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Canyon Council • Greater Yellowstone Coalition • Green Party of TN • Green River Action Network • GreenLatinos • Greenpeace USA • Greenway Transit Service • Growing Alternative Resource Development and Enterprise Network (GARDEN), Inc. • Harambee House, Inc. • Hawaii Audubon Society • Health Professionals for a Healthy Climate • Healthy Communities & Environmental Justice Conservation Law Foundation • Heartwood • Hispanic Federation • Houston Audubon • Howling For Wolves • Humane Society Legislative Fund • Humane Society of the United States • Humboldt Baykeeper • Idaho Rivers United • In Defense of Animals • In the Public Interest • Indiana Forest Alliance • Citizen • Inland Ocean Coalition • Institute for Applied Ecology • Institute for Fisheries Resources (IFR) • International Marine Mammal Project, Earth Island Institute • Islesboro Islands Trust • Kentucky Heartwood • Kettle Range Conservation Group • Klamath Forest Alliance • Labor Council for Latin American Advancement • Law Office of David H Becker, LLC • League of Conservation Voters • Living Rivers & Colorado Riverkeeper • Long Beach Alliance for Clean Energy • Long Beach Panthers • Los Angeles Audubon Society • Los Padres ForestWatch • Louisiana Audubon Council • Lower Brazos Riverwatch • Lower Columbia Basin Audubon Society • Lower Ohio River Waterkeeper • Madrone Audubon Society • Maine Coalition to Stop Smart Meters • Malach Consulting • Mankato Area Environmentalists • Marin Audubon Society • Marine Conservation Institute • Maryland Ornithological Society • Mass Audubon • Miami Waterkeeper • Midwest Pesticide Action Center • Mining Action Group of the Upper Peninsula Environmental Coalition • Minnesota Native Plant Society • Mission Blue / Sylvia Earle Alliance • Moab Solutions • Mojave Desert Land Trust • Monmouth County Audubon Society • Montana Wilderness Association • National Audubon Society • National Latino Farmers & Ranchers Trade Association • National Parks Conservation Association • National Whistleblower Center • National Wolfwatcher Coalition • Native Plant Conservation Campaign • Native Plant Society for the United States • Natural Heritage Institute • Natural Resources Council of Maine • NC WARN • Natural Resources Defense Council • Nature Abounds • Nature Coast Conservation, Inc. • Nevada Native Plant Society • Nevada Nuclear Waste Task Force • New Mexico Audubon Council • New Mexico Environmental Law Center • New Mexico Horse Council • New Mexico Law Center • New Mexico Wilderness Alliance • New Mexico Sportsmen • New York City Audubon • New York Lawyers for the Public Interest • Night Sky Conservancy • North Cascades Audubon Society • Northcoast Environmental Center • Northeast Oregon Ecosystems • Northeastern Minnesotans for Wilderness • Northern Alaska Environmental Center • Northern Plains Resource Council • Northwest Animal Rights Organization (NARN) • Oasis Earth • Occidental Arts and Ecology Center • Oceana • Ocean Conservation Research • Ocean Conservancy • Ocean Conservation Research • Ohio Valley Environmental Coalition • Okanogan Highlands Alliance • Orca Conservancy • Oregon Natural Desert Association • Oregon Wild • Pacific Coast Federation of Fishermen's Associations (PCFFA) • Partnership for the National Trails System • Paula Lane Action Network • Pelican Media • Pennsylvania Alliance for Clean Air and Water • People for Protecting Peace River, Inc Peoria Audubon Society • Pesticide Free Zone • Point Reyes Safaris • Ponca Tribe of Oklahoma • Powder River Basin Resource Council • Predator Defense • Progressive Caucus Action Fund • Public Employees for Environmental Responsibility (PEER) • Public Lands Project • Quad City Audubon Society • Rainforest Relief • Raptors Are The Solution • Resource Renewal Institute • RESTORE: The North Woods • Richardson Grove Coalition • Richmond Trees • Rock Creek Alliance • Rocky Mountain Wild • RootsAction.org • Russian Riverkeeper • Sacramento Audubon Society • Safe Alternatives for our Forest Environment • Salem Audubon Society • Safina Center • San Francisco Baykeeper • San Juan Citizens Alliance • Santa Barbara Audubon Society • Santa Cruz Climate Action Network • Save Nevada's Water: Ban Fracking In Nevada • Save Our Cabinets • Save Our Saluda • Save

Our Shores • Save Our Sky Blue Waters • Save Richardson Grove Coalition • Save the Bay • SAVE THE FROGS! • Save the Scenic Santa Ritas • Saving Birds Thru Habitat • Science and Environmental Health Network • ScientistsWarning.org • Selkirk Conservation Alliance • Sequoia ForestKeeper® • Sierra Club • Sierra Forest Legacy • Sierra Club Alaska • Soda Mountain Wilderness Council • South Florida Wildlands Association • South Umpqua Rural Community Partnership • Southeast Alaska Conservation Council • Southern Environmental Law Center • Southern Maryland Audubon Society • Southern Utah Wilderness Alliance • Spottswoode Winery, Inc. • Stanislaus Audubon Society • St. Louis Audubon Society • Sustainable Arizona • Tampa Bay Waterkeeper • Texas River Revival • The Cornucopia Institute • The Land Connection • The Lands Council • The Laukahi Network • The Otter Project and Monterey Coastkeeper • The Shalom Center • The Story of Stuff Project • The Urban Wildlands Group • The Wilderness Society • Time Laboratory • Toxic Free NC • TrailSafe Nevada • Trustees for Alaska • Turtle Island Restoration Network • Umpqua Watersheds Inc. • Upper Peninsula Environmental Coalition • Uranium Watch • Utah Native Plant Society • Utah Valley Earth Forum • Vet Voice Foundation • Virginia Native Plant Society • Wasatch Clean Air Coalition • Waterkeeper Alliance • WaterLegacy • WE ACT for Environmental Justice • Whale and Dolphin Conservation • West Virginia Environmental Council, Inc. • West Virginia Highlands Conservancy • Western Environmental Law Center • Western Organization of Resource Councils • Western Watersheds Project • Whidbey Environmental Action Network • WILD Coast • WildEarth Guardians • Wildlife Conservation Society • Wild Horse Education • Wild Nature Institute • Wilderness Workshop • Wildlife Rehabilitation Center of Northern Utah • Wings of Wonder • Wyoming Outdoor Council • Zumbro Valley Audubon

August 20, 2018

Ms. Mary Neumayr, Chief of Staff
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

**RE: Advance Notice of Proposed Rulemaking
40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508
[Docket No. CEQ-2018-0001]**

Dear Ms. Neumayr:

This letter represents the collective response of 343 public interest organizations, representing millions of members and supporters, to the Council on Environmental Quality's (CEQ) recent Advance Notice of Proposed Rulemaking (ANPRM). Given the critical importance of the National Environmental Policy Act (NEPA) regulations, some of our organizations will also be submitting separate comments emphasizing particular issues.

