



Institute *for*
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

March 10, 2020

VIA ELECTRONIC SUBMISSION

Executive Office of the President

Attn: Edward A. Boling, Associate Director for the National Environmental Policy Act;
Viktoria Z. Seale, Chief of Staff and General Counsel, NEPA-Update@ceq.eop.gov

Re: Proposed Rule: Update to the Regulations Implementing the Procedural
Provisions of the National Environmental Policy Act, Docket ID: CEQ-2019-0003

I. Summary

The Institute for Policy Integrity at New York University School of Law¹ (“Policy Integrity”) respectfully submits the following comments to the Council on Environmental Quality (“CEQ”) on its proposed changes to the regulations implementing the procedural provisions of the National Environmental Policy Act (“NEPA”).² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Under NEPA, an Environmental Impact Statement (EIS) is required for “all proposals for legislation and major federal actions significantly affecting the quality of the human environment.”³ An EIS must include information on the proposed action’s environmental impact, any unavoidable adverse environmental effects, and alternatives to the proposed action, among other requirements.⁴ CEQ is charged with promulgating regulations to implement NEPA, and pursuant to this authority, CEQ has proposed changes to decades-old NEPA regulations.⁵ The Proposed Rule impermissibly runs afoul of the statute and embraces practices that are arbitrary and capricious.

Our comments focus on the following issues:

- The Proposed Rule limits agencies’ ability to consider indirect effects of agency actions, contravening longstanding court interpretations of NEPA.

¹ This document does not purport to present New York University School of Law’s views, if any.

² Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020) (to be codified at 40 CFR pt. 1500 to 1508) [hereinafter “Proposed Rule”].

³ 42 U.S.C. § 4332(2)(C).

⁴ *Id.*

⁵ 42 U.S.C. § 4344.

- The Proposed Rule eliminates cumulative impacts analysis which, according to Supreme Court precedent, is commanded by NEPA.
- The Proposed Rule excludes the analysis of reasonable alternatives outside the lead agency's jurisdiction, shirking its responsibility under case law to rigorously analyze alternatives.
- The Proposed Rule's expansion of "functional equivalent" analyses for an EIS violates the narrow scope of the doctrine established by case law.
- CEQ's attempts to constrain agencies from implementing their own, more protective, NEPA procedures unlawfully undermines NEPA's environmental goals.
- The Proposed Rule contains several other issues that we address in less detail, but that are nonetheless problematic:
 - The Proposed Rule changes how the significance of a federal action is determined under NEPA, removing language that prohibits breaking a project into smaller parts for NEPA analyses to avoid finding significance. Allowing this kind of gamesmanship violates NEPA.
 - The Proposed Rule limits the environmental effects agencies may consider to those affecting Americans, rather than those affecting the world as a whole. This change contravenes NEPA.
 - The Proposed Rule weakens the requirement that agencies collect information relevant to NEPA analyses. While longstanding regulations required agencies to seek out essential information so long as the costs were not "exorbitant," the proposed regulations would allow agencies to forgo this information if the costs were merely "unreasonable." This change undermines the goals of NEPA.

As written, the Proposed Rule's unprecedented overhauling of NEPA exceeds CEQ's statutory authority. Furthermore, across the board, CEQ has failed to justify its reversal of agency policies in place since the Nixon Administration, making its changes arbitrary and capricious. While the Proposed Rule notes that NEPA establishes a policy "to use all practicable means and measures to . . . create and maintain conditions under which man and nature can exist in productive harmony,"⁶ the Proposed Rule threatens to severely diminish the environmental protections provided by NEPA.

II. Analysis

The Proposed Rule would dramatically change regulations that have governed NEPA for forty years or more. CEQ released initial NEPA guidance in 1971 ("1971 Guidance"),⁷ and

⁶ Proposed Rule, 85 Fed. Reg. at 1712.

⁷ Statements on Proposed Federal Actions Affecting the Environment, 35 Fed. Reg. 7724 (Apr. 23, 1971) [hereinafter "1971 Guidance"].

promulgated regulations in 1978 (“1978 Rule”).⁸ The 1978 Rule has remained essentially unchanged for over forty years, throughout administrations of both parties.⁹

A. Indirect Impacts

The 1978 Rule, still operative today, defines “effects” to include direct, indirect, and cumulative effects.¹⁰ Indirect effects are those that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”¹¹ The Proposed Rule makes several technical changes to the definition of effects, discussed below, which together result in two large substantive changes. First, CEQ limits the scope of effects to those that are “here and now,” excluding those that are remote in time or geographically remote. Second, CEQ limits consideration of effects that are causally attenuated, moving towards a proximate cause standard and using an “ordinary prudent person” standard for “reasonably foreseeable” effects.

The Proposed Rule makes a number of critical changes to the 1978 Rule. First, the Proposed Rule strikes “indirect effects” from the definition of effects.¹² While CEQ notes that effects that are remote in time or geographically removed (e.g., indirect effects) “may” be considered, such effects “should not be considered significant.”¹³ In short, while an agency may, at its discretion, choose to consider indirect effects while preparing an EIS, indirect effects alone “should not”¹⁴ trigger the preparation of an EIS, as an EIS is only triggered by “significant” environmental effects.¹⁵ In addition, CEQ seeks comment on whether its Final Rule should “affirmatively state that consideration of indirect effects is not required.”¹⁶ This, when paired with the Proposed Rule’s requirement that CEQ regulations act as both a floor and ceiling for NEPA analysis,¹⁷ could effectively eliminate consideration of indirect effects.

Next, the Proposed Rule limits effects to those that are “reasonably foreseeable with a reasonably close causal relationship to the proposed action or alternatives.”¹⁸ Previously, an effect was merely

⁸ National Environmental Policy Act Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55,978 (Nov. 23, 1978) [hereinafter “1978 Rule”].

⁹ Proposed Rule, 85 Fed. Reg. at 1684 (“CEQ has not comprehensively updated its regulations since their promulgation in 1978”).

¹⁰ See *infra* Section B for discussion of cumulative impacts.

¹¹ 40 C.F.R. § 1508.8.

¹² Proposed Rule, 85 Fed. Reg. at 1728–29 (“Effects or impacts means effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. Effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance.”).

¹³ *Id.* at 1729.

¹⁴ *Id.*

¹⁵ 42 U.S.C. § 4332(2)(C) (requiring preparation of an EIS for “legislation and other major Federal actions *significantly* affecting the quality of the environment.”) (emphasis added).

¹⁶ Proposed Rule, 85 Fed. Reg. at 1708.

¹⁷ See *infra* Section E for discussion of the Proposed Rule’s “ceiling provision.”

¹⁸ Proposed Rule, 85 Fed. Reg. at 1728–29 (“Effects or impacts means effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. Effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance.”).

required to be “reasonably foreseeable.”¹⁹ The Proposed Rule further defines “reasonably foreseeable” as an effect “sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”²⁰ These changes illegally constrict the scope of NEPA analysis, as discussed below.

1. The Proposed Rule’s Limits on Consideration of Indirect Effects Are Inconsistent with NEPA and Relevant Case Law.

The text of NEPA, existing case law, and historical CEQ regulations and guidance have consistently required the consideration of indirect effects. The Proposed Rule represents a stark reversal in agency policy that exceeds CEQ’s statutory authority while failing to provide adequate justification for the change.

i. NEPA explicitly demands consideration of effects that are remote in time.

NEPA requires the consideration of environmental effects that may occur in the long-term future. Section 101(b) of NEPA calls upon the government to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”²¹ In Section 102(2)(C), NEPA requires that an EIS consider “any adverse environmental effect,” as well as “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity” and “any irreversible and irretrievable commitments of resources.”²² Each of these sections contemplates consideration of effects that are “remote in time.”

Courts have reached the same interpretation, finding that environmental effects may require an EIS even if those effects would occur in the future. In *Scientists’ Institute for Public Information v. Atomic Energy Commission*, the D.C. Circuit required the Atomic Energy Commission to prepare an EIS for its breeder nuclear reactor program, even though the program was still in research and development, because “the fact that the effects will not begin to be felt for several years, perhaps over a decade, is not controlling, for [NEPA] plainly contemplates consideration of both the long-and short-range implications to man.”²³ The D.C. Circuit further cautioned that while agencies need not “foresee the unforeseeable,” they are forbidden from “shirk[ing] their responsibilities under NEPA by labelling any and all discussion of future environmental effects as ‘crystal ball inquiry.’”²⁴ This case was decided prior to the passage of the 1978 Rule and the Court was interpreting NEPA directly. Courts have continued to cite to *Scientists’ Institute* over the decades, to reaffirm the necessity of forecasting—and, consequently, considering—effects that are remote in time in NEPA analysis.²⁵

¹⁹ *Id.*

²⁰ *Id.* at 1730 (“Reasonably foreseeable means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”).

²¹ 42 U.S.C. § 4331(b)(1).

²² 42 U.S.C. § 4332(2)(C) (emphasis added).

²³ *Scientists’ Inst. for Pub. Inf., Inc. v. Atomic Energy Comm.*, 481 F.2d 1079, 1090 (D.C. Cir. 1973).

²⁴ *Id.* at 1092; *see also* *Dubois v. United States Dep’t of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996).

²⁵ *See, e.g.*, *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014); *Karst Envtl. Educ. & Prot. In. v. FHA*, No. 1:10-CV-00154-R, 2011 U.S. Dist. LEXIS 126925, at *80 (W.D. Ken. 2011); *Tex. Comm. On Natural*

In *Minn. Pub. Int. Research Grp. v. Butz*, the U.S. Forest Service had approved logging in the Boundary Waters Canoe Area (BWCA) without preparing an EIS, arguing that users of the BWCA had never observed a timber sale and therefore the human environment was not affected.²⁶ The Eighth Circuit disagreed, determining that NEPA “is concerned with indirect effects as well as direct effects,” and emphasized long-term effects as a reason the project would significantly affect the environment and require an EIS.²⁷ Logging roads, the Court noted, could “cause erosion and water pollution that remain visible for as long as 100 years.”²⁸ Again, this case predated the 1978 Rule, so the Court was interpreting the requirements of the NEPA statute, which do not change subject to the whims of CEQ.

