Comments on CEQ’s Proposed Revisions to Regulations Implementing the National Environmental Policy Act on Behalf of:

350 Bay Area • 350 New Orleans • 350 West Sound Climate Action • 350Dallas • 350NM • 500 Sails • Agua Fria Open Space Alliance, Inc. • Alaska Community Action on Toxics • Alaska Wilderness League • Alaska's Big Village Network • Alberta Wilderness Association • Alliance for International Reforestation, Inc. • Alliance for Justice • Amazing Earthfest • American Bird Conservancy • American Rivers • American Whitewater • Anacostia Riverkeeper • Animal Welfare Institute • Animal Legal Defense Fund • Animas Valley Institute • Appalachian Trail Conservancy • Arizona Mining Reform Coalition • Arizona Riparian Council • Arroyo Hondo Land Trust • Athens County’s Future Action Network • Audubon Naturalist Society • Audubon of Kansas, Inc. • Audubon Society of Omaha, Nebraska • Azul • Bahr Law Offices, P.C. • Bark • Basin and Range Watch • Battle Creek Alliance & Defiance Canyon Raptor Rescue • Bayou City Waterkeeper • Berks Gas Truth • Better Path Coalition • Black Hills Clean Water Alliance • Black Warrior Riverkeeper • Blue Mountains Biodiversity Project • Bold Alliance • Buckeye Environmental Network • CA Native Plant Society, San Luis Obispo Chapter • California Native Plant Society • California Sportfishing Protection Alliance • Californians for Western Wilderness • Campaign to Save the Boundary Waters • Cascadia Wildlands • Catskill Mountainkeeper • Carrizo Comecrudo Tribe • Climate Advocates Voces Unidas • Center for American Progress • Center for Biological Diversity • Center for Environmental Health • Center for Food Safety • Central Colorado Wilderness Coalition • Charles River Watershed Association • Cherokee Forest Voices • Chiricahua Apache Nation • Christian Council of Delmarva • Citizens for Pennsylvanias's Future (PennFuture) • Civil Liberties Defense Center • Clean Air Council • Clean Water Action • Climate Hawks Vote • Coalition To Protect America’s National Parks • Coalition for Sonoran Desert Protection • Coastal Plains Institute • Colorado Farm and Food Alliance • Common Ground Community Trust • Conejos Clean Water • Connecticut Audubon Society • Conservation Colorado • Conservation Council For Hawaii • Conservation Northwest • Conservation Voters of South Carolina • Conservatives for Responsible Stewardship • Conserve Southwest Utah • Crag Law Center • Defenders of Wildlife • Delaware Ecumenical Council • Diné C.A.R.E. • Don't Waste Arizona, Inc. • Earthjustice • EARTHWORKS • EcoFlight • Endangered Habitats League • Endangered Species Coalition • Environment America • Environmental Center of San Diego • Environmental Confederation of Southwest Florida • Environmental Defense Center • Environmental Law & Policy Center • Environmental Protection Information Center • Factory Farming Awareness Coalition • Fairmont, MN Peace Group • Flint Riverkeeper, Inc. • Food & Water Watch • For the Fishes • Forest Keeper • Fort Berthold Protectors of Water and Earth Rights • Friends of Animals • Friends of Arizona Rivers • Friends of Bell Meadow • Friends of Big Ivy • Friends of the Clearwater • Friends of Big Morongo Canyon Preserve • Friends of Merrymeeting Bay • Friends of Penobscot Bay • Friends of Plumas Wilderness • Friends of the Columbia Gorge • Friends of the Earth • Friends of the Inyo • Friends of the Kalmiopsis • Friends of the Santa Cruz River • Friends of the Sonoran Desert • Foothill Conservancy • Geos Institute • Gila Resources Information Project • Glynn Environmental Coalition • Golden West Women Flyfishers • Grand Canyon Trust • Grand Staircase Escalante Partners • Great Egg Harbor Watershed Association • Great Old Broads for Wilderness • Greater Hells Egg Harbor Watershed Association • Greater Hells Egg Harbor Watershed Association • Greater Hells Egg Harbor Watershed Association


