March 2, 2022

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

Dear Chair Mallory:

We are writing to provide recommendations for changes to the Council on Environmental Quality's (CEQ) regulations implementing the National Environmental Policy Act (NEPA). We know that you appreciate the significance of NEPA and these regulations to communities and public lands and waters throughout the country. Indeed, developments in NEPA implementation in the United States can influence the course of environmental assessment procedures around the world. The NEPA process has long been the major administrative process for consideration of proposed federal actions, but to help meet the challenges of climate change, environmental justice, and species extinction, our organizations urge you to restore the 1978 regulations and then adopt well considered additions to those regulations.

I. Restoration of Regulations

First, we emphatically stress that our number one priority is restoration of the 1978 regulations. The regulations issued by the last administration in 2020 eviscerate many elements of the NEPA process beyond those that CEQ is addressing in its Phase One rulemaking. Selecting a few additional key issues to address in the upcoming rulemaking will inevitably leave numerous harmful changes to the regulations intact. While some of the 2020 changes may seem minor, in the parlance of classic NEPA compliance, together, they have an adverse cumulative effect on agency compliance and the public's ability to engage in the NEPA process. There were a few administrative references that needed updating and the inclusion of tribal governments in the NEPA process was long overdue, but those discrete issues can be easily addressed as additions to the 1978 regulations. If CEQ chooses not to repromulgate the original regulations, we ask that all of the problems identified in our earlier letter be addressed in the Phase II rulemaking.[1]

Second, we want to provide these additional thoughts for building on the 1978 regulations by adopting new provisions that add additional directions for improving the NEPA process. For your convenience, we have incorporated the recommendations we made in our comment letter on the Phase I proposal, but also add a number of new recommendations.

II. Environmental Justice: Inclusive Process and Analyses

[1] *See*, Comments on Proposed NEPA Regulations Revisions, CEQ-2021-0002 from ninety-seven public interest organizations, Nov. 22, 2021 (Attachment A).

It is critical that CEQ gather input on the Phase II rulemaking from environmental justice communities and Tribes. Meaningful participation in this process requires that outreach and consultation be early, sustained, and robust. As an agency charged with oversight of the Federal government's compliance with Executive Order 12898 on environmental justice as well as NEPA, CEQ must ensure environmental justice concerns in Phase II are effectively identified and meaningfully addressed through adequate and inclusive outreach to environmental justice communities and tribes. The Phase II rulemaking is a singular opportunity to ensure that federal decisions promote environmental justice, health equity, and environmental quality – principles that must animate both the process and substance of CEQ's effort in Phase II.

Tribal Nations

The Phase II regulations should reflect the fact that sovereign tribal governments have a unique relationship with the federal government. This long overdue recognition of tribal governments in the NEPA process for actions with effects of interest to tribes both off and on reservations is the one positive step taken in the 2020 regulations. Significant improvements include clarifying that tribal agencies can be joint lead and cooperating agencies without constraint regarding the location of environmental and related social and economic effects in relationship to reservation land, as well as the inclusion of tribal governments in regard to notices of proposed actions, receipt of documents, consideration of tribal laws and policies, and the role of tribal governments to whom NEPA responsibilities are delegated. We strongly recommend that those provisions be included in the Phase II regulations.

Additionally, we recommend that the regulations explicitly require that tribes be consulted as sovereign nations and that tribal sovereignty, tribal engagement and inclusion, treaty rights, the federal trust responsibility, and government-to-government relationship are explicitly recognized in the regulations, with specific details informed through CEQ consultation with tribes regarding their priorities.

There is also a significant data gap that can hinder tribal participation in the NEPA process. First, data from the agency or the applicant may not be available to the tribe as part of the NEPA process. This can severely impact a tribal entity from providing relevant feedback to inform the analysis necessary to determine environmental impacts. Sometimes the relevant data is in the hands of other federal agencies, states, or applicants, but is not readily handed over to tribes for evaluation. This gap also includes baseline data, where tribes may not have access to the specific environmental baselines in the surrounding community to see how the project will impact those values.

The data gap also exists in the reverse, where agencies may not have the full picture of tribal lands or tribal communities that may be impacted by a proposed project. For example, Environmental Justice screens do not capture ceded territory or ancestral territory of tribes where they may still have treaty rights. Or the baseline environmental and socioeconomic data may be insufficient or inaccurate with respect to tribal communities.

