



**BEFORE THE COUNCIL ON ENVIRONMENTAL QUALITY**

**AND**

**THE ENVIRONMENTAL PROTECTION AGENCY**

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**PETITION TO HARNESS THE FULL POWER OF THE  
NATIONAL ENVIRONMENTAL POLICY ACT  
TO ADDRESS THE CLIMATE AND EXTINCTION CRISES,  
TO ENSURE ENVIRONMENTAL JUSTICE  
AND RESTORE ENVIRONMENTAL QUALITY**

**February 1, 2023**

*Submitted By*

**The Center for Biological Diversity**

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

The Honorable Michael Regan  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Dear Chairwoman Mallory and Administrator Regan,

We hereby petition you to comprehensively strengthen the regulations that implement the National Environmental Policy Act to address the climate crisis and the many other environmental challenges confronting the United States, and to fully address the continuing environmental injustices plaguing so many disproportionately impacted communities across this country.

In 2020, the previous administration gutted the regulatory framework that implements the National Environmental Policy Act, marking one of the most significant giveaways to polluters and other special interests. While the Biden administration has restored a few of the most critical safeguards from the pre-2020 regulations, far too many of the harmful changes enacted by that administration still remain in place.

Restoring the 1978 status quo in the Biden administration’s “Phase I” regulatory reversal may stem some of worst damages caused by the previous administration, but those changes will not make a dent in slowing the climate emergency we face, address the global extinction crisis, or even begin to address long-standing environmental injustices. More worrying still, at the current pace, it is highly unlikely the Biden administration would be able to complete any “Phase II” regulations before the end of the 2024, putting at risk this stated objective of the administration. This petition seeks to spur action on truly progressive and bold policies that will empower the National Environmental Policy Act to address the greatest challenges our nation and planet have ever faced.

The National Environmental Policy Act of 1969 (“NEPA”) aspired towards the day when every agency within the federal government would “encourage productive and enjoyable harmony between man and his environment” and promote “efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”<sup>1</sup> NEPA sought to address the “worldwide and long-range character” of environmental challenges, improve foreign relations, and strengthen the policies of every agency of the government to finally address the “profound impact of man’s activity on the interrelations of all components of the natural environment.”<sup>2</sup>

Despite this ambitious goal and clear purpose, NEPA has never realized its full potential. A few, throw-away musings from a 1989 Supreme Court opinion that NEPA was merely “a procedural statute” that “does not mandate particular results or substantive outcomes.”<sup>3</sup> Despite this mere dicta, litigants, courts, and agencies seized on this sentence and began a long process to hollow

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<sup>1</sup> 42 U.S.C. § 4321.

<sup>2</sup> 42 U.S.C. § 4331.

<sup>3</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

out NEPA and its environmental impact review process turning it often into a paperwork-heavy rubber stamp that has greenlighted an uncountable number of environmentally destructive projects to the detriment of countless communities across this nation.

Special interests, industry front groups, and many Republican members as well as some Democratic members of Congress, have further chipped away at NEPA. Since 2017 alone, more than 300 pieces of legislation have sought to weaken NEPA. These attacks continued even in the recently passed Infrastructure Investment and Jobs Act, the Inflation Reduction Act, and Senator Manchin’s so-called Building American Energy Security Act. This constant political pressure has encouraged agency non-compliance with NEPA, discouraged public participation, and tilted the scales in favor of the polluting industries. In short, most federal agencies routinely make poor decisions under NEPA that harm the environment rather than making better decisions that are environmentally protective.

It does not have to be this way.

When Congress passed the National Environmental Policy Act, it never intended the law to be a procedural inconvenience with no teeth. Congress clearly desired NEPA to push agencies towards *better* decisions — decisions that heal the environmental damage all around us and put this nation on a more sustainable path. NEPA was never intended to be agnostic towards environmental injustice or the ravages of the climate crisis we face nearly every day.<sup>4</sup>

Federal agencies can change their minds, and strengthen their regulations even if the Supreme Court has previously spoken on an issue.<sup>5</sup> It is therefore time for the Biden administration to reject the Supreme Court’s decades of indifference and develop a set of NEPA safeguards that are not “merely procedural” but instead require agencies to tip the scales in favor of protecting our climate, address environmental justice and begin restoring our degrading environment and declining wildlife all around us.

Therefore, we petition the Council on Environmental Quality and Environmental Protection Agency to complete a comprehensive rework of the NEPA regulations and implement powerful NEPA regulations that would encourage and incentivize every federal agency to adopt the environmentally beneficial alternative when considering a course of action, rather than the current approach that, more often than not, results in substantial environmental harm.

If a proposed federal agency action would worsen the climate crisis, exacerbate existing environmental injustice, perpetuate new environmental injustices, or will cause significant impacts on the human environment, then the agency should be strongly discouraged from being allowed to proceed with such harmful actions. NEPA must guide the way towards *better* agency decisions that achieve the national goal of living in productive harmony; otherwise, the climate crisis will wreak devastation for future generations.

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<sup>4</sup> See, e.g., 40 C.F.R. § 1500.1 (1978) (“Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”).

<sup>5</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 973 (2005).

Our proposed regulatory text below defines key areas where NEPA regulations have previously been silent, including defining environmental injustice, climate integrity, and environmental justice. The proposed text defines what it means to restore and maintain environmental quality — the overarching goal set forth by Congress in NEPA over 50 years ago. The proposed regulations require agencies to avoid exacerbating environmental injustice or worsening the climate crisis and eliminate the shield of agency deference that have long protected the most egregious projects from meaningful accountability in the courts. The petition also reduces the egregious abuses of categorical exclusions and inappropriate use of cursory environmental assessments. Finally, this petition undoes all of the counterproductive constraints placed on federal agencies by the Trump and Reagan-era NEPA regulations.

## **I. Legal and Factual Justification for Requested Regulatory Language**

The fundamental purposes that Congress envisioned for NEPA are far more urgent today than they were in 1970:

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.<sup>6</sup>

To achieve these purposes, Congress set forth the policy goals of NEPA as follows:

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and *recognizing further the critical importance of restoring and maintaining environmental quality* to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.<sup>7</sup>

While it is certainly clear that NEPA encompasses numerous policy goals and purposes, it cannot be denied that Congress intended NEPA to prevent or eliminate damage to the environment and to create mechanisms for both maintaining environmental quality and to restore environmental quality. As Congress explained when it passed the Act in 1970: “The costs of air and water

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<sup>6</sup> The National Environmental Policy Act of 1969, as amended. 42 U.S.C. § 4321.

<sup>7</sup> 42 U.S.C. § 4331.

pollution, poor land-use policies and urban decay can no longer be deferred for payment by future generations. These problems must be faced while they are still of manageable proportions and while alternative solutions are still available.”<sup>8</sup>

Unfortunately, federal agencies failed to face these problems when they were manageable and better alternative solutions were available. Across the government, federal agencies routinely approve thousands of projects every year that cause substantial environmental harm and degrade environmental quality, including projects that exacerbate the climate crisis, worsen environmental injustices and push species towards extinction.

One of the overarching reasons why NEPA has become increasingly toothless over time stems from the disastrous dicta contained in the Supreme Court case *Robertson v. Methow Valley Citizens Council*. In this case, the Supreme Court was asked to rule as to whether a particular Environmental Impact Statement regarding a ski resort in Washington required a fully developed mitigation plan and must also include a “worst case” analysis. Rather than ruling only on the specific questions presented to the it, the Supreme Court instead decided to take a wrecking ball to NEPA in its entirety for no apparent reason other than to satisfy their own agenda. In non-binding dicta only, the Court stated that NEPA “merely prohibits uninformed — rather than unwise — agency action.”<sup>9</sup> Of course, following this twisted logic to its conclusion, it would also be the case that NEPA would not promote efforts to prevent the complete extinction of any particular species, it would not prevent the collapse of society due to climate change, and it would not prohibit any racist policies designed to shift pollution to communities of color or to Tribal nations. In short, the Supreme Court believed that NEPA permitted the exact things that Congress sought to prevent when passing the law.

The Supreme Court was clearly wrong when it stated that the only purposes of NEPA were to ensure that agencies take a “hard look” at the environmental impacts of their actions, because it is impossible for an agency to take a “hard look” at an environmental problem if it knows that it can simply choose the path it always wanted to even if it results in substantial harm. And it is equally false that NEPA will ensure public participation when all federal agencies know that they can short-circuit the process at any time through categorical exclusions, environmental assessments, or padding the record of an environmental impact statement and ignore the pleas of those that legitimately object to an environmentally harmful project. NEPA should also promote efforts which will *prevent* agency decisions that are incompatible with a livable biosphere, a stable climate, and a just and equitable society.

Fortunately, the dicta in the *Methow Valley* decision can be tossed in the dustbin of history if the Biden Administration chooses to do so. The Supreme Court has held, as an actual matter of law in the *Brand X* case, that any federal agency can, under certain circumstances, develop new regulations even when they disagree or even contradict a ruling from a federal court, even the Supreme Court.<sup>10</sup> As the Court explained in *Brand X*, under longstanding rules of statutory interpretation and judicial review, when a statutory provision is ambiguous, a federal agency can interpret the meaning of that statute and develop regulations to implement it. If a federal court

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<sup>8</sup> S. Rep. No. 91-296, at 5.

<sup>9</sup> *Robertson v. Methow Valley Citizens Council*,

<sup>10</sup> *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

reviews that interpretation, as long as the interpretation of the ambiguous statutory provision is rational, then the agency interpretation should be afforded deference and upheld by the courts.<sup>11</sup> This rule remains true even where a court previously ruled that an ambiguous statute should be interpreted in a different manner. Under the *Brand X* decision, the CEQ is free to disregard a past judicial opinion regarding any ambiguous provision of NEPA and develop regulations that do not agree with the court's prior interpretations.

