



## National Wildlife Federation

National Advocacy Center

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Submitted via Regulations.gov

Mary B. Neumayr  
Acting Chair  
Counsel on Environmental Quality  
730 Jackson Place, N.W.  
Washington, DC 20503

Re: Docket No. CEQ-2018-0001, Advanced Notice of Proposed Rulemaking, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act

Dear Ms. Neumayr:

On behalf of our almost six million members and supporters, the National Wildlife Federation urges the Council on Environmental Quality (CEQ) to withdraw the ANPRM and retain the existing CEQ regulations implementing the National Environmental Policy Act (NEPA). The CEQ regulations establish common sense procedures and definitions that continue to serve the nation well. Changes to the regulations are unnecessary and would create significant inefficiencies and delays by upending decades of well-settled requirements and approaches.

The National Wildlife Federation is the nation's largest conservation education and advocacy organization with almost six million members and supporters, and affiliate conservation organizations in 51 states and territories. The Federation has a long history of working to protect and restore the nation's rich array of natural resources and the fish and wildlife that depend on those resources. We have extensive experience in working with, interpreting, and using NEPA to improve project planning.

The National Wildlife Federation has a vital interest in ensuring that the NEPA environmental review process works well. NEPA is rightfully referred to as the "grandparent" or "Magna Carta" of environmental law. It enshrines the value that federal agencies must broadly consider and evaluate the impacts of their actions on the natural world before deciding whether or how to proceed. As such, NEPA is the fundamental tool for ensuring a proper vetting of the impacts of major federal projects on wildlife, natural resources, and communities; for identifying less environmentally damaging alternatives; and for giving the public a say in federal actions that can have a profound impact on their lives and livelihoods. NEPA improves project planning, including by reducing adverse environmental impacts of federal actions and by improving the quality of federal restoration and other projects.

### Comments

The National Wildlife Federation urges CEQ to withdraw the ANPRM and retain the existing CEQ regulations. CEQ should then undertake a systematic initiative to enforce the existing regulations, and

should use its leadership role to ensure that agencies have the resources, training, and direction they need to properly implement NEPA.

The existing CEQ NEPA regulations were carefully developed with significant public input. These regulations reflect a deep commitment to the democratic process. They ensure that government will consider the impacts of its actions on wildlife, communities, and natural resources, that such impacts will transparently be disclosed, and that the public will be meaningfully involved in the decisionmaking process. The regulations also promote efficiency by establishing a uniform approach to implementing NEPA's important goals and requirements through common sense procedures and definitions that, among other things, timely engage not only the public but other federal, state, tribal and local agencies in the NEPA process. Moreover, as discussed in more detail below, the existing CEQ NEPA regulations effectively address the objectives identified in the many questions posed by the ANPRM.

As a result, changes to the existing CEQ NEPA regulations are unnecessary. Any such changes would also be unwise and potentially unlawful, including because they would **undermine** the efficiency of the NEPA process by upending decades of well-settled requirements and approaches. Additional inefficiencies will arise if litigation is filed to challenge the legality of any such changes or to ensure appropriate interpretation of any such changes.

The National Wildlife Federation fully recognizes that compliance with NEPA could—and should—be improved to protect the nation's vital wildlife resources. However, based on our extensive experience with NEPA, the problems with NEPA implementation are not related to the content of the existing CEQ NEPA regulations. Instead, those problems are driven by a lack of agency compliance with those regulations, lack of resources and training, and in many cases an unwillingness to meaningfully explore and adopt less environmentally harmful approaches. The solution to these problems is not to change the regulations, but to enforce the regulations and provide the funding, resources, training, and direction that agency staff need.

### **A. The Existing CEQ Regulations Effectively Implement NEPA's Important Mandates**

NEPA's clear goals and requirements have been, and continue to be, effectively implemented through the CEQ regulations that are the subject of this ANPRM.

Congress enacted NEPA to “declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” 42 U.S.C. § 4321. Congress further directed that:

“In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may-

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.”

42 U.S.C. §4331(b).

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

To achieve NEPA’s important goals, the statute contains several “action forcing” procedures, most significantly the mandate to prepare an environmental impact statement (EIS) on major Federal actions “significantly affecting the quality of the human environment.” *Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 348 (1989); 42 U.S.C. § 4332 (2)(C). NEPA also establishes clear requirements regarding information that must be addressed, consultation with other agencies, and agency and public review and comment. 42 U.S.C. § 4332

The Supreme Court has found that the preparation of an environmental impact statement promotes NEPA’s broad environmental objectives in two primary ways: “It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Methow Valley Citizens Council*, 490 U.S. at 349.

For decades, these critical mandates have been implemented through the existing CEQ NEPA regulations and a substantial body of federal case law that has co-evolved with those regulations. The existing CEQ NEPA regulations were thoughtfully developed with significant public input to provide a uniform and efficient approach to implementing NEPA. Among other things, these regulations ensure meaningful opportunities to engage the public and other federal, state, tribal and local agencies in the NEPA process, as required by statute.

The CEQ regulations enshrine fundamentally democratic principles into federal decision making—they ensure that the government will consider the effects of decisions on communities and the environment, disclose those impacts to those affected, and give the public an opportunity to meaningfully weigh in on decisions that can have a profound impact on their lives and livelihoods. NEPA’s role in protecting communities has made it the primary mechanism for incorporating environmental justice considerations into government decisions.