A significant omission in the consideration of environmental impacts within the NEPA process is Tribal Ecological Knowledge. A process must be in place whereby tribes and Indigenous communities can share Tribal Ecological Knowledge if they so choose and to have that information protected from the public as necessary. Agencies must also have a process where they can support tribes in their collection of Tribal Ecological Knowledge. Many tribes may need support to facilitate that transmission of knowledge.

CEQ should also establish a procedure for tribes to *review* agency information and return input without revealing sensitive cultural information, such as location, to the agency. Often the tribal authority may know where sensitive cultural resources are located and it's unreasonable to ask them to provide it. Instead, they should be able to keep that information within the tribe and provide non-location-specific input to the agency.

III. Procedural Improvements

Timely Public Release of All NEPA Documentation and CE Utilization

Far too many times, we find that federal agencies are withholding EAs and FONSIs unless and until they receive a FOIA request. This is contrary to the very definition of an EA as a "public document" as well as the direction in the regulations to involve the public "to the extent practicable" in preparing EAs. In some cases, agencies post NEPA documents on a website but rather than posting them as they become available, some agencies only update their sites periodically.[2] Filing FOIA requests to obtain NEPA documents is quite unworkable because decisions on the underlying proposed action are often made long before documents are released through the FOIA process.

We recommend that CEQ include in the NEPA regulation's public involvement section[3] a requirement that all NEPA documents be posted on agency websites and otherwise made available to the public as soon as possible. Such documents include: notices of intent and other scoping notices, environmental impact statements (EIS), environmental assessments (EAs), findings of no significant impact (FONSIs), Records of Decisions (RODs), any additional documentation related to NEPA analysis such as a Determination of NEPA Adequacy (DNA) or Supplemental Information Report (SIR) and actions that

[2]This has been an issue, for example, with the New Orleans District of the U.S. Army Corps of Engineers NEPA compliance website https://www.mvn.usace.army.mil/Environmental/NEPA/ . The Bureau of Land Management's NEPA register – "the e-planning" website – is another example where project information is not always created or regularly updated. https://eplanning.blm.gov/eplanning-ui/home. The St. Paul District Corps office of the Corps of Engineers similarly required a FOIA request for release of EAs and FONSIs related to the proposed Line 3 pipeline expansion **and released one of those EAs only after a complaint was filed in federal court.**

[3] 40 C.F.R. § 1506.6.

are intended to proceed under a categorical exclusion (CE) and the identification of that CE).[4]

Public Involvement in the EA Process

The flexibility afforded to agencies regarding public involvement in the EA process too often results in no public awareness or involvement in the process. For agencies that typically use EAs for their NEPA compliance, this issue can seriously undermine public confidence in agency analyses and public involvement. We propose that the regulations include a provision that requires agencies to make EAs available for public review and comment for a minimum of 30 days prior to the agency making a decision about the proposed action.

Adding Climate Change to the Definition of "Effects"

The time has come to add climate impacts to the definition of "effects."[5] Analysis and action in both EISs and EAs are fundamental both to meeting NEPA's goals and to achieving this administration's policies. CEQ also needs to make it clear in the regulatory framework that, along with the effects of proposed actions and alternatives on climate change, the effects of climate change on a proposed action and alternatives, along with analysis of the impacts of the proposed action and alternatives on increasing or reducing resilience and adaptation, including on vulnerable communities, must be included. As it did in previous guidance, CEQ should codify that climate change impacts should be studied in a quantitative way, even when the effect of an individual action is small, because of the cumulative nature of the impact. Agencies that manage large carbon stocks, like the Forest Service, should be required to analyze the cumulative impacts of multiple actions on climate rather than dismissing each individual project as insignificant.

While we appreciate that CEQ is working on updated climate change guidance to the agencies that we hope will provide useful legal, policy, and methodological guidance, it is important that this overwhelmingly significant impact now be explicitly included in the regulatory definition. We commend to your attention the recent publication, *Evaluating Climate Risk in NEPA Reviews: Current Practices and Recommendations for Reform*[6] that provides a detailed evaluation of deficiencies in current practices and a number of useful recommendations for reform.

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[4] As a reminder, the 1978 regulations directed agencies to make EISs, comments on them and "any underlying documents" available to the public w/o regard to the exclusion for interagency comments on EISs. *See,* (former 1506 CFR § 1506.6(f). The 2020 regulations eliminated that provision and it should be reinstated.

[5] Former 40 C.F.R. 1508.8 or current 1508.1 (g)(1).

