

**Comments on the Council on Environmental Quality's (CEQ) Proposed Rule  
"Update to the Regulations Implementing the Procedural Provisions of the  
National Environmental Policy Act"**

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

Agricultural Retailers Association  
Association of American Railroads  
American Farm Bureau Federation  
American Fuel & Petrochemical Manufacturers  
American Gas Association  
American Retailers Association  
American Road and Transportation Builders Association  
Associated Builders and Contractors  
Associated General Contractors of America  
Association of Oil Pipe Lines  
Consumer Energy Alliance  
National Association of Home Builders  
National Association of REALTORS®  
National Building Trades Union  
National Cattlemen's Beef Association  
National Ocean Industries Association  
National Rural Electric Cooperative Association  
Public Lands Council  
The Fertilizer Institute  
U.S. Chamber of Commerce

March 10, 2020

The Honorable Ms. Mary B. Neumayr  
Chair  
Council on Environmental Quality  
730 Jackson Place, N.W.  
Washington, D.C. 20503

**Re: Comments on the Council on Environmental Quality’s (CEQ) Proposed Rule, “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” Docket ID No. CEQ-2019-0003**

Dear Chair Neumayr:

The Agricultural Retailers Association, Association of American Railroads, American Farm Bureau Federation, American Fuel & Petrochemical Manufacturers, American Gas Association, American Retailers Association, American Road and Transportation Builders Association, Associated Builders and Contractors, Associated General Contractors of America, Association of Oil Pipe Lines, Consumer Energy Alliance, National Association of Home Builders, National Association of REALTORS®, National Building Trades Union, National Cattlemen’s Beef Association, National Ocean Industries Association, National Rural Electric Cooperative Association, Public Lands Council, The Fertilizer Institute, and the U.S. Chamber of Commerce (collectively, the “Coalition”) appreciates the Council on Environmental Quality’s (“CEQ”) efforts to modernize the implementation of one of the Nation’s most important environmental laws—the National Environmental Policy Act (“NEPA”). The Coalition offers the following comments in support of CEQ’s proposed revisions to its regulations implementing the procedural provisions of NEPA (“Proposed Rule”).<sup>1</sup>

Our organizations represent agriculture, energy, construction, forestry, manufacturing, transportation, and other sectors that form the backbone of America’s economy. We fully support the fundamental goals of NEPA to appropriately consider the potential environmental impacts of federal actions. The Coalition believes that CEQ’s proposed revisions refocus federal NEPA reviews on NEPA’s original purpose to facilitate excellent agency action through informed decision-making,<sup>2</sup> accomplished through the same balanced goals as the original 1978 NEPA regulations: “to reduce paperwork, to reduce delays, and at the same time to produce better decisions which further the national policy to protect and enhance the quality of the human environment.”<sup>3</sup> We urge CEQ to finalize updates to the NEPA implementing regulations to modernize the federal environmental review and permitting process under NEPA, with the goal of increasing infrastructure investment and project development in a manner that strengthens our economy and enhances environmental stewardship.

NEPA implicates a broad array of private sector activities and public sector efforts with important implications for American business. For example, infrastructure is an essential element of a productive and competitive economy. The development of new infrastructure to expand and modernize existing roadways, railways, airports and their related infrastructure, communications, energy systems, and other

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<sup>1</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,712 (Jan. 10, 2020) (“Proposed Rule”).

<sup>2</sup> 40 C.F.R. § 1500.1(c) (“NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.”).

<sup>3</sup> 43 Fed. Reg. 55,978, 55983 (Nov. 29, 1978) (“[A] primary objective of the regulations is to insure that these documents are clear, concise, and to the point.”).

projects is capital-intensive, which requires process and regulatory predictability to allow businesses to plan and invest with confidence.

The NEPA process, however, can impose unnecessary burden and delay, inconsistent with the intention of the statute and original regulations, particularly when NEPA analyses become overly expansive by incorporating information that is not truly informative of the environmental impacts as they relate to the federal action at hand. When transportation infrastructure projects are delayed, traffic congestion worsens, and the infrastructure further deteriorates.<sup>4</sup> For the mining industry, a study found that a typical mineral mining project loses over one-third of its economic value as a result of permitting delays.<sup>5</sup> Protracted NEPA reviews for energy infrastructure projects—including infrastructure supporting the deployment of renewable energy sources—hinders the ability to bring this energy to the ultimate consumer.

In the 40 years since CEQ promulgated its NEPA regulations, there has been a tremendous transformation in how agencies review projects and how information is developed, shared, and analyzed in support of satisfying the agency's NEPA obligations. NEPA reviews have become unnecessarily lengthy, comprehensive, and detailed analyses of all possible issues, without regard to significance, leading to reviews that have unreasonably long timeframes and amass overly broad and exhaustive analyses that are often of little utility to decision-makers. This result reduces the value of the scoping process, which is meant to identify potentially significant issues and deemphasize insignificant ones. NEPA's statutory purpose to meaningfully inform decision-makers and the public is diminished when agencies prepare NEPA documents that are unreasonably delayed and unnecessarily voluminous.<sup>5</sup> The wide variance of the average preparation time from one year to seven years among agencies further demonstrates that additional regulatory structure and guidance is needed.<sup>6</sup>

Because of its broad applicability across sectors and agencies, NEPA has been made the center of project opponents' strategy in litigation seeking to delay and block private sector activities. 1,500 lawsuits related to NEPA were filed between 2001 and 2013.<sup>7</sup> In response, agencies prepare analyses in defense of potential litigation, attempting to anticipate every possible objection that could be raised in court, however insignificant and however detached from the original intent of NEPA and its implementing

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<sup>4</sup> Almost 30 years after the State of North Carolina added the Bonner Bridge replacement to its transportation priorities, construction began on the replacement bridge, which services the only highway connection between Hatteras Island and the mainland. See N.C. DEP'T OF TRANSP.: BONNER BRIDGE REPLACEMENT, PROJECT HISTORY, <https://www.ncdot.gov/projects/bonner-bridge/Pages/project-history.aspx> (last visited Mar. 3, 2020).

<sup>5</sup> SNL METALS & MINING, *PERMITTING, ECONOMIC VALUE AND MINING IN THE UNITED STATES 7* (June 2015), available at [https://nma.org/wp-content/uploads/2016/09/SNL\\_Permitting\\_Delay\\_Report-Online.pdf](https://nma.org/wp-content/uploads/2016/09/SNL_Permitting_Delay_Report-Online.pdf).

<sup>5</sup> See, e.g., Meghan Lopez, *Denver Takes Center Stage in a National Debate Over Updating Environmental Policies*, DENVER7 (Feb. 12, 2020), <https://www.thedenverchannel.com/news/360/denver-takes-center-stage-in-a-national-debate-over-updating-environmental-policies> (discussing the thirteen-year NEPA process for the Denver I-70 highway expansion project that resulted in a nearly 16,000 pages of analysis).

<sup>6</sup> See COUNCIL ON ENVIRONMENTAL QUALITY, *ENVIRONMENTAL IMPACT STATEMENT TIMELINE (2010-2017)* 8-11 (Dec. 14, 2018) (between 2010 and 2017, average duration for each agency to conduct NEPA reviews, from the Notice of Intent to the Record of Decision, ranged from 1.09 to 7.72 years).

<sup>7</sup> See Robert Stilson, *NEPA Reform in the Eye of the Beholder*, CAPITAL RESEARCH CENTER (Feb. 4, 2020), <https://capitalresearch.org/article/nepa-reform-in-the-eye-of-the-beholder/>.

regulations, rather than to inform the agency or the public of truly relevant information. The result is that NEPA's purpose in promoting the consideration of environmental impacts is diminished, while at the same time projects suffer from lengthy and costly delays.

As further explained below, the Coalition believes that the Proposed Rule strengthens the role of NEPA in the federal decision-making process by building on decades of experience to tailor implementation to the goals of the law and to foster a process that provides meaningful information to decision-makers and to the public. Indeed, many, if not most, of the changes proposed either codify existing case law and agency best practices or clarify requirements that already exist in the current regulations, but that have been implemented improperly by agencies or courts.<sup>8</sup> The Proposed Rule strengthens the federal permitting process to improve the transparency and predictability of the process, better inform agency actions, and augment the existing robust public participation afforded by NEPA both procedurally<sup>9</sup> and substantively. The overall effect will be greater focus on environmental information that is meaningful to the agency's decision, better decisions overall, and a more informed public.<sup>10</sup>

**I. NEPA is Intended to Focus the Attention of Decision-makers and the Public on *Significant* Environmental Effects from *Major* Federal Actions**

**A. The Coalition Supports Revisions that Provide for Threshold Applicability Determinations**

The Coalition supports CEQ's effort to clarify that agencies should ask the threshold question of whether NEPA even applies to the proposed federal action at issue in order to focus agency review on those actions that most benefit from the type of analysis contemplated by NEPA. CEQ's proposed revisions recognize that federal agencies should not mechanically apply NEPA for every action they take.<sup>11</sup> Providing considerations to guide agencies in determining whether NEPA applies will assist agencies in conducting consistent NEPA threshold analyses and will help ensure that an agency's limited resources are allocated towards NEPA analyses of appropriate actions. The Coalition supports agencies making this threshold determination in an agency's NEPA regulations.<sup>12</sup> The flexibility to address categories of actions in an agency's regulations is critical—such identification will support transparency, predictability, and will

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<sup>8</sup> See, e.g., 40 C.F.R. § 1500.4(c) (requirement to discuss “only briefly issues other than significant ones” remains unchanged).

