alternatives, consistent with other aspects of the Interim Guidance. Elsewhere, the Interim Guidance instructs agencies to “discuss whether and to what extent the proposal's reasonably foreseeable GHG emissions are consistent with GHG reduction goals, such as those reflected in the U.S. nationally determined contribution under the Paris Agreement.”³⁴ Toward the end of the Interim Guidance's discussion of substitution effects, CEQ notes that “analysis generally should be complemented with evaluation that compares the proposed action's and reasonable alternatives' energy use against scenarios or energy use trends that are consistent with achieving science-based GHG reduction goals, such as those pursued in the *Long-Term Strategy of the United States*.”³⁵ If followed, this recommendation would significantly improve GHG accounting analysis, but risks being overlooked without a fuller description and more specific instruction from CEQ.

³⁴ 88 Fed. Reg. at 1203.

³⁵ *Id.* at 1205.

Current U.S. climate policy commits the U.S. to reduce GHGs by 50-52% below 2005 levels by 2030.³⁶ President Biden further set national goals to “achieve a carbon pollution-free electricity sector by 2035 and net-zero emissions economy-wide by no later than 2050.”³⁷ As it does regarding contextualizing climate impacts, CEQ should similarly instruct agencies to incorporate U.S. climate commitments as part of comparing climate impacts across alternatives. Specifically, CEQ should direct agencies to incorporate U.S. climate commitments and decarbonization pathways as part of the no action alternative baselines instead of assuming long-term reliance on fossil fuels. Unless CEQ instructs agencies to correct this approach in future NEPA reviews, many agencies will continue to provide decisionmakers and the public with a misleading comparison of the climate impacts of action and no action alternatives. When assuming fossil fuel reliance decades into the future, the frequent agency conclusion is that a proposed fossil fuel project will primarily substitute for other fossil fuels instead of renewables, thus minimizing a project’s climate impact, when a comparison to a Paris-compliant future would reveal significantly larger net GHG emissions.

The recent Final EIS for the Department of Interior leases sales in the Gulf of Mexico³⁸ reveals how critical this step would be to useful NEPA analysis. In that EIS, Interior estimated that the lease sale will generate 1.13 billion barrels of oil over several decades, generating truly massive amounts of GHG emissions over its full lifecycle. The agency then concluded that the net impact of the sale to GHG emissions was minimal by concluding that other sources of oil—some of which would have slightly higher emissions—would be used, enabling the agency to conclude that the net impact is marginal. That analysis does not incorporate the U.S. Paris Agreement commitment, or any other policy commitment, to reduce oil use. Instead, it implicitly assumes that the U.S. and every other nation will ignore those commitments and continue to produce and consume oil at the same rate it does today. If the analysis was done correctly—by comparing project emissions to a baseline that is in line with policy commitments and the science that motivated them—it would reveal the project to be a massive source of GHG emissions. The NEPA process should provide such clarity, so that decisionmakers and the public can make substantive decisions in light of the facts.

The same is true in the context of state and local policies calling for rapid phaseouts of fossil fuel uses and deep reductions in GHG emissions. Again, an example may be

³⁶ White House, “FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies,” (April 22, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

³⁷ Executive Order 14057, “Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability” (Dec. 8, 2021), available at <https://www.federalregister.gov/documents/2021/12/13/2021-27114/catalyzing-clean-energy-industries-and-jobs-through-federal-sustainability>.

³⁸ Available at <https://www.boem.gov/oil-gas-energy/gulf-mexico-lease-sales-259-and-261-supplemental-environmental-impact-statement>.

instructive. FERC is currently considering a proposal to significantly expand the capacity of a fossil gas pipeline (GTN Express) that carries gas from British Columbia to Washington, Oregon, and California. All three states have adopted aggressive decarbonization targets that will require drastically reducing if not eliminating the use of fossil gas. Even so, and over the heated opposition of the states themselves, FERC's Final EIS for the expansion assumes gas demand is fixed in these states, failing to even mention the conflict between the proposal and the states' climate policies or those of the federal government. Again, the result is an EIS that concludes that emissions will be inconsequential. Such an outcome undermines a key purpose of NEPA—to fully analyze and disclose a project's consistency with existing laws, international commitments, and treaty obligations.

The U.S. has made international commitments to reduce GHG emissions in line with the recommendations from the world's leading scientific bodies. CEQ rightfully instructs agencies to evaluate whether their proposed fossil fuel projects are inconsistent with national climate targets. CEQ should go further in its final guidance to clearly instruct agencies that when using a substitution analysis, the agencies should compare emissions across alternatives by using modeling that reflects the U.S. commitments to reduce GHG emissions. The final guidance should direct agencies not to base this comparison on an assumption that that historical uses will continue into the future.

3. Modeling assumptions and uncertainties must be clearly disclosed.

Substitution analysis is a complex undertaking fraught with uncertainty and marginal changes in assumptions used for such analysis can have consequential impacts on the outcome. It is not that complicated for agencies to identify reasonably foreseeable direct and indirect GHG emissions associated with the extraction, transportation, and combustion of fossil fuels. By contrast, there is far more uncertainty when agencies model market effects under a "no action" scenario, both domestic and international, years or decades into the future.

To address this situation, we urge CEQ to adopt two clear standards. First, agencies should fully disclose the uncertainties inherent in their substitution analyses. These analyses cannot compare the relatively straightforward calculation of project GHGs to a speculative guess of hypothetical emissions under the no action alternative. Yet this is what currently happens today in most cases: the comparison of project emissions and no action alternatives are presented as equivalent, leading to overly confident predictions of net impacts that are often marginal or negative.

Second, to avoid a "black box" scenario, where the public has no ability to test an agency's analysis based on proprietary models, agencies should make assumptions, inputs, and modeling codes publicly available no later than when the NEPA document is released to the public. Agencies should disclose any uncertainty in those modeling runs, including by discussing the extent to which the model outputs are susceptible to manipulation based on different inputs and assumptions. Where modeling results point to a range of potential outcomes, agencies should disclose those ranges and discuss their assessments of the likelihood of potential outcomes.

CEQ makes this clear in discussing other aspects of climate analysis, stating, “[q]uantification should include the reasonably foreseeable direct and indirect GHG emissions Agencies also should disclose the information and any assumptions used in the analysis and explain any uncertainty.”³⁹ While that is certainly true for the relatively straight-forward exercise of quantifying GHG emissions, it is also true for the more complicated market substitution analysis. Agencies should not present their reasonably certain estimates of GHG emissions on an equal footing with long-term, less certain, market forecasting that essentially discounts those emissions to the public and decisionmakers.⁴⁰

4. Substitution analysis must be applied to project benefits in the same manner it is applied to climate impacts.

Agencies frequently use substitution to discount GHG emissions when discussing the environmental impacts of a proposal, but almost never to discount purported project benefits using the same logic. This asymmetry inflates project benefits (such as taxes, state and federal royalties, jobs, indirect employment, etc.) while lessening the perception of costs by asserting that if coal, oil, or gas doesn’t come out of the ground in this project, the same or nearly the same amount will come from another source. But there’s typically no logical distinction that would justify such dissimilar approaches to impacts and benefits for fossil fuel proposals. As BLM explained in its 2017 federal coal program PEIS scoping report, “[t]he environmental (including climate change) *and economic impacts* of reform alternatives depend, in large part, on the estimated substitution effects.”⁴¹

Courts have long recognized that agencies may not provide misleading analysis by inflating benefits and obscuring or minimizing costs.⁴² In providing agencies with guidance on effective substitution analysis, CEQ should specifically instruct agencies to ensure substitution is applied equally to climate harms and purported economic benefits.

5. Explicitly call out and discuss infrastructure “lock-in” of new fossil projects.

While a GHG analysis that looks at fossil fuel emissions from fossil infrastructure projects is an important component of a NEPA analysis, it does not tell the whole story.

³⁹ NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. at 1204.

⁴⁰ Hasselman and Erickson, *supra*, note 25 at 4.

⁴¹ BLM, PEIS Coal Scoping Report at 6-48 (Jan. 2017) (emphasis added).

⁴² *E.g., Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198 (9th Cir. 2008) (finding analysis arbitrary and capricious where agency “put a thumb on the scale” through inconsistent treatment of costs and benefits). *Accord Utah Physicians for a Healthy Env’t v. BLM*, 528 F.Supp.3d 1222, 1232 (D. Utah 2021) (“The socioeconomics section may not lay out the economic benefits from the proposal without analyzing the socioeconomic costs of GHGs together with climate change.”)

Agencies must also consider the extent to which construction of new fossil fuel infrastructure “locks in” long-term emissions and creates an affirmative barrier to decarbonization efforts.⁴³ Privately financed infrastructure projects costing hundreds of millions if not billions of dollars will result in extraordinary pressure to continue using that infrastructure for many decades—well past the time when fossil fuel uses must be all but eliminated to ensure warming remains below thresholds set in international agreements—and beyond which catastrophic consequences are likely to accelerate and become irreversible. And other private actors make their own investment decisions based on the existence of such infrastructure, much like the construction of a new crude oil pipeline both spurs new development projects as well as other feeder pipelines relying on that new infrastructure.

Moreover, a project that “locks in” fossil fuels also “locks out” low carbon alternatives, “either because it uses up finite capital or to the extent that it contributes to social or political norms, building in redundancy of supply that helps to increase investor confidence in the long-term prospects of that fuel, or contributes to economies of scale for fossil fuel processing technologies.”⁴⁴ Other useful questions for the agency to ask may include whether the project could be repurposed at some point for low-GHG alternatives, and at what cost. These are crucial considerations that must be disclosed in a NEPA analysis.

In short, a useful climate analysis for major infrastructure projects must go further than just disclosing lifecycle emissions. Instead, agencies should assess the extent to which the project will create pressures to continue operations for decades and/or generate other investments that promote fossil fuel use, or risk becoming a stranded asset. In its final guidance CEQ should instruct agencies to disclose the risk of “locking in” GHG emissions and investments associated with fossil fuel infrastructure projects as part of their NEPA analyses.

CUMULATIVE EFFECTS

CEQ’s Final Guidance Should Provide Information About Appropriate Methodology to Address Cumulative Effects Requirements.

The very short discussion of cumulative impacts in the interim guidance falls short of what the science and the law require, and falls short of providing useful guidance to implementing agencies. Cumulative effects analysis that reflects reality is essential to useful NEPA analyses. Climate change is the quintessential impact that must be evaluated in an agency’s cumulative impacts analysis:

The large-scale nature of environmental issues like climate change show why cumulative impacts analysis proves vital to the overall NEPA

⁴³ Hasselman & Erickson, *supra*, note 25 at 13.

⁴⁴ Peter Erickson, *Assessing the Greenhouse Gas Emissions Impact of New Fossil Fuel Infrastructure*, Stockholm Env’t Inst. (2013).

analysis. The cumulative impacts analysis was designed precisely to determine whether a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact Thus, if BLM ever hopes to determine the true impact of its projects on climate change, it can do so only by looking at projects in combination with each other, not simply in the context of state and nationwide emissions. Without doing so, the relevant decisionmaker cannot determine whether, or how, to alter the program to lessen cumulative impacts on climate change.⁴⁵

CEQ explains in the Interim Guidance that:

the analysis and public disclosure of cumulative effects can be accomplished by quantifying GHG emissions and providing context for understanding their effects as discussed above, including by monetizing climate damages using estimates of the SC-GHG, placing those damages in the context of relevant climate action goals and commitments, and summarizing and citing to available scientific literature to help explain real world effects.⁴⁶

While this guidance is a good starting point, practically it suggests to the reader that a cumulative impacts analysis is essentially fulfilled by putting the analyses of indirect and direct effects in context and requires nothing more.⁴⁷ The position that a robust cumulative effects analysis of the incremental impacts resulting from additional GHG emissions is not required because climate change is inherently a cumulative phenomenon is circular and falls short of NEPA's hard look requirement.⁴⁸ The final guidance should provide additional information to assist agencies in developing the appropriate level of cumulative effects analysis, especially more robust guidance on the methods by which to contextualize impacts to determine the significance of GHG emissions from a proposed action.⁴⁹

⁴⁵ *WildEarth Guardians v. U.S. Bureau of Land Mgt.*, 457 F. Supp. 3d 880, 894 (D. Mont. 2020) (internal quotations and citations omitted).