We begin by emphasizing that CEQ's regulations provide a well-crafted, comprehensive framework for implementing the procedural provisions of NEPA. The regulations have stood the test of time well. Rather than contemplating a rewrite of the regulations, we urge that CEQ invest its modest resources, and most importantly, its leadership position, in a systematic initiative to enforce them. Changes to the regulations will not result in improvements unless federal agencies have the organizational structure and resources that facilitate their implementation. In our considered view, the single most important key to efficiency and effectiveness is having competent, trained, and adequate staff in agencies to implement the regulations. As we demonstrate below, the existing regulations already address many of the questions the ANPRM raises in regard to reducing paperwork and delay. What is lacking is the capacity and will to fully implement the regulations.

CEQ has an essential leadership role in ensuring that agencies receive the appropriate direction and resources. As the agency with NEPA oversight responsibility, CEQ should lead an effort to identify the real-world obstacles to implementing those provisions along with ensuring that the goals of inclusive analyses and informed decisionmaking are met. Only after undertaking such an effort should CEQ consider whether any regulatory revisions are warranted.

Concerns with the ANPRM Process

NEPA is rightfully referred to as the environmental "Magna Carta" of this country. Like that famous charter, NEPA enshrines fundamental values into government decisionmaking. NEPA is a proven bulwark against hasty or wasteful federal decisions by fostering government transparency and accountability. The NEPA process achieves the law's stated goal of improving the quality of the human environment by, most importantly, requiring the analysis of reasonable alternatives to a proposed action and by empowering people affected by agency decisions to participate in that analysis. Under NEPA, the identification and evaluation of alternatives must be grounded in sound science and transparency.

One of the authors of NEPA, Senator Henry Jackson, stated on the floor of the U.S. Senate that Congress' bipartisan passage of NEPA represented a declaration "that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind. That we will not intentionally initiate actions which will do irreparable damage to the resources which support life on earth." 115 Cong. Rec. 40,416 (1969). Rather, "The basic principle of [NEPA] is that we must strive, in all that we do, to achieve a standard of excellence in man's relationship to his physical surroundings. If there are to be departures from this standard they will be exceptions to the rule and the policy. And as exceptions they will have to be justified in the light of public scrutiny." 115 Cong. Rec. 29,056 (1969).

The implementing regulations now under consideration were thoughtfully developed and serve as the principal means by which American communities, individuals, and organizations are informed about and participate in federal agency decisionmaking. They have ensured that federal decisions are, at their core, democratic by guaranteeing meaningful public involvement and transparency in government decisionmaking. CEQ developed the regulations to provide a uniform, consistent approach that promotes effective decisionmaking in accord with the policies

set forth in NEPA. Critically, the regulations provide the public and other federal, state, tribal and environmental justice communities with an essential voice in that process. The regulations reflect case law developed through the federal courts, accounting for the complexities and opportunities that arise in specific places and contexts. Additionally, the regulations manifest a concerted effort to expedite the process without losing either substantive value or public involvement. The regulations also provide considerable flexibility to agencies in regard to their implementation. CEQ must consider how any changes to the NEPA regulations, after decades of experience with the current process, might lead to confusion and litigation.

The promise of the NEPA process—that the government will consider the environmental impacts of its decisions, disclose those impacts to those affected, and ensure the public has an opportunity to meaningfully weigh in—is at the heart of democracy. These democratic principles enshrined in NEPA explain why it is among the most widely exported laws the United States has ever passed, with over 160 countries adopting similar legislation. NEPA’s role in protecting communities is why it is the primary mechanism by which environmental justice considerations are incorporated into government decisions.

In light of other administrative actions taken over the course of the last year, it is clear this rulemaking is part of a broader and deeply troubling ideological effort to reduce or eliminate public contributions to decisionmaking by agencies expending public funds. Those efforts include processes to dismantle NEPA regulations in order to cater to special interests of developers and industry polluters — rather than the interests of the public for whom these regulations are intended to benefit. Misguided efforts to rescind or revise regulations, policies, and guidance across the federal government will put the environment and public health at risk by overemphasizing the supposed “burden” of review and oversight and ignoring the many enormous *benefits* that environmental rules and regulations secure for the public.

This administration’s narrow focus on eliminating regulatory protections and restricting the scope of environmental review is disturbingly clear in actions it has taken government-wide. Last spring, President Trump revoked CEQ’s guidance for agencies on the consideration of climate change in NEPA reviews, indicating an effort to institutionalize climate change denial into government decisionmaking. Then, in a series of actions over the next several months, agencies such as the Bureau of Land Management (BLM), Department of Transportation, Department of Energy, United States Forest Service, and others issued notices with the intention to review their NEPA regulations in a manner that seems intended to help project proponents “overcome” the “obstacles” of environmental review. These efforts systematically fail to acknowledge the critical benefits that review, disclosure, and public input under NEPA provide to all peoples’ health, quality of life, and relations to their surroundings. *See* Attachment 1, NEPA Success Stories. Critically, they also systematically fail to identify or begin to address the actual causes of delay in federal agency processes. The proposed “cures” generally miss the mark, focusing on a forced pathway to project approval rather than a solution based on addressing real world problems.

Our concerns are amplified by the breadth of the questions posed in this ANPRM, which seem to reflect an intention to fundamentally change the NEPA process. Such a fundamental change is not only unwarranted, but also unwise. The fundamentals of the NEPA regulations

are sound and thoughtful. We do, however, have serious concerns about the failure of many agencies to adequately implement the regulations. Those concerns will be assuaged not by changing the rules, but by enforcing them, and by providing the funding, resources, and training that agency staff need to effectively implement them.

The questions posed in the ANPRM and related documents issued by the current administration suggest a singular focus on “efficiency.” Sadly, the administration appears to equate efficiency solely with speed. Our understanding of efficiency is a process implemented in a manner consistent with three basic principles:

- (1) Consideration of the environmental and related social and economic impacts of proposed government actions on the quality of the human environment is essential to responsible government decisionmaking;
- (2) Analysis of alternatives to an agency’s proposed course of action is the heart of meaningful environmental review and indeed of good government more broadly; and
- (3) The public plays an indispensable role in the NEPA process.

Changes to NEPA’s implementing regulations are not warranted at this time. However, to the degree that CEQ does move forward with a rulemaking, we offer two suggestions for improving implementation of the regulations in ways that we believe would efficiently employ the three principles articulated above. As we demonstrate below, the existing regulations already address many of the questions the ANPRM raises. What is lacking is the will and assurance of capacity to fully implement the regulations.