The CEQ regulations and federal case-law ensure critical public and expert input and vital transparency that is a fundamental prerequisite for responsible agency action, as recognized by eight past chairs of the Council on Environmental Quality:

“[C]onsideration of the impacts of proposed government actions on the quality of the human environment is essential to responsible government decision-making. Government projects and programs have effects on the environment with important consequences for every American, and those impacts should be carefully weighed by public officials before taking action. **Environmental impact analysis is thus not an impediment to responsible government action; it is a prerequisite for it.**”<sup>1</sup>

Effective environmental reviews expose the true cost of environmentally damaging and ill-conceived proposals, leading to better and far less damaging projects and substantial savings for federal taxpayers. Environmental reviews of water resources projects provide valuable examples of these important benefits. For example:

- Preparation of a supplemental environmental impact statement led the U.S. Army Corps of Engineers (Corps) to save more than 4,300 acres of wetlands that would have been destroyed had the Corps followed its original plan for raising levees along the Mississippi River.<sup>2</sup>
- Environmental review of the proposed Bolinas Lagoon dredging project in California demonstrated that the Corps’ proposal would cause extensive harm to one of the most pristine tidal lagoons in California and was not necessary, saving taxpayers \$133 million.
- The environmental review process exposed the devastating environmental impacts of the Yazoo Backwater Pumping Plant project in Mississippi, prompting the George W. Bush Administration to veto the project. This saved taxpayers more than \$220 million and protected 200,000 acres of wetlands – an area the size of all 5 boroughs of New York City.

Changes to the CEQ NEPA regulations that undermine the effectiveness of the NEPA process or the public’s ability to provide input could wreak havoc on the environment and public safety, as demonstrated by projects planned before NEPA was enacted. For example, prior to the Corps’ pre-NEPA construction of the Mississippi River Gulf Outlet (MRGO) in Louisiana, the U.S. Fish and Wildlife Service raised serious concerns and recommended additional environmental and hydrologic modeling, but the Corps ignored this advice. Repeated concerns raised post-construction were also ignored.

Construction and maintenance of the MRGO destroyed more than 27,000 acres of coastal wetlands and damaged more than 600,000 acres of coastal ecosystems surrounding the Greater New Orleans area

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<sup>1</sup> September 19, 2005 Letter to the Honorable Cathy McMorris, Chair of the Task Force on Improving the National Environmental Policy Act from Russell E. Train (CEQ Chair 1970-1973), Russell W. Peterson (CEQ Chair 1973-1976), John Busterud (CEQ Chair 1976-1977), Charles W. Warren (CEQ Chair 1977-1979), J. Gustave Speth (CEQ Chair 1979-1981), Michael R. Deland (CEQ Chair 1989-1993), Kathleen A. McGinty (CEQ Chair 1995-1998), George T. Frampton Jr. (CEQ Chair 1998-2001), Gary Widman (CEQ General Counsel 1974-1976), Nick Yost (CEQ General Counsel 1977-1981) (emphasis added).

<sup>2</sup> Brief of Plaintiffs-Appellants, United States Court of Appeals for the Fifth Circuit, *Mississippi River Basin Alliance et al v. Lancaster et al.*, Case Number 99-31235, at 7 (January 26, 2000) (the supplemental EIS concluded that the traditional method of construction would destroy at least 11,654 acres of wetlands while the new alternative selected by the Corps would destroy 7,328 acres). The Corps continued to work on critical elements of this project while it prepared the supplemental environmental impact statement.

that are no longer available to help protect New Orleans from storm surges.<sup>3</sup> During Hurricane Katrina, the MRGO funneled and intensified Katrina's storm surge into New Orleans, resulting in devastating flooding in St. Bernard Parish and the lower Ninth Ward. During Hurricane Katrina, the funnel created by the MRGO increased the velocity of the storm surge to almost 7 feet per second, more than twice as fast as the 3-foot-per second velocity of the storm surge traveling over nearby marshes.<sup>4</sup> It also increased the surge height. The 18 to 25-foot-high onslaught of water that hurtled along the MRGO breached floodwalls and leveled many of the MRGO levees,<sup>5</sup> overwhelming both St. Bernard Parish and New Orleans' lower Ninth Ward. Only 52 of the 28,000 structures in St. Bernard Parish escaped unscathed from Katrina. For years, community leaders – including the St. Bernard Parish Council, activists, and scientists had warned that the MRGO was a hurricane highway and called for closing the outlet.<sup>6</sup>

## B. The Existing CEQ Regulations Effectively Promote Efficiency

Due in large part to the existing CEQ NEPA regulations, the vast majority of NEPA reviews are carried out under a very short timeframe. Approximately 95 percent of all projects subject to NEPA are carried out through the categorical exclusion process, which can typically be completed within a few days to a few months. Another four percent of projects are reviewed through environmental assessments, which are typically completed within four to 18 months. Less than one percent of projects are reviewed using the more comprehensive environmental impact statement.<sup>7</sup>

Importantly, however, efficiency requires much more than a speedy NEPA process; it requires that the process successfully achieve the goals of NEPA with little or no waste.<sup>8</sup> The existing CEQ NEPA