Importantly, since the principle that NEPA is “merely procedural” was only dicta in the *Methow Valley* case, the CEQ is certainly free to disregard it and other court opinions that have sought to curtail the purpose of the law and propose much stronger regulations that interpret NEPA as Congress clearly intended — as a law designed to restore environmental quality and prevent environmental degradation.

Under *Brand X*, the CEQ is free to interpret and give clearer meaning to key statutory terms in NEPA including what it means to “restore and maintain environmental quality” and explicitly set aside the Supreme Court's erroneous commentary in *Methow Valley*, which has done so much damage to the environment over the last 30 years.

It is desperately clear that far more transformational and environmentally beneficial regulations are required for NEPA. The life support systems of the planet are now reaching or exceeding tipping points that fundamentally threaten our civilization. Many ecosystems and wildlife species are nearing the point of no return. Between 2001 to 2017, the United States lost more than a football field's worth of natural area to development every 30 seconds.<sup>12</sup> Our planet now faces a global extinction crisis that has only occurred a handful of times in Earth's history, and never witnessed by humankind. Scientists predict that more than one million species are on track for extinction in the coming decades.

Continued extreme weather, wildfires, and droughts across the United States and the world demonstrate the inexorable connection between the extinction and the climate crisis. Three years ago, the United Nations starkly warned that global emissions were still sharply higher than what is needed to achieve 2030 interim emission reduction targets.<sup>13</sup> In 2021 the World Meteorological Organization warned that there is roughly a 40% chance of the average global temperature reaching 1.5°C above preindustrial levels within at least one of the next five years. And with month after month heat records set last year, both the United Nations Secretary General and President Biden described the climate crisis in 2022 as an “emergency.”

Major Federal actions including airports, highways, oil and gas drilling of public lands and waters, pipelines, and liquified natural gas terminals are among the main drivers of the climate crisis, and these infrastructure projects also have a disproportionate impact on environmental

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<sup>11</sup> *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984) (noting that “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”).

<sup>12</sup> Conservation Science Partners, *Methods and approach used to estimate the loss and fragmentation of natural lands in the conterminous U.S. from 2001 to 2017* (Truckee, CA: 2019), available at [https://www.csp-inc.org/public/CSP\\_Disappearing\\_US\\_Tech\\_Report\\_v101719.pdf](https://www.csp-inc.org/public/CSP_Disappearing_US_Tech_Report_v101719.pdf).

<sup>13</sup> *Emissions Gap Report 2019*, United Nations Environment Programme at xviii (2019).

justice communities. Compared to the general population, Black, Brown, Indigenous and low-income communities often have more health stressors because of the siting of multiple infrastructure projects in their backyards. These environmental justice communities who suffer from unhealthy levels of air pollution caused by these projects are at risk of premature death, lung cancer, asthma attacks and cardiovascular problems, and face increased risks of stillbirths and developmental delays in children.

Notably, the proposed regulatory text included below places importance on ensuring that environmental justice considerations are evaluated throughout the decision-making process. President Biden’s January 27, 2021 Executive Order, Tackling the Climate Crisis at Home and Abroad, stressed the importance of delivering “environmental justice in communities” through “assessment, disclosure, and mitigation of climate pollution and climate-related risks.”<sup>14</sup> The uninformed and unwise planning and placement of federal action can harm both the environment and vulnerable communities, establishing the necessity for NEPA regulations to require meaningful consultation with disproportionately impacted communities.

## **II. Narrative of Requested Changes to Regulatory Language**

This petition requests that CEQ adopt the specific regulatory language contained in Section III, below. Here, we provide a general explanation of the requested regulatory provisions.

### **a. Changes to PART 1501 – NEPA and Agency Planning**

The Biden administration’s commitment to addressing the climate crisis and improving environmental justice must be carried out throughout the agency planning process. CEQ’s NEPA regulations governing the scoping process must require agencies to consider direct, indirect, or cumulative effects on disproportionately impacted communities. Environmental justice communities are more vulnerable to the impacts of pollution compared to the general population because of socio-demographic stressors, including racial segregation, high rates of poverty, lack of access to affordable foods, and lack of access to healthcare.

We also propose change to expand when agencies must prepare environmental impact statements. In addition to considering requests by disproportionately impacted communities and Tribal nations, environmental impact statements should be prepared when the proposed action may have significant impacts on the human environment. Significance is based on context and intensity, but current NEPA regulations do not require agencies to consider effects to climate integrity. NEPA regulations must take climate integrity factors into consideration. In fact, several federal courts have held that agencies must consider the impacts of greenhouse gas emissions in their NEPA analyses.<sup>15</sup>

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<sup>14</sup> Exec. Order No. 14008, 86 Fed. Reg. 7619 (2021).

<sup>15</sup> *Ctr. For Biological Diversity v. Natl. Hwy. Traffic Safety Admin.* 538 F.3d 1172, 1217 (9th Cir. 2008) (stating that “[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”); *see, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (requiring the Commission to consider the reasonably foreseeable greenhouse gas emissions resulting from natural gas projects).

In turn, regulations governing environmental assessments should be strengthened to require assessment preparation when the significance of the effects of the proposed action are unknown and should include enforcement provisions for findings of no significant impact that rely on mitigation. When an agency relies on mitigation in an environmental assessment to argue that a potentially significant impact has been brought below the significance threshold (and thus need not be analyzed in an environmental impact statement), the agency must detail its analysis in both the environmental assessment itself and a finding of no significant impact.

Those documents must be made available for public scrutiny and subject to public comment before being finalized. Consequently, the public must have an opportunity to assess and question the efficacy of any mitigation that an agency and/or private project proponent relies on to maintain that a potentially significant impact has been adequately addressed, or at least been reduced below the threshold for environmental impact statement preparation.

We further propose restricting the use of categorical exclusions to activities that truly do not have significant cumulative effects on the human environment. Categorical exclusions, by their nature, are subject to minimal public scrutiny, and little documentation is required supporting the rationale for invocation. If a categorical exclusion is applicable, agencies must consider whether the action implicates extraordinary circumstances that would warrant undertaking the completion of an environmental assessment or environmental impact statement.

We propose revising NEPA regulations regarding what characteristics constitute extraordinary circumstances and include adverse effects on the health or environment of disproportionately impacted communities and significant cumulative impacts to climate integrity. When an agency finds that “extraordinary circumstances” apply to an action that might otherwise fall within the four corners of a categorical exclusion—e.g., because the action, though limited in size, may impair the critical habitat of an endangered or threatened species—this necessarily means that the action may have a significant impact, thus precluding the invocation of a categorical exclusion.<sup>16</sup> NEPA regulations must make clear that the existence of any extraordinary circumstances negates the invocation of a categorical exclusion and mandates the preparation of an environmental impact statement or environmental assessment.

The final changes we propose to Part 1501 contemplate tiering and incorporation by reference. Tiering and incorporation by reference should be utilized to improve efficiency and avoid duplicative analysis of background information. However, these efforts may only be used to the extent that they do not prevent meaningful opportunities for public engagement.

## **b. Changes to PART 1502 – Environmental Impact Statement**

The regulations governing the development of environmental impact statements must be updated to achieve the requirements of section 101 of NEPA to explicitly require agencies to put forth comprehensive and detailed discussions of all impacts to the human environment including possible impacts to the environment, environmental justice communities, and climate integrity.

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<sup>16</sup> See, e.g., *Citizens for a Better Env't v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1088 (N.D. Cal. 2007) (“Application of a CE is inappropriate if there is the possibility that an action *may* have a significant environmental effect.”).

To ensure that agencies consider the long-term effects of their proposed actions, an environmental impact statement's discussion of environmental consequences should include an evaluation of the worst-case scenario should the agency's preferred alternative be adopted, which would increase public knowledge of potential consequences. Furthermore, the consideration of environmental consequences should detail the relationship between short-term use and long-term productivity, and should appropriately consider interrelated economic, social, natural, and physical environmental effects.

In addition to requiring that agency NEPA documents include comprehensive detail of environmental consequences, the proposed changes to the regulatory text would require agencies to reconsider the development of alternatives. Agencies would be responsible for developing and assessing a no action alternative, an environmentally beneficial alternative, an alternative focused on promoting and strengthening environmental justice, and an alternative that would benefit climate stability. The development of these alternatives would help to ensure that agencies are fully informed of the potential consequences of their actions, and it would allow agencies to recognize that meaningful compliance with NEPA is possible.

In particular, the lead agency's consideration of alternatives should carefully contemplate effects to environmental justice and climate integrity. With President Biden's recommitment of the United States to the Paris Agreement<sup>17</sup> and by requiring agencies to account for greenhouse gas emissions during the planning process, the changes would directly further President Biden's goal of making the federal government carbon neutral by 2050 and further achievement of the swifter cuts to near-zero emissions that are scientifically necessary.<sup>18</sup> Thus, in their evaluation of climate integrity, agencies should consider greenhouse gas emissions resulting from the agency proposal and third-party entities. Furthermore, in instances where information is incomplete and relevant to the discussion of reasonably foreseeable impacts to environmental justice or climate integrity, the agency should not proceed with their preferred alternative. Instead, the agency should employ the environmentally preferable or no action alternative, as these options are the only mechanism for making a fully informed decision that does not unnecessarily impact the environment.

#### **c. Changes to Part 1503 – Commenting on Environmental Impact Statements**

This set of proposed changes to the regulatory text would require agencies to improve the commenting process. NEPA requires agencies to provide the public with opportunities to comment on draft environmental impact statements. To facilitate greater consideration of environmental justice effects on disproportionately impacted communities, agencies must develop methods to increase public participation and review of relevant materials. In many instances, this may require agencies to provide additional resources and assistance to individuals seeking to submit oral or written comments. Accessibility must also be considered, with opportunities for comments to be submitted electronically.

#### **d. Changes to Part 1505 – NEPA and Agency Decision Making**

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<sup>17</sup> Exec. Order No. 14008, 86 Fed. Reg. 7619 (2021).

<sup>18</sup> Exec. Order No. 14057, 86 Fed. Reg. 70935 (2021).

