March 9, 2020

Ms. Mary Neumayr, Chairman
Council on Environmental Quality
Docket No. CEQ-2019-0003
730 Jackson Place, N.W.
Washington, DC 20503

Re: Comments on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

Dear Ms. Neumayr:

On behalf of the Center for Biological Diversity, we submit these comments on the January 2020 "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act."[1]

In 2018, the Trump administration launched what threatens to be the largest rollback in history to "our basic national charter for protection of the environment,"[2] the National Environmental Policy Act ("NEPA"). The president's Council on Environmental Quality ("CEQ") initiated this assault by issuing an Advanced Notice of Proposed Rulemaking ("ANPRM") concerning the CEQ's long-standing NEPA regulations (hereinafter "CEQ regulations" or "NEPA regulations"), which detail the 48-year-old law's longstanding requirements for robust environmental reviews before approval of federal agency actions and projects. CEQ's request for comment was essentially an invitation for corporate lobbyists to propose new, less-protective regulations for environmental reviews.

In January 2020, the Trump administration continued with this roll back by issuing this Notice of Proposed Rulemaking (hereinafter "NPRM" or "proposed rule") on the CEQ regulations that implement NEPA. The proposed rule fails to meet the statutory command, Congressional intent of NEPA, and Supreme Court precedent. Indeed, by providing even less clarity to agencies the proposed rule reflects a complete disregard for NEPA and the current implementing CEQ regulations.

This proposed rule, like other Trump administration environmental rollbacks, ignores the threats to our environment, including that of climate change and the wildlife extinction crisis. It is nothing less than a giveaway to special interest corporate polluters, which will eliminate meaningful input by scientists and the public, and is a disgrace to the long, bipartisan and non-

[1] These comments supplement those that the Center for Biological Diversity submits in coalition with numerous other groups.
[2] *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215-16 (9th Cir. 1998).

partisan nature of CEQ. The proposed rule is arbitrary and capricious and thus CEQ must withdraw the proposed rule.

I. INTRODUCTION

The fundamental purposes for which NEPA was signed into law are more urgent today than they were in 1970. The purpose of NEPA is:

> 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.[3]

Nature—like climate change—is reaching a tipping point. 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.[4] Our planet now faces a global extinction crisis never witnessed by humankind. Scientists predict that more than one million species are on track for extinction in the coming decades.

NEPA's implementing regulations are fundamental to meeting NEPA's statutory purpose. When correctly followed, the current regulations fulfill two core purposes: (1) ensuring that federal agencies take a "hard look" at the environmental impacts of their actions,[5] and (2) requiring public participation in the decision-making process by requiring comment periods during which the public can respond to and rebut the agencies' data, choices, and conclusions.[6] These twin aims, and the associated "informed decision-making and informed public participation"[7] they promote, can only be realized through a federal agency's completion of an Environmental Impact Statement ("EIS"), or, where a federal action will have no significant impacts, to determine whether an action will have significant impacts necessitating an EIS or at least an Environmental Assessment ("EA").

In response to CEQ's ANPRM,[8] which suggested that changes to the CEQ regulations were necessary to improve efficiency and otherwise ensure the NEPA process does not interfere with agency actions, we urged that there were "many other factors that influence the timing of projects much more than compliance with NEPA, and any challenges that may exist concern

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[3] The National Environmental Policy Act of 1969, as amended. 42 U.S.C. § 4321.
[4] 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. Additional data tables from this study are available from CAP and CSP upon request.
[5] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (noting the Supreme Court's "hard look" standard was based on "[t]he sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences.").
[6] *See, e.g., Cascadia Wildlands v. BIA*, 801 F.3d 1105, 1110-11 (9th Cir. 2015).
[7] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 368 (1989).
[8] Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28591 (June 20, 2018).

agency implementation of the CEQ regulations rather than the regulations themselves."[9] Indeed, the Department of Treasury identified 40 economically significant infrastructure projects and found that "a lack of public funding is by far the most common factor hindering the completion of transportation and water infrastructure projects."[10] We concluded that "CEQ should focus on better NEPA implementation rather than considering regulatory changes."[11]

We incorporate by reference the response to the ANPRM[12] to this letter (Ex. 1) and ask that CEQ respond to each point raised in that letter along with responses to this NPRM.

II. THE CEQ PROPOSED RULE REPRESENTS AN AGENCY ACTION, WHICH REQUIRES SECTION 7 CONSULTATION UNDER THE ENDANGERED SPECIES ACT.

Section 7 of the Endangered Species Act ("ESA") requires each agency to engage in consultation with the U.S. Fish and Wildlife Service ("FWS") and/or the National Marine Fisheries Service ("NMFS") (collectively the "Services") to "insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species… determined…to be critical…."[13]

As the Supreme Court has made clear, a Section 7 Consultation is required for each discretionary agency action that "may affect listed species or critical habitat."[14] Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[15]

The trigger for consultation is very low.[16] The "may affect" standard broadly includes "any possible effect, whether beneficial, benign, adverse or of an undetermined character."[17] Even if the Services and action agency ultimately conclude that an action is not likely to adversely affect listed species, any possible effect triggers the consultation requirement.[18] Only if an agency action truly has "no effect" on listed species, and the action agency makes such a finding, is the

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[9] Letter from Center for Biological Diversity to Mary Neumayr, Council on Environmental Quality, in response to Docket No. CEQ-2018-0001, at 1-2 (Aug. 20, 2018), attached as Ex. 1.
[10] Toni Horst, et al., Department of Treasury, *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance* at 6 (Dec. 2016), attached as Ex. 2, and available at https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf (last viewed Mar. 9, 2020).
[11] Letter from Center for Biological Diversity to Mary Neumayr (Ex. 1), at 2.
[12] *Id*.
[13] 16 U.S.C. § 1536(a)(2).
[14] *See Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); 50 C.F.R. § 402.14.
[15] 50 C.F.R. § 402.02 (emphasis added).
[16] 50 C.F.R. § 402.14(a).
[17] 51 Fed. Reg. 19,926 (Jun. 3, 1986).
[18] 51 Fed. Reg. 19,926 (June 3, 1986)). *See Karuk Tribe v. Cal. v. U.S. Forest Serv*., 681 F.3d 1006, 1027 (9th Cir. 2012) ("[A]ctions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA.")

consultation requirement waived.[19] The Services' regulations clearly articulate the use of "programmatic" consultations on federal, nationwide rulemakings that impact listed species and that may affect listed species. Indeed, both the Services' 2015 final rulemaking regarding Incidental Take Statements and the Services' deeply flawed 2019 regulations regarding consultations expressly make clear that programmatic consultations should occur when an agency promulgates regulations that may affect endangered species.[20]

Since the decision to completely re-write the NEPA regulations clearly represents an agency action of that kind that falls within the scope of section 7, the only question is whether the proposed changes "may affect" endangered species or their designated critical habitats, and therefore require consultation. In fact, the proposed changes not only satisfy this low standard for consultation, but will adversely affect listed species and critical habitats in a myriad of ways.

The clearest demonstration as to how the regulations may affect listed species is the proposed change that allows agencies to ignore cumulative impacts. By allowing all federal agencies to ignore cumulative impacts entirely, cumulative impacts on listed species and critical habitats that occur downstream, downwind or otherwise outside the immediate action areas of an agency's proposed action will never be evaluated. Agencies would have the green light to ignore entirely how a proposed action may, in conjunction with other actions affecting a species, have potentially devastating effects on a species and/or its habitat.

Moreover, the elimination of cumulative impacts analysis under NEPA is especially harmful to imperiled species because the cumulative impacts analysis under the existing CEQ regulations presently is *broader* than that conducted pursuant to the ESA itself. As explained by one court in the course of rejecting an agency's contention that NEPA review is the "substantial equivalent" of the analysis of listed species impacts required by the ESA, "the ESA Section 7 consultation process differs from the cumulative impacts analysis required by NEPA in a number of important ways."[21] In particular, the ESA Section 7 regulations "only require agencies to consider the cumulative impacts of non-federal actions" on endangered and threatened species, while "NEPA requires agencies to consider the cumulative impacts of *all* actions."[22] Because the "ESA Section 7 consultation process is not the functional equivalent of the cumulative impacts analysis required by NEPA"[23] it is apparent that CEQ's proposed elimination of *any* cumulative impacts analysis as part of the NEPA process will have highly detrimental impacts on the ability of federal agencies to take cumulative effects on species into consideration when making decisions regarding particular activities and projects.

The proposed rule will also adversely affect listed species by eliminating, as one of the explicit criteria for determining whether an action will have significant adverse impacts (thus necessitating an EIS), the "degree to which the action may adversely affect an endangered or

[19] *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 598 (D.C. Cir. 2019).
[20] *See* 50 C.F.R. § 402.02 (defining "action"); *id.* (defining "programmatic consultation"); *Incidental Take Statements*, 80 Fed. Reg. 26,832 (May 11, 2015); Regulations for Interagency Cooperation, 80 Fed. Reg. 44,976 (Aug. 27, 2019).
[21] *Fund for Animals v. Hall*, 448 F. Supp. 2 127, 136 (D.D.C. 2006).
[22] *Id*, (emphasis added).
[23] *Id*. at 136-37.

threatened species or its habitat that has been determined to be critical under [the ESA]."[24] The unexplained (and inexplicable) excision of this longstanding significance criterion will inevitably encourage federal agencies (and private project proponents) to ignore or discount the consideration of impacts on listed species and critical habitats in their NEPA analysis, to the detriment of such species and habitats.

Further, the proposed rule will adversely affect species and critical habitats by eliminating the obligation of agencies to conduct studies and affirmatively obtain information where that is necessary to an EIS's informed assessment of impacts and alternatives. It is often necessary for agencies and/or project proponents to conduct additional surveys and other studies regarding species and habitat impacts so that impacts and alternatives can be meaningfully considered.[25] Consequently, eliminating the obligation to conduct such research in appropriate circumstances will further undermine the ability of agencies to take a "hard look" at the impacts of their actions on listed species and critical habitats.

These are but some of the ways in which the proposed rule "may affect" endangered and threatened species and critical habitats, but they are more than sufficient to establish that CEQ must conduct formal Section 7 consultation in connection with the proposed rule. Under the joint regulations implementing the ESA, if an impact on a listed species may occur, then the CEQ must complete consultations with the Services.[26] If CEQ elects to first complete an informal consultation, it must first determine whether its action is "not likely to adversely affect" ("NLAA") a listed species or is "likely to adversely affect" ("LAA") a listed species.[27] The Services define "NLAA" determination to encompass those situations where effects on listed species are expected to be "discountable, insignificant, or completely beneficial."[28] Discountable effects are very rare, and limited to situations where it is not possible to "meaningfully measure, detect, or evaluate" harmful impacts.[29] Any harm or take of an individual member of a listed species crosses the LAA threshold and requires formal consultations with the Services.[30] It is crystal-clear that, here, the proposed weakening of the NEPA regulations crosses this threshold and necessitates formal consultation.

During a programmatic formal consultation process, the Services would assess the environmental baseline, potential effects to species and critical habitats, including cumulative effects, and determine if the CEQ, in making the changes, is "insur[ing]" that the proposed changes are "not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of designated critical habitat.[31]

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[24] 40 C.F.R. § 1508.27(b)(9).
[25] *See, e.g.*, *Anderson v. Evans*, 350 F.3d 815, 837 (9th Cir. 2003) (requiring preparation of an EIS for "additional study of a key scientific issue" relevant to the impact of a proposed hunt on a local whale population).
[26] U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* (hereafter CONSULTATION HANDBOOK).
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] 16 U.S.C. § 1536(a)(2).

Additionally, the proposed regulatory changes would gut the sole program that CEQ oversees to protect species listed under the ESA, replacing that program with an insignificant measure, in violation of ESA section 7(a)(1). The proposed rule changes would gut the sole program that CEQ provides to conserve species listed under the ESA, replacing that program with an insignificant measure, in violation of ESA section 7(a)(1). "[S]ection 7(a)(1) imposes a specific obligation upon all federal agencies to carry out programs to conserve each endangered and threatened species."[32] "Total inaction is not allowed."[33] "[W]hile agencies might have discretion in selecting a particular program to conserve…they must in fact carry out a program to conserve, and not an 'insignificant' measure that does not, or is not reasonably likely to, conserve endangered or threatened species. To hold otherwise would turn the modest command of section 7(a)(1) into no command at all by allowing agencies to satisfy their obligations with what amounts to total inaction."[34] "Conservation" means to use all necessary methods and procedures to bring any listed species to the point at which ESA protections are no longer necessary.[35] An agency cannot strip away the sole existing conservation measure it provides for listed species without violating the duty to conserve imposed by section 7(a)(1).[36]

CEQ's current NEPA regulations provide benefits that promote the conservation of listed species by requiring an assessment of cumulative impacts that includes consideration of the cumulative impacts of future federal actions, unlike the regulations implementing the ESA itself, which limit the analysis to "those effects of future State or private activities, not involving Federal activities[.]"[37] Further, the existing CEQ regulations require the assessment of impacts that do not necessarily cause jeopardy in violation of the ESA, but nonetheless may be significant. The CEQ's proposed rule would strip away those benefits by barring the assessment of cumulative impacts entirely and otherwise weakening the analysis of impacts that do not amount to violations of other federal laws, making the remaining consideration of impacts merely an "insignificant measure" that cannot satisfy the section 7(a)(1) duty. In sum, the proposed rule takes away the additive value that NEPA analysis provides to informing decisions above and beyond the analysis that would occur in the course of an ESA section 7(a)(2) consultation, and do not provide any substitute for those stripped benefits.

III. THE CEQ PROPOSED RULE VIOLATES THE APA, FUNDAMENTAL NOTIONS OF DUE PROCESS AND FAIRNESS, AND VIOLATES SEPARATION OF POWERS PRINCIPLES OF THE CONSTITUTION.

The Administrative Procedure Act ("APA") was passed over 70 years ago to set minimum standards of fairness when ordinary citizens sought to participate in the decision-making of the

[32] *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1146 (11th Cir. 2008) (citing *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir.1998)).
[33] *Id*. (citing *Glickman*, 156 F.3d at 617–18; *Nat'l Wildlife Fed'n*, 332 F.Supp.2d 170, 187 (D. D.C. 2004) (section 7(a)(1) confers discretion, but that "discretion is not so broad as to excuse total inaction"); *Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior,* 354 F.Supp.2d 1156, 1174 (D. Or. 2005) ("compliance is not committed to agency discretion by law")).
[34] *Fla. Key Deer v. Paulison*, 522 F.3d at 1147.
[35] 16 U.S.C. § 1532.
[36] *Cf. Ctr. for Biological Diversity v. Vilsack*, 276 F. Supp. 3d 1015, 1032 (D. Nev. 2017), amended, No. 2:13-CV-1785-RFB-GWF, 2018 WL 3059913 (D. Nev. June 19, 2018*)* (terminating conservation program without providing any substitute measures to address adverse impact violated affirmative 7(a)(1) duty to conserve).
[37] 50 C.F.R. § 402.02.

federal government to ensure the First Amendment rights of all citizens. The notice and comment process — so basic to our democracy — was intended to provide a level playing field for interested persons to submit information and comments at the same time regarding a proposal.[38]

If the APA's public comment requirements mean anything, it requires "that a reasonable commenter must be able to trust an agency's representations about which particular aspects of its proposal are open for consideration."[39] An agency must "provide an accurate picture of [its] reasoning" and cannot provide a myopic, "one-sided or mistaken picture of the issues at stake."[40] Nor can an agency address an issue only "in the most general terms" or fail to put a change in "pre-existing agency practice… in the overall regulatory scheme into their proper context"[41] or otherwise fail to "adequately frame[] the subjects for discussion."[42] An agency may not "pivot from one administration's priorities to those of the next" without "at least some fidelity to law and legal process. Otherwise, government becomes a matter of the whim and caprice of the bureaucracy."[43] The proposed rule meets *none* of these basic standards for rulemakings.

With respect to providing factual information to the public, the APA further requires the CEQ to "to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."[44] Consequently, CEQ must disclose to the public in far greater detail the factual background and legal context that underlies the proposed rule. Given that federal agencies have completed hundreds of thousands of EISs, EAs, and Categorical Exclusions ("CE"), and given that virtually every aspect of NEPA has been thoroughly reviewed by the Judicial branch, the biased, limited and selective presentation of case law and precedent in the proposed rule is virtually unprecedented by any federal agency in history. The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticism. The public cannot do so when the agency cherry-picks only limited, out-of-context information. By doing so, the CEQ has set a new low for behavior by a federal agency, and it undermines basic notions of due process, fairness, and democratic engagement.

Over the past 50 years, the Supreme Court, U.S. Circuit Courts and District Courts have reviewed virtually every aspect of NEPA, its regulations, and agency actions pursuant to the law. During that time, the courts have held that certain interpretations of the law are unreasonable, either based on the statute's plain meaning, or where the statute is arguably ambiguous but the agency interpretation would clearly subvert Congress's design. The CEQ makes zero effort to discuss or explain to the public why it believes it can disregard court decisions and in fact does the opposite of what the courts have held to be the proper interpretation and meaning of NEPA.

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[38] *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).
[39] *Environmental Integrity Project v. Environmental Protection Agency*, 425 F.3d 992, 998 (D.C. Cir. 2005).
[40] *Connecticut Light & Power Co. v. Nuclear Regulatory Com*., 673 F.2d 525, 530 (D.C. Cir. 1982) (emphasis added).
[41] *American Medical Ass'n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989).
[42] *Nat'l Rest. Ass'n v. Solis*, 870 F.Supp. 2d 42, 51 (D.D.C. May 29, 2012); *see also*, *Connecticut Light & Power Co. v. Nuclear Regulatory Com*., 673 F.2d 525 (D.C. Cir. 1982).
[43] *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2002).
[44] *Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9, 36 (D.C. Cir. 1977).

As perhaps one of the most egregious examples where CEQ fails to inform the public is its proposal to simply eliminate cumulative effects. The Supreme Court clearly explained in *Kleppe v. Sierra Club*, that when actions with "cumulative or synergistic environmental impacts upon a region are pending concurrently before an agency, their environmental consequences *must be considered together*. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action."[45] Despite this clear command from the Supreme Court, CEQ now proposes to do away with all considerations of cumulative impacts, thereby ignoring the settled law of the land. Doing so represents a flagrant violation of separation of powers and the structure of our Constitutional government because Article III of the Constitution vests "[t]he judicial Power of the United States."[46] As explained in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[47]

The CEQ does not even attempt to explain to the public why it may reject the clear holding of the Supreme Court and instead do the exact opposite of what the court has concluded about the meaning of the law. In essence, the CEQ is attempting to usurp the power of the judicial branch of the government by simply rejecting without explanation or justification as to where or how it possesses the Constitutional power to overrule binding Supreme Court precedent. As Justice Thomas warned, this type of behavior represents "administrative absolutism" and s "in serious tension" with Article III of the Constitution and separation of powers.[48]

Beyond Supreme Court precedent, we also note that many U.S. Circuit Court of Appeals have also weighed in on the statutory meaning of NEPA. Where a court has ruled that an interpretation of a statute is unreasonable, an agency may not simply propose a rulemaking to overrule that holding by the court. To do otherwise would allow the executive branch to simply ignore precedent and usurp the judicial power of the Article III courts; as Justice Scalia described such a scenario, this improperly allows "judicial decisions [to be] subject to reversal by executive officers."[49] Article III courts do not sit to render decisions that can be reversed or ignored by executive officers. An agency should not be able to disregard a court's interpretation of what is unreasonable, and then simply seek *Chevron* deference for a contrary construction the next time around.[50]

And yet, not only is the CEQ moving down this unconstitutional path with reckless abandon, it is doing so without even alerting the public as to which changes to the regulations have already been held by Article III courts to be unreasonable. The CEQ preamble is remarkable given that it does not discuss a single court case that disagrees with its proposed changes to the NEPA

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[45] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (emphasis added); *see also McDowell v. Schlesinger*, 404 F. Supp. 221, 244 (W.D. Mo. 1975) (citing *Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971); *EDF v. TVA*, 468 F.2d 1164 (6th Cir. 1972) (stating "it is necessary at the outset to note that the sweep of NEPA is extraordinarily broad. NEPA mandates that any and all types of potential environmental impact be considered by the agency involved. Further, the environmental considerations mandated by NEPA to be considered by federal agencies include both the direct and indirect effects of federal action.")

[46] U.S. Constitution, Article III, Section 1.

[47] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[48] *Baldwin, et. ux. v. United States*, No. 19-402, 589 U. S. ___ (Feb. 24, 2020) (Thomas, J., dissenting from denial of certiorari) (slip op. at 9-10).

[49] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1016 (2005) (Scalia, J., dissenting).

[50] *Id*.

implementing regulations. Because of this deficiency, we expressly request that the CEQ address these specific concerns in a supplementary proposed rulemaking notice.

IV. THE CEQ PROPOSED RULE REDEFINITION OF MAJOR FEDERAL ACTION FUNDAMENTALLY UNDERMINES NEPA AND DISREGARDS SUPREME COURT PRECEDENT.

CEQ proposes to "clarify" the phrase "major federal action" by replacing the existing definition with one that accomplishes the opposite of clarification. According to the proposed revision, "major federal action" does "not include non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project." However, CEQ has not even begun to articulate the criteria by which an agency will assess whether its "funding" or "involvement" is "minimal" in the context of any particular project or activity, or why that is an appropriate standard vis-à-vis NEPA's purposes.

Nor has CEQ explained how an agency is to determine whether its funding or involvement can "control the outcome of the project," let alone why *that* is an appropriate standard for preparation of a NEPA analysis. Indeed, even if an agency "cannot control the outcome of the project" as a whole, but *could*, e.g., influence the adoption of measures for avoiding, minimizing, or mitigating particular adverse impacts, then the purposes of NEPA would be served through preparation of an EIS or EA. The existing CEQ regulations properly recognize this critical distinction, by defining "major federal action" to include actions "*with effects that may be major* and which are potentially subject to Federal control and responsibility."[51] Rather than "clarify" anything, therefore, the proposed change would, at the very least, create massive confusion and, at worst, serve as an open invitation to agencies to devise convenient excuses for avoiding NEPA review even where the objectives of the statute to reduce environmental harm through improved federal decision making would plainly be served.