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<sup>3</sup> Louisiana State University, Louisiana Coast, and Sea Grant Louisiana, "Closing" the Mississippi River Gulf Outlet, *Environmental and Economic Considerations* available at

[http://www.ccmrgo.org/documents/closing\\_the\\_mrgo.pdf](http://www.ccmrgo.org/documents/closing_the_mrgo.pdf) (last visited September 21, 2005). Maintaining this destructive outlet cost the federal taxpayers more than \$12,600 per vessel per day. *Id.*

<sup>4</sup> Bob Marshall, *Studies abound on why the levees failed. But researchers point out that some levees held fast because wetlands worked as buffers during Katrina's storm surge*, New Orleans Times-Picayune, March 23, 2006 available at <http://www.nola.com/search/index.ssf?/base/news-3/1143101527153500.xml?nola> (last visited March 27, 2006).

<sup>5</sup> Ralph Vartabedian, *Much Wider Damage to Levees Is Disclosed*, Los Angeles Times, September 13, 2005, available at <http://www.latimes.com/news/nationworld/nation/la-na-corps13sep13,0,5962987.story?coll=la-homeheadlines>.

<sup>6</sup> Michael Grunwald, *Canal May Have Worsened City's Flooding*, The Washington Post, September 14, 2005 at A21; Louisiana State University, Louisiana Coast, and Sea Grant Louisiana, "Closing" the Mississippi River Gulf Outlet, *Environmental and Economic Considerations* available at [http://www.ccmrgo.org/documents/closing\\_the\\_mrgo.pdf](http://www.ccmrgo.org/documents/closing_the_mrgo.pdf).

<sup>7</sup> Government Accountability Office, National Environmental Policy Act: Little Information Exists on NEPA Analyses, GAO-14-370 (April 2014) at 8; Congressional Research Service, The National Environmental Policy Act: Background and Implementation (January 10, 2011) available at [https://www.everycrsreport.com/files/20110110\\_RL33152\\_69b27c980f2b1121fd078e3982ac47e9c48d7111.pdf](https://www.everycrsreport.com/files/20110110_RL33152_69b27c980f2b1121fd078e3982ac47e9c48d7111.pdf).

<sup>8</sup> *E.g.*, Merriam-Webster Dictionary (efficient means "productive of desired effects; *especially*: capable of producing desired results with little or no waste (as of time or materials)") available at <https://www.merriam-webster.com/dictionary/efficient>; Cambridge Dictionary (efficiency means "the condition or fact of producing the results you want without waste") available at <https://dictionary.cambridge.org/us/dictionary/english/efficiency>; Oxford English Dictionary (efficient means "achieving maximum productivity with minimum wasted effort or expense") available at <https://en.oxforddictionaries.com/definition/efficient>.

regulations ensure an efficient NEPA process by providing clear and well-settled guidance for advancing NEPA’s fundamental objectives, including:

- (1) Ensuring consideration of the environmental and related social and economic impacts of proposed government actions on the quality of the human environment;
- (2) Analyzing alternatives to an agency's proposed course of action to determine whether there are less environmentally damaging approaches to achieving the project purpose; and
- (3) Ensuring that the public, federal and state agencies, and tribes have the opportunity to meaningfully engage in the NEPA process, including ensuring full consideration of all comments submitted.

The existing CEQ NEPA regulations help federal agencies efficiently achieve these objectives by, among other things:

- Allowing the use of categorical exclusions, environmental assessments, and “findings of no significant impact”;
- Providing for alternative arrangements for complying with NEPA in certain circumstances where “emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations.” 40 C.F.R. 1506.11;
- Emphasizing agency coordination and providing a strong structure to ensure that agency coordination occurs in a concurrent, synchronized, and timely manner;
- Facilitating the use of environmental studies, analyses, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions;
- Setting sensible target page limits, allowing for the setting of time limits, and providing a recommended format to promote consistency and efficiency, while allowing the flexibility needed to address the many different and varied projects subject to NEPA;
- Supporting a robust and effective avenue for public comment;
- Providing authority to focus analysis on significant issues that are relevant to decision makers and the public, and highlighting the importance of utilizing the alternatives evaluation to examine less damaging, and often less costly, approaches to meeting the project purpose; and
- Establishing effective definitions of critical terms in a manner that is consistent with the underlying statute.

The flexibility in the existing CEQ NEPA regulations allow the use of innovative approaches to implementing NEPA, including through the proactive coordination of reviews of complex projects to improve project delivery. For example, under the existing CEQ NEPA regulations, the RESTORE Council effectively coordinated environmental reviews, including by building off existing NEPA analyses where appropriate, to develop their first project list for the Gulf of Mexico region where nearly \$16 billion dollars will be invested in restoration projects over the next 15 years. Similarly, the existing CEQ NEPA regulations have supported cooperation and regular interagency meetings under the FAST-41 permitting dashboard process. These coordination efforts, which are encouraged under the existing CEQ NEPA regulations, have resulted in a more efficient and effective permitting timeline for the Mid-Barataria Sediment Diversion project, the first ecosystem restoration project to be covered under the federal permitting dashboard.