⁴⁶ 88 Fed. Reg. 1206.

⁴⁷ While the cumulative effects language in the 2023 Interim Guidance is more in line with relevant climate science and case law than the 2016 Interim Guidance (*see* section A.5), essentially the two say the same thing: that a robust cumulative emissions and climate impacts analysis is not required by NEPA, “[g]iven that climate change is the result of the increased global accumulation of GHGs climate effects analysis is inherently cumulative in nature.” 88 Fed. Reg. 1206.

⁴⁸ *See, e.g., Ctr. for Biological Diversity v. Nat’l Hwy. Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) (“[T]he fact that climate change is largely a global phenomenon that includes actions that are outside of the agency’s control does not release the agency from the duty of assessing the effects of its actions on global warming within the context of other actions that also affect global warming.”)

⁴⁹ *See, Diné Citizens Against Ruining Our Env. v. Haaland*, 59 F.4th 1016, 1042 (10th Cir. 2023) (“if an accurate method exists to determine the effect of the proposed action, BLM must perform that analysis or explain why it has not.”) (citing *WildEarth Guardians v. Bernhardt*, 502 F. Supp.

Mere quantification of emissions “does not evaluate the incremental impact that these emissions will have on climate change or on the environment.”⁵⁰ “Indeed, all agency actions causing an increase in GHG emissions will appear de minimis when compared to the regional, national, and global numbers.”⁵¹

For actions “with *relatively large* GHG emissions or reductions or that will perpetuate reliance on GHG-emitting energy sources,” CEQ advises agencies to explain how the proposed action and alternatives would “help meet or detract from achieving relevant climate action goals and commitments.”⁵² However, the Interim Guidance provides no basis on which to judge whether GHG emissions are relatively large or small, and no justification for this distinction in light of the fact that climate change is quintessentially a problem of cumulative additions, even the largest of which appears small on a global scale. On the one hand, CEQ acknowledges, as it must, that “diverse individual sources of emissions each make a relatively small addition to the global atmospheric GHG concentration that *collectively have a large effect*” which is “the nature of climate change itself.”⁵³ On the other hand, CEQ advises that “actions *with only small* GHG emissions may be able to rely on less detailed emissions estimates.”⁵⁴ Agencies could better reconcile these statements with useful analysis if CEQ provided more guidance on how to evaluate the level of analysis needed for projects with differing levels of GHG emissions. The final guidance should direct agencies to prevent segmentation of cumulatively large impacts and should provide additional information to assist agencies in developing the appropriate level of cumulative effects analysis, especially more robust guidance on the methods by which to contextualize impacts, in order to determine the significance of GHG emissions from a proposed action. We recommend that some specific examples interpreting the “rule of reason” be included in the final guidance.

As one example to illustrate why more is needed in the Interim Guidance to address cumulative effects analysis and significance evaluation, we point out that in recent U.S. Bureau of Land Management onshore oil and gas lease sales, the agency regularly and arbitrarily, and contrary to NEPA, fails to consider the effects – including those related to climate and GHG emissions as well other impacts, such as those to wildlife habitat, water pollution, impacts to recreation, socioeconomic impacts, public health impacts, and environmental justice impacts – of the lease sales when added to the effects of other lease sales, despite the lease sales being part of a national oil and gas leasing program across

3d 237, 255 (D.D.C. 2020) (“BLM either had to explain why using a carbon budget analysis would not contribute to informed decisionmaking, in response to WildEarth’s comments, or conduct an ‘accurate scientific analysis’ of the carbon budget.”) (quoting 40 C.F.R. § 1500.1(b)); *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022) (recognizing the requirement of using “science-based criteria” for determining “significance [of GHG emissions] in terms of contribution to global warming that is grounded in the record and available scientific evidence.”)

⁵⁰ *Ctr. For Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d. 1172, 1216 (9th Cir. 2008).

⁵¹ 88 Fed. Reg. 1201, *Diné CARE*, 59 F.4th at 1043.

⁵² 88 Fed. Reg. 1203 (emphasis added).

⁵³ *Id.* (emphasis added).

⁵⁴ *Id.* at 1202 (emphasis added).

multiple states. The failure to properly evaluate cumulative effects results in the agency finding no significant effects, thereby masking the severity of the adverse effects.

ENVIRONMENTAL JUSTICE

Our Organizations Urge that the Final Guidance Include More Detailed Direction Regarding the Need for Agencies to Significantly Improve the Analysis of Alternatives, Effects and Decisionmaking on Environmental Justice Communities and their Involvement in the Process.

The federal government's efforts to address current and historic environmental injustice through decisionmaking that addresses these historic and current severe impacts are crucial and integral to NEPA. NEPA should be seen as a bridge, not a barrier, to ensuring that: (1) we build out the clean energy infrastructure of the future in a just, equitable, sustainable, and timely way; and (2) we increase, not decrease, community resilience to climate change. As such, cumulative impacts and efforts to address them must include a broad range of strategic, scientific, technological, regulatory, community engagement, and economic issues related to environmental justice. The final guidance should redirect agencies to comply with existing CEQ Guidance on Environmental Justice Under NEPA⁵⁵ by a) considering the composition of the affected area to identify potentially affected tribal, minority or low-income communities; b) analyzing relevant public health and other available credible scientific information concerning the potential for cumulative exposure to affected communities health; c) recognizing the past and present interrelated cultural, social, occupational, historical and economic factors that may amplify the reasonably foreseeable future cumulative effects on the community and the surrounding environment; d) implement effective participation strategies in concert with the affected communities, including appropriate tribal representation and government to government consultation with tribal nations.⁵⁶

Agencies should also be reminded of the requirement to respond to comments regarding environmental justice concerns by either modifying alternatives or analysis to respond to the comment or explaining why the comments do not warrant agency response.⁵⁷ The final guidance should also direct agencies to explain how the agency considered and incorporated environmental justice concerns into its final decision on the proposed action.⁵⁸

1. The requirement to assess health effects should be emphasized in the final guidance.

In particular, in the climate context, we emphasize that agencies should be explicitly directed to include health effects in the NEPA analysis, as long

⁵⁵ <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf>

⁵⁶ <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/>

⁵⁷ 40 CFR § 1503.4

⁵⁸ 40 CFR § 1505.2(a).

required.⁵⁹ As the National Research Council Report notes, agencies “often lack public health expertise, and the lack of guidance may be a disincentive to a more robust, systematic approach to health.”⁶⁰ As the Pan American Health Organization has stated, “Climate change is the biggest global health threat of the 21st century. Health is and will be affected by the changing climate through direct impacts (heat waves, droughts, heavy storms, and sea-level rise), and indirect impacts (vector-borne and airways diseases, food and water insecurity, undernutrition, and forced displacements).”⁶¹ As numerous studies, including government studies, have shown, it is the environmental justice communities in the U.S. that are the most significantly affected by climate-related health effects.⁶² Focusing increased attention on these communities is critically important for many reasons; indeed, as the IPCC’s latest report states, “Adaptation and mitigation actions that prioritize equity, social justice, climate justice, rights-based approaches, and inclusivity, lead to more sustainable outcomes, reduce trade-offs, support transformative change and advance climate resilient development.”⁶³

Health impact assessment, a methodology modeled after environmental impact assessment, has been broadly accepted by institutions such as the National Research Council⁶⁴ and the Center for Disease Control.⁶⁵ In the NEPA context, agencies need to:

- i. Determine when to conduct a systematic analysis of health effects in an EIS or an EA;
- ii. Determine what populations or communities are affected and describe baseline conditions in them;
- iii. Determine the appropriate scope of health problems in close consultation with the affected communities and public health experts;
- iv. Provide analysis of health effects in a scientifically and legally defensible manner; and

⁵⁹ 40 CFR §1508.1(g).

⁶⁰ *Id.*

⁶¹ PAHO, Climate Change and Health, <https://www.paho.org/en/topics/climate-change-and-health>.

⁶² EPA. 2021. Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts. U.S. Environmental Protection Agency, EPA 430-R-21-003; *Climate Changes Health: Ensuring Environmental Justice Underlies Public Health’s Climate Change Work, A Summit’s Proceeding Report*, August, 2018, available at <https://graham.umich.edu/media/files/APHA-Climate-Justice-Summit-Proceedings-2018.pdf>

⁶³ IPCC Synthesis Report, Summary for Policymakers, C.5.2. (March 2023).

⁶⁴ National Research Council. 2011. *Improving Health in the United States: The Role of Health Impact Assessment*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/13229>.

⁶⁵ <https://www.cdc.gov/healthyplaces/hia.htm>

- v. Identify appropriate mitigation measures for any identified effects on public health.⁶⁶

2. The concerns of and impacts on environmental justice communities must be at the forefront of cumulative effects analysis of proposed climate mitigation measures, including carbon capture proposals.

Environmental justice analysis integrated into the NEPA process must cover the broad spectrum of effects potentially realized by these communities in all contexts, including proposed climate mitigation measures. Importantly, existing and proposed carbon capture, utilization and sequestration activities (CCUS) disproportionately occur in proximity to vulnerable communities since that is where many fossil fuel extraction, transportation and processing facilities were constructed. Our organizations urge CEQ to direct agencies to incorporate co-pollutant modeling into cumulative effects analysis for all such proposed actions.

EVALUATING SIGNIFICANCE

While Retaining the Direction on the Social Cost of Carbon, the Final Guidance Should Include Additional Direction Regarding the Evaluation of the Magnitude and Severity of Climate Impacts of the Proposed Action and Alternatives.

1. The guidance properly recognizes the importance of providing monetized estimates for climate impacts using the social cost of greenhouse gases.

CEQ appropriately recommends that agencies should apply the best available SC-GHG estimates to emissions, even when other costs and benefits are not monetized.⁶⁷ The SC-GHG provides critical context for the significance of climate impacts. Furthermore, while NEPA does not require an analysis that fully monetizes costs and benefits associated with an action, in instances where an agency has monetized the benefits associated with an action and can reasonably quantify GHG emissions increases, courts have determined that the agency must include a monetized estimate of the climate impacts of an action using the best available SC-GHG.⁶⁸

⁶⁶ *Improving Health in the United States*, Appendix F, “Analysis of Health Effects under the National Environmental Policy Act.”

⁶⁷ 88 Fed. Reg. 1202.

⁶⁸ *See, e.g., California v. Bernhardt*, 472 F. Supp. 3d 573, 623 (N.D. Cal. 2020) (“It is arbitrary for an agency to quantify an action's benefits while ignoring its costs where tools exist to calculate those costs.”), *High Country Conservation Advocates v. United States Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (“arbitrary and capricious to quantify the *benefits* of [agency action] and then explain that a similar analysis of the *costs* was impossible when such an analysis was in fact possible”), *Mont. Envtl. Info. Ctr. v. United States Office of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017) (similar), *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200, 1214 (9th Cir. 2008) (holding that NEPA requires an agency to analyze the effects of its actions on global climate change and cannot assign a cost of zero to emissions).