Our position that changes to NEPA’s implementing regulations are not warranted is premised on the lack of public outreach and careful analytical groundwork that is essential to justify what will likely prove to be a time and resource consuming process. NEPA’s implementing regulations have withstood the test of time and should not be revised absent good cause. While we appreciate the extension of the comment period deadline from the original 30 days, we still feel that CEQ’s process falls short. Even with the extension, the process appears designed more for NEPA experts than for the public. Certainly, the extra time will allow more people to respond, but many of the questions, while perhaps appearing simple, involve decades of agency and judicial interpretation. We remind CEQ of its own admonition to agencies that, “Members of the public are less likely to participate or engage in the commenting process if they do not fully understand how a particular project affects them. It is critical that agencies provide context and as much information as possible in the beginning of the public involvement process.” Memorandum for Heads of Federal Departments and Agencies on Effective Use of Programmatic NEPA Reviews, December 28, 2014, fn. 33.

CEQ has customarily engaged in substantial public outreach, especially when considering the regulations as a whole. That outreach has included public meetings with many specific, identifiable constituencies. In this instance, CEQ has provided no forum for an overall discussion of the NEPA process, no public meetings, and indeed, no public outreach that we are aware of other than the publication of the notice in the *Federal Register* and a link on CEQ’s website. This lack of engagement of the public at this initial step limits the role of the public in

informing and shaping this process as it moves forward. Should CEQ decide to propose amendments to its regulations, we urge it to follow its own guidance and engage in more comprehensive outreach, an appropriate comment time frame, and inclusion of multiple accessible public hearings. If it does not, CEQ risks the credibility of its decision-making process and increases the risk of uninformed action—action that would render agency decisions reached in accord with any new regulations vulnerable to failure and cause harm to our country’s health, environment, and economy.

Finally, we remind CEQ that if it proceeds to proposed rulemaking, it must consider the appropriate level of NEPA compliance for its proposal.

Questions and Responses

NEPA Process:

1. Should CEQ’s NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?

No. CEQ’s regulations already require that “to the fullest extent possible,” agencies prepare draft EISs “concurrently with and integrated with environmental impact analyses and related surveys and studies” required by other environmental laws. *See* 40 C.F.R. § 1502.25; *see also* 40 C.F.R. § 1500.2(c) (requiring, to the fullest extent possible, that federal agencies “[i]ntegrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively”); 40 C.F.R. § 1500.4(k) (agencies should reduce paperwork by “[i]ntegrating NEPA requirements with other environmental review and consultation requirements”); 40 C.F.R. § 1500.5(i) (agencies shall reduce delay by “[c]ombining environmental documents with other documents”). Since promulgation of the regulations, CEQ has consistently stressed the need for environmental review processes to run concurrently rather than sequentially. This makes sense, not just from the point of view of meeting a particular timeline, but also because availability of analyses required by other laws such as the National Historic Preservation Act and the Clean Water Act will result in a more informative EIS. The current regulations and guidance are sound in this respect. These mechanisms to reduce delay and paperwork are also applicable to EAs, per CEQ’s guidance on “Improving the Process for Preparing Efficient and Timely Environmental Review under the National Environmental Policy Act” (Mar. 12, 2012).

We are aware that in practice, compliance is not always “concurrent, synchronized, timely and efficient.” We suggest that a first step to addressing that concern is to systematically survey the federal agencies that typically prepare the majority of EISs and identify the actual on-the-ground barriers that prevent CEQ’s existing regulations and guidance from being implemented, and then propose steps to address the actual problems. This information should then be shared with the public for input: often the public and

affected stakeholders can identify specific barriers (particularly adequate staffing, training, and funding) to efficient coordination among federal agencies.

2. Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?

No. Under CEQ's current regulations, agencies are already directed to use available environmental studies and analyses, whose scientific and professional integrity they can assure, in the course of implementing NEPA, whether those studies and analyses were prepared in the context of an earlier federal, state, tribal or local environmental review or outside of such a review. A study that is relevant to the proposed action and judged to be credible by a federal agency (and does not contain proprietary information) – whether or not it was produced in the course of an agency environmental review process – can and should be incorporated by reference. The only additional requirement is that the study be available to the public during the comment period, which is reasonable. *See* 40 C.F.R. § 1502.21.

If the existing study is a formal environmental review document prepared in the course of another federal, state, tribal or municipal environmental review process for substantially the same action as the proposed action at hand, the analysis upon which it is based remains current, *and* the document was prepared to meet NEPA requirements with the involvement of at least one federal agency, *then* it can be adopted by the lead federal agency by simply recirculating the statement as a final EIS (with no comment period). If the proposed action is not substantially the same as that covered under the earlier review but is still relevant, an agency can circulate it as a draft EIS (40 C.F.R. §1506.3.), (after reviewing to determine whether the EIS needs to be supplemented) or the agency may incorporate the document by reference.

Further, agencies should make much better use of tiering from existing NEPA documents, as we discuss in response to Question 12. This is an underutilized and often misused mechanism that – when coupled with the development of more effective higher-level EIS-level NEPA analyses – has the potential for greatly increasing efficiency and effectiveness of NEPA reviews.

Regulatory changes are unwarranted because the current provisions work. They maximize use of available analyses, reviews, and reports. They provide the public and other agencies with the ability to track and understand what analyses are being relied upon in the decisionmaking process. These regulations are successfully implemented by many agencies. When they are not it is often because agency staff do not understand how to use them. The solution to this problem is not regulatory changes, but training for all agency NEPA staff on an annual basis would help ensure greater awareness of these mechanisms.

This question also includes a reference to “decisions.” We interpret that to mean decisions related to the implementation of an earlier environmental review process, resulting in a determination of adequacy. We would oppose a revision of the CEQ regulation to waive or exempt a lead federal agency from independently evaluating and taking responsibility for an environmental document being used for compliance with NEPA. Indeed, CEQ cannot take such action through rulemaking because it is a fundamental change to statutory direction, whether the document is prepared by a federal agency or a state agency. *Compare* 42 U.S.C. § 4332(2)(C) with § 4332(D)(iii). We believe the same standard should apply if the document is prepared by a municipality or a tribe. This issue is best addressed by engaging in joint environmental review processes.