<sup>9</sup> The Coalition supports CEQ's proposal to update the range of communication methods that may be used for public involvement. See Proposed Rule, 85 Fed. Reg. at 1692 (citing revisions in Proposed §§ 1500.4(o), 1501.2(b)(2), 1502.9, 1502.20, 1502.21, 1503.4(c), 1506.3, and 1506.8(c)(2)). The Coalition recommends that the Final Rule support additional communication options, such as electronic communications, while also retaining the option to use existing methods, such as advertising in the legal section of a newspaper.

<sup>10</sup> To ensure that implementation of the revisions does not disrupt the process for existing NEPA reviews, the Coalition recommends that the Final Rule provide agencies discretion to complete NEPA reviews pursuant to the current regulations, where the agency reasonably expects that conducting the NEPA review pursuant to the prior version of the regulations would allow the agency to more efficiently conclude the NEPA analysis pending before the agency.

<sup>11</sup> See generally, Proposed Rule, 85 Fed. Reg. at 1714 (Proposed § 1501.1).

<sup>12</sup> See Proposed Rule, 85 Fed. Reg. at 1714 (Proposed § 1501.1(b)).

assist agencies and non-federal project proponents in evaluating whether a future federal agency action will require a NEPA analysis.

To maximize the potential benefits associated with these revisions, CEQ should encourage agencies to codify the threshold applicability of certain types of actions in its NEPA procedures,<sup>13</sup> and sufficiently document its analysis and determination for each type of action as part of its rulemaking process. Once codified, the agency need not conduct further determinations for those types of actions on an individual basis.

The Coalition's members regularly engage in activities that are subject to federal permitting and approvals across many different federal agencies. Agencies that implement an appropriate threshold applicability analysis may avoid the time and costs that would otherwise be associated with a NEPA analysis of these activities that is not meaningful or beneficial to the agency. However, if a court were to find that an agency improperly identified certain actions as not being subject to NEPA, the value provided by the threshold applicability determination would be lost. If made for individual projects, those projects would suffer timing and planning setbacks as the agency would need to start afresh on its NEPA analysis, well after it would have otherwise started the analysis. In addition to harming individual projects, overturned applicability determinations could erode the certainty and use of such determinations and eliminate the potential process improvements and predictability created by the applicability determination. Ensuring agency determinations are codified in the agency's NEPA procedures, and are sufficiently and adequately documented, will support more durable applicability determinations and create a clear record for a reviewing court to consider if the determination is challenged.

The Proposed Rule contains concepts that are well established in decades of NEPA jurisprudence. For example, proposed § 1501.1(a)(3) states that an agency should consider whether compliance with NEPA would “clearly and fundamentally conflict with the requirements of another statute.”<sup>14</sup> This element of the threshold applicability analysis should be noncontroversial and has substantial support in longstanding case law that recognizes that NEPA is not required when there is a “clear conflict” with other statutory authority.<sup>15</sup> Nevertheless, agencies may feel compelled to attempt a NEPA analysis given the broad language of the statute even where a fundamental conflict exists; this proposed rule will reinforce the premise that NEPA review is not appropriate to each and every action taken by an agency.

A thorough threshold applicability analysis is particularly important where the agency is analyzing considerations outside of a statute that the agency itself administers or where the “clear conflict” may be more difficult to discern. Proposed § 1501.1(a)(2) anticipates that the agency should consider whether it even has the authority to “consider environmental effects as part of its decision-making process.”<sup>16</sup> Again, soon after NEPA was enacted courts recognized the lack of such authority as a valid reason to forego NEPA review, yet agencies have, in many cases, strayed from this original intent, driven by concerns over litigation.<sup>17</sup> Proposed § 1501.1(a)(4) recommends that agencies determine “[w]hether the proposed

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<sup>13</sup> See *id.* (“**Federal agencies may make these determinations in their agency NEPA procedures** or on an individual basis”) (emphasis added) (internal citations omitted).

<sup>14</sup> See Proposed Rule, 85 Fed. Reg. at 1714 (Proposed § 1501.1(a)(3)).

<sup>15</sup> See, e.g., *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (“Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority.”) (emphasis in original).

<sup>16</sup> Proposed Rule, 85 Fed. Reg. at 1714 (Proposed § 1501.1(a)(2)).

<sup>17</sup> See, e.g., *Milo Cmty. Hosp. v. Weinberger*, 525 F.2d 144 (1st Cir. 1975).

action is an action for which compliance with NEPA would be inconsistent with congressional intent due to the requirements of another statute.”<sup>18</sup> This consideration may require agencies to wade into the requirements and indicia of congressional intent. Given the complexity of this analysis, an agency’s decision to forgo NEPA review based on this determination should be sufficiently documented.

CEQ’s additional direction on this issue will help agencies implement threshold applicability determinations that are hewn more closely to the original understanding of when NEPA review is required and useful, and will maximize the benefit for both federal and non-federal project proponents.

## **B. The Coalition Supports the Intent of CEQ’s Proposed Revision to Clarify the Meaning of Major Federal Action**

The Coalition supports CEQ’s proposal to tie the phrase “major Federal action” more closely to the statutory text, by giving the word “major” a meaning independent of the word “significantly.”<sup>19</sup> In so doing, CEQ has appropriately recognized that, to be “major Federal Action,” the agency must have a sufficient level of control over the action and there must be potentially significant effects. This approach reinforces the intention of the existing regulations that such actions must be major *and* must be “subject to federal control and responsibility” to trigger NEPA review.<sup>20</sup>

The Proposed Rule properly excludes from the definition of “major Federal action”—and thus from NEPA review—those actions that implicate only limited federal funding or limited federal control, “where the agency cannot control the outcome of the project.”<sup>21</sup> CEQ’s revised interpretation of the statutory term “major Federal action” to exclude these actions is appropriate and reasonable.<sup>22</sup> Federal agencies should direct their resources toward completing effective and efficient NEPA reviews where the agency is actually in a position to control the outcome.<sup>23</sup> NEPA’s purpose of informed decision-making is not served by analyzing effects that, even after consideration, an agency is not in a position to alter.

The Coalition recommends that the Final Rule go a step further and explain how agencies should determine whether an action includes only “minimal Federal involvement” or “minimal Federal funding.” Defining categories of action that do not require NEPA review is similar to current agency procedures under which agencies issue categorical exclusion for types of action likely not to have a potentially *significant* impact on the environment.<sup>24</sup> CEQ should direct agencies to determine that a federal action implicates only “minimal Federal involvement” if the federal agency’s authority under the action statute does not relate to activities that themselves cause environmental effects and does not afford the agency

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<sup>18</sup> See Proposed Rule, 85 Fed. Reg. at 1714 (Proposed § 1501.1(a)(4)).

<sup>19</sup> See Proposed Rule, 85 Fed. Reg. at 1729 (Proposed § 1508.1(q)).

<sup>20</sup> 40 C.F.R. § 1508.18 (“*Major Federal* action includes actions with effects that may be major **and** which are potentially subject to Federal control and responsibility.”) (bolded emphasis added).

<sup>21</sup> See Proposed Rule, 85 Fed. Reg. at 1729 (Proposed § 1508.1(q)).

<sup>22</sup> See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (finding that CEQ’s interpretation was “entitled to substantial deference even though the regulations reverse[d] CEQ’s interpretation under earlier advisory guidelines”).

<sup>23</sup> Notably, the Coalition strongly supports the proposal specifying that farm ownership and operating loan guarantees provided by the Farm Service Agency and the business loan guarantee programs of the Small Business Administration are not major federal actions. See Proposed Rule, 85 Fed. Reg. at 1729 (Proposed § 1508.1(q)(1)).

<sup>24</sup> See 40 C.F.R. § 1508.4.

the opportunity itself to control the activities of the project subject to review that would cause environmental effects.

With respect to federal funding in particular, the Coalition also recommends that CEQ direct agencies to determine that a federal action implicates only “minimal Federal funding” if the level of government funding for a project proposed by a private entity is either small relative to the total funding of the project or in absolute terms; or if the amount or type of funding does not give the federal agency control over the project for which it is used. For example, if an agency’s funding of an action does not allow the agency to specify how the action is executed, then an agency may reasonably determine that the federal agency lacks control over the outcome and, therefore, its decision does not constitute a “major Federal action.”<sup>25</sup> Again, while this is a concept recognized in case law, it can lead to confusion and delays when agencies struggle to define the limits of federal influence.<sup>26</sup>

Where the outcome of a project (and therefore its environmental effects) is sufficiently subject to federal control and responsibility, but where the action is only one part of a larger proposal, the NEPA review, where review is required, should be limited only to the portions of the proposal for which the agency has such control and responsibility.<sup>27</sup> For example, the U.S. Army Corps of Engineers (the “Corps”) generally limits its NEPA reviews to the relevant water crossings when issuing permit approvals for construction activities involving the dredge and fill of wetlands,<sup>28</sup> even if such approvals are part of a large project (such as the construction of linear infrastructure).<sup>29</sup> This approach is codified in the Corps’ NEPA regulations and has been upheld by courts.<sup>30</sup> The Coalition recommends that CEQ adopt this approach in the Final Rule and provide that NEPA reviews for federal agency actions taken, in whole or in part, at the behest of a non-federal proponent, should be tailored to an analysis of the impacts of the specific activity requiring federal agency action and any portions of the project over which the agency has sufficient control and responsibility to warrant federal review. This revision would ensure that NEPA analyses are appropriately scoped in relation to the major federal action taken by the federal agency.