Notably—and contrary to a widely circulated false narrative—the existing CEQ NEPA regulations are not a significant cause of undue delay in project construction. The Congressional Research Service has repeatedly concluded that “there is little data available to demonstrate that NEPA currently plays a



significant role in delaying federal actions.”<sup>9</sup> It has also repeatedly found that “factors ‘**outside** the NEPA process’ were identified as the cause of delay between 68% and 84% of the time.”<sup>10</sup>

The Congressional Research Service has also determined that the NEPA process is not a significant source of delay for federally funded highway projects. Delays in those projects instead typically result from a variety of other factors:

“Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope.”<sup>11</sup>

Delays for Corps of Engineers water resources projects similarly are typically caused by other factors, including severe funding constraints—which have produced a \$100 billion backlog of authorized but unconstructed projects—substantial community opposition, and fundamentally flawed planning.

As noted above, changes to the existing CEQ NEPA regulations will almost certainly **undermine** the efficiency of the NEPA process.

### C. The ANPRM Is Being Driven By A False Narrative

The National Wildlife Federation is deeply concerned that the ANPRM is being driven by the pervasive, but false, narrative that environmental regulations, including those that implement NEPA, create a substantial “burden” on the public and the economy. This false narrative ignores the many, enormous **benefits** that environmental rules and regulation provide to the nation.

For NEPA, this false narrative includes the incorrect claim that NEPA is a primary source of delays in project construction. As discussed in Section B of these comments, this claim has been demonstrably debunked. Robust environmental reviews under NEPA are not a burden. They help protect the public, the environment, the nation’s vital fish and wildlife resources, and the economic well-being of communities across the country.

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<sup>9</sup> Congressional Research Service, The National Environmental Policy Act (NEPA): Background and Implementation, at 26, 28, RL33152 (Jan. 10, 2011) (emphasis added) (these same conclusions were reached in the February 27, 2008, June 7, 2007, and November 16, 2005 versions of this Congressional Research Service Report) (all four versions of the report are available at <https://www.everycrsreport.com/reports/RL33152.html>).

<sup>10</sup> *Id.* (this same conclusion was also included in the 2011, 2008, 2007, and 2005 versions of this report).

<sup>11</sup> Congressional Research Service, The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress, at summary, R42479 (April 11, 2012)(available at [https://environment.transportation.org/pdf/proj\\_delivery\\_stream/crs\\_report\\_envrev.pdf](https://environment.transportation.org/pdf/proj_delivery_stream/crs_report_envrev.pdf).) A 2011 U.S. Chamber of Commerce study entitled *Project No Project* (<http://www.projectnoproject.com/>) supports these findings. The Partnership Project carried out a detailed review of the 350 case studies used by the Chamber of Commerce to develop this report. That analysis revealed that: (1) local opposition in combination with a chronic lack of funding were the primary barriers to project completion; and (2) project delays associated with the NEPA review process were minimal; more than 70% of the 350 projects reviewed were delayed or canceled projects due to reasons **unrelated to** the NEPA process. Local and state opposition was the source of delay for 47.1% of the projects (165 projects). External factors including lack of funding, construction delays, lost bids, lack of project feasibility were the source of delay for 32.9% of the projects (115 projects). Zoning was the source of delay for 4% of the projects (14 projects). Other factors (including NEPA) were the source of delay for 27% of the projects (56 projects).

We are also extremely concerned that the sweeping scope of the ANPRM suggests an intention to fundamentally change the NEPA process to eliminate critical protections enshrined in the regulations. Indeed, the ANPRM is completely unbounded. It opens up the entire set of CEQ NEPA regulations for change and, but for a list of open-ended questions, fails to provide any background information regarding specific problems that the ANPRM is seeking to address.

The genesis of this ANPRM, Executive Order 13777, likewise does not provide any meaningful limitations or guidance. To the contrary, Executive Order 13777 seeks to rescind or revise regulations, policies, and guidance across the federal government to minimize the supposed “burden” of those regulations while ignoring the many, enormous **benefits** that environmental rules and regulation provide to public health and safety, to the environment, and to the economic well-being of communities across the country.

The administration has already taken many steps to eliminate regulatory protections and restrict environmental reviews. For example, last spring, the President revoked CEQ’s guidance for agencies on the consideration of climate change in NEPA reviews, despite the increasingly disturbing evidence of climate impacts such as severe weather events, increasing droughts, and devastating wildlife fires as well as a growing number of court decisions clearly directing agencies to consider climate impacts under NEPA. Agencies such as the Bureau of Land Management, Department of Transportation, Department of Energy, and others have also issued notices stating that they would review their NEPA regulations in a manner that appears intended to help project sponsors avoid NEPA compliance rather than improving NEPA compliance to benefit the public.

Congress has also instituted a number of highly significant changes to the NEPA implementation process for a number of federal agencies. For example, despite the many benefits of comprehensive environmental review, and despite extensive opposition from the conservation community and leading experts, Congress enacted significant changes to the NEPA review process for certain agencies in the Water Resources Reform and Development Act (WRRDA) of 2014, the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (Map-21), and the Fixing America’s Surface Transportation Act (FAST Act). These provisions, however, have yet to be fully implemented and evaluated. Making additional changes to the CEQ NEPA regulations will add to the regulatory uncertainty created by these legislative changes, resulting in potentially significant delays in project delivery and improper limitations on environmental reviews and public input.

The existing CEQ NEPA regulations are sound and well-reasoned. These regulations effectively implement NEPA and provide vital, tangible benefits to the nation. The National Wildlife Federation urges CEQ to withdraw the ANPRM and abandon efforts to rewrite these regulations.