We further caution CEQ to remember that the NEPA process hinges on a specific “proposal” and the agency’s consequent “purpose and need” for a particular agency action. *See* 40 C.F.R. §§ 1502.13, 1508.23. This is acutely important relative to the agency’s hard look at impacts and the identification and consideration of alternatives with the public, in particular where there are “unresolved conflicts” (which requires consideration of alternatives even where impacts are not expected to be significant). 42 U.S.C. § 4332(2)(E). Unfortunately, certain agencies, namely the BLM, have invented mechanisms (so-called “Determinations of NEPA Adequacy,” or “DNAs”) to avoid public input and NEPA review and, in effect, to inappropriately justify a distinct implementation-level “proposal” on the basis of an existing, often decades-old, NEPA analysis developed for a separate, typically programmatic level decision. For example, BLM has sought to use DNAs to justify the sale of geographically discrete oil and gas leases on the basis of land use plan-level NEPA analyses. Neither BLM’s programmatic NEPA analyses—which typically cover millions of acres—nor BLM’s DNAs provide the requisite site-specific analysis of impacts or consider alternatives calibrated to geographically specific proposed oil and gas leases, including the option not to issue the oil and gas lease or to condition the lease on site-specific stipulations or mitigation measures. Accordingly, leases issued pursuant to DNAs are of dubious legal validity at best and voidable. These DNAs also undercut public involvement, undermining agency credibility with local communities and leading to distrust. It should therefore be no surprise that these DNAs—because of conflicts with NEPA’s statutory framework—have given rise to litigation.

We have seen this attempted dodge of analysis before by agencies trying to rely on a programmatic NEPA analysis that simply does not cover a proposed site-specific action. The DNA process is simply putting a new label on it. To the degree that agencies think implementation-level actions should not require further NEPA review, the proper course is not to contrive a new, non-NEPA mechanism, but to improve the robustness of programmatic NEPA analyses that clearly and explicitly address these implementation-level issues in advance, properly tier to those programmatic NEPA analyses (while ensuring appropriate analysis of any site-specific impacts not covered by the earlier programmatic analysis), or to consider and justify appropriate categorical exclusions.

Similarly, for many years, some agencies have utilized a Supplemental Information Report (SIR) as a mechanism for evaluating new information related to an action

analyzed in an EIS. Except for new information that clearly has no potential for significance relevant to environmental concerns or substantial changes related to the proposed action, this type of analysis should be evaluated through the NEPA process. The analysis could be presented in an EA available for public review or, of course, through a supplemental EIS. Further, an SIR is not an appropriate place to present new analysis of information available at the time the original NEPA documentation was provided. Generally, the default mechanism for evaluating new information, especially in the context of a proposed action analyzed in an EIS, should be, at a minimum, an EA with public involvement.

CEQ guidance is needed to address this issue throughout the executive branch. Such guidance should reiterate the importance of evaluating environmental consequences and providing for public review before making commitments of public resources and provide strict limitations on uses of DNAs. The guidance should emphasize that if there is not an available categorical exclusion, a DNA is not the next best option.

3. Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

CEQ's regulations provide a solid framework for interagency coordination between federal, state and local agencies. As set forth below in our responses to questions 6a and 18, we support improving the regulations dealing with coordination with tribal governments, because the existing regulations do not adequately ensure appropriate coordination over issues that affect tribal members.

The existing regulations allow a lead agency to fund analyses from cooperating agencies, mandate that lead agencies include such funding requirements in their budget requests, and require that agencies notify CEQ when they are unable to cooperate in the NEPA process because of other program commitments. Further, as made clear by CEQ many years ago, if a potential cooperating agency's involvement in the NEPA process is precluded because of other commitments, it is barred from further involvement with the project under the CEQ regulations (although other laws may require its involvement in some form). See 40 C.F.R. § 1501.6. and *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 *Fed. Register* 18026 (March 23, 1981), Q. 14a. It is not clear the extent to which these provisions of the regulations are typically applied by federal agencies in the course of implementing NEPA for proposed actions.

We are aware that there is concern that agencies do not always provide comments in a timely manner. We question how much of that concern is based on anecdotes and myths versus systematic surveys of factual information. Indeed, the Government Accountability Office (GAO) underscored the paucity of information about NEPA implementation in a 2014 report, *Little Information Exists on NEPA Analysis* (GAO-14-369). Existing research relates almost exclusively to federal highway actions. Since at least the mid-1990s, the GAO and the Congressional Research Service (CRS), have prepared a series

of reports, remarkably consistent in their findings, regarding the construction of highway projects and the relationship of environmental laws generally—and NEPA specifically—to decisionmaking timelines. This type of analysis is needed more broadly so that agencies and legislators are able to formulate successful approaches to reducing delays. In short, the GAO and CRS reports find that a number of federal projects have indeed been delayed or stopped, but for reasons unrelated to NEPA. “Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope.” Congressional Research Service, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, R42479, (Apr. 11, 2012).¹ Nonetheless, NEPA usually gets the blame. CEQ is in the ideal position to conduct a systematic study throughout the executive branch to determine the actual, as opposed to perceived, causes of delay in interagency coordination.

Scope of NEPA Review:

4. Should the provisions in CEQ’s NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?

Format: No. We are not aware of a rationale for changing the regulation at § 1502.10 on recommended format. As the title of the regulation makes clear, this is a recommendation and an agency may use a different format so long as it addresses all required sections and there is a compelling reason to change the format.

Page length: No. We support the current suggested page limits in the CEQ regulation at §1502.7 (150 pages for an EIS or for proposals of unusual scope of complexity, no more than 300 pages). These limits help encourage brevity and clarity and focus agencies on those issues that could significantly affect the environment, as the regulations already require. See §§ 1500.1(b) and 1501.7. However, as the important qualifier “normally” makes clear, situations will arise in which adequate disclosure of potential impacts requires additional pages. One size does not fit all when it comes to effective and efficient NEPA analysis. Avoiding excess verbiage will improve the quality of environmental review. But elevating page length over effective disclosure of potential impacts as the ultimate criterion of adequacy would lead to less informed public participation, poorer decisionmaking, and more violations of NEPA.

We also support the suggested limits with the understanding that as stated in the regulation, these page limits only include the substantive portions of an EIS and do not

¹ See also, Government Accountability Office Report No.14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses*, (Noting that “there could be a number of ‘non-NEPA’ reasons for the ‘start,’ ‘pause,’ and ‘stop’ of a project, such as waiting for funding or a non-federal permit, authorization, or other determination.”), (August, 2014); see also, Department of Treasury report by Toni Horst, et al., *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*, (Noting that “a lack of funds is by far the most common challenge to completing” major transportation infrastructure projects)(December, 2016).

include appendices, which are vital to providing technical information. Without excluding appendices from the page count, it is virtually impossible for an agency preparing an EIS to implement the regulatory direction to integrate other environmental review requirements with NEPA. 40 C.F.R. § 1502.25.

