VIA: Federal eRulemaking Portal November 22, 2021

Amy B. Coyle
Deputy General Counsel
Council on Environmental Quality
730 Jackson Place NW
Washington, DC
20503

RE: COMMENTS ON NOTICE OF PROPOSED RULEMAKING FOR THE NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING REGULATIONS REVISIONS, DOCKET NUMBER CEQ-2021-0002

Dear Ms. Coyle,

The Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum, (collectively "DRN") thanks the Council on Environmental Quality ("CEQ") for the opportunity to submit comment on the CEQ's "Notice of Proposed Rulemaking for the National Environmental Policy Act Implementing Regulations Revisions" ("Notice").[1]

The Delaware Riverkeeper Network is a Pennsylvania non-profit organization established in 1988 and has more than 25,000 members. DRN members include individuals concerned about the protection and restoration of the Delaware River, and its tributaries, habitats and resources. DRN's members are dedicated to preserving and improving the cultural, historic and environmental resources of the Delaware River watershed. DRN's mission is to protect and restore the Delaware River, and its tributaries, habitats and resources. To achieve these goals, DRN organizes and implements stream bank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River watershed—an area which includes portions of Pennsylvania, New York, New Jersey and Delaware—and on the national level when necessary to achieve its mission.

Maya van Rossum, the Delaware Riverkeeper, is a full-time privately funded ombudsman responsible for the protection of the waterways in the Delaware River Watershed. Maya van Rossum advocates for the protection and restoration of the cultural, historical, ecological,

[1] 86 Fed. Reg. 55,757 (Oct. 7, 2021)

recreational, commercial and aesthetic qualities of the Delaware River and its tributaries, habitats and resources. As the Delaware Riverkeeper, Ms. van Rossum serves on a number of the region's water quality committees, including the Delaware River Basin Commission's Water Quality Advisory Committee, and on New Jersey's Stormwater Focus Group. Ms. van Rossum also serves as a member of the Area Plan Committee and the Area Maritime Security Committee, both of which are committees of the United States Coast Guard, the Philadelphia Group. Maya van Rossum regularly visits the Delaware River for personal and professional reasons.

DRN submits this comment to meaningfully assist CEQ in its revisions of the National Environmental Policy Act Implementing Regulations that were promulgated on July 16, 2020 ("2020 NEPA Regulations").[2] NEPA sets forth a host of procedural requirements and substantive policies intended, in part, to ensure that the federal government "fulfill[s] the responsibilities of each generation as trustee of the environment for succeeding generations."[3]

The 2020 NEPA Regulations displaced much of the 1978 NEPA Regulations, which had remained largely undisturbed for over 40 years. Among a suite of unnecessary changes, the 2020 NEPA Regulations eliminated the definition of "cumulative action," "similar action," and the term "cumulative impacts" within 40 C.F.R. Pt. 1508, § 1508.1.[4] If CEQ intends to restore the definition of "cumulative impact," CEQ must also revise the regulations to reflect specifically the rule against segmentation. Alternatively, CEQ must minimally restore the regulatory provisions defining "scope" from the 1978 NEPA Regulations, which included the terms "similar actions" and "cumulative actions."[5]

In any new regulations, CEQ must be guided by the principle that NEPA empowers federal agencies to take a holistic approach towards NEPA reviews. Put simply, CEQ should signal to federal agencies that they should avoid permitting the over-exploitation of our natural environment through artificially narrowed environmental reviews. As this Comment argues, CEQ can accomplish this by restoring the spirit of NEPA in its current Phase 1 rulemaking process.

I. CEQ MUST REVISE THE NEPA REGULATIONS TO RESTORE THE DEFINITION OF "CUMULATIVE IMPACT"

1. NEPA Evinces Congressional Intent to Include "Cumulative Impact" in the NEPA Scoping Processes

In the Preamble to the 2020 NEPA Regulations, CEQ correctly stated that the defined term "cumulative impact" is not found within the text of NEPA.[6] CEQ introduced this precise phrase for the first time in the 1978 NEPA Regulations. Despite the absence of the exact phrase in the statute, however, the legislative history of NEPA evinces a clear and logical intent of Congress to require federal agencies to consider cumulative impacts.