Next, the petition updates agency decision-making procedures to ensure that agency actions further the purposes of NEPA. Under the proposed textual changes, agencies should be required to the maximum extent practicable to adopt the project alternative that restores and maintains environmental quality, environmental justice, and climate integrity. If the agency's chosen action or alternative does not fulfil these goals, reviewing courts should give the agency no deference under *de novo* review.

Increased transparency is critical to fulfilling the purpose of NEPA, and efforts to increase transparency should require agencies to certify that all alternatives, information, analyses, and objections submitted by State, Tribal, and local governments were considered prior to agency action. Furthermore, agencies should certify that public comments were received and evaluated, and agencies should make information regarding the implementation of mitigation and monitoring requirements readily available to the public.

#### **e. Changes to Part 1506 – Other Requirements of NEPA**

Currently, NEPA provides that agencies may not take actions that irretrievably commit natural resources until a finding of no significant impact or record of decision has been issued. The proposed changes to the regulatory text would add that agencies are prohibited from taking premature action that would negatively affect disproportionately impacted communities or climate integrity.

Next, when selecting appropriate methods for providing public notice, agencies should consider the ability of affected persons to access electronic media sources. Currently, notice of actions with effects of national concern are required to be published in the *Federal Register*. The proposed changes to the regulatory text would require this notice requirement to extend to actions that contain significant environmental justice concerns.

Our proposal would also require that only the agency that has primary responsibility for the subject matter involved must prepare a legislative environmental impact statement. For regulatory proposals, agencies are to comply with NEPA unless other statutory provisions provide appropriate exemptions.

#### **f. Changes to Part 1507 – Agency Compliance**

Finally, we propose changes to NEPA's regulatory language concern agency compliance. Agency policies and procedures should be continuously reviewed to ensure that all provisions and purposes of NEPA are appropriately complied with throughout the decision-making process. Our proposed provisions also encourage agencies to reevaluate the efficiency of their operating procedures. Furthermore, the proposed regulatory language provides a floor for compliance with NEPA, and agencies are encouraged to develop regulations that are more stringent and protective of the environment, disproportionately impacted communities, and climate integrity.

#### **g. Addition of Part 1508 – EPA Review of Environmental Impact Statements**

In 2018, the Trump administration discontinued the EPA’s 1984 “Policy and Procedures for the Review of Federal Actions Impacting the Environment,” which included a grading system criterion to assess draft environmental impact statements. The proposed regulatory language would restore and simplify the grading system for the public by using the letter grading system: A, B, C, and F.

### III. Requested Regulatory Language<sup>19</sup>

#### PART 1500—POLICY AND PURPOSE

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375

##### § 1500.1 Purpose and Policy.

- (a) The purpose of the National Environmental Policy Act (NEPA) is to 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.
- (b) NEPA establishes the national policy of restoring and maintaining environmental quality to the overall welfare and development of the people of the United States. It recognizes the profound impact of peoples’ activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances on the environment.
- (c) NEPA requires the Federal Government, in cooperation with State and local governments, to use all practicable means and measures, including financial and technical assistance, to foster and promote the general welfare, create and maintain conditions under which people and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations.
- (d) NEPA sets forth 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 aesthetically 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

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<sup>19</sup> We submit this petition under the right to petition provided in the First Amendment to the U.S. Constitution and the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*

- 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.
- (e) Section 102(2) of NEPA establishes the action-forcing provisions to ensure federal agencies act according to the letter and spirit of the Act to maintain and restore environmental quality. In particular, it requires Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment. Through this detailed statement, all Federal agencies shall 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. In furtherance of these goals, all Federal agencies shall be required to meaningfully evaluate in detail the environmental consequences of their actions, provide the public a meaningful opportunity to provide public input on the decision-making process and adopt alternatives that are consistent with the purpose and spirit of NEPA.
- (f) The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive policy requirements of the Act.

**§ 1500.2 Definitions.**

- (a) *Act* or *NEPA* means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*).
- (b) *Affecting* means will or may have an effect on.
- (c) *Alternatives* means a range of alternatives that to the maximum extent practicable meet the purpose and need for the proposed action, and when practicable meet the goals of the applicant. Alternatives shall include a no action alternative, and no less than one environmentally beneficial alternative that is protective of the climate and ensures environmental justice.
- (d) *Categorical exclusion* means a category of actions that the agency has determined, after compliance with all applicable statutory and regulatory requirements, do not individually or cumulatively have a significant effect on the human environment, does not perpetuate or undermine environmental justice, and does not threaten climate integrity. In addition, each agency shall ensure that if any other extraordinary circumstances exist, a categorical exclusion shall not be utilized.
- (e) *Cooperating agency* means any Federal agency, State, Tribal, or local agency with agreement of the lead agency, other than a lead agency, that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or an alternative) for legislation or other major Federal action that may significantly affect the quality of the human environment.
- (f) *Council* means the Council on Environmental Quality established by title II of the Act.
- (g) *Climate integrity* means the long-term maintenance and protection of a stable climate in which greenhouse gas emission are maintained at levels no greater than 350 parts per million and in which global temperatures do not rise more than 1.5°C above pre-industrial levels.
- (h) *Cumulative effect* means the changes or impacts on the environment which results from the incremental effects or impact of the action when added to other past, present, and future actions regardless of what agency (Federal or non-Federal) or person undertakes

such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time. Cumulative effects include actions that undermine climate integrity, perpetuate environmental injustice or undermine environmental justice. Cumulative effects include those impacting fenceline communities disproportionately or amplifying environmental injustice amongst historically disenfranchised populations.

- (i) *Direct Effects* means changes to the human environment from the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives.
- (j) *Disproportionately Impacted Community* means a community with significant representation of communities of color, low-income communities, or Tribal and Indigenous communities, that experiences, or is at risk of experiencing higher or more adverse human health or environmental effects.
- (k) *Effects* mean any changes to ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health conditions. Effects include both beneficial and detrimental changes to current conditions.
- (l) *Environmental assessment* means a concise public document prepared by a Federal agency that serves to support its determination of whether to prepare an environmental impact statement or a finding of no significant impact.
- (m) *Environmental impact statement* means a detailed written statement as required by section 102(2)(C) of NEPA.
- (n) *Environmental injustice* means any historic, current, or future exposure to pollution, environmental impacts, or health hazards that results in an unequal burden on a disproportionately impacted community which is caused in part or in whole by historic, current or future unequal implementation of laws, regulations, governmental programs, enforcement, or policies.
- (o) *Environmental justice* means the fair treatment and meaningful involvement of all people regardless of race, color, culture, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies to ensure that each person enjoys the same degree of protection from environmental and health hazards and equal access to any Federal agency action in order to have a healthy environment in which to live.
- (p) *Federal agency* means all agencies of the Federal Government. It does not include the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. A federal agency also includes States, units of general local government, and Tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute.
- (q) *Finding of no significant impact* means a document by a Federal agency briefly presenting the reasons why an action, not otherwise categorically excluded, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.
- (r) *Human environment* means comprehensively the natural, biogeochemical and physical environment, and the relationship of present and future generations of people with that human environment.
- (s) *Indirect Effects* means changes to the human environment resulting from the proposed

action or alternatives that are later in time or farther removed in distance from the proposed action or alternatives. Indirect effects may include growth inducing effects, impacts to the climate, environmental justice effects, and other effects related to induced changes in the pattern of land use, population density or growth rate, and effects on air and water and other natural systems, including ecosystems.

- (t) *Legislation* means a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations or legislation recommended by the President. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.
- (u) *Major Federal action* or *action* means any activity or decision with significant impacts on the human environment and for which the agency retains any amount of discretion in deciding whether or not to take an action or make a decision. Major Federal actions may include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals. Major Federal actions include extraterritorial activities or decisions where such actions result in impacts to climate, environmental justice, or migratory wildlife that may enter the territorial possessions of the United States. Major Federal actions do not include entirely non-discretionary activities. Major Federal actions do not include bringing judicial or administrative civil or criminal enforcement actions, and do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds.
- (v) *Mitigation* means measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document or record of decision. Mitigation measures shall be prioritized such that an agency shall first attempt to avoid the impact altogether by not taking a certain action or parts of an action, second shall attempt to minimize impacts by limiting the degree or magnitude of the action and its implementation, and third compensate the impact by repairing, rehabilitating, or restoring the affected environment. Mitigation measures also include mandatory reporting requirements and adaptive management measures to ensure that mitigation measures are effective.
- (w) *Notice of intent* means a public notice that an agency will prepare and consider an environmental impact statement.
- (x) *Participating agency* means a Federal, State, Tribal, or local agency participating in an environmental review or authorization of an action.
- (y) *Proposal* means a proposed action when an agency has a goal, and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.
- (z) *Referring agency* means the Federal agency that has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

- (aa) *Restoring and maintaining environmental quality* or *restore and maintain environmental quality* means the adoption of an alternative that is most likely to improve the quality of the human environment, is protective of environmental justice, preserves climate integrity, and to the maximum extent practicable achieves the purpose and need for the proposed action.
- (bb) *Scope* consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement.
- (cc) *Special expertise* means statutory responsibility, agency mission, or related program experience.
- (dd) *Tiering* refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin-wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.
- (ee) *Tribal Nation, Tribal government or Native American community* includes, but is not necessarily limited to, American Indian or Alaska Native or Hawaiian native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges as a Federally recognized tribe. A federal agency shall seek the guidance of the Secretary of the Interior when considering and reviewing input from any native or indigenous community or group that is not recognized by the Secretary of the Interior and give such comments appropriate consideration in any decision-making process.