Time limits: No. We support the existing regulation that sets forth the factors to be considered in setting timeframes for analysis and agree with CEQ's determination that prescribing universal time limits is inflexible and unwise. 40 C.F.R. § 1501.8. As CEQ noted in its preamble to the current regulations, "The factors which determine the time needed to complete an environmental review are various, including the state of the art, the size and complexity of the proposal, the number of Federal agencies involved, and the presence of sensitive ecological conditions. These factors may differ significantly from one proposal to the next." National Environmental Policy Act, Implementation of Procedural Provisions; Final Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978). The preamble goes on to note that the same law that applies to a Trans-Alaska pipeline applies to a modest federally funded building and that the individual agencies are in the best position to judge the appropriate time needed. We also note that the current regulation allows applicants to ask an agency to set time limits for a particular proposed action. The scoping process is the appropriate time for an agency to set both page and time limits if necessary. 40 C.F.R. § 1501.7(b) and (c).

We are concerned about the "one size fits all" approach now being implemented at, for example, the Department of the Interior. Secretarial Order 3355, "Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807" (August 31, 2017); Additional Direction for Implementing Secretary's Order to Assistant Secretaries, Heads of Bureaus and Offices and NEPA Practitioners (April 27, 2018). This management direction ignores critical considerations of context, 40 C.F.R. § 1508.27(a), and the importance of carefully considering alternatives with the public and other stakeholders which may require time, in particular where there are "unresolved conflicts," 42 U.S.C. §§ 4332(2)(C)(ii), 4332(2)(E). Rushed NEPA analyses, especially given severe staff shortages in a number of agencies, will result in badly flawed results. Rushed public processes may result in increased litigation, decreased agency credibility with the public, and distorted, poorly reasoned decisionmaking. *See* Attachment 2, Statement Geoffrey Haskett, former U.S. Fish & Wildlife Service Director for Alaska (On rushed NEPA process for proposed oil and gas development in the Arctic National Wildlife Refuge).

As President Nixon once said:

The National Environmental Policy Act has given new dimension to citizen participation and citizen rights as is evidenced by the numerous court actions through which individuals and groups have made their voices heard. Although these court actions demonstrate citizen interest and concern, they do not in themselves represent a complete strategy for assuring compliance with the Act. We must also work to make government more responsive to public views at every stage of the decisionmaking process. Full and timely public disclosure of

environmental impact statements is an essential part of this important effort. President's Message to Congress, August, 1971.

Ultimately, the key to robust compliance with NEPA that empowers the public, inform input from sister agencies and elected officials, and guide better, more durable, and less wasteful decisions is proper staffing and training of the agency personnel principally responsible for compliance.

5. Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decisionmakers and the public, and if so, how?

No. No one would be more delighted than our millions of members to review NEPA documents that provide greater clarity and better analysis of significant issues relevant to the proposed action. Much of our advocacy in the context of NEPA relates to this very topic. However, improved clarity will not be achieved by changes to CEQ's regulations but, rather, by better implementation of CEQ's existing regulations.

CEQ regulations already call for: concentrating "on the issues that are truly significant to the action in question, rather than amassing needless detail," 40 C.F.R. § 1500.1(b), reducing the accumulation of extraneous background data, § 1500.2(b), using the scoping process to identify significant issues and de-emphasize insignificant issues, § 1501.7, the often-overlooked regulation calling for clear writing and appropriate graphics, § 1502.8, and the mandate to ensure professional integrity of analyses, § 1502.24, and all associated CEQ guidance. Fully implemented, these provisions would go far in achieving greater clarity and better informing both decisionmakers and the public.

CEQ's Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping, (April 30, 1981), is excellent guidance that focuses on ways to effectively and efficiently undertake the scoping process. We suggest that CEQ revisit that guidance with an eye to updating it to account for new approaches to communication and lessons learned since publication of the original guidance.

Most importantly, CEQ, working with agencies that regularly implement NEPA, needs to provide training to the agencies on effective scoping processes. Efficiency in the NEPA process must begin at the start of the process with a good internal and external scoping process that results in agencies identifying the important issues that must be analyzed, the information they need to obtain, the parties who are interested in and may be affected by the proposed action, and at least the initial appropriate spatial and temporal scope boundaries of the analyses for each significant issue. As agencies plan for scoping processes for particular types of actions, they should also educate and solicit input from the interested public regarding the NEPA process generally and the purpose of scoping in particular. Simply noticing a meeting and expecting well crafted, thoughtful scoping comments is not sufficient.

6. Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?

Our members consistently support robust public involvement throughout the NEPA process. While the overall framework for public involvement set forth in §1506.6 is sound, there are several improvements that should be made:

- a. Consistent with 40 C.F.R. § 1501.7(a)(1) and with our response to question 18 below, the restrictions in 40 C.F.R. § 1503.1(a)(2)(ii), regarding inviting comments on an EIS, and 40 C.F.R. § 1506.6(b)(3)(ii), regarding the requirement to notify tribal governments of proposed agency actions with effects primarily of local concern, should be modified to substitute “**affect tribal interests**” for the phrase “occur on reservations” as the trigger.
- b. CEQ should issue guidance directing agencies to use all available technology as well as (not as a substitute for) the mechanisms already identified in § 1506.6. Given modern communications technology, there is no reason that notification of actions falling under an agency's categorical exclusions cannot be easily provided; indeed, the Department of Energy and Forest Service do just that; *See* 36 C.F.R. § 220.4(e)(1) and <https://www.energy.gov/nepa/nepa-documents/categorical-exclusion-determinations>. Other agencies should follow that example. Certainly, agency websites and other means of communication should be employed to reach all potentially interested parties. We recommend that CEQ reference such mechanisms generally so that the guidance stays current.

That said, we emphasize that not everyone uses the internet, let alone social media. According to 2018 studies by the Pew Research Center, home broadband access is around 50% for African Americans and Hispanics and also low for low-income populations, older adults and rural residents. <http://www.pewinternet.org/fact-sheet/internet-broadband/>. Indeed, as of January 2018, 30% of all US adults do not have home broadband access. With an estimated 200 million adults in the US, this means that 60 million people rely on phones, work, or libraries for internet access. These alternative means of access, such as use of computers in public libraries, are typically quite restricted. Approximately 11% of American adults don't use the internet at all. <http://www.pewresearch.org/fact-tank/2018/03/14/about-a-quarter-of-americans-report-going-online-almost-constantly/>. Moving all notifications and documents to the internet in anticipation of the day when all Americans are on it would restrict involvement by many individuals in affected communities or in remote, rural areas. It would also ignore the potential for online outages that make documents unavailable or unsearchable for critical periods of time during public review. To ensure that public involvement is conducted in a manner that is truly inclusive, the regulations should expressly require that in providing notice about the availability of documents and scheduling public meetings, agencies consider whether the format and timing equitably provides notice, information, and meaningful opportunities to participate to vulnerable and traditionally marginalized populations.