Yellowstone Coalition • Green America • Green for All • GreenLatinos • Greenpeace • Guardians of Gani • Harpeth Conservancy • Health Professionals for a Healthy Climate • High Country Conservation Advocates • Hispanic Federation • Holitna River Watcher • Howling For Wolves • Hudson Riverkeeper • Humane Society Legislative Fund • I Heart Pisgah • Idaho Conservation League • Idaho Organization of Resource Councils • Idaho Rivers United • Indian Creek Watershed Association • Inland Ocean Coalition • International Fund for Animal Welfare • International Marine Mammal Project of Earth Island Institute • Iowa Environmental Council • Jill Witkowski Heaps Consulting • John Muir Project • Kalmiopsis Audubon Society • Kentucky Heartwood • Klamath Forest Alliance • Klamath-Siskiyou Wildlands Center • Labor Council for Latin American Advancement • Lapides Foundation • Lassen Forest Preservation Group • Laukahi: The Hawaii Plant Conservation Network • LEAD Agency, Inc. • League of Conservation Voters • Living Rivers & Colorado Riverkeeper • Long Beach Gray Panthers • Los Padres ForestWatch • Low Impact Hydropower Institute • Madrone Audubon Society, Sonoma County, CA • Maine Audubon • Mālama Mākua • Maricopa Audubon Society • Maryland United for Peace and Justice • Mass Audubon • Metcalf Archaeological Consultants, Inc • Great Old Broads for Wilderness • Mississippi River Network • Mojave Desert Land Trust • Monmouth County Audubon Society • Montana Wilderness Association • Morongo Basin Conservation Association • Mount Graham Coalition • The Moving Forward Network • Multicultural Alliance for a Safe Environment • National Audubon Society • National Parks Conservation Association • National Trust for Historic Preservation • National Wildlife Federation • Natural Resources Council of Maine • Natural Resources Defense Council • Nature Coast Conservation, Inc. • New Mexico Horse Council • New Mexico Interfaith Power and Light • New Mexico Sportsmen • New Mexico Wilderness Alliance • Northcoast Environmental Center • Northeast Oregon Ecosystems • Northeastern Minnesotans for Wilderness • Northern Alaska Environmental Center • NORTHERN MARIANAS DESCENT CORPORATION • Northwest Center for Alternatives to Pesticides • Nuclear Watch New Mexico • NY4WHALES • NYC Audubon • Ocean Conservancy • Ocean Conservation Research • Oceana • Ogeechee Riverkeeper • Ohio Environmental Council • Ohio River Waterkeeper • Olympic Climate Action • Operation HomeCare • Oregon Natural Desert Association • Oregon Wild • Our Common Wealth • Ohio Valley Environmental Coalition • Pacific Coast Federation of Fishermen’s Association • Pacific Environment • PaganWatch • Partnership for Policy Integrity • Paula Lane Action Network (PLAN) • Pelican Media • Peoria Audubon Society • Pilchuck Audubon Society • PNM Shareholders for a Responsible Future • Potomac Valley Audubon Society • Powder River Basin Resource Council • Predator Defense • Preserve Giles County • Progressive Voters Alliance of Grant County • Protect Our Commonwealth • Public Citizen • Public Employees for Environmental Responsibility • Public Lands Project • Puget Soundkeeper Alliance • Quiet Use Coalition • Raptors Are The Solution • Resource Renewal Institute • Rio Arriba Concerned Citizens • Rock Creek Alliance • Rocky Mountain Recreation Initiative • Rocky Mountain Wild • Russian River Watershed Protection Committee • Safe Alternatives for our Forest Environment • Salem Audubon Society • San Juan Citizens Alliance • San Luis Valley Ecosystem Council • Santa Cruz Climate Action Network • Santa Fe Green Chamber of Commerce • Save Lake Superior Association • Save Our Cabinets • Save Our Sky Blue Waters • Save the Manatee Club • Save the Scenic Santa Ritas • Sequoia ForestKeeper® • Seven Circles Foundation • Sierra
Club • Sierra Forest Legacy • Silver Valley Community Resource Center • Sky Island Alliance • Soda Mountain Wilderness Council • Soil Works, Inc. • South Umpqua Rural Community Partnership • Southeast Alaska Indigenous Transboundary Commission • Southern Oregon Climate Action Now • Southern Utah Wilderness Alliance • Southwest Native Cultures • Spottswoode Winery, Inc. • Sustainable Obtainable Solutions • Tennessee Clean Water Network • The Climate Reality Project • The Community Water Coalition of Southern Arizona • The Cultural Landscape Foundation • The Humane Society of the United States • The Land Connection • The Spirited Mane • The Walton Works • The Wilderness Society • Thorton Creek Legal Defense Fund • Tinian Women’s Association, Inc. • Tile River Conservancy • Torreon Community Alliance • Trustees for Alaska • Tucson Audubon Society • Tule River Conservancy • Tuolumne River Trust • Turner Environmental Law Clinic at Emory University School of Law • Turtle Island Restoration Network • Unexpected Wildlife Refuge • Center for Land, Environment, and Natural Resources, University of California, Irvine • University of New Mexico American Planning Association • University of Tulsa College of Law • Unexpected Wildlife Refuge • Upper Gila Watershed Alliance • Upper Peninsula Environmental Coalition • Uranium Watch • The US National Committee for the International Council of Monuments and Sites • Utah Native Plant Society • Voyageurs National Park Association • Wasatch Clean Air Coalition • Washington Conservation Voters • Washington Wild • Waterkeeper Alliance • Weber Sustainability Consulting • Western Colorado Alliance • Western Environmental Law Center • Western Organization of Resource Councils • Western Slope Conservation Center • Western Values Project • Western Watersheds Project • Wichita Audubon Society • WILD Arizona • Wild Connections • Wild Watershed • WildEarth Guardians • Wilderness Watch • Wilderness Workshop • WildWest Institute • Willamette Law Group • Willamette Riverkeeper • Winter Wildlands Alliance • Wyoming Outdoor Council • Wyoming Outdoor Council • Wyoming Wildlife Advocates
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March 10, 2020