### **§ 1500.3 Environmental Mandate.**

Federal agencies shall to the fullest extent possible:

- (a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.
- (b) Implement procedures to further the policy goals of NEPA and to make the NEPA process more useful to decisionmakers and the public.
- (c) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.
- (d) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice.
- (e) Use the NEPA process to identify and assess real environmental issues and meaningful alternatives to proposed actions that will ensure final agency actions both restore and maintain environmental quality for the overall welfare and development of the people of the United States.
- (f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.
- (g) Use all available means to avoid cumulative effects on any disproportionately impacted community by ensuring that there is a reasonable certainty of no harm to the health of any potentially impacted or susceptible subpopulation within such community.

### **§ 1500.4 Ensuring Justice.**

- (a) A violation of NEPA's procedural regulations can result in substantive and irreparable

damage to the environment, undermine environmental justice, and harm the interests of individuals and communities across the United States. A procedural violation of NEPA therefore creates a strong presumption that the violation of NEPA is a basis for injunctive relief.

- (b) Meaningful consultations, including during the scoping process, with impacted communities are essential to the NEPA process and can reduce delays and increase accountability. Therefore, all agencies shall meaningfully consult with disproportionately impacted communities early in the NEPA process and prepare alternatives that address all substantive and procedural concerns raised in such consultations. Tribal nations shall be contacted early in the NEPA process, and every federal agency shall consult with Tribal nations in the manner and at the time requested by such Tribal nation prior to the publication of any final NEPA document.
- (c) Excessive paperwork can be utilized as a tactic by agencies to avoid meaningfully addressing alternatives, avoid the substantive concerns of the public, and otherwise rationalize a predetermined course of action. Agencies shall therefore ensure meaningful compliance with the policy goals of NEPA by avoiding excess paperwork or manipulating the public record in ways designed to defeat public concerns.
  - (1) Agencies shall conduct meaningful analyses of projects rather than providing encyclopedic factual minutiae without real analysis.
  - (2) Agencies shall not improperly expand the use of categorical exclusions or environmental assessments where meaningful analysis indicates that cumulative harm is occurring.
  - (3) Agencies shall avoid improper use of environmental assessments and invocations of “findings of no significant impact” when an action causes impacts to the human environment to rationalize the accelerated approval of an agency project.
- (d) All NEPA documents shall be written in plain language, following a clear and consistent format, and emphasize the key decisions within them that are most relevant to decision makers and the public.
- (e) Agencies shall consider the use of programmatic environmental impact statements and tiering to ensure that landscape level impacts are identified early in the NEPA process and fully addressed at the earliest possible time. Agencies shall ensure that the public understands the full scope of such reviews and shall not attempt to avoid meaningful review of those concerns at any stage during the NEPA process.
- (f) Agencies shall to the maximum extent practicable, integrate NEPA requirements with other environmental review and consultation requirements, including with State, Tribal, and local procedures. Integration of these review processes should not be used as an excuse to avoid or limit meaningful consideration of impacts, alternatives, or input from the public.

#### **§ 1500.5 Meaningful compliance with NEPA.**

- (a) Delays in the NEPA process can stem from the failure of agencies to properly fund their NEPA reviews and from agencies attempting to shortcut the NEPA process, thereby increasing litigation and undermining trust with disproportionately impacted communities and other stakeholders.
- (b) Agencies shall ensure that sufficient funds are available or will be allocated for the entire NEPA process prior to the commencement of a NEPA review. If resources are not

sufficient, agencies shall provide notice to the public that the agency does not anticipate having sufficient funding to complete the NEPA process at the current time.

- (c) Agencies shall meaningfully engage in all required interagency cooperation and consultations as soon as possible, and meaningfully addressing the concerns of cooperating and consulting agencies as quickly as possible. To the extent that disputes arise among agencies, the agency proposing the project shall work to resolve disputes fairly and quickly, without compromising any mandate of law.

**§ 1500.6 Agency authority.**

- (a) The phrase “to the fullest extent possible” in section 102 of NEPA means that each agency of the Federal Government shall comply with the Act’s requirements, purposes and policies section to the fullest extent possible. Each agency shall interpret the requirements of the Act as a supplement to its existing authority and as a mandate to supplement its policies and missions in the light of the Act’s national environmental objectives.
- (b) Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary, or when requested to do so by the Council, to ensure full compliance with the policies and purposes of the Act.

## PART 1501—NEPA AND AGENCY PLANNING

**Authority:** 42 U.S.C. 4321–4347 and 42 U.S.C. 4371

### § 1501.1 Apply NEPA Early in the Process.

- (a) Agencies shall integrate the NEPA process with other planning and authorization processes at the earliest time to ensure that agencies fully consider all the environmental impacts in their planning and decisions further the Act’s goal of restoring and maintaining environmental quality, to avoid delays later in the process, and to head off potential conflicts.
- (b) Each agency shall:
  - (1) Comply with the mandate of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach which will ensure 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 the human environment.
  - (2) Identify environmental effects and values in sufficient detail so they can be compared to other required analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.
  - (3) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of NEPA.
  - (4) Provide for actions subject to NEPA that are planned by private applicants or other non-Federal entities before Federal involvement so that:
    - (i) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.
    - (ii) The Federal agency consults early with appropriate State, Tribal, and local governments, and with interested private persons and organizations when their involvement is reasonably foreseeable.
    - (iii) The Federal agency commences its NEPA process at the earliest possible time.

### § 1501.2 Scoping and determining the appropriate level of NEPA review.

- (a) *Generally.* Agencies should use an early and open process to determine whether an environmental impact statement, environmental assessment, or categorical exclusion is appropriate.
- (b) *Scoping process.* The scoping process shall identify the scope of issues for analysis in an environmental impact statement, including identifying the significant issues, necessary consultations with disproportionately impacted communities, Tribal nations and other appropriate governments and interested entities. Agencies shall to the maximum extent possible develop or obtain current maps that identify disproportionately impacted communities within the geographic area where direct, indirect, or cumulative effects may occur prior to the opening of the scoping process.
- (c) *Invite cooperating and participating agencies.* As part of the scoping process, the lead agency shall invite the participation of affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and other affected or interested person.
- (d) *Scoping outreach.* As part of the scoping process the lead agency may hold an early

scoping meeting or meetings, publish scoping information, or use other means to communicate with those persons or agencies who may be interested or affected, which the agency may be integrated with any other early planning meeting.

- (e) *Notice of intent.* As soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an environmental impact statement, the lead agency shall publish a notice of intent to prepare an environmental impact statement in the *Federal Register*. The notice shall include:
  - (1) The purpose and need for the proposed action.
  - (2) A preliminary list of possible alternatives the environmental impact statement will consider including at least one environmentally beneficial alternative.
  - (3) A brief summary of expected impacts, including direct, indirect or cumulative effects, impacts on climate stability, potential for causing or contributing to environmental injustices, or otherwise harming any disproportionately impacted communities.
  - (4) Anticipated permits and authorizations from cooperating agencies.
  - (5) Connected actions, cumulative actions or similar actions that are related and that might not proceed unless the proposed action or other actions are approved.
  - (6) Identified mitigation measures and the impacts that might be addressed by such measures.
- (f) *Additional scoping responsibilities.* As part of the scoping process, the lead agency shall:
  - (1) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.
  - (2) Identify other environmental review, authorization, and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently and integrate the environmental impact statement.
  - (3) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decision-making schedule.
  - (4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has.

### **§ 1501.3 When to Prepare an Environmental Impact Statement.**

- (a) A Federal agency shall prepare an environmental impact statement when:
  - (1) Its regulations or procedures supplementing these regulations require the preparation of an environmental impact statement.
  - (2) The proposed action normally requires an environmental impact statement.
  - (3) The nature of the proposed action is one without precedent.
  - (4) The scoping process raises concerns that an environmental impact statement is recommended.
  - (5) A potentially-impacted Tribal nation requests the proposed action be considered through an environmental impact statement.
  - (6) A disproportionately impacted community, or members thereof, requests that the proposed action be considered through an environmental impact statement.
  - (7) The proposed action may have significant impacts on the human environment, based on context and intensity. "Context" is the geographic, biophysical, and social context in which the effects will occur. "Intensity" refers to the severity of the impact, in whatever context(s) it occurs. Both short- and long-term impacts are relevant, and

impacts may be both beneficial and adverse. If any of the intensity factors listed below are present, the agency may not prepare a finding of no significant impact and instead must prepare an environmental impact statement. In determining context and intensity of such impacts, agencies will evaluate:

- (i) The degree to which the proposed action affects public health and safety.
- (ii) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (iii) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (iv) The degree to which the action may cause or contribute to an environmental injustice, undermine environmental justice, or otherwise harm a disproportionately impacted community.
- (v) The degree to which members of the local community where the project is located, or members of the public at large, are concerned about the proposed action and its impacts.
- (vi) The degree to which the action may establish a precedent for future actions with significant impacts or represents a decision in principle about a future consideration.
- (vii) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, roadless areas, wilderness study areas, areas of critical environmental concerns, national park lands, national monuments, critical habitat for species listed as endangered or threatened under the Endangered Species Act, wildlife migration corridors, or ecologically critical areas.
- (viii) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.
- (ix) Whether direct, indirect or cumulative effects of the action will significantly undermine the climate integrity of the environment.
- (x) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (xi) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (xii) The degree to which the proposed action may affect a species as to which the U.S. Fish and Wildlife Service, or National Marine Fisheries Service, has determined there is substantial scientific or commercial information indicating that the species may warrant listing under the Endangered Species Act of 1973, as provided by 16 U.S.C. 1533(a)(3)(A).
- (xiii) The degree to which the proposed action may impact the public's ability to engage in the recreational use of federal and state public lands, including impacts on viewscales, soundscapes, light and noise pollution, or other aesthetic factors.
- (xiv) Whether the action may cause effects that would violate Federal, State, Tribal,

- or local law or requirements imposed for the protection of the environment.
- (8) An agency shall seek to complete an environmental impact statement in a timely manner, and shall comply with both the spirit and intent of the Act in doing so.