### **C. CEQ’s Proposed Clarification on the Application of Categorical Exclusions Will Focus Agency Resources on Federal Actions with Potentially Significant Impacts**

CEQ has long recognized the importance and value that excluding categories of federal actions that normally do not have significant effects from detailed NEPA review can serve in promoting the goals of NEPA: “[t]he use of categorical exclusions can reduce paperwork and delay, so that *[Environmental*

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<sup>25</sup> See *Scarborough Citizens Protecting Res. v. U.S. Fish and Wildlife Serv.*, 674 F.3d 97 (1st Cir. 2012).

<sup>26</sup> See *Rattlesnake Coalition v. U.S. EPA*, 509 F.3d 1095 (9th Cir. 2007) (federal funding comprising 6% of the estimated implementation budget not enough to federalize implementation of entire project); *Macht v. Skinner*, 916 F.2d 13 (D.C. Cir. 1990) (funding for planning and studies not enough to federalize a project); *Save Our Dunes v. Pegues*, 642 F. Supp. 393 (M.D. Ala. 1985) (federal funding for state coastal programs did not trigger NEPA).

<sup>27</sup> See *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015) (pipeline not federalized for purposes of NEPA when federal agencies had limited authority with respect to construction); *Sierra Club v. Bureau of Land Mgmt.*, 786 F.3d 1219 (9th Cir. 2015) (wind project on private lands was not federalized for purposes of NEPA review even though federal agency issued right-of-way across federal lands to allow access).

<sup>28</sup> 33 U.S.C. § 1344.

<sup>29</sup> See 33 C.F.R. § 325 App. B(7)(b)(1).

<sup>30</sup> See, e.g., *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d at 50.

*Assessments (“EA”)] and [Environmental Impact Statements (“EIS”)] are targeted toward proposed actions that truly have the potential to cause significant environmental effects.”*<sup>31</sup> CEQ has proposed several important regulatory clarifications to the application of categorical exclusions that would provide agencies with flexibility in developing and implementing categorical exclusions, while ensuring that their use complies with and advances the purpose and goals of NEPA.<sup>32</sup>

In the application of categorical exclusions, CEQ has recognized that certainty regarding the absence of potential significant impacts of a federal action can be a difficult test to satisfy and, if so required, would preclude the use of the categorical exclusion.<sup>33</sup> In support, CEQ’s Proposed Rule carries forward the current premise that a categorical exclusion is for an activity that “normally” does not have significant effects.<sup>34</sup> The Proposed Rule also maintains the requirement that agency procedures shall provide for situations of extraordinary circumstances in which normally excluded actions may have significant environmental effects. The Proposed Rule builds on this concept by providing for a clear, stepped analysis whereby an agency should consider whether extraordinary circumstances are present, and if they are, whether the significant effects can be avoided. In those circumstances, the Proposed Rule offers agencies the ability to mitigate significant impacts, rely on the categorical exclusion, and ensure the agency’s resources are better focused on those actions requiring an EA or EIS. The Coalition supports this clear approach, which will have the added benefit of encouraging projects to avoid impacts in order to facilitate and expedite agency review.

CEQ also has proposed that an agency may adopt another agency’s determination that a categorical exclusion applies when the proposed actions are substantially the same.<sup>35</sup> The Coalition encourages CEQ to provide additional instruction to agencies on the requisite determinations and documentation for the finding that a proposed action is substantially the same and that the agency’s NEPA obligation is satisfied. In particular, as part of an agency’s requirement to consider their own categorical exclusions,<sup>36</sup> CEQ could require that agencies develop procedures that would govern the adoption of another agency’s categorical exclusions as well as require that agencies review the existing categorical exclusions of other agencies and incorporate those applicable into their NEPA procedures.

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<sup>31</sup> COUNCIL ON ENVIRONMENTAL QUALITY, FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON ESTABLISHING, APPLYING, AND REVISING CATEGORICAL EXCLUSIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (“Categorical Exclusion Guidance”), 75 Fed. Reg. 75,628 (Dec. 6, 2010) (emphasis added). When an agency establishes new categorical exclusions or revises existing categorical exclusions, there are significant resources that can be saved and used in other more meaningful ways. For example, in support of proposed revisions to its NEPA regulations, the Farm Service Agency (FSA) estimated that the revisions to categorical exclusions alone would eliminate 314 EAs per year, at an aggregate annual cost savings of \$345,000. 79 Fed. Reg. 52,239, 52,246 (Sep. 3, 2014).

<sup>32</sup> See Proposed Rule, 85 Fed. Reg. at 1715 (Proposed § 1501.4); Proposed Rule, 85 Fed. Reg. at 1728 (Proposed § 1508.1(d)).

<sup>33</sup> See, e.g., 40 C.F.R. 1508.4; Categorical Exclusion Guidance, 75 Fed. Reg. at 75,628 (“A categorical exclusion is a category of actions that a Federal agency determines does not *normally* result in individually or cumulatively significant environmental effects.”) (emphasis added).

<sup>34</sup> See Proposed Rule, 85 Fed. Reg. at 1728 (Proposed § 1508.1(d)).

<sup>35</sup> See Proposed Rule, 85 Fed. Reg. at 1725 (Proposed § 1506.3(f)).

<sup>36</sup> 40 C.F.R. § 1507.3(b)(2)(ii).

## II. NEPA Analysis is Focused on the Effects of the Agency Action and Reasonable Alternatives to that Action

### A. The Coalition Supports Revisions to Clarify the Statement of Purpose and Need and the Scope of the Alternatives Analysis

The Coalition supports CEQ's proposal to clarify the scope of the alternatives analysis and to tailor the analysis to the purpose and need of the proposal before the agency. In anticipation of potential litigation, agencies often conduct alternatives analyses that have become untethered from the purpose of NEPA, which is to better inform agency decision-making.<sup>37</sup> The breadth and depth of the analyses have increased to analyze an unreasonable number of alternatives that can be unnecessarily detailed as well as far afield from the project proponent's intentions. Inappropriate consideration of alternatives can lead to an analysis of information that is not meaningful to the agency's decision-making process, can frustrate lawful private sector efforts, and can result in agency resources being diverted from understanding relevant and feasible alternatives.

CEQ's proposed revision to § 1502.13 would appropriately tailor the purpose and need of the federal action to the agency's relevant statutory authority and, where a non-federal project proponent is seeking an approval or authorization, to the goals of the applicant.<sup>38</sup> This revision will facilitate more effective NEPA review by more closely aligning the definition of the purpose and need statement with the actual purpose of the agency action.

By more clearly defining the purpose and need of a proposed federal action, agencies will be better positioned to conduct an appropriate alternatives analysis.<sup>39</sup> The Coalition supports CEQ's proposed revision to § 1502.14 to clarify the scope of the alternatives analysis.<sup>40</sup> Analyses that consider alternatives that do not meet the purpose and need of an action are not meaningful to the agency's decision-making process nor do they meaningfully inform the public. Thus, a correct formulation of the purpose and need statement appropriately limits the number of alternatives that must be considered.<sup>41</sup> Alternatives that do not meet the purpose and need of an action may yield information that is not relevant to the decision before the agency or even feasible within the agency's statutory authority. The Coalition agrees with CEQ's proposed definition of "reasonable alternatives," which reflects that reasonable alternatives must be tailored to the purpose and need of the federal action.<sup>42</sup> Consistent with the statutory principles of NEPA, the definition also appropriately reflects that reasonable alternatives should be limited to alternatives that are technically and economically feasible.<sup>43</sup> Again, this clarification is

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<sup>37</sup> *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768-69 (2004).

<sup>38</sup> See Proposed Rule, 85 Fed. Reg. at 1720 (Proposed § 1502.13).

<sup>39</sup> See *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 869 (D.C. Cir. 1999) (stating that "a reasonable alternative is defined by reference to a project's objectives.") (internal quotation marks omitted).

<sup>40</sup> See Proposed Rule, 85 Fed. Reg. at 1720 (Proposed § 1502.14).

<sup>41</sup> See *Slater*, 198 F.3d at 867 (an agency is required only to consider alternatives that "bring about the ends of the federal action.") (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)).

<sup>42</sup> See Proposed Rule, 85 Fed. Reg. at 1730 (Proposed § 1508.1(z)).

<sup>43</sup> See 42 § 4331(b) ("In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to **use all practicable means**, consistent with other essential considerations

consistent with longstanding case law recognizing that a rule of reason applies to the type of alternatives that must be considered in order to serve the purpose and need of the proposed action.<sup>44</sup>

The Proposed Rule appropriately removes the current directive to “[i]nclude reasonable alternatives not within the jurisdiction of the lead agency.”<sup>45</sup> By their very nature, alternatives that the lead federal agency has no authority over are neither “reasonable” nor within the purpose of the proposed federal action and could create the type of roadblocks that NEPA was designed to avoid.<sup>46</sup> Indeed, early court decisions attempted to push federal agencies beyond the bounds of their legal authority and expertise by requiring an agency to, for example, consider measures that would eliminate the need for offshore oil and gas leasing—an activity compelled by federal law.<sup>47</sup> While the effect of these early decisions has been somewhat mitigated by subsequent Supreme Court and other judicial decisions, the notion that agencies should consider alternatives that may be outside of their statutory authority when reviewing proposed actions continues to impact agency decision-making.<sup>48</sup>

The Coalition also supports CEQ’s clarification that agencies must only consider reasonable alternatives that are sufficient to inform the agency’s reasoned decision-making and need not exhaust all potential alternatives.<sup>49</sup> In the context of federal approval of private development, for example, this is consistent with longstanding case law that recognizes the limits of the obligation to consider alternatives and ties it back to an applicant’s purpose and need.<sup>50</sup>

CEQ’s proposed revisions would guide agencies in selecting appropriate alternatives by focusing agencies on the specific purpose and need of the federal action and by limiting the number of alternatives to those that would most meaningfully inform their decision-making.