More generally, since the earliest days of NEPA, case law has stressed the broad range of effects that agencies must consider when determining whether a project “significantly affect[s] the quality of the human environment.” In the 1972 case *NRDC v. Grant*, the U.S. District Court for the Eastern District of North Carolina construed the “significantly affecting” standard of NEPA to mean “having an important or meaningful effect, direct or indirect, upon a broad range of aspects of the human environment.”²⁹

The broad range of effects that courts have found trigger an EIS demonstrates that CEQ lacks the authority to allow agencies to blind themselves to effects remote in time, either by declining to consider those effects, or by categorically pronouncing them insufficient to trigger an EIS. CEQ’s proposed changes with respect to effects remote in time thus violate NEPA’s mandate and are illegal.

ii. Effects that are geographically remote may be significant effects and therefore must be considered under NEPA.

NEPA demands an EIS for major federal actions that cause significant impacts on the human environment. Case law shows that geographically remote effects can be significant and require an EIS, meaning such effects must be considered under NEPA.

In *Scientists’ Institute*, the D.C. Circuit required an EIS for a breeder nuclear reactor program that was expected to have impacts not only far in the future (remote in time) but also across the nation (geographically remote).³⁰ As noted earlier, *Scientists’ Institute* was decided before the 1978 Rule was promulgated and relies on the Court’s own interpretation of NEPA. The Atomic Energy Commission argued that no EIS was needed for its national technology development plan for breeder nuclear reactors, but rather that EIS’s should be delayed until specific facilities were under consideration.³¹ The Court determined that, although “NEPA requires predictions, not prophecy,” agencies could not wait for a technology to be proved economically feasible to conduct a NEPA

Res. V. Van Winkle, 197 F. Supp. 2d 586, 619 (N.D. Tex. 2002) (“[U]ncertainty alone does not excuse the COE’s failure to address the cumulative impacts of these projects in connection with the DFE project.”).

²⁶ *Minn. Pub. Int. Research Grp. v. Butz*, 498 F.2d 1314, 1322 (8th Cir. 1974).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *NRDC v. Grant*, 341 F. Supp. 356, 367 (E.D.N.C. 1972).

³⁰ *Scientists’ Inst. for Pub. Info.*, 481 F.2d at 1098 (noting that the nuclear program will overhaul the entire nation’s electricity production and result in large amounts of hazardous waste).

³¹ *Id.* at 1095.

analysis of the technology's environmental effects.³² By that time, the Court noted, “[s]ubstantial investments will have been made . . . and options will have been precluded without consideration of environmental factors,” and, as a result, “the purposes of NEPA will already have been thwarted.”³³ To determine whether an EIS was appropriate, the Court endorsed a judicial test weighing several factors, including the severity of environmental effects if the project were implemented.³⁴ When considering the severity of environmental effects, the Court stressed that nationally, the program would produce 600,000 cubic feet of radioactive waste by the year 2000, even though the locations of waste storage facilities were evidently as of yet unknown.³⁵ The Court found these waste effects to “warrant the most searching scrutiny under NEPA,” triggering an EIS.³⁶ In short, the Court found that the waste effects would be significant under NEPA, irrespective of the geographic proximity of waste storage to the facilities that produced the waste.

In the 1976 case *Sierra Club v. Coleman*, the D.C. District Court directly interpreted NEPA to require consideration of the geographically remote effects of building a highway.³⁷ The Federal Highway Administration planned to build a highway through Panama and Colombia, filling a gap between existing highways and thus linking South America to North America by car.³⁸ Although the Court noted the pristine ecological nature of the areas to be developed in Panama and Colombia, the “most significant environmental problem” associated with bridging this gap in Panama and Colombia was not local to those areas, but rather the effect that such a connection would have in North America.³⁹ Specifically, the project could facilitate the spread of foot-and-mouth disease to the continent, causing a loss of \$10 billion in domestic livestock in the United States within the first year alone.⁴⁰ The agency had conclusively determined that control programs in Central America would eventually be effective enough to prevent this spread, but the Court determined that this prediction was highly uncertain and that without more understanding, the agency could not “rationally conduct the balancing process required by NEPA.”⁴¹ The agency, therefore, had to revise its EIS.⁴² The geographically remote effect upon American livestock was significant enough to render invalid the EIS for a project completed in two countries thousands of miles away.

Before the 1978 Rule was in place, courts affirmed that geographically remote effects may be significant enough to trigger EIS's under NEPA. Thus, CEQ's proposal to allow agencies to ignore such effects and forbid agencies from finding such effects significant violates NEPA.

³² *Id.* at 1093.

³³ *Id.* at 1093–94.

³⁴ *Id.* at 1094.

³⁵ *See id.* at 1097–98 (emphasizing that a NEPA statement should determine “the total amounts of land area needed for long-and shortterm storage of these wastes,” suggesting exact locations were not yet known, and stressing the amount of waste to be produced).

³⁶ *Id.* at 1098.

³⁷ *See generally* 421 F. Supp. 63.

³⁸ *See id.* at 65 (discussing building the Darian Gap Highway through Panama and Colombia).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 66.

⁴² *Id.*

iii. CEQ's limits on causality contradict NEPA's goals, and its use of a proximate cause standard to eliminate indirect effects analysis is inadequately explained.

CEQ's shift to a "person of ordinary prudence" standard to define what is "reasonably foreseeable" is impermissible. CEQ proposes to define "reasonably foreseeable consistent with the ordinary person standard—that is, what a person of ordinary prudence would consider in reaching a decision."⁴⁶ This new definition is contrary to NEPA's stated goal to use the best scientific information available to disclose environmental effects,⁴⁷ rather than to base analysis on "what a person of ordinary prudence would consider." Agencies are held to a higher standard than a mere "person of ordinary prudence" when considering projects that may have environmental effects.

CEQ's justifies limits on geographically and temporally remote effects by applying a "proximate cause" standard to effects analysis, citing the need for a "manageable line" to determine which effects drive environmental harms.⁴⁸ CEQ's misinterpretations of case law in applying this standard will be discussed in detail, below, however, even if a proximate cause standard were applied, it could not justify eliminating the consideration of indirect effects. For example, NHTSA's adjustments to fuel economy standards were found to *proximately cause* climate change—an effect that is both remote in time and geographically remote.⁴⁹

2. The Proposed Rule Does Not Adequately Justify CEQ's Reversal of Years of Agency Policy.

For almost 50 years, CEQ's regulations have required the consideration of indirect effects. The Proposed Rule reverses the agency's longstanding position. When an agency amends, suspends, or repeals a rule, "a reasoned explanation is needed for disregarding facts or circumstances that underlay or were engendered by the prior policy."⁵⁰ Because the Council fails to adequately explain its sudden departure from precedent with respect to indirect effects, the change is arbitrary and capricious.

CEQ's 1971 Guidance called for an EIS to include "any probable adverse environmental effects which cannot be avoided (such as . . . undesirable land use patterns . . . urban congestion . . . or other consequences adverse to the environmental goals set out in section 101(b) of the Act)."⁵¹ Land use patterns and urban congestion are both clearly indirect effects that are remote in time, causally attenuated, and geographically remote.

The 1978 Rule, which has remained essentially unchanged through today, defines indirect effects and requires their consideration.⁵² CEQ Guidance released in recent years demonstrates that

⁴⁶ Proposed Rule, 85 Fed. Reg. at 1710.

⁴⁷ 42 U.S.C. § 4332(2)(A) (calling upon 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").

⁴⁸ Proposed Rule, 85 Fed. Reg. at 1708.

⁴⁹ See *Ctr. for Bio. Diversity*, 538 F.3d at 1217.

⁵⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

⁵¹ 1971 Guidance, 36 Fed. Reg. at 7725.

⁵² 40 C.F.R. § 1508.7, § 1508.8.

indirect effects have remained a major CEQ consideration up to the present. For example, in 2016, CEQ issued guidance noting that “[f]or actions such as a Federal lease sale of coal for energy production, the impacts associated with the end-use of the fossil fuel being extracted would be the reasonably foreseeable combustion of that coal.”⁵³ The Trump Administration’s Draft Guidance on Considering Greenhouse Gas Emissions notes that “[a]gencies should attempt to quantify a proposed action’s projected direct and reasonably foreseeable indirect GHG emissions.”⁵⁴ In the Proposed Rule, however, as discussed earlier, CEQ inserts a problematic definition of “reasonably foreseeable” that creates a “person of ordinary prudence” standard.⁵⁵

Until today, CEQ has taken a consistent stance that indirect effects are a critical piece of NEPA analysis. CEQ issues the following rationales for reversing course: First, CEQ points to commenters’ concerns that the existing regulations have been interpreted expansively in a way that exceeds the bounds of NEPA and generates excessive litigation, without adding value to informed decision-making.⁵⁶ In response, CEQ claims the new definition will “provide clarity on the bounds of effects, consistent with the Supreme Court’s holding in *Department of Transportation v. Public Citizen*.”⁵⁷ Second, CEQ argues that these changes will allow agencies “to focus agency time and resources on considering whether an effect is caused by the proposed action rather than on categorizing the type of effect,” as “substantial resources have been devoted to categorizing effects.”⁵⁸

These justifications are not compelling. CEQ uses two Supreme Court cases to justify these changes. These cases do not support the agency’s new, aggressive limits on NEPA analysis. The remaining justifications ignore obvious alternative solutions, or other major considerations underlying the problem at hand.

i. CEQ’s reliance on Public Citizen and Metro Electric Co. is misplaced.

CEQ justifies tightening NEPA’s causal standard to a “reasonably close causal relationship” by drawing language from the Supreme Court case *Metro Edison Co.*, but CEQ’s temporal and geographic limitations are entirely new.⁵⁹ CEQ justifies these changes by citing to *Public Citizen*, which notes that agencies must “draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.”⁶⁰

⁵³ Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change, Council on Environmental Quality, 16 (Aug. 1, 2016) available at: https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

⁵⁴ Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019).

⁵⁵ See *infra* at text accompanying notes 30–33.

⁵⁶ Proposed Rule, 85 Fed. Reg. at 1708.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1708 (citing *Metro Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774).

⁶⁰ *Id.* at 1708 (quoting *Dept. of Transportation v. Public Citizen*, 541 U.S. 752, 767–68 (quoting *Metro Edison Co.*, 460 U.S. at 774 n.7)).

While CEQ’s definition of its causal standard under “effects” borrows much of its language from *Metro Edison Co.* and *Public Citizen*, when read in context, these cases do not support CEQ’s constricted definition.