We strongly support the Interim Guidance’s recommendations on the monetization of climate damages through the use of the SC-GHG, placing those costs in the context of relevant climate goals and commitments, and summarizing available scientific literature to document real-world effects from GHG emissions. Yet, while these steps are all useful in contextualizing a project’s GHG emissions, in most respects, applying these tools in isolation with no standard or threshold by which to measure their significance does not “properly evaluate the severity of the adverse effects” from the quantified GHG emissions in order to fully inform the decisionmaker and the public about the climate impacts of a proposed project.⁶⁹

2. The final guidance should include direction on utilizing the carbon budget tool to evaluate the magnitude and severity of GHG emissions and resulting climate impacts.

In addition to recommendations on monetizing climate impacts using the SC-GHG estimates, we request that the final guidance include an additional accepted methodology available for analyzing the magnitude and severity of GHG emissions: the application of those emissions to the remaining global carbon budget. The carbon budget represents a cap on the remaining stock of GHGs that can be emitted while still keeping global average temperature rise below scientifically-established warming thresholds—beyond which climate change impacts may result in catastrophic and irreparable harm to the biosphere and humanity. The use of a carbon budget is essential for evaluating whether a given project would help meet or detract from achieving climate goals, and for analyzing the scope of such help or hindrance.

The Tenth Circuit Court of Appeals recently described the carbon budget as an accepted methodology “deriv[ing] from science suggesting the total amount of GHGs that are emitted is the key factor to determine how much global warming occurs. The carbon budget is a finite amount of total GHGs that may be emitted worldwide, without exceeding acceptable levels of global warming.”⁷⁰ The court held that BLM violated the law by failing to consider the impacts of projected GHG emissions from new oil and gas well drilling approvals because it “neither applied the carbon budget method nor explained why it did not.”⁷¹

The 2023 Interim Guidance recommends that agencies should place GHG emissions “in the context of relevant climate action goals and commitments including Federal goals, international agreements, state or regional goals, Tribal goals, agency-specific goals, or others as appropriate.”⁷² Perhaps the most relevant climate action commitment for

⁶⁹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)

⁷⁰ *Diné CARE.*, 59 F.4th at 1043.

⁷¹ *Id.* (“NEPA does not give BLM the discretion to ignore the impacts to the environment when there are methods for analyzing those impacts. So, while it is correct that BLM need not use any specific methodology, it is not free to omit the analysis of environmental effects entirely when an accepted methodology exists to quantify the impact of GHG emissions from the approved APDs.”)

⁷² 88 Fed. Reg. at 1203.

purposes of CEQ's guidance is the United States' commitment to the climate change target of holding the long-term global average temperature "to well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 CO₂ above pre-industrial levels" under the Paris Agreement.⁷³ The Paris Agreement established the CO₂ climate target given the evidence that two degrees of warming would lead to catastrophic climate harms.⁷⁴ Scientific research has estimated the global carbon budget—the remaining amount of carbon dioxide that can be emitted—for maintaining a likely chance of meeting the Paris climate targets, providing clear benchmarks for the United States and global climate action.⁷⁵ It should also be noted that the U.S. is a signatory to the Global Methane Pledge, which is "a collective effort to reduce global methane emissions at least 30 percent from 2020 levels by 2030," and the Global Methane Pledge Energy Pathway, which aims to capture the maximum potential of cost-effective methane mitigation in the oil and gas sector and eliminate routine flaring as soon as possible, and no later than 2030.⁷⁶

Immediate and aggressive greenhouse gas emissions reductions are necessary to keep warming well below a 2 degree Celsius rise above pre-industrial levels. The IPCC Fifth Assessment Report and other expert assessments have established global carbon budgets, or the total amount of carbon that can be burned while maintaining some probability of staying below a given temperature target.⁷⁷ Most recently, the IPCC Sixth Assessment Report estimated the carbon budget for a 67 percent probability of limiting temperature rise to 1.5°C at just 400 GtCO₂ from the beginning of 2020 and at 500 GtCO₂ for a 50

⁷³ United Nations Framework Convention on Climate Change, Conference of the Parties (Nov. 30-Dec. 11, 2015), Adoption of the Paris Agreement Art. 2, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015), available at: <http://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf> ("Paris Agreement"). The United States signed the Paris Agreement on April 22, 2016 as a legally binding instrument through executive agreement, and the treaty entered into force on November 4, 2016.

⁷⁴ IPCC, Global Warming of 1.5°C, an IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty (Oct. 6, 2018), available at: <http://www.ipcc.ch/report/sr15/>.

⁷⁵ *Id.*

⁷⁶ <https://www.globalmethanepledge.org/> <https://www.state.gov/u-s-eu-joint-press-release-on-the-global-methane-pledge-energy-pathway/>

⁷⁷ For example, the 2013 IPCC Fifth Assessment Report estimated that total cumulative anthropogenic emissions of CO₂ must remain below about 1,000 GtCO₂ from 2011 onward for a 66 percent probability of limiting warming to 2°C above pre-industrial levels, and to 400 GtCO₂ from 2011 onward for a 66 percent probability of limiting warming to 1.5°C. *See* IPCC [Intergovernmental Panel on Climate Change], 2013: Summary for Policymakers. In: *Climate Change 2013: The Physical Science Basis, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Stocker, T.F. et al. (eds.)], Cambridge University Press (2013) at 25; IPCC [Intergovernmental Panel on Climate Change], *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)], IPCC, Geneva, Switzerland, 151 pp. (2014) at 63-64 & Table 2.2.

percent probability of 1.5°C.⁷⁸ A 2022 study has an even more harrowing estimate of just 300 GtCO₂ remaining from the start of 2022 for a 50 percent chance of limiting warming to 1.5°C.⁷⁹ A third study found that, at current emissions rates, the world will exhaust the carbon budget for a 50 percent chance for 1.5°C in 10 years and the carbon budget for a 67 percent chance in seven years.⁸⁰ Published scientific studies have also estimated the United States' portion of the global carbon budget by allocating the remaining global budget across countries based on factors including equity principles and economics. Estimates of the remaining U.S. carbon budget consistent with meeting a 1.5°C target are negative or near zero.⁸¹ Therefore, whatever remaining carbon budget the U.S. has left, if any, is very small and rapidly being consumed. We ask that the final guidance specifically include the well-accepted carbon budget tool for agencies to use to evaluate whether a given project would help meet or detract from achieving climate goals.

The Final Guidance Should Continue to Give Special Attention to Biological GHG Sources and Sinks and Add Additional Direction Regarding Certain Features.

1. The final guidance should direct agencies to evaluate the GHG sequestration benefits of wetlands and other natural systems affected by a federal action.

The Final Guidance should direct agencies to evaluate the GHG sequestration benefits of wetland and other natural systems that will be affected by a federal action as part of the baseline for assessing climate change impacts. A growing body of science demonstrates the importance of healthy wetlands as vital carbon sinks, as summarized in a May 2022 study published in *Science*. That study found that while wetlands cover just 1% percent of the Earth's surface, they “store 20% of ecosystem organic carbon. This disproportional share is fueled by high carbon sequestration rates and effective storage in peatlands, mangroves, salt marshes, and seagrass meadows, which greatly exceed those of oceanic and forest ecosystems.” This study reviews the process that underlines these carbon sink qualities and documents:

⁷⁸ Intergovernmental Panel on Climate Change, Summary for Policymakers In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021), <https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/> at SPM-38.

⁷⁹ CONSTRAIN, Zero In On: The Critical Decade: Insights from the Latest IPCC Reports on the Paris Agreement, 1.5°C, and Climate Impacts (2022).

⁸⁰ Calverley and Anderson, Phaseout Pathways for Fossil Fuel Production Within Paris-compliant Carbon Budgets (2022), [https://www.research.manchester.ac.uk/portal/en/publications/phaseout-pathways-for-fossil-fuel-production-within-paris-compliant-carbon-budgets\(c7235a8e-e3b1-4f44-99de-c27958c03758\).html](https://www.research.manchester.ac.uk/portal/en/publications/phaseout-pathways-for-fossil-fuel-production-within-paris-compliant-carbon-budgets(c7235a8e-e3b1-4f44-99de-c27958c03758).html)

⁸¹ Van den Berg, Nicole et al., Implications of various effort-sharing approaches for national carbon budgets and emission pathways, *Climatic Change* 162: 1805-1822 (2020), <https://link.springer.com/article/10.1007%2Fs10584-019-02368-y>; Dooley, Kate et al., Ethical choices behind quantifications of fair contributions under the Paris Agreement, *Nature Climate Change* 11: 300-305 (2021), <https://www.nature.com/articles/s41558-021-01015-8>.

“how feedback disruption can switch wetlands from carbon sinks into sources. Currently, human activities are driving rapid declines in the area of major carbon-storing wetlands (1% annually). Our findings highlight the urgency to stop through conservation ongoing losses and to reestablish landscape-forming feedbacks innovations that recover the role of biogeomorphic wetlands as the world’s biotic carbon hotspots.”⁸²

2. *The final guidance should direct agencies to evaluate the GHG emissions from reservoirs and from other areas where water flow is reduced (such as behind navigation locks and dams).*

Dams and reservoirs emit a significant amount of methane to the atmosphere. The Guidance should direct agencies to evaluate the GHG emissions from reservoirs, and from other areas where water flow is reduced such as the areas behind navigation locks and dams (e.g., the Upper Mississippi River Navigation System), hydropower and other dams, low head dams, and weirs.⁸³ This analysis should be required as a fundamental component of NEPA reviews, and of supplemental NEPA reviews, carried out in connection with new projects, including the development of new operating plans (including such things as water control manuals, and operation and maintenance plans for navigation systems and individual locks and dams); and when updating existing operating plans. These analyses are critical for planning and operating projects in a way that avoids, minimizes, and mitigates the release of GHGs from reservoirs and other permanently flooded lands.

As discussed above, methane is a GHG that is 28 to 36 times more warming than carbon dioxide over a 100-year period and approximately 84 times as potent over a 20-year period, and thus has a disproportionate impact on short-term warming relative to CO₂.⁸⁴ Globally, dams and reservoirs (with and without hydropower) are estimated to emit approximately 13.4 million metric tons of methane per year, with nearly half of that coming from hydroelectric reservoirs.⁸⁵ Some individual hydropower facilities emit on par with fossil fuel sources like coal and natural gas when considered on an emission-per-unit-of-energy basis.⁸⁶ In 2020 reservoir emissions rivaled the international shipping

⁸² Ralph J. M. Temmink, L.P.M. Lamers, C. Angelini et al., *Recovering wetland biogeomorphic feedbacks to restore the world’s biotic carbon hotspots*, Cite this article as R. J. M. Temmink et al., *Science* 376, eabn1479 (2022). DOI: 10.1126/science.abn1479.

⁸³ The Environmental Protection Agency has noted, “[s]ince reservoirs are not natural systems, greenhouse gasses emanating from reservoirs are considered to have an anthropogenic, or human-made, origin.” United States EPA, “Research on Emissions from U.S. Reservoirs”, <https://www.epa.gov/air-research/research-emissions-us-reservoirs> (last visited Oct. 20, 2022).

⁸⁴ Henriette I. Jager et al., *Getting Lost Tracking the Carbon Footprint of Hydropower*, 162 RENEWABLE AND SUSTAINABLE ENERGY REV. 2 (2022).

⁸⁵ Bridget R. Deemer et al., *Greenhouse Gas Emissions from Reservoir Water Surfaces: A New Global Synthesis*, 66 BIOSCIENCE 494 (2016) (Deemer 2016).