Ms. Mary Neumayr, Chair
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

RE:  CEQ-2019-0003
PROPOSED REVISIONS TO REGULATIONS IMPLEMENTING
THE NATIONAL ENVIRONMENTAL POLICY ACT

Dear Chairman Neumayr:

This letter represents the collective comments of 328 organizations and tribal nations, representing millions of members and supporters, responding to the Council on Environmental Quality’s (CEQ) proposed revisions to regulations implementing the National Environmental Policy Act (NEPA or the Act). Many of our organizations and members will also be submitting individual comments.

This proposed revision of CEQ’s NEPA regulations is deeply flawed, violates the letter and intent of NEPA and will not satisfy the objectives of this exercise as articulated in the preamble. It is therefore arbitrary and capricious and must be withdrawn.

I. INTRODUCTION

NEPA is the lodestar of this country’s environmental conscience and actions. In NEPA, Congress clearly articulated environmental policies and goals for the United States, while acknowledging the “worldwide and long-range character of environmental problems”. Fully implemented, NEPA could help Americans meet today’s dual challenges of climate change and loss of biological diversity. As Senator Henry Jackson, the primary Senate sponsor of the Act, explained, NEPA “serves a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values.” While full implementation of NEPA has yet to be realized, NEPA’s procedural requirements, as interpreted through CEQ’s regulations have fundamentally changed the nature of federal decision making for the better by providing thorough analysis and public involvement.

1 42 U.S.C. § 4332(F).
NEPA currently requires “that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” Through NEPA, communities have been able to learn ahead of time when their government is proposing to permit the expansion of an airport, a new management plan on a nearby national forest, or a new deepwater port for export of coal. Through NEPA, Americans living, working and recreating near or on public lands have had an opportunity to consider proposed changes to land management plans and actions such as proposed timber harvest, oil and gas leasing and road construction, and to influence those decisions. Marginalized communities have had an opportunity to have their voices heard before construction of a proposed highway that might divide their community.