### **Answers to Questions Raised in the ANPRM**

#### **NEPA Process:**

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

No. CEQ’s direction since promulgation of the regulations has consistently stressed the need for environmental review processes to run concurrently rather than sequentially with other processes. This makes sense not only from a timing perspective but because having analyses required by other laws



such as the Historic Preservation Act and the Clean Water Act available results in a better, more informative EIS. The current regulations and guidance places ample emphasis on agency coordination and provides a strong structure to ensure that agency coordination occur in a concurrent, synchronized, and timely manner.

CEQ's regulations specifically require that "to the fullest extent possible" federal agencies "[i]ntegrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively," 40 C.F.R. 1500.2(c), and that they prepare draft EISs "concurrently with and integrated with environmental impact analyses and related surveys and studies" required by other environmental laws. Id. § 1502.25. The regulations furthermore require that agencies "[i]ntegrate NEPA requirements with other environmental review and consultation requirements), Id. § 1500.4, and "combin[e] environmental documents with other documents". Id. § 1500.5(i).

Other provisions also strongly encourage reviews and decisions that are concurrent, synchronized, timely, and efficient. For example, agencies should "[i]ntegrat[e] the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay", Id. § 1501.1(a), and "[e]mphasiz[e] cooperative consultation among agencies before the environmental impact statement is prepared, "[p]rovid[e] for the swift and fair resolution, "of lead agency disputes" as well as "[p]rovide a mechanism for putting appropriate time limits on the environmental impact statement process." Id. § 1501.1 (a)(b) and (c). The regulations further provide that: "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." Id. § 1501.2. To promote cooperation and efficiency, the regulations also require that each agency "circulate[] and review[] environmental documents and appropriate analyses at the same time as other planning documents.", Id. § 1501.2(b), and agencies shall "commence [the] NEPA process at the earliest possible time." Id. § 1501.2(d)(3).

We acknowledge that in practice, agencies do not always follow the letter or the spirit of the regulations. However, the answer to this problem – when it arises – is not to change the regulations, but rather to ensure better agency training, practice, and allocation of resources to ensure that concurrent, synchronized, timely, and efficient reviews and authorizations occur. There is no rational basis to revise the regulations for this purpose.

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

No. The regulations provide an effective framework for facilitating the use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions. The regulations call for agencies to "incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action." § 40 C.F.R. § 1502.21. Thus, relevant studies can and should be incorporated by reference regardless of whether they were prepared for the specific review so long as they are made public – a requirement consistent with sunlight role of NEPA. Id. The regulations also allow an agency to adopt a federal draft or final environmental impact statement or portion thereof if "the actions covered by the original environmental impact statement and the

proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it [for comment] except as a final statement." Id. § 1506.3(b). Also, a cooperating agency "may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied." Id. § 1506.3 (c). The regulations further allow that "[a]ny environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." Id. § 1506.4.

These regulations, if implemented properly, quite effectively allow for use of studies, analyses, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions. They provide the public and other agencies with the ability to track and understand what analyses are being used in the decisionmaking process. They are used by many agencies successfully and provide a sound framework for use of such documents.

The question also includes a reference to "decisions." We interpret that to mean decisions related to the implementation of an earlier environmental review process that resulted in a determination of adequacy. We oppose any revision of the regulations that would waive or exempt a lead federal agency from independently evaluating and taking responsibility for an environmental document being used for compliance with NEPA. In fact, we believe that doing so would likely be unlawful given directives in the statute that require federal officials to "independently evaluat[e]" such documents. E.g., 42 U.S.C. § 4332(D)(iii).

There is not a rational basis to revise the regulations for the purpose raised in this question.

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

No. The regulations provide an effective and adequate way to optimize interagency coordination of environmental reviews and authorization decision. This includes the designation of a lead agency and cooperating agencies, with clear obligations outlined for all involved agencies, as well as the ability for states, tribes, and local governments to participate effectively. See 1501.5 (lead agencies); 1501.6 (cooperating agencies, where provisions provide for both staff and funding support from the lead agency); 1501.7 (scoping).

It is worth noting that interagency coordination of review and comments under NEPA often gets blamed for delay attributable to other issues. The limited information available suggests that a number of federal projects have indeed been delayed or stopped for reasons other than NEPA such as lack of funding, changes in the proposal by applicants, applicants assessments that the project is no longer desirable, opposition from citizens and state and local governments. See, e.g., 2014 report, Little Information Exists on NEPA Analysis (GAO-14-369). The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress", CRS 7-5700, R42479, April 11, 2012 (<https://www.gao.gov/assets/670/662543.pdf>).

There is not a rational basis to revise the regulations for this purpose.

### ***Scope of NEPA Review:***

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

No. The regulations, provide for the ability of lead agencies to set reasonable time limits and page limits for a NEPA review process. 40 C.F.R. §§ 1501.7 (b) (allowing the lead agency to set time limits for the scoping process); 1501.8 (allowing the setting of time limits); 1502.5 (timing for EIS); 1502.7 (page limits for EIS). The regulations also establish a standard and appropriate recommended format that can be adjusted as needed so long as basic components are included to ensure that adequate information and a meaningful public review can occur. *Id.* § 1502.10.