⁸⁶ For example, the validated G-res Tool modeling results of Weiss dam on the Coosa River in Alabama shows a net carbon footprint of 118,437 metric tons of carbon dioxide equivalent being

sector in terms of carbon dioxide equivalence.⁸⁷ Methane emissions have been observed at all reservoirs where measurements have been taken, including in at least 11 US states and Puerto Rico (AL, CA, CO, GA, ID, NC, OR, SC, TN, WA, WI, PR) according to a detailed 2016 study (and its underlying data set).⁸⁸ A 2020 report by the Environmental Protection Agency (EPA) estimates that reservoirs and other artificially flooded lands produced 797 kilotons of methane, annually.⁸⁹

Methane is produced through the decomposition of organic matter (e.g., leaves, trees, algae) under the anoxic (i.e., no oxygen) conditions that are common in reservoir sediments. Methane is emitted from anthropogenic reservoirs through several pathways including: (1) continuous diffusion across the surface of the reservoir; (2) bubbling (“ebullition”) from sediments; and (3) transport through plants growing within the reservoir.⁹⁰ Ebullition is generally understood to be the primary mechanism for methane emissions from reservoirs,⁹¹ particularly in the first 10 to 20 years after dam construction, though emissions persist for the life of the reservoir.⁹²

The energy generation technology used at hydropower dams can increase the net methane emissions of the reservoir through turbine gassing, spill changes, and drawdowns.⁹³ When the water in a reservoir is passed through energy-generating turbines and the spillway (which deposits the water back into the river or channel), the water is “degassed,” meaning that the dissolved gases naturally present in the water are separated from the water and released into the atmosphere.⁹⁴ Additional GHGs are released from

emitted per year, with methane composing over 60% of the emissions. Validated G-res modeling results for Weiss dam and reservoir and R.L. Harris dam and reservoir are available at https://alabamarivers.org/reservoir_emissions.

⁸⁷ Cynthia Soued et al, “Reservoir Carbon Dioxide and Methane Emissions and Their Climate Impact Over the Period 1900-2060”, *Nature Geoscience*, (Sept. 2022), Vol 15, 700-705, <https://www.nature.com/articles/s41561-022-01004-2>.

⁸⁸ Deemer 2016.

⁸⁹ EPA (2022) Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2020. U.S. Environmental Protection Agency, EPA 430-R-22-003, at 6-5. <https://www.epa.gov/ghgemissions/draft-inventory-us-greenhouse-gas-emissionsand-sinks-1990-2020>.

⁹⁰ See Jake J. Beaulieu et al., *High Methane Emissions from a Midlatitude Reservoir Draining an Agricultural Watershed*, 48 ENV'T SCI. AND TECH. (2014). See also Deemer 2016; John A. Harrison et al., Reservoir Water-Level Drawdowns Accelerate and Amplify Methane Emission, 51 ENV'T SCI. AND TECH. 1267.

⁹¹ Jake J. Beaulieu et al., *Methane and Carbon Dioxide Emissions from Reservoirs: Controls and Upscaling*, 125 J. OF GEOPHYSICAL RSCH. 1, 11 (2020). Sjoji D. Thottathil & Yves T. Prairie, *Coupling of Stable Carbon Isotopic Signature of Methane and Ebullitive Fluxes in Northern Temperate Lakes*, 777 SCI. OF THE TOTAL ENV'T 146117 (2021).

⁹² Nathan Barros et al., *Carbon Emission From Hydroelectric Reservoirs Linked To Reservoir Age and Latitude*, 4 NAT. GEOSCIENCE 593 (2011).

⁹³ Henriette I. Jager et al., *Getting Lost Tracking the Carbon Footprint of Hydropower*, 162 RENEWABLE AND SUSTAINABLE ENERGY REV. 2 (2022).

⁹⁴ A. Levasseur et al., *Improving the Accuracy of Electricity Carbon Footprint: Estimation of Hydroelectric Reservoir Greenhouse Gas Emissions*, 136 RENEWABLE AND SUSTAINABLE ENERGY REV. 110433 (2021).

large drawdowns, which cause increased bubbling of methane and periodic exposure of flooded, methane-producing sediments to the atmosphere.⁹⁵ River segments downstream of hydropower dams are also associated with increased methane emissions, especially if anoxic, methane-rich water from the bottom of the reservoir flows through the turbines.⁹⁶

3. The final guidance should be expanded to explicitly cover ocean and coastal resource management planning.

The discussion regarding NEPA analyses for management planning⁹⁷ should be expanded to include the, “land, ocean, coastal and resource management context” and a reference or mention should be added that addresses the difference between land-based sources and sinks and those that are ocean and coastal-based, including the different levels of certainty in modeling and quantification of sources and sinks. Additionally in this section, the reference to “Federal land and resource management agencies” should be expanded to “Federal land, ocean, coastal, and resource management agencies” to include NOAA and BOEM in the statement. It is critical that the, “specific principles and guidance for considering biological carbon in management and planning decisions,” capture principles and guidance for ‘blue carbon’ and therefore included agencies responsible for ocean and coastal based ecosystems is critical.

CONSIDERING THE EFFECTS OF CLIMATE CHANGE ON A PROPOSED ACTION

The Final Guidance Should Provide Additional Guidance on a Number of Issues Related to the Effects of Climate Change on a Proposed Action and the Affect Environment

The Interim Guidance properly recognizes that a NEPA analysis must consider how the impacts of climate change could affect a proposed action and its environmental outcomes, a requirement that has been confirmed by multiple court decisions.⁹⁸ This analysis is essential in light of the pervasive and escalating impacts of climate change on the natural and built environment.⁹⁹

⁹⁵ Bridget R. Deemer et al., *Greenhouse Gas Emissions from Reservoir Water Surfaces: A New Global Synthesis*, 66 *BIOSCIENCE* 494 (2016). *See also* John A. Harrison et al., *Reservoir Water-Level Drawdowns Accelerate and Amplify Methane Emission*, 51 *ENV’T SCI. AND TECH.* 1267.

⁹⁶ Bridget R. Deemer et al., *Greenhouse Gas Emissions from Reservoir Water Surfaces: A New Global Synthesis*, 66 *BIOSCIENCE* 494 (2016).

⁹⁷ 88 Fed. Reg. 1207.

⁹⁸ *See, e.g., AquAlliance, et al., v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969 (E.D. Cal. 2018); *National Wildlife Federation v. National Marine Fisheries Service*, 184 F. Supp. 3d 861, 875 (D. Or. 2016); *Friends of Wild Swan v. Jewell*, No. CV 13-61-M-DWM, 2014 U.S. Dist. LEXIS 116788, at *31 (D. Mont. Aug. 21, 2014); *Southern Utah Wilderness Alliance v. Burke*, 981 F. Supp. 2d 1099, 1110–1111 (D. Utah 2013).

⁹⁹ ROMANY M. WEBB ET AL., *EVALUATING CLIMATE RISK IN NEPA REVIEWS: CURRENT PRACTICES AND RECOMMENDATIONS FOR REFORM* 23 (2022), https://scholarship.law.columbia.edu/sabin_climate_change/185/ (“Without first considering the how climate impacts will affect a project and the surrounding environment, agencies cannot possibly hope to make a decision that reflects the most ‘beneficial uses of the environment

As CEQ’s Interim Guidance affirms, agencies should incorporate climate impact considerations throughout their NEPA analyses, including in assessments of: the baseline current and projected future state of the affected environment; reasonably foreseeable environmental effects of the proposed action and alternatives; resilience, adaptation, and mitigation measures; and disproportionate effects on environmental justice communities.¹⁰⁰ The analysis should consider all types of climate impacts that could affect the proposed action and its environmental outcomes, should be appropriately tailored to the characteristics of the proposed action, and should be sufficiently concrete and comprehensive to meaningfully inform the agency’s decision-making.¹⁰¹

1. The final guidance should provide additional direction regarding the best available science and available tools and resources.

In addition to relying on available national climate assessments or reports, as the guidance encourages,¹⁰² CEQ should also advise agencies to incorporate and utilize the best available scientific information on climate impacts on specific resources that may be impacted by the proposed action and its alternatives. To provide a concrete example, best available science shows that climate change is predicted to affect individual species such as caribou in Alaska’s Arctic through increased wildfire, summer insect harassment, and icing events, as well as changes to forage quality and quantity, spring phenology, and distribution and migratory behavior.¹⁰³ Thus, when considering an oil and gas development proposal, the Bureau of Land Management must analyze how disturbance, fragmentation, and other impacts from development will affect climate-stressed caribou over the life of the project. Simply acknowledging that climate change will make caribou – or any other resource – more vulnerable to potential impacts from a proposed action is insufficient. This sort of qualitative, resource-specific analysis is necessary to fully disclose the impacts of climate change on a proposed action and its reasonably foreseeable direct, indirect, and cumulative impacts on the affected environment, as well as determine the significance of those impacts and consider through alternatives and effects analysis how best to mitigate them in the context of a climate-stressed environment.

CEQ rightly notes that agencies “should use the most up-to-date scientific projections available, identify any methodologies and sources used, and where relevant, disclose any relevant limitations of studies, climate models, or projections they rely on.”¹⁰⁴ While the

without degradation, risk to health or safety, or other undesirable and intended consequences,’ and are thus at risk of violating their statutory responsibilities.”) (quoting 42 U.S.C. § 4331(b)(3)).

¹⁰⁰ 88 Fed. Reg. 1208-1209.

¹⁰¹ WEBB ET AL., *supra* note 92 at 27 (explaining that effective climate impact analysis should be holistic, specific, and actionable).

¹⁰² CEQ Interim Guidance at 1208.

¹⁰³ *E.g.*, Mallory, Conor D., and Mark S. Boyce. “Observed and predicted effects of climate change on Arctic caribou and reindeer.” *Environmental Reviews* 26.1 (2018): 13–25.

¹⁰⁴ 88 Fed. Reg. at 1,208.

Interim Guidance already notes that “the best available climate change reports . . . often project at least two possible future emissions scenarios” and instructs agencies to “identify and use information on future projected GHG emissions scenarios to evaluate potential future impacts,” we recommend that CEQ expressly specify that agencies should consider climate impacts under multiple possible GHG emissions scenarios, including a high GHG emissions scenario.¹⁰⁵ Agencies should take into account the range of potential climate change trajectories to ensure their assessments are realistic and resilient.

To assist agencies in implementing this guidance, we recommend that CEQ build upon the list of GHG-focused tools and resources that it maintains with additional tools and resources that agencies can use to rigorously assess effects of climate change on a proposed action and its outcomes.¹⁰⁶ As with the GHG-focused list, the climate impact-focused list should include notes that contextualize and recommend specific uses for the resources. This would ensure that agencies and the public alike are aware of, can easily access, and understand how to use the many relevant resources and tools available to conduct such analyses.¹⁰⁷

2. The final guidance should direct agencies to evaluate the resilience benefits of the full array of natural systems affected by a federal action as part of the affected environment baseline.

As discussed above, healthy natural systems play a significant role in sequestering GHG emissions. Healthy natural systems are also essential if the nation’s human and wildlife communities are to remain resilient in the face of the many challenges resulting from climate change. As defined in the Interim Guidance, resilience is “the ability to prepare for and adapt to changing conditions and withstand and recover rapidly from disruption.”

To ensure meaningful consideration of climate change impacts the final guidance should direct agencies to evaluate the resilience benefits of the full array of natural systems affected by a federal action as part of the affected environment baseline. The final guidance should also provide examples of the ways in which natural systems advance resilience, some of which are highlighted below.

For example, as CEQ is well aware, healthy wetlands, floodplains and rivers provide essential flood protection services that are critical to community resilience. Wetlands act

¹⁰⁵ WEBB ET AL., *supra* note 92, at 28.

¹⁰⁶ *GHG Tools and Resources*, NEPA.GOV, <https://ceq.doe.gov/guidance/ghg-tools-and-resources.html> (last visited Feb. 9, 2023); *see* WEBB ET AL., *supra* note 74 at Part 4.3 and Appendix 2 (listing relevant data sources, tools, and guidance documents).