CEQ claims its proposed changes aim “to provide clarity on the bounds of effects consistent with” *Public Citizen*.⁶¹ In *Public Citizen*, the Department of Transportation was sued for failure to consider the environmental impact of registering additional vehicles for travel in the United States after the President lifted a moratorium on cross-border entry from Mexico.⁶² Because the agency’s duty was non-discretionary, the Court found that it would not “satisfy NEPA’s ‘rule of reason’ to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform.”⁶³ These factors drove the Court’s embrace of a “reasonably close causal relationship” similar to the “familiar doctrine of proximate cause.”⁶⁴ The Court notes that the legally relevant cause of the additional pollution was the President’s decision to lift the moratorium.⁶⁵ Thus *Public Citizen*’s emphasis on proximate cause only limits the application of NEPA in cases where an agency is acting upon a non-discretionary duty prompted by an act by the President that was not subject to NEPA.⁶⁶

Later cases make clear that *Public Citizen* applies only in rare cases where the agency lacks discretion over the activity giving rise to the foreseeable effects. In most instances, however, the agency preparing the EIS or EA does have discretion to permit the action, refuse it, or choose another alternative. In *WildEarth Guardians v. Zinke*, for example, the court noted that once an agency permitted oil and gas drilling, it had “made an irrevocable commitment to allow some” GHG emissions. . . [and] was therefore required to fully analyze the reasonably foreseeable impacts of those emissions at the leasing stage.”⁶⁷ In *WildEarth Guardians v. Office of Mining, Reclamation, and Enforcement*, the court concluded that while an agency “is not required to consider the effects of an action that it ‘has no ability to prevent,’” an agency “must take into account the effects of such [coal] combustion when determining whether there will be a significant impact on the environment.”⁶⁸

CEQ cites *Public Citizen* to prove that effects “should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy causal chain,” by saying “courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.”⁶⁹ This section of the case, however, is referring to the *legal responsibility* of the actors, not

⁶¹ Proposed Rule, 85 Fed. Reg. at 1708.

⁶² *Public Citizen*, 541 U.S. at 769.

⁶³ *Id.*

⁶⁴ *Id.* at 767.

⁶⁵ *Id.*

⁶⁶ See e.g., *Tulare Cty. v. Bush*, 185 F. Supp. 2d 18, 28 (D.D.C. 2001) (noting that the President is not a federal agency for the purpose of NEPA).

⁶⁷ *WildEarthGuardians v. Zinke*, 368 F. Supp. 3d 41, 66 (D.D.C. 2019).

⁶⁸ *WildEarth Guardians v. U.S. Office of Mining, Reclamation, and Enforcement*, 104 F. Supp. 3d 1208, 1230 (D. Colo. 2015).

⁶⁹ Proposed Rule, 85 Fed. Reg. at 1708.

causal attenuation.⁷⁰ *Public Citizen*, as discussed above, hinges on whether a decision is discretionary or mandatory, and does not invite arbitrary line drawing as to the time or place of the effect.

The relevant section of *Public Citizen* in fact comes from *Metro Edison Co.*, an earlier Supreme Court case. CEQ uses this section to justify eliminating the direct/indirect effects distinction and to limit the significance of effects that are geographically or temporally removed. The Council quotes a passage that analogizes the cause-effect standard under NEPA to the tort concept of proximate cause, requiring a “reasonably close causal relationship.”⁷¹ But CEQ deprives the quote of its surrounding context, resulting in a misleading interpretation.

Metro Edison Co. concerned an EIS prepared in connection with the reopening of two nuclear power plants at Three Mile Island.⁷² The Supreme Court considered whether the Nuclear Regulatory Commission (NRC) had to consider harms to the psychological well-being of nearby residents who feared the risk of a nuclear disaster.⁷³ The Court held that “NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment.”⁷⁴ While the Court recognized that NEPA’s goals are rooted in human health and welfare, it found that the means to achieve these goals are dependent on impacts on the physical environment.⁷⁵

As an example, the Court cited a hypothetical rule imposing stringent requirements on federal funding for hospitals and nursing homes that caused many facilities to close and left many ill people unable to afford medical care. Those damages, the Court explained, would not require an EIS, because they would not be “proximately related to a change in the physical environment.”⁷⁶ Again, the focus here is on the *physical* environment.

Ultimately, the Court held that “the terms ‘environmental effect’ and ‘environmental impact’ in § 102 [must] be read to include a requirement of a reasonably close causal relationship between a change in the *physical environment* and the effect at issue . . . like the familiar doctrine of proximate cause from tort law.”⁷⁷ This language is lifted directly into the proposed CEQs regulation.⁷⁸ Following the quoted passage, however, the Court clarifies that the effect at issue in the case—psychological damage from the risk of a nuclear accident—is too attenuated because “a *risk* of an accident is not an effect on the physical environment. . . . the element of risk and its perception . . . are necessary middle links . . . that lengthen[] the causal chain beyond NEPA’s reach.”⁷⁹ The

⁷⁰ *Dept. of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004) (citing W. KEETON ET AL., *LAW OF TORTS* 264, 274-75 (5th ed. 1984)).

⁷¹ Proposed Rule, 85 Fed. Reg. at 1708 (2020) (“a reasonably close causal relationship between a change in the physical environment and the effect at issue” and stating that “[t]his requirement is like the familiar doctrine of proximate cause from tort law.”) (quoting *Metro Edison Co.*, 460 U.S. at 774).

⁷² *Metro Edison Co.*, 460 U.S. at 768 (1983).

⁷³ *Id.*

⁷⁴ *Id.* at 772.

⁷⁵ *Id.* at 773.

⁷⁶ *Id.* at 773-74.

⁷⁷ *Id.* at 774 (emphasis added).

⁷⁸ Compare Proposed Rule, 85 Fed. Reg. at 1728 with *Metro Edison Co.*, 460 U.S. at 774.

⁷⁹ *Metro Edison Co.*, 460 U.S. at 775 (1983).

Court elaborated its concern that allowing consideration of psychological health damage from an unrealized risk may eventually make it challenging to distinguish between “genuine claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted policy.”⁸⁰

Thus, neither of CEQ’s cited changes justifies its elimination of indirect effects from required NEPA consideration. In *Public Citizen*, the problem that the Court identified with the causal chain was not that the impacts were geographically remote or remote in time, but that the agency was acting under a non-discretionary duty and therefore was not a legal cause of increased emissions. *Metro Edison Co.* was distinctive in two ways: 1) The effects considered were not “environmental effects” and 2) The effects’ existence hinged upon the highly uncertain event of a nuclear disaster. Neither of the Court’s reasons justifies allowing agencies to ignore likely environmental effects because they are remote in time or space. It is unclear how CEQ took two cases unrelated to geographic or temporal remoteness and determined that, combined, they justified overhauling fifty years’ of agency policy.

ii. CEQ’s remaining reasons fail to justify eliminating a cornerstone of NEPA analysis.

CEQ largely relies on a reduction in paperwork to justify its changes to the 1978 Rule. Specifically, CEQ claims that the categorization of effects as either cumulative, direct, or indirect, wastes agency resources.⁸¹ CEQ fails to consider that it could relieve agencies from the requirement of categorizing effects, but retain the analysis of those effects. If agencies expend too much time determining how to classify a given effect, the solution is not to say the effect need not be considered, but rather to dispense with the process of formal categorization, instead emphasizing the underlying analyses agencies must do to consider all relevant impacts. Such a change would eliminate the paperwork associated with categorization, without running afoul of the statutory bounds of NEPA.

Further, CEQ claims that eliminating consideration of indirect impacts will improve decisionmaking by focusing agency attention on the most important impacts, but this fails to recognize that the most significant impact of an agency action may well be an indirect effect. Consider, for example, *Center for Biological Diversity* or *WildEarth Guardians* cases described above. In those cases, the significant impact that required the agencies to prepare an EIS was the action’s indirect impact on climate change. Thus, CEQ’s justification fails to explain its elimination of indirect effect consideration.

CEQ also irrationally focuses on the positive consequences of its changes regarding indirect effects while neglecting the likely downsides. To explain its change, CEQ claims that agencies will be able to “reduce delays and paperwork [associated] with unnecessary analyses.”⁸² But eviscerating indirect effect analysis will also almost certainly lead to additional environmental harms, because more impoverished EIS’s will systematically underestimate the environmental effects of federal actions, hobbling agencies’ abilities to make fully informed decisions about whether and how to

⁸⁰ *Id.* at 778.

⁸¹ Proposed Rule, 85 Fed. Reg. at 1708.

⁸² *Id.*

proceed with projects. CEQ fails to consider such forgone benefits. By emphasizing only the upsides of its change while ignoring clear downsides, the Council impermissibly “put[s] a thumb on the scale” of its analysis.⁸³ Multiple circuits have found such analysis to be arbitrary and capricious.⁸⁴

CEQ’s unlawful proposal could have dire implications if finalized, and considering those implications reveals just how irrational these changes are. For example, current projects that exacerbate climate change—arguably the greatest environmental challenge of our time—will wreak increased havoc in years to come, because greenhouse gases can stay in the atmosphere for decades, leading to more drastic effects as the Earth’s temperature rises.⁸⁵ But CEQ’s proposed regulations could allow agencies to neglect climate change’s future impacts, and might bar the agencies from considering those consequences significant enough to trigger EIS preparation. Moreover, because climate change is a global phenomenon,⁸⁶ a carbon-intensive project could lead to environmental harms far away—across the country or across the world. But CEQ’s proposed regulations could allow agencies to neglect such geographically removed impacts and bar them from finding such impacts significant. These changes’ potential to neuter NEPA with respect to such a predominant environmental threat illustrates how irrational the proposed changes are.

Not only does CEQ’s elimination of indirect effects contravene NEPA, the Council’s justifications also fail to explain the changes in a rational way, making the proposed changes arbitrary and capricious.

B. Cumulative Impacts

As currently defined, cumulative impacts are, “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”⁸⁷ Cumulative impacts are invoked in multiple places throughout the 1978 Rule.⁸⁸ Notably, “[s]ignificance cannot be avoided by terming an action temporary or by breaking it down into smaller parts.”⁸⁹

The Proposed Rule strikes the definition of cumulative impacts, removes references to cumulative impacts throughout, and affirmatively states that “analysis of cumulative effects is not required.”⁹⁰

⁸³ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

⁸⁴ *See e.g., id.*; *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding that an agency “cannot tip the scales . . . by promoting [the action’s] possible benefits while ignoring [its] costs”).