Thus, the regulations sensibly and properly set page limits, allow for the setting of time limits, and provide a recommended format that allows for consistency and efficiency, but also the flexibility needed to address the many different and varied projects that agencies must contend with under NEPA. A one size fits all approach will lead to poor and inadequate analyses, rushed processes that lead to unsatisfactory results, and more litigation as agencies stumble to poor conclusions. Such inflexible timelines also impede meaningful public participation, particularly on complex or controversial projects where public education, input, and meaningful agency response can and should take time to ensure that all issues are properly addressed.

The current regulations, if properly followed, will quite adequately enable adequate setting of page and time limits while enabling meaningful review. There is not a rational basis to revise the regulations for this purpose.

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

No. CEQ regulations and guidance already speak to this adequately, and if followed, significant issues should be identified and discussed in all NEPA analyses. For example, the regulations state that agencies should, early in the process, “[i]dentify environmental effects and values in adequate detail so they can be compared with economic and technical analyses.” 40 C.F.R. § 1501.2(b). When it is determined that an EIS is needed, the regulations have an effective process for identifying which issues are significant and which are not. This starts with the scoping process, which should be used to “identify significant environmental issues deserving of study” as well as “insignificant issues” so as to “narrow[] the scope of the environmental impact statement process.” *Id.* § 1500.4(g); see *id.* § 1501.7. Once the decision to prepare an EIS is made, the regulations provide for a broad scoping process early on to “[d]etermine ... the significant issues to be analyzed in depth in the environmental impact statement” as well as “[i]dentify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review.” *Id.* § 1501.7(a).

The regulations also call for focusing “on the issues that are truly significant to the action in question, rather than amassing needless detail,” *id.* § 1500.1(b), reducing the accumulation of extraneous background data, *id.* §1500.2(b), and using the scoping process to identify significant issues and emphasize insignificant issues, *id.* § 1501.7. The regulations also include the often overlooked regulation mandating clear writing and appropriate graphics, *id.* § 1502.8, mandating professional integrity of analyses, *id.* §1502.24, and all associated CEQ guidance and direction.

If properly implemented, these provisions provide for surety that significant issues will be identified and analyzed. There is not a rational basis to revise the regulations for this purpose.

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

Public participation and public involvement are at the heart of the NEPA process. The current regulations and supporting case law have for years supported a robust and effective avenue for the public to weigh in on projects that impact their environment, their lives, and how their tax dollars are spent. Section 1506.6 generally provides a sound framework for public involvement in NEPA – one that has worked and, if followed, continues to work well.

We do acknowledge that there may be ways to broaden and strengthen public involvement and we urge greater public involvement as a practice. This is particularly important for tribes and environmental justice communities that often have not been provided meaningful opportunities and notice to engage in the NEPA process for projects that have profound effects on their health, safety, environment, and well-being. We also recommend that agencies adopt a standard, 30-day minimum comment period for all environmental assessments to allow the public to engage in these important reviews in a more meaningful and predictable way. We also believe that agencies should structure comment periods to best accommodate technological advances as well as to ensure that individuals who do not have access to the internet can review materials and provide comment. This is important as research shows that many Americans, particularly lower income Americans who are most directly impacted by many projects, rural Americans, and elderly Americans, do not use or have convenient access to the internet.

However, such changes in practice do not require regulation changes, but instead can and should be done under the existing regulations. There is no rational basis to revise the regulations for this purpose.

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

The below definitions are sound, based firmly in the statute and case law, and have and continue to provide strong guidance in carrying out NEPA. They also are well understood by federal agencies, project proponents, NEPA practitioners, and many other stakeholders who engage in the NEPA process.

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

The current regulations comprehensively and effectively define these terms in a manner that is consistent with the underlying statute. For example, for the term “significantly” (40 C.F.R. § 1508.27), the regulations instruct agencies to look at the context and intensity of actions. The regulations then give clear and effective guidance on what agencies need to look for in evaluating both context and intensity. The definition is both comprehensive and specific, and is aided by specific agency guidance that gives further clarity to determining significance for actions taken by that agency. Similarly,

“effects,” “cumulative impacts,” and “scope” are defined in a clear, concise manner that provides agencies ample clarity to determine a project’s impacts in a manner that ensures effective, comprehensive, and timely reviews consistent with the statute. Indeed, if properly followed, the regulations’ definitions of direct, indirect, and cumulative impacts (id. § 1508.7 and § 1509.8) ensure the best and appropriately comprehensive and thorough considerations of impacts a given project might have, as NEPA requires.

The above terms are all comprehensively and effectively defined in a manner that is consistent with the underlying statute. Their use and applicability is, if anything, more apt today than when they were promulgated given that they are now supported by decades’ worth of case law and agency guidance to clarify their meaning and scope. None of these terms need to be revised, and doing so would create uncertainty by potentially undermining the clear meanings and interpretive case law that supports them, and by undermining the intent of NEPA, which these definitions support. There is no rational basis to revise these important terms.

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

The below definitions are also sound, based firmly in the statute and case law, and have and continue to provide strong guidance in carrying out NEPA – indeed they give shape to some of the most important aspects of NEPA. They are well understood by federal agencies, project proponents, NEPA practitioners, and many other stakeholders who engage in the NEPA process.