¹⁰⁷ *See* WEBB ET AL., *supra* note 92, at 55-56 (“[W]hile many useful resources are already publicly available, some federal agencies appear to be unaware of or unwilling to use them. For example, FERC has argued that it is unable to perform detailed climate impact analysis for hydroelectric projects because it lacks access to localized climate projections, but useful projections have been published by other government agencies.”) (citing analysis of recent FERC EISs).

as natural sponges, storing and slowly releasing floodwaters after peak flood flows have passed, and coastal wetlands buffer the onslaught of hurricanes and tropical storms. A single acre of wetland can store one million gallons of floodwaters.¹⁰⁸ Just a 1 percent loss of a watershed's wetlands can increase total flood volume by almost seven percent.¹⁰⁹ Restoring a river's natural flow and meandering channel, and giving at least some floodplain back to the river, slows down floodwaters and gives the river room to spread out without harming homes and businesses.

As an example, wetlands prevented \$625 million in flood damages in the 12 coastal states affected by Hurricane Sandy, and reduced damages by 20 to 30 percent in the four states with the greatest wetland coverage.¹¹⁰ The forest and other conservation lands that make up the 28,000 acre Meramec Greenway along the Meramec River in southern Missouri contribute about \$6,000 per acre in avoided flood damages annually.¹¹¹ Wetlands in the Eagle Creek watershed of central Indiana reduce peak flows from rainfall by up to 42 percent, flood area by 55 percent, and maximum stream velocities by 15 percent.¹¹² Coastal wetlands reduced storm surge in some New Orleans neighborhoods by two to three feet during Hurricane Katrina, and levees with wetland buffers had a much greater chance of surviving Katrina's fury than levees without wetland buffers.¹¹³ These systems also have the significant added benefit of benefits of being self-sustaining and avoiding the risk of catastrophic structural failures.

Healthy rivers, floodplains, and wetlands are also essential for allowing people and wildlife to benefit from natural flood cycles. In a healthy, functioning river system, precipitation events and other natural increases in water flow can deposit nutrients along floodplains creating fertile soil for bottomland hardwood forests. Sediment transported by these increased flows form islands and back channels that are home to fish, birds, and other wildlife. By scouring out river channels and riparian areas, these events prevent rivers from becoming overgrown with vegetation. They also facilitate breeding and migration for a host of fish species, and provide vital connectivity between habitat areas.

¹⁰⁸ Environmental Protection Agency, "*Wetlands: Protecting Life and Property from Flooding.*" EPA 843-F-06-001. (2006) (factsheet).

¹⁰⁹ Demissie, M. and Abdul Khan. 1993. "Influence of Wetlands on Streamflow in Illinois." Illinois State Water Survey, Contract Report 561, Champaign, IL, Table 7, pp. 44-45.

¹¹⁰ Narayan, S., Beck, M.B., Wilson, P., et al., [The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA](#). Scientific Reports 7, Article number 9463 (2017), doi:10.1038/s41598-017-09269-z.

¹¹¹ Kousky, C., M. Walls, and Z. Chu. 2014. Measuring resilience to climate change: The benefits of forest conservation in the floodplain. p 345–360. In: V.A. Sample and R.P. Bixler, eds. *Forest Conservation and Management in the Anthropocene: Conference Proceedings*. Proceedings RMRS-P-71. Fort Collins, CO: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station.

¹¹² Javaheri, A., and M. Babbar-Sebens. 2014. On comparison of peak flow reductions, flood inundation maps, and velocity maps in evaluating effects of restored wetlands on channel flooding. *Ecological Engineering* 73: 132–145.

¹¹³ Bob Marshall, *Studies abound on why the levees failed. But researchers point out that some levees held fast because wetlands worked as buffers during Katrina's storm surge*, *The New Orleans Times-Picayune* (March 23, 2006).

In the deltas at the mouths of rivers, increased flows release freshwater and sediment, sustaining and renewing wetlands that protect coastal communities from storms and provide nurseries for multibillion dollar fisheries.

Wetlands are equally essential for ensuring thriving and resilient populations of fish and wildlife. Wetlands are some of the most biologically productive natural ecosystems in the world, and support an incredibly diverse and extensive array of fish and wildlife. America's wetlands support millions of migratory birds and waterfowl. Up to one-half of all North American bird species rely on wetlands. Although wetlands account for just about 5 percent of land area in the lower 48 states, those wetlands are the only habitat for more than one third of the nation's threatened and endangered species and support an additional 20 percent of the nation's threatened and endangered species at some time in their life. These same wetlands are home to 31 percent of the nation's plant species.¹¹⁴

3. The final guidance should direct agencies to evaluate the direct, indirect, and cumulative effects of a proposed action on the ability of affected natural systems to retain and/or increase resilience for communities and fish and wildlife in the face of climate change.

To facilitate development of alternatives that advance resilience and adaptation, the final guidance should direct agencies to evaluate the direct, indirect, and cumulative effects of a proposed action on the ability of the natural systems affected by the proposed action to retain and/or increase resilience for communities and fish and wildlife in the face of climate change.

As discussed above, the critical importance of healthy natural systems for both human and wildlife communities is well known. But the role that these systems play in ensuring resilience in the face of climate change is virtually never assessed or considered in the NEPA context.

For example, the Army Corps of Engineers did not evaluate the implications for ecosystem resilience in its September 2022 Draft Environmental Assessment and FONSI analyzing the Corps' plan to close a natural crevasse in the lowest reaches of the Mississippi River despite the well-recognized deltaic land-building that is occurring as a direct result of the crevasse and the EA's conclusion that closing the crevasse would result in the loss of 533 acres of wetlands from the loss of deltaic land building.¹¹⁵ As CEQ and the Army Corps are well aware, reestablishing Louisiana's coastal wetlands is critical to the long-term survival and resilience of this region. The Army Corps did not assess the adverse implications to ecosystem resilience from a project that would damage many tens of thousands of acres of hemispherically significant wetlands in its 2020

¹¹⁴ Environmental Protection Agency, Economic Benefits of Wetlands, EPA843-F-06-004 (May, 2006) (factsheet).

¹¹⁵ U.S. Army Corps of Engineers, Draft Finding of No Significant Impact and Draft Environmental Assessment, Mississippi River, Baton Rouge To The Gulf Of Mexico, Louisiana Neptune Pass Rock Closure, Plaquemines Parish, Louisiana September 2022.

supplemental Environmental Impact Statement on the Yazoo Area Pump Project.¹¹⁶ The Army Corps did not assess the adverse implications to resilience for fish and wildlife that rely on a 195-mile stretch of the Mississippi River despite acknowledging extensive adverse impacts to fish and wildlife habitat in its supplemental EIS on the activities it carries out to maintain navigation on this reach of the river.¹¹⁷ Similarly, the Army Corps did not assess the adverse implications to resilience in its analysis of an operating plan for the Apalachicola-Chattahoochee-Flint river system, despite the enormous harm that the plan would cause to the vitally important Apalachicola River and its floodplain.¹¹⁸

The changing climate, combined with historic and ongoing destruction¹¹⁹ and degradation¹²⁰ of vast swaths of habitat,¹²¹ have pushed America's wildlife into crisis, helping to drive the planet's ongoing 6th Mass Extinction of species.¹²² As many as one-

¹¹⁶ The Mississippi Delta wetlands that would be harmed by this devastating project are located in the heart of the Mississippi River Flyway. U.S. Army Corps of Engineers, *Second Final Supplemental, USACE, MS*, Final Supplement No. 2 to the 1982 Yazoo Area Pump Project Final EIS (December 2020).

¹¹⁷ Final Supplement to The Final Environmental Statement, Regulating Works on the Mississippi River Between The Ohio And Missouri Rivers (May 2017).

¹¹⁸ U.S. Army Corps of Engineers, Final Environmental Impact Statement, Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin in Alabama, Florida, and Georgia and a Water Supply Storage Assessment (December 2016).

¹¹⁹ For example, at least ten states have lost more than 70 percent of their wetlands, which provide essential fish and wildlife habitat, while 22 states have lost 50 percent or more of their original wetland acreage. T.E. Dahl and S.M. Stedman. 2013. [Status and trends of wetlands in the coastal watersheds of the Conterminous United States 2004 to 2009](#). U.S. Department of the Interior, Fish and Wildlife Service and National Oceanic and Atmospheric Administration, National Marine Fisheries Service. (46 pp); Dahl, T.E. 2006. [Status and trends of wetlands in the conterminous United States 1998 to 2004](#). U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. (112 pp); Dahl, T.E. 2000. [Status and trends of wetlands in the conterminous United States 1986 to 1997](#). U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. (82 pp); Dahl, T.E., and Johnson, C.E., 1991, [Status and trends of wetlands in the conterminous United States, mid-1970's to mid-1980's](#). U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. (28 pp).

¹²⁰ Fish and wildlife have also been severely harmed through the pervasive alteration of natural stream flows, including from reservoirs and locks and dams, which have occurred in 86 percent of the almost 3,000 streams assessed by the U. S. Geological Survey. U.S. Geological Survey, Ecological Health in the Nation's Streams, Fact Sheet 2013-3033 (July 2013); Carlisle, D.M., Meador, M.R., Short, T.M., Tate, C.M., Gurtz, M.E., Bryant, W.L., Falcone, J.A., and Woodside, M.D., 2013, [The quality of our Nation's waters—Ecological health in the Nation's streams, 1993–2005](#): U.S. Geological Survey Circular 1391 (120 pp).

¹²¹ For example, the construction of levees by the Army Corps and others to reduce the frequency and duration of flooding in the lower Mississippi River Valley is the single largest contributor to wetland losses in the country, according to the Department of the Interior. Report to Congress by the Secretary of the Interior, The Impact of Federal Programs on Wetlands, Volume II, at 145 (1994). Approximately 80 percent of the bottomland hardwood wetlands in the lower Mississippi River basin have already been lost approximately. Report to Congress by the Secretary of the Interior, The Impact of Federal Programs on Wetlands, Volume I at 39.

¹²² Gerardo Ceballos, Ehrlich Paul, Raven Peter, [Vertebrates on the brink as indicators of biological annihilation and the sixth mass extinction](#). Proceedings of the National Academy of

third of America’s plant and wildlife species are vulnerable, with one in five imperiled and at high risk of extinction.¹²³ A 2023 assessment found that an alarming 40% of all animal species in the United States are at risk of extinction and that 41% of all ecosystems “at risk of range-wide collapse.”¹²⁴ Approximately 40 percent of the nation’s freshwater fish species are now rare or imperiled.¹²⁵ Nearly 60 percent of the nation’s globally significant freshwater mussel species are imperiled or vulnerable, and an additional 10 percent are already extinct.¹²⁶

Our wildlife crisis extends well beyond rare and endangered species, and now affects many widespread and previously abundant creatures, such as the little brown bat, monarch butterfly, and many of our most beloved songbirds. State fish and wildlife agencies have identified more than 12,000 species nationwide in need of conservation action, and fully one-third of North America’s bird species require urgent conservation attention.¹²⁷

4. The final guidance should direct agencies to evaluate the direct, indirect, and cumulative effects / risks of a proposed action transferring flood risks to other communities, increasing flooding upstream, and increasing flooding downstream.

Structural projects, while necessary in some places including for flood risk reduction, can transfer flood risks to other communities. For example, a recent study found that building one large seawall in a small portion of California’s San Francisco Bay could

Sciences Jun 2020, 117 (24) 13596-13602; DOI: 10.1073/pnas.1922686117 (“The ongoing sixth mass extinction may be the most serious environmental threat to the persistence of civilization, because it is irreversible. . . . the sixth mass extinction is human caused and accelerating. . . . species are links in ecosystems, and, as they fall out, the species they interact with are likely to go also. . . . Our results reemphasize the extreme urgency of taking massive global actions to save humanity’s crucial life-support systems.”)