[2] *See* 85 Fed. Reg. 43,304 (July 16, 2020).
[3] 42 U.S.C. § 4331(b)(1).
[4] 85 Fed. Reg. 43,304, at 43,343 (July 16, 2020).
[5] 43 Fed. Reg. 56,005 (Nov. 29, 1978) (setting forth 40 C.F.R. § 1508.23).
[6] 85 Fed. Reg. 43,343 (July 16, 2020).

In describing the impetus for NEPA in a 1969 Senate Committee Report, NEPA's primary Senate sponsor, late Senator Henry Jackson (D-Wash), provided that

> [a]s a result of failure to formulate a comprehensive national policy, decision-making largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions . . . Important decisions . . . continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.
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> S. Rep. No. 91-296 (1969).

Further, the Committee on Interior and Insular Affairs—which unanimously sponsored and supported NEPA[7]—provided in a Senate Report that NEPA was "designed to deal with the long-range implications of the crucial environmental problems which have caused great public concern in recent years. . . .[the] threats [to the environment] were the spinoff, the fallout, and the unanticipated consequences which resulted from the pursuit of narrower, more immediate goals."[8]

While ultimately not included in the text of NEPA or legislative history itself, the consideration of cumulative impacts underpinned NEPA's passage.[9] The previous regulatory requirement of federal agencies to consider cumulative impacts captures some of the central tenets of NEPA: "to consider long-term environmental effects, to look beyond incremental decision-making, and to consider the effects of the actions of multiple actors."[10] CEQ's decision to repeal from the regulations the definition of "cumulative impact" in the 2020 NEPA Regulations was warrantless. Though CEQ first introduced the defined term "cumulative impact" for the first time in the 1978 NEPA Regulations, this decision was actually a codification of existing case law interpreting NEPA.

A. Pre-1978 Case Law Interpreting NEPA to Required Federal Agencies to Consider "Cumulative Impact" or "Cumulative Effect"

In *Natural Resource Defense Council, Inc. v. Callaway*, plaintiffs, a collection of environmental and citizen groups, brought action against defendants, the Secretary of the Army, the Secretary of the Navy and other related federal officials, for alleged violations of NEPA and the Federal Water Pollution Control Act Amendments of 1972.[11] The federal activity at issue in *Natural Resource Defense Council* was the U.S. Navy's deposit of dredged spoil at a site in New London, Connecticut from the Thames River in Connecticut. The plaintiffs alleged, in part, that

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[7] Courtney A. Shultz, *History of the Cumulative Effects Analysis Requirement Under NEPA And Its Interpretation In U.S. Forest Service Case Law*, 27 J. ENVTL. L. & LITIG. 125, 131–32(2012).
[8] S.Rep. No. 91-269 (1969).
[9] *See e.g.*, 115 Cong. Rec. 26,569, 25,584 (1969) (Statement of Rep. Robert Leggett (D-CA), providing that "[w]hen a Federal project, such as the Peripheral Canal project, irreversibly changes the ecology of a vast region there needs to be in depth study of the total environmental effects of such a program.")
[10] Shultz, *supra* note 7, at 133.
[11] Nat. Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 81 (2d. Cir. 1975).

the U.S. Navy's EIS was inadequate under NEPA because it failed to take into consideration the impact of other dredged material from projects elsewhere in the Long Island Sound.[12]

Reversing the lower court's determination on this specific issue, the United States Court of Appeals for the Second Circuit held that the U.S. Navy was

> required at least to disclose in its EIS other planned or proposed dredging projects in the area of New London and other plans or proposals to dispose of dredged spoil at or near New London, with a discussion and analysis of the *combined environmental impact* of its own and these other projects.
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> *Natural Resource Defense Council*, 524 F.2d 79, 90 (2d. Cir. 1975) (emphasis added).

The *Natural Resources Defense Council* court even provided that

> NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking [sic] process a more comprehensive approach so that long term and *cumulative effects* of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration.
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> *Id.* at 88 (emphasis added).