⁸⁵ *Future of Climate Change*, EPA (last updated Dec. 27, 2016), https://19january2017snapshot.epa.gov/climate-change-science/future-climate-change_.html (explaining that “past and present-day greenhouse gas emissions will affect climate far into the future” because many greenhouse gases stay in the atmosphere for long periods).

⁸⁶ *The Effects of Climate Change*, NASA (last updated Mar. 6, 2020), <https://climate.nasa.gov/effects/>.

⁸⁷ 40 C.F.R. § 1508.7.

⁸⁸ *See, e.g.*, 40 C.F.R. §§ 1500.4(a), 1500.5(a), 1508.25, 1508.27(7).

⁸⁹ 40 C.F.R. § 1508.27(7).

⁹⁰ *See Proposed Rule*, 85 Fed. Reg. at 1708, 1729.

CEQ justifies these changes by arguing that the consideration of cumulative impacts has led to “excessively lengthy documentation that does not focus on the most meaningful issues.”⁹¹

Eliminating cumulative impacts analysis is an end-run around the environmentally protective goals of NEPA. The Proposed Rule exceeds CEQ’s statutory authority under NEPA and is arbitrary and capricious, due to a failure to provide a reasoned explanation for reversing the agency’s longstanding position on this issue.

1. CEQ Exceeds Its Statutory Authority Under NEPA by Claiming that Cumulative Impacts Analysis Is Not Required.

For nearly fifty years, the federal courts have interpreted Section 102(2)(C) of NEPA to require agencies to consider cumulative effects. CEQ’s Proposed Rule releases agencies from this requirement, contradicting longstanding precedent. Prior to the 1978 Rule requiring consideration of cumulative impacts, courts had already interpreted NEPA to require such an analysis. Accordingly, the Proposed Rule’s attempt to eliminate this analysis would exceed the bounds of CEQ’s statutory authority under NEPA.⁹³

In the 1972 case of *Hanly v. Kleindienst*, the Second Circuit interpreted the text of Section 102(2)(C) to require that significance be evaluated by considering, “the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions.”⁹⁴ The decision notes that “[o]ne 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.”⁹⁵ Courts across the country have continued to cite *Hanly* as independent support for cumulative impacts analyses through the present-day.⁹⁶

The Supreme Court has also read the requirement of cumulative impacts analysis into NEPA. In 1976, the Court held that “when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.”⁹⁷

In 1983, the Supreme Court again held, while citing NEPA directly and without citing CEQ regulations, that the statute requires that “an EIS . . . disclose the significant health, socioeconomic, and cumulative consequences of the environmental impact of a proposed action.”⁹⁹ In 1988, the D.C. Circuit noted that, “NEPA, as interpreted by the courts, and CEQ regulations both require agencies to consider the cumulative impacts of proposed actions.”¹⁰⁰ Today, courts continue to cite

⁹¹ *See id.* at 1729.

⁹³ *See* 5 U.S.C. § 706(2)(C) (Administrative Procedure Act).

⁹⁴ *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972).

⁹⁵ *Id.* at 831.

⁹⁶ *See, e.g.*, *Baykeeper v. United States Army Corps of Eng’rs*, NO. CIV. S-06-1908 FCD/GGH, 2006 U.S. Dist. LEXIS 67483, at *40-41 (E.D. Cal. 2006); *Austin v. Ala. Dept. of Transportation*, No. 2:15-cv-01777-JEO, 2016 U.S. Dist. LEXIS 159113, *24 (N.D. Ala. 2016).

⁹⁷ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

⁹⁹ *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 106–07 (1983).

¹⁰⁰ *NRDC v. Hodel*, 865 F.2d 288, 297 (2d Cir. 1988).

Supreme Court precedent for the proposition that NEPA’s statutory language requires cumulative impacts.¹⁰¹

The Proposed Rule’s elimination of cumulative impacts analysis thus contradicts the requirements of NEPA, as interpreted by the courts for nearly fifty years, and exceeds CEQ’s statutory authority.

2. CEQ’s Justifications for Eliminating Cumulative Impacts Analysis from the Proposed Rule Do Not Amount to a “Reasoned Analysis,” Rendering the Proposed Rule Arbitrary and Capricious.

CEQ’s 1971 Guidance defined “major federal actions significantly affecting the quality of the human environment” to include the “overall, cumulative impact of the action proposed,” noting that the impact of a project may be “individually limited but cumulatively considerable.”¹⁰² This view was reaffirmed in the 1978 Rule.¹⁰³

The Proposed Rule reverses the agency’s longstanding position. As discussed in the “Indirect Effects” section, according to the Supreme Court, when an agency amends, suspends, or repeals a rule, “a reasoned explanation is needed for disregarding facts or circumstances that underlay or were engendered by the prior policy.”¹⁰⁴ Here, CEQ provides four justifications for its reversal of policy. These justifications do not constitute a “reasoned explanation,” rendering CEQ’s reversal of policy arbitrary and capricious.

CEQ justifies eliminating cumulative impacts analysis on the following bases: (1) categorization of effects as direct, indirect, and cumulative uses substantial resources, (2) analysis of cumulative effects, as described in CEQ’s current regulations, is not required under NEPA, (3) cumulative impacts analysis diverts agency attention away from the “most significant effects,” and (4) the combination of the above contribute to worse decisionmaking.¹⁰⁵ None of these justifications are sufficient to support the elimination of cumulative impacts analysis.

First, even if it is true that categorizing effects as direct/indirect/cumulative strains agency resources, this does not support eliminating the consideration of cumulative impacts analysis. For example, as discussed in the “Indirect Effects” section, CEQ could relieve agencies from the requirement of categorizing effects but retain the analysis of those effects. This change alone would be sufficient to eliminate the paperwork associated with categorization, without exceeding the statutory bounds of NEPA. Decisions based on unreasoned rationales are arbitrary and capricious.¹⁰⁶

¹⁰¹ See, e.g., *Jensen v. Williams*, No. 08-2016, 2009 U.S. Dist. LEXIS 36619, at *9 (Apr. 27, 2009); *Indigenous Envtl. Network v. United States Dep’t of State*, No. CV-17-29-GF-BMM, 2019 U.S. LEXIS 25264, at *16 (D.C. Mon. Feb. 15, 2019) (explaining that “when several projects that may have cumulative environmental impacts are pending concurrently, NEPA requires that the environmental consequences should be considered together”).

¹⁰² 1971 Guidance, 36 Fed. Reg. at 7724.

¹⁰³ 1978 Rule, 43 Fed. Reg. at 56,004 (defining “cumulative impact” and explaining that such impacts “can result from individually minor but collectively significant actions taking place over a period of time”).

¹⁰⁴ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

¹⁰⁵ Proposed Rule, 85 Fed. Reg. at 1708.

¹⁰⁶ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

Second, as discussed in detail above, from the 1970s to the present, case law has interpreted NEPA’s statutory language to mandate consideration of cumulative impacts. This directly contradicts CEQ’s claim that, “analysis of cumulative effects, as defined in CEQ’s current regulations, is not required.”¹⁰⁷ Given that courts have consistently interpreted NEPA to require consideration of cumulative effects, this rationale, “runs counter to the evidence before the agency.”¹⁰⁸ Decisions based on such flawed rationales are arbitrary and capricious.¹⁰⁹

CEQ’s third rationale—that cumulative impacts analysis diverts agency attention away from the most significant impacts—ignores the possibility that, in certain cases, the most significant impact from a federal action may be a cumulative impact. In such a case, failure to consider cumulative effects may result in mischaracterizing an action as insignificant. For example, in *Center for Biological Diversity v. NHTSA*, the significant effect at issue was the cumulative impact of carbon emissions.¹¹⁰ Similarly, many projects may not be significant when considered on their own, but could become environmentally destructive when considered within a broader context – *Hanley’s* “straw that breaks the camel’s back.”¹¹¹ Again, a decision based on a rationale that is both inconsistent with case precedent and illogical is arbitrary and capricious.¹¹²

Finally, the above examples also demonstrate why the elimination of cumulative impacts analysis could, in fact, cause agencies to engage in worse decisionmaking by, for example, mischaracterizing significant environmental impacts as insignificant. In ignoring this, CEQ “entirely fails to consider an important aspect of the problem,” rendering the Proposed Rule arbitrary and capricious.¹¹³

C. Alternatives Analysis

NEPA requires that federal agencies, “to the fullest extent possible,” provide a detailed statement including “alternatives to the proposed action.”¹¹⁴ NEPA duties are not “inherently flexible,” but rather “must be complied with to the fullest extent, unless there is a clear conflict of statutory authority.”¹¹⁵ Since 1971, CEQ has honored this requirement by requiring agencies to analyze alternatives in NEPA analyses before deciding to proceed with a given federal action.¹¹⁶

According to the D.C. Circuit, NEPA “requires a presentation of the environmental risks incident to reasonable alternative courses of action.”¹¹⁷ Since its promulgation, the 1978 Rule has required

¹⁰⁷ Proposed Rule, 85 Fed. Reg. at 1708.

¹⁰⁸ *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

¹⁰⁹ *Id.*

¹¹⁰ See generally *Ctr. for Bio. Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008).

¹¹¹ See, e.g., *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 51 (D.C. Cir. 2015) (“An agency deciding whether to approve construction of a replacement airport, for example, must consider the prospective impact of the airport’s added noise in the context of noise from other sources—including private sources not traceable to agency action.”); *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972).

¹¹² *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

¹¹³ *Id.* at 29, 43 (1983).

¹¹⁴ 42 U.S.C. § 4332; see *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (“Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality.”).

¹¹⁵ *Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

¹¹⁶ 1971 Guidance, 36 Fed. Reg. at 7725.

¹¹⁷ *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972).

agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives.”¹¹⁸ The language tracks the Nixon administration’s 1971 Guidance to federal agencies, which instructed, “A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential.”¹¹⁹ CEQ now proposes to delete the qualifier “rigorously explore and objectively” preceding “evaluate.” CEQ does not explain why its view of the statute has changed to disfavor rigor and objectivity.

Figure 1: Redline from CEQ's proposal (from the docket).

(a) ~~Rigorously explore and objectively e~~valuate all reasonable alternatives ~~to the proposed action~~, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

Similarly, CEQ proposes to delete language from the 1978 Rule stating that alternatives analysis is “the heart of the environmental impact statement.”¹²⁰ This change, along with the changes in Figure 1, deemphasizes the important role that the alternatives analysis is to play in EIS’s, and it is unclear why the Council made these decisions.