Receiving public comment is only part of the purpose of the NEPA process. Those comments must be evaluated and considered by the agencies when they are making decisions. Through compliance with the current regulations, federal agencies have learned that they are expected to stop, look and listen to the taxpayers they are serving before committing resources. Through public comments and comments from other agencies, lead agencies have learned of better alternatives to achieve a particular goal while minimizing harm to communities, public land and the environment. Federal agencies have learned important new information about an area that an agency manages or a community in which it operates. In short, while implementation has been far from perfect, Americans as a whole have benefitted from the important information and public involvement achieved through NEPA’s implementation.

In a response to CEQ’s Advance Notice of Proposed Rulemaking (ANPRM), many of the signatories to this letter urged that, “CEQ invest its modest resources and most importantly, its leadership position, in a systematic initiative to enforce [the regulations].” We pointed out that, “[c]hanges to the regulations will not result in improvements unless federal agencies have the organizational structure and resources that facilitate their implementation.” We explained, painstakingly, that the current regulations hold the key to almost all of the efficiency issues suggested by the ANPRM and that, “[w]hat is lacking is the capacity and will to fully implement the regulations.” Unfortunately, that well-grounded advice was fundamentally disregarded. While we welcome the long-overdue recognition of tribal nations throughout the regulations, the extreme reversals of long-held CEQ positions would serve neither tribes nor the public well but instead would have a significantly detrimental and adverse impact on decisionmaking.

We incorporate by reference the response to the ANPRM to this letter (Attachment A) and ask that CEQ respond to each point raised in that letter along with responses to this Notice of Proposed Rulemaking (NPRM).
The proposed revisions fundamentally mischaracterize and attempt to rewrite the purpose of NEPA. They seek to substantially reduce both the breadth and depth of NEPA analysis as well as eviscerate available remedies for inadequate compliance. They try to reduce or eliminate the applicability of NEPA to a wide range of actions. They dismiss conflict of interest concerns along with the public’s interest in being able to enforce the law. Instead of the public’s interest in sound decisionmaking being central to the NEPA process, they elevate the profit-driven objectives of private corporations.

Given the emphasis in the ANPRM on efficiency, it is particularly startling to see that the proposal contains several stunning reversals of long-held CEQ positions and decades of practice and case law. While agencies can change their position, it must show awareness of the change, give a reasoned explanation for it, and explain how the change is permissible under the relevant statute. In this instance, some changes are not even acknowledged in CEQ’s preamble. For example, there is no acknowledgement that the proposed revision would eliminate all systematic public involvement in the referral process.7 There is also no acknowledgement that CEQ is eliminating the rule that EISs must be available for 15 days prior to a hearing on the EIS.8 Other changes are acknowledged but brushed off with a broad reference to providing “more flexibility”9 or stating that provisions in the current regulations are “unnecessarily limiting”10 and are devoid of a reasoned explanation and supporting rationale. For example, CEQ states in the preamble that NEPA does not contain the terms “direct indirect, or cumulative effects”11 that it proposes to simplify the definition by simply eliminating those terms and eliminate the requirement to analyze cumulative effects all together, referencing excessively lengthy documentation and irrelevant or inconsequential information.12 But CEQ never explains the basis on which they reached these conclusions, let alone acknowledge the fundamental importance of cumulative effects in meeting NEPA’s mandate. CEQ cannot cure these deficiencies by providing a new rationale in a preamble to final regulations.

Other proposed revisions delete long-standing criteria that are replaced with the vaguest of direction – for example, the proposed deletion of the definition of “significantly” at 40 C.F.R. § 1508.27 and the substitution of vague, ambiguous language amenable to numerous interpretations. Neither of these tactics will result in efficiency; rather, they will result in further delays and inefficiencies and in a substantial amount of litigation.