The United States Court of Appeals for the Second Circuit also provided relevant guidance in 1972. In *Hanly v. Kleindienst* (*Hanly II*), appellants, a group of members of a planned community, alleged that appellees—the United States, the Attorney General, and the directors of the General Service Administration and of the Federal Bureau of Prisons—violated NEPA by failing to determine whether the construction of a jail and other facilities would trigger the threshold requirement for an EIS.[13] The *Hanly II* court articulated that agencies tasked with making this threshold determination—whether a major federal action will "significantly" affect the quality of the human environment—must ordinarily review the action "in light of at least two relevant factors:"

> (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it; and
> (2) the absolute quantitative adverse environmental effects of the action itself, including the *cumulative harm* that results from its contribution to existing adverse conditions or uses in the affected area.

[12] Nat. Res. Def. Council, Inc. v. Callaway, 389 F. Supp. 1263, 1278 (D. Conn. 1974), *rev'd* 524 F.2d 79, 90 (1975).
[13] Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972).

Hanly II, 417 F.2d at 830–31 (emphasis added).

Notably, the *Hanly II* court also provided that

> although the existing environment of the area which is the site of a major federal action constitutes one criterion to be considered, it must be recognized that even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel. Hence the absolute, *as well as comparative*, effects of a major federal action must be considered.
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> *Id.* at 831 (emphasis added).

In *City of Rochester v. U.S. Postal Service*, the United States Court of Appeals for the Second Circuit also has articulated that

> [t]he cases in this circuit and elsewhere have consistently held that NEPA mandates *comprehensive consideration* of the effects of *all* federal actions . . . To permit noncomprehensive consideration of the effects of all federal actions into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has *cumulative significant impact* would provide a clear loophole in NEPA.
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> 541 F.2d 967, 972 (2d Cir. 1976).

As these decisions demonstrate, addressing the cumulative impacts or effects of a major federal action is a consideration that not only satisfies an appeal to common sense but was a requirement in place before CEQ promulgated the 1978 NEPA Regulations. Failing to require federal agencies to consider the cumulative impacts of a given major federal action permits agencies to "ignore, [for example] the long-term impacts of toxic pollution from gold or copper mines; the risks of new levees diverting floodwaters onto other communities; and loss of wetlands caused by reservoir management practices that starve a river of the water flows needed to sustain those wetlands."[14]

In the Preamble to the final 2020 NEPA Regulations, CEQ relied on a highly fact-specific case to justify repealing the term "cumulative impact" and changing the definitions of "direct" and "indirect" effects. As such, CEQ incorporated reasoning from *Department of Transportation v. Public Citizen*—reminiscent of proximate cause in tort law—that "effects must be reasonably foreseeable and have a close causal relationship to the proposed action or alternatives; a 'but for'

[14] Ilana Rubin on Behalf of 331 Conservation, Health, and Justice Organizations and Business, National Wildlife Foundation, *Comment on Docket No. CEQ-2019-0003, Notice of Proposed Rulemaking, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 2 (Mar. 10, 2020) (available at https://www.regulations.gov/comment/CEQ-2019-0003-169702) (last visited Nov. 22, 2021).

causal relationship is insufficient to make an agency responsible for a particular effect under NEPA."[15]

Public Citizen involved a challenge to the adequacy of an Environmental Assessment (EA) and subsequent Finding of No Significant Impact (FONSI) prepared by the Federal Motor Carrier Safety Administration (FMCSA) regarding two proposed rules, one for the application form for Mexican-domiciled motor carriers to obtain operating authority within the United States and one for the "establishment of a safety-inspection regime for carriers receiving operating authority."[16] Prior to the publication of the proposed rules, Congress enacted a moratorium in 1982 that: 1) "prohibited Mexican[-domiciled] motor carriers from obtaining operating authority within the United States[; and 2)] authorized the President to lift the moratorium."[17] The President announced his intention to lift the moratorium in 2001, which was conditional on the promulgation of new regulations that granted relevant authority to Mexican-domiciled motor carriers.