In addition to sidelining the alternatives analysis, CEQ proposes to narrow the scope of alternatives that agencies must consider in two ways. First, the Council has eliminated the requirement that agencies include reasonable alternatives not within their jurisdiction.¹²¹ Second, the Council claims that alternatives must be defined in reference to the goals of non-federal permit applicants, where applicable.¹²²

Neither the marginalization of the alternatives analysis, nor the jurisdiction-based alternatives restriction, nor the goals-based alternatives restriction is legal. We discuss each set of changes in turn.

1. CEQ Provides No Explanation for Changing Its Views on the Importance of Alternatives Analysis, Making the Changes Arbitrary and Capricious.

CEQ does not explain its decision to no longer require that agencies’ alternatives analyses be rigorous and objective. Nor does the Council explain its deletion of language placing alternatives analysis at “the heart” of EIS’s. CEQ’s guidance has long stressed that alternatives analysis is central to NEPA’s statutory design,¹²³ so the Proposed Rule’s downgrade of this analysis departs from CEQ’s longstanding policy and demands reasoned explanation. CEQ’s complete lack of explanation for the changes renders the changes arbitrary and capricious.

¹¹⁸ 40 C.F.R. § 1502.14(a) (2020).

¹¹⁹ 1971 Guidance, 36 Fed. Reg. at 7725.

¹²⁰ 40 C.F.R. § 1502.14 (2020).

¹²¹ Proposed Rule, 85 Fed. Reg. at 1702.

¹²² *Id.* at 1710.

¹²³ *Monroe Cty. Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697–98 (2d Cir. 1972) (calling the alternatives analysis the “linchpin . . . of the entire impact statement”). The Court also noted that “A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential.” *Id.* at 698 n.3 (quoting 1971 Guidance, 6(iv), 36 Fed. Reg. at 7725).

The Proposed Rule’s muddling of alternatives analysis also exceeds CEQ’s statutory authority by contradicting NEPA’s statutory requirement to develop the EIS “to the fullest extent possible.”¹²⁴ Again, CEQ does not offer any reasons for changing its longstanding view. The Proposed Rule also deletes the aim of “sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.”¹²⁵ While CEQ might respond that this aim does not create substantive legal obligations, courts have evaluated EIS sufficiency according to the standard from the 1978 Rule.¹²⁶ The “sharply defining” requirement is a means of assessing whether the comparison of alternatives is adequate. Permitting comparisons that do not sharply define the issues and provide a clear basis for choice would contradict longstanding policy of administrations of both parties, and contradict the purpose of the EIS. To do so without explanation is arbitrary and capricious.¹²⁷

2. The Proposed Rule Unlawfully Excludes Analysis of Reasonable Alternatives Outside the Lead Agency’s Jurisdiction.

The 1978 Rule requires alternatives analysis to “include reasonable alternatives not within the jurisdiction of the lead agency.”¹²⁸ In the drafting of the 1978 Rule, CEQ stated that the requirement to analyze reasonable alternatives outside the lead agency’s jurisdiction was “declaratory of existing law,”¹²⁹ evidently referring to case law interpreting NEPA.¹³⁰ In 1981 guidance on the 1978 Rule, CEQ stated, “An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable.”¹³¹ CEQ took an expansive view, stating that alternatives analysis must even include reasonable alternatives that Congress has not funded or approved, as an EIS may serve as a basis for Congress to fund or approve a project.¹³² In summary, CEQ’s longstanding view recognizes that NEPA requires agencies to analyze reasonable alternatives, even if another agency would ultimately implement those alternatives.

¹²⁴ 42 U.S.C. § 4332. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (“Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality.”).

¹²⁵ 40 C.F.R. § 1502.14 (2020).

¹²⁶ *See, e.g. Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1179 (10th Cir. 2008) (stating that the Forest Service meets the “hard look” requirement by “present[ing] the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options.”) (internal citation omitted); *WildEarth Guardians v. United States Bureau of Land Mgmt.*, 870 F.3d 1222, 1235 (10th Cir. 2017) (holding a Bureau of Land Management analysis arbitrary and capricious for failure to provide evidence “sufficient in volume and quality to ‘sharply defin[e] the issues and provid[e] a clear basis for choice among options.’”); *In re Operation of Missouri River Sys. Litig.*, 421 F.3d 618, 636 (8th Cir. 2005) (finding that an Army Corps of Engineers EIS “enables the reader to compare the relative effectiveness of each of the alternatives”).

¹²⁷ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹²⁸ 40 C.F.R. § 1502.14(c) (2020).

¹²⁹ 1978 Rule, 43 Fed. Reg. at 55,984.

¹³⁰ *See id.* at 55,983–84 (although CEQ does not elaborate on which existing law its regulations codify, the preceding paragraph justifies the requirement to analyze “all reasonable alternatives” as a requirement “firmly established in the case law interpreting NEPA,” suggesting that when the Council refers to “existing law,” the agency is referring to judicial interpretations of the statute).

¹³¹ *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (1981).

¹³² *Id.*

The Proposed Rule scraps this longstanding interpretation by removing the requirement that agencies consider alternatives outside their control.¹³³ CEQ explains that the change will “preclude” consideration of such alternatives, notwithstanding a couple of vague exceptions.¹³⁴ To the extent that CEQ justifies these changes at all, the Council explains that reducing the scope of alternatives considered would conform to case precedent eliminating EISs for non-discretionary actions¹³⁵ and would reduce paperwork.¹³⁶

With respect to agencies taking non-discretionary actions, CEQ again over-extends the reasoning of *Department of Transportation v. Public Citizen*.¹³⁷ An agency need not conduct a NEPA analysis for a non-discretionary action,¹³⁸ but that does not mean that for a discretionary action, an agency must willfully ignore whether another agency might be better positioned to act.

In fact, like CEQ, the D.C. Circuit has interpreted NEPA to require analysis of reasonable alternatives outside the implementing jurisdiction of the lead agency. In *Nat. Res. Def. Council, Inc. v. Morton*, a case predating the 1978 Rule, the D.C. Circuit directly interpreted NEPA’s mandate to consider alternatives, ruling that the Secretary of the Interior failed to consider reasonable alternatives outside of Interior’s jurisdiction during a cross-agency effort to increase energy production.¹³⁹ The Court found that limiting alternatives to only those the agency could implement was unsuited to the lease sale of offshore oil lands because reasonable alternatives included eliminating or reducing oil import quotas, actions within the authority of the President and Congress.¹⁴⁰ In a subsequent case, the D.C. Circuit again rejected limiting alternatives by agency jurisdiction, noting that “within the context of a coordinated effort to solve a problem of national scope, a solution that lies outside of an agency’s jurisdiction might be a ‘reasonable alternative.’”¹⁴¹ The cases together illustrate that the definition of a “reasonable alternative” cannot be confined to a categorical rule bounded by what an agency could itself implement.¹⁴² Thus, CEQ’s proposal to strike such alternatives illegally contradicts case precedent.¹⁴³

With respect to CEQ’s justifications based on reducing delays and paperwork, CEQ fails to consider that limiting alternatives analysis could create new inefficiencies. In *Morton*, the D.C. Circuit recognized that solving national problems “may call for each of several departments or agencies to take a specific action; this cannot mean that the only discussion of alternatives required in the ensuing environmental impact statements would be the discussion by each department of the particular actions it could take as an alternative to the proposal underlying its impact

¹³³ Proposed Rule, 85 Fed. Reg. at 1702.

¹³⁴ *See id.* (reserving the right of an agency to consider alternatives outside the agency’s control “when necessary for the agency’s decision-making process . . . and [pursuant] to specific Congressional directives.”).

¹³⁵ *See id.* at 1695, 1702 (explaining changes to § 1501.1 in a cursory fashion, and justifying changes to alternatives analysis as consistent with the changes to § 1501.1, respectively).

¹³⁶ *Id.* at 1702.

¹³⁷ *Dept. of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

¹³⁸ *See generally id.*

¹³⁹ *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 834–35 (D.C. Cir. 1972).

¹⁴⁰ *Id.*

¹⁴¹ *City of Alexandria, VA v. Slater*, 198 F.3d 862, 869 (D.C. Cir. 1999) (clarifying *Morton*).

¹⁴² *City of Alexandria, VA. v. Slater*, 198 F.3d at 869 (“*Morton* thus stands for the same proposition as *Citizens Against Burlington*: namely, that a ‘reasonable alternative’ is defined by reference to a project’s objectives.”).

¹⁴³ *Id.*

statement.”¹⁴⁴ Rather, “it is the essence and thrust of NEPA that the pertinent Statement serve to gather in one place a discussion of the relative environmental impact of alternatives.”¹⁴⁵ Forcing agencies to contravene *Morton* is not only contrary to law, but also inimical to a holistic and efficient environmental review in one place.

Categorically eliminating alternatives analysis for actions implemented by other agencies would hamper NEPA analysis because it could lead agencies to duplicate others’ work or produce analyses with informational gaps. These defects would undermine what the Supreme Court has termed the “twin aims” of NEPA: 1) to facilitate informed governmental decisionmaking and 2) to apprise the public of environmental concerns associated with federal projects.¹⁴⁶

As to the first goal, the D.C. Circuit has observed that even actions that an agency cannot take unilaterally may be “within the purview of both Congress and the President, to whom the impact statement goes . . . The impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers.”¹⁴⁷ Because Congress and the President have national authority, their policymaking has a far broader scope than that of an agency. Eliminating extra-jurisdictional alternatives analysis will make it more difficult for these decisionmakers to evaluate the environmental consequences of national policymaking. This will slow and deteriorate policymaking, creating costs, delays, and substantively inferior results.

As to the second goal to inform the public of environmental concerns, failure to consider alternatives outside an agency’s control may prevent the public from learning of such alternatives. Moreover, such narrow alternatives analyses may fail to assure the public that NEPA is being implemented properly. The Supreme Court has mandated that an agency’s NEPA analysis must “inform the public that the agency has considered environmental concerns in its decisionmaking process.”¹⁴⁸ If an agency cannot consider important alternatives merely because those alternatives are outside of the agency’s control, then it will face hurdles in assuring the public that it is analyzing environmental effects adequately.