Moreover, the central premise underlying CEQ's insistence on opening up this Pandora's box is legally bankrupt. CEQ asserts that it must redefine the meaning of "major federal action" because "[u]nder the current interpretation . . . the word 'major' is rendered virtually meaningless" and "all words of a statute must be given meaning consistent with longstanding principles of statutory interpretation."[52] However, under controlling judicial analyses of NEPA and the CEQ regulations it is simply not the case that the word "major" has been "rendered virtually meaningless."

Rather, in *Department of Transp. v. Public Citizen* the Supreme Court held that, even where an agency's action may be a "but for" cause of *significant* environmental impacts, the action is not a "*major* federal action" for purposes of NEPA's EIS requirement when the agency "has no discretion" to take those impacts into consideration in making its decision.[53] In *Public Citizen*, the federal agency at issue was arguably a "but for" cause of environmental impacts associated with the relevant agency action (certifying Mexican motor carriers for operation in the U.S.) but, because the agency had *no* discretion to take those impacts into consideration in its decision

[51] 40 C.F.R. § 1508.18 (emphasis added).
[52] 85 Fed. Reg. 1684, 1708-1709 (Jan. 10, 2020).
[53] *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004).

making, its action could not be deemed "*major* federal action," irrespective of the significance of the impacts.[54]

Under the Supreme Court's controlling analysis of NEPA and the existing CEQ regulations, therefore, "major" is *already* afforded a meaning distinct from any other part of the statute: it means an agency action as to which the agency has some legal "authority" to take environmental impacts into consideration in its decision making. Where the agency lacks such latitude, and hence preparation of an EIS "would serve 'no purpose' in light of NEPA's regulatory scheme as a whole," there is no "major federal action" for NEPA purposes regardless of how significant the ensuing environmental impacts may be.[55] Conversely, when an agency *does* have the "power to act on whatever information might be contained in an EIS"—e.g., in assessing whether to take the action and/or by incorporating measures for minimizing or mitigating impacts—NEPA "require[s] agencies to undertake analyses of the environmental impact of their proposals and actions."[56]

In short, CEQ's proposed redefinition of major federal action is based on the palpably erroneous premise that the "word 'major' is rendered virtually meaningless" under existing law. And while there is absolutely no need or legal justification for the proposed change, it *would* create a massive loophole in NEPA's comprehensive scheme by allowing agencies to dispense with *any* NEPA review merely by characterizing their *discretionary* actions as "minimal" regardless of the significance of environmental impacts connected to those actions and irrespective of the degree to which the agency's decision making could, e.g., influence the consideration of less environmentally harmful alternatives or the adoption of mitigation or other protective measures. CEQ's proposed change would fundamentally undermine NEPA and also contravene *Public Citizen* and many other judicial rulings that stand for the proposition that NEPA compliance is required when an agency has any legal latitude to incorporate environmental factors into its decision making.

V. THE CEQ PROPOSED RULE CHANGE OF CATEGORICAL EXCLUSIONS CONFLICTS WITH NEPA'S FUNDAMENTAL PURPOSE AND EXTENSIVE COURT PRECEDENT.

CEQ proposes to significantly expand the use of categorical exclusions ("CE"), including by providing that the "mere presence of extraordinary circumstances does not preclude the application of a CE"[57]—in conflict with the existing CEQ regulations and extensive precedent construing them. Departing sharply from the existing regulations as applied by many federal courts, CEQ proposes that, even "when extraordinary circumstances are present"—which would otherwise preclude the use of a CE and instead necessitate preparation of an EIS or EA—"agencies may consider whether mitigating circumstances, such as the design of the proposed

[54] *Id.*; *see also id.* at 763 (explaining that "[u]nder applicable CEQ regulations, '[m]ajor Federal action' is defined to 'include actions with effects that may be major and which are potentially subject to Federal control and responsibility").
[55] *Public Citizen*, 541 U.S. at 767.
[56] *Id*. at 767, 768.
[57] 85 Fed. Reg. 1684, 1696 (Jan. 10, 2020).

action to avoid effects that create extraordinary circumstances, are sufficient to allow the proposed action to be categorically excluded."[58]

This proposed change would fundamentally alter the role that CEs are supposed to play in the NEPA process and encourage agencies to invoke CEs—thereby bypassing any meaningful public review or input—in many situations in which agency actions would have potentially significant environmental effects. As CEQ acknowledges, the entire purpose of CEs is to provide for truncated review with respect to actions that *ordinarily* have insignificant effects.[59] When an agency finds that "extraordinary circumstances" apply to an action that might otherwise fall within the four corners of a CE—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 CE.[60]

Allowing an agency to rely on "mitigation" to invoke a CE that would otherwise be unavailable improperly conflates the function of a CE and an EA, and invites further abuse of CEs—which are already subject to extensive misuse, as many courts have held in the course of invalidating CEs. When an agency relies on mitigation in an EA to argue that a potentially significant impact has been brought below the significance threshold (and thus need not be analyzed in an EIS), the agency must detail its analysis in both the EA itself and a Finding of No Significant Impact ("FONSI"). Those documents must be made available for public scrutiny and they are often subject to public comment before being finalized. Consequently, the public has an opportunity to assess and question the efficacy of any mitigation that an agency and/or private project proponent is relying on to maintain that a potentially significant impact has been adequately addressed or at least been reduced below the threshold for EIS preparation.

In sharp contrast, CEs, by their nature, are subject to minimal, if any, public scrutiny and there is ordinarily little documentation required or provided supporting the rationale for invocation of the CE. Consequently, if an agency acknowledges that one or more extraordinary circumstances may be present, that should be the end of the matter insofar as a CE is concerned. At that point, the potential environmental impact, any proposed mitigation, and any *alternatives* (including alternative mitigation) should then be considered in an EIS or at least an EA. On the other hand, allowing mitigation issues to be inserted into the CE process effectively forecloses public scrutiny of purported mitigation and alternative (and potentially superior) means of avoiding or mitigating impacts on imperiled species or other affected resources.

According to CEQ, allowing an agency to rely on purported mitigation to invoke an otherwise inapplicable CE "reflects current practice for *some* agencies" – thus implicitly conceding that this is *not* the practice followed by the vast majority of agencies. Moreover, the agency regulations cited by CEQ make crystal-clear why this approach should be rejected rather than endorsed by CEQ.

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[58] *Id*.

[59] *See also Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9th Cir. 2007) (explaining that CEs, "by definition, are limited to situations where there is an insignificant or minor impact on the environment").

[60] *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.").

For example, the Federal Highway Administration ("FHWA") regulations provide that "[a]ny action that normally would be classified as a CE but could involve unusual circumstances [FHWA's terminology for extraordinary circumstances]"—such as the presence of "[s]ignificant environmental impacts" or "[s]ubstantial controversy on environmental grounds"—"will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies *to determine if the CE classification is proper*."[61] In other words, rather than provide that the apparent existence of "significant environmental impacts" or other "unusual circumstances" must compel preparation of an EIS or at least an EA, the FHWA approach allows the agency and "applicant" to conduct "appropriate environmental studies"—without *any* public review or input—and then rely on such project-specific studies to contend that the action is subject to a "***categorical*** exclusion."

This anomalous approach is most assuredly one that that CEQ should *not* endorse. It perverts the narrow function of CEs and eviscerates public scrutiny of, and involvement in, environmental reviews that cry out for such public scrutiny and involvement. Further, authorizing agencies to take this kind of approach will unavoidably result in more, rather than less, NEPA litigation—precisely what CEQ claims it desires to avoid. Plainly, if the affected public is shut off from participating in assessments of the efficacy of mitigation (or other purported means of nullifying conditions that would otherwise mandate an EIS or EA), the public will have no choice but to seek judicial review of their objections that particular issues or mitigation measures have been addressed in a skewed or improper manner in the course of an agency's invocation of a CE.

Consequently, CEQ's proposed change is counterproductive even from the standpoint of CEQ's own asserted objectives, as well as being subversive of NEPA's fundamental purposes. CEQ should therefore abandon that proposed change and instead make clear that the existence of any extraordinary circumstances *does* negate the invocation of a CE and mandate preparation of an EIS or EA.

VI. CEQ MUST PREPARE A COST-BENEFIT ANALYSIS PURSUANT TO EXECUTIVE ORDER 12866.

Because CEQ's NEPA rulemaking meets the test for a "significant regulatory action" as defined in Executive Order 12866, it must be reviewed by the Office of Information and Regulatory Affairs ("OIRA") pursuant to that Order.[62] The proposed rule may meet the Executive Order's monetary criteria because it could result in more than $100 million per year in damage to natural resource and/or impacts to the economy. The proposed rule could have a "materially adverse impact" on large private sectors of the nation's economy, including recreation and public health. The proposed rule is likely to materially and adversely affect Tribal communities across the nation. The proposed rule will adversely impact the environment in a material way by eliminating the ability of federal agencies to account for, disclose, and mitigate cumulative impacts, such as air and climate pollution. And it will raise novel legal or policy issues because it will upend a half-century of caselaw, and 40 years of regulatory certainty, in interpreting NEPA.

[61] 23 C.F.R. §§ 771.117(b)(1), (2) (emphasis added).

[62] As discussed below, CEQ and/or OIRA have apparently determined that the rule constitutes a significant regulatory action, but have declined to provide any documentation concerning the basis for such a determination.

Designating CEQ's NEPA regulations as a significant regulatory action, and one that may have an impact of more than $100 million per year on the economy, means that CEQ must comply with E.O. 12866's cost-benefit analysis requirements. This will provide OIRA the opportunity to justify or terminate the proposed rulemaking in light of the proposal's overwhelmingly negative social and environmental costs, including its harmful impacts to Tribal communities.

a. Legal Background: Executive Order 12866

In 1993, President Clinton issued Executive Order 12866 to established procedures for "Regulatory Planning and Review."[63] These procedures require OIRA to review certain regulations before they can be published.

The Office of Management and Budget's ("OMB") duty to review a rule hinges in part on whether the rule constitutes a "significant regulatory action." E.O. 12866 defines "significant regulatory action" as

> any regulatory action that is likely to result in a rule that may:
>
> (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
>
> (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
>
> (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
>
> (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.[64]

The determination that a rulemaking is a "significant regulatory action" triggers a number of agency duties, including the responsibility that the agency prepare "[a]n assessment of the potential costs and benefits of the regulatory action," for the rule and submit it to OIRA, which OIRA must review within 120 days.[65] For those rulemakings determined to have more than $100 million per year in impact to the economy or to "adversely affect in a material way" the environment or tribal communities, the order requires a more rigorously-defined cost-benefit analysis, including "[a]n assessment, including the underlying analysis, of benefits [and costs] … together with, to the extent feasible, a quantification of those benefits [and costs]," and "[a]n assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation."[66]

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[63] E.O. 12866 (Sep. 30, 1993), 58 Fed. Reg. 51,735 (Oct. 4, 1993).
[64] E.O. 12866, § 3(f).
[65] E.O. 12866, §§ 6(a)(3)(B) & 6(b).
[66] E.O. 12866, § 6(a)(3)(C).

E.O. 12866 applies to agencies, which means "any authority of the United States that is an "agency" under 44 U.S.C. 3502(1)."[67] That statute defines "agency" to include: "any executive department … or other establishment in the executive branch of the Government (including the Executive Office of the President)."[68]

The Order defines "rules" to which it applies as "an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency."[69]

b. CEQ's NEPA Rulemaking

On June 20, 2018, CEQ published an advance notice of proposed rulemaking ("ANPRM") to "update" regulations implementing NEPA.[70] The ANPRM stated that the proposal is a "significant regulatory action" pursuant to E.O. 12866.[71] The notice stated, however, that "the various statutes and executive orders that normally apply to rulemaking do not apply in this case" because "this action," presumably the advance notice, "does not propose or impose any requirements, and instead seeks comments and suggestions for CEQ to consider in possibly developing a subsequent proposed rule."[72] The notice concludes: "[i]f CEQ decides in the future to pursue a rulemaking, CEQ will address the statutes and executive orders applicable to that rulemaking at that time."[73]

In its preamble to the proposed rule to roll back NEPA regulations, CEQ states only that "[t]his proposed rule is a significant regulatory action that was submitted to OMB for review."[74] OIRA's website indicates that the proposal was designated as an "other significant" rulemaking, although the website contains no justification for that conclusion.[75]

c. The CEQ Proposed Rule Is a Significant Regulatory Action Requiring Preparation of a Cost-Benefit Analysis.

As an initial matter, E.O. 12866's provisions apply to this proposed rulemaking. CEQ meets the definition of "agency" under the order, and the proposed rule meets the definition of a "rule." CEQ's statement upon the publication of the ANPRM that "the various statutes and executive orders that normally apply to rulemaking do not apply in this case" do not apply here at the proposed rulemaking stage.

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[67] E.O. 12866, § 3(b).
[68] 44 U.S.C. § 3502(1).
[69] E.O. 12866, § 3(d)
[70] 83 Fed. Reg. 28,591 (June 20, 2018).
[71] 83 Fed. Reg. at 28,592.
[72] *Id*.
[73] *Id*.
[74] 85 Fed. Reg. at 1711.
[75] Office of Information and Regulatory Affairs, webpage of RIN 0331-AA03, attached as Ex. 3, and available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=0331-AA03 (last viewed Mar. 9, 2020).

CEQ's proposed rule meet the definition of a "significant" regulatory action includes actions "likely to result in ... an annual effect on the economy of $100 million or more or adversely effect in a material way ... jobs, the environment, … or tribal governments or communities."[76] A "significant regulatory action" also includes a rule that may "[r]aise novel legal or policy issues arising out of legal mandates," or that may "[c]reate a serious inconsistency … with an action taken or planned by another agency."[77] CEQ's proposed rule meet each of these criteria for significance.

i. The CEQ Proposed Rule Is Likely to Have an Economic Impact of More Than $100 Million Per Year or Materially Adversely Impact a Sector of the Economy and Jobs.

As noted elsewhere in these comments, the proposed rule will reduce the number of and type of decisions subject to NEPA review, eliminate the consideration of cumulative impacts and invite agencies to fail to disclose indirect impacts, and discourage agencies from considering all reasonable alternatives. A reasonably foreseeable impact of the proposed rule is thus that significant impacts that could otherwise have been identified, and avoided or mitigated, will occur, costing the economy millions. For example, the changes will likely result in agencies failing to disclose climate pollution impacts, because those impacts are likely to be considered cumulative or indirect effects. Agencies will not consider alternatives that reduce such pollution, nor will they consider mitigation measures. The proposed rule will thus likely lead to an increase in climate pollution, which will increase costs to local and state governments to mitigate those impacts, and will add public health costs as temperatures rise, and diseases spread more rapidly.

Further, narrowing the scope and number of NEPA analyses will likely harm outdoor recreation businesses whose customers rely on clean air, scenic beauty and unspoiled landscapes on federal public lands. As discussed elsewhere in this letter, the proposed rule's elimination of the consideration of cumulative impacts, and appearing to make optional the disclosure of indirect impacts, may permit oil leasing to occur with little or no environmental review, and will allow oil and gas drillers to segment analysis of their proposals. This is likely to lead to more air pollution, more oil spills, more roads, more habitat destruction, and more roadkill. All of these impacts will discourage the use of public lands, damaging ecotourism and other recreation-based businesses.[78] These costs have the potential to reach well over $100 million per year.

Even if those annual costs do not exceed $100 million, the costs of unaccounted and unmitigated impacts due to the proposed rule will cause material adverse effects to the economy, rendering this rulemaking a "significant regulatory action."

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[76] *Id.* § 3(f)(1).
[77] *Id.* §§ 3(f)(2) & 3(f)(4).
[78] The Bureau of Economic Analysis last year estimated that the outdoor recreation sector accounted for $427 billion (more than 2%) of the Unites States' GDP. Bureau of Economic Analysis, Outdoor Recreation Satellite Account, U.S. and Prototype for States, 2017 (Sep. 20, 2019), attached as Ex. 4, and available at https://www.bea.gov/news/2019/outdoor-recreation-satellite-account-us-and-prototype-states-2017 (last viewed Mar. 9, 2020).

Although the proposed rule changes are likely to result in significant economic costs from unanalyzed harm to the environment, the proposed rule's proponents allege that the proposal rule will increase jobs, investment, and economic activity. Proponents do not address the scale of this change, but they appear to believe that these impacts will be significant. At a minimum, this requires CEQ to estimate the economic impacts of the proposed rule to determine whether it is likely to exceed $100 million per year.

For example, CEQ itself has featured and republished on its website statements by industry trade groups and local governmental officials alleging major economic impacts from "modernizing" the NEPA regulations, including that the proposed rule will:

- "remove regulatory barriers that hinder housing and economic growth;"
- "directly help our state's … economy;"
- "facilitate marked national growth and expansion;"
- "enhanc[e] economic productivity and support[] more and better-paying jobs throughout the country;"
- "spur jobs creation and grow our economy;"
- "improve our economy by creating jobs;"
- "eliminate unnecessary barriers to good-paying jobs;"
- "lead to more new roads [and] higher wages;"
- "speed up the creation of good jobs;" and
- "create jobs."[79]

Other proposed rule supporters have made similar claims. The U.S. Chamber of Commerce argues that the proposed rule will "[r]educ[e] delays and uncertainties associated with infrastructure investment and related projects," and that this "will allow businesses to plan and invest with confidence while *enhancing economic productivity* and *supporting more and better-paying jobs throughout the country*."[80] By asserting that the proposed rule will "[e]nhanc[e] economic productivity and support[] more and better paying jobs" nationwide, the Chamber of Commerce asserts that the rule change will have significant economic impacts.

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[79] Council on Environmental Quality, What They Are Saying: Support for CEQ's Proposal to Modernize its NEPA Regulations (Jan. 16, 2020), attached as Ex. 5, and available at https://www.whitehouse.gov/wp-content/uploads/2020/01/20200116-FINAL-NPRM-WTAS-1.pdf and https://www.whitehouse.gov/ceq/nepa-modernization/ (last viewed Mar. 9, 2020).

[80] U.S. Chamber of Commerce, U.S. Chamber's Donohue Praises Efforts to Modernize NEPA (Jan. 10, 2020) (emphasis added), attached as Ex. 6, and available at https://www.uschamber.com/press-release/us-chambers-donohue-praises-efforts-modernize-nepa (last viewed Mar. 9, 2020).

A Chamber-led coalition, "Unlocking America's Investment," makes similar claims that modifying NEPA will unshackle infrastructure investments and "spur[] economic growth":

> Updating NEPA will reduce delays hindering critical projects, resulting in better infrastructure, a stronger economy, and continued environmental stewardship. Modernizing NEPA is the key to unlocking investment….
>
> A modernized NEPA will increase infrastructure investment and project development, spurring economic growth by:
>
> - Creating new jobs in the infrastructure sector - airways, waterways, and roadways.
> - Increasing tax revenue in local communities.
> - Reducing the need for long-term, costly upkeep and repairs to deteriorating infrastructure.[81]

We believe these claims are likely inflated, and in any case ignore the substantial financial, natural resource, and public health costs of turning a blind eye to numerous environmental impacts, as the regulations propose to do.

However, CEQ cannot have it both ways. CEQ cannot tout the rulemaking's alleged economic benefits and simultaneously inform the public and OIRA that the proposal will have no (or only minor) economic impacts. To comply with E.O. 12866, CEQ must undertake a cost-benefit analysis for this significant rulemaking. And if the boosterism of its backers is to be believed, those benefits are likely to be in excess of $100 million per year, requiring the most rigorous level of cost-benefit analysis required by E.O. 12866.[82]

ii. The CEQ Proposed Rule Is Likely to Adversely Affect in a Material Way Tribal Governments or Communities.

The proposed rule is likely to materially and adversely affect Tribal communities. We understand that a number of tribes are likely to write separate comments to oppose the proposed rule changes on the grounds that the proposed rule will diminish Tribal voices in the NEPA process, and that the rule changes are likely to degrade natural resources that are central to Tribal culture, identity, health and welfare. Thus, the proposed rule meets the definition of significance because of the material adverse impacts to Tribes.

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[81] Unlocking America's Investment, National Environmental Policy Act Fact Sheet (2020), attached as Ex. 7, and available at https://www.unlockamericaninvestment.com/wp-content/uploads/2020/01/NEPA_1.10.2020.pdf and https://www.unlockamericaninvestment.com/2020/01/09/national-environmental-policy-act-fact-sheet/ (last viewed Mar. 9, 2020). The fact sheet also asserts that reducing environmental oversight will somehow have environmental benefits, by "[r]educing emissions through investment in renewable energy sources and transmission infrastructure," and "[i]mplementing conservation projects that can better mitigate environmental impacts in a timely manner." *Id*.

[82] For these same reasons, CEQ cannot fail to complete an environmental analysis of the proposed rule pursuant to NEPA.

iii. The CEQ Proposed Rule Is Likely to Adversely Affect in a Material Way the Environment.

The CEQ proposed rule meets the significance threshold per E.O. 12866 because it is likely to materially and adversely affect the environment. The proposed rule will cause agencies to turn a blind eye to cumulative and indirect impacts, to limit alternatives analysis, and to limit the type and number of actions that receive the most rigorous level of analysis. Ignoring impacts means more impacts are likely to occur, and damage is less likely to be mitigated or avoided. Given the national reach of the CEQ regulations and the thousands of federal projects the regulations will impact, the adverse effects will be material.

iv. The CEQ Proposed Rule Is Likely to Raise Novel Legal or Policy Questions.