[6] Webb, Romany M., Panfil, Michael, Jones, Stephanie H., an Adler, Dena, *Evaluating Climate Risk in NEPA Reviews: Current Practices and Recommendations for Reform*, Columbia Law School, Sabin Center for Climate Change Law and Environmental Defense Fund, February 2022, available at https://scholarship.law.columbia.edu/sabin_climate_change/185/.

Strengthening the Conflicts of Interest Provisions

Both the reality and the perception of conflicts of interests undermine the goal of presenting a credible evaluation of the effects of proposed actions and alternatives. Even under the original regulations that included a conflict of interest prohibition and an expression of "intent" that agencies choose the contractor, the implementation of the so-called "third party EIS process" presented serious problems. Agencies often deferred to the applicant to choose the consultant for EIS preparation. Further, communications between the contractor and the applicant frequently bypassed the agency completely. Thus, even with the conflict of interest provision in place, the applicant exerted enormous influence over the identification of alternatives and effects analysis.[7] Today's regulations make no pretense of even having a conflict of interest prohibition.

We think that NEPA documents prepared within the agencies better serve the purposes of NEPA as well as often being more efficient. In that regard, it is imperative that CEQ advocate for increased resources dedicated to NEPA capacity, both for itself and for implementing agencies within the executive branch.

However, given the high probability that third party contracts will continue to be utilized, CEQ should codify stronger requirements for agency preparation and oversight of document preparation, including agency selection of contractors. This should occur concurrently with reinstatement of the original conflict of interest provisions. CEQ should also require that all communications by a contractor regarding the NEPA process, including communications with the applicant, be directed to the lead and cooperating agencies and be part of the administrative record and subject to disclosure under FOIA. Neither guidance nor case law provides that direction at present. We note that a Washington State regulation WAC 173-802-090 provides a relevant model.[8]

Deter Deferred Cumulative Effects Analysis

Agencies too often decide to defer cumulative analysis until a later stage of the NEPA process; for example, when tiering is utilized or until NEPA compliance takes place for a related action. Some judicial decisions have allowed this approach, reasoning that a future NEPA analyses for some connected or otherwise related action will have to consider the cumulative impacts of the future federal action, together with the impacts of

[7] For example, the EIS written for the proposed Dakota Access Pipeline was written by a company that was a member of the American Petroleum Institute. While the contractor apparently felt able to sign the required conflict of interest statement, in a more general sense the contractor was viewed by many participants as having a less than neutral perspective regarding fossil fuel development. An example of what appears to be an even more direct conflict, the contractor for the EIS for expanded ski resorts on both the Superior and Caribou-Targhee National Forests is the same contractor that prepared the Master Development Plan.

[8] WAC 173-802-090, available at: https://app.leg.wa.gov/WAC/default.aspx?cite=173-802-090.

the initial federal action under consideration.[9] However, this reasoning completely overlooks the problems caused by allowing an agency to avoid this analysis when making the initial decision. In particular, a decision to move forward with the first action (whether it is a programmatic decision or a site specific action that is logically related to a later decision) often provides for the implementation of critical elements (whether infrastructure, policy direction or some other type of commitment to action) such that it almost inevitably influences decisionmaking regarding the later action. Allowing agencies to defer consideration of cumulative impacts degrades the ability of decisionmaker, the public, and other federal, tribal, state and local agencies to appreciate the full suite of potential effects from the first decision. An additional problem is that agencies often do not follow through at the site specific level to actually do the effects analysis.

Delaying cumulative effects analysis is counter to better reasoned case law that points out that, "NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done."[10] Specifically, it is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now."[11]

We recommend that CEQ modify the regulations to direct the assessment of cumulative effects at "the earliest possible time." CEQ should direct agencies to refrain from deferring analysis of cumulative effects to subsequent, related, connected or tiered analyses. The initial cumulative effects analysis may, of course, be refined and presented in greater detail at a later stage, but lack of every piece of possible information should not be a rationale for deferring an appropriately scaled analysis of cumulative effects as early as possible.

Deter Deferred Indirect Effects Analysis

For the same reasons, we encourage CEQ to be clear that a robust assessment of indirect effects should not be deferred until after a preferred alternative has been selected. This often occurs for highway projects, where a quantitative analysis is only performed for the preferred alternative during the Final EIS stage. Just as with cumulative effects, this prevents a meaningful comparison of the indirect effects of different alternatives. CEQ should direct CEQ to conduct an analysis of indirect effects at "the earliest possible time".