In some situations, failure to analyze alternatives controlled by another agency would lead to absurd, inefficient results. For example, Federal Highway Administration (FHWA) guidance recognizes that transportation projects in urbanized areas frequently require comparing different modes of transportation, such as highways or mass transit.¹⁴⁹ Consistent with a statutory mandate for comprehensively planned urban development, FHWA reasoned that transportation planning requires consideration of system-wide consequences of operational improvements, including how different forms of transportation interact in an integrated urban design.¹⁵⁰ Under the Proposed

¹⁴⁴ *Id.* at 835.

¹⁴⁵ *Id.* at 834. *See also* *Ilio’ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1098 (9th Cir. 2006) (citing *Slater*, 198 F.3d at 868) (“[w]hen the proposed action . . . is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened.”).

¹⁴⁶ *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983).

¹⁴⁷ *Morton*, 458 F.2d at 835.

¹⁴⁸ *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981).

¹⁴⁹ U.S. Dep’t of Transp., Fed. Highway Admin., *NEPA and Transportation Decisionmaking: The Importance of Purpose and Need in Environmental Documents* (1990), <http://environment.fhwa.dot.gov/projdev/tdmneed.asp> (last visited March 2, 2020).

¹⁵⁰ *Id.* (citing 23 U.S.C. § 134).

Rule, FHWA seemingly could not consider mass transit alternatives because mass transit is within the jurisdiction of the Federal Transit Administration (FTA), so the Proposed Rule would deem it technically infeasible.¹⁵¹ It is common sense that mass transit will sometimes be a more cost-effective and environmentally beneficial alternative to expanding highways in cities. Thus, the Proposed Rule could hamper urban development and efficient environmental analysis by creating a presumption that FHWA cannot consider transit alternatives within the jurisdiction of FTA. Similar problems could arise across the federal government.¹⁵²

CEQ justifies the proposal to eliminate extra-jurisdictional alternatives analysis with the claim that “it is not efficient or reasonable.”¹⁵³ This is conclusory. Case law states that such analysis is sometimes reasonable and required.¹⁵⁴ And, as previously discussed, such analysis often promotes efficiency. CEQ fails to consider the efficiency costs of the proposal, contrary to its duties.¹⁵⁵ NEPA expressly contemplates interagency coordination and consultation: “[T]he responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”¹⁵⁶ Because “any environmental impact involved” could implicate alternatives outside the lead agency’s jurisdiction, NEPA’s structure encourages, rather than disfavors, analysis of alternatives that require a federal official to “consult with or obtain the comments” of other agencies. This is consistent with NEPA’s aim of “gather[ing] in one place a discussion of the relative environmental impact of alternatives.”¹⁵⁷ CEQ fails to explain why the Council no longer believes the 1978 Rule reflects the law, contradicting its prior view that the analysis is mandatory if reasonable. CEQ’s efficiency-based justifications for eliminating alternatives outside of an agency’s control are thus arbitrary and capricious.

3. NEPA Requires Agencies to Analyze Alternatives that Do Not Meet Non-Federal Applicant Goals.

CEQ “proposes to clarify that a reasonable alternative must also consider the goals of the applicant when the agency’s action involves a non-Federal entity,” and argues that “these changes would help reduce paperwork and delays by helping to clarify the range of alternatives that agencies must consider.”¹⁵⁸ Such a change could wreak significant environmental harm, because the agency might be unreasonably limited in the alternatives it can consider. For example, if a coal company applies for a coal lease, an agency might be limited to considering alternatives that yield profits for the coal company.

¹⁵¹ Proposed Rule, 85 Fed. Reg. at 1702.

¹⁵² See, e.g., *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1170 (10th Cir. 2002), *as modified on reh’g*, 319 F.3d 1207 (10th Cir. 2003) (FHWA and the U.S. Army Corps of Engineers failed to take a hard look at whether public transit could alleviate the immediacy of the need for highway expansion).

¹⁵³ Proposed Rule, 85 Fed. Reg. at 1702.

¹⁵⁴ *Slater*, 198 F.3d at 869.

¹⁵⁵ See *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding that an agency “cannot tip the scales . . . by promoting [the action’s] possible benefits while ignoring [its] costs”).

¹⁵⁶ 42 U.S.C. § 4332(2)(C).

¹⁵⁷ *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972).

¹⁵⁸ Proposed Rule, 85 Fed. Reg. at 1710.

CEQ's proposal, however, runs contrary to NEPA's language and courts' interpretation of that language. The Supreme Court was "unanimous in concluding that the essential requirement of NEPA is that before an agency takes major action, it must have taken 'a hard look' at environmental consequences."¹⁵⁹ An "action" does not change based on its proponent. In prior guidance, CEQ has recognized that "neither NEPA nor the CEQ regulations make a distinction between actions initiated by a Federal agency and by applicants."¹⁶⁰ Therefore, alternatives analysis must be equally rigorous whether or not the proposed "action" will be carried out by a Federal or non-Federal entity. CEQ's previous guidance stated, "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."¹⁶¹ The Proposed Rule redefines reasonable alternatives to those that, where applicable, meet the goals of the applicant.¹⁶² As explained below, this directly contradicts longstanding case law interpreting NEPA. Further, CEQ's only proffered justification that the change would "reduce paperwork and delays" is an insufficient justification for significantly changing a longstanding policy, rendering the change arbitrary and capricious.¹⁶³

Because NEPA requires alternatives analysis "to the fullest extent possible,"¹⁶⁴ narrowly limiting the analysis to conform exclusively to the applicant's goals would contradict congressional directives. Thus, to the extent that consideration of applicant goals would exclude the analysis of reasonable alternatives, such a narrow alternatives analysis would violate NEPA.

Courts have held that agencies may—and sometimes must—consider alternatives that do not meet a non-Federal applicant's goals. Although there is conflicting authority on the extent to which an agency should consider an applicant's goals in defining reasonable alternatives, courts agree that agencies must always consider the views of Congress, including the mandates set out in NEPA. The Seventh Circuit has held that NEPA requires "evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals."¹⁶⁵ The D.C. Circuit, on the other hand, has held that agencies should consider applicants' goals,¹⁶⁶ but also directs agencies to "consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives."¹⁶⁷ In short, while the D.C. Circuit's interpretation may hew closer than the Seventh Circuit's to CEQ's chosen interpretation, neither case allows agencies to consider applicants' goals at the exclusion of statutorily mandated

¹⁵⁹ *New York v. Kleppe*, 429 U.S. 1307, 1311 (1976) (citing *Kleppe v. Sierra Club*, 427 U.S. at 410, n.21) (internal quotations omitted).

¹⁶⁰ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34266 (1983).

¹⁶¹ Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026-01 (1981).

¹⁶² Proposed Rule, 85 Fed. Reg. at 1730.

¹⁶³ *Id.* at 1710.

¹⁶⁴ 42 U.S.C. § 4332.

¹⁶⁵ *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). *See also* *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997) (agencies should "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.").

¹⁶⁶ *Citizens Against Burlington v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991).

¹⁶⁷ *Busey*, 938 F.2d at 196.

functions, such as analyzing reasonable alternatives to the fullest extent possible.¹⁶⁸ The Proposed Rule mandates consideration of an applicant's wants to the exclusion of other reasonable alternatives, which contradicts NEPA and exceeds CEQ's statutory authority.

D. Substitution of Other Analyses for EIS

CEQ proposes that analyses prepared according to other statutory or Executive Order requirements, such as a Regulatory Impact Analysis (RIA) pursuant to E.O. 12866, "may serve as the functional equivalent of the EIS and be sufficient to comply with NEPA."¹⁶⁹ This functional equivalent exemption contradicts case law and NEPA's policies because it is overbroad.

In *Portland Cement Association v. Ruckelshaus*, Judge Leventhal permitted a NEPA exemption for EPA because "section 111 of the Clean Air Act, properly construed, requires the functional equivalent of a NEPA impact statement."¹⁷⁰ The carveout for EPA's implementation of the Clean Air Act was approved because of EPA's environmentally protective function.¹⁷¹ The functional equivalence doctrine has been almost entirely limited to EPA, and has been denied for agencies tasked with both conservation and development.¹⁷² EPA is an unusual agency because its mission is solely environmental protection. Accordingly, courts have mostly rejected extending any exception for functional equivalency to agencies other than EPA.¹⁷³ In the rare cases where courts have extended the doctrine to other agencies, the justification was an environmentally protective statutory mandate.¹⁷⁴ Because courts have generally refused a functional equivalence exemption for agencies other than EPA, CEQ's proposal to make functional equivalence available to all agencies violates the law.¹⁷⁵

Notably, the functional equivalence exemption was applied only "when the agency's *organic legislation mandated* specific procedures for considering the environment that were 'functional

¹⁶⁸ *Id.* at 199 (emphasis added).

¹⁶⁹ Proposed Rule, 85 Fed. Reg. at 1705.

¹⁷⁰ 486 F.2d 375, 384 (D.C. Cir. 1973).

¹⁷¹ *Id.* at 387 (D.C. Cir. 1973) ("NEPA must be accorded full vitality as to non-environmental agencies"). See also *Env'tl. Def. Fund, Inc. v. Env'tl. Prot. Agency*, 489 F.2d 1247, 1257 (D.C. Cir. 1973), *cert. denied*, 439 U.S. 966 (1978) ("[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient.").

¹⁷² *Portland Cement*, 486 F.2d at 387 (D.C. Cir. 1973) ("NEPA must be accorded full vitality as to non-environmental agencies"). Cf. *Texas Comm. on Nat. Res. v. Bergland*, 573 F.2d 201, 208 (5th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978) (denying the Forest Service a functional equivalence exemption because, "Unlike an agency whose sole responsibility is to protect the environment...[i]ts duties include both promotion of conservation of renewable timber resources... and [ensuring] that there is a sustained yield of those resources available. [T]he Forest Service must balance environmental and economic needs in managing the nation's timber supply.").

¹⁷³ Functional equivalence, NEPA Law and Litig. § 5:16 (2019) ("The courts have generally limited the functional equivalence exemption to programs administered by the EPA.").

¹⁷⁴ See, e.g., *Pac. Legal Found. v. Andrus*, 657 F.2d 829, 835–36 (6th Cir. 1981) (approving a functional equivalence exemption for the Fish and Wildlife Service because its authorizing legislation, the Endangered Species Act, left no discretion in listing endangered and threatened species based on five criteria). Cf. *Douglas Cty. v. Babbitt*, 48 F.3d 1495, 1504 n.10 (9th Cir. 1995) (distinguishing the functional equivalence argument, which maintains that one process requires the same steps as another, from displacement by the Endangered Species Act, when Congress intended to displace NEPA environmental impact analysis with non-discretionary species listing criteria).