## **B. The Definition of Effects Needs Regulatory Clarity**

The identification of potential effects or impacts<sup>51</sup> related to a federal action is the core of NEPA analysis. As such, it is critical that the definition of “effects” is crafted in a way that provides agencies with

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of national policy, to improve and coordinate Federal plans, functions, programs, and resources . . . .”) (emphasis added); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (scope of NEPA inquiries must remain manageable to meet NEPA’s goal of informing agency’s fully informed and well considered decision).

<sup>44</sup> *See League of Wilderness Def.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F. 3d 1060 (9th Cir. 2012) (alternative of exempting large trees from removal did not meet need for fire suppression); *Rivers Unlimited v. U.S. Dep’t of Transportation*, 533 F. Supp. 2d 1 (D.D.C. 2008) (agency need not consider expansion of existing river crossing because it did not meet need to build new bridge).

<sup>45</sup> 40 C.F.R. 1502.14(c).

<sup>46</sup> *See Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996) (“An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives.”) (citations omitted).

<sup>47</sup> *See Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

<sup>48</sup> *See Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

<sup>49</sup> *See Proposed Rule*, 85 Fed. Reg. at 1720 (Proposed § 1502.14(a)).

<sup>50</sup> *Roosevelt Campobello Intern. Park Comm’n v. U.S. EPA*, 684 F.2d 1041 (1st Cir. 1982); *Env’tl. Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm’n*, 470 F.3d 676 (7th Cir. 2006).

<sup>51</sup> The Coalition uses the terms “effects” and “impacts” synonymously in this letter.

a clear and direct process for identifying the potential effects of their actions. The Coalition appreciates CEQ's efforts to provide regulatory clarity to this definition in an attempt to establish clear and workable boundaries around the effects analysis.

NEPA imposes procedural requirements on federal agencies to evaluate and consider the environmental impacts of their actions. The statutory language of NEPA provides that for major federal actions, agencies prepare a detailed statement of, among other things, the "environmental impact of their proposed action" and "adverse environmental effects" that cannot be avoided.<sup>52</sup> For the consideration of effects resulting from a federal action, CEQ's current regulations establish a framework that subdivides reasonably foreseeable "effects or impacts" into "direct" and "indirect" effects of a proposed action, in addition to considering the "cumulative effects" of that action with other reasonably foreseeable actions affecting the same resource.<sup>53</sup> As CEQ recognizes, the current framework of considering direct, indirect, and cumulative effects is not required by the statute,<sup>54</sup> and was instead CEQ's interpretation of the general statutory directive to consider "environmental impacts."<sup>55</sup>

The existing framework and imprecision on the boundary scope of effects to be considered has caused difficulties for federal agencies, private applicants, and courts. The U.S. Court of Appeals for the D.C. Circuit's decision in *Sierra Club v. FERC* ("*Sabal Trail*") provides an example of how lack of clarity in the definition of effects results in inconsistent case law that does not advance NEPA's purpose.<sup>56</sup> In *Sabal Trail*, a divided panel of the D.C. Circuit held that the Federal Energy Regulatory Commission's (FERC) NEPA analysis of interstate natural gas pipeline projects should have considered the downstream use of the transported natural gas after it leaves the FERC-certified pipeline, despite the fact that FERC has no involvement or control over what happens to the gas after it leaves the pipeline and no legal authority over the combustion of that gas for electricity or use of that gas as a feedstock for such products as fertilizers and pharmaceuticals.<sup>57</sup> The D.C. Circuit also did not take into account the challenges associated with assessing the impact of those specific emissions on the global climate and linking them to any particular outcome.<sup>58</sup> The D.C. Circuit's holding is in tension with long-standing Supreme Court precedent that more than a "but for" causal relationship is required to demonstrate a connection under NEPA.<sup>59</sup> FERC ultimately satisfied the court order with a relatively short supplemental analysis that was, of necessity, without any determination of the significance of the impacts from downstream greenhouse gas

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<sup>52</sup> 42 U.S.C. § 4332(2)(C)(i)-(ii).

<sup>53</sup> See 40 C.F.R. §§ 1508.7 and 1508.8.

<sup>54</sup> See Proposed Rule, 85 Fed. Reg. at 1707-08.

<sup>55</sup> 42 U.S.C. 4332(C). The U.S. Supreme Court has long recognized the ambiguity in the terms of NEPA and that NEPA does not apply to all effects of a federal action. See *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983) ("To determine whether § 102 requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue.").

<sup>56</sup> *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017).

<sup>57</sup> Such authority belonged to the State of Florida and its related agencies.

<sup>58</sup> *Id.* at 1371.

<sup>59</sup> See *Pub. Citizen*, 541 U.S. at 769 (agencies are not the legally relevant cause of environmental effects "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions"); *Metro. Edison Co.*, 460 U.S. at 774 ("Some effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within § 102 because the causal chain is too attenuated.")

("GHG") emissions and that did not alter the agency's original decision.<sup>60</sup> This type of analysis for analysis' sake does not serve the purpose of NEPA and exemplifies how NEPA reviews can become so protracted. Further, this is an example of inconsistency in the interpretation of the bounds of NEPA review that poses challenges for agencies and the regulated community. Contrary to the D.C. Circuit's decision in *Sabal Trail*, in other contexts courts have had little trouble with the notion that NEPA requires a substantial causal relationship between the impact and the federal action for federal review to be required, illustrating the need for clarity and consistency for both agencies and courts.<sup>61</sup>

Now, forty years after promulgating the existing regulations, CEQ has proposed a revised definition in order to provide additional clarity around the boundaries of an agency's effects analysis.<sup>62</sup> CEQ's authority to revise the definition of effects cannot be seriously disputed.<sup>63</sup> CEQ's revised definition of "effects" shifts the focus from the type of effect—direct, indirect, or cumulative—to the causal relationship of the effect with the federal action. The Coalition believes that this change in emphasis will help the government and private entities engaged in the NEPA process focus more productively on identifying and considering meaningful environmental impacts rather than attempting to fill each of the current three buckets with a long list of items that may not be meaningful in the context of the action at issue. CEQ's regulatory definition does not break new ground. Instead, it relies on Supreme Court precedent, developed in the absence of regulatory clarity, that "NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause."<sup>64</sup> Importantly, as would be codified in the regulatory definition under CEQ's proposed revisions, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA."<sup>65</sup> The Proposed Rule would provide much needed regulatory direction to improve application of the causation requirement in a consistent and predictable manner.

The Proposed Rule also recognize that for an analysis to be meaningful and serve the purposes of NEPA, the analysis must be relevant to the agency's decision-making discretion within the bounds of the statute under which it is acting.<sup>66</sup> NEPA review is triggered by an agency's action taken pursuant to an authorizing statute—for example, permitting under the Clean Water Act or a certification pursuant to the Natural Gas Act. It is the action statute that prescribes the parameters for agency decision-making and

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<sup>60</sup> FERC's supplemental analysis quantified the maximum GHG emissions from downstream use of natural gas transported on the pipeline without any determination of the significance of impacts from these emissions. *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 P 15 (2018).

<sup>61</sup> See *Ohio Valley Env'tl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009) (Corps of Engineers not required to consider impacts of surface coal mining as impacts of its own action under the Clean Water Act); *Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dept. of the Interior*, 547 F. Supp. 2d 1033 (D. Ariz. 2008).

<sup>62</sup> See Proposed Rule, 85 Fed. Reg. at 1707-08.

<sup>63</sup> See *Andrus*, 442 U.S. at 358 (1979) ("substantial deference" afforded to CEQ's interpretation of NEPA); see also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124-25 (2016) (recognizing an agency's authority to change a longstanding interpretation of an ambiguous statute).

<sup>64</sup> *Pub. Citizen*, 541 U.S. at 767.