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[9] *See, Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 980 (9th Cir. 2006) in which the Court permitted deferred cumulative impacts analysis for proposed long term oil and gas leases despite publication of a Notice of Intent for a related action, premised on the understanding that the subsequent NEPA analyses would include cumulative effects analysis. *See also, Tinian Women Ass. v. U.S. Dept. of the Navy*, 976 F.3d 832, 838-39 (9th Cir. 2020).

[10] *Kern v. U.S. Bur. of Land Mgt*., 284 F.3d 1062, 1072 (9th Cir. 2002), citing *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 fn. 9 (9th Cir. 1984).

[11] *Id*. at 1075, citing *Neighbors of Cuddy Mountains*, 137 F.3d at 1380; *City of Tenakee Springs*, 915 F.2d at 1312-13.

Address Other Attempts to Avoid Site-Specific Analysis through Mechanisms Such As "Condition-Based Management", Determinations of NEPA Adequacy, Various Invalid Assumptions and Other Mechanisms

Ninety-four public interest organizations recently sent a comprehensive analysis of agency attempts to avoid site-specific analysis. While not a new problem, agencies appear to have been ramping up efforts to avoid actual site-specific analysis. We endorse the analysis and recommendations in that letter and urge CEQ to take action to address this very serious problem in its multiple forms.[12]

Addressing the "Small Federal Handle" Doctrine

In the early 1980's, some federal agencies, most notably the Army Corps of Engineers, began relying on a doctrine long referred to as the "small federal handle issue" that maintained that the Corps' NEPA responsibilities only related to the specific proposed permitted activity at issue and not other parts of a proposed project. Some courts upheld that approach in certain instances.[13] It should be noted that the Corps had previously analyzed the effects of the entire project. The Corps' proposed regulation to codify the small federal handle was the subject of a referral to CEQ by EPA. The referral process resulted in a modest broadening of the regulation to cover the "cumulative federal control and responsibility" instead of just the Corps' responsibility but in practice this distinction has not proven to be particularly effective.

Subsequently, some cases have pushed back on this doctrine and required agencies to fully analyze the effects of their decision.[14] However, case law in this area remains very much a fact-based determination with decisions in several circuits that uphold an unduly restrictive scope of analysis[15] and the Corps' NEPA regulation for permitting that provides for this approach remains in place.[16]

The 2020 CEQ regulations explicitly adopted case law in the initial small federal handle cases; for example, by codifying the rejection of the "but for" test in one of the initial

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[12] *Request for CEQ-Issued Guidance and/or Regulatory Change Addressing Federal Land Management Agency Attempts to Avoid Site-Specific NEPA and Disclosure*, to Brenda Mallory, Chair, CEQ, Jayni Hein, Senior Director for NEPA & Counsel, CEQ, and Justin Pidot, General Counsel, February 3, 2022, available at: https://westernlaw.org/wp-content/uploads/2022/02/2022.02.03-Request-to-CEQ-re-CBM.pdf.

[13] *See, e.g., Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980).

[14] *Save our Sonoran, Inc. v. Flowers* 408 F.3d 1113 (9th Cir. 2004). *See also, White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033 (9th Cir. 2009).

[15] *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015), holding that for a proposed oil pipeline spanning 593 miles that required the Corps to grant three easements for crossing federal or Indian lands and also involved multiple utilization of a Corps nationwide permit as well as several incidental take permits did not federalize the entire pipeline and therefore the Corps properly confined their analysis to only those matters directly related to their authority.

[16] 33 C.F.R. Part 324, Appendix B, 7b (1).

small federal handle cases[17] and adopting other restrictive parameters to narrow the scope of analysis. In its Phase I proposal, CEQ has proposed repealing those provisions and restoring what it characterizes as the 1978 CEQ regulations' discretion, vested in the agencies, "to identify the reasonably foreseeable effects of a proposed action and its alternatives." The preamble has a good discussion of the problems with the "but for" test and other limitations present in the 2020 regulations and helpfully states that, "Reasonably foreseeable environmental effects do not fall neatly within discrete agency jurisdictional or regulatory confines; rather, agencies make decisions about reviews and authorizations that have real world impacts, including effects like water or air pollution that are measurable and ascertainable yet may have physical effects outside an agency's statutory purview."[18]

However, absent clear direction from CEQ, agencies are likely to continue to severely truncate NEPA analysis for large development and energy projects that have very significant impacts. The U.S. Army Corps of Engineers has declined to assess the impacts on either fossil fuel production or consumption of infrastructure that it authorizes, reasoning that these matters are outside of its "responsibility and control." But this confuses the scope of the proposed action with the scope of the direct, indirect and cumulative impacts of the proposed action and alternatives. It is well understood that changes in fossil fuel production and/or consumption effects of major infrastructure decisions should be analyzed in NEPA documents.