The CEQ proposed rule meets the E.O. 12866's significance threshold because it will completely rewrite regulations and upend caselaw that has served to provide certainty for agencies and the public for four decades. In addition, in a departure from the paradigm of the last forty years, CEQ's proposed rule would serve as both the floor and the ceiling for agency NEPA procedures. The proposal bars agencies from imposing procedures or requirements beyond those set forth in the CEQ regulations "except as otherwise provided by law or for agency efficiency."[83] It would also require agencies to adopt new NEPA procedures that "eliminate any inconsistencies with [CEQ's proposed] regulations" within one year.[84]

A report from the Environmental Law Institute aptly describes the legal chaos that is likely to follow adoption of the proposed rule.

> If adopted as proposed, the regulations would, as CEQ recognizes, necessarily sweep away all existing CEQ guidance documents and handbooks. 85 Fed. Reg. 1710. They would also require complete revision of the NEPA procedures of all federal agencies, as well as all of their handbooks, manuals, forms, and guidance documents, within what is likely to be a chaotic period of up to 12 months. This transition period will in turn raise concerns about federal actions undergoing NEPA review and/or entering the process, or being reconsidered or addressed on remand. A substantial technical literature on NEPA practice would also be superseded.
>
> At the same time, the substantive changes would call into question the continuing applicability of a half-century of federal court decisions and administrative tribunal decisions, creating future issues of whether these precedents concerning "cumulative" impact analysis, "indirect effects," "reasonable alternatives," or "significance" were interpretations of the NEPA statute or simply of the prior regulations. Nearly every word of the 1978 regulations has been litigated many times over. If adopted, the proposal would create new interpretive issues for litigators, judges, and agencies.

[83] Proposed 40 C.F.R. § 1500.3(a).
[84] Proposed 40 C.F.R. § 1507.3(a).

> Finally, the proposed rule, if finalized, will likely draw challenges in scores of federal district courts across the country. In addition to substantive issues, it can be expected that there will be fierce contests over standing, ripeness, deference or lack thereof, retroactivity, and the relationship of current agency NEPA procedures (embodied in regulations, handbooks, and contracts) to new CEQ regulations. Different legal outcomes in multiple jurisdictions, including differences in the scope of remedial relief, may be further complicated by CEQ's own proposal that all sections of the new rule be deemed "severable" (proposed §1500.3(e)). This may mean that for much of the next several years portions of the regulations may be applicable in some districts and not others; and federal agencies may need to manage NEPA processes differently across their portfolio of lands, planning and leasing activities, and permit actions in different geographic jurisdictions. States, tribes, and local governments, as well as applicants, will be faced with complex challenges as the rule is litigated.[85]

Because the proposed rule, if adopted, will "call into question the continuing applicability of a half-century of federal court decisions and administrative tribunal decisions," will lead to a "chaotic" transition period, and will require "years" to interpret in the courts, the proposed rule plainly raises novel legal issues and policy questions, rendering this proposal a "significant regulatory action."[86]

d. CEQ Must Prepare a Cost-Benefit Analysis.

In sum, CEQ's proposed rulemaking constitutes "significant regulatory action" because of its material impacts on the environment and to tribes, and its novel legal approach. Based on supporters' claims of job growth and economic stimulus, echoed by CEQ, the proposed rule could have an economic impact of more than $100 million a year, although the climate and other environmental impacts may result in a net harm to the economy exceeding that amount. CEQ therefore must prepare for OIRA – and for the public – a rigorous cost-benefit analysis as required by Executive Order 12866, § 6(a)(3)(C). At an absolute minimum, CEQ must prepare and provide to OIRA and the public the cost-benefit analysis required by § 6(a)(3)(B).

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[85] J. McElfish, *Practitioners' Guide to the Proposed NEPA Regulations*, Environmental Law Institute (Feb. 2020) at 13, attached as Ex. 8, and available at https://www.eli.org/sites/default/files/eli-pubs/practioners-guide-proposed-nepa-regulations-2020.pdf (last viewed Mar. 9, 2020).

[86] Because the proposed rule will also sweep away guidance documents under the current rules prepared by numerous other agencies, the proposal will also "[c]reate a serious inconsistency or otherwise interfere with an action taken … by another agency." For example, the Forest Service within days may finalize regulations implementing CEQ's current NEPA regulations. The Forest Service's new regulations will have to largely be scrapped only weeks or months after they are finalized if the CEQ proposed rule is finalized this summer or fall. *See* letter of S. Brown, Western Environmental Law Center to V. Christiansen, U.S. Forest Service (Jan. 15, 2020), attached as Ex. 9.

VII. ENVIRONMENTAL JUSTICE AND PUBLIC PARTICIPATION

a. The CEQ Proposed Rule Undermines Environmental Justice.

The proposed rule would appear to undermine the consideration of environmental justice impacts of proposed agency actions, and CEQ fails to comply with NEPA by declining to disclose the environmental justice impacts of this rulemaking.

Executive Order 12898 directs federal agencies to take environmental justice concerns into account. While CEQ acknowledged in its rulemaking that it must analyze the effect of its proposal on E.O. 12898, CEQ concluded, without analysis, that the proposed rule will not have a disproportionately high and adverse effect on "minorities" and low-income populations, and that an analysis of any such effects would more properly occur during implementation of specific projects subject to NEPA. Specifically, the proposed rule's preamble states:

> would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations. This rule would set forth implementing regulations for NEPA; it is in the agency implementation of NEPA when conducting reviews of proposed agency actions where consideration of environmental justice effects typically occurs.[87]

The CEQ's conclusions are incorrect, arbitrary, and capricious.

CEQ should have analyzed how the proposed rule itself and its implementation would affect E.O. 12898's mandates. This proposal will have disproportionate impacts on environmental justice communities by reducing opportunities for such communities to engage in the NEPA process, and by curtailing consideration of cumulative pollution sources and climate-change related impacts, which disproportionately burden environmental justice communities.

The proposed rule mandates that the agency disclose only "reasonably foreseeable effects that occur at the same time and place," and those effects that "have a reasonably close causal relationship to the proposed action or alternatives."[88] The proposed rule explicitly eliminates the term "cumulative" from the definition of impacts, thus ending the requirement that agencies analyze and disclose the cumulative impacts of agency action.[89]

This change will particularly impact the analysis of environmental justice impacts because environmental justice communities often suffer a plethora of threats from siting of multiple projects. Many 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. Eliminating cumulative impacts analysis will result in NEPA documents that omit or obscure a project's real-world effects since communities do not experience a project's pollution

[87] 85 Fed. Reg. 1684, 1712 (Jan. 20, 2020).
[88] Proposed 40 C.F.R. § 1508.1(g).
[89] 85 Fed. Reg. 1684, 1708 (Jan. 10, 2020) ("CEQ proposes to strike the definition of cumulative impacts.").

in isolation. In short, eliminating the consideration of such threats will make it impossible for agencies to disclose environmental injustice.

Further, the preamble states that CEQ will terminate all prior NEPA guidance, and it is unclear what guidance, if any, will replace it.[90] Thus, CEQ's current guidance on environmental justice, which emphasize the potential for cumulative impacts to result in disproportionate impacts to disadvantaged and minority communities, will be rescinded.[91]

Because the proposed rule ends a key way to evaluate and understand environmental justice impacts (by eliminating cumulative impact analysis), and will eliminate any guidance assisting agencies in understanding how to understand and disclose environmental justice impacts, the proposed rule will likely result in worse environmental justice outcomes. Therefore, the preamble's statement that the proposed rule "would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations" is false.

b. The CEQ Proposed Rule on the Use of Electronic Communication and Public Participation are Opaque, Undermine the Statutory Purpose of NEPA and Will Likely Lead to Increased Litigation.

Since the proposed rule provides even less clarity to agencies on when they can use electronic communication, we include the following examples of environmental reviews and corresponding questions on how the proposed rule, if it had been in place, would affect these reviews.

i. Federal Communications Commission's Claim of Ubiquitous High-speed Internet in Rural America is Suspect, Even by Industry.

Under the proposed rule § 1506.6, CEQ is proposing to decrease its mail notification and increase its reliance on the electronic communication and high-speed internet for public involvement. While this might benefit certain portions of the population, as evident by the Federal Communications Commission's ("FCC") flawed Form 477 and industry practices, CEQ's proposed changes would clearly be a detriment to over 40 million Americans. Public involvement in the NEPA process should be guarded and protected and the use of electronic communication and high-speed internet should not be used to supplant existing proven methods to facilitate participation and should only be used to enhance public involvement.

In 2019, the FCC stated its draft 2019 Broadband Deployment Report showed more than a 25% decrease in Americans who lack access to fixed broadband.[92] However, less than a month later,

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[90] 85 Fed. Reg. 1684, 1710 (Jan. 20, 2020) ("If CEQ finalizes the proposed rule, CEQ anticipates withdrawing all of the CEQ NEPA guidance that is currently in effect and issuing new guidance as consistent with Presidential directives.").

[91] *See* Council on Environmental Quality, Environmental Justice: Guidance under the National Environmental Policy Act (Dec. 10, 1997), attached as Ex. 10, and available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf (last viewed Mar. 9, 2020).

[92] Report: America's Digital Divide Narrows Substantially: Draft 2019 Broadband Deployment Report Shows More Than 25% Drop in Americans Lacking Access to Fixed Broadband, Federal Communications Commission (Feb. 19,

the organization Free Press informed the FCC that its report included "tremendous over-reporting" by BarrierFree, an internet service provider ("ISP") claiming services to an erroneous 2 million out of the FCC's 5.6 million newly-served rural persons.[93] BarrierFree acknowledged its error to the FCC[94] and the FCC issued a revised statement that in 2017, 21.3 million Americans lacked access to broadband internet.[95]

The FCC currently collects data via Form 477,[96] which allows an ISP to count an entire census block as having broadband internet i.e. "served" even if an ISP can only serve one location with broadband internet.[97] Research in 2019 by CostQuest Associates, working for the broadband industry lobby group USTelecom, identified and informed the FCC of additional inaccuracies with the FCC's broadband connectivity data.[98] The research only looked at Virginia and Missouri but it showed that as much as 38% of the rural areas in these two states were actually without broadband service in census blocks that the FCC Form 477 indicates as "served."[99] Additionally, in 2020, BroadbandNow Research manually checked over 11,000 addresses based on FCC Form 477 data.[100] While the FCC claims 21.3 million Americans lack access to broadband internet, the BroadbandNow study claims the figure is closer to 42 million.[101]

The FCC also excludes some home internet speeds from its SamKnows speed test, which are reported in the FCC's yearly Measuring Broadband America reports. According to the Wall

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2019), attached as Ex. 11, and available at https://docs.fcc.gov/public/attachments/DOC-356271A1.pdf (last viewed Mar. 9, 2020).

[93] Re: GN Docket No. 18-238, Free Press (Mar. 5, 2019), attached as Ex. 12, and available at https://ecfsapi.fcc.gov/file/10306056687881/Free%20Press%20706%20Report%20Form%20477%20Erroneous%20Data%20ex%20parte.pdf (last viewed Mar. 9, 2020).

[94] Jon Brodkin, *Ajit Pai's rosy broadband deployment claim may be based on gigantic error*, Ars Technica (Mar. 3, 2019), attached as Ex. 13, and available at https://arstechnica.com/tech-policy/2019/03/ajit-pais-rosy-broadband-deployment-claim-may-be-based-on-gigantic-error/ (last viewed Mar. 9, 2020).

[95] *Revised Draft Broadband Deployment Report Continues To Show America's Digital Divide Narrowing Substantially*, Federal Communications Commission (May 1, 2019), attached as Ex. 14, and available at https://docs.fcc.gov/public/attachments/DOC-357271A1.pdf (last viewed Mar. 9, 2020).

[96] *See* Form 477 Resources, Federal Communications Commission (Jan. 14, 2020), https://www.fcc.gov/economics-analytics/industry-analysis-division/form-477-resources (last viewed Mar. 9, 2020).

[97] *For the First Time, People Can Respond Online From Any Device, By Mail or by Phone*, Census Bureau (April 1, 2019) (noting that "An average census block has 4,000 people in it."), attached as Ex. 15, and available at https://www.census.gov/library/stories/2019/03/one-year-out-census-bureau-on-track-for-2020-census.html (last viewed Mar. 9, 2020).

[98] Re: Establishing the Digital Opportunity Data Collection WC Docket No. 19-195; Modernizing the FCC Form 477 Data Program, WC Docket No. 11-10; Connect America Fund, WC Docket No. 10-90; Rural Digital Opportunity Fund, WC Docket No. 19-126, USTelecom (Aug. 20, 2019), attached as Ex. 16, and available at https://ecfsapi.fcc.gov/file/1082010869365/Mapping%20Pilot_Report_Filing_08202019_Ex_Parte_FINAL.pdf (last viewed Mar. 9, 2020).

[99] *Id*. at 2. Jim Stegeman, *Broadband Mapping Initiative: Proof of Concept*, CostQuest Associates at 21 (Aug. 2019) (noting "The number of locations identified for the same census block can vary substantially depending on the data source and data vintage"), attached as Ex. 17, https://ecfsapi.fcc.gov/file/1082010869365/UST%20BSLF%20PoC%20Findings%20-%20August%202019.pdf (last viewed Mar. 9, 2020).

[100] John Busby, Julia Tanberk, *FCC Reports Broadband Unavailable to 21.3 Million Americans, BroadbandNow Study Indicates 42 Million Do Not Have Access*, BroadbandNow Research (Feb. 2020), attached as Ex. 18, and available at https://broadbandnow.com/research/fcc-underestimates-unserved-by-50-percent (last viewed Mar. 9, 2020).

[101] *Id*.

Street Journal's investigative piece, *Your Internet Provider Likely Juiced Its Official Speed Scores*, AT&T informed the FCC it would no longer participate in the SamKnows speed test.[102] Satellite provider Viasat also left the SamKnows speed test when its competitor Hughes Network's results showed 160% greater download speeds than advertised, which greatly exceeds Viasat's.[103] AT&T also convinced the FCC to exclude its slower broadband internet test results from the FCC's 2018 Measuring Broadband America report, which were included in previous FCC reports.[104]

If CEQ plans to include wireless broadband in its high-speed internet definition, the disclosure and accuracy of who has access appears to be just as bleak as wired broadband access. In 2017 the FCC required wireless carriers to file maps and data to disclose their 4G Long-Term Evolution ("LTE") coverage.[105] In 2018 filings with the FCC, the Rural Wireless Association ("RWA") stated, "Verizon's claimed 4G LTE coverage is grossly overstated"[106] and RWA also had "concerns about overstated coverage by T-Mobile."[107] In their investigated report, the FCC stated "Overstating mobile broadband coverage misleads the public and can misallocate our limited universal service funds, and thus it must be met with meaningful consequences."[108] The report found that Verizon, U.S. Cellular, and T-Mobile all likely overstated their actual coverage and real world performance.[109] And it looks like 5G coverage accuracy might not fare much better with CTIA, an industry lobby group for AT&T, Verizon, T-Mobile, and Sprint, already telling the FCC "There is broad agreement that it is not yet time to require reporting on 5G coverage."[110]

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[102] Shalini Ramachandran, Lillian Rizzo, and Drew FitzGerald, *Your Internet Provider Likely Juiced Its Official Speed Scores,* Wall Street Journal (Dec. 12, 2019), attached as Ex. 19, and available at https://www.wsj.com/articles/its-hard-to-trust-the-numbers-internet-providers-inflate-official-speed-results-11576171855 (last viewed Mar. 9, 2020).

[103] *Id*.

[104] Eighth Measuring Broadband America Fixed Broadband Report, Federal Communications Commission (Dec. 14, 2018) (illustrating that in 2018 only AT&T's IPBB was included in the report), attached as Ex. 20, and available at https://www.fcc.gov/reports-research/reports/measuring-broadband-america/measuring-fixed-broadband-eighth-report (last viewed Mar. 9, 2020); *but see* Seventh Measuring Broadband America Fixed Broadband Report, Federal Communications Commission (Dec. 14, 2018) (illustrating that in 2017 both AT&T's DSL and IPBB were included in the report), attached as Ex. 21, and available at https://www.fcc.gov/reports-research/reports/measuring-broadband-america/measuring-fixed-broadband-seventh-report (last viewed Mar. 9, 2020).

[105] Mobility Fund Phase II (MF-II), Federal Communications Commission (Dec. 4, 2019), attached as Ex. 22, and available at https://www.fcc.gov/mobility-fund-phase-ii-mf-ii (last viewed Mar. 9, 2020).

[106] Informal Request Of The Rural Wireless Association, Inc. For Commission Action, Rural Wireless Association (Aug. 6, 2018), attached as Ex. 23, and available at https://ecfsapi.fcc.gov/file/108060795725985/RWA%20MFII%20Informal%20Request%20for%20Commission%20Action-%20Final.pdf (last viewed Mar. 9, 2020).

[107] Re: Notice Of Ex Parte: WT Docket No. 10-208: Universal Service Reform – Mobility Fund, Rural Wireless Association at 2 (Dec. 10, 2018), attached as Ex. 24, and available at https://ecfsapi.fcc.gov/file/12100564510999/RWA%2012102018%20Ex%20Parte%20-%20FINAL.pdf (last viewed Mar. 9, 2020).

[108] Mobility Fund Phase II Coverage Maps Investigation Staff Report, Federal Communications Commission at 2 (2019), attached as Ex. 25, and available at https://docs.fcc.gov/public/attachments/DOC-361165A1.pdf (last viewed Mar. 9, 2020).

[109] *Id*.

[110] Reply Comments of AT&T to FCC, at 6 (Oct. 7, 2019), attached as Ex. 26, and available at https://ecfsapi.fcc.gov/file/1007604908368/ATT%20DODC%20Reply.pdf (last viewed Mar. 9, 2020).

Questions for CEQ: How does CEQ define high-speed internet, please include a distinction between upload and download transmission speeds for each in millions of bits per second ("Mbps")?

How does CEQ determine if an area has limited access to high-speed internet, is it based on the FCC Form 477 or some other metric?

Does CEQ's definition of high-speed internet only apply to wired connections such as Digital Subscriber Line ("DSL"), coaxial cable modem, and fiber, or does high-seed internet also include mobile wireless and satellite?[111]

In more rural areas, high-speed internet may be limited to more costly internet options such as mobile wireless and satellite. How will CEQ consider the cost of the type of high-speed internet connection when it determines if electronic communication is appropriate?

In some regions, high-speed internet plans include a data cap. How will CEQ consider if electronic communication is appropriate in areas with data caps?

ii. Holloman Air Force Base F-16 Training Expansion Proposal

The Air Force has proposed to expand its current F-16 training areas in New Mexico and is conducting a NEPA process to inform this decision.[112] However, the Air Force has failed repeatedly to involve the communities that might be affected by the proposed action.

The proposed rule could further undermine public involvement. Specifically, the proposed rule would "allow agencies to conduct public hearings and public meetings by means of electronic communication except where another format is required by law."[113] In New Mexico, the availability of broadband internet essential to the ability of the general public to participate in online meetings is limited. Lower income New Mexicans are less likely to have fast internet.

A 2018 Santa Fe New Mexican article details then recently released census information about poverty in New Mexico and internet availability:

> New Mexico's issues with poverty and low income are evident throughout the state. Only Los Alamos County has less than 10 percent poverty. Otherwise, the state falls alongside Arizona, South Carolina and Delaware as the only states with no counties with less than 10 percent poverty.
>
> On the broadband front, only Bernalillo, Sandoval, Santa Fe and Eddy counties have 75 to 85 percent of households with broadband subscriptions. Counties with broadband rates below 55 percent include Doña Ana, Socorro, Cibola, McKinley,

[111] Types of Broadband Connections, Federal Communications Commission (June 23, 2014), attached as Ex. 27, and available at https://www.fcc.gov/general/types-broadband-connections (last viewed Mar. 9, 2020).
[112] *See* Environmental Impact Statement for Special use Airspace Optimization Holloman Air Force Base, New Mexico http://www.hollomanafbairspaceeis.com/alternatives.aspx (last viewed Mar. 9, 2020).
[113] Proposed 36 C.F.R. § 1506.6(c).

Rio Arriba, Guadalupe, San Miguel, Mora and Harding - most with poverty rates between 26 and 37 percent.[114]

Thus, in New Mexico there appears to be a linkage between poverty and lack of broadband access. According to the New Mexico Department of Workforce Solutions, "New Mexico had the joint second-highest poverty rate (tied with Louisiana) in the country in 2017."[115] If agencies are allowed in New Mexico to use online-only public meetings to comply with NEPA, many low-income residents will not be able to participate because they would not be able to get online.

Questions for CEQ: Is it CEQ's position that the proposed rule allows agencies, like the U.S. Air Force, to conduct public meeting exclusively online, even in areas where a substantial portion of the interested public have no access to broadband? Please explain your answer: yes or no.

Further, please explain why such a result would be consistent with NEPA and current caselaw.

iii. Mid-County Parkway, Riverside County, California

NEPA reviews are one of the primary ways the federal government considers the frequently disproportionate impacts that siting large-scale, highly disruptive projects and facilities have on people of color, indigenous people, and poor and immigrant populations. Central to consideration of disproportionate burdens is the consideration of cumulative impacts, which result from past, present, and reasonably foreseeable future actions in a project area.

The requirements to analyze environmental justice impacts in the NEPA analysis has led to important public disclosures of disproportionate impacts to low income and minority communities, which would not have otherwise been addressed. Highway construction are federally funded and permitted projects that result in significant environmental justice impacts. The Federal Highway Administration's environmental impact statement for the Mid County Parkway provides a recent example.[116] The Mid County Parkway Final Environmental Impact Statement ("FEIS") disclosed that the new freeway would "bisect a residential community" in Perris, California resulting "in a 'physical change that would permanently alter the character of the existing community.'"[117]

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[114] Teya Vitu, *Census Report Shows Depth of New Mexico's Broadband Problem*, S.F. New Mexican (Dec. 27, 2018), attached as Ex. 28, and available at https://www.govtech.com/network/Census-Report-Shows-Depth-of-New-Mexicos-Broadband-Problem.html (last viewed Mar. 9, 2020).
[115] R. Moskowitz, *Poverty in New Mexico,* N.M. Dept. of Workforce Solutions (2019), attached as Ex. 29, and available at https://www.dws.state.nm.us/Portals/0/DM/LMI/Poverty_in_NM.pdf (last viewed Mar. 9, 2020).
[116] *See* Mid County Parkway Final EIR/EIS and Final Section 4(f) Evaluation (April 2015) ("MCP FEIR/FEIS") available at https://www.rctc.org/mid-county-parkway/ (last viewed Mar. 9, 2020).
[117] MCP FEIR/FEIS, Ch. 3.4 at 3.4-23, attached as Ex. 30, and available at http://midcountyparkway.org/uploads/eir3/Volume%20I%20-%20Chapters%201%20-%202%20and%20Chapters%204%20-%207/Volume%201%20-%20Chapter%203/3.4%20Community%20Impacts.pdf (last viewed Mar. 9, 2020).