<sup>65</sup> *Id.*

<sup>66</sup> See Proposed Rule, 85 Fed. Reg. at 1729 (Proposed § 1508.1(g)(2)) ("Effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.")

thus limits the agency's discretion to act. NEPA does not expand these parameters.<sup>67</sup> As a result, an agency's consideration of effects resulting from an action that it has no ability to prevent is not meaningful to its decision, and thus fails to fulfill NEPA's statutory purposes of promoting informed agency actions and providing the public with the relevant information considered.<sup>68</sup>

### **C. The Elimination of Cumulative Effects Analysis Will Focus Agencies on Meaningful Information**

Congress intended NEPA to provide action-forcing mechanisms to ensure that in making decisions, agencies "will have available, and will carefully consider, detailed information concerning significant environmental impacts."<sup>69</sup> To inform its decision, an agency is "not required 'to engage in speculative analysis' or 'to do the impractical, if not enough information is available to permit meaningful consideration.'"<sup>70</sup>

The cumulative effects analysis historically required by CEQ's regulations has been challenging for agencies to prepare, in part due to the difficulty in bounding a potentially open-ended analysis to the satisfaction of the courts and in providing a meaningful analysis of large-scale or system-wide phenomena subject to nearly limitless variables. Over the years, CEQ has put significant effort into providing additional guidance and instruction on the bounds of the cumulative effects analysis in order to improve the analysis and provide more meaningful information for agencies to consider.<sup>71</sup> Despite these efforts, agencies and courts are still challenged by considering cumulative effects in a meaningful way. Instead of providing meaningful information to agencies, challenges to the adequacy of the cumulative effects analysis have become a focal point in litigation, furthering confusion regarding the proper scope of review.<sup>72</sup> Indeed, different courts of appeals have taken different approaches to measuring an agency's compliance with NEPA when it comes to considering cumulative effects.<sup>73</sup> Issues considered by courts range from the scope of the geographic area evaluated, the similarity of other actions, whether different types of projects in a certain area should be included, and the timing of unrelated actions. Courts struggle with the level of detail required with respect to effects that may be well outside an agency's areas of expertise or

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<sup>67</sup> For example, the D.C. Circuit has recognized that NEPA does not require consideration of effects where an agency lacks authority to prevent the effect of concern. *See Town of Barnstable v. Federal Aviation Administration*, 740 F.3d 681 (D.C. Cir. 2014) (FAA lacked authority to contradict approval of wind project regardless of outcome of assessment of risk to air traffic).

<sup>68</sup> *See Pub. Citizen*, 541 U.S. at 768-69 (describing why considering effects that an agency has no ability to control does not serve the statutory purpose of NEPA).

<sup>69</sup> *Robertson v. Methow Valley*, 490 U.S. 332, 349 (1989).

<sup>70</sup> *Dominion Transmission, LLC*, 163 FERC ¶ 61,128, at PP 41, 62 (2018) (quoting *N. Plains Res. Council v. Surface Transp. Board*, 668 F.3d 1067, 1078 (9th Cir. 2011)).

<sup>71</sup> *See, e.g.*, Memorandum from James L. Connaughton, Chairman, CEQ to Heads of Federal Agencies, Guidance on the Consideration of Past Actions in Cumulative Effects Analysis, June 24, 2005; CEQ, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Jan. 1997).

<sup>72</sup> *See Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F. Supp. 2d 656 (W.D. Wis. 2013) (court required agency to evaluate cumulative effects of highway expansion with respect to impacts on transit expansion even though it lacked authority to undertake transit projects).

<sup>73</sup> *Compare Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998) (cumulative effects analysis must consider other "reasonably foreseeable" similar agency actions), *with Utahns for Better Transportation v. U.S. Dep't of Transportation*, 319 F.3d 1207 (10th Cir. 2003) (applying an independent utility test).

control.<sup>74</sup> Decisions are fact-specific and rarely result in clear guidance that an agency can apply to other situations, resulting in yet more confusion and inconsistency. In NEPA litigation in the U.S. Courts of Appeals, challenges to cumulative effects analyses routinely account for twenty-five percent of all NEPA litigation.<sup>75</sup>

CEQ's proposal to eliminate the separate category of cumulative effects and to add regulatory language instructing agencies that "analysis of cumulative effects is not required"<sup>76</sup> recognizes the problems associated with the formulaic cumulative effects analysis and would focus agency resources on an analysis that is more likely to provide meaningful information to the agency's decision. Specifically, the Proposed Rule ensures that agencies will consider reasonably foreseeable effects on the environment that are properly tied to the agency's action. The consideration of effects necessarily includes analysis of the affected environment in its known and reasonably foreseeable condition. This straightforward approach obviates the need to conduct a formulaic and isolated "cumulative impacts analysis."

### **III. The Focus of NEPA Should Be on Improving Agency Decisions**

Without appropriate boundaries, NEPA's procedural obligation for agencies to consider the potential environmental impacts of their decisions can result in a continuous request for information that detracts from the goal of analysis that is sufficient to support a reasonable decision. CEQ and the courts have recognized the need for these boundaries and have long-established principles intended to provide federal agencies with the necessary guidance for balancing the desire for information against the procedural-limitations of NEPA. Since first promulgating its regulations in 1978, CEQ has maintained that "NEPA's purpose is not to generate paperwork."<sup>77</sup> In addition, courts have recognized that agencies may rely on existing analyses prepared by other agencies.<sup>78</sup> Nonetheless, agencies are still faced with constant pressure to increase the amount of information generated.<sup>79</sup> The Coalition supports CEQ's proposed revisions that provide agencies additional instruction on the appropriate reliance on existing available information.

#### **A. Federal Agencies Should Rely on Existing Information and Analyses**

As agencies consider the environmental impacts of their actions, their reliance on existing information and analyses—both from within the agency and from other agencies—to inform their

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<sup>74</sup> See *Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37 (D.D.C. 2010).

<sup>75</sup> See e.g., NATIONAL ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS, 2018 ANNUAL NEPA REPORT (Nov. 2019) (identifying challenges to the cumulative effects analysis in 1 of the 35 cases before the U.S. Court of Appeals).

<sup>76</sup> See Proposed Rule, 85 Fed. Reg. at 1728 (Proposed § 1508.1(g)).

<sup>77</sup> 40 C.F.R. § 1500.1(c).

<sup>78</sup> See *Calvert Cliffs' Coordinating Comm., Inc.*, 449 F.2d at 1118.

<sup>79</sup> See e.g., *Protect Our Communities Foundation v. Jewell*, 825 F.3d 571, 583 (9th Cir. 2016) (rejecting argument that the Bureau of Land Management was required to comprehensively review the effects of noise on birds at all stages of life); *Sierra Club v. United States Dep't of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017) ("The purpose of NEPA is not to 'generate . . . excellent paperwork,' but rather to 'foster excellent action' through informed decisionmaking.") (quoting 40 C.F.R. § 1500.1(c)).

decisions and satisfy their NEPA obligations is an important step towards “facilitating more efficient, effective, and timely NEPA reviews by Federal agencies.”<sup>80</sup>

The Coalition appreciates CEQ’s direction to agencies to “make use of reliable existing data and resources” and the clarification that agencies “are not required to undertake new scientific and technical research to inform their analyses.”<sup>81</sup> Often, there can be existing information from prior reviews, in the vicinity of or under similar circumstances to, the proposed action.<sup>82</sup> By considering this existing information it may be possible for an agency to determine whether or not additional information-gathering or analysis is warranted, or whether the existing information alone is informative of significance. It is also possible, and likely, that existing information informative to an agency’s consideration of impacts has been developed by other agencies that have statutory authority and technical expertise.<sup>83</sup> For example, the Corps in its analyses of water quality impacts “considers conclusive with respect to water quality considerations” those water quality analyses prepared under state review.<sup>84</sup> Given the substantive and technical expertise of these other agency actions, not to mention their legal jurisdiction over certain types of impacts, the Coalition encourages CEQ to include a presumption that analysis of an impact is sufficient for NEPA purposes if analyzed pursuant to a federal statutory scheme designed to regulate that impact.<sup>85</sup> This would clearly permit, but not require, agencies to rely on existing analyses. Where an agency determines that an existing analysis does not satisfy the rule of reason because the information is not useful to the agency’s decision-making, the agency is not required to consider the existing analyses.<sup>86</sup> However, a presumption that these analyses would be sufficient for NEPA purposes would encourage agencies to consider these analyses and would help eliminate duplicative analyses across agencies.<sup>87</sup> Once again, this builds upon existing regulations and case law.<sup>88</sup>

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<sup>80</sup> See Proposed Rule, 85 Fed. Reg. at 1691 .

<sup>81</sup> Proposed Rule, 85 Fed. Reg. at 1721 (Proposed § 1502.24)..

<sup>82</sup> CEQ should recognize that existing analyses (including NEPA analyses) should not be subject to any predefined expiration period, but instead should remain reliable for so long as it is probative of significance for the agency.

<sup>83</sup> See *Pub. Citizen v. Nat’l Highway Traffic Safety Admin.*, 848 F.2d 256 (D.C. Cir. 1988) (agency entitled to rely on EPA advice regarding annual fuel economy rule).

<sup>84</sup> See 33 C.F.R. § 320.4(d).

<sup>85</sup> See *Pub. Citizen v. Nat’l Highway Traffic Safety Admin.*, 848 F.2d at 267-68 (“implied presumption” that EPA finding of compliance with Clean Air Act standards meant there would be an insignificant emissions increase”).

<sup>86</sup> <sup>86</sup> *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. at 767 (“inherent in NEPA and its implementing regulations is a “rule of reason,” which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process.”).

<sup>87</sup> The Coalition notes that reliance on existing analyses does not modify an agency’s obligation to make its own determination of significance. See *Calvert Cliffs’ Coordinating Committee v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1118 (D.C. Cir. 1971). Neither does this provision require agencies to rely on existing information to consider impacts that are not significant and that the agency would not include in its NEPA analysis if not but for their existence.

<sup>88</sup> See 40 C.F.R. 1502.21; *Citizens for Smart Growth v. Dep’t of Transportation*, 669 F.3d 1203 (11<sup>th</sup> Cir. 2012) (local planning documents properly incorporated into agency analysis); *City of Carmel-By-The-Sea v. U.S. Dep’t. of Transportation*, 123 F.3d 1142 (9<sup>th</sup> Cir. 1997) (indirect effects of project need not be considered because it was incorporated into state and local analyses).