- c. As noted previously, the emphasis on meaningful public input and careful consideration of environmental impacts outlined in NEPA and its implementing regulations is why it is one of the principal tools in ensuring environmental justice principles guide government decisionmaking. The NEPA process provides one of the primary forums for agencies to openly consider the composition of affected areas, relevant public health impacts, exposure risks, and solicit meaningful public input with the aim of avoiding disproportionate impacts on vulnerable and traditionally marginalized communities. In the memorandum to departments and agencies on Executive Order 12898 (Feb. 16, 1994) (“Federal Actions to Address Environmental Justice in Minority and Low-Income Populations”) President Clinton emphasized the importance of NEPA in addressing environmental justice issues, which led CEQ to issue guidance on environmental justice under NEPA in 1997. The guidance provides an excellent model for how agencies should incorporate environmental justice considerations into government decisionmaking. However, an update is needed given that guidance is now twenty years old and is in need of an update. Specifically, the guidance should be updated to include strong recommendations to agencies to consider opportunities in the NEPA process to accommodate individuals with limited English proficiency, consistent with Executive Order 13166 (Aug. 11, 2000) (“Improving Access to Services for Persons with Limited English Proficiency”). In addition CEQ should update the guidance to reflect the roles of new technologies and supplement the guidance to align with the 2016 report of the Federal Interagency Working Group on Environmental Justice and NEPA Committee entitled “Promising Practices for EJ Methodologies in NEPA Reviews,” and its more recent (March 2018) report entitled “Community Guide to Environmental Justice and NEPA Methods.” Updated and formalized guidance would better promote transparency, disclosure, collaboration, and meaningful input of environmental justice communities.
- d. Per our response to question 9c below, we also recommend a new provision in 40 C.F.R. § 1501.4 to enhance public participation in the context of environmental assessments.

7. Should definitions of any key NEPA terms in CEQ’s NEPA regulations, such as those listed below, be revised, and if so, how?

In general, the existing definitions are sound and have stood the test of time. They are based on case law, best practices, and considerable experience and are well understood by practitioners. Revisions are not warranted.

- a. Major Federal Action - No.**
- b. Effects - No.**
- c. Cumulative Impact - No.**
- d. Significantly - No.**
- e. Scope - No.**
- f. Other NEPA terms - No**

8. Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?

The existing definitions are sound and have stood the test of time. Revisions are not warranted. The definitions are based on case law, best practices, and considerable experience and are well understood by practitioners. CEQ will bear a heavy burden if it proposes changes in definitions to fundamental concepts such as these.

- a. Alternatives - No.**
- b. Purpose and Need - No.**
- c. Reasonably Foreseeable - No.**
- d. Trivial Violation - No.**
- e. Other NEPA terms - No.**

9. Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?

a. Notice of Intent - No.

b. Categorical Exclusions – No.

c. Environmental Assessments - The nature of public involvement for EAs varies a great deal. CEQ's regulations currently offer minimal guidance specific to EAs, stating that agencies "shall involve environmental agencies, applicants and the public to the extent practicable" in the preparation of EAs. 40 C.F.R. § 1501.4(b). In practice, agencies seldom involve the public in the preparation of EAs, although some agencies routinely provide a comment period on EAs and some provide a comment period in particular situations. Frequently, however, EAs are prepared for actions that may have significant effects or actions for which the nature of those effects is in dispute, there are "unresolved conflicts" compelling consideration of alternatives (42 U.S.C. § 4332(2)(E)), or there are sensible opportunities to engage the public with an eye towards further mitigating impacts beyond what the agency has already considered. We propose the following as an additional sentence to be added to the end of 40 C.F.R. § 1501.4(b): "**Agencies shall make an EA available for public review for a minimum of 30 days.**"

d. Findings of No Significant Impact – No.

e. Environmental Impact Statements – No.

f. Records of Decision – No.

g. Supplements – CEQ's current regulatory direction on supplementing EISs is excellent and we support retaining it. 40 C.F.R. §1502.9(c)

However, we strongly recommend CEQ consider issuing guidance on the types of documents that individual agencies are currently using to determine whether to supplement NEPA analyses, including Supplemental Information Reports (SIRs) and Determinations of NEPA Adequacy (DNAs). We understand, of course, the need to review earlier NEPA documents in light of new or revived proposals and the desirability of documenting an agency's rationale. However, we reiterate the concerns about the Bureau of Land Management's use of DNAs noted in response to Q. 2. CEQ guidance regarding use of both SIRs and DNAs should reiterate the importance of evaluating environmental consequences, permitting public review, and making commitments of public resources. CEQ should provide strict limitations on the use of non-NEPA documents to bypass public involvement. A brief EA with public involvement is the most appropriate way of assessing the significance of new information or possible changed circumstances.

10. Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?

No. We support the existing regulation on timing of agency action at 40 C.F.R. § 1502.5. The regulation lays out a common-sense approach for linking the NEPA process to the agency's consideration of a proposed action.

11. Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?

CEQ's existing provisions regarding agency responsibility and preparation of NEPA documents by contractors and project applicants, including the conflict of interest provision, are the minimum of what should be required and certainly must be retained, if not strengthened. We are very concerned about conflicts of interest when agencies use contractors paid for by an applicant to prepare an EIS—the so-called “third-party EIS” situation. CEQ's requirements that a federal agency select the contractor and that contractors execute disclosure statements regarding any conflict of interest are essential. The disclosure statement should be executed prior to signing the contract and should always be publicly available. It must also be understood that the agency continues to have the legal responsibility for any and all NEPA documents prepared by an outside contractor. It cannot shift NEPA compliance duties to an outside entity, in particular given that outside entities may lack an understanding of local community dynamics to help balance competing needs and issues and ensure that public input is properly accounted for. It is also essential to maintain strong oversight and enforcement of the prohibition on utilizing contractors that would benefit in some manner by the proposed action (for example, additional contracts implementing a particular proposed action) that is the subject of the NEPA process at issue.

We understand that agencies need to be able to communicate directly with the applicant regarding the proposed action. However, agencies must take special care in the context of a third-party EIS. For example, applicants should not be invited to regularly attend

interdisciplinary team meetings or interagency meetings. Agencies must draw a bright line distinguishing their role of evaluation and regulation from the role of the applicant.