¹⁷⁵ See *Bergland*, 573 F.2d at 208.

equivalents' of the impact statement process."¹⁷⁶ The doctrine does not apply unless a statute requires the functionally equivalent analysis.¹⁷⁷ CEQ's proposal to allow the exemption when analysis is prepared pursuant to an Executive Order, rather than statutory design, contradicts case law. CEQ's own guidance from 1997 states, "[T]he specific statutory requirement to prepare an EIS or EA [may] not apply... [due to] a claim by an agency that another environmental *statute* establishes the 'functional equivalent' of an EIS or EA."¹⁷⁸ CEQ has not adequately explained why it believes that Executive Order-based analyses may lawfully substitute for an EIS.

CEQ also ignores the narrow application of the functional equivalence doctrine to scenarios in which another statute provides for proper consideration of the environment. "The rationale for the functional equivalence doctrine is the well-established principle that a 'general statutory rule usually does not govern unless there is no more specific rule.'"¹⁷⁹ In *Portland Cement*, the D.C. Circuit permitted the exemption because Section 111 of the Clean Air Act provides a more specific framework than NEPA for regulating stationary sources' emissions; the court rejected the argument that the interpretation extends to the whole Clean Air Act.¹⁸⁰ Therefore, CEQ's wholesale extension of functional equivalence a broader range of statutes is inconsistent with law.

The Proposed Rule putatively imposes some safeguards, but these qualifiers are unavailing. According to the Proposed Rule:

An RIA, alone or in combination with other documents, may serve the purposes of the EIS if (1) there are substantive and procedural standards that ensure full and adequate consideration of environmental issues; (2) there is public participation before a final alternative is selected; and (3) a purpose of the review that the agency is conducting is to examine environmental issues.¹⁸¹

It is insufficient that environmental analysis is "a purpose" of the review. The agency must be "engaged *primarily* in an examination of environmental questions."¹⁸² The Proposed Rule significantly undermines NEPA's mandate because it creates a much broader exemption than courts have permitted. Considerations of administrative difficulty, delay, or economic cost do not strip NEPA duties of their legally binding importance.¹⁸³

¹⁷⁶ *Id.* at 207 (emphasis added).

¹⁷⁷ See *Andrus*, 657 F.2d at 835–36.

¹⁷⁸ Council on Environmental Quality, Executive Office of the President, *Environmental Justice: Guidance Under the National Environmental Policy Act*, at 16 (1997), available at https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf (last visited Feb. 23, 2020) (emphasis added).

¹⁷⁹ *Am. Trucking Associations, Inc. v. U.S. E.P.A.*, 175 F.3d 1027, 1042 (D.C. Cir.), *opinion modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), and *aff'd in part, rev'd in part sub nom. Whitman v. Am. Trucking Associations*, 531 U.S. 457 (2001).

¹⁸⁰ *Id.* at 1042 (D.C. Cir.) (noting that *Portland Cement* only permitted the exemption for Section 111 of the Clean Air Act, not the entire statute).

¹⁸¹ Proposed Rule, 85 Fed. Reg. at 1705.

¹⁸² *Env'tl. Def. Fund, Inc. v. Env'tl. Prot. Agency*, 489 F.2d 1247, 1257 (D.C. Cir. 1973) (emphasis added).

¹⁸³ *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

E. CEQ Regulations as a Ceiling and a Floor

The Proposed Rule seeks to constrain other agencies from pursuing the statute’s aims “to the fullest extent possible” by forbidding agencies from creating procedures that “impose additional procedures or requirements beyond those set forth in these regulations, except as otherwise provided by law or for agency efficiency.”¹⁸⁴ This type of limit does not exist in the 1978 Rule.¹⁸⁵ NEPA expressly contemplates that agencies play a direct role in developing methods and procedures, as reflected in the statute’s language and case law. CEQ’s attempt to create a ceiling for agency procedure is incompatible with NEPA’s environmental aims and exceeds the bounds of CEQ’s authority.

1. NEPA Expressly Contemplates a Proactive Role for Agencies in Developing Procedures; Thus the Proposed Rule Exceeds CEQ’s Statutory Authority.

The text of NEPA precludes CEQ’s setting a “ceiling” for agency procedures. First, NEPA directs agencies to pursue the statute’s aims “to the fullest extent possible.”¹⁸⁶ In *Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n*, a case predating the 1978 Rule in which the D.C. Circuit interpreted NEPA directly, the Court noted that “[b]eyond Section 102(2)(C), NEPA requires that agencies consider the environmental impact of their actions ‘to the fullest extent possible.’ The Act is addressed to agencies as a whole.”¹⁸⁷ In *North Carolina v. Federal Aviation Admin.*, the Fourth Circuit interpreted Section 102(2) of NEPA to “preclude[] an agency from avoiding the Act’s requirements by simply relying on another agency’s conclusions about a federal action’s impact on the environment.”¹⁸⁸ Both of these cases demonstrate that agencies are ultimately responsible for their own NEPA analyses and must do more than the bare minimum in investigating environmental effects. Given that responsibility for administering NEPA is discharged to all agencies—not only to CEQ—agencies must be allowed to pursue the environmental aims of NEPA to the fullest extent possible, as viewed by the agency. CEQ’s ceiling violates NEPA by preventing agencies from honoring this statutory obligation.

Second, NEPA instructs agencies to develop methods and procedures for the production of Environmental Impact Statements, implying that agencies are intended to take responsibility for their own procedures, even while consulting with CEQ.¹⁸⁹ If agencies delegate authority to states, NEPA clarifies that ultimate responsibility for an EIS’s quality still rests with the federal agencies. In Section 102(2)(D), discussing when state officials may prepare EIS’s, NEPA notes that following the “procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act.”¹⁹⁰ These sections place the ultimate responsibility of enacting

¹⁸⁴ Proposed Rule, 85 Fed. Reg. at 1712–13.

¹⁸⁵ Compare *id.* with 40 C.F.R. 1500.3(a).

¹⁸⁶ 42 U.S.C. § 4332.

¹⁸⁷ *Calvert Cliffs*, 449 F.2d at 1118.

¹⁸⁸ 957 F.2d 1125, 1129-30 (4th Cir. 1992) (citing *Calvert Cliffs*, 449 F.2d at 1122–27).

¹⁸⁹ 42 U.S.C. § 4332(2)(B) (“all agencies of the Federal Government shall . . . identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.”).

¹⁹⁰ 42 U.S.C. § 4332(2)(D).

NEPA on the shoulders of agencies, not only on CEQ. By setting an upper limit on agencies' procedures, CEQ unlawfully disrupts agencies' ability to fulfill their duties under NEPA.

The proposed change also runs counter to the goals of NEPA. While NEPA calls upon agencies to determine if existing practices contain "deficiencies or inconsistencies . . . which prohibit full compliance" with the Act, nowhere does NEPA contemplate or forbid overly thorough analysis.¹⁹¹ And NEPA's strong pro-environmental goals belie a reading placing a ceiling on environmental protection. Even the Proposed Rule notes that NEPA establishes a mandate "to use all practicable means and measures to . . . create and maintain conditions under which man and nature can exist in productive harmony."¹⁹²

In summary, CEQ's "ceiling provision" conflicts with NEPA and is thus illegal.

2. Claiming that the "Ceiling Provision" Is Justified by Cost-Savings Is Arbitrary and Capricious Because It Ignores Forgone Environmental Benefits.

CEQ justifies the ceiling provision by claiming it will "prevent agencies from designing additional procedures that will result in increased costs or delays."¹⁹³ CEQ ignores the forgone benefits of this proposal and thus fails to engage in reasoned decisionmaking.¹⁹⁴

Creating a "ceiling" on environmental protection will likely result in forgone environmental benefits, relative to leaving the current regulations in place. Under the current regulations, an agency has the freedom to employ more protective NEPA procedures than CEQ regulations require. Potential forgone benefits are easy to imagine in the context of the Proposed Rule. As has been discussed in great detail, the Proposed Rule discourages—and contemplates eliminating—consideration of indirect effects, eliminates cumulative impacts analysis, declaws alternatives analysis, and encourages substituting other impact analyses for EIS's. Each of these changes is likely to decrease environmental protection. For example, a federal action that may have previously been considered significant due to substantial indirect effects, may not be considered significant under the new rules. If an agency were allowed to retain its status quo procedures, that agency could realize additional environmental benefits despite a weaker procedural baseline set by CEQ. However, the ceiling provision of the Proposed Rule would bar agencies from taking extra protective measures.

Moreover, it is far from clear that CEQ's proposed ceiling provision would reduce costs or delays in NEPA procedures. Eliminating agencies' right to use more protective procedures could create additional expenses by sparking lawsuits that allege insufficient NEPA analysis.

¹⁹¹ 42 U.S.C. § 4333.

¹⁹² Proposed Rule, 85 Fed. Reg. at 1712.

¹⁹³ *Id.* at 1693.

¹⁹⁴ See *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding that an agency "cannot tip the scales . . . by promoting [the action's] possible benefits while ignoring [its] costs").

By ignoring the costs and focusing solely on the benefits of constraining agency action, CEQ impermissibly “put[s] a thumb on the scale” of its analysis.¹⁹⁵ As discussed above, such lopsided analysis is arbitrary and capricious.¹⁹⁶

F. Other Proposed Changes that Would Violate NEPA

Other proposed changes could permit actions that make project effects look artificially insignificant, limit relevant effects to those in the United States, and allow agencies to avoid collecting essential information. Each of these proposed changes violates NEPA and is an unexplained departure from past agency practice.

1. The Proposal Would Eliminate Important Language on Assessing Significance.

The Proposed Rule seeks to change how the significance of a federal action is determined under NEPA, removing language that prohibits breaking a project into smaller parts for NEPA analyses so as to avoid finding significance. Allowing this kind of gamesmanship not only violates NEPA, but also represents an inadequately explained departure from deep-rooted agency policy, making the change arbitrary and capricious.