**§ 1501.4 When to Prepare an Environmental Assessment.**

- (a) An agency shall prepare an environmental assessment:
- (1) If required by the agency's regulations or procedures that supplement these regulations.
  - (2) At any time in order to assist agency planning and decision making.
  - (3) When the significance of the effects of the proposed action is unknown.
- (b) An environmental assessment shall:
- (1) Fully involve the public, State, Tribal, and local governments, relevant environmental agencies, and any applicants, in the preparation and completion of the assessment.
  - (2) Consider the proposed action and a no action alternative.
  - (3) Briefly analyze whether significant impacts are likely.
  - (4) Determine whether to prepare an environmental impact statement or a finding of no significant impact if all impacts can be fully mitigated or avoided.
  - (5) When practicable, be no more than 75 pages, not including appendices.
- (c) An agency shall make a draft environmental assessment available for public review for a minimum of 30 days.
- (d) An agency shall prepare a finding of no significant impact, if the agency determines, based on the environmental assessment, the proposed action will not have significant effects, and shall make the finding of no significant impact available to the public for 30 days before the action may begin.
- (e) The finding of no significant impact shall state the authority for all mitigation that the agency has adopted and all applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, then the mitigated finding of no significant impact shall require all mitigation or commitments be fully enforceable and implemented. Only mitigation measures that the agency finds based on record evidence that are guaranteed to be funded and implemented and are likely to effectively reduce adverse environmental effects below the level of potential significance can support an agency decision not to prepare an environmental impact statement.
- (f) An agency shall aim to complete an environmental assessment within one year to the maximum extent possible if it expects to have the staffing and resources to meaningfully complete the process within such time frame. An agency shall notify the public if it lacks the resources to complete an assessment within this time period.

**§ 1501.5 When to Utilize Categorical Exclusions.**

- (a) Agencies may identify in their NEPA procedures categories of actions that normally do not have any cumulative significant effects on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.
- (b) When an agency determines that a categorical exclusion covers a proposed action, the agency shall evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect.
- (c) An agency shall prepare an environmental assessment or environmental impact

statement, as appropriate, if extraordinary circumstances are likely to exist.

- (d) Extraordinary circumstances include, but are not limited to, the following:
- (1) Adverse effects on human health or safety that are not negligible or discountable.
  - (2) Adverse effects on an area with unique environmental characteristics (e.g., wetlands and floodplains, protected areas, or monuments) that are not negligible or discountable.
  - (3) Adverse effects on species or habitats protected by the Endangered Species Act, the Marine Mammal Protection Act, the Migratory Bird Treaty Act, or Magnuson-Steven Fisheries Conservation Act.
  - (4) The generation, use, storage, transport, or disposal of hazardous or toxic substances.
  - (5) Adverse effects on properties listed or eligible for listing on the National Register of Historic Places authorized by the National Historic Preservation Act of 1966, or National Historic Landmarks designated by the Secretary of the Interior.
  - (6) Adverse effects on Federally recognized Tribal and Native Alaskan lands, cultural or natural resources, or religious or cultural sites that cannot be resolved through applicable regulatory processes.
  - (7) Adverse effects on the health or the environment of any disproportionately impacted community.
  - (8) Contribution to the introduction, continued existence, or spread of noxious weeds or nonnative invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of the species.
  - (9) A potential violation of Federal, State, or local law or requirements imposed for protection of the environment.
  - (10) Highly controversial environmental effects.
  - (11) The potential to establish a precedent for future action or an action that represents a decision in principle about future actions with potentially significant environmental effects that are uncertain, unique, or unknown.
  - (12) The potential for significant cumulative impacts, including impacts to climate integrity when the proposed action is combined with other past, present and reasonably foreseeable future actions, even though the impacts of the proposed action may not be significant by themselves.
- (e) An agency shall make the information regarding the use of any categorical exclusions available to the public 60 days before implementing the categorical exclusion.

#### **§ 1501.6 Lead Agency and Cooperating Agencies.**

- (a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:
  - (1) Proposes or is involved in the same action; or
  - (2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.
- (b) Federal or Tribal, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement.
- (c) If an action falls within the provisions of paragraph (a) of this section, so as to not cause delay, the potential lead agencies shall determine by letter or memorandum which agency will be the lead agency and which will be cooperating agencies.
- (d) If there is disagreement among the agencies, the following factors (which are listed in

order of descending importance) shall determine lead agency designation:

- (1) Magnitude of agency's involvement.
  - (2) Project approval or disapproval authority.
  - (3) Expertise concerning the action's environmental effects.
  - (4) Duration of agency's involvement.
  - (5) Sequence of agency's involvement.
- (e) If Federal agencies are unable to agree on which agency will be the lead agency, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency. A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:
- (1) A description of the nature and extent of the proposed action, and
  - (2) A detailed statement of why each potential lead agency should or should not be the lead agency.
- (f) The Council shall determine as soon as possible-which Federal agency will be the lead agency and which other Federal agencies will be cooperating agencies.
- (g) The lead agency shall:
- (1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.
  - (2) Develop a schedule for all environmental reviews and authorizations required for implementation of the action, in consultation with any applicant and all cooperating agencies.
  - (3) Determine the purpose and need, and alternatives in consultation with any cooperating agency.
  - (4) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise.
- (h) Cooperating agencies shall:
- (1) Participate in the NEPA process, including scoping, at the earliest time.
  - (2) On request of the lead agency, develop information and prepare environmental analyses, including portions of the environmental impact statement or environmental assessment concerning which the cooperating agency has special expertise.
  - (3) On request of the lead agency, make available staff support to enhance the lead agency's interdisciplinary capability.
  - (4) Alert the lead agency regarding its ability to use its own funds for any analyses. The lead agency shall-fund those major activities or analyses it requests from cooperating agencies whenever practicable. Potential lead agencies shall include such funding requirements in their budget requests.
  - (5) Meet the lead agency's schedule for providing comments and analyses.
  - (6) To the maximum extent practicable, jointly issue environmental documents with the lead agency.

#### **§ 1501.7 Tiering.**

- (a) Agencies are encouraged to tier programmatic environmental impact statements to site-specific actions to avoid repetitive background information, in order to assist the public and decision makers on the specific issues ripe for decision at each level of environmental review.
- (b) Tiering is appropriate when the sequence of analysis is from a programmatic, plan, or

policy to an analysis of lesser or narrower scope or to a site-specific statement or analysis. Tiering may also be appropriate when an analysis is from a specific action at an early stage of a process set forth by statute to an analysis at a subsequent stage of a process.

- (c) When an agency has prepared an environmental impact statement and intends to tier subsequent decisions to such statement, it may summarize and incorporate by reference the issues discussed in the original document, but only to the extent it does not detract from the ability of the public to meaningfully engage in the subsequent decisions.

**§ 1501.8 Incorporation by reference.**

Agencies should incorporate by reference background and supporting material into an environmental impact statement only when the effect will be to cut down on bulk without impeding agency decision making and meaningful public review of the action.

- (a) All information incorporated by reference shall be freely available to the public, including the posting of information on an agency website.
- (b) A request by the public to make public any information that is incorporated by reference shall create a rebuttable presumption that the agency has failed to make such information reasonably available to the public, and that such information shall not be used to justify a decision unless and until such time as it is reasonably available to the public for its review.

## **PART 1502—ENVIRONMENTAL IMPACT STATEMENT**

**Authority:** 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609

### **§ 1502.1 Purpose of environmental impact statement.**

- (a) The primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA is to serve as an action-forcing mechanism to ensure meaningful public involvement in the decision making process, to ensure agencies make informed decisions, and to restore and maintain environmental quality to the maximum extent practicable.
- (b) The environmental impact statement shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of alternatives, shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses.

### **§ 1502.2 Implementation.**

- (a) Environmental impact statements shall be analytic and concise, but should not downplay, discount or ignore possible impacts on the human environment, including impacts on disproportionately impacted communities or climate integrity.
- (b) The length of environmental impact statements should be proportional, both with respect to project size and the significance of potential environmental effects, with briefer discussion of non-significant issues.
- (c) Environmental impact statements shall state how alternatives are considered in it and how decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.
- (d) Agencies shall prepare environmental impact statements using an inter-disciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts. The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process.
- (e) Agencies shall write environmental impact statements in plain language and may use appropriate graphics so that decision makers and the public can readily understand such statements. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which shall be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.
- (f) Agencies shall not commit staff or resources prejudicing selection of alternatives, or justifying decisions already made, or rationalizing a pre-determined outcome before making a final decision.

### **§ 1502.3 Major Federal actions requiring the preparation of environmental impact statements.**

- (a) Agencies shall use the criteria for scope to determine which proposals shall be the subject of a particular statement. Agencies shall evaluate in a single environmental impact statement proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action.
- (b) Environmental impact statements are required for programmatic Federal actions, including the adoption of new agency programs or regulations. When agencies prepare

such statements, they should be timed to coincide with meaningful points in agency planning and decision making. When preparing statements on programmatic actions (including proposals by more than one agency), agencies may evaluate the proposals in one of the following ways:

- (1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.
  - (2) Generically, including actions that have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.
  - (3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies that, if applied, could significantly affect the quality of the human environment.
- (c) Statements shall be prepared on such programs and should be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

#### **§ 1502.4 Timing.**

- (a) An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or receives a proposal. The statement shall be prepared early enough so that it can serve as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made.
- (b) For projects directly undertaken by Federal agencies, the agency shall prepare the environmental impact statement at the feasibility analysis (go/no-go) stage and may supplement it at a later stage, if necessary.
- (c) For applications to the agency requiring an environmental impact statement, the agency shall commence the statements as soon as practicable after receiving the application. Federal agencies should work with potential applicants and applicable State, Tribal, and local agencies and governments prior to receipt of the application.
- (d) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances, the statement may follow preliminary hearings designed to gather information for use in the statements.
- (e) For informal rulemaking, the draft environmental impact statement shall accompany the proposed rule.