[18] U.S. Geological Survey, Ecological Health in the Nation’s Streams, Fact Sheet 2013-3033 (July 2013); Carlisle, D.M., Meador, M.R., Short, T.M., Tate, C.M., Gurtz, M.E., Bryant, W.L., Falcone, J.A., and Woodside, M.D., 2013, [The quality of our Nation’s waters—Ecological health in the Nation’s streams](#), 1993–2005: U.S. Geological Survey Circular 1391 (120 pp).

¹²³ Stein, B. A., L. S. Kutner, J. S. Adams eds. 2000. [Precious Heritage: The Status of Biodiversity in the United States](#). New York: Oxford University Press.

¹²⁴ NatureServe. 2023. Biodiversity in Focus: United States Edition. NatureServe: Arlington, VA at 8, 11 (https://www.natureserve.org/sites/default/files/NatureServe_BiodiversityInFocusReport_medium.pdf).

¹²⁵ Jelks, H. L., S.J. Walsh, N.M. Burkhead, et al. 2008. [Conservation status of imperiled North American freshwater and diadromous fishes](#). Fisheries. 33: 372-407.

¹²⁶ Williams, J. D., M. L. Warren, K. S. Cummings, J. L. Harris, and R. J. Neves. 1993. Conservation status of freshwater mussels of the United States and Canada. Fisheries 18: 6–22; Lydeard, C., R. H. Cowie, W. F. Ponder, et al. 2004. The global decline of nonmarine mollusks. BioScience 54 321-330.

¹²⁷ Stein, B. A., N. Edelson, L. Anderson, J. Kanter, and J. Stemler. 2018. [Reversing America’s Wildlife Crisis: Securing the Future of Our Fish and Wildlife](#). Washington, DC: National Wildlife Federation.

significantly increase flooding in other areas, causing up to \$723 million of flood damages to those areas during each flood event¹²⁸—an estimate that is highly conservative as it “doesn’t account for potential damage to ecosystems and fisheries.”¹²⁹ New levees, or levee raises, that may help one community can similarly push flood waters onto others, increasing risks for other communities including very often, communities of color and low-income communities that do not have the resources to construct or raise their own levees.

The impacts associated with transferring flood risks will be greatly exacerbated by the appreciable increases in both the intensity and number of extreme storms that the nation will suffer as our climate continues to warm.¹³⁰ In some locations, future extreme events could be twice as intense as historical averages.¹³¹ By 2100, previously rare extreme rainstorms could happen every two years.¹³² By 2050, high tides could cause “sunny day” flooding in coastal communities 25 to 75 days a year.¹³³ By the end of the century, homes and commercial properties currently worth more than \$1 trillion could be at risk of chronic flood inundation.¹³⁴

Storms and floods in the U. S. disproportionately harm Black, Latinx, Indigenous, low-income, and frontline communities. For example, the neighborhood that suffered the worst flood damage during Hurricane Harvey was in an area of southwest Houston where 49 percent of the residents are people of color. Damage from Hurricane Katrina was most extensive in the region’s Black neighborhoods. In four of the seven ZIP codes that suffered the costliest flood damages from Hurricane Katrina at least 75 percent of

¹²⁸ Michelle Hummel, Griffin R., Arkema K., Guerry A., PNAS 2021 Vol. 118 No. 29 e2025961118, [Economic evaluation of sea-level rise adaptation strongly influenced by hydrodynamic feedbacks](https://doi.org/10.1073/pnas.2025961118) <https://doi.org/10.1073/pnas.2025961118> (July 2021) (documenting that the seawall would divert 36 million cubic meters of flood waters (9.5 billion gallons) onto other communities, and demonstrating the value of natural infrastructure for alleviating flooding and damages along other stretches of the coastline.).

¹²⁹ Matt Simon, [Be very careful where you build that seawall](#), WIRED (July 14, 2021).

¹³⁰ The nation has already suffered more billion-dollar inland flood disasters in the last decade than in the prior three decades combined. We have also endured more billion-dollar hurricane disasters in the last five years than in the decade before. NOAA National Centers for Environmental Information (NCEI) U.S. Billion-Dollar Weather and Climate Disasters (2021) (<https://www.ncdc.noaa.gov/billions/>), DOI: [10.25921/stkw-7w73](https://doi.org/10.25921/stkw-7w73) (inland flooding “[caused by billion-dollar hurricanes \(i.e., Harvey, Florence, Matthew\) has also increased](#)”).

¹³¹ E&E News, Anne C. Mulkern, [Climate drives rise in global damage from storms — study](#), July 12, 2021; Madakumbura, G.D., Thackeray, C.W., Norris, J. et al. [Anthropogenic influence on extreme precipitation over global land areas seen in multiple observational datasets](#). Nat Commun 12, 3944 (2021). <https://doi.org/10.1038/s41467-021-24262-x>.

¹³² Inside Climate News, [New Study Shows Global Warming Intensifying Extreme Rainstorms Over North America](#), June 2, 2020; Megan C. Kirchmeier-Young, Xuebin Zhang, [Human influence has intensified extreme precipitation in North America](#), Proceedings of the National Academy of Sciences Jun 2020, 117 (24) 13308-13313; DOI:10.1073/pnas.1921628117.

¹³³ NOAA High Tide Flooding Report, [2021 State of High Tide Flooding and Annual Outlook](#).

¹³⁴ Union of Concerned Scientists. [Underwater: Rising Seas, Chronic Floods, and the Implications for US Coastal Real Estate](#) (2018).

residents were Black.¹³⁵ Over the next 30 years, the “risk of coastal floods damaging or destroying low-income homes will triple” resulting in the flooding of more than 25,000 affordable housing units each year.¹³⁶

In addition, “while severe storms fall on the rich and poor alike, the capacity to respond to and recover from flooding is much lower in socially vulnerable populations that even in the best of times are struggling to function.”¹³⁷ Even low levels of flooding can wreak havoc on buildings and the residents who live in them, damaging belongings, disrupting electrical equipment, contaminating water sources and septic systems, and generating mold. These impacts can “cause profound disruptions to families already struggling to make ends meet” and can be particularly challenging to remedy in affordable housing units, which are often in poor repair to begin with.¹³⁸

It is critical that agencies evaluate whether a federal action will transfer flood risks onto other communities as our rapidly changing climate produces increasingly severe storms and floods and wildfires (that can lead to increased flooding due to the loss of vegetative cover) fueled by our rapidly changing climate.¹³⁹

5. The final guidance should direct agencies to fully evaluate, as part of each NEPA review, locating the proposed project or activity at alternative sites that would avoid climate change risk (e.g., sea level rise, storm surge, floodplains) and avoid and reduce the adverse impacts to healthy natural systems.

Many NEPA reviews examine projects in areas at high risk from climate change and/or projects that will adversely affect natural systems essential for the long-term resilience of communities and wildlife. The final guidance should direct agencies to fully evaluate and consider, as part of each NEPA review, locating the proposed project or activity at a location that would: (a) avoid or minimize climate change risks to the project; and (b) avoid and minimize adverse impacts to natural systems essential for resilience.

For example, when conducting a NEPA review of a facility that would be located in a coastal area subject to sea level rise, wave and storm-drive erosion, or subsidence,

¹³⁵ Thomas Frank, [Flooding Disproportionately Harms Black Neighborhoods](#), Scientific American (June 2, 2020).

¹³⁶ Maya K Buchanan *et al*, [Sea level rise and coastal flooding threaten affordable housing](#), *Environ. Res. Lett.*, 15 124020/ (2020).

¹³⁷ National Academies of Sciences, Engineering, and Medicine 2019. [Framing the Challenge of Urban Flooding in the United States](#). Washington, DC: The National Academies Press. <https://doi.org/10.17226/25381>.

¹³⁸ Buchanan *et al*, [Sea level rise and coastal flooding threaten affordable housing](#) (see footnote 8).

¹³⁹ For example, a recent study concludes that climate change-induced sea level rise accounted for 13% of the damage caused by Hurricane Sandy (approximately \$8.1 billion of the \$62.5 billion in total damages) and 54% of the people affected (71,000 people out of the total of 131,000 people affected). Strauss, B.H., Orton, P.M., Bittermann, K. et al [Economic damages from Hurricane Sandy attributable to sea level rise caused by anthropogenic climate change](#). *Nat Commun* 12, 2720 (2021). <https://doi.org/10.1038/s41467-021-22838-1>.

agencies should be required to assess options for alternate locations that would not be subject to those same risks. Similarly, agencies should be required to conduct a robust review of alternatives that would avoid adverse impacts to wetlands that provide essential flood assimilation and/or fish and wildlife habitat. Full examination of such alternatives should already be happening to achieve the fundamental goals of NEPA, but often is not. The final guidance should ensure that these critical assessments are in fact carried out.

6. The final guidance should also recognize the important role that public lands play in resilience, GHG emissions reductions, and adaptation.

Public lands – encompassing approximately one-third of the land mass of the U.S. – play an outsized role in reducing climate change emissions (both through carbon storage and opportunities to rapidly decrease fossil fuel emissions), supporting species adaptation, and building resilience for communities through providing clean air and water and access to nature. Healthy landscapes are natural and efficient carbon captors, while at the same time a significant portion of the nation’s energy production – representing roughly 20-25% of U.S. GHG emissions – comes from federal lands and waters.¹⁴⁰ The Biden Administration’s America The Beautiful and 30x30 commitment recognizes the importance of protecting and connecting U.S. lands and waters in the face of climate change. Proposed actions that could impact that commitment – through conservation gains or losses – need to be thoroughly analyzed under NEPA. This could be recognized in the guidance as another example of a climate-focused tool against which the impacts of a proposed action and alternatives should be measured (similar to tools discussed that would help agencies measure GHG emissions against various climate targets or emissions management frameworks).

CONCLUSION

Our organizations hope that you and your staff find these observations and recommendations useful. CEQ’s Interim Guidance provides essential legal direction to federal agencies. Our recommendations highlight areas where more detailed guidance would help ensure that agencies are accurately accounting for communicating to the public the impacts of their decisionmaking. We look forward to seeing the final version of the guidance and, importantly, the proposals for CEQ’s Phase 2 Rulemaking. We would be pleased to discuss any of these issues with you or your staff further if that would be helpful. Please contact Stephen Schima, Senior Legislative Counsel, Earthjustice, at sschima@earthjustice.org or (503) 830-5753.

Sincerely,

Center for Biological Diversity
Center for International Environmental Law (CIEL)
Defenders of Wildlife

¹⁴⁰ See Matthew D. Merrill et al., U.S. Geological Survey, Scientific Investigations Report 2018-5131: Federal Lands Greenhouse Gas Emissions and Sequestration in the United States: Estimates for 2005-14.

Earthjustice
Environmental Defense Fund
Environmental Law and Policy Center
Evergreen Action
Food and Water Watch
League of Conservation Voters
National Wildlife Federation
Natural Resources Defense Council
Ocean Conservancy
The Sierra Club
WE ACT for Environmental Justice
The Wilderness Society

ATTACHMENT 2



DATE: September 29, 2023

TO: Council of Environmental Quality (CEQ)

FROM: GreenLatinos and WE ACT for Environmental Justice

SUBJECT: Docket ID No. CEQ-2023-0003 National Environmental Policy Act Implementing Regulations Revisions Phase II

GreenLatinos and WE ACT for Environmental Justice, along with the undersigned organizations, submit these comments to express our support and provide improvements to the Council on Environmental Quality (“CEQ”) National Environmental Policy Act (“NEPA”) Implementing Regulations Revisions Phase II (No. CEQ-2023-0003). The submitted comments are framed with the goal of centering and securing the safety, health, and resiliency of Black, Brown, and Indigenous communities that historically and currently experience undue burdens of environmental and climate injustice.