The current CEQ regulations state that, “[s]ignificance cannot be avoided by terming an action temporary or by breaking it down into smaller parts.”¹⁹⁷ The proposed rule would remove this statement. CEQ’s proffered explanation for the change is that, “this is addressed in the criteria for scope in § 1501.9(e) and § 1502.4(a), which would provide that agencies evaluate in a single EIS proposals or parts of proposals that are related closely enough to be, in effect, a single course of action.”¹⁹⁸ But CEQ’s explanation does not indicate why the agency deleted the language that prevented circumventing NEPA by breaking an action down into smaller parts in order to avoid a finding of significance. The finding of significance is distinct from an agency’s initial decision whether to prepare an EIS covering proposals that are closely related. While the current regulations’ language deals with the former decision, CEQ’s proposed explanation for deleting the language deals with the latter. Moreover, CEQ’s proffered explanation is silent as to terming an action temporary in order to avoid a finding of significance.

The problems are exacerbated by the elimination of a cumulative effects analysis, as described above.¹⁹⁹ By breaking down fossil fuel projects into smaller parts, for example, greenhouse gas emissions could potentially be made to look small or insignificant, and without a cumulative impacts analysis, these projects’ effects might never be considered together. Such a change would violate longstanding legal precedent and CEQ practice.²⁰⁰ This unexplained change is arbitrary and capricious.

¹⁹⁵ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

¹⁹⁶ *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Aut. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

¹⁹⁷ 40 C.F.R. § 1508.27(7).

¹⁹⁸ Proposed Rule, 85 Fed. Reg. at 1695.

¹⁹⁹ *See* Proposed Rule, 85 Fed. Reg. at 1708, 1729.

²⁰⁰ *See, e.g., Alpine Lakes Protection Soc’y v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); *Blue Ocean Preservation Soc’y v. Watkins*, 754 F. Supp. 1450 (D. Haw. 1991).

2. The Proposal Would Artificially Limit Analysis to National Effects, as Opposed to Global Effects, in Violation of NEPA.

The Proposed Rule purports to limit the environmental effects agencies may consider to those affecting Americans, rather than the world as a whole. CEQ proposes to change the definition of “human environment” to “include the natural and physical environment and the relationship of present and future generations of Americans with that environment.”²⁰¹ CEQ would also eliminate several references to the global effects or the world, substituting instead “national” and “local.” For instance, in proposed 40 C.F.R. § 1501.3, CEQ would change the description of the relevant affected area to read, “national, regional, or local” and clarify that “significance would usually depend upon the effects in the locale rather than in the Nation as a whole.”²⁰² By contrast, the existing regulation states:

the significance of an action must be analyzed in several contexts such as *society as a whole (human, national)*, the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the *world as a whole*.²⁰³

These changes contravene NEPA, and CEQ’s lack of explanation renders the change arbitrary and capricious.

NEPA Section 102(F) states that agencies should “recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.”²⁰⁴ Consistent with this statutory injunction, courts have held that if a transboundary effect is foreseeable, it must appear in NEPA analysis. For example, in the 2010 case *Gov’t of Man. v. Salazar*, the D.C. District Court stated that “NEPA requires agencies to consider reasonably foreseeable transboundary effects resulting from a major federal action taken within the United States.”²⁰⁵ In making this assertion, the Court considered 1997 CEQ guidance persuasive, but not binding, underscoring that the Court was interpreting the NEPA statute, not merely following CEQ guidance.²⁰⁶ Similarly, in a 2017 case, the U.S. District Court for the Southern District of California held that the Department of Energy must take into account the effects in Mexico of both the U.S. and Mexico portions of an electric transmission line that ran across the U.S.-Mexico border.²⁰⁷ The court explained that the “U.S. line’s construction and

²⁰¹ Proposed Rule, 85 Fed. Reg. at 1729.

²⁰² *See, e.g.*, proposed changes to 40 C.F.R. § 1501.3 “Determine the appropriate level of NEPA review”; *see also* Proposed Rule, 85 Fed. Reg. at 1695.

²⁰³ 40 C.F.R. § 1508.27 (emphasis added; italics represent some words struck from proposed rule).

²⁰⁴ 42 U.S.C. § 4332(2)(F).

²⁰⁵ *Gov’t of Man. v. Salazar*, 691 F. Supp. 2d 37, 51 (D.D.C. 2010).

²⁰⁶ *See id.* at 51 n.13.

²⁰⁷ *Backcountry Against Dumps v. United States DOE*, No. 3:12-cv-03062-L-JLB, 2017 U.S. Dist. LEXIS 114496, at *12 (S.D. Cal. 2017).

operation is a proximate cause of the construction and operation of the Mexico line...and any associated environmental impacts” and that “NEPA requires the government to consider the extraterritorial effects stemming from major federal actions (such as the construction and operation of the U.S. Line) undertaken on U.S. soil.”²⁰⁸ To support this proposition, the Court cited NEPA section 102(F).²⁰⁹

Even if CEQ’s proposal to ignore environmental effects were allowed by the statute, the agency would still need to supply an explanation for reversing decades of guidance. CEQ has repeatedly issued guidance urging federal agencies to take both domestic and international effects into account in NEPA analyses. In 1973, CEQ stated the NEPA regulations require “agencies to assess the positive and negative effects of the proposed action as it affects both the national and international environment.”²¹⁰ The Council similarly encouraged consideration of international impacts in 1976.²¹¹ CEQ guidance from 1997 states that agencies “must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States.”²¹² The agency’s longstanding recognition of “indirect effects,” prior to the Proposed Rule, also supports analyzing international effects.²¹³ Moreover, to the extent CEQ’s proposed change seeks to limit the discussion of global climate change effects in NEPA reviews, CEQ issued guidance in 2016 instructing agencies to consider effects to global climate change in their NEPA analyses.²¹⁴ Without providing a “reasoned explanation” for reversing decades of policy, CEQ’s proposed change is arbitrary and capricious.²¹⁵

Many agencies regularly account for international effects in their analysis, especially climate change effects, as such effects are very often the reasonably foreseeable consequence of fossil fuel projects in the United States. Thus, CEQ’s proposal breaks from longstanding agency practice, as well. For instance, the NEPA analyses accompanying BLM’s resource management plans frequently account for national and global emissions,²¹⁷ as do BOEM’s and BLM’s NEPA analyses for fossil fuel lease sales and related approvals.²¹⁸ In BLM’s 2017 NEPA analysis for the King II mine, the agency accounted for greenhouse gas emissions in the United States and

²⁰⁸ *Id.* at *12-3.

²⁰⁹ *Id.*

²¹⁰ 38 FED. REG. 20,553 (1973) (<http://cdn.loc.gov/service/ll/fedreg/fr038/fr038147/fr038147.pdf>)

²¹¹ CEQ’s Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions (Sept. 24, 1976), reprinted at 42 Fed. Reg. 61068 (1976), available at https://www.jstor.org/stable/20691673?seq=1#metadata_info_tab_contents.

²¹² CEQ, Memorandum to Head of Agencies on the Application of NEPA to Proposed Federal Actions in the United States With Transboundary Effects (July 1, 1997), available at https://www.energy.gov/sites/prod/files/2014/08/f18/CEQTransboundaryGuidance_07_01_97.pdf.

²¹³ *Id.* at 2.

²¹⁴ See Council on Env’tl. Quality, Exec. Office of the President, Memorandum for Heads of Federal Departments and Agencies, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Review, 13-14, 16 (2016), <https://perma.cc/QP7E-7PUM>.

²¹⁵ FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009).

²¹⁷ See, e.g., BLM, MILES CITY FIELD OFFICE RMP, MONTANA at 4-17 (2015), available at <https://eplanning.blm.gov/epl-front-office/projects/lup/59042/97931/118176/52Chpt4.pdf>.

²¹⁸ See, e.g., BOEM, COOK INLET PLANNING AREA OIL AND GAS LEASE SALE 244, ALASKA 4-13, 4-26, 4-27, 5-3, 5-27 (2016), available at <https://www.boem.gov/Cook-Inlet-Lease-Sale-244-Final-EIS-Volume-1/> (assessing how emissions affect the “global impacts” of climate change).

Mexico.²¹⁹ And in BOEM’s EIS for the Liberty Development Project Development and Production Plan, the EIS takes into account the global effect of GHG emissions.²²⁰

CEQ’s proposed change is presented without explanation, and without acknowledging its prior, longstanding position that reasonably foreseeable international effects be included in NEPA analysis. This renders the proposed change arbitrary and capricious.

C. The Proposed Rule Impermissibly Weakens the Requirement that Agencies Collect Information Relevant to NEPA Analyses.

While longstanding CEQ regulations require agencies to seek out essential information so long as the costs are not “exorbitant,” the proposed regulations would allow agencies to forgo this information, if the costs are merely “unreasonable.” Diluting agency responsibility to make informed decisions undermines NEPA and is inadequately explained, rendering the change arbitrary and capricious.

The existing NEPA regulations, promulgated in the 1978 Rule,²²¹ provide that “[i]f the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are *not exorbitant*, the agency shall include the information in the environmental impact statement.”²²² Agencies should conduct additional research to fill in essential incomplete information when the costs are not exorbitant, viewing the reasonableness of costs in light of the total usefulness of the information across all relevant applications. For example, in considering whether to adapt a substitution model to study a leasing action’s net contribution to net climate costs and net economic effects, the long-term value of the substitution model in other applications (such as other NEPA analyses) should be considered. CEQ does not explain this proposed change, rendering it arbitrary and capricious.

²¹⁹ BLM, *King II Mine, La Plata County, Colorado* at 81-22 (2017).

²²⁰ BOEM, LIBERTY DEVELOPMENT PROJECT DEVELOPMENT AND PRODUCTION PLAN IN THE BEAUFORT SEA, ALASKA 3-21 (2016), available at <https://www.boem.gov/2016-010-Volume-1-Liberty-EIS/>.

²²¹ 1978 Rule, 43 Fed. Reg. at 55,984.

²²² 40 C.F.R. § 1502.22(a).

III. Conclusion

Taken together, the Council's proposed changes hamstring NEPA in a way that is both illegal and unprecedented. CEQ's proposed changes will undermine agency ability to fulfill obligations under NEPA in one situation after another. The Council does not have authority to promulgate regulations that violate the very statute it is tasked with implementing. Moreover, CEQ's proposed changes depart from a half-century of regulatory policy that began with the Nixon administration and that administrations of both parties have honored for decades. The Council's explanations for these changes are either nonexistent, off-subject, internally contradictory, or incomplete. The Proposed Rule is thus arbitrary and capricious.

Respectfully,

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