Then, in a Department of Transportation Appropriations Act, Congress prohibited the appropriation of funds for the review or processing of Mexican-domiciled motor carrier applications until FMSCA implemented "specific application and safety-monitoring requirements."[18] The FMSCA then published a programmatic EA for its proposed rules, which the petitioners challenged as violative of NEPA. The EA "did not consider the environmental impact that might be caused by the increased presence of Mexican trucks in the United States, concluding that any such impact would be an effect of the moratorium's modification, not the regulations' implementation."[19] As such, FMSCA issued a FONSI for its proposed rules, which it used to demonstrate the rules' compliance with NEPA.

The plaintiff-respondents challenged the proposed rules as violative of NEPA and the Clean Air Act. The Court of Appeals agreed, set aside the rules, and remanded the case to FMSCA to prepare a full EIS. The Court of Appeals determined that "the President's rescission of the moratorium was 'reasonably foreseeable' at the time the EA was prepared and the decision not to prepare an EIS was made."[20] Petitioners appealed to the Supreme Court of the United States, which reversed the Court of Appeal's determination.

Citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, the Court provided that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause,"[21] not a "but for" causal relationship. The Court similarly dismissed the respondents' claim that FMSCA's proposed rules did not consider cumulative impacts and instead found that the EA satisfied FMSCA's obligation under NEPA. The Court ultimately held that "because the President, not FMSCA, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMSCA has no discretion to prevent the entry of

[15] 85 Fed. Reg. 43,304, at 43,343 (July 16, 2020).
[16] Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756 (2004).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Dep't of Transp. v. Pub. Citizen, 316 F.3d 1002, 1022 (9th Cir. 2003).
[21] Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983).

Mexican trucks, its EA did not need to consider the environmental effects arising from the entry [of the Mexican-domiciled trucks]."[22]

In its 2020 NEPA Regulations, CEQ relied on this highly fact-specific case—that was reliant on an agency's lack of discretion to prevent a specific activity from occurring—to support its reasoning to strike the previously-defined term "cumulative impact" from the NEPA-implementing regulations.[23] If *Public Citizen* stood for the proposition that cumulative effects or impacts were no longer appropriate for consideration under NEPA, the unanimous Court would undoubtedly have said so. Instead, the Court explained that "the 'cumulative impact' regulation required FCMSA to consider the 'incremental impact' of the safety rules themselves, in the context of the President's lifting of the moratorium and other relevant circumstances."[24] DRN urges CEQ to change its view and acknowledge that the reasoning within its 2020 NEPA regulations, which inappropriately expanded the *Public Citizen* holding to permit federal agencies to ignore cumulative impacts in their NEPA analyses, was plainly incorrect.

In the Preamble to the 2020 NEPA Regulations, the CEQ provided that striking the term "cumulative impact," as well as the terms "direct" and "indirect," would "simplify" the definition of "effects" when, in reality, it simply allows federal agencies to disregard crucial information needed to inform valid NEPA reviews. Striking and modifying these terms permits federal agencies to unnecessarily constrain their NEPA reviews as they see fit.

Thus, DRN supports—in part—CEQ's current proposal to: 1) remove from the regulations the definition of effects that are "reasonably foreseeable and have a close causal relationship to the proposed action or alternatives;" and 2) remove the language that states "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA."[25]

Environmental crises including, but not limited to, climate change, necessarily require the consideration of cumulative and related agency actions. Permitting federal agencies to ignore cumulative impacts of a given federal action conceivably can engender harmful dormant environmental consequences. That environmental problems—and oftentimes latent environmental problems—arise from improper initial consideration of the project's cumulative impact is not a problem that ceases to exist simply because CEQ removed requisite language from its NEPA implementing regulations. To this end, DRN supports CEQ's proposal to remove the language defining "effects" as only "those that are reasonably foreseeable and have a reasonably close causal relationship."[26]

Thus, while DRN is pleased that CEQ intends to reinstate the defined term of "cumulative effects," CEQ must nonetheless address and incorporate the rule against segmentation in any new regulation for such reinstatement to make a meaningful difference in restoring the scope and import of NEPA.