We strongly believe the integrity, effectiveness, and efficiency of the NEPA process are much-better served when agencies conduct the NEPA process themselves, as the law intended. This is particularly the case where the NEPA process operates as a critical decisionmaking tool for agencies with complex, diverse missions—e.g., land management agencies that operate under a “multiple use” framework or where local community dynamics require careful attention to ensure that the agency listens to public concerns. Contractors and project applicants are simply not in a position to effectively apply this framework to resolve conflicts or to balance competing values and agency mandates.

12. Should the provisions in CEQ’s NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?

No. CEQ’s guidance document on “Effective Use of Programmatic NEPA Reviews” is comprehensive, current, and useful. It accurately reflects the concerns of many of our members regarding the challenges the public often faces in the context of programmatic NEPA documents and tiering. Chief among these concerns is the difficulty of determining when an agency will do a particular type of analysis. As noted in CEQ’s guidance, agencies sometimes say they are deferring a particular type of analysis to a later stage, only to improperly refer back to a programmatic document when that later stage arrives to justify the implementation-stage action. We certainly support tiering a more detailed and site-specific analysis at the project level to a programmatic EIS, but only when the programmatic analysis is sufficient to support such tiering by providing a site-specific hard look at impacts to inform alternatives and mitigation. As discussed in the guidance, it is imperative for agencies to be clear about what type of analysis they will do at what stage of a tiered process—and then to do it, absent changed circumstances accompanied by a clear explanation to the public.

For specific observations on the implementation problems with programmatic EISs and tiering, we incorporate by reference the discussion presented in the context of the Forest Service’s Advance Notice of Proposed Rulemaking on its NEPA regulations. *See*, Letter from The Wilderness Society and 82 other organizations to Chief Tony Tooke, February 1, 2018, pp. 18-21 (Attachment 3). As stated in that discussion, which we believe is applicable to other agencies’ NEPA implementation, especially in the land management and installation management context, agencies are often not taking advantage of efficiencies that the tiering process provides. Rather, there is a tendency to push analysis and decisionmaking off to a later time. Unfortunately, when that later time comes, agencies are often under even more pressure to “streamline” the process.

We see no reason for regulatory change in this area. Rather, we recommend CEQ invest resources into training and assisting agencies to shape programmatic NEPA analyses so that the resulting documents will facilitate appropriate tiering. Indeed, we think more effective programmatic analyses—i.e., “smart from the start” thinking to shape and

inform implementation-level action that tiers from a programmatic analysis—provides one of the single greatest opportunities to improve the efficiency of the NEPA process and to cultivate good-will and public buy-in for actions that meet a project applicant’s goals while also protecting our country’s health, environment, and economy.

13. Should the provisions in CEQ’s NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

No. We oppose changes to the regulations regarding an appropriate range of alternatives. Changes are not warranted and could do tremendous damage to the value of NEPA. NEPA calls for analysis of alternatives twice, emphasizing their importance. *See* 42 U.S.C. §§ 4332(2)(C)(ii), 4332(2)(E). Consistent with these statutory mandates and per the regulations, alternatives are indeed the “heart” of the NEPA process. 40 C.F.R. § 1502.14. Without them, NEPA review cannot perform its core function of creating informed reflection so that agencies do not simply pursue their first reflexive idea about discharging a mandate or responsibility. Without a bona fide examination of alternatives, the NEPA process would do nothing more than document the impacts of the agency’s or applicant’s preferred course of action with the possible addition of some mitigation measures. In numerous examples, the alternatives developed—whether by a lead agency or externally—have truly improved decisionmaking. Further, agencies have benefitted from alternatives proposed by members of the public or by other agencies. Even where alternatives offered by members of the public are not chosen, agencies create public buy-in and acceptance when they show they have taken public input seriously. *See* Attachment 1 for examples of where alternatives analysis has benefitted decisionmaking.

CEQ and the courts have consistently made it clear that the range of reasonable alternative varies with the facts of each situation, resting on public input and key notions of reasonableness and feasibility. Any effort to constrain the requirement to analyze alternatives, including the no action alternative and reasonable action alternatives not within the jurisdiction of the lead agency, would directly undercut a central mandate of NEPA and be met with significant public backlash. If anything, we would strongly encourage agency training for making better and more expansive use of alternatives as a tool to better engage and work with the public on the design of action alternatives that eliminate or mitigate impacts. Done well, the careful identification and consideration of alternatives—*with the public*—will improve the credibility and acceptability of agency action and better protect our country’s health, environment, and economy.

We also oppose changes to Section 1506.1 regarding limitations on actions during the NEPA process, which is essential to the analysis of alternatives. The very purpose of limiting action while the NEPA process is ongoing is to avoid the “real environmental harm [that] will occur through inadequate foresight and deliberation.” *See Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (noting the difficulty of stopping a “bureaucratic steam roller” once started). The regulation already allows the development of plans, designs, or performance of other work necessary to support compliance with other legal requirements. Allowing additional work to be done on a preferred alternative

would eviscerate the value of alternatives in actually influencing the agency's decision for the better. It would relegate NEPA analysis to a post-hoc justification for a decision the agency had already made, rather than a process for determining the best course of action. NEPA itself contemplates its role before a decision is made. *See* 42 U.S.C. § 4332(c)(v) (requiring the "detailed statement" to discuss "any irreversible and irretrievable commitments of which *would be* involved in the proposed action *should it be* implemented") (emphasis added).

General:

14. Are any provisions of the CEQ's NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.

The references to EPA's publication of the *102 Monitor* in § 1506.6(b)(2) and § 1506.7 are obsolete.

15. Which provisions of the CEQ's NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?

Utilization of existing and new technologies could greatly enhance the quality of analyses and the communication of those analyses to all interested parties. However, this goal requires leadership and resources, not regulatory changes. Section 1502.24 dealing with "Methodology and scientific accuracy" emphasizes scientific integrity and disclosure of methodologies rather than endorsing particular methods; this is a sound approach in terms of technology. It would not be practical for regulations to prescribe particular types of technology for every agency. Doing so would no doubt result in obsolete regulations within a short amount of time. This is another instance in which leadership and resources make the NEPA process more effective *and* efficient through increasing information access to all involved.

Per our response to question 6, CEQ could issue guidance both encouraging the use of technology to provide information and as a tool for public involvement. However, CEQ should also provide for communities and individuals who by choice or necessity do not have access to computers. In addition, to the extent that technology is referenced, it must be clear that there is an obligation to ensure clear pathways for use (including advisors to provide assistance) and to ensure that the technology is fully functioning at all times.

Again, most important gains to be achieved through technology do not require regulatory revisions, but rather financial investments and leadership. For example, all available EISs and EAs should be available electronically on a single website that permits searching by types of actions, locations, and impacts. Such a tool could greatly facilitate preparation of NEPA documents, particularly in assessing cumulative impacts and increasing public understanding of particular topics. Additionally, Geographical Information Systems data utilized in NEPA analysis should be readily available to the public (subject to any legal requirements to keep certain locational information

confidential).