## **B. Analyses That Serve as the “Functional Equivalent” of a NEPA Analysis Can Satisfy an Agency’s NEPA Obligation**

The Proposed Rule recognizes that there may be synergies between an agency’s NEPA analysis and other analyses prepared pursuant to other statutory or executive requirements, and that, where appropriate, these other analyses may serve the “functional equivalent” of the agency’s NEPA analysis.<sup>89</sup> This concept should apply to both EISs and EAs since it is not exclusive to actions with potentially significant impacts. The Coalition supports these revisions to the extent that they promote efficiency and reduce duplication of agency efforts.

As CEQ recognizes, for some agency rulemakings and determinations, agencies conduct analyses that may assess environmental impacts, including impacts to air and water quality, ecosystems, and animal habitat.<sup>90</sup> Where those analyses meet the statutory obligations of NEPA as documented by the agency, they may serve the purpose of an EIS and satisfy an agency’s NEPA obligation. The Coalition agrees with CEQ that, for an agency analysis to serve the purpose of an EIS, the “analysis must address environmental effects, alternatives, the relationship between short-term uses and long-term productivity, and any irreversible commitments of resources.”<sup>91</sup> These considerations will ensure that a federal agency is meeting its NEPA obligation when relying on such analyses.

A number of courts have recognized that there are situations where an agency’s action pursuant to a substantive statute may serve as the “functional equivalent” of the EIS process.<sup>92</sup> By codifying this concept in the NEPA implementing regulations, CEQ would be providing consistent direction to agencies on the scope of actions by which the functional equivalence determination can apply and the appropriate factors for consideration by an agency in making the determination.<sup>93</sup>

CEQ has invited comment on analyses that can serve as the functional equivalent of an EIS.<sup>94</sup> In response, the Coalition encourages CEQ to provide agencies with further direction, either in the regulations or through guidance, on the need to document how an analysis satisfies the explicit requirements of Section 102(C) of NEPA. Further, the Coalition encourages CEQ to recognize that the scope of an Executive Order cost-benefit analysis for economically significant rulemakings is not an appropriate guide for considering environmental impacts. Often, NEPA reviews relate to an agency’s action regarding a specific project or proposal, while the cost-benefit provisions of EO 12866 are designed for evaluating regulatory programs that can impact entire sectors of the economy. In particular, neither NEPA nor the implementing regulations (existing and proposed) require that agencies undertake a cost-benefit analysis in their considerations of the environmental effects of their proposed actions.<sup>95</sup> Instead,

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<sup>89</sup> See Proposed Rule, 85 Fed. Reg. at 1726 (Proposed § 1506.9).

<sup>90</sup> See Proposed Rule, 85 Fed. Reg. at 1705.

<sup>91</sup> See Proposed Rule, 85 Fed. Reg. at 1705; see also 42 U.S.C. § 4332(2)(C).

<sup>92</sup> See, e.g., *State of Ala. ex rel. Siegelman v. EPA*, 911 F.2d 499, 504 (11th Cir. 1990); *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm’n*, 869 F.2d 719, 729 n. 7 (3d Cir.1989); *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 367 n. 51 (D.C.Cir.1981).

<sup>93</sup> CEQ’s proposed codification of the functional equivalence doctrine need not align perfectly with judicial application. CEQ’s regulatory interpretation of the statute is afforded substantial deference. See *Andrus*, 442 U.S. at 358 (“substantial deference” afforded to CEQ’s interpretation of NEPA).

<sup>94</sup> See Proposed Rule, 85 Fed. Reg. at 1705.

<sup>95</sup> 42 U.S.C. § 4332; 40 C.F.R. § 1502.23 (“For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis

the agency is to use its expertise to assess the analytical method that would provide meaningful information for its decision. Whereas, the 12866 cost-benefit analysis is focused primarily on the costs and benefits of the anticipated regulatory action with the purpose of ensuring that agencies “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>96</sup> This mismatch in purposes between the 12866 cost-benefit analysis and the NEPA analysis suggests that the 12866 cost-benefit analysis may not appropriately inform the agency in its decision on the potential environmental impacts. For this reason, CEQ should clarify that agencies should not conduct a 12866 cost-benefit analysis for the purpose of complying with NEPA.

**C. “Unavailable” Information Should Be Obtained If Not Unreasonable to Obtain and If Meaningful to the Agency’s Decision**

The Proposed Rule would update CEQ’s existing regulation addressing how to account for unavailable information where the information relates to a “reasonably foreseeable adverse impact” that is “essential” to the agency’s reasoned choice among alternatives. By shifting the standard for obtaining such information from where the costs to obtain are “not exorbitant” to where the costs to obtain are “not unreasonable,”<sup>97</sup> CEQ has recognized that there may be unreasonable costs associated with obtaining that information. For example, although it is almost always possible to gather more field data through additional studies, the costs associated with obtaining this information, including not just monetary costs, but also costs associated with delays of the agency action and resource costs—may outweigh the value of the information or the need for timely action on a particular proposal.

CEQ has requested comment on whether “overall costs” warrants further definition to address whether costs are or are not unreasonable. The Coalition encourages CEQ to provide direction on how to define costs. The focus should not be limited to monetary cost and should take into account the goals of an applicant. The agency should weigh the value of obtaining additional information to the agency’s decision under its action statute against factors such as the complexity of or difficulty in obtaining the information and the impacts of delays to achieving the purpose of the proposed action.

**D. The Coalition Supports CEQ’s Revisions to Increase Interagency Coordination and to Support More Effective and Predictable NEPA Reviews**

The Coalition supports CEQ’s effort to increase interagency coordination in support of more effective and predictable NEPA reviews. Proposed §§ 1501.7 and 1501.8 would clarify the roles of lead and coordinating agencies to facilitate greater coordination among federal agencies in implementing NEPA processes.<sup>98</sup> The proposed revisions would also codify important principles of the “One Federal Decision” framework included in Executive Order 13807 and in the March 20, 2018 interagency

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and should not be when there are important qualitative considerations.”). NEPA’s silence on the appropriate analytical method makes sense given that some impacts are more amenable to a cost-benefit analysis or quantification than other impacts. For example, economic impacts may be more amenable to quantification than noise or vibration impacts.

<sup>96</sup> See Exec. Order. No. 12866, *Executive Order 12866 of September 30, 1993: Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>97</sup> See Proposed Rule, 85 Fed. Reg. at 1721 (Proposed § 1502.22(b) Incomplete or unavailable information).

<sup>98</sup> See Proposed Rule, 85 Fed. Reg. at 1715-16 (Proposed §§ 1501.7 Lead agencies and 1501.8 Cooperating agencies).

Memorandum of Understanding.<sup>99</sup> Specifically, the revisions would require the development of a joint schedule and identification of milestones for environmental reviews to create a more transparent NEPA process and to facilitate more efficient NEPA reviews.<sup>100</sup> The Coalition also supports the corresponding proposed revisions to more clearly require cooperating agencies to consult with the lead agency, meet the joint schedule, and identify issues that may affect the agency's ability to meet the joint schedule.<sup>101</sup> The Coalition observes that this process may benefit from the involvement of project management experts at each agency who can smooth the integration of multiple agencies. These efforts are critical—the Coalition has observed that some agencies have struggled with the One Federal Decision mandate when it comes to creating an efficient joint process. These revisions would not only benefit interagency processes, but would provide greater transparency and predictability to non-federal project proponents that seek government authorizations requiring NEPA review. The Coalition also agrees with CEQ's proposal to apply §§ 1501.7 and 1501.8 to EAs as well as EISs to realize the efficiency gains for both types of environmental documents.

The Coalition supports the revision to Proposed § 1501.7 to require the lead and cooperating agencies to evaluate the proposed federal action in a single EIS (or EA) and to issue a joint record of decision (or joint Finding of No Significant Impact ("FONSI")) when practicable.<sup>102</sup> By creating a presumption that agencies shall prepare joint NEPA and decisional documents, the Proposed Rule would encourage agency collaboration and help ensure more consistent outcomes. The proposal also appropriately requires this joint action only if it would be practicable. By limiting joint action to circumstances in which it would be practicable, the Proposed Rule would focus the NEPA process on meaningfully informing agency decision-making and would not force the requirement of a joint action where doing so could cause delay or other inefficiencies. CEQ should provide additional clarification that agencies should consider efficacy, efficiency, and the potential for delays in determining practicability.

#### **E. The Coalition Supports the Reasonable Presumptive Page and Time Limits Proposed by CEQ**

The Coalition supports CEQ's proposal to set presumptive page and time limits for EA and EIS documents.<sup>103</sup> The preparation time and length of documents have become disproportionate to what is required by NEPA. For example, federal agencies took an average of 4.9 years to prepare the EISs completed in 2018.<sup>104</sup> Between 2010 and 2017, 25 percent of the NEPA reviews, from the Notice of Intent

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<sup>99</sup> See Exec. Order. No. 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, 82 Fed. Reg. 40,463 (Aug. 24, 2017); Memorandum from Mick Mulvaney, Director, Office of Management and Budget and Mary Neumayr, Chief of Staff, Council on Environmental Quality for Heads of Federal Departments and Agencies, M-18-13, (Mar. 20, 2018).

<sup>100</sup> See Proposed Rule, 85 Fed. Reg. at 1716 (Proposed § 1501.7(i)).

<sup>101</sup> See Proposed Rule, 85 Fed. Reg. at 1716 (Proposed § 1501.8(b)(6)).