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[22] *Pub. Citizen*, 541 U.S. at 770.
[23] 85 Fed. Reg. 43,304, at 43,343 (July 16, 2020).
[24] *Pub. Citizen*, 541 U.S. at 769–70.
[25] 85 Fed. Reg. at 55,765 (Oct. 7, 2021).
[26] 86 Fed. Reg. at 55,762 (Oct. 7, 2021).

II. NEPA REQUIRES COMPREHENSIVE REVIEW OF RELATED AGENCY ACTIONS

Relevant to the discussions within this Comment is one of the hallmarks of NEPA: the environmental impact statement ("EIS"). Pursuant to Section 102(2)(C) of NEPA, federal agencies must prepare an EIS for every "recommendation, or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . ."[27] The purpose of an EIS is to ensure not only that federal agencies seriously consider the environmental impacts of major federal actions, but to create records of agencies' decision-making, and to ensure that the public has a meaningful opportunity to participate in the NEPA process.[28]

Prior to the 2020 NEPA Regulations, CEQ promulgated regulations regarding the scope of actions, alternatives, and impacts agencies subject to NEPA must duly consider in creating an EIS. The 1978 NEPA Regulations provided, in relevant part, that

> . . . [t]he scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:
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> (a) Actions (other than unconnected single actions) which may be:
> (1) Connected actions, which means that they are closely related in the same impact statement. Actions are connected if they:
> (i) Automatically trigger other actions which may require environmental impact statements.
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
> (iii) Are interdependent parts of a larger action and dependent on the larger action for their justification.
> (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
> (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

[27] 42 U.S.C. § 4332(2)(C).
[28] *See e.g.*, Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974).

(b) Alternatives, which include: (1) No action alternative. (2) Other reasonable courses of actions. (3) Mitigation measures (not in the proposed action).
(c) Impacts, which may be (1) Direct. (2) Indirect. (3) Cumulative.

The 2020 NEPA Regulations, in part, struck the language defining "cumulative actions" and "similar actions" from the 1978 NEPA Regulations defining "scope."[29] The rationale CEQ provided for this decision in 2020 was that striking the previous regulatory language would "eliminate confusion" given the concomitant changes to the definition of "effects of the action" in 40 C.F.R. § 1501.9(e)(1)(i)(C).[30] In so doing, and as will be discussed throughout this Comment, CEQ set forth a non-solution to a problem it created in promulgating the 2020 NEPA Regulations. What remains from the 1978 NEPA Regulations regarding "scope" is only a requisite consideration of "connected actions," meaning only those actions that "are closely related and therefore should be discussed in the same impact statement."[31] This is plainly not what NEPA contemplates.

B. Statutory Language and Judicial Interpretation Supports the Position that Federal Agencies Must Consider Related Agency Actions

Section 102(1) of NEPA requires federal agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment."[32] Comprehensive consideration of related federal actions clearly satisfies the policy objective to effectuate a "systematic and interdisciplinary approach" toward NEPA reviews. Further, federal agencies are under a continuing obligation under NEPA to "use all practical means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may (1) fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations."[33] CEQ must then make clear in promulgating any new regulations that federal agencies must, consonant with the policies of NEPA and under the directive to act as a trustee of the environment for future generations, comprehensively consider related agency actions under NEPA.

Further, the Supreme Court of the United States has articulated in *Kleppe v. Sierra Club*, that Section 102(2)(C) of NEPA itself may, at times, require a "comprehensive impact statement . . . where several proposed actions are pending at the time."[34] In hearing a claim about an alleged NEPA Section 102(2)(C) violation for failure to prepare a programmatic EIS, the Court articulated

[29] 85 Fed. Reg. 43,326 (July 16, 2020).
[30] *Id.*
[31] 40 C.F.R § 1501.9(e).
[32] 42 U.S.C. § 4332(A).
[33] 42 U.S.C. § 4331(b)(1).
[34] Kleppe v. Sierra Club, 427 U.S. 390, 490 (1976).