#### **§ 1502.5 Draft, final, and supplemental statements.**

- (a) Except for proposals for legislation, agencies shall prepare environmental impact statements in two stages and, where necessary or appropriate, may be supplemented.
- (b) *Draft environmental impact statements.* Agencies shall prepare draft environmental impact statements in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required. The draft statement shall fulfil the requirements established for final statements in section 102(2)(C) of NEPA. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish a revised or supplemental draft of the appropriate portion. The agency shall discuss all major points of view on the environmental impacts of the alternatives including the proposed action.

- (c) *Final environmental impact statements.* Final environmental impact statements shall address and respond to all substantive comments. The agency shall discuss any responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.
- (d) *Supplemental environmental impact statements.* Agencies:
  - (1) Shall prepare supplements to either the draft or final environmental impact statements if the agency makes substantial changes to the proposed action that are relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.
  - (2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.
  - (3) Shall prepare, publish, and file a supplement to a statement in the same fashion as a draft and final statement as is appropriate to the stage of the statement involved.

**§ 1502.6 Recommended format.**

- (a) Agencies shall use a format for environmental impact statements that will encourage good analysis and clear presentation of the alternatives including the proposed action. Agencies should use the following standard format for environmental impact statements:
  - (1) Cover.
  - (2) Summary.
  - (3) Table of contents.
  - (4) Purpose of and need for action.
  - (5) Alternatives including the proposed action.
  - (6) Affected environment.
  - (7) Environmental consequences.
  - (8) Environmental justice consequences.
  - (9) Climate integrity consequences.
  - (10) Submitted alternatives, information, and analyses.
  - (11) List of preparers.
  - (12) Appendices (if any).

**§ 1502.7 Cover.**

The cover shall not exceed one page and shall include:

- (a) A list of the responsible agencies, including the lead agency and any cooperating agencies.
- (b) The title of the proposed action that is the subject of the statement.
- (c) The name, address, and telephone number of the person at the agency who can supply further information.
- (d) A designation of the statement as a draft, final, or draft or final supplement.
- (e) A one paragraph abstract of the statement.
- (f) The date by which the agency must receive comments.

**§ 1502.8 Summary.**

- (a) Each environmental impact statement shall contain a summary that adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of dispute raised by agencies and the public, and the issues to be resolved

(including the choice among alternatives). The summary shall not exceed 15 pages.

**§ 1502.9 Purpose and need.**

- (a) The statement shall briefly specify the underlying purpose and need for the proposed action.

**§ 1502.10 Alternatives including the proposed action.**

- (a) The alternatives section is the heart of the environmental impact statement.
- (b) The agency shall present the proposed action and the alternatives in comparative form thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.
- (c) Agencies shall rigorously explore and objectively evaluate all reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (d) Agencies shall prepare and assess a no action alternative.
- (e) Agencies shall prepare and assess the most environmentally beneficial alternative that would restore and maintain environmental quality to the greatest extent possible.
- (f) Agencies shall prepare and assess one alternative that would promote, restore, or strengthen environmental justice in disproportionately impacted communities to the maximum extent possible should such an alternative differ from the most environmentally beneficial alternative.
- (g) Agencies shall prepare and assess one alternative that would lead to the greatest benefit to climate stability and a reduction in greenhouse gases should such an alternative differ from the most environmentally beneficial alternative.
- (h) Agencies shall provide equal and substantial treatment to each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.
- (i) Agencies shall identify its preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (j) Agencies shall include all possible or appropriate mitigation measures not already included in the proposed action or alternatives.

**§ 1502.11 Affected environment.**

- (a) The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration.
- (b) The environmental impact statement may combine the description with evaluation of the environmental consequences, and it shall be no longer than is necessary to understand the effects of the alternatives.

**§ 1502.12 Environmental consequences.**

- (a) The environmental consequences section forms the scientific and analytic basis for the comparisons under § 1502.10. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA that are within the scope of the statement and as much of section 102(2)(C)(iii) of NEPA as is necessary to support the comparisons. The discussion shall include:

- (1) The environmental impacts of the proposed action and alternatives to the proposed action and the significance of those impacts. The comparisons of the proposed action and alternatives under § 1502.10 shall be based on this discussion of the impacts.
- (2) All environmental justice impacts, including the extent to which the agency proposal addresses past environmental injustices.
- (3) All biodiversity impacts, including anticipated consequences of the proposed agency action and mitigation proposals. Biodiversity monitoring can aid in improving future predictions, identify unintended consequences of the proposed actions, and to inform adaptive management.
- (4) The extent to which each alternative harms or benefits climate integrity.
- (5) Any adverse environmental effects that cannot be avoided should the proposal be implemented.
- (6) The worst case scenario should the agency's preferred alternative be adopted, including if the agency fails to complete legally required mitigation measures.
- (7) The relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity.
- (8) Any irreversible or irretrievable commitments of resources that would be involved in the proposal should it be implemented.
- (9) Possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local land use plans, policies and controls for the area concerned.
- (10) Energy requirements and conservation potential of various alternatives and mitigation measures.
- (11) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.
- (12) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.
- (13) All legal requirements and enforceable measures to mitigate adverse environmental impacts.
- (14) Where applicable, economic and technical considerations, including the economic benefits of the proposed action.
- (15) Economic or social effects only where the agency determines that environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated.

**§ 1502.13 Environmental justice consequences.**

- (a) The agency shall prepare a focused discussion of all relevant environmental justice impacts or benefits, and the extent to which the agency proposal may help or hinder efforts to address historic or past environmental injustice. The discussion shall provide a summary of the agency's efforts to engage with disproportionately impacted communities, and whether or not individuals from such communities have raised objections to any of the proposed alternatives.

**§ 1502.14 Climate integrity consequences.**

- (a) The agency shall prepare a qualitative or quantitative analysis that addresses the

greenhouse gas emissions from the agency proposal and all alternatives analyzed in detail, including upstream and downstream and cumulative greenhouse emissions from third-party entities, including but not limited to the burning of fossil fuels by consumers.

- (b) In conducting this analysis, the agency shall compare the benefits and impacts to climate integrity from each alternative under consideration, and identify which, if any, alternative provides the greatest benefit to overall climate integrity.

**§ 1502.15 Summary of submitted alternatives, information, and analyses.**

- (a) The draft environmental impact statement shall include a summary that identifies all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters during the scoping process for consideration by the lead and cooperating agencies in developing the environmental impact statement.
- (b) The agency shall append to the draft environmental impact statement or otherwise publish all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process that identified alternatives, information, and analyses for the agency's consideration.
- (c) The final environmental impact statement shall include a summary that identifies all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the final environmental impact statement.

**§ 1502.16 List of preparers.**

- (a) The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement.
- (b) Where possible, the environmental impact statement shall identify the persons who are responsible for a particular analysis, including analyses in background papers.
- (c) The statement shall identify any contractors who prepared portions of or the entirety of a statement, and explain to the public the role of the contractor in development of the statement.

**§ 1502.17 Appendix.**

- (a) If an agency prepares an appendix, the agency shall publish it with the environmental impact statement.
- (b) The appendix shall include materials substantiating any analysis fundamental to the impact statement, materials relevant to the decision to be made, all comments (or summaries thereof where the response has been exceptionally voluminous) and responses to comments, and analyses for the agency's consideration.

**§ 1502.18 Publication of the environmental impact statement.**

- (a) Agencies shall publish the entire draft and final environmental impact statements including in both paper and electronic form, as provided in § 1506.7 of this chapter, and shall provide the statement to any appropriate Federal, State, Tribal, or local agency, the applicant if any, and any person, organization, or agency requesting the entire environmental impact statement.

**§ 1502.19 Incomplete or unavailable information.**

- (a) When an agency is evaluating foreseeable significant adverse effects on the human environment in an environmental impact statement, and there is incomplete or unavailable information, the agency shall make clear that such information is lacking.
- (b) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned decision-making, the agency shall obtain or acquire such information prior to completing the environmental impact statement unless the costs of doing so are excessive. Agencies shall presume that incomplete information regarding climate impacts or environmental justice impacts are essential to any decision-making and shall not proceed prior to obtaining such information.
- (c) If the incomplete information is relevant to reasonably foreseeable significant adverse impacts and cannot be obtained because the overall costs are excessive, the agency shall not proceed where potential impacts to environmental justice or climate will occur under the agency's preferred alternative, and may only elect to follow the environmentally preferable alternative or the no action alternative.

**§ 1502.20 Cost-benefit and social cost of greenhouse gases analysis.**

- (a) If the agency is considering a cost-benefit analysis for the proposed action, the agency shall incorporate the cost-benefit analysis by reference or append it to the statement as an aid in evaluating the environmental consequences.
- (b) If a cost-benefit analysis is used, the statement shall discuss the relationship between that cost-benefit analysis and any analyses of unquantified environmental impacts, values, and amenities.
- (c) Agencies need not display the weighing of the merits and drawbacks of the various alternatives in a monetary cost-benefit analysis and should not do so when there are important qualitative considerations.
- (d) A rebuttable presumption exists that an environmental impact statement is arbitrary and capricious in situations where a cost-benefit analysis supports an agency's preferred alternative, but the agency failed to explain or assess the environmental justice impacts or impacts to climate integrity in a manner that is similarly robust and analytical to the cost-benefit analysis.
- (e) Separately and in addition to any cost-benefit analysis, the agency shall incorporate the estimates of the social cost of carbon (SC-CO<sub>2</sub>), social cost of methane (SC-CH<sub>4</sub>), and social cost of nitrous oxide (SC-N<sub>2</sub>O) by reference or append it to the statement as an aid in evaluating the environmental consequences. These values are referenced as the "social cost of greenhouse gases".

**§ 1502.21 Methodology and scientific accuracy.**

- (a) Agencies shall ensure the professional integrity and scientific integrity of the discussions and analyses in environmental documents.
- (b) Agencies shall identify any methodologies used and shall make explicit reference to the scientific and other sources relied upon for conclusions in the statement.