Construction of the highway would force up to 396 residents from their homes and displace businesses that employ more than 170 people. It "would result in the highest impacts to residential relocations in areas with minority and low-income populations" and where seven existing schools are within 0.25 miles of the Project.[118] It also runs directly adjacent to Paragon and Liberty parks and would divide neighborhoods in Perris from those community parks.[119] These impacts to low income, predominantly Latinx and Spanish speaking communities would not have been disclosed without NEPA's requirements to analyze disproportionate impacts on low income and minority communities. The analysis and disclosure resulting from the environmental review process also resulted in outreach meetings in affected communities, which provided the public a better opportunity to learn about and voice concerns related to the project.

The disclosure of these impacts allowed the environmental and community advocates to reach a legal settlement with government transportation agencies to help mitigate the impacts of the new freeway construction. The settlement agreement dedicated $17 million to install air filtration devices in homes and schools, construct solar energy panels at commuter rail stations to reduce air pollution, fund park renovations in affected communities, increase incentives for public transit and carpooling, provide increased pedestrian and cycling access, increase safety measures for motorists, and protect key wildlife habitat.[120]

It is unlikely that at all of these impacts would have been disclosed, or the improved outcome achieved, under CEQ's proposed rule. First, the proposed rule explicitly terminates the requirement that agencies analyze and disclose the cumulative impacts of agency action.[121] This will particularly hobble the analysis of environmental justice impacts because disadvantaged and minority communities often face a plethora of threats from the siting of multiple projects. Eliminating the consideration of such threats will make it impossible for agencies to disclose environmental injustice. Further, impacts to the parks, community and its "character and cohesion" might be considered "indirect" impacts, and thus might not be disclosed because the proposed rule appears to make the disclosure of such impacts optional.[122]

Second, the preamble states that CEQ will terminate all prior guidance, and does not state what guidance, if any, will replace prior guidance.[123] Thus, CEQ's current guidance on environmental justice, which emphasizes the need to evaluate cumulative impacts in analyzing disproportionate

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[118] MCP FEIR/FEIS, Summary at ES-35, attached as Ex. 31, and available at http://midcountyparkway.org/uploads/eir3/Volume%20I%20-%20Chapters%201%20-%202%20and%20Chapters%204%20-%207/Summary.pdf (last viewed Mar. 9, 2020); MCP FEIR/FEIS, Chapter 4, California Environmental Quality Act at 4-57, attached as Ex. 32, and available at http://midcountyparkway.org/uploads/eir3/Volume%20I%20-%20Chapters%201%20-%202%20and%20Chapters%204%20-%207/4.0%20CEQA.pdf (last viewed Mar. 9, 2020).

[119] MCP FEIR/FEIS Ch. 3.4 (Ex. 30) at Figure 3.4.5.

[120] Center for Biological Diversity, Agreement Dedicates $17 Million to Reduce Harms of Southern California Freeways (July 2018), attached as Ex. 33, and available at https://www.biologicaldiversity.org/news/press_releases/2018/mid-county-parkway-sr-60-07-02-2018.php (last viewed Mar. 9, 2020).

[121] 85 Fed. Reg. 1684, 1708 (Jan. 10, 2020) ("CEQ proposes to strike the definition of cumulative impacts.").

[122] MCP FEIR/FEIS Ch. 3.4 (Ex. 30) at 3.4-54.

[123] 85 Fed. Reg. 1684, 1710 (Jan. 20, 2020) ("If CEQ finalizes the proposed rule, CEQ anticipates withdrawing all of the CEQ NEPA guidance that is currently in effect and issuing new guidance as consistent with Presidential directives.").

impacts to disadvantaged and minority communities, will be rescinded.[124] The lack of agency guidance could leave relevant agencies confused about whether and how to disclose environmental justice impacts.

> ***Questions for CEQ***: Is it CEQ's position that the proposed rule, had it been in place, would have required more, the same, or less disclosure of environmental justice impacts than included in the Mid-County Parkway FEIS? Please explain your answer.
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.

iv. Bureau of Land Management Instruction Memorandum 2018-034

On January 31, 2018, the Bureau of Land Management ("BLM") issued an "Instruction Memorandum" ("IM") ordering significant changes to the way the agency would review oil and gas leasing. Such leasing has led to oil and gas drilling that has fouled water, destroyed wildlife habitat, and worsened climate and air pollution across large swaths of the West. IM 2018-034 claimed as its purpose:

> to simplify and streamline the [oil and gas] leasing process to alleviate unnecessary impediments and burdens, to expedite the offering of lands for lease, and to ensure quarterly oil and gas lease sales are consistently held in accordance with the Mineral Leasing Act (30 U.S.C. § 226), Executive Order 13783, and Secretary Order 3354.[125]

IM 2018-034 "supersedes existing policy" contained in IM 2010-117 and replaces "any conflicting guidance or directive found in the BLM Manual or Handbook."[126] IM 2018-034 departs from previous guidance governing BLM lease sale administration, by (1) requiring parcel review by state or field offices with 6 months (§ III.A), (2) subjecting parcel deferral to Washington Office approval (§ III.A), (3) eliminating the "rotating" lease sale schedule within state offices, (4) eliminating the requirement for public participation in NEPA processes (§ III.B.5), (5) requiring use of "Determinations of NEPA Adequacy" ("DNAs") in some circumstances and eliminating the requirement for 30-day public comment on DNAs (§ III.D), and (6) cutting protest periods from 30 to 10 days (§ IV.B).

In these provisions, IM 2018-034 goes beyond a general statement of policy; rather, it sets forth a new, different, and mandatory template for BLM's oil and gas leasing process that prescribes how to implement and interpret law, namely NEPA. Because the IM consummates these changes in a departure from earlier direction, and because its provisions have legal consequences for both BLM and the public, IM 2018-034 is a final action. Conservation groups challenged the IM on the grounds that BLM's failure to provide public notice and comment for that final agency action

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[124] *See* Council on Environmental Quality, Environmental Justice: Guidance under the National Environmental Policy Act (Dec. 10, 1997), attached as Ex. 10.
[125] Department of the Interior, IM 2018-034 (Jan. 31, 2018), attached as Ex. 34, and available at https://www.blm.gov/policy/im-2018-034 (last viewed Mar. 9, 2020).
[126] *Id*.

violated public participation provisions of the Federal Land Policy and Management Act of 1976 ("FLPMA"), which require that "the Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give ... the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands."[127] That failure also violated NEPA, which "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and that "the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision."[128] Further, by employing provisions of IM 2018-034 to approve oil and gas lease sales, thereby restricting public participation in those decisions, the conservationists alleged BLM had in turn violated provisions of both FLPMA and NEPA.

The District Court of Idaho generally agreed with conservationists' claims and in a ruling just two weeks ago held that BLM's promulgation of IM 2018-034 and its issuance of several oil and gas lease sales pursuant to the IM violated NEPA and FLPMA.[129] The court ruled that, "BLM made an intentional decision to limit the opportunity for (and, in some circumstances, to preclude entirely) contemporaneous public involvement in decisions concerning whether to grant oil and gas leases on federal lands," and "the fact of doing so in the manner pursued by BLM cannot be reconciled with FLPMA and NEPA's overarching mandates."[130]

Under the CEQ's proposed rule, documents such as IM 2018-034, which BLM has characterized as "guidance," would not be subject to NEPA, risking further violations of NEPA, FLPMA, and APA where that guidance and its implementation prescribes agency action running afoul of those and other laws.

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, had it been in place, would have allowed BLM to approve IM 2018-034 provisions in the absence of public notice and comment requirements of NEPA and FLPMA?
>
> Is it CEQ's position that the proposed rule, had it been in place, would have allowed BLM to implement IM 2018-034 provisions in the approval of oil and gas lease sales on public lands in the absence of public notice and comment requirements of NEPA and FLPMA?
>
> Please answer each question "yes" or "no" and provide a detailed explanation for each of the questions above.
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.

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[127] 43 U.S.C. § 1712(h).
[128] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).
[129] *W. Watersheds Project v. Zinke*, 2020 U.S. Dist. LEXIS 34612, Case No. 1:18-cv-00187-REB (D. Idaho Feb. 27, 2020).
[130] *Id*. at *55-*56.

VIII. THE CEQ PROPOSED RULE ON IMPACTS, ALTERNATIVES, AND SCIENCE ARE OPAQUE, UNDERMINE THE STATUTORY PURPOSE OF NEPA AND WILL LIKELY LEAD TO INCREASED LITIGATION.

Since the proposed rule provides even less clarity on (1) direct, indirect, and cumulative impacts; (2) alternatives; and (3) the use of science, research, and surveys; we include the following examples of environmental reviews and corresponding questions on how the proposed rule, if it had been in place, would affect these reviews.

a. The CEQ Proposed Rule on Direct, Indirect, and Cumulative Impacts

i. Spruce Beetle Epidemic and Aspen Decline Management Response

By the early 2010s it was estimated that approximately 140,000 acres of spruce-fir and 145,000 acres of aspen forests had experienced mortality from insects and disease over the course of the previous decade.[131] The Grand Mesa, Uncompahgre, and Gunnison National Forest's response was the Spruce Beetle Epidemic and Aspen Decline Management Response ("SBEADMR") project, a massive timber proposal to cover commercial and non-commercial activities on these forests over a 10 year period.[132] At the scoping stage, the Forest Service in 2013 proposed 4,000 to 6,000 acres of timber cuts per year and an additional 3,000 to 6,000 acres of non-commercial treatments in spruce-fir forests.[133] Although mechanized cuts were not proposed in Colorado Roadless Areas, Research Natural Areas or Special Management Areas that were managed for wilderness values, the Forest Service proposed that these areas could receive non-mechanized cuts and other treatments such as hand cutting trees or prescribed fire, under the proposed action.[134] Prior to the scoping notice, the Forest Service conducted initial outreach and throughout the agency decisionmaking process, the Forest Service held a variety of public meetings, field trips and workshops regarding the proposal.[135]

The public process exposed significant concerns including but not limited to implementation of the best available science, the amount of available acres for activities, amount of road miles that would be created, timber sales and firebreaks in the remote backcountry well beyond the wildlands urban interface, and the total acres for proposed activities. As a result of a robust public process, numerous changes were made to the proposal.

For example, the final decision excluded Colorado Roadless Areas, a change that was made apparently in response to public comment.[136] The Forest Service concluded that this change

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[131] USDA Forest Serv., Spruce Beetle Epidemic and Aspen Decline Mgmt. Response; Grand Mesa, Uncompahgre, and Gunnison National Forest ("GMUG") Colo., 78 Fed. Reg. 46312 (July 31, 2013).
[132] *Id*. at 46313.
[133] *Id*.
[134] *Id*.
[135] Forest Service, Final Record of Decision, Spruce Beetle Epidemic and Aspen Decline Mgmt. Response, 7-8 (July 5, 2016) ("SBEADMR ROD"), attached as Ex. 35, and available at https://www.fs.usda.gov/nfs/11558/www/nepa/96623_FSPLT3_3802025.pdf (last viewed Mar. 9, 2020).
[136] *See, e.g.,* SBEADMR ROD (Ex. 35) at 10 (noting that these areas were excluded by the DEIS stage) but at scoping stage, *supra* note 135, 78 Fed. Reg. 46312 such areas were not yet excluded.

directly benefited that agency "as the limited agency capacity will be applied most effectively to conduct active management treatments to less controversial areas."[137]

Public comment also led the Forest Service to narrow the areas for treatments, which had a positive effect on the agency's analysis and ultimate decision-making.[138]

As the Forest Service explained in its Record of Decision ("ROD"):

> We responded to public comment on the DEIS by investing in a multi-month process to develop Priority Treatment Areas (PTAs) from the original broader opportunity areas. Using ideas from stakeholders, these PTAs were developed in partnership with the SBEADMR Science Team through a landscape-scale GIS analysis. After refining the original area to approximately one half the extent of DEIS opportunity areas, we incorporated our specialists' working knowledge of the ground to fine-tune and validate the PTAs based on real-world conditions. For commercial treatments, this resulted in a change from the original 164,000-278,000 acres (varies by alternative) of potential commercial treatment areas analyzed to the final subset of 46,000-113,000 acres analyzed as PTAs. For noncommercial treatments, this resulted in a change from the original 101,000-132,000 acres of potential noncommercial treatment areas analyzed to the final subset of 56,000-77,000 acres analyzed as PTAs. The ratio of acres analyzed to total acres treated now ranges from a maximum of one: two in Alternative 2 to one: one in Alternative 3. This effort enabled more thorough, quantitative upfront effects analysis and disclosure in the FEIS.
>
> With refined PTAs, we were then able to respond to an associated public concern regarding the location of proposed new road construction. By mapping a proposed road system for SBEAMDR implementation, we were also able to more thoroughly, quantitatively analyze and disclose effects in our environmental analysis. For Alternative 2, this resulted in a change from the original maximum of 320 miles of road construction proposed (both temporary and designed) to the final proposal of a maximum of 178 miles of new road construction. For Alternative 3, the total proposed road construction remained the same at 80 miles.[139]

Because the Forest Service used the NEPA process to home in on priority areas based on science and expert knowledge, the Forest Service was able to provide "a more thorough, quantitative upfront effects analysis" leading to tangible and meaningful on-the-ground changes, such as reducing proposed road miles by 55%.[140] This is not only a positive for the public but also land managers by providing greater focus (and likely efficiency) in implementing approved activities.

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[137] Forest Service, Final EIS, Spruce Beetle Epidemic and Aspen Decline Mgmt. Response (May 2016) at 39, attached as Ex. 36, and available at https://www.fs.usda.gov/nfs/11558/www/nepa/96623_FSPLT3_3083981.pdf (last viewed Mar. 9, 2020).
[138] SBEADMR ROD (Ex. 35) at 12.
[139] SBEADMR ROD (Ex. 35) at 10.
[140] *Id*.

Under the CEQ's proposed rule, however, the Forest Service might never have undertaken new scientific and technical research even though it was necessary and resulted in a better end-product.[141] The proposed rule states that "[a]gencies shall make use of reliable existing data and resources and are not required to undertake new scientific and technical research to inform their analyses."[142] Here, the Grand Mesa, Uncompahgre, Gunnison National Forest ("GMUG's") Forest Plan dated back to 1983 and significant changes to forest structure, health, and composition had occurred since then (and are continuing to occur). Without the additional information and data gathering on the SBEADMR project that the Forest Service performed (beyond that collected two decades earlier), the ultimate decisionmaker and the public would have been operating in the dark as to current conditions and expected outcomes and effects of agency action. Wise management that conserves and preserve our invaluable natural resources for current and future generations requires not only the ability to undertake new science and technical research but requirements to ensure this is part of the decision-making process. Without it, land managers and the public will inevitably be poorly positioned to make informed decisions.

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, had it been in place, would not necessarily have required that the Forest Service obtain new science and technical research for the forest and areas within the proposed projects action area because existing data and resources is sufficient? Please explain your answer yes or no.
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.

SBEADMR also illustrates the harm that the proposed rule would cause by eliminating analysis of indirect effects. The indirect effects from logging activities approved by SBEADMR on a variety of forest resources was and is a significant issue. As a result, the Forest Service sought to implement measures seeking to avoid, minimize, and mitigate these damaging, indirect impacts.[143] Road bulldozing, re-construction, and use is one particularly useful example of how important analysis of indirect effects is for informed decisionmaking. As the attached study shows (Ex. 37), indirect and cumulative impacts from roads include significant ramifications on water quality and quantity, erosion, spreading and increasing invasive and noxious weeds on the landscape, and watershed health.[144] For the SBEADMR project, as result of analyzing these impacts and consequently disclosing them, the Forest Service decreased the amount of road building from the original proposal by 55% in order to reduce many of these impacts.

Under the proposed rule, such positive modifications would likely be neither proposed nor adopted as the Forest Service would need not disclose these impacts because they could be considered not "proximate" enough to the proposed action. The proposed rule eliminates the

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[141] *Id*. at 10.
[142] Proposed 40 C.F.R. § 1502.24.
[143] *See, e.g.,* SBEADMR FEIS (Ex. 36) at 137–359 (discussing indirect effects to soils, waterbodies and stream health, water quality, water yield, fends, wetlands, and riparian areas).
[144] *See e.g.* Jonathan J. Rhodes, The Watershed Impacts of Forest Treatments to Reduce Fuels and Modify Fire Behavior, 17, 29, 26-30, 32, 79-80, 81 (2007) ("Roads are typically the single largest source of elevated erosion in forested watersheds. . . . Roads and landings essentially zero out soil productivity for some time and reduce it for long periods thereafter. . . .This is the case even with "temporary" roads and landings."), attached as Ex. 37, and available at http://www.orww.org/Wildfires/References/Forest_Fuels/Rhodes_2007.pdf (last viewed Mar. 9, 2020).

terms "indirect" and "cumulative" from the definition of impacts, mandating that the agency disclose only "reasonably foreseeable effects that occur at the same time and place."[145] Effects "*may* include reasonably foreseeable effects that are later in time or farther removed in distance;" use of the term "may" rendering the disclosure of indirect impacts optional.[146] Had the Forest Service ignored indirect impacts from the SBEADMR project, the agency would likely have ignored mitigation measures and modifications to the proposal that reduced impacts to critical public resources (including watersheds).

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, had it been in place, would not necessarily have required that the Forest Service disclose the impacts of roads, mechanized timber cuts, and other approved actions' impacts on water quality and quantity, erosion, spreading and increasing invasive and noxious weeds on the landscape, and watershed health because such impacts could be considered not "proximate" enough? Please explain your answer yes or no.
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.

ii. Signal Peak Trail EA

In 2017, the Gunnison BLM Field Office started a NEPA EA process for new trail construction in an area just north of Gunnison, Colorado. The BLM land where the proposed action would take place provides important seasonal habitat for wintering big game and critical habitat for the threatened Gunnison Sage-grouse.[147] At the scoping stage, the only proposed action was submitted by the project proponent, Gunnison Trails (a mountain bike group). BLM proposed to use 7.8 miles of existing system single-track trail; adopt, retrofit, or realign 7.7 miles of existing single-track and design and construct another 20 miles of new trails (34.7 miles total) through wintering and critical habitat. The proposed action included some measures to reduce impacts to this habitat and wildlife.[148]

Comments submitted during the scoping period highlighted the need for indirect and cumulative impacts analyses and for development of reasonable alternatives to reduce impacts on wintering ungulates, Gunnison Sage-grouse, and their habitat.[149] In response, BLM's EA included a new alternative, Alternative B, that incorporated many of elements of the proposed action "but with a focused reduction in trail miles and an enhanced seasonal closure to benefit wintering wildlife and Gunnison Sage-grouse."[150] This alternative reduced trail miles by 7.4 miles, a direct result of "landowner comments and wildlife habitat concerns that were specific to the north side of the

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[145] Proposed 40 C.F.R. § 1508.1(g); 85 Fed. Reg. 1684, 1708 (Jan. 10, 2020) ("CEQ proposes to strike the definition of cumulative impacts.").
[146] Proposed 40 C.F.R. § 1508.1(g).
[147] BLM, Environmental Assessment, Signal Peak Trail System, DOI-BLM-CO-F070-2017-0012-EA, 15 (June 2018) ("The project area provides important year-round habitat for Gunnison Sage-grouse and winter habitat for mule deer and elk.") ("Signal Peak EA"), attached as Ex. 38, and available at https://eplanning.blm.gov/epl-front-office/projects/nepa/77462/148786/182743/Signal_Peak_Trails_EA_Final.pdf (last viewed Mar. 9, 2020).
[148] *Id*. at 25.
[149] *See e.g. id*. at 3, 7.
[150] *Id*. at 7, 27.

project area."[151] Alternative B also proposed more robust seasonal closures than the proposed action, including specific closures for types of use (motorized, mechanized, foot/horse), for longer periods of time, as well as including an area-wide closure.[152]

To reduce impacts on Gunnison Sage-grouse, Alternative B included "a seasonal area closure around the Signal Peak West lek site. This closure will reduce impacts associated with bird disturbances during the breeding season by not only protecting the lek site, but also increasing protection to the birds daily use patterns once they leave the lek."[153] Because the trail in this area is in close proximity to the lek, Alternative B's seasonal area closure would limit "both on and off trail use during the lek season" (or both direct and indirect impacts).[154] BLM noted the importance of going beyond minimum conservation measures because of low lek counts in previous years and the increased use of the Signal Peak area by recreators.[155]

Because indirect and cumulative impacts to wildlife and their habitat were raised and then subsequently analyzed, BLM's final decision adopted Alternative B versus the proponent proposed action.[156] In noting its rationale, BLM stated that it chose Alternative B because it would still create "a positive, healthy experience for the user" but also "minimize[] visitor resource impacts and potential user conflict while protecting wintering wildlife and Gunnison Sage-grouse."[157]

CEQ's proposed rule proposes a number of changes that undercut the importance of alternative consideration to the NEPA process. The proposed rule removes from the current regulation the statement that alternatives are "the heart of the environmental impact statement."[158] The proposed rule also removes the direction to "rigorously explore and objectively" evaluate alternatives and eliminates "all" before the phrase "reasonable alternatives." These changes signal to agencies and to the public CEQ's intent to downgrade the importance of alternatives. Without a robust analysis of alternatives, the NEPA process becomes a process of documenting the effects of a "done deal" rather than contributing to an informed decision-making process. CEQ also invites the public to comment "on whether the regulations should establish a presumptive maximum number of alternatives for evaluation of a proposed action, or alternatively for certain categories of proposed actions."[159] This could result in the agency choosing to mandate that EAs consider only two alternatives: the action and non-action alternatives.