While the preamble language to the Phase I rulemaking and retraction of the related 2020 regulations is essential, it does not fully address the problem inherent in the Corps' codification of the small federal handle doctrine. In addition to restoring the original definition of "effects" (along with the addition of climate), CEQ should affirmatively clarify in the definition of "effects" agencies' responsibility and authority to assess all reasonably foreseeable direct, indirect, and cumulative effects of the proposed action even if the lead agency does not have direct responsibility and control.

<u>Improving the Usefulness and Validity of the "No Action Alternative"</u>

The importance of the no action alternative is frequently overlooked by agencies, but it is a key component of the analysis. The analysis of the effects of the no action alternative should function as a baseline that can be compared with the effects of other alternatives. It should give the decisionmaker and the public a reasonably accurate assessment of the effects of not going forward with an action alternative; indeed, at times, upon reflection and public input, agencies have chosen the no action alternative as their decision.

However, far too often, the analysis is a completely inadequate and inaccurate conclusionary paragraph or two that opines that the no action alternative will simply result in the status quo continuing. Such analysis typically fails to acknowledge continuing effects of past impacts on the landscape and the potential further effects of

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[17] *Save the Bay, Inc. v. Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980).
[18] 86 Fed. Reg. 55757, 55766.

those impacts in the future. CEQ's 2005 guidance on the consideration of past actions in cumulative effects analysis provides some direction in this regard,[19] but agencies too often overlook the need to actually do this analysis. If NEPA analyses considers only impacts from changes to the status quo without understanding past actions, it misses cumulative effects that have resulted from the Corps' management of a reservoir or the Forest Service's management of a forest. For example, the Corps of Engineers only considered impacts from changes to the status quo in its 2016 EIS assessing proposed updates to the water control manuals for the Apalachicola-Chattahoochee-Flint river system, despite never having considered the fundamental and highly damaging changes to system caused by decades of reservoir operations that continually ratcheted down the amount of water reaching Florida's Apalachicola River, floodplain, and bay. The Corps instead concluded that 50 more years of operation that further reduced downstream flows would not harm this ecologically rich system because, according to the Corps, the new water control manuals would impose only modest changes to the operating status quo.[20]

Another problem we have seen with some "no action" analysis is an assumption that an underlying, related action will continue no matter the agency's decision. For example, agencies have often assumed that even if they denied a permit for infrastructure to transport fossil fuel, the fuel will be produced anyway and transported by a possibly riskier means of conveyance. However, another possibility is that the lack of a pipeline might inhibit the development of the fuel. For example, the multiple Keystone Pipeline NEPA documents that actually analyzed three alternative transportation scenarios as the "no action alternative" (rail and pipeline, rail and tanker and rail direct) that, in the words of the EIS, "are believed to meet the proposed Project's purpose (i.e., providing WCSB and Bakken crude oil to meet refinery demand in the Gulf Coast area) if the Presidential permit for the proposed Project were denied, or if the pipeline were otherwise not constructed."[21] In other words, the EIS never seriously considered the possibility that denial of the Presidential Permit might result in the pipeline not being constructed. Yet that is exactly what happened as the result of President Biden's withdrawal of the permit.[22] However, this approach continues today.[23]

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[19] Guidance on the Consideration of Past Actions in Cumulative Effects Analysis", James L. Connaughton, Chairman, to Heads of Federal Agencies, June 24, 2005, available at: https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/Guidance_on_CE.pdf

[20] USACE, Final Environmental Impact Statement Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin in Alabama, Florida, and Georgia and a Water Supply Storage Assessment (December 2016). In reality, the water control manuals approved by the Corps will make the already dire ecological conditions in the Apalachicola River, floodplain, and bay much worse. These water control manuals will hold significantly more water back for Georgia water supply, initiate drought restrictions earlier and more frequently, and severely restrict flows to the Apalachicola River more often and for longer periods of time.