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

There is no rational basis for added definitions for the above terms. The purpose and need and examination of alternative are key and interlinked steps in the NEPA process. The instructions in the regulations that the alternatives be “reasonable” and help “avoid or minimize adverse effects of these actions upon the quality of the human environment” give agencies meaningful guidance on actions as disparate as moving people around a metropolitan area or establishing core agency regulations to implement a new program or initiative. 40 C.F.R. § 1500.2(e) and § 1502.1.

This language is aided by decades of established case law that gives additional clarity to the meaning of these terms that help ensure that meaningful NEPA reviews occur. For instance, case law has explained that the purpose and need will be judged under a reasonableness standard and “[a]gencies are afforded considerable, although not unlimited, discretion to define the purpose and need of a project,” *Northwest Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175, 1185 (W.D. Wa. 2005) (citation omitted). However, “[b]ecause the purpose and need defines the range of alternatives, an agency ‘cannot define its objectives in unreasonably narrow terms.’” *Sierra Club v. U.S. Dep’t of Transp.*, 310 F.Supp.2d 1168, 1192 (D. Nev. 2004) (citing *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9<sup>th</sup> Cir. 1997)). The Agencies must also analyze a “no action” alternative and an EIS must “[i]nclude the alternative of no action.” 40 C.F.R. § 1502.14(d). Thus, case law has struck a balance between deferring to the agency on the reasonableness of the purpose and need, so long as the purpose and need ensures a meaningful range of alternatives is considered. The evaluation of

alternatives is one of the most important and informative aspects of NEPA and restricting it would inevitably lead to poorer decision-making, less transparency, waste, and greater environmental harm.

Likewise, the term “reasonably foreseeable” is an essential component of the NEPA cumulative impacts analysis. Id. § 1508.7. This term appropriately affords the agency ample discretion to determine what is reasonable to foresee and what is not, as what is or is not reasonably foreseeable will likely vary from project to project. A reasonableness standard – which qualifies both alternatives that need to be examined and the foreseeable future actions which must be considered in looking at cumulative impacts – is backed by ample case law to guide the agency. This standard affords the agency a substantial degree of deference to determine on a case-by-case basis what is reasonable and what is not, but also holds the agency accountable to the underlying law and the facts. With a variance in projects and project scopes, a one-size fits all approach would inevitably have the effect of limiting review in some instances, and perhaps unnecessarily expanding it in others. The current regulations, with underlying case law, work well.

Furthermore, the term “trivial violation” only appears in reference to CEQ intentions regarding causes of action (“it is the Council’s intention that any trivial violation of these regulations not give rise to any independent cause of action.”). It should be the goal and duty of agencies to be in full compliance with the law, and defining areas where compliance is not mandated is an invitation for an agency to cut corners which will result in poor environmental reviews and unnecessary and avoidable environmental harm.

These definitions should not be changed, nor is there a rational basis for doing so.

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

Again, the below definitions are sound, based firmly in the statute and case law, and have and continue to provide strong guidance in carrying out NEPA. They are well understood by federal agencies, project proponents, NEPA practitioners, and many other stakeholders who engage in the NEPA process.

- a. **Notice of Intent;** – *no*
- b. **Categorical Exclusions Documentation;** – *no*
- c. **Environmental Assessments;** – *no*
- d. **Findings of No Significant Impact;** – *no*
- e. **Environmental Impact Statements;** – *no*
- f. **Records of Decision;** – *no*
- g. **Supplements** – *no*

**Notice of Intent** – No. This is a straightforward provision that provides basic information and notice of agency action to prepare an EIS.

**Categorical Exclusions Documentation** – We agree with CEQ’s observations in its guidance on “Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act” that agencies should utilize information technology to provide the public with access to information, including information about the use of categorical exclusion, but do not believe that requires the regulations to be changed. We urge agencies to follow this guidance and do a better job of providing access to information regarding documentation of categorical exclusions.



**Environmental Assessments** – In practice, public involvement for EAs varies a great deal. The regulations state that the process “shall involve environmental agencies, applicants and the public to the extent practicable” in the preparation of EAs. 40 C.F.R. § 1501.4(b). However, the public is rarely involved in these processes. We urge greater public involvement as a practice, but do not suggest regulatory changes at this time. In order to ensure adequate public participation, we recommend agencies adopt a standard, 30-day minimum comment period for all EAs. This can and should be done under existing regulations. There is no rational basis to change this provision.

**Findings of No Significant Impact** – The provision (40 C.F.R. § 1508.13) concerning findings of no significant impact is clear and reasonable and there is no rational basis to change this provision.

**Environmental Impact Statements** – This definition (40 C.F.R. § 1508.11) is straight forward and references directly back to the Act, and there is no rational basis to change this provision.

**Records of Decision** – The provision regarding issuing a record of decision in cases requiring an EIS is clear, comports with the statute, and ensure, if followed, that adequate information is provided to the public. There is no rational basis to change this provision.

**Supplements** – The provision (40 C.F.R. § 1502.9(c)) provides clear instructions to agencies on when they should supplement EISs. As with all the NEPA regulations, we recommend more robust compliance with this provision and applicable case law to ensure that supplemental reviews are carried out where necessary and appropriate. There is no rational basis to change this provision.