Under the CEQ's proposed rule, then, BLM might never have explored, much less chosen, an alternative different from the proposed action even though a different alternative still fit the

[151] *Id*. at 7-8.
[152] *Id*. at 9-10.
[153] *Id*. at 39.
[154] *Id*. at 39.
[155] *Id*. at 39.
[156] BLM, Decision Record, DOI-BLM-CO-F070-2017-0012-EA (June 2018), at 3 (Signal Peak Decision Record), attached as Ex. 39, and available at https://eplanning.blm.gov/epl-front-office/projects/nepa/77462/148785/182742/Signal_Peak_Trails_DR_Final.pdf (last viewed Mar. 9, 2020).
[157] *Id*.
[158] 40 C.F.R. § 1502.14.
[159] 85 Fed. Reg. 1684, 1702 (Jan. 10, 2020).

purpose and need while positively reducing negative direct, indirect, and cumulative impacts to wintering ungulates and Gunnison Sage-grouse and its critical habitat.

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, had it been in place, would not have necessarily required that BLM rigorously evaluate alternatives in the Signal Peak proposal beyond the proponent proposed action? Please explain your answer yes or no.
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.

This Signal Peak EA also demonstrates the importance of analyzing indirect and cumulative impacts for informed agency decisionmaking that leads to a better on-the-ground result. As discussed above, because the NEPA process highlighted the need to analyze impacts to wintering habitat and ungulates as well as Gunnison Sage-grouse and its critical habitat, the BLM undertook such analysis and, as a result, opted for a decision that would minimize, mitigate, and otherwise avoid some of the impacts of the proponent proposed action. Indeed, BLM specifically considered impacts of the proposal and adopted an alternative that had less indirect and cumulative impacts to ungulates and Gunnison Sage-grouse.[160]

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, had it been in place, would not necessarily have required that BLM's Signal Peak project disclose the indirect and cumulative impacts of the proposed action and alternatives to wintering habitat and wintering ungulates as well as Gunnison Sage-grouse and its critical habitat because such impacts would not be considered "proximate" enough? Please explain your answer yes or no.
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.

iii. Forest Service: National Forests and Grasslands of Texas and Los Padres National Forest

Based on a plain reading of the proposed rule, oil and gas drillers may argue that the proposed rule permits the BLM and Forest Service to turn a blind eye to the indirect and cumulative impacts of any proposed decision to lease lands for oil and gas development, potentially ending any NEPA review of leasing.

The proposed rule eliminates the terms "indirect" and "cumulative" from the definition of impacts, mandating that the agency disclose only "reasonably foreseeable effects that occur at the same time and place."[161] Effects "*may* include reasonably foreseeable effects that are later in time or farther removed in distance," rendering the disclosure of indirect impacts optional.[162]

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[160] *See e.g.* Signal Peak EA (Ex. 38) at 33-35; 37-39.
[161] Proposed 40 C.F.R. § 1508.1(g); 85 Fed. Reg. 1684, 1708 (Jan. 10, 2020) ("CEQ proposes to strike the definition of cumulative impacts.").
[162] Proposed 40 C.F.R. § 1508.1(g).

If the agencies were to decide that they need not analyze indirect effects, federal agencies may take the position that NEPA analysis of oil and gas leasing decisions is no longer required. In multiple leasing decisions, BLM has asserted that oil and gas leasing (or opening lands to leasing) does not result in "direct" effects and only results in "indirect" effects. Although under current law, courts have mandated that BLM analyze drilling as a reasonably foreseeable impact of leasing, courts have recognized BLM's treatment of oil and gas development as "indirect" effects of leasing.[163] Further, because the proposed rule would no longer explicitly require BLM to analyze cumulative impacts of drilling throughout the planning area, these impacts could escape review at the application for permit to drill ("APD") stage as well.[164] Accordingly, the proposed rule could allow federal agencies to entirely overlook broad-scale impacts of oil and gas leasing throughout a planning area.

For example, in 2016, the Forest Service withdrew consent to leasing on over 30,000 acres in the National Forests and Grasslands of Texas ("NFGT") in response to public concerns that its 1996 leasing analysis did not address the impacts of fracking and horizontal drilling, and because it failed to involve the public in its decision to authorize leasing.[165] As a result, the Forest Service halted oil and gas leasing in the Texas National Forests and initiated a new oil and gas analysis to address these impacts. Last year, the Forest Service released the Reasonable Foreseeable Development Scenario for oil and gas wells in the NFGT, which will inform the EIS's oil and gas leasing analysis. It projects that over the next 20 years, cumulatively 1,530 fracking wells could be drilled within the boundary of the NFGT (on both federal and private surface); 5.3 billion gallons of water depleted for fracking; and over 32.3 billion gallons of wastewater produced.[166] These impacts of oil and gas leasing, of the type that federal agencies and industry contend are indirect and cumulative, would not have been disclosed but for the Forest Service's decision that existing NEPA regulations required their disclosure. So far, 600-700 unique public comments have been received in response to the notice of intent ("NOI"), most of them concerned with the impacts of fracking.

Stronger protections for forest habitat, water resources, and soils are likely to result from the new analysis. The NOI proposes to expand No Surface Occupancy ("NSO") stipulations to lands with natural heritage botanical areas, drinking water reservoirs, special status species, unique prairie vegetation communities, inclusional wetlands, sensitive aquatic areas, natural springs, and steep

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[163] *See New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 716-19 (10th Cir. 2009) (BLM must disclose *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 67 n.21 (D.D.C. 2019) (BLM asserting that greenhouse gas emissions can be an indirect impact of leasing); *Ctr. for Biological Diversity v. United States BLM*, No. 3:17-CV-553-LRH-WGC, 2019 U.S. Dist. LEXIS 7525, at *14 (D. Nev. Jan. 15, 2019).

[164] *See Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 853-54 (10th Cir. 2019) (requiring analysis of cumulative impacts of drilling thousands of wells throughout the planning area at the APD stage if these effects were not adequately addressed at the planning stage).

[165] USFS, Letter to BLM Withdrawing Consent, available at https://www.biologicaldiversity.org/campaigns/keep_it_in_the_ground/pdfs/2820_Texas_Withdrawal_Consent_to_BLM_2016_02_18.pdf; National Forests and Grasslands in Texas; Oil and Gas Leasing Availability Analysis Environmental Impact Statement, Notice of Intent, 84 Fed. Reg. 44843 (Aug. 27, 2019).

[166] U.S. Forest Service, National Forests and Grasslands in Texas, Reasonable Foreseeable Development Scenario for Oil and Gas Activities Final Report (Nov. 2018) at 3, attached as Ex. 40, and available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd659157.pdf (last viewed Mar. 9, 2020).

slopes.[167] This would increase lands with NSO stipulations from 11,100 to 28,000 acres. The NOI also proposes to strengthen stipulations to protect habitat for the endangered red-cockaded woodpecker by requiring site-specific species surveys on 226,700 acres of forest. It also proposes to create new stipulations to address invasive plants and soil stability associated with well pad construction. But for the Forest Service's new analysis, the Forest Service and BLM would still be issuing leases without considering these proposed protections.

Likewise, in 2016, the U.S. Forest Service voluntarily continued its stay of leasing in the Los Padres National Forest (which began with a prior 2005 lawsuit), until it prepared and approved a supplemental EIS to address the impacts of fracking, in response to new information about fracking.[168] The Sespe Oil Field is largely contained within the Los Padres National Forest and surrounded by the Sespe Condor Sanctuary and Hopper Mountain National Wildlife Refuge.[169] Nearly all wells in this oil field are fracked. The Forest Service has never analyzed cumulative and indirect effects of fracking in the forest, such as the risk of spills and leaks from frack wells and unlined frack waste pits, and their impacts on endangered California condor and steelhead. The new supplemental EIS process, required by the existing NEPA regulations, will allow the Forest Service to analyze these impacts and formulate appropriate protections.

With respect to indirect effects, the proposed rule could also create a conflict with the Forest Service's oil and gas leasing regulations. The Forest Service's regulations require the Forest Service to "[p]roject the type/amount of *post-leasing activity that is reasonably foreseeable as a consequence of conducting a leasing program* consistent with that described in the proposal and for each alternative," and to "[a]nalyze the reasonable foreseeable *impacts of post-leasing activity* projected."[170] On the other hand, the Forest Service's regulations require the Forest Service to comply with the CEQ regulations in analyzing lands for leasing, 36 C.F.R. § 228.102(a), which could soon eliminate the Forest Service's duty to consider indirect effects, including post-leasing activities and impacts.[171]

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule would not necessarily require land management agencies to disclose the indirect or cumulative impacts of oil and gas leasing? And if so, given the agencies' position that there are no direct impacts of oil and gas leasing, could land management agencies issue oil and gas leases with a

[167] *See* 84 Fed. Reg. 44843 (Aug. 27, 2019).
[168] L. Orozco, Los Padres National Forest Puts New Freeze on Plans to Open 52,000 Acres to Oil and Gas Development, KCLU (Dec. 16, 2016), attached as Ex. 41, and available at https://www.kclu.org/post/los-padres-national-forest-puts-new-freeze-plans-open-52000-acres-oil-and-gas-development#stream/0 (last viewed Mar. 9, 2020); Center for Biological Diversity, Forest Service Agrees to Halt Oil, Gas Leasing in Los Padres National Forest, Yubanet.com (Dec. 6, 2016), attached as Ex. 42, and available at https://www.biologicaldiversity.org/news/press_releases/2016/los-padres-national-forest-12-06-2016.html (last viewed Mar. 9, 2020).
[169] Los Padres ForestWatch, Report: Oil Industry Trashing Public Lands and Endangering Wildlife in Los Padres National Forest (Nov. 2013), attached as Ex. 43, and available at https://lpfw.org/wp-content/uploads/2013/11/Trashing-The-Sespe-MAIN-REPORT.pdf (last viewed Mar. 9, 2020).
[170] 36 C.F.R. § 228.102(c)(3), (4) (emphases added).
[171] *See* Proposed 40 C.F.R. § 1500.3(a) (generally barring agencies from imposing procedures or requirements beyond those set forth in the CEQ regulations); Proposed 40 C.F.R. § 1507.3(a) (requiring agencies to adopt new NEPA procedures that "eliminate any inconsistencies with [CEQ's proposed] regulations" within one year).

categorical exclusion or no NEPA at all, assuming the agency concluded there were no direct impacts of leasing? Please explain your answers.

Further, please explain why such a result would be consistent with NEPA and current caselaw.

Is it CEQ's position that Forest Service regulations requiring the agency to "[a]nalyze the reasonable foreseeable impacts of post-leasing activity projected" would be effectively repealed by the proposed rule, or at a minimum that the Forest Service regulations would be interpreted to no longer require the disclosure of the indirect and cumulative impacts of leasing? Does the proposed rule intend to eliminate the Forest Service's duty to conduct an oil and gas leasing analysis under 36 C.F.R. § 228.102? Please explain why and how CEQ reaches its conclusions.

Is it CEQ's position, yes or no, that the elimination of the consideration of cumulative impacts would effectively overturn the holding of *Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 853-54 (10th Cir. 2019), which required analysis of cumulative impacts of drilling thousands of wells throughout the planning area at the APD stage if these effects were not adequately addressed at the planning stage? Please explain why and how CEQ reaches its conclusions.

iv. Northern Arizona Mineral Withdrawal EIS

Federal lands around the Grand Canyon but outside the National Park contain rich uranium deposits. In 2007, the price of uranium spiked at $130 per ton, and mining companies staked (or "located") thousands of mining claims on the million acres of federal public lands to the Canyon's south, north and east.[172] In response to concerns about the environmental damage large-scale uranium mining could cause, the Department of the Interior on July 21, 2009 published notice of the Interior Secretary's proposal to withdraw those one million acres from mineral entry for 20 years, as authorized by FLPMA.[173]

BLM and cooperating agencies prepared an EIS to evaluate the environmental impacts of and alternatives to, withdrawing the one million acres.[174] The EIS evaluated several alternatives, including that of "no action," allowing BLM to compare the impacts of uranium mining with and without the withdrawal. Without the withdrawal, BLM concluded that uranium "could result in approximately 728 uranium exploration projects, 30 uranium mines, 317,505 ore haul trips, and 22.4 miles of new roads and power lines with approximately 1,321 acres of disturbed landscape

[172] Bureau of Land Management, Northern Arizona Mineral Withdrawal Final Environmental Impact Statement (Oct. 2011) at 1-3, attached as Ex. 44, and available at https://www.grandcanyontrust.org/sites/default/files/resources/gc_FEIS_Northern_Arizona_Proposed_Withdrawal.pdf (last viewed Mar. 9. 2020).
[173] *See id.*; *see also* 74 Fed. Reg. 35,887 (July 21, 2009) (notice of proposed withdrawal); 43 U.S.C. § 1714(b) (FLPMA authority for mineral withdrawals).
[174] BLM, Northern Arizona Mineral Withdrawal FEIS (Ex. 44).

over 20 years."[175] The EIS concluded that these actions would degrade wildlife habitat, scenic vistas, and other values.[176]

Uranium mining also threatened to contaminate groundwater. Other than the mainstem Colorado River, streams in public lands around, and within, the Grand Canyon are fed by seeps and springs, which in turn arise from groundwater in the regional Redwall-Muav aquifer ("R-aquifer") and the discontinuous perched aquifers above.[177] These groundwater-fed springs provide critical water sources for plants, animals, and backcountry recreationists in an otherwise parched landscape.[178] The aquifer is the source of Havasu Creek, the source of drinking and irrigation water for the Havasupai Tribe, who take their name from the Creek's blue-green waters. Relatively little is known, however, about the movement of groundwater that supports these springs.[179]

Uranium deposits are found in geologic features known as breccia pipes that serve as internal drainage features that collect water and transmit it downward, and that the U.S. Geologic Survey concluded "may have a significant effect on the regional occurrence and movement of groundwater."[180] Water traversing these pipes may pick up radioactive particles mobilized by mining and poison the groundwater, which may take months or decades to reach seeps, springs, and creeks fed by the aquifer.

Absent the mineral withdrawal, the FEIS found uranium mining could result in potentially "major" impacts to R-aquifer water quality at certain South Rim springs and the public drinking water wells at the South Rim town of Tusayan, which is outside of the withdrawal area.[181] The Secretary, in his ROD, concluded that the withdrawal was justified, in part, to prevent major impacts to the region's water resources.[182] The Secretary acknowledged the uncertain nature of the existing science and that "the likelihood of a serious impact may be low, but should such an event occur, significant."[183] Given the importance of the resource, the Secretary concluded that the risk of catastrophic harm – however remote – was not justified.[184]

Under the CEQ's proposed rule, however, the BLM might never have evaluated or disclosed these potential impacts to groundwater outside of the lands withdrawn because the agency

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[175] *Id*. at 4-173.
[176] *See, e.g., id*. at ES-13 – ES-18.
[177] *Id*. at 3-64; 3-80. *See also id*. at 4-69 (springs support species diversity up to 500 times greater than surrounding areas).
[178] *Id*. at 3-215; 3-218; 4-51; 4-132.
[179] *Id*. at 3-41 – 3-42; 4-69.
[180] USGS, Hydrogeology of the Coconino Plateau and Adjacent Areas Coconino and Yavapai Counties Arizona (2007) at 9, attached as Ex. 45, and available at https://pubs.usgs.gov/sir/2005/5222/sir2005-5222_text.pdf (last viewed Mar. 9, 2020).
[181] BLM, Northern Arizona Mineral Withdrawal FEIS (Ex. 44) at 4-67, 4-79, 4-81 – 4-83; 4-96.
[182] BLM, Record of Decision, Northern Arizona Mineral Withdrawal (Jan. 2012) at 9-10, attached as Ex. 46, and available at https://www.fwspubs.org/doi/suppl/10.3996/052014-JFWM-039/suppl_file/052014-jfwm-039r1-s08.pdf (last viewed Mar. 9, 2020).
[183] *Id*.
[184] *Id*.

concluded that the impact was "*indirect*."[185] For example, BLM specifically labelled the potentially devastating impact to groundwater at Havasu Springs as indirect.[186]

The proposed rule appears to make the disclosure of indirect impacts optional, because they define "Effects" to "*include* reasonably foreseeable effects that occur at the same time and place and *may include* reasonably foreseeable effects that are later in time or farther removed in distance."[187] Thus, the Interior Department could decide it did not need to disclose these indirect impacts – to wildlife, to a people, to an entire culture – because they were "later in time or farther removed in distance" from uranium mining. This would result in turning a blind eye to one of the most contentious and potentially significant impacts of the failure to adopt a mineral withdrawal (the "no action" alternative), undermining NEPA's purpose to ensure excellent decision-making and environmental protection and disclosure.

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, had it been in place, would not necessarily have required that BLM disclose the impacts of uranium mining on groundwater and surface waters, particularly outside the withdrawal areas, such as Havasu Spring, because such impacts could be considered not "proximate" enough? Please explain your answer yes or no.
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.

v. Izembek National Wildlife Refuge Land Exchange Road Corridor

Izembek National Wildlife Refuge is the smallest, yet one of the most ecologically unique among Alaska's refuges. Most of the refuge is congressionally designated wilderness and home to a diverse array of wildlife species including five species of salmon; furbearers such as wolf, fox and wolverine; and large mammals such as caribou and brown bear. The refuge provides important habitat for Pacific black brant, tundra swans, emperor geese, Steller's eiders, and a myriad of ducks. The refuge also provides an important stop-over area during migration for thousands of shorebirds. Many seabirds also use the refuge. In recognition of its global importance to migratory waterbirds, Izembek Lagoon was designated as a wetland of international importance under the Ramsar Convention.

In the Omnibus Public Land Management Act of 2009, Congress directed the Secretary of the Interior to prepare an Environmental Impact Statement to analyze a proposed land exchange, alternatives for road construction and operation and a specific road corridor through congressional designated wilderness in the Izembek National Wildlife Refuge.

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[185] *See* BLM, Northern Arizona Mineral Withdrawal FEIS (Ex. 44) at 4-71 ("Potential indirect impacts to groundwater resources include impacts to R-aquifer springs and wells located outside and at a distance from each parcel. Potential indirect impacts to surface water resources and surface water drainage channels are those that are located outside and at a distance from each parcel.").
[186] *Id*. at 4-77 ("Because of the distance from the South Parcel, potential impacts assumed for Havasu Springs and Blue Springs are considered to be indirect").
[187] Proposed 40 C.F.R. § 1508.1(g) (emphases added).

The 2013 Final EIS and Record of Decision, found that this globally significant landscape would be "irretrievably damaged by construction and operation of the proposed road."[188] Specifically, the U.S. Fish and Wildlife Service ("FWS") found that once a road is in place there would be a certainty of increased human access and activity including increased human traffic, noise, hydrological changes, damage to wetlands, run off, introduction of contaminants, and introduction of invasive species.

These findings were largely based on the analyses of the indirect and cumulative impacts of operating and maintaining the road. While the construction and the physical footprint of the road would affect relatively few acres (direct impacts), the permanent presence of the road would have far reaching indirect impacts (e.g. later in time or removed in distance) and cumulative impacts (e.g. additive and interactive) on the wildlife and irreplaceable habitat of Izembek.

The proposed road would cut through the Izembek isthmus, a rich and diverse ecosystem with abundant wildlife species, putting humans and wildlife in close proximity. Dispersed along the 18.5 miles of the proposed road corridor would be 136 turnouts for passing that would encourage visitors to stop and view wildlife, hunters to access high density game and subsistence species, or just stop and get out of vehicles. Two road corridors were evaluated in the EIS and effects of the corridors were found to be generally similar.

The following summarizes the indirect and cumulative effects of creating a road corridor:

> Summary of indirect and cumulative impacts to bird species
>
> "Therefore, road construction, operation, and maintenance plus cumulative impacts to the project area for Tundra Swan, Black Brant, Emperor Goose, and most likely other waterfowl and shorebird species would be considered major because the intensity of the proposed action would be high (measurable change in resource condition) within the Izembek isthmus (an area critically important for several species) the duration would be permanent (lasting beyond the life of the project), the extent would be local (limited geographically) for these important (Emperor Goose) and unique (Black Brant and Tundra Swan) species. However, for cumulative effects the extent would include the entire range of each species (extended) because the habitat loss on a species' breeding grounds, staging area, or wintering grounds, would be additive to the total habitat loss for each species throughout their range."[189]

[188] U.S. Fish & Wildlife Service, Record of Decision, Izembek National Wildlife Refuge Land Exchange/Road Corridor Final Environmental Impact Statement (Dec. 23, 2013), attached as Ex. 47, and available at https://www.fws.gov/uploadedFiles/Region_7/NWRS/Zone_1/Izembek/PDF/rod_signed.pdf (last viewed Mar. 9, 2020).

[189] U.S. Fish & Wildlife Service, Izembek National Wildlife Refuge Land Exchange/Road Corridor Final Environmental Impact Statement, Chapter 4, Environmental Consequences, at 4-157 (Feb. 2013), attached as Ex. 48, and available at https://www.fws.gov/uploadedFiles/Region_7/NWRS/Zone_1/Izembek/PDF/08%20Chapter%204%20Environmental%20Consequences.pdf (last viewed Mar. 9, 2020).

Summary of indirect impacts on large mammals:

"An indirect effect of road operation and maintenance that may have the greatest adverse impact on mammals is the potential increase in human access into the project area. Increased human access would result in increased human harvest pressure, plus the potential for increased predation mortality that could alter traditional migration patterns. Combined, these factors create conditions conducive to an ecological trap and population sink that would produce moderate adverse effects to the Southern Alaskan Peninsula Caribou Herd."