GreenLatinos is an active comunidad of over 14,000 Latines and allies across the U.S. and territories, united to ensure that environmental justice is embedded across all levels of governmental policies. We envision a healthy and equitable society where communities of color are liberated from disproportionate environmental burdens, free to breathe fresh air, drink pure water, access clean transportation, and enjoy our majestic public lands, ocean, and waters. GreenLatinos analysis of the proposed regulations are informed by the the Latino Climate Justice Framework (“LCJF”)¹ The LCJF is a blueprint for decision makers and underserved communities alike to champion equitable policy solutions aimed at improving disproportionately impacted environmental justice communities, especially communities of color. The Framework was developed through extensive partner and community input over the course of 1.5 years and

¹Green Latinos, *Latino Climate Justice Framework*, (hereafter cited to as “LCJF”), https://www.lcjf.greenlatinos.org/_files/ugd/352e47_e3bf44c2175e4867a171544cd4a72ac2.pdf. (October 2022).

was launched in October 2022 alongside 22 Latine-serving partner organizations. Currently, over 70 additional organizations have endorsed the Framework.

WE ACT for Environmental Justice (“WE ACT”) is a Northern Manhattan-based member organization whose mission is to advocate for and build healthy communities by ensuring communities of color and low income communities lead in creating just and equitable environmental health laws, policies, and practices.² Since its founding in 1988, WE ACT has worked to serve environmental justice communities across the country which have been and continue to be adversely affected by harmful infrastructure, pollution, and the inequitable enforcement of environmental laws.³ WE ACT consistently calls for strong environmental protections and actions that address and remediate historical burdens. WE ACT’s Federal Policy Office in Washington, D.C. pursues national policy solutions that center the positions, interests, goals, and voices of environmental justice organizations across the country. The Federal Policy Office addresses injustice and equity within the federal landscape and seeks to drive just and equitable solutions in the realms of clean air, clean water, climate, transportation, and energy justice, as well as the creation of healthy homes and other issue areas.

I. BACKGROUND

Since its establishment over 50 years ago, NEPA has been the nation’s bedrock environmental law, requiring review and oversight for any major federal action. It is a tool used to integrate the voice of the people into federal decision making. Unfortunately, fossil fuel and special interests have weakened this critical law, which ultimately hampers communities’ ability to provide input into projects being developed in their backyards, neighborhoods, and towns. CEQ has already begun the important work of restoring NEPA provisions, as was evidenced in the first phase of CEQ’s regulations, which focused on reversing dangerous rollbacks made by the previous Administration. In Summer 2023, NEPA faced additional setbacks and carve-outs through the passage of the Fiscal Responsibility Act (“FRA”), where there were significant concessions to industry and conservative interests that effectively weakened NEPA and its application.⁴ We commend the Biden-Harris Administration and Executive Order 14096 for

² WE ACT for Environmental Justice, *Who We Are*, <https://www.weact.org/whoweare/ourstory/> (2023).

³ *Id.*

⁴ WE ACT for Environmental Justice, *WE ACT For Environmental Justice Decries Debt Ceiling Concessions and Calls for Amendments to Remove Harmful NEPA and MVP Provisions*, <https://www.weact.org/2023/05/we-act-for-environmental-justice-decries-debt-ceiling-concessions-and-calls-for-amendments-to-remove-harmful-nepa-and-mvp-provisions/> (May 31, 2023).

furthering the interests and goals of environmental justice through this proposed rule. Further, the undersigned organizations reiterate that the Biden-Harris Administration must no longer use environmental justice communities as bargaining chips at the negotiation table.⁵

The scientific record and lived experience demonstrates that a strong NEPA process makes projects more resilient, less likely to face litigation, and ultimately allows them to move faster all while safeguarding affected communities.⁶ It is always worth repeating - environmental justice communities historically and currently bear the burden of climate and environmental injustice. Historic permitting and siting practices have marginalized front and fenceline voices, created sacrificial zones, and excluded environmental justice communities from environmental benefits while burdening them with environmental harms. Discriminatory practices, such as segregation, redlining, and unjust industrial zoning policies cause Black, Brown, Indigenous, and/or low-income communities to house a disproportionate amount of pollution infrastructure.⁷

Indeed, Black and Hispanic communities respectively bear 56% and 63% excess air pollution exposure, relative to the exposure caused by their consumption.⁸ Specifically, deaths from Particulate Matter 2.5, also known as soot, are disproportionately felt by Black and Brown communities. Black populations 65 years or older, experience three times as many PM2.5-attributable deaths per capita compared to all other races.⁹ More than one million Black Americans face a cancer risk above “EPA’s level of concern.” Approximately, 13.4% of Black children suffer from asthma, as compared to 7.3% of white children. Latine children are more likely to be diagnosed with asthma and are twice as likely to die from an asthma attack compared to their white counterparts.¹⁰ Lastly, Black Americans are 75% more likely to live in

⁵ WE ACT for Environmental Justice, *Letter Regarding May 2023 Congressional Debt Ceiling Negotiations*, https://www.weact.org/wp-content/uploads/2023/05/FINAL_EJ-Debt-Ceiling-Letter-to-President-Biden.pdf (May 25, 2023)

⁶ Roosevelt Institute, *Climate and Community Project: A Progressive Take on Permitting Reform*, https://rooseveltinstitute.org/wp-content/uploads/2023/08/RI_Progressive_Permitting_Report_202308.pdf (2023).

⁷ Equitable & Just National Climate Platform, *Approaches to Defining Environmental Justice Community for Mandatory Emissions Reduction Policy* (September 2021) at 4.

⁸ Christopher W. Tessum et al., *Inequity in consumption of goods and services adds to racial-ethnic disparities in air pollution exposure* (Mar. 11, 2019), <https://www.pnas.org/doi/10.1073/pnas.1818859116>.

⁹ Industrial Economics, *Analysis of PM.25 - Related Health Burdens Under Current and Alternative NAAQS*, <https://globalcleanair.org/wp-content/blogs.dir/95/files/2022/05/Analysis-of-PM2.5-Related-Health-Burdens-Under-Current-and-Alternative-NAAQS.pdf>.

¹⁰ GreenLatinos, *LCJF*, https://www.lcjf.greenlatinos.org/_files/ugd/352e47_e3bf44c2175e4867a171544cd4a72ac2.pdf (October 2022).

fence-line communities housing industrial facilities that produce a myriad of negative impacts, including emission exposure, traffic, odor, and noise.¹¹ In addition to the overwhelming data, communities have deeply woven experiences of impacts and generational harm that still exist today, as a result of systemic racism, economic inequality, and injustice.

This comment letter will discuss the proposed climate change and environmental justice provisions and call for the strengthening and preservation of pathways for equitable public participation and engagement. The undersigned organizations urge CEQ to adopt strong regulations that effectively and thoroughly center environmental justice communities. Embedding such protections in NEPA’s implementation regulations would be a shared victory for communities and advocates across the country, all while advancing more durable and resilient infrastructure.

II. DISCUSSION

A. Proposed §1508.1 Definitions

NEPA is often referred to as the “People’s Environmental Law” and the “Magna Carta” of federal environmental laws.¹² Accordingly, the implementing regulations must boldly and directly identify *who* the people are, with a heightened focus on those harmed and targeted by environmental injustice and inequity.

- **Proposed Definition of Environmental Justice (EJ) Communities:** Proposed section 1508.1(k) proposes to define “environmental justice” as “the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that affect human health and the environment so that people: (1) Are fully protected from disproportionate and adverse human health

¹¹ Princeton University, *Racial Disparities and Climate Change*, <https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change#:~:text=In%20total%2C%20African%20Americans%20are,health%20problems%20such%20as%20asthma>. (August 15,2020).

¹² National Environmental Policy Act Website, *Welcome*, <https://ceq.doe.gov/#:~:text=NEPA%20was%20the%20first%20major,actions%20prior%20to%20making%20decisions> (undated); Also see Earthjustice, *The People’s Environmental Law: National Environmental Policy Act*, <https://earthjustice.org/feature/national-environmental-policy-act#:~:text=January%209%2C%202023-.The%20People%27s%20Environmental%20Law%3A%20National%20Environmental%20Policy%20Act,or%20poorly%20planned%20federal%20projects> (January 9, 2023).

and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and (2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.”¹³ The inclusion of this definition is welcome and long overdue. Since NEPA’s enactment in 1970 and subsequent amendments and implementing regulations over the years, an explicit recognition of environmental justice communities has not existed, despite overwhelming science and data indicating the distinct experience, suffering, and interests of communities of color and/or low-income communities across the country. Environmental justice advocates have historically called for a recognition of communities overburdened with pollution and environmental infrastructure noting “for federal policies, there is value in providing a baseline definition of EJ community that can serve as a floor and as a guardrail to ensure that the most affected geographic areas are covered under the definition.”¹⁴

- **Proposed Definition of Cumulative Impacts:** The inclusion of “cumulative impacts” in the proposed definition is also significant, as CEQ rightfully acknowledges that the concept has “-meaning in the context of environmental justice relating to the aggregate effect of multiple stressors and exposures on a person, community, or population” and further, that “the evolving science on cumulative impacts is “sufficiently distinct from the general meaning of cumulative effects under the NEPA regulations that using a different term could be helpful to agencies and the public.”¹⁵ There has been significant advancement in cumulative impact assessments at the state level, as evidenced by the enactment of landmark environmental justice laws in New Jersey and New York State.¹⁶ Federal agencies have also recognized cumulative impacts, such as

¹³ Proposed § 1508.1(k).

¹⁴ Equitable & Just National Climate Platform, *Approaches to Defining Environmental Justice Community for Mandatory Emissions Reduction Policy*, (September 2021) at 4.

¹⁵ Federal Register, *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, “6. Environmental Justice (§ 1508.1(k))” <https://www.federalregister.gov/d/2023-15405/p-430>

¹⁶New Jersey Environmental Justice Law, N.J.S.A.

13:1D, <https://dep.nj.gov/wp-content/uploads/ej/docs/ej-law.pdf> and; New York Environmental Justice Law, Senate Bill 8830 and Assembly Bill 2103D.

DOE and EPA.¹⁷ Distinguishing cumulative impacts in the proposed rule is a just and promising step in advancing equity and justice in the federal permitting process.

B. Proposed §1500.2: Policy

The undersigned organizations support the inclusion of environmental justice and climate change considerations in the Policy section of the proposed rule. Proposed §1500.2(d) directs federal agencies to “Encourage and facilitate public engagement in decisions that affect the quality of the human environment, including meaningful engagement with communities with environmental justice concerns, which often include communities of color, low-income communities, indigenous communities, and Tribal communities.”¹⁸ Proposed §1500.2(3)(e) directs federal agencies to “Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment, such as alternatives that will reduce climate change-related effects or address adverse health and environmental effects that disproportionately affect communities with environmental justice concerns.”¹⁹

Both provisions rightfully amplify the importance of environmental and climate justice in regulatory processes. As outlined in the above, environmental justice communities are overburdened with polluting infrastructure and often facing additional barriers, exacerbating public health, quality of life, and safety implications. The direct mention of climate-change, in the context of environmental justice, is also significant. Since NEPA was passed in 1970, anthropogenic climate change has accelerated at an unprecedented pace, with far-reaching and potentially irreversible consequences.²⁰ And Black, Brown, Indigenous and/or low-income communities are at the forefront of the climate crisis and they are the least able to prepare for, and recover from, the impacts which include heat waves, poor air quality, and flooding.²¹ Indeed, Black and African American individuals are 40% more likely to currently live in areas with the

¹⁷ Environmental Protection Agency, *Cumulative Impacts Research*, <https://www.epa.gov/healthresearch/cumulative-impacts-research> (last updated May 17, 2023).

¹⁸ Proposed Rule §1500.2(d).

¹⁹ Proposed Rule §1500.2(e).