"only through *comprehensive consideration* of pending agency proposals can the agency evaluate different courses of action."[35]

CEQ incorporated this purpose of NEPA—comprehensive consideration of multiple agency actions—in the 1978 NEPA Regulations. CEQ's decision to remove "cumulative actions," "similar actions," and "cumulative impacts," in the 2020 NEPA Regulations plainly frustrates at least one of the purposes of NEPA that directs federal agencies to "attain the widest range of beneficial uses of the environment *without* degradation, risk to health or safety, or other undesirable and unintended consequences."[36] As will be discussed next in this Comment, what remains from the 2020 NEPA Regulations regarding the scope of NEPA review—"connected actions"—has been significantly narrowed by the U.S. judiciaries. Thus, the harmful removal of "cumulative actions," "similar actions," and "cumulative impacts" together with the judicial narrowing of the terms "connected actions" leaves little of the purposes of NEPA intact.

B. Judicial Narrowing of "Connected Actions" Frustrates the Purpose of NEPA and Underscores the Urgency of CEQ to Revise NEPA Regulations to Account for Comprehensive Review of Related Agency Actions

While courts will generally give deference to federal agencies for their scoping decisions under the connected-actions NEPA regulations,[37] several courts have nonetheless thwarted the import of NEPA by narrowing the application of the regulation. This is acutely relevant for CEQ to consider in promulgating any new NEPA regulations because "connected actions"—as opposed to the prior regulatory terms "cumulative actions" and "similar actions"—is what remains in the current NEPA regulations.

Courts have determined that the following actions were not "connected" for purposes of NEPA review:

- A transportation system for salmon and a river flow improvement program for the Federal Colombia River Power System—both intended to improve the salmon population—were not determined to be "connected actions" because the United States Court of Appeals for the Ninth Circuit determined that the two "actions" were not so "interdependent as parts of the larger action of improving the survival of salmon that they must [have been] addressed in the same NEPA document."[38]

[35] *Id.* at 410. (emphasis added) (respondents claimed appellants failed to prepare a programmatic EIS for the entire Northern Great Plains region when the major federal actions at issue involved only local or national coal development project proposals, rather than a regional development project proposal. Respondents argued at the lower courts that the petitioners should have prepared a programmatic EIS because the coal-development projects should have been considered in concert with other proposed coal development project as cumulative actions. The Court determined that petitioners did not need to conduct a programmatic EIS because there were no proposed regional coal development plans or programs at the time respondents brought the underlying action).
[36] 42 U.S.C. § 4331(b)(3) (emphasis added).
[37] Weiss v. Kempthorne, 580 F.Supp. 2d. 184, 188 (D.D.C. 2008).
[38] Northwest Res. Info. Ctr. v. Nat. Marine Fisheries Serv., 56 F.3d 1060, 1069 (9th Cir. 1995).

- A proposed resort and golf course were not determined to be "connected actions" because the United States Court of Appeals for the Ninth Circuit determined that "each could exist without the other, although each would benefit from the other's presence."[39]

- Portions of a natural gas pipeline and related easements were not "connected actions" because the United States Court of Appeals for the District of Columbia Circuit determined that—despite the fact that the pipeline was "undoubtedly a single 'physically, functionally, and financially connected project' "—only "five per cent [of the pipeline] [was] subject to federal review."[40]

- A natural gas export facility and the relevant natural gas pipeline were not "connected actions" because the United States Court of Appeals for the District of Columbia Circuit determined that because the pipeline was not subject to FERC approval, the two actions were not required to be aggregated in one NEPA document.[41]

- A project to upgrade an existing interstate natural gas pipeline system so it could increase the volume of natural gas it could transport and a proposal for another pipeline that would have been "the source of gas that [would be] transported using the capacity added by the first upgrade project were not "connected actions" because the United States Circuit Court for the Third Circuit determined that the actions had independent utility.[42]

Though there is no bright-line rule in interpreting the connected-actions doctrine, courts have generally applied a test that asks whether the actions at issue have "independent utility" from one another. Courts will likely not consider two actions "connected" if "a single action does not necessarily trigger another and has utility apart" from the other action.[43]

Because the remaining requirement for agencies in determining their scoping processes has been artificially constrained only to those "connected actions"—a term itself which has been unnecessarily narrowed by the judiciaries—CEQ must now revise the NEPA implementing regulations to incorporate the previous regulatory language defining "cumulative actions," "similar actions," and "cumulative impacts."