"Increased human presence and activities such as all-terrain vehicle travel beyond the barrier would result in long-term indirect effects on brown bear. Disturbances would have the greatest adverse impact during spring emergence from denning and fall pre-denning and denning. Overall, the combined disturbances would most likely reduce the overall carrying capacity of bears for the project area resulting in a major adverse effect."[190]

Summary of cumulative effects on large mammals:

"The combinations of direct habitat loss from the constructed road footprint, the 11,840 acres of unusable habitat due to disturbance from vehicle traffic within 0.5 miles on both sides of the road, the potential for vehicle collisions, and the potential disturbance from increased human access provided by the road, there would be a moderate contribution to cumulative effects for caribou, brown bear and wolf."[191]

Indirect and cumulative effects on bears:

"All these considerations suggest the most predictive and likely response of brown bears to the proposed road corridor would result in physiological and behavioral stress, displacement of bears from suitable habitat and/or degrading preferred foraging habitats. Overall, the combined disturbances would most likely reduce the overall carrying capacity of bears for the project area.

Direct and indirect impacts to brown bears would be high intensity within the vicinity of the road corridor (local) because the change in resource condition and habitat function is measurable and observable, but intensity would be medium throughout the project area (regional) because the change in resource condition would be detectable. The effects would be long-term (behavioral disturbance) and permanent (habitat alteration) in duration for this important resource. Bear habitat within the State's Izembek Controlled Use Area is considered an important resource. The impact of Alternative 2 on brown bear is considered major."[192]

[190] *Id.* at 4-170.
[191] *Id.* at 4-172.
[192] *Id.* at 4-168.

Increase of all-terrain vehicles:

> "Improved access, favorable topography, and shrub vegetation coupled with a harsh climate and slow rates of recovery for soils and vegetation predispose that all-terrain vehicle use would increase quickly and cause erosion which can degrade habitats. The road corridor proposed under this alternative would serve as a starting point for all-terrain vehicle access by subsistence and recreational users from the communities of King Cove and Cold Bay. Based on documented use trends, it is estimated that all-terrain vehicle use would increase with improved road access (illegal and legal) and would be difficult to manage and control."[193]

> "Under the current situation, these areas are not be easily accessible by all-terrain vehicles. Habitat fragmentation and damage would likely occur due to the increase in transecting all-terrain vehicle routes that would develop from the road. Increased use could degrade habitats, disturb and displace fish and wildlife populations. The summary impact of Alternative 2 on land use and management would be considered major."[194]

However, under the CEQ's proposed rule, the FWS might never have evaluated or disclosed these potential impacts to migratory and resident bird populations and large mammals because the agency concluded that the impacts were either "*indirect*" and/or "*cumulative*." By not evaluating the cumulative impact, or by allowing the agency discretion to ignore indirect impacts, the FWS might have concluded the land exchange and construction of the road would not have a significant adverse effect. Such a determination would have undermined NEPA's purpose to ensure excellent decision-making and environmental protection and disclosure.

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, had it been in place, would not necessarily have required that the FWS disclose the impacts of the road on wildlife beyond the direct impacts of the land exchange and road construction because such impacts could not be considered "reasonably foreseeable effects that occur at the same time and place?" Please explain your answer yes or no.
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.

vi. SunWest Park and Harbourtowne Development

In 2007, the Pasco County Board of County Commissioners and SunWest Acquisition Inc. agreed to cooperate on all marine related activities associated with two projects: one designed to create a county park, SunWest Park; the other, a large commercial/residential development, SunWest Harbourtowne.[195] Pasco County is in west central Florida borders the Gulf of Mexico, just north of Tampa Bay, and is home to a many wildlife species, including the Florida manatee

[193] *Id.* at 4-207.
[194] *Id.* at 4-208.
[195] *See* 2008.01-18 ACOE Public Notice.

and Florida black bear. Its coastal estuaries support vast expanses of seagrass that serve as breeding grounds for coastal wildlife.

As originally proposed, SunWest Park would have consisted of a seven-lane boat ramp with three 408 square foot accessory docks, a floating kayak/canoe dock, two pedestrian bridges, a manatee observation tower, a parking lot providing 219 parking spaces for vehicles and 250 parking spaces for vehicles with trailers.[196] SunWest Harbourtowne would have included a resort hotel, residential development, a marina with a boat lift to the channel, golf course, and commercial/retail spaces.[197] SunWest Harbourtowne was designed to accommodate approximately 500 boats, but was proposed to provide Gulf access for only 40 boats per day.[198]

Collectively, the two projects would require the maintenance dredging of 1.27 miles of an unused, filled in existing channel 80 feet wide.[199] The initial estimated impacts included the loss of 3.6 acres of seagrass, and 4.27 acres of sawgrass wetlands.[200]

The Army Corps of Engineers ("Corps") determined it had jurisdiction to review the applications under the Clean Water Act and the Rivers and Harbors Act.[201] In 2013, it completed an environmental assessment on the SunWest proposal, and subsequently rejected that permit application as not in the public interest due to the developments' myriad direct, indirect, and cumulative environmental, economic, and other harms.[202]

Specifically, the Corps concluded that secondary and cumulative impacts from dredging the channel to permit more and larger vessels to use the area included damage to aquatic vegetation due to "vessel groundings, propeller scarring, increased turbidity, petroleum spills, and vessel wakes. The project induced increase in the number of vessels [also] has the potential to increase the number of vessel strikes on [imperiled] manatees and sea turtles utilizing the area."[203] The Corp found that due to "secondary and cumulative impacts to aquatic resources, this project has the potential to create a significant and persistent loss of seagrass habitat."[204] Further, in considering cumulative and secondary impacts, the Corps stated:

> The proposal will add to cumulative adverse effects in the region. The project site is located in an area of Florida referred to as the "Nature Coast", which is

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[196] 2012.09-04 ACOE Public Notice.
[197] 2008.01-17 ACOE Public Notice.
[198] *Id*.
[199] 2011.04-12 ACOE Public Notice.
[200] *Id.*
[201] 2008.01-18 ACOE Public Notice.
[202] U.S. Army Corps of Engineers, U.S. Army Corps of Engineers denies permit for proposed SunWest County Park (May 10, 2013) attached as Ex. 49, and available at https://www.saj.usace.army.mil/Media/News-Releases/Article/479892/us-army-corps-of-engineers-denies-permit-for-proposed-sunwest-county-park/ last viewed Mar. 9, 2020).
[203] U.S. Army Corps, Environmental Assessment and Statement of Finding for Permit Application SAJ-2007-05788-IP-MGH (May 10, 2013) at 131, attached as Ex. 50, and available at https://www.saj.usace.army.mil/Portals/44/docs/regulatory/Items%20of%20Interest/SunWest/20130510_SunWest_EASOF_FINAL(2).pdf (last viewed Mar. 9, 2020).
[204] *Id*.

> characterized by relatively undisturbed and unimpacted coastline. The project will change the characteristics, values and functions of the area.[205]

This example highlights two ways the proposed rule weakens NEPA and would result in significant impacts to the human environment. First, under the proposed rule, the Corps here could have ignored disclosing these critical secondary (indirect) and cumulative impacts, which led in part to the agency's rejection of the permit as contrary to the public interest. As noted above, the proposed rule eliminates consideration of cumulative impacts and make analysis of indirect impacts discretionary.

Second, CEQ is seeking comment on whether the agency should change the definition of "major federal action" in a way that may have changed the outcome of the SunWest NEPA process. CEQ regulations now define "major federal actions" that must undergo NEPA review as those "projects [or] programs entirely or *partly* financed, assisted, conducted, regulated, or approved by Federal agencies."[206] The preamble to CEQ's proposed rule asks the public to address whether the agency "should make any further changes to this paragraph, including changing 'partly' to '*predominantly*.'"[207] This change could have resulted in the Corps concluded that it need not review or disclose impacts of the project on the uplands although such impacts would not occur but for the dredging regulated by the Corps.

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, had it been in place, would not necessarily have required that the Corps to disclose the secondary (indirect) and cumulative impacts of dredging to submerged aquatic vegetation or on the "relatively undisturbed and unimpacted coastline" of the Nature Coast? Please explain your answer yes or no.
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.
>
> If the CEQ redefines "major federal actions to include those "projects [or] programs entirely or *predominantly* financed, assisted, conducted, regulated, or approved by Federal agencies," is it CEQ's position that the Corps in the SunWest case would not have been required to disclose impacts of the upland portion of the SunWest project or any of the connected SunWest Harbourtowne proposal?

vii. Four Corners Power Plant and Navajo Mine Energy Project

The Four Corners Power Plant, located on lands of the Navajo Nation, is the largest source of air and climate pollution in the southwestern United States. The operation of the plant, and its exclusive source of coal at the nearby Navajo Mine, has important environmental implications in many areas, including the economies of the Navajo Nation and Hopi Tribe, air quality in the Four Corners region, water quality in the San Juan River, and the survival of endangered fish species. Continued operation of the sprawling mine, power plant, and waste disposal complex

[205] *Id*. at 129.
[206] 40 C.F.R. § 1508.18(a) (emphasis added).
[207] 85 Fed. Reg. 1684, 1709 (Jan. 10, 2020) (emphasis added).

implicates numerous federal agency decisions, some large, some small. These include approval of new and renewal of existing mining permits for the Navajo Mine by the Office of Surface Mining, Reclamation, and Enforcement ("OSMRE") under the Surface Mining Reclamation and Control Act, and approval by the Secretary of the Interior of lease and right-of-way agreements across Navajo Nation lands for both the plant site lease and transmission lines, water pipelines, and access roads serving the power plant. Operation of the power plant takes place pursuant to an EPA-approved Federal Implementation Plan ("FIP") for Best Available Retrofit Technology under Clean Air Act regulations, 40 C.F.R. Part 49.5512; EPA's approval of the FIP is exempt from NEPA under 15 U.S.C. § 793(c)(1).

Under current NEPA regulations governing inclusion of connected actions, 40 C.F.R.§ 1508.25, the Office of Surface Mining, Reclamation, and Enforcement, together with numerous cooperating agencies and governments including the Bureau of Indian Affairs, Bureau of Land Management, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, Navajo Nation, Hopi Tribe, and National Park Service, prepared a single analysis of four "primary and related actions":

1. Approval of the Navajo Transitional Energy Company ("NTEC"), Limited Liability Company ("LLC") application for a new Surface Mining Control and Reclamation Act ("SMCRA") permit for the Pinabete Permit Area, which is located within the existing Navajo Mine Lease Area, to begin operations in 2016 and continue through 2041 in 5-year permit renewal intervals.

2. Renewal of NTEC's existing SMCRA permit for Areas I, II, III, and portions of Area IV North of the Navajo Mine Lease Area for 5 years.

3. Approval of Arizona Public Service Company ("APS") Proposed Four Corners Power Plant ("FCPP") lease amendment and right-of-way ("ROW") renewals, located on the Navajo Reservation in San Juan County, New Mexico, for 25 years beginning in 2016.

4. ROW renewals for four transmission lines associated with the FCPP.

In addition, under CEQ regulations on cumulative actions, OSMRE and its cooperating agencies addressed not only these four connected actions, but additional prior, ongoing, and foreseeable actions—including EPA's statutorily-exempted FIP for the Power Plant. Under CEQ's existing regulations, OSMRE concluded that NEPA required that "the environmental effects of continued operation of FCPP, including APS's compliance with the FIP, are analyzed in the EIS."[208]

By analyzing these connected and cumulative actions in a single EIS, OSMRE and its cooperating agencies engaged in a comprehensive analysis of numerous complex and interrelated implications of the multiple interlocking decisions required by multiple agencies and governments to extend the operation of the Four Corners Power Plant and Navajo Mine complex.

[208] U.S. Office of Surface Mining Reclamation and Enforcement, Final Environmental Impact Statement for the Four Corners Power Plant and Navajo Mine Energy Project, Introduction (2015) at 1-3, attached as Ex. 51, available at https://www.wrcc.osmre.gov/initiatives/fourCorners/documentLibrary.shtm (last viewed Mar. 9, 2020).

Issues examined in the single Four Corners Power Plant and Navajo Mine Energy Project FEIS included impacts Navajo and Hopi employment and tax revenue, greenhouse gas emissions, criteria and hazardous air pollutants, multiple options for coal ash management and disposal, mine reclamation, and impacts on endangered fish in the nearby San Juan River. Although OSMRE's methods and conclusions have been subject to criticism (and to litigation ultimately dismissed due to NTEC's sovereign immunity), it is clear that without the connected and cumulative action requirements of existing 40 C.F.R. § 1508.25(a)(2), the agencies would not have been required to address the full suite of interlocking actions in a single, comprehensive analysis.

Under CEQ's proposed Section 1501.9(e) limiting analysis of cumulative actions, as well as proposed Sections 1501.1(5) and 1507.3(b)(6) on functional equivalence, agencies would no longer be required to consider in a single NEPA document multiple actions that "when viewed with other proposed actions have cumulative significant impacts and should therefore be discussed in the same impact statement."[209] Although the proposed rule would retain the connected action requirement, their proposal to exclude cumulative actions (and actions analyzed under another statute such as the Clean Air Act), would appear likely to lead to partial, fragmented, and incomplete analyses of complex, multi-agency decisions such as those surrounding the multiple authorizations involved in the Four Corners Power Plant/Navajo Mine EIS.

Authorizing agencies to fragment analysis into separate documents for individual mine plan modifications, rights-of-way, lease renewals, and the EPA FIP, as apparently contemplated by the CEQ proposal, would further neither efficiency nor more informed decision-making. Indeed, such a fragmented approach prevent the comprehensive single-EIS approach that compelled the agencies at least to disclose the complex suite of environmental and economic consequences that flow from the continued operation of the entire Navajo Mine/Four Corners Power Plant/coal ash disposal complex analyzed in the Four Corners Final Environmental Impact Statement.

> ***Questions for CEQ***: Is it CEQ's position that the proposed rule, had it been in place, would not necessarily have required federal agencies to review in one NEPA document the connected and cumulative actions surrounding Four Corners Power Plant, including EPA's Federal Implementation Plan? Please explain your answer yes or no.
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw, and why it would be more (or less) efficient for federal agencies to complete numerous overlapping and competing NEPA analyses.

viii. Nevada Groundwater Pipeline, and Indirect Impacts

In 2012, the BLM issued a Final EIS for the proposed "Clark, Lincoln, and White Pine Counties Groundwater Development Project" ("Groundwater Project"), which considered a right-of-way ("ROW") application submitted by the Southern Nevada Water Authority ("SNWA"). SNWA sought to construct a 263-mile pipeline to allow it to pump and transport groundwater from a vast area of rural east-central Nevada to Las Vegas. While the clearing of the ROW and

[209] 40 C.F.R. § 1508.25(a)(2).

construction of the pipeline would have directly impacted over 10,000 acres, most of the environmental concern over this proposal was focused on the widespread decline in groundwater levels over time in Spring, Delamar, Dry Lake, and Cave Valleys, which would result in permanent and devastating impacts to rural Nevada where the groundwater would be withdrawn, including the loss of thousands of acres of wetlands, the drying up of springs and streams, and the widespread loss of over 100,000 acres of wildlife habitat. The project was challenged in court by a broad coalition of interests, with the plaintiffs prevailing in part and the project remanded to the BLM.[210]

If this proposal had been analyzed under the proposed rule, or if the BLM prepares an entirely new analysis on remand under the proposed rule, that draft, if finalized, would not necessarily ensure that BLM, other state and federal agencies, the public, and the affected Native American Tribes, would be sufficiently aware of and notified of the vast majority of environmental harm and destruction that would be caused by the Groundwater Project. While the severe environmental impacts that would be caused by the groundwater drawdown is clearly required to be considered and disclosed in the NEPA analysis under the current CEQ regulations, it is unclear whether this requirement would remain under the proposed rule.

There is no question that the groundwater drawdown impacts are reasonably foreseeable if the Groundwater Project is approved: the entire purpose of the project is to access, pump, and transport massive amounts of groundwater from these rural valleys to Las Vegas, in perpetuity. However, the proposed rule defines effects as "reasonably foreseeable effects that occur at the same time and place *and may include* reasonably foreseeable effects that are later in time or farther removed in distance."[211] Most of the groundwater drawdown effects that other state and federal agencies, the public, and the Tribes expressed concern over for the Groundwater Project would be later in time (some impacts might not be felt for years or decades) from the construction of the pipeline, and would extend for tens to hundreds of thousands of acres.

For example, the U.S. Environmental Protection Agency stated that "we believe the project's indirect and cumulative impacts to aquatic resources are significant," and recommended that the BLM model the project's cumulative effects on air quality and climate pollution.[212] The U.S. Fish and Wildlife Service criticized BLM's draft EIS for failing to address the necessary geographic and temporal scope of the project's cumulative impacts.[213] The Nevada Department of Wildlife expressed particular concern about the need to address the "very significant" cumulative impacts to wildlife of the project together with climate change effects, and noted that evaluating the proposed action together with other proposed groundwater pumping projects "substantially increases the potential effects on priority and sensitive species of concern."[214]

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[210] *See Center for Biological Diversity v. BLM*, 2017 U.S. Dist. LEXIS 137089 (D. Nev. Aug. 23, 2017).
[211] Proposed 40 C.F.R. § 1508.1(g) (emphasis added).
[212] Letter of J. Blumenfeld, EPA to A. Lueders, BLM (Nov. 30, 2011) at 2, attached as Ex. 52; U.S. EPA Detailed Comments on the Draft Environmental Impact Statement for the Clark, Lincoln, and White Pine Counties Groundwater Development Project, Nevada & Utah (Nov. 30, 2011) at 7, 11 (attached to Blumenfeld letter).
[213] Letter of J. Ralston, U.S. Fish & Wildlife Service to Project Manager, BLM (Oct. 11, 2011) at 5-8, attached as Ex. 53.
[214] R. Haskins, Nevada Dep't of Wildlife to K. Dow, BLM (Oct. 11, 2011) at 2 ("A further concern is assessment of cumulative impacts combining the proposed … Project with existing and potential future groundwater development actions by other parties in the development and adjacent basins. That assessment, as presented in the EIS,

Under the proposed rule, it appears BLM could argue that it can or must ignore some or all of these impacts of critical interest to federal and state agencies.

> ***Question***: Is it CEQ's position that the BLM would have complete discretion whether or not it chose to consider, analyze, and disclose the reasonably foreseeable impacts of groundwater pumping in its NEPA analysis of this project?

Similarly, there is no question that there is a "but for" causal relationship between the groundwater withdrawal impacts and the Groundwater Project, as these impacts would not occur without the approval and implementation of the Project. However, the proposed rule states that this is "insufficient," and that these severe, devastating effects "should not be considered significant if they are remote in time [or] geographically remote."[215]

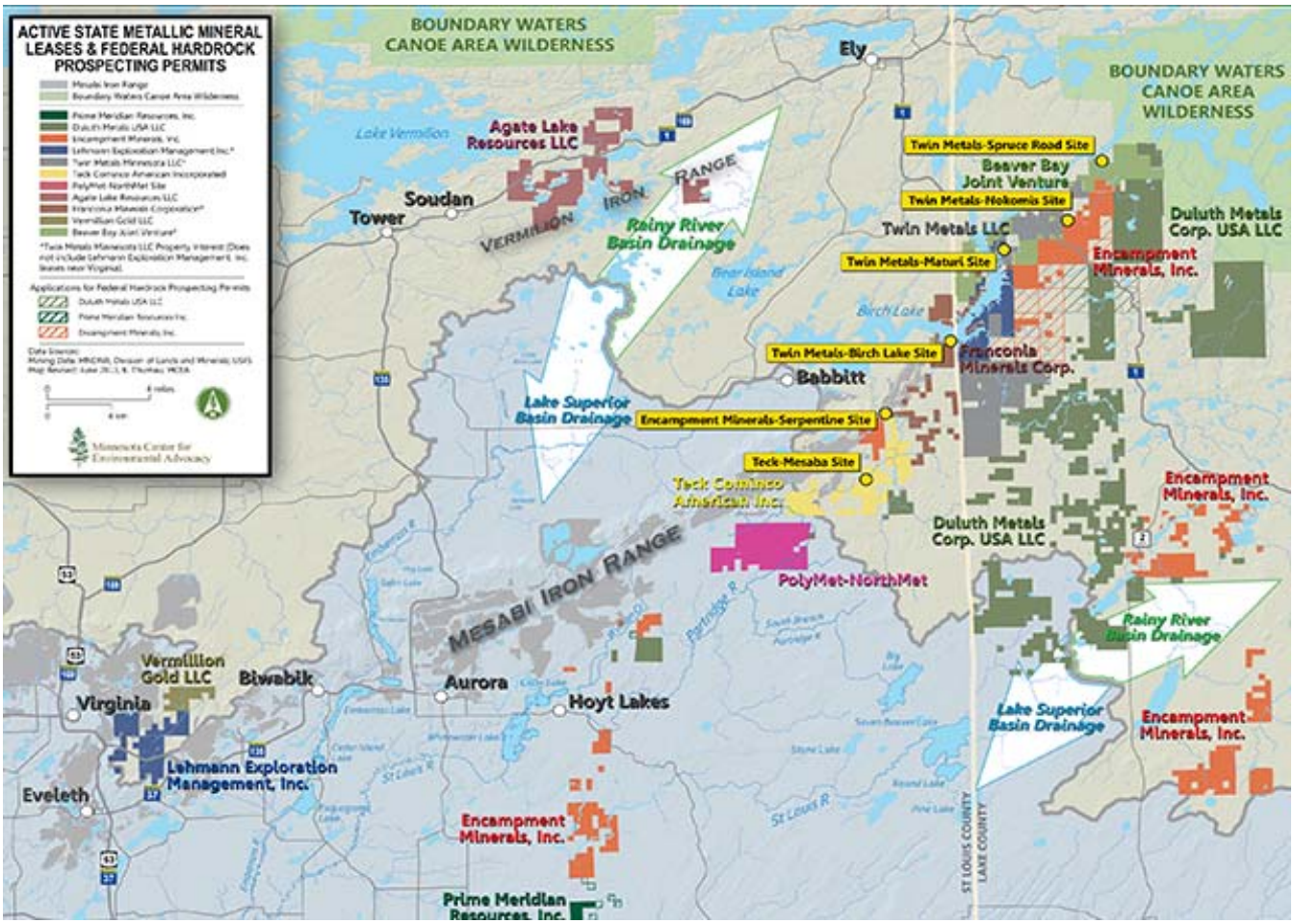
> ***Question***: Would the proposed rule allow the BLM to ignore the most severe and devastating impacts of this proposed action, even though these impacts would be the likely result of the Project if it is approved? If so, how is that consistent with the intent and purposes of NEPA?

ix. Mine Exploration and Proposals in Northeastern Minnesota, and Cumulative Effects

The "iron range" of Northeastern Minnesota has experienced a century of iron ore and taconite mining, which continues and is ongoing. Meanwhile, this region and beyond is now the site of extensive, ongoing exploration for copper, nickel, gold, and other minerals, and two large-scale copper-nickel proposals (PolyMet and Twin Metals), with more proposals anticipated. *See* graphic below.

substantially increases the potential effects on priority and sensitive species of concern to NDOW and aquatic dependent ecosystems particularly outside of the immediate Project development basins and those additional cumulative effects likely would not occur, or occur at the projected levels of severity over +75-year and +200-year timeframes, without the Project implementation.); *id*. at 3 ("The additional cumulative effect from climate change to any of the described Action Alternatives on aquatic and terrestrial ecosystems, surface and groundwater resources, and associated wildlife species is potentially very significant under even conservative climate change scenarios"), attached as Ex. 54.