[21] Final Supplemental Environmental Impact Statement, Keystone XL Project, 2021, ES-28. ***See also*, U.S. Army Corps of Engineers, Environmental Assessment for Enbridge Line 3 Replacement Project that also assumed oil would continue to need to be transported and analyzed transport by train and truck in a flawed no action alternative.**

[22] https://www.npr.org/2021/06/09/1004908006/developer-abandons-keystone-xl-pipeline-project-ending-decade-long-battle .

[23] *See*,

One additional problem arises where agencies actually assume construction of a proposed project into their "no action" analysis. For example, no build analyses for highway projects are often based on transportation and land use models that assume construction of the highway project as part of a long-range planning process. The result is a "no-action" scenario that presents all the growth and traffic that would result from the highway, without the highway itself. This artificially suggests a need for the project that would not otherwise be there.[24]

Further, agencies sometimes presume that ongoing illegal activity (for example, unpermitted take of an ESA-listed species) is part of a no action alternative. For example, in the context of land management agencies' travel management plans, the no action alternative often assumes the existence of unpermitted motorized vehicular traffic. Similarly, some NEPA analyses has assumed the illegal taking of wildlife listed as endangered or threatened.[25] Two modest steps could help improve the quality of analysis for the no action alternative:

> 1. CEQ should codify direction to analyze the present effects of past actions to identify any continuing, additive impacts of those actions on the environment that would be affected by a new proposed action and alternatives.
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> 2. CEQ should codify that analysis of a "no action" alternative must be based on data that is free from any assumption that a proposed action will be taken.
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> 3. CEQ should also amend the regulation to clarify that unlawful activity should not be included as part of the no action alternative. There is precedent for this standard. In the context of management of the national forests in the Pacific Northwest, a federal court affirmed that land management agencies had no obligation to analyze a no action alternative that reflected management directive that had been enjoined. As the Court stated, "The Secretaries acted within the scope of their authority [by not fully analyzing the normal no action alternative]

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[24] *See, e.g., N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596 (4th Cir. 2012) ("Without accurate baseline data, an agency cannot carefully consider information about significant environment impacts . . . resulting in an arbitrary and capricious decision.") (internal citations and quotation omitted); *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 588 (4th Cir. 2012) ("A material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision.) *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011) (finding that surface transportation board's inclusion of mitigation measures in baseline data was improper because it presupposed the project's approval); *Sierra Club v. U.S. Dep't of Transp.,* 962 F. Supp. 1037, 1043 (N.D. Ill. 1997) ("[T]he final impact statement contains a socioeconomic forecast that assumes the construction of a highway such as the tollroad and then applies that forecast to both the Build and No–Build alternatives . . . As a result, [it] creates a self-fulfilling prophecy that makes a reasoned analysis of how different alternatives satisfy future needs impossible.")

[25] *See, Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1050-53 (9th Cir. 2013) for a discussion about the no action alternative in the context of changing legal requirements; *see also*, *New Mexico ex rel. Richardson v. Bureau of Land Mgt.*, 565 F.3d 683, 708-11.

> because legal rulings and recently-acquired biological information made it not feasible. An agency may modify a no-action alternative where a continuation of the existing plan would be unlawful."[26]

Interrelated Social and Economic Effects on the Human Environment

We recommend reverting back to the definition of the "human environment" in the 1978 regulations with one modification. The definition in the 1978 regulation[27] and similar language in the 2020 regulations[28] are in the context of environmental impact statements. Agencies can and frequently do misinterpret the text to mean that social and economic effects that are interrelated with environmental effects do not need to be analyzed in an environmental assessment (EA). That is incorrect: both EAs and EISs must include analysis of social and economic impacts interrelated with physical environmental effects. Omission of interrelated economic and social impacts in EAs adversely affects communities, including environmental justice communities and tribal nations, affected by proposed federal actions.

We recommend that the original definition of the "Human environment" be amended to make it clear that agencies need must analyze social and economic impacts interrelated with physical environmental effects in both EAs and EISs.