**§ 1502.22 Environmental review and consultation requirements.**

- (a) To the fullest extent possible, agencies shall prepare draft environmental impact

statements concurrently and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws, including the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (5416 U.S.C. 300101470 *et seq.*), and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

- (b) The draft environmental impact statement shall list all Federal permits, licenses, and other authorizations which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other authorization is necessary, the draft environmental impact statement shall so indicate.

**PART 1503—COMMENTING ON ENVIRONMENTAL IMPACT STATEMENTS,  
ENVIRONMENTAL ASSESSMENTS, AND CATEGORICAL EXCLUSIONS**

**§ 1503.1 Inviting comments.**

- (a) After preparing a draft environmental impact statement or draft environmental assessment and before preparing a final environmental impact statement or final environmental assessment the agency shall:
  - (1) Obtain the comments of any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or is authorized to develop and enforce environmental standards.
  - (2) Request the comments of appropriate State, Tribal, and local agencies that are authorized to develop and enforce environmental standards, or that may be affected by the proposed action.
  - (3) Request comments from the applicant, if any.
  - (4) Request comments from the public, affirmatively soliciting comments in a manner designed to inform from those persons or organizations who may be interested in or affected by the proposed action.
  - (5) Facilitate the participation and comment of disproportionately impacted communities to ensure members of such communities are able to provide comment, including providing resources to provide written or oral comments.
- (b) Invite comment specifically on the submitted alternatives, information, and analyses and the summary thereof.
- (c) An agency may request comments on a final environmental impact statement before the final decision.
- (d) An agency shall provide for electronic submission and by mail of public comments, with reasonable measures to ensure the comment process is accessible to all potentially affected persons, including disproportionately impacted communities. Reasonable measures shall include:
  - (1) providing the translation of publicly available documents in any language spoken by more than 5 percent of the population who may be affected by the proposed Federal action; and
  - (2) accepting public comments in any language spoken by more than 5 percent of the population who may be affected by the proposed Federal action.

**§ 1503.2 Duty to comment.**

- (a) Cooperating agencies and agencies that are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority within the time period specified for comment.
- (b) A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that the environmental impact statement adequately reflects its views are, it should reply that it has no comment.

**§ 1503.3 Specificity of comments.**

- (a) Agency comments on an environmental impact statement or on a proposed action should be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

- (b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology that it prefers and why.
- (c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or authorizations.
- (d) A cooperating agency with jurisdiction by law shall object to or express reservations about a proposal on grounds of environmental impacts and shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

**§ 1503.4 Response to comments.**

- (a) An agency preparing a final environmental impact statement or final environmental assessment shall consider and respond to comments to the maximum extent possible.
- (b) In the final environmental impact statement, the agency may respond to comments by:
  - (1) Modifying alternatives including the proposed action.
  - (2) Developing and evaluating alternatives not previously given serious consideration by the agency.
  - (3) Supplementing, improving, or modifying its analyses.
  - (4) Making factual corrections.
  - (5) Explaining why the comments do not warrant further agency response, and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.
- (c) An agency shall append to the final statement or otherwise publish all substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous) whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.
- (d) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, an agency may write any changes on errata sheets and attach them responses to the statement instead of rewriting the draft statement.

**PART 1504—PRE-DECISION REFERRALS TO THE COUNCIL OF PROPOSED  
FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY  
UNSATISFACTORY**

**§ 1504.1 Purpose.**

- (a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.
- (b) Section 309 of the Clean Air Act (42 U.S.C. 7609), directs the Administrator of the Environmental Protection Agency (EPA) to review and comment publicly on the environmental impacts of Federal activities, including actions for which agencies prepare environmental impact statements. If, after this review, the Administrator determines that the matter is “unsatisfactory from the standpoint of public health or welfare or environmental quality,” section 309 directs that the matter be referred to the Council (hereafter “environmental referrals”).

**§ 1504.2 Criteria for referral.**

- (a) Environmental referrals should be made to the Council only after unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:
  - (1) Possible violation of national environmental standards or policies.
  - (2) Severity.
  - (3) Geographical scope.
  - (4) Impacts to climate change.
  - (5) Environmental justice concerns.
  - (6) Duration.
  - (7) Importance as precedents.
  - (8) Availability of environmentally preferable alternatives.

**§ 1504.3 Procedure for referrals and response.**

- (a) A Federal agency making the referral to the Council shall:
  - (1) Notify the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.
  - (2) Include such a notification whenever practicable in the referring agency’s comments on the environmental assessment or draft environmental impact statement.
  - (3) Identify any essential information that is lacking and request that the lead agency make it be made available at the earliest possible time.
  - (4) Send copies of the referring agency’s views to the Council.
- (b) The referring agency shall deliver its referral to the Council not later than 25 days after the lead agency has made the final environmental impact statement available.
- (c) The referral shall consist of:
  - (1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it.
  - (2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental

- quality.
- (3) The referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.
  - (d) Not later than 25 days after the referral to the Council, the lead agency may deliver a response to the Council, and the referring agency.
  - (e) Not later than 25 days after receipt of both the referral and any response by the lead agency, the Council may take one or more of the following actions:
    - (1) Conclude that the process of referral and response has successfully resolved the problem.
    - (2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.
    - (3) Determine that the referring and lead agencies should further negotiate the issue, and the issue is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.
    - (4) Publish its findings and recommendations.
    - (5) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

## PART 1505—NEPA AND AGENCY DECISION MAKING

### § 1505.1 Agency decisionmaking procedures.

- (a) All federal agencies shall adopt procedures to ensure that decisions are made in accordance with the policies and purposes of the Act.
- (b) In making any decision, all federal agencies shall to the maximum extent practicable, adopt the alternative, or modified alternative, that restores and maintains environmental quality, ensures environmental justice, and maintains climate integrity.
- (c) In reviewing an agency decision, a reviewing court shall evaluate *de novo* the agency's record of decision and final environmental impact statement. If the agency's adopted alternative, or modified alternative, fails to restore and maintain environmental quality, ensure environmental justice, or maintain climate integrity then there shall be a rebuttable presumption that the agency's action is arbitrary and capricious.
- (d) Agencies shall review their NEPA guidance and regulations to be consistent with the requirements in this rule within 6 months of the effective date of this rule.

### § 1505.2 Record of decision in cases requiring environmental impact statements.

- (a) At the time of its decision or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which each agency may integrate into any other record it prepares shall:
  - (1) State the decision.
  - (2) Identify alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives that were environmentally preferable. An agency shall identify and discuss all such factors, including any essential considerations of national policy, that the agency balanced in making its decision and state how those considerations entered into its decision.
  - (3) State whether the agency has adopted all practicable means to avoid or minimize environmental harm from the alternative selected and if not, why not. The agency shall adopt a monitoring and enforcement program for all mitigation requirements or commitments.
- (b) The decision maker shall certify in the record of decision that the agency has considered all of the alternatives, information, analyses, and objections submitted by State, Tribal, and local governments and public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement.

### § 1505.3 Implementing the decision.

- (a) Mitigation and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency.
- (b) To ensure mitigation is completed, an agency shall include conditions in grants, permits, funding or other approvals.
- (c) Agencies shall provide for monitoring to ensure that their decisions and all required mitigation are completed.
- (d) A lead agency shall inform cooperating or participating agencies on progress in carrying out mitigation measures that were adopted by the agency making the decision.

- (e) Unless the costs are excessive, an agency shall publish or make available online the implementation of all required mitigation and result of required monitoring on at least an annual basis.

## PART 1506—OTHER REQUIREMENTS OF NEPA

### § 1506.1 Limitations on actions during NEPA process.

- (a) Until an agency issues a finding of no significant impact, or record of decision, as provided in § 1505.2 of this chapter, no action concerning the proposal shall be taken that would:
  - (1) Have an adverse environmental impact;
  - (2) Result in an adverse impact on environmental justice or climate integrity; or
  - (3) Limit the choice of alternatives.
- (b) Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment made by non-governmental entities seeking loan guarantees from the Administration.

### § 1506.2 Coordination with State, Tribal, and local procedures.

- (a) Federal Agencies are authorized by law to cooperate with State, Tribal, and local agencies that are responsible for preparing environmental documents.
- (b) Agencies shall cooperate with State, Tribal, and local agencies to the fullest extent possible to reduce duplication between NEPA and State, Tribal, and local requirements, including through use of studies, analysis, and decisions developed by State, Tribal, or local agencies, unless the agencies are specifically barred from doing so by some other law. Such cooperation may include:
  - (1) Joint planning processes.
  - (2) Joint environmental research and studies.
  - (3) Joint public hearings (except where otherwise provided by statute).
  - (4) Joint environmental assessments.
- (c) To better integrate environmental impact statements into State, Tribal, or local planning processes, environmental impact statements shall discuss any inconsistency of a proposed action with any approved State, Tribal, or local plan or laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law. While the statement should discuss any inconsistencies and attempt reconciliation where possible, NEPA does not require reconciliation with conflicting State, Tribal, or local requirements.

### § 1506.3 Applicant responsibilities for environmental documents.

- (a) An agency may require an applicant to submit environmental information for possible use by the agency in preparing an environmental document.
- (b) If reasonable assurances are made regarding meeting the standards of the Act and scientific integrity, an agency may direct an applicant or authorize an unbiased, neutral contractor to prepare an environmental document under the supervision of the agency.
- (c) An agency shall assist the applicant by outlining the types of information required or, for the preparation of environmental documents, shall provide guidance to the applicant or contractor and participate in their preparation.
- (d) The agency shall independently evaluate the information submitted or the environmental document prepared and shall be responsible for independently verifying its accuracy, scope, and contents.