[215] Proposed 40 C.F.R. § 1508.1(g)(2).



Due in part to past mining, much of the Iron Range and watersheds downstream have been polluted and degraded, including within the headwaters of the Lake Superior watershed. The St. Louis River is impaired by mercury, with a Total Maximum Daily Limit required by the Clean Water Act long overdue. The extensive mining operations have also fragmented habitat leaving few remaining corridors for wildlife, including gray wolves and Canada lynx, which are threatened with extinction. Wild rice, a staple of indigenous people in the area, has been negatively affected by an increase in sulfates and other pollutants. And thousands of acres of high-quality wetlands have been destroyed.

The current CEQ regulations require the Forest Service, BLM, and/or U.S. Army Corps of Engineers to consider the potential environmental impacts of any proposed action within the context of the past, present, and reasonably foreseeable actions and projects in this region. This is because multiple actions in the same region may result in a "cumulative or synergistic environmental effect."[216] Without a detailed consideration of the potential cumulative impacts of a proposed action, the public cannot be assured that the agency provided the hard look of the

[216] *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990).

potential environmental impacts of a proposal, as NEPA mandates.[217] The proposed rule, however, wholly eliminate this long-standing "cumulative effects" requirement.[218]

The proposed rule recognizes that NEPA is intended "to ensure Federal agencies consider the environmental impacts of their actions in the decisionmaking process."[219] As stated by the Supreme Court, NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a rule in both the decisionmaking process and the implementation of that decision."[220] By focusing the agency's attention on the potential environmental consequences of a proposed action, "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."[221]

> ***Question***: Can CEQ please explain how allowing the Forest Service, BLM, and/or U.S. Army Corps of Engineers to consider the environmental impacts of mineral exploration and mine plan proposals in northeastern Minnesota, without consideration of the cumulative or synergistic environmental effects on watersheds and wildlife of all past, present, and reasonably foreseeable projects and actions in the region, will satisfy the intent and purposes of NEPA, especially as compared to the current, long-standing regulatory requirement to include a detailed cumulative impacts analysis?

x. Buffalo River Hog Farming Loan Guarantees

In 2012, the Farm Service Agency ("FSA") and the Small Business Administration ("SBA") approved loan guarantees (totaling $3.6 million) granted by the agencies for a 6,500-head hog operation in Arkansas. The operation would not have been built but for the loan guarantees.

> These swine will generate approximately 1,780,000 gallons of waste-filled water each year. The water is stored in two small settling ponds near the barns. The ponds seep. It's uncertain how much waste water will seep out, but [hog farm operator] C&H's engineers estimated that several thousand gallons a day could. Each year in the spring and the fall, C&H plans to drain the ponds. After testing nutrient levels in certain nearby fields, C&H will spray the water on them.[222]

The waste-application fields are located along a tributary to the Buffalo National River, the nation's first wild and scenic river and part of the National Park System. The FSA prepared an environmental assessment for its loan guarantee, the SBA did not.[223]

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[217] *Neighbors of Cuddy Mt. v. U.S. Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998).
[218] Proposed 40 C.F.R. § 1508.1(2) ("Analysis of cumulative effects is not required.").
[219] Proposed 40 C.F.R. § 1500.1(a).
[220] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).
[221] *Id*.
[222] *Buffalo River Watershed Alliance v. Dep't of Agric*., Docket No. 4:13-cv-450-DPM, 2014 U.S. Dist. LEXIS 168750, at *5-*6 (E.D. Ark. Dec. 2, 2014) (citations omitted).
[223] *Id*. at *2-*6.

Conservation groups, led by the Buffalo River Watershed Alliance, sued the agencies for failing to comply with NEPA in preparing inadequate, or failing to prepare at all, NEPA analyses. The Court found that both agencies failed to take a hard look. FSA's EA failed to identify or discuss many of the affected resources and ESA-listed species, including the endangered gray bat, and gave no support for its conclusory statements that any impacts would be mitigated by the waste-disposal plan that the facility would operate under. The Court found that FSA also violated its own regulation for public notification of the proposal, which requires publication in a local or community and state-wide paper at least 30 days before adopting the proposal. The Court further found the SBA's failure to prepare a NEPA review to violate NEPA.[224] The court issued a permanent injunction of the loan guaranties and set a timeline for completion of the required procedures.[225]

Following the case, the agencies prepared additional NEPA analyses. Although the facility was constructed, following the NEPA reviews and the significant environmental and species impacts identified through this lawsuit, the State of Arkansas opted to buy the operator out, close it, and place a conservation easement on the property.[226] As support for its decision, representatives for the state cited their obligation to protect the rivers and streams of Arkansas and to "ensure that this national treasure receives the protection that it deserves."[227] Further, a temporary moratorium was put in place on the construction of any additional small or medium factory farms in the watershed; at the time of the buy-out, Arkansas's Governor directed the relevant state agency to begin rulemaking to make that moratorium permanent.[228]

CEQ's proposed rule would specifically exclude farm ownership and operating loan guarantees by the FSA pursuant to 7 U.S.C. 1925 and 1941-1949 and SBA pursuant to 15 U.S.C. 636(a), 636(m) and 695-697f from being considered a major federal action or action for purposes of NEPA. More generally, it states that major federal actions subject to NEPA review do not include "loans, loans guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of the action."[229] If this provision had been in place, the public would have had no way to understand the impacts of the proposed loans, and how the United States was making possible the deposition of nearly two-million-gallons of water polluted with hog excrement within the watershed of the Buffalo National River each year.[230]

More globally, this change will throttle environmental oversight, informed decisionmaking, and public participation—as NEPA requires—for billions of dollars worth of federal loans and loan guarantees. As the above case illustrates, one industrial farming operation alone can be granted

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[224] *Id*. at *5.
[225] *Id*. at *6-*7 (determining that Conservation Groups' "interest in addressing C & H's effects on the environment will be irreparably harmed absent an injunction" and that "the public interest is best-served by ensuring that federal tax dollars aren't backing a farm that could be harming natural resources and an endangered species").
[226] Emily Walkenhorst, *C&H Hog Farm Takes State Buyout; $6.2M Deal Cut to Preserve Buffalo River*, Arkansas Democrat Gazette (June 14, 2019), attached as Ex. 55, available at https://www.arkansasonline.com/news/2019/jun/14/c-h-hog-farms-takes-state-buyout-201906/ (last viewed Mar. 9, 2020).
[227] *Id*.
[228] *Id*.
[229] Proposed 40 C.F.R. § 1508.1(q).
[230] *Buffalo River Watershed Alliance*, 2014 U.S. Dist. LEXIS at *5.

upwards of millions of dollars in federal loan guarantees from both the SBA and FSA. When consider on aggregate, in fiscal 2016 FSA's guaranteed loan activities for all farm operations totaled approximately $4 billion dollars.[231] By July of the same fiscal year, the SBA had already provided "more than $629 million in SBA loans . . . to this community."[232] Put another way, in 2016 SBA granted over $600 million in guaranteed loans *to just* industrial animal feeding operations, like C&H.[233] Excluding these monumental uses of federal funds from NEPA oversight and review will not serve the public interest or the goals of NEPA because it will remove essential environmental analyses that "ensur[e] that federal tax dollars aren't backing a farm that could be harming natural resources and an endangered species."[234]

> ***Questions for CEQ:*** Under CEQ's proposed rule, neither FSA nor SBA would be required to disclose the impacts of granting $3.6 million in guarantees loans for the construction of an industrial hog operation adjacent to a tributary of the Buffalo National River, correct?
>
> Is such a result consistent with NEPA and current caselaw? If so, please explain how?
>
> Please also explain how turning a blind eye to the environmental impacts of lending federal funds to construct and expand industrial animal feeding operations such as the C&H operation that cause industrial animal waste to enter rivers, streams, drinking water resources, and wild and scenic rivers across the country serves the purposes of NEPA as set out in 40 U.S.C. § 4331(b), which include that:
>
> > it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
> >
> > (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> >
> > (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
> >
> > (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences….

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[231] Catherine Boudreau, *Feds Hit Breaks on Loans to Big Farms*, Politico (Oct. 24, 2016), attached as Ex. 56, and available at https://www.politico.com/story/2016/10/slow-loans-over-green-woes-put-cafos-in-limbo-230234 (last viewed Mar. 9, 2020).
[232] USDA, USDA Announces Availability of Additional Farm Loan Funding (Sep. 2, 2016), attached as Ex. 57, and available at https://www.fsa.usda.gov/news-room/news-releases/2016/nr_20160902_rel_0107 (last viewed Mar. 9, 2020).
[233] *Feds Hit Breaks on Loans to Big Farms*, Politico (Ex. 56).
[234] *Buffalo River Watershed Alliance*, 2014 U.S. Dist. LEXIS at *6.

b. The CEQ Proposed Rule on Alternatives

i. Department of Energy Uranium Leasing Program Final Programmatic Environmental Impact Statement

In 2014, the Department of Energy ("DOE") published a Final Programmatic Environmental Impact Statement ("FPEIS") for the Uranium Leasing Program in southwestern Colorado. DOE's Uranium Leasing Program administers tracts of land located in Mesa, Montrose, and San Miguel Counties in western Colorado for the exploration, mine development and operations, and extraction of uranium and vanadium ores. The FPEIS analyzed reasonably foreseeable environmental impacts, including the site-specific impacts, of several alternatives identified for the management of the Uranium Leasing Program.[235]

The leasing program, including uranium mining activities conducted pursuant to it, have stirred public controversy due to past and potential future impacts of mining and highly toxic uranium pollution on air quality, soil, water quantity and quality, and wildlife. The program's 31 lease tracts spanning 26,000 acres include two rivers (the Dolores and San Miguel), encompass dozens of past and potential future uranium mines, and are located in or near habitat for federally threatened species, including Gunnison sage grouse, Colorado pikeminnow, and razorback sucker. The 2014 FPEIS was prepared in response to a court order overturning an earlier decision approving the Uranium Leasing Program whose analysis initially failed to adequately address site-specific impacts of the leasing program, and failed to ensure protection of federally threatened and endangered species pursuant to the Endangered Species Act.

The FPEIS analyzed the direct, indirect, and cumulative impacts of five alternatives across 13 human health and environmental resource areas: air quality, acoustic environment, geology and soils, water resources, human health, ecological resources, land use, socioeconomics, environmental justice, transportation, cultural resources, visual resources, and waste management.[236] The five alternatives differed in both mining activity and federal jurisdiction of subject lands. Alternatives ranged from terminating all the leases and conducting reclamation where needed, with DOE continuing to maintain oversight of the lands without uranium leasing; terminating the leases and conducting reclamation where needed, restoring the lands to the public domain by the Department of the Interior and if approved, placing the lands under BLM's administrative control and terminating the DOE Uranium Leasing Program; and continuing the program with associated exploration, mine development and operations, and reclamation at some or all of the 31 lease tracts.[237]

The resulting analysis revealed key differences between alternatives for human health and environmental resource areas. For example, Alternative 1, which involved only mine reclamation activities, posed pollution threats to rivers only through erosion; alternatives involving exploration and mining included additional erosion and water pollution impacts from those

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[235] *See* Department of Energy, Final Uranium Leasing Program Programmatic Environmental Impact Statement, Volume 1 (Mar. 2014), attached as Ex. 58, and available at https://www.energy.gov/sites/prod/files/2019/10/f67/Final_ULP_PEIS_Volume_1.pdf (last viewed Mar. 9, 2020).
[236] *See id*. at 2-2.
[237] *Id*. at 2-1.

activities, in addition to the potential for groundwater pollution.[238] Similarly, where " impacts on aquatic biota from Alternative 1 would be negligible," impacts resulting from alternatives involving exploration and mining "may result in potentially unavoidable impacts on aquatic biota (particularly the Colorado River endangered fish species)," would result in impacts to biota that are "long term," would include direct impacts that "could result from the destruction of habitats during site clearing, excavation, and operations" and indirect impacts that "could result from fugitive dust, erosion, sedimentation, and impacts related to altered surface water and groundwater hydrology."[239]

Under the CEQ's proposed rule, however, DOE would not have been required to undertake a rigorous evaluation of all reasonable alternatives, and could have defined the "purpose and need" in a way that would have eliminated consideration and comparison of alternatives such as Alternative 1, which, being limited to mine reclamation activities, differs from DOE's purpose of administering the lease tracts for renewed uranium exploration and mining activity. Moreover, under CEQ's proposed rule, DOE would have had the discretion to not identify, evaluate, or mitigate uranium exploration and mining impacts including "fugitive dust, erosion, sedimentation, and impacts related to altered surface water and groundwater hydrology" because those impacts are "indirect." Under the proposed rule, DOE would have the discretion to turn a blind eye to these indirect impacts – to wildlife, to a people, to two western rivers – because they would occur "later in time or farther removed in distance" from the lease decision.[240] Ignoring these potentially significant, long term impacts would undermine NEPA's purpose to ensure excellent decision-making and environmental protection and disclosure.

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, had it been in place, would have allowed DOE to analyze a range of alternatives as wide as that in the FPEIS? Would they have allowed DOE to analyze Alternative 1, focused narrowly on mine reclamation activities?
>
> Is it CEQ's position that the proposed rule, had it been in place, would have foreclosed or precluded analysis of cumulative impacts, and would have allowed DOE to elect to ignore the indirect effects, of uranium exploration and mining across each of the 13 human health and environmental resource areas included in the FPEIS?
>
> Is it CEQ's position that the proposed rule, had it been in place, would have allowed DOE to conclude that it need not perform any NEPA analysis across the 13 human health and environmental resource areas that were evaluated in the FPEIS on the grounds that all of those impacts arguably would occur "later in time or farther removed in distance" from the decision to lease the area, given the programmatic nature of the FPEIS and Uranium Leasing Program?
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.

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[238] *Id*. at Table 4.7-12.
[239] *Id.*
[240] Proposed 40 C.F.R. § 1508.1(g).

Please answer each question "yes" or "no" to each of the questions above, and provide a detailed explanation for each.

ii. BLM's Uncompahgre Field Office Resource Management Plan EIS

The Uncompahgre Field Office ("UFO") Resource Management Plan ("RMP") planning area covers about 675,800 acres of BLM-administered public lands—including portions of the Dominguez Canyon Wilderness Area and four river systems (the Gunnison, San Miguel, Dolores, and Uncompahgre)—and 971,220 acres of federal subsurface mineral estate.[241]

The community in the North Fork Valley of the Gunnison has extensively participated in the planning process for the UFO RMP for over a decade—with a particular focus in a collaborative effort developing the North Fork Alternative Plan ("NFAP"), which was submitted to BLM on December 2, 2013 and included by BLM in the agency's draft and final EISs as Alternative B.1.[242]

The NFAP was developed with the input of a stakeholders representing agricultural, tourism, realty, businesses, and conservation organizations.[243] It came about through a process that identified key resources, land uses, and values of the North Fork which could be impacted by oil and gas development, and applying management stipulations to protect those values by closing certain areas of public lands and minerals to oil and gas leasing, and imposing development setbacks with strict surface restrictions in places where leasing might be allowed to occur.[244] The NFAP area comprises about 7% of the BLM-UFO lands and less than one percent (0.7 %) of the BLM lands in the state.[245] BLM lands represent a crucial piece of the North Fork Valley but make up less than ten percent of the overall project area.

The North Fork's BLM lands are closely connected with the valley's human environment, towns, farms, water supplies, residences, and businesses.[246] Although it affects only a fraction of the public lands and minerals managed by the BLM-UFO, the NFAP focuses on an area with a concentration of resources, heavy public utilization, and high public value.[247] Under the current CEQ regulations, it is within the BLM's authority to implement the North Fork Alternative Plan, which comprised a reasonable, prudent, and narrowly crafted component of the final management plan for the public lands in the North Fork Valley.[248]

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[241] Bureau of Land Management, *Uncompahgre Field Office Proposed Resource Management Plan Revision and Final Environmental Impact Statement*, Volume I, pg. 1-1 (June 28, 2019), attached as Ex. 59, and available at https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=86004 (last viewed Mar. 9, 2020).
[242] Kolbenschlag, P., Ramey, J., *The North Fork Alternative Plan*: A Proposal to the BLM for Managing Oil and Gas Development in the North Fork Valley (Dec. 2013), attached as Ex. 60, and available at https://www.dropbox.com/sh/u9y6lcflrxs667i/AABGaYwmE8gotZPHnHP5w4M9a (last viewed Mar. 9, 2020).
[243] *Id*. at 2.
[244] *Id*.
[245] *Id*. at 3, 4.
[246] *Id*. at 11, 12.
[247] *Id*.
[248] *Id*. at 14.

BLM included the NFAP in its range of six different alternatives, stating: "alternative B.1 is a resource-based set of recommendations provided by community groups and … would close certain areas to oil and gas leasing and impose development setbacks with strict surface use restrictions, including no surface occupancy ("NSO"), controlled surface use ("CSU"), and timing limitations ("TLs"), in places where leasing may be allowed."[249]

Although BLM did not adopt the NFAP as its preferred alternative in the plan, the acknowledgment of the community's proposal with vast grassroots support at the time it was submitted, provided a more expansive range of alternatives that led to a more robust review of the resource values within the planning area. It permitted NFAP's many supporters to understand how the proposal's impacts compared to other alternatives, and furthered NEPA's goals by reviewing all reasonable alternatives.

CEQ proposes changes that undercut the importance of alternative consideration in the NEPA process. The proposed rule removes from the current regulations the statement that alternatives are "the heart of the environmental impact statement."[250] The proposed rule also removes the direction to "rigorously explore and objectively" evaluate alternatives and eliminates "all" before the phrase "reasonable alternatives."[251] These changes signal to agencies and to the public CEQ's intent to downgrade the importance of alternatives. Without a robust analysis of alternatives, the NEPA process becomes a process of documenting the effects of a "done deal" rather than contributing to a decision-making process. CEQ also invites the public to comment "on whether the regulations should establish a presumptive maximum number of alternatives for evaluation of a proposed action, or alternatively for certain categories of proposed actions."[252]

The cumulative effect of all these changes is to make it far less likely that agencies will consider in detail alternatives, such as the NFAP, crafted by interested citizens. This will reduce public engagement with, and confidence in, agencies who will be more likely to ignore a citizen-proposed alternative as one too many. Ignoring less-damaging, locally-driven alternatives will hurt agencies by reducing their opportunity to avoid conflict and work with stakeholders to find creative solutions.

CEQ also proposes to strike the word "guide" from the current definition of major federal action requiring NEPA review in the context of stating that, "[a]doption of formal plans, such as official documents prepared or approved by federal agencies which *guide* or prescribe alternative uses of federal resources, upon which future agency actions will be based."[253] While a BLM resource management plan should be considered a "formal plan[] … which prescribe[s] alternative uses of Federal resources,"[254] it is possible that CEQ or BLM may conclude otherwise, and thus may conclude that no NEPA is required for the adoption of resource management plans based on the omission of the word "guide."

[249] BLM, *Uncompahgre Field Office Proposed Resource Management Plan Revision*, Volume I (Ex. 59), at 2-5.
[250] 40 C.F.R. § 1502.14.
[251] 40 C.F.R. § 1502.14(a).
[252] 85 Fed. Reg. 1684, 1702 (Jan. 10, 2020).
[253] *Compare* proposed 40 C.F.R. § 1508.1(q)(2) *with* 40 C.F.R. § 1508.18(b)(2) (emphasis added).
[254] Proposed 40 C.F.R. § 1508.1(q)(2).

Questions for CEQ: Is it CEQ's position that the proposed rule, had it been in place, would not have required that BLM analyze additional alternatives in the UFO RMP EIS, and in fact would have resulted in BLM rejecting the inclusion in the EIS of the community-based NFAP? Please explain your answer yes or no.

Further, is it CEQ's position that no NEPA review would be required for this RMP because it "guides" land management allocation? Please explain your answer yes or no.