Restrain Inappropriate Promulgation and Use of Categorical Exclusions

Some agencies have significantly increased their use of categorical exclusions and are utilizing them for actions that are far beyond CEQ's original intent of using them for actions with no or truly de minimis environmental effects, both individually and cumulatively. As CEQ has stated in its guidance on categorical exclusions, "If used inappropriately, categorical exclusions can thwart NEPA's environmental stewardship goals, by compromising the quality and transparency of agency environmental review and decisionmaking, as well as compromising the opportunity for meaningful public participation and review."[29] While this trend has been going on for a long time, the problem is exacerbated by the deletion of the reference to cumulative effects in the 2020

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[26] *Seattle Audubon Soc. v. Lyons*, 871 F. Supp. 1291, 1319-20 (W.D. Wash. 1994). In that instance, CEQ's General Counsel had written a letter to the agencies on the record advising that further consideration was unnecessary because the no-action alternative did not constitute a reasonable alternative under the CEQ regulations and that letter was given deference by the Court. But the regulations themselves should make it clear that illegal activity is not an appropriate component of any alternative. *See also*, *Seattle Audubon Soc. v. Lyons*, 520 F.3d 1024, 1037-38 (9th Cir. 2008).

[27] 40 C.F.R. § 1508.14 (1978).

[28] 40 C.F.R. § 1502.16(a)(b) (2021).

[29] Memorandum for Heads of Federal Departments and Agencies, *Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act*, Nancy H. Sutley, Chair, November 23, 2010 at p. 3.

definition of categorical exclusions and by several especially egregious categorical exclusions promulgated in December, 2020.[30]

We recommend that CEQ not only re-promulgate the original definition of "categorical exclusions" that references cumulative effects but that it further amend the regulations:

1. To require agencies to publish an administrative record for public review and comment that supports the proposed categorical exclusion and explicitly analyzes the cumulative effects of the proposed exclusion;

2. To require agencies to provide scoping or other public notice of the use of categorical exclusions with information supporting the applicability of the particular CE and the absence of extraordinary circumstances, and an opportunity for comment.

Further, the requirements of previous CEQ guidance on the promulgation of CEs should be incorporated into the regulations. Specifically, where agencies rely on previous projects found to be non-significant to support creation of new CEs, any mitigation measures relied on to justify the FONSI must be part of the new CE definition.

In addition, agencies should be prohibited from using other agencies' CEs, which may have been developed in very different contexts without a formal adoption process and opportunity for public comment. For example, an FHWA CE for road work may have very different considerations in an urban environment than the Forest Service's use of that same CE on public lands.

Agencies should also be prohibited from "stacking" CEs—i.e., breaking interconnected actions apart and covering constituent pieces with different CEs.

We also recommend that CEQ begin systematic reviews of agencies' categorical exclusions and that the review include a public comment component. This is particularly important to ensure that current agency categorical exclusions reflect concerns about climate change, environmental justice, and the extinction crisis.

Making Mitigation Matter

Identifying mitigation of adverse impacts can be a highly constructive outcome of the

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[30] *See, e.g.,* the Bureau of Land Management's (BLM) salvage logging CE that covers up to 3,000 acres of total harvest with a mile of permanent road construction, https://www.federalregister.gov/documents/2020/12/10/2020-27159/national-environmental-policy-act-implementing-procedures-for-the-bureau-of-land-management-516-dm.
The same day, BLM published another CE that covers up to 10,000 acres (contiguous or non-contiguous) for various "treatments" including cutting, mulching, burning, and other actions in response to Interior Secretary Zinke's Secretarial Order 3356 on Hunting, Fishing an other activities. https://www.govinfo.gov/content/pkg/FR-2020-12-10/pdf/2020-27158.pdf.

NEPA process. CEQ's guidance on "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact" provides important direction. CEQ should codify several core concepts included in the guidance in its regulations. It is essential to the integrity of the process that mitigation be capable of being implemented, that it is in fact implemented and that implementation is monitored. To that end, we suggest the following additions to CEQ's NEPA regulations:

1. Adding a sentence that requires agencies to state in the EIS how each mitigation measure would be funded and monitored and any uncertainties regarding the possibility of the mitigation measures' implementation.

2. Adding a provision that would require agencies to consider mitigation measures, including compensatory mitigation, for the reduction of GHG emissions when analyzing proposed actions and alternatives that would otherwise lead to increased GHG emissions.

3. Adding to the definition of monitoring after the definitions of mitigation by addressing enforcement and effectiveness monitoring; for example:

   (a) Enforcement monitoring ensures that mitigation is being performed as described in the Record of Decision or other decision document and in any legal document implementing the action (for example, contracts, leases, permits or grants).

   (b) Effectiveness monitoring measures the success of the mitigation effort in achieving the desired outcome.

4. Adding language that if an agency incorporates measures into a Finding of No Significant Impact such that those particular measures are relied upon to reduce environmental impacts to the degree that they are no longer significant, the agency must mandate the implementation of those specific mitigation measures. If any of the identified mitigation measures appear unlikely to occur, the agency must prepare an EIS.