- (e) If the agency elects to use the information submitted by the applicant in the environmental document, either directly or by reference, then the names and qualifications of the persons preparing environmental documents, and conducting the independent evaluation of any information submitted or environmental documents prepared by an applicant or contractor shall be included in the list of preparers for environmental impact statements.
- (f) Contractors or applicants preparing environmental assessments or environmental impact statements shall submit a disclosure statement to the lead agency that specifies all financial or other interest in the outcome of the action. The execution of the disclosure statement shall be made public by the agency and must occur before the third-party contract is executed with the agency.
- (g) Nothing in this section is intended to prohibit any agency from requesting any person, including the applicant, to submit information to it or to prohibit any person from submitting information to any agency for use in preparing environmental documents.

#### **§ 1506.4 Public involvement.**

- (a) Federal agencies shall provide public notice of NEPA-related hearings, public meetings, and other opportunities for public involvement, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected by their proposed actions. When selecting appropriate methods for providing public notice, agencies shall consider the ability of affected persons and agencies to access electronic media. Reasonable measures for hearings, public meeting, and public notice shall include:
  - (1) providing interpretation services at hearings and public meetings in any language spoken by more than 5 percent of the population who may be affected by the proposed Federal action; and
  - (2) providing the translation of publicly available documents, including when providing public notice, in any language spoken by more than 5 percent of the population who may be affected by the proposed Federal action.
- (b) In all cases, an agency shall notify by mail those who have requested notice on an individual action.
- (c) In the case of an action with effects of national concern or significant environmental justice concerns, notice shall include publication in the *Federal Register*.
- (d) In the case of an action with effects primarily of local concern, the notice may include:
  - (1) Notice to State, Tribal, and local governments or agencies that may be interested or affected by the proposed action.
  - (2) Publication in print and electronic local newspapers and other applicable local media (in papers of general circulation rather than legal papers).
  - (3) Notice to potentially interested community organizations including small business associations.
  - (4) Publication in newsletters or other electronic platforms that may be expected to reach potentially interested persons.
  - (5) Direct mailing to owners and occupants of nearby or affected property.
  - (6) Posting of notice on and off site in the area where the action is to be located.
  - (7) Notice through electronic media (*e.g.*, a project or agency website, email, or social media).

- (e) Hold or sponsor public hearings, public meetings, or other opportunities for public involvement whenever appropriate or in accordance with statutory requirements applicable to the agency. Agencies may conduct public hearings and public meetings by means of electronic communication except where another format is required by law. When selecting appropriate methods for public involvement, agencies shall consider the ability of affected entities to access electronic media.
- (f) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.
- (g) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act, as amended (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

#### **§ 1506.5 Proposals for legislation.**

- (a) A legislative environmental impact statement is the detailed statement required by law to be included in an agency's recommendation or report on a legislative proposal to Congress.
- (b) When developing legislation, agencies shall integrate the NEPA process for proposals for legislation significantly affecting the quality of the human environment.
- (c) Only the agency that has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.
- (d) A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement that can serve as the basis for public and Congressional debate. To the maximum extent possible, the statement must be available in time for Congressional hearings and deliberations.
- (e) Preparation of a legislative environmental impact statement shall conform to the requirements of the regulations in this subchapter, except that there need not be a scoping process.

#### **§ 1506.6 Proposals for regulations.**

- (a) Where the proposed action is the promulgation of a rule or regulation, an agency shall comply with the requirements of the Act unless another statutory provision exists that specifically exempts the promulgation of a rule or regulation from the requirements of the Act.

#### **§ 1506.7 Filing requirements.**

- (a) Agencies shall file environmental impact statements along with any appendices, comments and responses with the Environmental Protection Agency (EPA), Office of Federal Activities.
- (b) Agencies shall file statements with the EPA no earlier than they are also transmitted to

participating agencies and made available to the public. EPA may issue guidelines to agencies to implement its responsibilities under this section.

**§ 1506.8 Timing of agency action.**

- (a) The Environmental Protection Agency shall publish a notice in the *Federal Register* each week of the items listed in § 1506.7 of this chapter filed since its prior notice during the preceding week and available in an online database to the public.
- (b) Unless otherwise provided by law, including statutory provisions for combining a final environmental impact statement and record of decision, Federal agencies may not make or issue a record of decision until the later of the following dates:
  - (1) 90 days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.
  - (2) 30 days after publication of the notice described in paragraph (a) of this section for a final environmental impact statement.
- (c) Where agencies have a formally established appeal process after publication of the final environmental impact statement that allows other agencies or the public to take appeals on a decision and make their views known, where a real opportunity exists to alter the decision, the agency may make and record the decision at the same time it publishes the environmental impact statement. The period for appeal of the decision and the 30-day period set forth in paragraph (b) of this section may run concurrently. In such cases, the environmental impact statement shall explain the timing and the public's right of appeal and provide notification.
- (d) An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety may waive the time period in paragraph (b) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement, and provide notification.

**§ 1506.9 Emergencies.**

- (a) Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of the regulations in this subchapter, the Federal agency taking the action should consult with the Council about alternative arrangements for compliance with section 102(2)(C) of NEPA.
- (b) Agencies and the Council shall limit such arrangements to actions necessary to control the immediate impacts of the emergency. All other actions remain subject to NEPA review.

## PART 1507—AGENCY COMPLIANCE

### § 1507.1 Agency Compliance.

- (a) All agencies of the Federal Government shall continuously review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall take such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.
- (b) Nothing in section 102 or 103 of the Act shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.
- (c) The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

### § 1507.2 Agency capability to comply.

- (a) Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements of NEPA, and at a minimum, comply with the regulations in this subchapter. Such compliance may include use of resources of other agencies, applicants, and other participants in the NEPA process.
- (b) Each agency shall fulfill the requirements of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making that may have an impact on the human environment.
- (c) Each agency shall designate a senior agency official to be responsible for overall review of agency NEPA compliance, including resolving implementation issues.
- (d) Each agency shall continuously identify methods and procedures required by section 102(2)(B) of NEPA to ensure that presently unquantified environmental amenities and values may be given appropriate consideration.

### § 1507.3 Agency NEPA procedures.

- (a) The regulations of this subchapter provide a floor for compliance with the Act. Each agency may develop supplemental or superseding regulations that are more stringent and protective to further restore and enhance the quality of the human environment.
- (b) Each agency shall develop or revise as necessary, procedures and regulations to implement the requirements of this subchapter on an annual basis.
- (c) Each agency shall consult with the Council while developing or revising its proposed procedures and before publishing them in the *Federal Register* for comment.

## PART 1508 —REVIEW OF ENVIRONMENTAL IMPACT STATEMENTS

Authority: 42 U.S.C. 7609

### § 1508.1 Environmental Protection Agency Review of Environmental Impact Statements.

- (a) *Establishing deadlines and time extensions.* The EPA shall provide comments on a draft environmental impact statement to the action agency within 45 days from the start of the official review period. In providing its comments, the EPA shall provide a letter grade to each draft environmental impact statement of either A, B, C or F to further transparency and public understanding of the EPA's review.
- (b) *Categorization and agency notification system for draft environmental impact statement.*
  - (1) Assignments of the grade will be based on both the overall environmental impact of the proposed project or action, and the adequacy of the statement itself in compliance with the regulations of this chapter or the regulations set forth by the action agency.
  - (2) To assure the objectivity and independence of the EPA review responsibility, the EPA comment letter itself and the assigned rating are not subject to negotiation and should not be changed on the basis of any meetings with the agency.
- (c) *Scope of comments on the draft environmental impact statement.*
  - (1) *Mitigation.* EPA's comments shall include measures to avoid or minimize damage to the environment, or to protect, restore, and enhance the environment. Suggestions for mitigation should be oriented towards selection of mitigation measures that are of long-term effectiveness and have a high likelihood of being implemented.
  - (2) *Alternatives.* If significant impacts are associated with the proposal and they cannot be adequately mitigated, EPA's comments may only suggest the environmentally preferable or no action alternative.
- (d) *Rating system criteria.*
  - (1) **A Grade.** The EPA has not identified any potential environmental impacts requiring substantive changes to the preferred alternative. The draft environmental impact statement appears to have selected the environmentally beneficial alternative that promotes climate integrity and environmental justice as the preferred alternative. No further analysis or data collection is necessary, but the EPA may suggest the addition of clarifying language or information.
  - (2) **B Grade.** The EPA has identified environmental impacts that must be avoided in order to fully protect the environment, but do not appear to be addressed fully in the alternatives analysis. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact to avoid impacts to climate stability or environmental justice. The draft environmental impact statement does not contain sufficient information to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft environmental impact statement, which could reduce the environmental impacts of the proposal.
  - (3) **C Grade.** The action agency's preferred alternative substantially harms climate integrity and environmental justice. The EPA has identified significant environmental impacts that must be avoided in order to adequately protect the environment and of which are not present in the draft environmental impact statement. Corrective

measures are required substantial changes to the preferred alternative or consideration of some other project alternative. The basis for a C includes situations:

- (i) Where an action might violate or be inconsistent with achievement or maintenance of a national environmental standard.
  - (ii) Where the Federal agency violates its own substantive environmental requirements that relate to EPA's areas of jurisdiction or expertise.
  - (iii) Where there is potential for significant environmental degradation that could be corrected by project modification or other alternatives.
  - (iv) Where proceeding with the proposed action would set a precedent for future actions that collectively could result in significant environmental impacts.
- (4) F Grade. The EPA has identified adverse environmental impacts that are of sufficient magnitude that EPA believes the proposed action cannot proceed as proposed. This grade indicates EPA's conclusion that the draft environmental impact statement does not meet the purpose of NEPA and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft environmental impact statement.
- (i) The basis for an F includes:
    - (a) The potential violation of or inconsistency with a national environmental standard.
    - (b) The severity, duration, or geographical scope of the impacts associated with the proposed action warrant special attention.
    - (c) The potential threat to the national environmental resources or to the environmental policies.
- (e) *Reporting and Control*. The EPA shall publish a notice in the *Federal Register* each week of the comment letters and grades on draft environmental impact statements' filed since its prior notice during the preceding week and available in an online database to the public.