Further, please explain why such results would be consistent with NEPA and current caselaw.

iii. Grand Mesa, Uncompahgre, Gunnison National Forest Land Resource Management Plan Revision

In early summer 2017, the Grand Mesa, Uncompahgre, Gunnison National Forest ("GMUG") started its forest plan revision process to update the existing and very outdated 1983 Forest Plan.[255] The revision process was kicked off with the "assessment phase" in which the Forest Service invited "other governmental agencies, non-governmental parties, and the public to share material about existing and changed conditions, trends and perceptions of social, economic and ecological systems."[256] The Forest Service then initiated a public scoping period to help develop alternatives. The Forest Plan will be a "forest-wide and geographic/management area specific desired conditions, goals, objectives, standards, guidelines, and the designation of lands suitable for timber production."[257] To accomplish this purpose, the Forest Plan is to, among other things, "[p]rovide for ecological sustainability by maintaining or restoring ecological integrity; air, soil and water; and riparian areas, taking into account stressors such as wildland fire, insect and disease, and changes in climate."[258]

The Forest Service has been transparent with the process to date, including providing public engagement opportunities, offering public engagement periods, and holding multiple meetings. In doing this, the Forest Service has set out the framework and expectations for how the public can shape forest management into the future by engaging in the plan process. There is also a clear understanding that public engagement will shape alternatives and ultimately the Forest Plan. However, because the Forest Service could choose to apply CEQ's proposed rule to ongoing NEPA processes, there are significant questions as to how the Forest Plan process would proceed and how public engagement would shape the final decision.[259] Under the

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[255] The Forest Service is required to revise its Forest Plans "at least every fifteen years." 36 U.S.C. § 1604(f)(5). The GMUG plan is thus more than 20 years overdue for its revision.

[256] USDA, Forest Serv., Notice of initiating the assessment phase of the land mgmt. plan revision for the GMUG Forests, 82 Fed. Reg. 25764 (June 5, 2017). All Forest Service documents related to this proposed forest plan revision can be found at: https://www.fs.usda.gov/project/?project=51806.

[257] USDA, Forest Service, Notice of Intent to revise the GMUG Land and Resource Mgmt. Plan and to prepare an Envt'l Impact Statement, 83 Fed. Reg. 14243, 14244 (Apr. 3, 2018).

[258] *Id*.

[259] Proposed 40 C.F.R. § 1506.13.("The regulations in parts 1500 through 1508 apply to any NEPA process begun after [EFFECTIVE DATE OF FINAL RULE]. An agency *may* apply these regulations to ongoing activities and environmental documents begun before [EFFECTIVE DATE OF FINAL RULE].") (emphasis added).

proposed rule, the Forest Service might not explore different alternatives that could better ensure the objectives of the Plan revision are met.

> ***Questions for CEQ***: Is it CEQ's position that the proposed rule, if implemented prior to the Forest Plan being finalized that the Forest Service would not need to rigorously evaluate alternatives beyond the proposed plan the Forest Service decides to propose? Please explain your answer yes or no.
>
> Please also explain how this result is consistent with NEPA and current caselaw.

Because the Forest Service could choose for the CEQ regulations to apply to this project, the agency might be forced to complete its NEPA process and Forest Plan within weeks, because the GMUG National Forest issued its scoping notice on the Forest Plan in April 2018, and the two-year deadline to complete a ROD on an EIS starting from the time of the scoping notice would expire in April 2020.

> ***Questions for CEQ***: Is it CEQ's position that the Forest Service could require that the proposed rule take effect immediately regarding the GMUG National Forest Plan Revision, and thus require the Forest Plan to be finalized by April 2020? Please explain your answer yes or no.
>
> Please also explain how this result is consistent with NEPA and current caselaw.

Since the Plan was adopted in 1983 (and amended in 1989), there have been significant changes ranging from increased recreational use and stress in certain areas of the forest, listed endangered species and designated critical habitat, changed forest conditions from insects and climate disruption, as well as new information on forest conditions. Yet the proposed rule would not require that the Forest Service obtain new science and technical research on these changed conditions. Without such information the Forest Service and the public cannot make informed decisions as to how the Forest Plan would be relevant or useful for guiding management decisions that would be made over the next decade.

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, if it was implemented prior to the Forest Plan being finalized, that the Forest Service would not necessarily be required to obtain new science and technical research to inform the Forest Plan? Please explain your answer yes or no.
>
> If such information would not need to be obtained, can you explain how a Forest Plan could serve its purpose of guiding land and resource management in a way that is consistent with the Forest Service's mandates and with current conditions?
>
> Further, please explain why such a result would be consistent with NEPA and current caselaw.

c. The CEQ Proposed Rule on Categorical Exclusions

i. Tecuya Ridge Shaded Fuelbreak Project Categorical Exclusion (Los Padres National Forest)

On the Los Padres National Forest, commercial logging has not been promoted for decades, and prior to the Trump administration, the Forest Service was often willing to consider project alternatives proposed by the public, sometimes choosing that alternative. An example of that is the Frazier Mountain Project which was approved with an EA and FONSI in 2012.[260] As described in the FONSI (which approved Alternative 3):

> An issue brought up by several of the respondents was a concern over the harvest of larger diameter trees and the need for a commercial timber sale to implement Alternative 2 (Proposed Action). The respondents requested the Forest Service develop and study in detail an alternative that included a diameter limit (10 inches) for thinning activities. Alternative 3 was developed to address this issue and includes the 10-inch diameter cap for thinning and would not require a commercial timber sale to implement. Alternative 3 focuses on the removal of smaller diameter trees to accomplish project objectives. It would only allow for thinning of a very limited number of larger trees (> 10 inches diameter) for safety needs around landings or roads during thinning operations.[261]

Recently, however, projects very similar to the Frazier Mountain Project are proceeding in a very different fashion. Rather than utilizing at least an EA, and thereby considering (and potentially adopting) an alternative to the proposed project, the Los Padres National Forest is instead relying on a "categorical exclusion" ("CE"). Specifically, the agency is using 36 C.F.R. § 220.6(e)(6): "Timber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction." The agency is arguing that essentially any type of thinning, even when commercial, and without a diameter limit, qualifies under this CE.

A disturbing example of this new trend is the Tecuya Ridge Shaded Fuelbreak Project, approved by the Los Padres National Forest in 2019.[262] Not only does this project rely on a CE, it does so while proposing and then authorizing over 1,000 acres of logging, without a diameter limit, in occupied California condor habitat, in an inventoried roadless area (the Antimony IRA). Further, by relying on a CE, the Forest Service has avoided all consideration of alternatives, such as one with a diameter limit, and has avoided public input regarding better ways to protect local

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[260] Forest Service, Environmental Assessment, Frazier Mountain Project (May 2012), attached as Ex. 61, and available at https://www.fs.usda.gov/nfs/11558/www/nepa/2136_FSPLT2_126952.pdf (last viewed Mar. 9, 2020); Forest Service, Decision Notice and Finding of No Significant Impact, Frazier Mountain Project (May 29, 2012), attached as Ex. 62, and available at https://www.fs.usda.gov/nfs/11558/www/nepa/2136_FSPLT2_126944.pdf (last viewed Mar. 9, 2020).

[261] Forest Service, Frazier Mountain Decision Notice (Ex. 62) at 2.

[262] *See* Forest Service, Decision Memo, Tecuya Ridge Shaded Fuelbreak Project (Apr. 9, 2019), attached as Ex. 63, and available at https://www.fs.usda.gov/nfs/11558/www/nepa/107660_FSPLT3_4638126.pdf (last viewed Mar. 9, 2020).

communities from wildfire, such as an alternative that puts the fuelbreak closer to communities where it would actually be effective.

This type of misuse of a CE under the current regulations will only be made worse by the proposed rule which weakens the definition of "extraordinary circumstances" by allowing an agency to continue to use a CE, via relying on "mitigation," even when "extraordinary circumstances" exist. This will not only wrongly allow a CE to be used when a project has the potential to cause significant impacts, it will also further limit the ability of the public to have project alternatives considered. That in turn would undermine public involvement, a core aspect of NEPA, and preclude the ability of agencies to adopt project alternatives that reduce environmental damage and/or better protect public safety, such as the situation with the Tecuya project and wildfire protection.

> ***Questions for CEQ:*** Is it CEQ's position that the proposed rule, if implemented, would expand the use of categorical exclusions in a manner that will further restrict the consideration of alternatives, including those that could reduce environmental harm and/or protect public safety? Please explain your answer.

d. The CEQ Proposed Rule on Science

The proposed rule contains two provisions that will likely result in NEPA documents failing to disclose critical impacts to flora and fauna. First, the proposed rule places arbitrary time limits on the completion of EAs (one year) and EISs (two years).[263] Second, the proposed rule permits agencies to gather no new data when preparing NEPA review documents: "Agencies shall make use of reliable existing data and resources and are *not required to undertake new scientific and technical research* to inform their analyses."[264] Wildlife are not static; they move with changing conditions, seasons, food availability, and many other factors. Similarly, some plants may not be detectable in certain years or at certain times of year due to moisture, temperature, precipitation, and other factors that may be influenced by changing weather patterns, global warming, and other factors. Arbitrary time limits and the failure to gather new information may thus result in misleading agencies to assume that an area impacted by a project contains little important habitat. Several examples follow.

i. Quino checkerspot butterfly

The Quino checkerspot butterfly is a federally listed endangered species that has a unique biological characteristic of butterflies adapted to ephemeral resources, such as the federally endangered Mount Charleston blue butterfly in Nevada and the Bay checkerspot butterfly in California. Research into the conspecific bay checkerspot butterfly (*Euphydryas editha bayensis*) reveal that the butterflies spend approximately less than 5% of their lives as adults, about 80% as a caterpillar, 5% as a pupa, and 5% in the egg stage.[265] These butterflies can be thought to have two very distinct stages and thus appearances in the landscape: (1) the highly active winged adult butterflies, and (2) the less conspicuous early-stage eggs, caterpillars, and pupae. Adapted to

[263] Proposed 40 C.F.R. §§ 1501.10(b)(1) & (b)(2).
[264] Proposed 40 C.F.R. § 1502.24 (emphasis added).
[265] White, R. 1986(87). The trouble with butterflies. Journal of Research on the Lepidoptera 25(3): 207-212, attached as Ex. 64.

drought-prone southern California, the Quino checkerspot is an extreme example of this life history strategy.

The Quino checkerspot butterfly has evolved to survive in the hot dry summers of the Mediterranean climate of southern California by entering diapause (a period of suspended development) in its caterpillar stage. Caterpillars can undergo diapause for multiple years when food plants dry out, coming out of diapause only after periods of higher precipitation to complete their larval growth and pupate into an adult.[266] The animal may be able to survive multiple years of extended drought in a state of diapause, during which caterpillars do not metamorphose into adults.[267] Caterpillars enter diapause in cracks in the soil, under logs or rocks, in leaf litter, or under bark, making them difficult to locate during surveys. This can lead surveyors to incorrectly conclude that a site is unoccupied. The final rule designating critical habitat for the Quino checkerspot butterfly noted negative surveys are not considered credible if unfavorable conditions, such as drought, limit the detectability of the butterfly.[268]

Due to the dynamic metapopulation biology of the Quino checkerspot butterfly and the varying environmental conditions of San Diego County in which it lives, it is simply impossible to state whether the Quino checkerspot butterfly "occupies" a habitat patch based on a mere two years of data alone. Quino checkerspot butterfly metapopulations have large (20-100 fold) population fluctuations over 10-20 years[269] and the U.S. Fish and Wildlife Service ("FWS") defines Quino checkerspot butterfly occupancy based on "population-scale occupancy" that is defined by "all areas used by adults during the persistence time of a population (years to decades)."[270] Further, the FWS characterizes Quino checkerspot butterfly occupancy in terms of "occurrence complexes;" occurrences within "1.2 miles (2 km) of each other are part of the same occurrence complex."[271] In order to definitively determine occupancy, and therefore impact, due to both the metapopulation structure of the species and the cryptic life stages, surveys for both adults and early life stages of the Quino checkerspot butterfly must to be completed over multiple years of varying resource conditions.

Because the proposed rule provides for a period of two years or less for nearly all NEPA reviews, and do not require the agency to even gather new information during the NEPA process, it is likely that any proposed action near the currently known range of the Quino checkerspot would fail to take a hard look at impact to this imperiled species.

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[266] Preston, K. L., Redak, R. A., Allen, M. F., & Rotenberry, J. T. (2012). Changing distribution patterns of an endangered butterfly: Linking local extinction patterns and variable habitat relationships. Biological Conservation *152*: 280-290, attached as Ex. 65. *See also* U.S. Fish and Wildlife Service. 2009. Quino Checkerspot Butterfly (*Euphydryas editha quino*) 5-Year Review: Summary and Evaluation. Carlsbad Fish and Wildlife Office, Carlsbad, California, attached as Ex. 66, and available at https://www.fws.gov/carlsbad/SpeciesStatusList/5YR/20090813_5YR_QCB.pdf (last viewed Mar. 9, 2020).
[267] U.S. Fish and Wildlife Service. 2003. Recovery plan for the quino checkerspot butterfly (Euphydryas editha quino). U.S. Fish and Wildlife Service, Portland, Oregon (FWS 2003), attached as Ex. 67, and available at https://www.fws.gov/Carlsbad/SpeciesStatusList/RP/20030811_RP_QCB.pdf (last viewed Mar. 9, 2020).
[268] FWS 2009 (Ex. 66).
[269] Preston et al. 2012 (Ex. 65).
[270] FWS 2009 (Ex. 66).
[271] *Id*.

Questions for CEQ: Is it CEQ's position that the proposed 40 C.F.R. § 1502.24 would preclude agencies from conducting new surveys or research for Quino checkerspot butterflies where projects might impact habitat in areas adjacent and near currently occupied habitat? Please explain your answer yes or no.

If agencies intend to undertake EAs for projects in and near potential habitat for Quino checkerspot butterflies, how would the agency ensure that the agency had the time to undertake the potentially necessary multi-year surveys? Would the "senior agency official of the lead agency" be *required* to approve a longer period to comply with the protocol? If the "senior agency official has the discretion to disapprove surveys over multi-year periods once the NEPA process begins under the proposed rule, how would the agency comply with its duty to take the required "hard look," to "ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents," as required by proposed 40 C.F.R. § 1502.24, and comply with the Endangered Species Act?

ii. Rusty Patched bumble bee

The rusty patched bumble bee ("RPBB") was once widely found in the upper Midwest and Northeastern United States in a variety of habitats, including prairies, woodlands, marshes, and gardens. It lives underground or in cavities throughout the year as solitary queens or in colonies that the queen initiates in the spring. Throughout its active season, early spring (at least beginning of April) to mid-fall (September/October),[272] the RPBB is a generalist forager that "relies on diverse and abundant flowering plant species."[273] RPBB colony locations are dynamic, as new queens form their own colonies at locations different from their colony of origin. The RPBB likely disperses long distances, up to 6.2 miles, to find mates or suitable overwintering sites in the fall.[274]

The FWS's RPBB Information for Planning and Consultation ("IPaC") maps recommends review of impacts to the species only in areas deemed "High Potential Zones" or within 2.5 miles of sites in which the bee was observed in 2007, or only 0.1% of the RPBB's former range.[275] These areas are a snapshot of the bee's occurrences in one year and do not take into account the vast majority of the bee's historic and potential range, despite its range being dynamic.[276] In

[272] U.S. Fish and Wildlife Service, 2017. The Rusty Patched Bumble Bee (*Bombus affinis*), Interagency Cooperation under Section 7(a)(2) of the Endangered Species Act Voluntary Implementation Guidance, Version 1.1 at 8-9 ("FWS *Bombus* ESA Guidance"), attached as Ex. 68.
[273] FWS *Bombus* ESA Guidance (Ex. 68) at 9.
[274] U.S. Fish and Wildlife Service, Survey Protocols for the Rusty Patched Bumble Bee (*Bombus affinis*) Version 2.2 (April 1, 2019) at 5, attached as Ex. 69, and available at https://www.fws.gov/midwest/endangered/insects/rpbb/pdf/RPBB_Survey_Protocols_1April2019final.pdf (last viewed Mar. 9, 2020).
[275] FWS *Bombus* ESA Guidance (Ex. 68) at 3.
[276] *See* U.S. Fish and Wildlife Service, Rusty Patched Bumble Bee Map, Where the rusty patched bumble bee may be present, available at https://www.fws.gov/midwest/endangered/insects/rpbb/rpbbmap.html (last viewed Mar. 9, 2020); *see also* U.S. Fish and Wildlife Service, Species Profile, Rusty patched bumble bee (*Bombus affinis*) (webpage), attached as Ex. 70, and available at https://ecos.fws.gov/ecp0/profile/speciesProfile?sId=9383 (last viewed Mar. 9, 2020).

order to determine impact of an agency action, bee surveys and habitat assessment studies must be done as part of the NEPA process to insure avoidance of jeopardy.

The consultation process for the Atlantic Coast Pipeline ("ACP") is an example of inadequate bee surveys triggered by the limited potential zone and IPaC maps. The initial permit and biological opinion, based on findings of no jeopardy or impact, for the ACP was vacated by the 4th Circuit Court after numerous sightings of the RPBB made along the direct path of the ACP in Virginia and West Virginia, outside of areas deemed "High Potential Zones."[277] This original NEPA process was the result of inadequate bee surveys that could have been avoided or at least anticipated if the NEPA and resulting consultation process required thorough surveys and habitat assessment studies over a larger area and over a longer period of time. Due to the bee's temporal and spatially dynamic populations, if no further studies are required as part of the NEPA process, there will be no way of knowing if the endangered Rusty Patched bumble bee occurs in a project area.

Under the proposed rule, no additional surveys would be required, or likely authorized, given the time limits on completing NEPA analysis and the prohibition on undertaking new analysis as part of the NEPA process.

> ***Questions for CEQ:*** Is it CEQ's position that the proposed 40 C.F.R. § 1502.24 would preclude agencies from conducting new surveys or research for rusty patched bumble bee where projects might impact habitat in areas adjacent and near currently occupied habitat? Please explain your answer yes or no.

iii. Protocols Requiring Multi-Year Surveys

The California Department of Fish and Wildlife's 2018 *Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities* specifies that the use of existing surveys for determining whether a special status native plant occurs at a site may not be adequate for a number of reasons, including that the existing surveys are not current, "did not occur at the appropriate times of year," "were not conducted for a sufficient number of years to detect plants that are not evident and identifiable every year," were conducted in naturally variable ecosystems that experience fluctuations in conditions and populations, "[f]ire history, land use, or the physical or climatic conditions of the project area have changed since the last botanical field survey was conducted," or "[c]hanges in vegetation or plant distribution have occurred since the last botanical field surveys were conducted, such as those related to habitat alteration, fluctuations in abundance, invasive species, seed bank dynamics, or other factors."[278]

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[277] S. Johnson, New Rusty Patched Bumblebee Populations Found Near the Path of the Atlantic Coast Pipeline (Oct. 29, 2018), attached as Ex. 71, and available at http://wildvirginia.org/new-rusty-patched-bumblebee-populations-found-near-path-atlantic-coast-pipeline/ (last viewed Mar. 9, 2020).

[278] California Department of Fish and Wildlife, *Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities* (Mar. 20, 2018) at pages 6-7, attached as Ex. 72, and available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959&inline (last viewed Mar. 9, 2020).

The Protocol also states that the failure to locate a plant species during one field season does not mean that the plant no longer exists there, and that surveys over several years may be needed to accurately determine presence or absence of the species:

> Adverse conditions from yearly weather patterns may prevent botanical field surveyor from determining the presence of, or accurately identifying, some special status plants in the project area. Disease, drought, predation, fire, herbivory or other disturbance may also preclude the presence or identification of special status plants in any given year…. The failure to locate a known special status plant occurrence during one field season does not constitute evidence that the plant occurrence no longer exists at a location, particularly if adverse conditions are present. For example, botanical field surveys over a number of years may be necessary if the special status plant is an annual or short-lived plant having a persistent, long-lived seed bank and populations of the plant are known to not germinate every year.[279]

Agencies and experts have adopted similar protocols elsewhere. For example, in 2009, organizations working with the State of Colorado prepared a report setting out a protocol to protect 17 species of globally imperiled plants found in oil and gas development areas in Colorado that are in danger of extinction. The report concluded that "[o]ne of the biggest issues is the lack of awareness of the existence and status of these rare plant species," and it provided recommendations for identifying the location and extent of each species.[280]

The protocol recommended, among other things, that:

> Field botanical surveys should be conducted at a time when the plant species of concern can be detected and accurately identified. In some cases *multi-year surveys are necessary*. For example, in dry years some ephemeral annuals (such as Phacelia submutica) may not germinate and produce plants, but they are still present at the site in the seedbank.[281]

The requirement for "multi-year surveys" appears to conflict directly with the one-year limit for preparation of EAs and with the proposed rule that agencies "are not required to undertake new scientific and technical research to inform their analyses."

> ***Questions for CEQ:*** Can CEQ please explain why there is no potential conflict between the time limits set for EAs and EISs in the proposed rule, the draft mandate that agencies are not required to undertake new research to inform their analyses, and the protocol that

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[279] *Id*. at 7.
[280] B. Elliott *et al*., Recommended Best Management Practices for Plants of Concern: Practices Developed to Reduce the Impacts of Oil and Gas Development Activities to Plants of Concern (Mar. 27, 2009) at page 1, attached as Ex. 73, and available at http://www.elliottconsultingusa.com/Colorado%20oil%20&%20gas%20Best%20Management%20Practices.pdf (last viewed Mar. 9, 2020) (report preparers include Colorado Natural Heritage Program, The Nature Conservancy, Colorado Natural Areas Program, and Colorado Open Lands).
[281] *Id*. at 6 (emphasis added).

in certain circumstances require surveys over multiple years to ensure that imperiled plants and wildlife are not driven to extinction?

IX. CONCLUSION

While CEQ's proposed rule will likely result in increased litigation for a myriad of violations, including violating Section 7 consultation under the ESA, Supreme Court precedent interpreting NEPA, and the Constitution, CEQ should withdraw this proposed rule because of the harm it will inflict on our human and natural environment. Moreover, CEQ should focus on the purpose and statutory requirements of NEPA and improve agency implementation of the current CEQ regulations. For these reasons, CEQ must withdraw the proposed rule, which is arbitrary and capricious.

Sincerely,

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Center for Biological Diversity
plopes@biologicaldiversity.org
(202) 849-8401 x 105

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

TABLE OF EXHIBITS

Exhibit 15. *For the First Time, People Can Respond Online From Any Device, By Mail or by Phone*, Census Bureau (April 1, 2019).

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