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

No. Section 1502.5 sets forth a rational structure for the timing of preparation of an EIS. The provision’s stress on preparing an EIS early so it can “serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made” is crucial to ensuring NEPA’s role as a “look before you leap” statute is fulfilled. There is no rational basis to change this provision.

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

No. It is, and should be, the ultimate responsibility of the agency preparing documents and assessments under NEPA to ensure they are accurate and objective and result in a thorough and proper review process. The current regulations, if properly enforced, allow for information to be submitted by an applicant but require that “[t]he agency shall independently evaluate the information submitted and be responsible for its accuracy.” 40 C.F.R. § 1506.5(a). Likewise, the practice of having environmental impact statements prepared by an outside entity is common and acknowledges the time and resource limitations of agencies. It is fitting that the regulations make clear that if the applicant prepares an environmental assessment, the agency “shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.” Id. § 1506.5(b). Where an environmental impact statement is required, the current regulations provide that the agency, not the applicant, choose the contractor and that “[c]ontractors shall execute a disclosure statement prepared

by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project” and that “[i]f the document is prepared by contract, the responsible federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents.” Id. § 1506.5(c).

While there is valid concern about conflicts of interest in regard to the agency use of contractors and applicant materials, these provisions, if strictly adhered to do not need to be revised and absolutely need to remain as strong as they are. We also believe that the more agencies conduct review processes themselves, without reliance on applicants and third parties, the better. However, there is no rational basis to revise these regulations.

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

No. Programmatic NEPA reviews and tiering (Section 1502.20) can be, if properly used, an effective way to achieve comprehensive environmental review of major programmatic initiatives that need to be examined holistically or related subsequent actions. However, it is important that these reviews be used in a clear and consistent manner and that promises to prepare analyses down the road are followed through on. That said, the regulations are sufficient and should not be changed, nor is there a rational basis to do so.

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

No. This provision is, as the regulations state, the heart of the NEPA analysis. The statute calls for a consideration of alternatives, stressing its importance as NEPA is not to just be an accounting of the impacts of something proposed, but an examination of other ways to meet a purpose and need that could have fewer impacts and often lower economic costs. The regulation (40 C.F.R. § 1502.14) regarding alternatives has, since its promulgation, been central in ensuring that agencies rigorously explore reasonable alternatives and make informed choices. It is thorough and effective and should not be changed. Altering it would almost certainly weaken NEPA and have a deleterious impact on wildlife and the environment by allowing agencies to avoid adequately and rigorously exploring less impactful ways to meet the purpose and need and to avoid asking the critically important and basic question of whether no action would be a wiser course of action.

We also oppose changes to Section 1506.1 regarding limitations on actions during the NEPA process, which is integral to the integrity of the alternatives process. The regulation already allows the development of plans, designs or performance of other work necessary to support compliance with other legal requirements. Allowing additional work to be done on a preferred alternative would seriously eviscerate the value of the NEPA review and alternatives analysis in actually influencing the agency’s decision.

There is no rational basis to revise these regulations.

**General:**

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

There are some references that are out of date. The references to EPA's publication of the 102 Monitor in § 1506.7(c) and in § 1506.6(b)(2) is obsolete since EPA no longer issues that particular publication.

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

New and existing technologies can and should be used to both make the NEPA process more efficient and to increase opportunities for public involvement. However, regulatory changes are not needed to achieve this, and the current regulations do not impede any effort by agencies to improve their use of technology and integrate new technologies. We certainly encourage agencies to appropriately use technology to improve the NEPA process, and to continue to open doors for public involvement access (without closing other opportunities for members of the public who may not have access to certain technologies, including notably access to the internet or access to high speed internet). But these changes need not involve regulatory changes. In fact, given the rapid pace of technological change, making specific changes based on current technology would likely mean that such regulations would go out-of-date quite quickly. There is not a rational basis to change the regulations to reflect new technologies.

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

No. CEQ regulations and guidance already provide for and encourage combining NEPA documents with other relevant decision documents. For example, the requirements for a Record of Decision can and should be integrated into the final preamble for a final rule. There is not a rational basis to change the rules to promote coordination of environmental review and authorization.

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

No. There is not a rational basis to change the regulations for this purpose. Such improvements, to the extent they are necessary, can be adequately made under existing regulations by promoting better training, additional resources, and leadership on the importance of NEPA compliance.

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

We support providing tribal governments the same status as state or local agencies, including the ability to be designated as a cooperating agency, and for accounting for the fact that many Native Americans do not live on reservations and that tribal interests extend beyond reservation lands.

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

No, and we do not agree with the underlying premise of this question which appears to suggest that NEPA is a burden and not a benefit to the public. We do not believe there is a rational basis for changing regulation on this basis. The current regulations have multiple provisions that reduce delays, including an entire provision (40 C.F.R. §1500.5) devoted solely to reducing delay.

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

No. CEQ has strong guidance on “Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact” and we encourage agencies to follow that guidance and the regulations on using mitigation to arrive at FONSI.

### Conclusion

The National Wildlife Federation urges CEQ to withdraw the ANPRM. Instead of considering or conducting a rewrite of the CEQ NEPA regulations, CEQ should instead undertake a systematic initiative to enforce the existing regulations. CEQ should also use its leadership role to ensure that agencies have the resources, training, and leadership needed to properly implement NEPA.

Sincerely,



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