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[39] Sylvester v. U.S. Army Corp. of Eng'rs, 884 F.2d 394, 400 (9th Cir. 1989).
[40] Sierra Club v. United States Army Corps of Eng'rs, 803 F.3d 31, 50 (D.C. Cir. 2015).
[41] Big Bend Conservation All. v. Fed. Energy Reg. Comm'n, 896 F.3d 418, 424 (D.C. Cir. 2018) (rejecting the "federalization" theory).
[42] Twp. of Bordentown v. Fed. Energy Reg. Comm'n, 903 F.3d 234 (3d Cir. 2018).
[43] *Shultz*, *supra* note 7, at 142.

III. CEQ'S REINSTATEMENT OF "CUMULATIVE IMPACT" WITHOUT ADDRESSING THE ISSUE OF SEGMENTATION IS NONSENSICAL

While federal agencies are not required to perform "crystal ball inquiries" when conducting NEPA reviews, federal agencies are nonetheless mandated under the statute to fulfill their NEPA obligations "to the fullest extent possible."[44] This principle supports the well-recognized rule against segmentation throughout the NEPA review process. Federal agencies "impermissibly 'segment' NEPA review when [they] divide[] connected, cumulative, or similar federal actions into separate projects and thereby fail[] to address the true scope and impact of the activities that should be under consideration."[45]

In hearing improper segmentation claims, courts have considered "a multitude of factors, including the manner in which [the project] was planned, their geographic locations, and the utility of each in the absence of the other."[46] Courts have also articulated these factors into a four-pronged test to determine whether the major federal action runs afoul of the rule against segmentation. The four-pronged test asks "whether the proposed segment: 1) has logical termini; 2) has substantial independent utility; 3) does not foreclose the opportunity to consider alternatives; and 4) does not irretrievably commit federal funds for closely related projects."[47]

Under these factors, courts have found that federal agencies have impermissibly segmented NEPA review such as when:

- the Federal Energy Regulatory Commission (FERC) failed to consider three other closely-related pipeline upgrade projects that were either under construction or were pending FERC approval at the time the disputed Northeast Pipeline—a project that the court determined had neither separate logical termini nor substantial independent utility from the three other pipeline segments—was under review;[48]
- the United States Forest Service (USFS) prepared an EA only for the construction of a road for transport of timber through a federal roadless area but did not prepare an EIS that analyzed the cumulative impacts of the sale of the timber itself because the

[44] *Scientists' Inst. for Pub. Info., Inc*., 481 F.2d 1079, 1090 (D.C. Cir. 1973).
[45] Delaware Riverkeeper Network v. Fed. Energy Reg. Comm'n, 753 F.3d 1304, 1313 (D.C. Cir. 2014).
[46] James River and Kanawha Canal Parks, Inc. v. Richmond Metro. Auth., 359 F.Supp. 611, 635 (E.D. Va. 1973) (ultimately rejecting plaintiffs' claim that defendants violated NEPA in the construction of the expressway where the was not a showing that "sufficient federal involvement in the planning and construction of the Downtown Expressway [and thus] federal statutory requirements" did not need to be met prior to its construction.); *aff'd*, 481 F.2d 1280 (4th Cir. 1973).
[47] Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981); Swain v. Brinegar, 542 F.2d 364 (7th Cir. 1976); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974); Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973).
[48] *Delaware Riverkeeper Network*, *supra* note 44, at 1315–17.

USFS argued that to have done so at that time would have been too speculative;[49]

- the Army Corps of Engineers only prepared an EIS for the "designation of [the] site for [the] dumping of dredge materials without also considering [the] effects of issuance of permits and the actual [types and quantities of sediments to be dumped at the site];[50]

- the Department of Energy did not analyze the impacts of a sand and gravel mine on the environment—in either an EA or EIS—before granting a road easement to use the mine itself; and[51]

- the Atomic Energy Commission did not address the impacts of the Liquid Metal Fast Breeder Reactor program as a whole, only the building of one demonstration plant.[52]