16. Are there additional ways CEQ’s NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?

No. CEQ regulations and guidance already provide for and encourage combining NEPA documents with other relevant decision documents. For example, the requirements for a Record of Decision can and should be integrated into the preamble for a final rule. *See* 40 C.F.R. § 1502.2. However, many agencies lack staff who have received enough training to identify these opportunities. Regular training of agency NEPA staff would help the agencies, our members, the public in general, and applicants.

We caution against a move to promote combining a final EIS (FEIS) and a Record of Decision, except in the limited instance provided for in Section 1506.10(b)(2). An EIS, and especially an EIS that carries with it the full weight of compliance with all environmental review laws, contains a considerable amount of information, which the decisionmaker must consider. Allowing the decision to be made simultaneously with publication of the FEIS creates pressure to make the decision in haste without thoughtful consideration of all relevant issues. It would also eliminate a window for additional outside input in light of changes to analysis and alternatives in the FEIS that in our experience can improve agency decisions and increase public acceptance. Put differently, combining the FEIS and ROD into a single document strikes us a “penny wise, pound foolish” gimmick that would degrade the ability of agencies to make reasoned and informed decisions.

17. Are there additional ways CEQ’s NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

If improving the effectiveness and efficiency of the implementation of NEPA is truly a goal, then CEQ should reinstate the sensibly written guidance for agencies on the consideration of climate change in NEPA reviews. Planning projects and investing taxpayer dollars without considering the risks associated with rising sea levels, increased droughts, and more severe weather is irresponsible and ignores the statutory mandate to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321. As CEQ noted in the now revoked guidance, “[c]limate change is a fundamental environmental issue, and the relation of Federal actions to it falls squarely within NEPA’s focus.” It is now well established by courts that climate change is precisely the type of environmental impact agencies should consider. Moreover, it is utterly impractical to ignore climate change relative to virtually any project, in particular public infrastructure, that is designed and built with public funds and must be durably built to withstand climate and environmental realities. Revocation of the climate guidance did not relieve agencies of their responsibility to consider climate impacts; its sole accomplishment was to introduce tremendous regulatory uncertainty for both agency officials and project sponsors and increase the risk that projects will fail, wasting taxpayer and private sector resources.

The climate guidance therefore rightly provided much needed clarity to agencies on how to not only consider how federal projects and decisions impact the climate, but also how climate change impacts federal projects and infrastructure. To truly ensure the regulations implement NEPA's goal of preserving the human environment for future generations, CEQ should reinstate the guidance. The guidance will provide agency staff, project sponsors, and communities the confidence that the government is investing taxpayer dollars on critical infrastructure that is resilient and built to withstand the future impacts of climate change. By providing guidance to agencies on how to consider the fundamental environmental challenge of this century, CEQ will not only provide consistency across agencies and further the purposes of NEPA, but will also better fulfill its responsibility under Executive Order 12898 ("Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations") to identify and address "disproportionately high and adverse human health or environmental effects" on minority and low-income communities. It is now well known that minorities, low-income communities, immigrants, and people who are not fluent in English suffer disproportionate health impacts due to climate change, have less ability to relocate or rebuild after a disaster, and are generally exposed to greater risks – all due to climate change. Reinstatement of the guidance will help to ensure that the potential health, environmental, and economic impacts of climate change are mitigated if not prevented and are better disclosed to disproportionately impacted communities.

In addition to reinstating the climate change guidance, CEQ's should focus on enforcing and ensuring adequate funding for implementation of the existing regulations, not expending limited resources through what will likely prove to be a time-consuming and contentious rulemaking. CEQ's regulations state that, "Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements [of the regulations.] Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it." 40 C.F.R. § 1507.2. Accordingly, we urge systematic oversight of agency compliance with this provision. In our considered view, the single most important key to efficiency and effectiveness is having competent, trained, and adequate agency staff to implement NEPA.

18. Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?

Yes. Tribal governments should be accorded the same status as state or local agencies, including, specifically, the ability to be designated as a cooperating agency. The current regulations narrowly focus tribal government participation on circumstances where the effects of a proposed action are located on a reservation. Not all tribal lands are, however, reservations. Moreover, less than 22% of Native Americans and Alaska Natives live on reservations, (https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff22.html) and a number of reservations are not in the traditional homeland of a tribe, or represent a small fraction of the original homeland. Further, with one exception,

Alaska Natives do not have reservations at all because of the provisions of the Alaska Native Claims Settlement Act of 1971 and Pueblo peoples are located on sovereign, ancestral lands. Perhaps most importantly, the Federal government holds a legal trust obligation towards Native peoples that is not delimited by the location of either reservations or tribal lands, period. Indeed, Native peoples hold protected rights to and interests in non-reservation and non-tribal lands that are rooted in their individual histories, vibrant cultural and land protection practices and ethics, and economic vitality.

Section 1508.5 should be amended to delete the phrase, “when the effects are on a reservation” so that the relevant sentence reads, “**A state, tribal, or local government agency of similar qualifications may by agreement with the lead agency become a cooperating agency.**”

Per our response to question 6, the restriction in § 1506.6(b)(3)(ii), regarding the requirement to notify tribal governments of actions with effects primarily of local concern, should be modified to delete the phrase “when effects may occur on reservations” and substitute “**affect tribal interests**” for the phrase “occur on reservations” as the trigger.

19. Are there additional ways CEQ’s NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?

CEQ’s guidance on “Improving the Process for Preparing Efficient and Timely Environmental Review under the National Environmental Policy Act” (Mar. 12, 2012) made it clear that existing CEQ regulations intended to reduce delay and paperwork in preparation of EISs (for example, incorporation by reference, adoption, supplements) could also apply to EAs. Again, this is an issue in which the key to improvement is training within the agencies.

20. Are there additional ways CEQ’s NEPA regulations related to mitigation should be revised, and if so, how?

CEQ’s guidance on “Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact” is an excellent document. Mitigation and monitoring are often the neglected part of the NEPA process. It is essential to the integrity of the process that mitigation be capable of being implemented, that it is implemented and that it is monitored. We are concerned that ineffective mitigation measures have been used as a means to overlook environmental and community harms having significant impact.

Thank you for the opportunity to comment. Representatives of our organizations would be pleased to discuss any of these responses with CEQ representatives. Our contact for this purpose is Stephen Schima at the Partnership Project, (503) 830-5753 or by email at sschima@partnershipproject.org.

cc: Edward Boling, Associate Director for the National Environmental Policy Act Council on Environmental Quality
Sincerely,

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