<u>Clarifying When a Supplemental EIS is Required</u>

A Supplemental EIS is sometimes required to effectuate [NEPA]'s 'action-forcing' purpose.[31] The decision whether to prepare a Supplemental EIS "turns on the value of the new information to the still pending decisionmaking process."[32] As such, it should be clear that when significant new information arises that would impact the decisionmaking process, a Supplement should be prepared. Such information could obviously include new information about the impact of the proposed action, but it might also include information about the viability and impacts of various alternatives. Although the purpose

[31] *Marsh*, 490 U.S. at 370–71.
[32] *Id.* at 374.

of NEPA make clear that both of these "twin aims" are essential, some agencies have suggested that they need only consider new information if it relates to the environmental impact of the alternative they have selected. This undermines NEPA's value as a democratic decisionmaking tool.

We suggest that CEQ amend 40 C.F.R. § 1502.9(d)(1)(ii) to clarify that a Supplemental EIS is needed wherever significant new information would aid the multiple purposes of NEPA by amending the language accordingly: A Supplemental EIS is required where "there are new significant circumstances or information relevant to environmental concerns and bearing on the proposed action, *alternatives to the proposed action,* or its impacts."

Finally, CEQ should make clear that supplementation can also be required in the context of an EA, when significant information arises or circumstances change prior to a final decision.

IV. Beyond 1978 - Putting NEPA's Policies Back into the NEPA Process

Finally, it is time for CEQ to propose regulatory changes that will strengthen the now tenuous linkage between the NEPA process and the purpose of the statute as a whole: that is, to actually implement NEPA's far-sighted policies that include promoting efforts to prevent or eliminate environmental harms, improve the health and welfare of human beings, and protect and enrich ecological systems. To help meet those goals, we recommend the following measures:

<u>Strengthen the Linkage between Alternatives and NEPA's Policies</u>

The NEPA regulations already require agencies to state in EISs how alternatives "considered in it and decisions based on it will or will not achieve the requirements of sections 101[33] and 102(1)[34] of NEPA and other environmental laws and policies.[35] Unfortunately, this is one of the most neglected provisions in the regulations and many agency personnel are not even aware of the requirement. While we strongly believe that the NEPA process, when correctly implemented, provides great value to decision makers and the public, a frequent complaint about NEPA is that it is "just" procedural and "just" paperwork. In fact, as the title implies, NEPA was always intended to be about *environmental policies*, not just process. As the D.C. Court of Appeals stated fifty-one years ago, "NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department."[36]

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[33] 42 U.S.C. §4331, setting forth this country's national environmental policies.

[34] 42 U.S.C. § 4332(a), "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act".

[35] 40 C.F.R. § 1502.2(c) in the 1978 regulations and 1502.2(d) in the 2020 regulations, along with extraneous language that should be deleted.

[36] *Calvert Cliffs v. Atomic Energy Comm.*, 449 F.2d 1109, 1112 (D.C. 1971).

We recommend that CEQ add additional language to Section 1502.2 of the 1978 regulations to provide clearer direction on how to demonstrate how each alternatives in an EIS would or would not achieve the requirements of sections 101 and 102(1) of NEPA. We also recommend that CEQ direct agencies to assess how each of the alternatives would affect the United States' ability to meet the Paris Agreement goal of limiting global temperature increase to no more than 1.5 Celsius as well as how each alternative would reflect environmental justice policies.

Direct Agencies to Mitigate Adverse Significant Impacts

CEQ should direct agencies to mitigate significant impacts to the maximum extent practicable. Such direction to mitigate to the maximum extent practicable would focus agencies' attention and resources on mitigation measures. Coupled with the procedural provisions regarding mitigation that we suggest above, such direction could make a real difference in achieving the administration's goals of meeting the climate, environmental justice and extinction challenges.

In conclusion, we appreciate the hard work that you and your staff are putting into the restoration of essential requirements in CEQ's NEPA regulations. We hope that you find these recommendations helpful. We believe they would add considerable strength to the NEPA process. Please do not hesitate to contact Stephen Schima at (503) 803-5753 or sschima@earthjustice.org with any questions.

Sincerely,

Earthjustice
Environmental Defense Fund
Friends of the Earth
National Parks Conservation Association
National Wildlife Federation
Natural Resources Defense Council
Ocean Conservancy
Southern Environmental Law Center
The Wilderness Society