The justification for the rule against segmentation is clear: federal agencies cannot artificially segment projects into smaller projects to evade review under NEPA. As such, it challenges logic to reinstate "cumulative impacts" without also addressing the rule against segmentation because one way in which federal agencies can avoid addressing cumulative impacts is by impermissibly segmenting actions for NEPA review. While the first step of this inquiry is of course agencies' proper scoping of the action subject to NEPA review, DRN nonetheless urges CEQ to incorporate the common-sense rule against segmentation in any new regulations.[53] While it is axiomatic that "the rule against segmentation . . . is not required to be applied in every situation," CEQ must make clear in any new regulation that discharging NEPA duties requires federal agencies to consider "connected, contemporaneous, closely related, and interdependent projects" for any given action that triggers NEPA review.[54]

The practical ramifications of the 2020 NEPA Regulations cannot be understated. For example, the Federal Energy Regulatory Commission (FERC) currently has five pending applications for major pipeline projects in the Pennsylvania region.[55] Where any agency has multiple pending projects in a region, there is a risk that the agency will fail to evaluate the "cumulative or synergistic

[49] Thomas v. Peterson, 753 F.2d 754, 758–59 (9th Cir. 1985) (determining that the building of the timber-harvest road and the sale of the timber itself were "connected actions" under CEQ regulations, and that failing to prepare and EIS that took into consideration the cumulative effects of the timber sale was impermissible segmentation under NEPA).
[50] *See* Town of Huntington v. Marsh, 859 F.2d 1134 (2d Cir. 1988) (West headnote 5).
[51] *See* Sierra Club v. U.S., 255 F.Supp. 2d 1177, 1182–86 (D. Colo. 2002) (determining further that the road easement and mine were "inextricably linked" "connected actions" under CEQ regulations).
[52] *See generally,* Scientists' Inst. For Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973).
[53] 42 U.S.C. § 4332.
[54] *Delaware Riverkeeper Network, supra* note 48, at 1308.
[55] Fed. Energy Reg. Comm'n, *Major Pipeline Projects Pending*, https://www.ferc.gov/industries-data/natural-gas/major-pipeline-projects-pending (last visited Nov. 22, 2021) (the five major pipeline projects in Pennsylvania are: 1) Brooke County Access I, LLC, Equitrans, L.P./Tri-State Corridor Project; 2) Adelphia Gateway, LLC/Marcus Hook Electric Compression Project; 3) Transcontinental Gas Pipe Line Company/Regional Energy Access Expansion Project; 4) Eastern Gas Transmission and Storage, Inc/Mid-Atlantic Cooler Project; and 5) Tennessee Gas Pipeline Company, LLC/East 300 Upgrade Project.).

environmental impact upon a region" and "evaluate different courses of action" as required by NEPA.[56] This is an unacceptable result.

While NEPA does not mandate particular results, it nonetheless requires environmental considerations to imbue the entirety of federal project decision-making processes. Any new revision should directly incorporate the rule against segmentation in broad language so that project proponents and federal agencies alike cannot do indirectly what they should be prohibited from doing directly: evade NEPA review by impermissibly segmenting projects that would otherwise trigger NEPA review.

CONCLUSION

In promulgating any new regulations, CEQ must be guided by the purpose of NEPA to assure the full consideration of environmental impacts of federal actions in the decision-making process. NEPA itself requires comprehensive review of related agency actions, and CEQ must revise the NEPA regulations to reflect this principle. While DRN is encouraged that CEQ intends to revise the 2020 NEPA Regulations, it must do so with special focus paid towards incorporating the rule against segmentation into the NEPA scoping provisions. As this Comment argues, reinstating "cumulative impact" without addressing the issue of segmentation challenges logic and runs afoul of the spirit of NEPA. Alternatively, CEQ must minimally restore the prior regulatory definition of "scope" that included "similar" and "cumulative actions."

DRN thanks CEQ for the opportunity to provide feedback on the notice of proposed rulemaking for revisions to the NEPA-implementing regulations.

Respectfully submitted,

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the Delaware Riverkeeper

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[56] *Del. Riverkeeper Network*, 753 F.3d at 1313 (quoting *Kleppe*, 427 U.S. at 410).