<sup>102</sup> See Proposed Rule, 85 Fed. Reg. at 1716 (Proposed § 1501.7(g)).

<sup>103</sup> See Proposed Rule, 85 Fed. Reg. at 1717 (Proposed § 1501.10) (prescribing presumptive time limits of one year for EAs and two years for EISs); Proposed Rule, 85 Fed. Reg. at 1715 (Proposed § 1501.5(e)) (prescribing a presumptive page limit of 75 pages for EAs); Proposed Rule, 85 Fed. Reg. at 1719 (Proposed § 1502.7)(prescribing a presumptive page limit of 300 pages for EISs).

<sup>104</sup> NATIONAL ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS, 2018 ANNUAL NEPA REPORT 9-10 (November 2019).

to the Record of Decision, took more than six years.<sup>105</sup> The Bayonne Bridge project between New York and New Jersey to elevate its bridge deck to accommodate larger ships provides a specific example of a NEPA process that was unreasonable in its length.<sup>106</sup> The project's NEPA review generated more than 5,000 pages of federally mandated archaeological, traffic, fish habitat, soil, pollution, and economic reports, costing over \$2 million to produce.<sup>107</sup> The project has taken a decade from conception to completion.<sup>108</sup>

CEQ's proposed presumptive page and time limits would foster better decision-making by supporting agencies in preparing more focused NEPA documents that direct analysis towards information that is meaningful to agency decisions. Agencies can meet these limits by focusing on issues and information that is most relevant to the decision before the agency. By implementing this streamlined approach, agencies can develop NEPA analyses that are easier to understand and more concise, but remain probative of significant issues. To ensure similar benefits are achieved with respect to the appendices and other material supplementing an EIS or EA, CEQ should direct agencies to limit the information included in supplemental material to information that is probative of the significant environmental impacts within the scope of the agency's NEPA review.

Presumptive time limits would also support non-federal project proponents by facilitating more transparent timelines for projects requiring agency approval. The Coalition recommends that CEQ strengthen this provision by encouraging agencies to rigorously conform to the direction provided in Proposed § 1501.9, which requires the lead agency to publish a notice of intent "[a]s soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an [EIS].<sup>109</sup> The Coalition recommends that CEQ require in the Final Rule that federal agencies provide clear notice of its "date of decision" for preparing an EA, thus starting the time period.<sup>110</sup> This will provide greater certainty around the time limits for an EA. The presumptive page limits would make clear to courts that NEPA analyses are not expected to be treatises on any particular topic in order to comply with the law. Voluminous NEPA documents serve more to overwhelm rather than inform decision-makers and the public. Accordingly, CEQ's proposed revisions would provide for a more efficient, transparent, and useful analysis that is better aligned with the goals of NEPA.

The Coalition also supports the proposal to allow for a senior agency official to approve in writing a longer time or page limit for NEPA documents. This will provide agencies flexibility to deviate from the presumptive limits when necessary to meet the agency's NEPA obligations. CEQ should clarify, however, that agencies may delegate the responsibilities of the "senior agency official" to an appropriate member of the agency if necessary to facilitate more efficient decision-making and, if the agency lacks the position (or a clear equivalent to the position) of "assistant secretary." CEQ should clarify, however, that the designated senior agency official retains the ultimate responsibility for resolving implementation issues and other NEPA compliance issues.

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<sup>105</sup> See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENT TIMELINE (2010-2017) 1 (Dec. 14, 2018).

<sup>106</sup> Sasha Mackler & Michele Nellenbach, *America's National Climate Strategy Starts with NEPA*, BIPARTISAN POLICY CENTER (Jan. 08, 2020).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Proposed Rule, 85 Fed. Reg. at 1716 (Proposed § 1501.09(d)).

<sup>110</sup> Proposed Rule, 85 Fed. Reg. at 1717 (Proposed § 1501.10(b)(1)).

## **F. Applicant-Prepared NEPA Documents**

The Coalition supports CEQ's proposed revisions clarifying the role of applicants in preparing NEPA documents.<sup>111</sup> While the nature of the practice varies by agency, it is currently common for applicants to support the preparation of EAs and EISs by funding a third party contractor or otherwise providing contractor support to produce appropriate environmental reviews. Under these scenarios, the agencies direct the efforts and are ultimately responsible for ensuring that the analysis fully complies with NEPA and fulfills the agencies' needs. The Proposed Rule would codify this practice and clarify that it does not amount to an agency avoiding its own NEPA responsibilities, but increases efficiency by leveraging private sector resources. Because NEPA is a federal responsibility, the Proposed Rule clarifies that the involvement of an applicant does not shift the agency's responsibility for ensuring the scope and content of the NEPA review. This regulatory direction will help reduce delays due to resource constraints while ensuring that there is no confusion regarding the fact that the NEPA analysis must present the agency's own assessment of the issues.

## **G. Irreversible and Irretrievable Commitment of Resources**

NEPA requires that agencies take a "'hard look' at [the] environmental consequences" of their actions.<sup>112</sup> Implicit in this requirement is that agencies should undertake this inquiry in good faith, and should not predetermine the NEPA analysis by committing themselves to an outcome before completing their analysis.<sup>113</sup> Courts have held that an agency predetermines the outcome when the agency "irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis."<sup>114</sup> CEQ's current regulations attempt to head off this concern by prohibiting actions concerning a proposal that "would (1) have an adverse environmental impact; or (2) limit the choice of alternatives" and by providing instruction on the types of private activities that can proceed before the NEPA analysis is final.<sup>115</sup>

Over time, the scope of activities allowed to proceed has shrunk as courts have continued to expand the scope of the "proposal" beyond the scope of the federal agency's authorization.<sup>116</sup> CEQ's proposed revisions seek to clarify the activities that can proceed during the NEPA process.<sup>117</sup> The Coalition encourages CEQ to clarify further that the scope of the "proposal" is limited to that project over which the agency has authorization and that activities outside of this scope, for example facilities related to the project but over which the agency has no authority and the staging of materials needed for eventual construction of a project, are not included in this prohibition. Indeed, given that NEPA does not expand an agency's underlying statutory authority, CEQ should clarify that an agency cannot prevent private activity that it does not have the authority to regulate, even during the pendency of NEPA review.

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<sup>111</sup> See Proposed Rule, 85 Fed. Reg. at 1725 (Proposed § 1506.5).

<sup>112</sup> *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (quoting *Morton*, 458 F.2d at 838).

<sup>113</sup> *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010).

<sup>114</sup> *Id.* 714.

<sup>115</sup> 40 C.F.R. § 1506.1(a).

<sup>116</sup> See e.g., *Maryland Conservation Council v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986) (finding an entire proposed highway as a "federal action" for NEPA purposes because of a single confirmed crossing of federal land).

<sup>117</sup> See Proposed Rule, 85 Fed. Reg. at 1724 (Proposed § 1506.1).

CEQ also has proposed revisions that would provide additional clarity on what activities are allowable during the NEPA process, including “acquisition of interests in land (*e.g.*, fee simple, rights-of-way, and conservation easements), purchase of long lead-time equipment, and purchase options made by applicants.”<sup>118</sup> The revised regulations suggest that these activities are authorized when an agency is considering a “proposed action for Federal funding.” The Coalition encourages CEQ to recognize that some activities should also be allowed to proceed when the federal agency is considering “an application from a non-Federal entity.”

#### **H. NEPA Does Not Require Mitigation**

“It is now well settled that NEPA itself does not mandate particular results, but simply describes the necessary process.”<sup>119</sup> The role of mitigation under NEPA is subject to these procedural constraints; that is, NEPA itself does not require mitigation, but agencies can, and may be required to, consider mitigation. For example, the statute requires discussion of “any adverse environmental effects which cannot be avoided.”<sup>120</sup> Early on in the implementation of NEPA, the Supreme Court recognized the value of mitigation under NEPA, but cautioned that requirements that a mitigation plan actually be developed and implemented would be inconsistent with the procedural limitations of NEPA.<sup>121</sup> The Coalition supports CEQ’s efforts to provide regulatory clarity on the role of mitigation under NEPA versus an action statute that may have independent requirements for mitigation.<sup>122</sup>

Although not required by NEPA, the mitigation of environmental impacts can assist agencies and applicants in the regulatory process and should remain an important element of agency analyses. For example, the consideration of mitigation measures to lessen or avoid potentially significant environmental effects of proposed actions that would otherwise need to be analyzed by an EIS<sup>123</sup> may allow an agency to proceed based on an EA or a categorical exclusion. CEQ’s proposed revisions would require an explanation of the means of and authority for any mitigation in order to preserve this important tool while protecting against potential misuse. This proposal appropriately recognizes that NEPA itself cannot provide the authority for required mitigation and that an action statute must provide that authority for an agency to impose mitigation requirements. However, because of the value that mitigation can provide in lessening the potentially significant environmental effects, the Coalition encourages CEQ to clarify that NEPA itself does not prohibit mitigation and that a project applicant can offer and agree to mitigation measures not required by any action statute for consideration under NEPA.

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<sup>118</sup> *Id.*

<sup>119</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350.

<sup>120</sup> 42 U.S.C. § 4332(2)(C); *Robertson*, 490 U.S. at 332.

<sup>121</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352.

<sup>122</sup> See Proposed Rule, 85 Fed. Reg. at 1715 (Proposed § 1501.6(c)). (“The finding of no significant impact shall state the means of and authority for any mitigation that they agency has adopted, and any applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.”)