²⁰ Environmental Protection Agency, *Climate Change Indicators: U.S. and Global Temperatures*, <https://www.epa.gov/climate-indicators/climate-change-indicators-us-and-global-temperature#:~:text=Since%201901%2C%20the%20average%20surface,F%20per%20decade%20since%201979>).

²¹ Environmental Protection Agency, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf (September 2021) at 4 - 8.

highest projected increases in extreme temperature related deaths.²² Hispanic and Latin American individuals are 43% more likely to currently live in areas with the highest projected reductions in labor hours due to extreme temperatures.²³

C. Proposed §1501.3: Determine the appropriate level of NEPA review

Proposed Section §1501.3 provides a consolidated description of the process agencies should use to determine the appropriate level of NEPA review for a federal action. The undersigned organizations support the addition of paragraph (d)(2)(ix) in Section §1501.3, requiring agencies to analyze the degree to which an “action may have disproportionate and adverse effects on communities with environmental justice concerns” when determining the appropriate level of NEPA review.²⁴

- **Environmental Justice Concerns should be distinctly considered when determining the level of NEPA review:** As outlined above, environmental justice communities bear an unjust amount of environmental historically rooted inequities and accordingly, should receive a heightened level of review. Countless communities live in dangerous proximity to multiple exposure sites such as highways, gas plants, pipelines, waste management infrastructure, oil extraction sites, petrochemical facilities, and others. Further, Black and Brown communities are also particularly hit hard by the effects of the climate crisis.²⁵
- **The final rule must further define the “degree” to which an action may have a disproportionate impact:** The undersigned organizations ask that under paragraph (d)(2)(ix), CEQ be more specific about how an agency will include the “degree” to which an action may have disproportionate impacts that is aligned with our comments under §1502.16 *Environmental Consequences*, including how an agency considers not only

²² Environmental Protection Agency, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf (September 2021) at 4 - 8.

²³ *Id.* at 6.

²⁴ Proposed §1501.3.

²⁵ GreenLatinos, *LCJF*, https://www.lcjf.greenlatinos.org/_files/ugd/352e47_e3bf44c2175e4867a171544cd4a72ac2.pdf. (October 2022) at 4.

the potential for adverse impacts but also the need for mitigation measures and equitable solutions.

D. Proposed §1501.9: Public and governmental engagement

Proposed section §1501.9 addresses how agencies should conduct public engagement to inform the public of an agency's proposed action and how agencies should allow for meaningful engagement during the NEPA process, which ensures decision makers are informed by the views of the public. This section is an integral component of NEPA as it guides federal agencies on effective, two-way public engagement. Drawing upon the language access and justice principles in the LCJF, we offer the following considerations regarding language justice²⁶:

- **Language Access in Public Outreach:** Proposed §1501.9(c)(3) outlines how to identify appropriate outreach methods, including “the ability of affected persons and agencies to access electronic media and the primary language of affected persons.”²⁷ Language access in every structure of government and broad outreach to non-English speaking communities, or those with limited English proficiency (LEP), regardless of citizenship status, is vital to the meaningful engagement of marginalized communities in NEPA's democratic process. To this end, we urge CEQ to require translation and interpretation at every step of the outreach and notification in the NEPA process. CEQ must go beyond the “primary language of affected persons” and use U.S. Census data on the most widely spoken languages in an affected community to guide translation priorities into multiple languages. In §1501.9(d), we recommend requiring that public notices are published in English and any other required alternative languages in all available avenues, including email announcements, public notices physically posted in places of interest to the community, websites, social media, and other media forms.
- **Culturally Competent Community Engagement:** CEQ must provide guidance regarding how agencies hold engagement sessions with local partners to ensure that sessions are conducted in culturally sensitive ways. We also recommend that CEQ itself, as its own entity, conduct engagement sessions with local partners in culturally sensitive

²⁶ GreenLatinos, *LCJF*, https://www.lcjf.greenlatinos.org/_files/ugd/352e47_e3bf44c2175e4867a171544cd4a72ac2.pdf (October 2022) at 26.

²⁷ Proposed §1501.9(c)(3).

ways so that communities have built-in trust and buy-in i.e. partnering with a local validator or trusted community leader. CEQ must also recognize that not every U.S. resident has citizenship; therefore, public forums should not be held in venues requiring state-issued ID to enter, which restricts participation based on age and citizenship status. The undersigned organizations urge CEQ to incorporate language that would advise against the presence of uniformed officers, including Customs and Border Protection or Immigration and Customs Enforcement officers, at public forums that could deter undocumented persons or mixed-status families from attending and participating in public processes. In §1501.9(d)(C), we recommend coordination with local ethnic media outlets to ensure public notice announcements are disseminated directly into multilingual and multiethnic communities and shared broadly with community organizations, leads, and public service entities.

- **Translation of EISs and EAs:** Environmental Impact Statements (EIS) and Environmental Assessments (EA) must be translated and disseminated in culturally relevant, sensitive and competent ways.

In addition to these proposed changes for the Phase II Regulations, we express the importance of inclusive language in CEQ's Citizen's Guide to NEPA:

- **Inclusive Language in CEQ's *A Citizen's Guide to NEPA*:** Even in 2023, language is still too often a barrier to access and equity. CEQ's *A Citizen's Guide to NEPA* has only been translated into one other language: Spanish. This is problematic given the U.S. Census Bureau reports²⁸ that nearly 68 million people in the United States speak a language other than English as their primary language. This number is only projected to increase in the coming decade, with waves of migration increasing the presence of Asian languages such as Chinese, Vietnamese, Korean and Arabic in the United States. Further, the Spanish version of the Guide is outdated, as it reflects the 2007 edition and not the current edition issued in January 2021.
 - The undersigned organizations urge CEQ to remove the term "citizen" from the title and replace the term within the guide as well, as this language is exclusionary of permanent or temporary residents, as well as immigrants who do

²⁸ Sandy Dietrich, Erik Hernandez, *Nearly 68 Million People Spoke a Language Other Than English at Home in 2019*, <https://www.census.gov/library/stories/2022/12/languages-we-speak-in-united-states.html>. (December 6, 2022).

not have citizenship but who are affected by a federal project in their community and have a right to share their voice. Words such as “community” or “people” (as in “The People’s Guide to NEPA” or “The Community’s Guide to NEPA”) are suggested as more inclusive replacements for the word “citizen.”

In addition to the language justice provisions, we offer the following considerations to increase accessibility and engagement in NEPA processes:

- **Accessibility of EISs and EAs:** Environmental Impact Statements (EIS) and Environmental Assessments (EA) must be made available in formats that are reader-friendly and easy to understand for community members who may not have specialized expertise.
- **Community Driven Solutions:** CEQ should clearly define its plan to include community-driven solutions throughout the NEPA process. Importantly, CEQ must ensure mechanisms that invite affected communities to propose mitigation measures and alternatives that are not unduly difficult to engage with.
- **Addressing Inequitable Broadband Access:** We urge CEQ to require an equitable balance of internet-based outreach and physical outreach to accommodate communities with limited internet access, including rural communities with poor bandwidth infrastructure challenges and low-income communities.

By incorporating these recommendations, CEQ can enhance language justice and community access to the often daunting and tedious government public input processes. These recommendations further the spirit and intent of NEPA and restore its place as a critical tool in advancing public engagement, transparency, and participation for communities impacted by environmental and climate injustice.²⁹

E. Proposed §1501.10: Deadlines and Schedule for the NEPA Process

²⁹ GreenLatinos, *LCJF*, https://www.lcjf.greenlatinos.org/_files/ugd/352e47_e3bf44c2175e4867a171544cd4a72ac2.pdf. (October 2022) at 26 - 36.

Proposed §Section 1501.10 titled “Deadlines and Schedule for the NEPA Process” sets timelines for environmental assessments and environmental impact statements. Amendments to proposed Section §1502.7 sets page limits for environmental impact statements at 150 pages or 300 pages for proposals of “extraordinary complexity.”³⁰

- **Preserving complete and thoroughly analyzed assessments:** It is critical that withstanding these stringent page limitations, environmental impact statements and assessments are thorough, fulsome, analyses that do not sacrifice completeness or accuracy. Importantly, assessments must deliver upon the climate and environmental justice provisions that will be included in the final rule, despite politicalized attempts to shorten or dilute their consideration. The undersigned organizations encourage CEQ to include language in the final rule that emphasizes this.

F. Proposed § 1501.3(d)(2): Determination of Significance

Proposed §Section 1501.3(d)(2) proposes to add new “intensity” factors when determining whether the effects of a proposed major federal action are significant. Specifically, Proposed §1501.3(d)(2)(ix) proposes an intensity factor that measures “the degree to which the action may have disproportionate and adverse effects on communities with environmental justice concerns.”³¹ Communities impacted by environmental and climate injustice face particularized harms and vulnerabilities. Those experiences should be weighed, on their own merits, in the significance determination.

G. Proposed §1502.16: Environmental Consequences

Proposed §1502.16 forms the scientific and analytical basis for comparisons in the “alternatives” section of EISs.³² The following provisions are of note:

- **Proposed §1502.16 (10):** Proposes the identification of “Any relevant risk reduction, resiliency, or adaptation measures incorporated into the proposed action or alternatives, informed by relevant science and data on the affected environment and expected future conditions”;

³⁰ Proposed §1502.7.

³¹ Proposed § 1501.3(d)(2)(ix).

³² Proposed § 1502.16(14).

- **Proposed §1502.16 (14):** Proposes the identification of “The potential for disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.”³³

Importantly, the section proposes to require an explicit discussion of disproportionate harms imposed on environmental justice communities in the environmental consequences section. The inclusion of this consideration is long overdue, given the centuries of environmental dangers, toxins, public health implications, quality of life impacts, and unjust practices that perpetuate environmental violence on communities across the country. CEQ must ensure that this provision remains in the final version of the rule as a significant and long awaited step towards codifying environmental justice in the NEPA processes.

The undersigned organizations encourage the CEQ to further strengthen the language in this section to more effectively address these critical issues. Climate change is one of the most pressing challenges facing our planet, with far-reaching and potentially irreversible consequences. Given the urgency of the climate crisis, it is essential that NEPA provides clear guidance on how federal agencies should assess and mitigate climate-related impacts comprehensively. This includes not only the direct impacts of proposed actions but also the broader consequences of a changing climate on these actions and alternatives. Notwithstanding the “reasonably foreseeable” standard, we recommend the following enhancements for this section:

- **Comprehensive Climate Risk Assessment:** There should be a requirement for agencies to conduct a thorough climate risk assessment, including an evaluation of how climate change may affect the feasibility, viability and effectiveness of proposed actions themselves over their entire lifecycle.
- **Public Engagement on Climate:** Ensure that public engagement processes for NEPA reviews explicitly include opportunities for stakeholders to provide input and feedback on climate change considerations.

By strengthening the language in this section in the above ways, CEQ can demonstrate leadership in addressing the climate crisis and promote responsible federal decision-making

³³ Proposed §1502.16 (14).

that is attuned with the existential moment we are living and prioritizes climate change mitigation and resilience.

III. CONCLUSION

GreenLatinos, WE ACT for Environmental Justice, and the allied environmental justice and environmental organizations below thank the Council on Environmental Quality for an opportunity to comment on CEQ's National Environmental Policy Act Implementing Regulations Revisions Phase II (No. CEQ-2023-0003). Historically and currently, environmental justice communities have been marginalized and sacrificed in the buildout of environmental infrastructure in this nation. CEQ's efforts to directly advance equity and justice through these implementing regulations are welcomed and supported. As mentioned above, "The People's Environmental Law" must include *and* center the most impacted among those that face historic and present suffering, and are in need of timely, effective, change to combat climate change and harms caused by overburdening and pollution.

Respectfully submitted,

GreenLatinos

WE ACT for Environmental Justice