<sup>123</sup> COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT, A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (Jan. 1997) (noting that “mitigated FONSI” are on the rise).

## **I. Guidance Documents Must Be Aligned with Any Revisions to the NEPA Regulations**

CEQ has requested comment providing feedback on the continued value of existing guidance documents.<sup>124</sup> Since 1977, CEQ has developed a vast library of guidance documents and handbooks intended to address questions on the appropriate implementation of NEPA. Regardless of the current state of effectiveness or usefulness of the materials, the fundamental changes that CEQ has proposed, if finalized, will necessitate the review and updating of almost all of the guidance materials.<sup>125</sup> Further, to the extent that the purpose of the Proposed Rule is to provide clarity on topics that cause confusion under the current rules, such as consideration of cumulative effects, the guidance materials must be reconsidered. The Coalition recommends withdrawing all current guidance and considering, in consultation with the public and other federal agencies, which guidance materials should be re-issued or revised.<sup>126</sup>

In addition to requesting feedback on the guidance materials generally, CEQ has specifically requested feedback on the need for finalization of CEQ's draft guidance to federal agencies on their consideration of GHG emissions when evaluating proposed major federal actions in accordance with NEPA ("Draft GHG Guidance").<sup>127</sup> The Draft GHG Guidance was intended to provide federal agencies direction on how to assess potential climate effects under NEPA, through reliance on a project's direct and reasonably foreseeable indirect emissions.

With respect to analysis required by NEPA, as with other guidance materials, if CEQ finalizes its Proposed Rule, revisions to the Draft GHG Guidance would also be warranted for alignment with the shifts in evaluating the appropriate scope of NEPA analysis. Moreover, any final GHG guidance should be brief, consistent with the regulations, and, importantly, recognize that GHG emissions and impacts on the climate should be treated the same as any other type of environmental impact under the revised regulations. The Draft GHG Guidance achieved these goals against the backdrop of the existing NEPA regulations, but the approach should be re-assessed in line with new regulations.

## **IV. The Coalition Supports the Revisions That Would Bring Order to the Judicial Review Process**

Several elements of the Proposed Rule would bring additional predictability to the judicial review process without infringing on the rights of citizens to bring claims alleging violations of the statute.

First, the Coalition supports CEQ's proposal to clarify that judicial review may only occur after the lead agency has issued the record of decision or taken other final agency action.<sup>128</sup> This proposed provision would codify established case law and would more clearly define the proper timing for NEPA

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<sup>124</sup> See Proposed Rule, 85 Fed. Reg. at 1710.

<sup>125</sup> For example, CEQ's original guidance document – the "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18,026 (Mar. 23, 1981), is out of date and inconsistent with existing and proposed principles of NEPA review.

<sup>126</sup> The Coalition suggests that its recommendation be implemented in conjunction with the review of guidance documents as directed by Executive Order 13891. See Exec. Order. No. 13891, *Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents*, 84 Fed. Reg. 55,235 (Oct. 15, 2019).

<sup>127</sup> 84 Fed. Reg. 30,097 (June 26, 2019).

<sup>128</sup> See Proposed Rule, 85 Fed. Reg. at 1713 (Proposed § 1500.3(c)).

review, heading off litigation over actions that are not final or actions that are not ripe.<sup>129</sup> The record of decision is often the “consummation” of the agency’s decision-making process and therefore the appropriate action for a court to review an agency’s NEPA compliance.<sup>130</sup> Proposed § 1500.3(c) appropriately recognizes that other agency action may constitute “final agency action.”<sup>131</sup> CEQ’s discussion in the preamble to the Proposed Rule suggests that agencies may “designate” Final EISs, FONSI, or categorical exclusion determinations as final agency actions.<sup>132</sup> The Coalition suggests that CEQ clarify that whether these actions constitute final agency action is determined by whether the action “mark[s] the consummation of the agency’s decision-making process” and whether the action is “one by which rights or obligations have been determined, or from which legal consequences will flow . . . .”<sup>133</sup> This will avoid premature judicial review of NEPA documents that may never form the basis for agency action.<sup>134</sup>

Second, the Coalition also supports CEQ’s proposal to provide clear parameters for public comment and for cooperating agency comment; and to deem forfeited and waived any comments not submitted in the available time periods.<sup>135</sup> This revision will help ensure that agencies have an opportunity to meaningfully consider public comments prior to issuing a final decision on the proposed action.<sup>136</sup> Requiring the submission of comments and objections to the submitted alternatives, information, and analyses section within appropriate time periods provides a reasonable time for public comment.<sup>137</sup> Deeming submission a predicate for judicial review merely codifies a large body of existing precedent.<sup>138</sup> CEQ’s proposal would require agencies to include “a summary of all alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies” and require that agencies invite comment on the completeness of the summary in the draft EIS.<sup>139</sup> If CEQ retains this requirement in the Final Rule, the Coalition recommends that CEQ direct agencies to fulfill this requirement through an efficient process that does not create additional delay in the NEPA process.

Third, the Coalition recommends that CEQ clarify the provision in Proposed § 1500.3(c) concerning administrative stay procedures. The provision proposes to allow agencies to “structure their decision making to allow private parties to seek agency stays of final agency decisions pending administrative or

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<sup>129</sup> See *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

<sup>130</sup> See *id.*

<sup>131</sup> See Proposed Rule, 85 Fed. Reg. at 1713 (Proposed § 1500.3(c) (“It is the Council’s intention that judicial review of agency compliance . . . not occur before an agency has issued the record of decision **or taken other final agency action.**”) (emphasis added)).

<sup>132</sup> See Proposed Rule, 85 Fed. Reg. at 1693-94.

<sup>133</sup> *Bennett*, 520 U.S. at 177–78 (citations omitted).

<sup>134</sup> Courts consider both whether a challenged action is “final agency action” and whether a NEPA claim is ripe in deciding the availability of judicial review. See *South Carolina v. United States*, 912 F.3d 720 (4th Cir. 2019); *Los Alamos Study Group v. U.S. Dept. of Energy*, 692 F.3d 1057 (10th Cir. 2012); *Nuclear Energy Inst., Inc. v. Env’tl. Prot. Agency*, 373 F.3d 1251 (D.C. Cir. 2004).

<sup>135</sup> See Proposed Rule, 85 Fed. Reg. at 1713 (Proposed § 1500.3(b)(3)).

<sup>136</sup> See, e.g., *Pub. Citizen*, 541 U.S. at 764 (“Persons challenging an agency’s compliance with NEPA must ‘structure their participation so that it . . . alerts the agency to the [parties’] position and contentions,’ in order to allow the agency to give the issue meaningful consideration.” (citing *Vermont Yankee*, 435 U.S. at 553)).

<sup>137</sup> See Proposed Rule, 85 Fed. Reg. at 1713 (Proposed § 1500.3(b)(3)).

<sup>138</sup> See *Vermont Yankee*, 435 U.S. at 553; *Pub. Citizen*, 541 U.S. at 764).

<sup>139</sup> See Proposed Rule, 85 Fed. Reg. at 1720 (Proposed § 1502.17).

judicial review of those decisions.”<sup>140</sup> CEQ should clarify that NEPA does not provide this authority and that agencies may only provide this opportunity if authorized by the agency’s organic statute and agency regulations promulgated thereunder.<sup>141</sup> For example, certain actions taken by agencies within the U.S. Department of the Interior are subject to administrative appeal procedures that permit parties to petition for administrative stays.<sup>142</sup> CEQ should be clear that agencies should not establish administrative appeal processes, based on NEPA, that may tie up private activity in another layer of review unless the agency’s own statutory authority contemplates the process. While the Coalition agrees that potential litigants must exhaust administrative remedies when they are available, a principle that should be noncontroversial, the Coalition does not advocate creating another layer of administrative review based solely on NEPA. Accordingly, the Coalition suggests that the provisions relating to administrative stay procedures be clarified.

Finally, the Coalition supports the codification of important principles regarding available remedies for violations of NEPA. These principles, in Proposed § 1500.3(d), reflect both widely-applied legal standards governing the availability of injunctive relief;<sup>143</sup> and the established notion that non-substantive NEPA violations that have no effect on agency decision-making can amount to no more than “harmless” error, which is not sufficient to invalidate agency action because no harm can result from violations that would not change the outcome of the federal action.<sup>144</sup> Codification of these principles will further the goal of creating predictability and consistency in the process by minimizing the potential for inconsistent judicial results on these issues.

## **V. Conclusion**

The Coalition appreciates the opportunity to provide comments on this significant proposal. Few initiatives of this Administration will do more to enhance federal decision-making going forward and the Coalition commends the Administration for advancing a proposal that respects and strengthens NEPA while bringing it into the modern era.

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<sup>140</sup> See Proposed Rule, 85 Fed. Reg. at 1713 (Proposed § 1500.3(c)).

<sup>141</sup> See *Darby v. Cisneros*, 509 U.S. 137 (1993).

<sup>142</sup> See, e.g., 43 C.F.R. 4.21(b) (providing general standards and procedures for obtaining stays of certain agency action subject to review before the Office of Hearings and Appeals).

<sup>143</sup> In *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008), the Supreme Court established that the showing required for injunctive relief does not differ in a NEPA case from other types of cases.

<sup>144</sup> See *Webster v. U.S. Dep’t of Agric.*, 685 F.3d 411 (4th Cir. 2012).