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7 Proposed revisions to § 1504, 85 Fed. Reg. at 1704.
8 Proposed § 1506.6(f), 85 Fed. Reg. at 111705.
9 Proposed 1506.5(c), 85 Fed. Reg. at 1705 (giving agencies more flexibility by allowing applicants to prepare EISs).
10 Preamble to Proposed § 1502.22(a), 85 Fed. Reg. at 1703 (proposing to delete the word “always” from the obligation to obtain information relevant to reasonably foreseeable significant adverse impacts in certain circumstances).
12 85 Fed. Reg. at 1707-08.
The proposed revisions not only fail to satisfy the effectiveness objectives set forth by CEQ but also violate the Congressionally mandated purpose of NEPA of, among other goals, fulfilling the responsibilities of each generation as trustee of the environment for succeeding generations.\textsuperscript{13}

Today, our country and our world face some of the most significant challenges to life on earth that we have encountered in recorded history. The science is clear that human caused activity is inducing both major changes in climate and in the extinction of flora and fauna. A plethora of authoritative studies and reports tell us that we have a rapidly closing window of time in which we can possibly prevent or slow continued warming that will harm humans’ existence on earth for centuries as well as jeopardize the continued existence of about one million animal and plant species.\textsuperscript{14} As the United States Global Change Research Program stated,

The last few years have also seen record-breaking, climate-related weather extremes, the three warmest years on record for the globe, and continued decline in arctic sea ice. These trends are expected to continue in the future over climate (multi-decadal) timescales. Significant advances have also been made in our understanding of extreme weather events and how they relate to increasing global temperatures and associated climate changes. Since 1980, the cost of extreme events for the United States has exceeded $1.1 trillion; therefore, better understanding of the frequency and severity of these events in the context of a changing climate is warranted.\textsuperscript{15}

Climate change poses significant national security and economic risks to the United States. As the Department of Defense stated in 2019, “The effects of a changing climate are a national security issue with potential impacts to Department of Defense missions, operational plans, and installations.” The report identifies climate-related events such as flooding, drought, desertification and wildfires on 79 military installations within the next twenty years.\textsuperscript{16} In addition, the Executive Vice President of the New York Federal Reserve Bank recently stated that, “Climate change has significant consequences for the US economy and financial sector through slowing productivity growth, asset revaluations and sectorial reallocations of business activity.”\textsuperscript{17}

\textsuperscript{13} 42 U.S.C. § 4331(b)(1).
\textsuperscript{17} “Climate events have cost the US economy more than $500 billion over the last 5 years, Fed official says”, https://markets.businessinsider.com/news/stocks/climate-change-impact-on-economy-has-cost-500-billion-fed-2019-11-1028675379.
This nation’s minority and low-income communities\textsuperscript{18} and Native American tribes\textsuperscript{19} experience and will continue to experience disproportionately severe effects of climate change. As the most recent climate change assessment for the United States says, “People who are already vulnerable, including lower-income and other marginalized communities, have lower capacity to prepare for and cope with extreme weather and climate-related events and are expected to experience greater impacts.”\textsuperscript{20} And the same study finds that:

The health risks of climate change are expected to compound existing health issues in Native American and Alaska Native communities, in part due to the loss of traditional foods and practices, the mental stress from permanent community displacement, increased injuries from lack of permafrost, storm damage and flooding, smoke inhalation, damage to water and sanitation systems, decreased food security, and new infectious diseases.\textsuperscript{21}

Our national parks are particularly impacted by climate change, warming twice as fast as the rest of the country on average, given their geographic distribution in the U.S.\textsuperscript{22} Moreover, many parks contain unique geological and ecological features—e.g., high mountains and arid deserts—that are particularly vulnerable to changes in the climate. For instance, Cape Hatteras National Seashore is eroding into the sea from rising tides; Rocky Mountain National Park is experiencing record wildfires, scarring the landscape and devastating nearby communities and local economies; and namesake features at Glacier and Saguaro National Parks are disappearing from loss of snow and ice and other changes to the landscape resulting from warming temperatures. The changes within National Park landscapes put wildlife and cultural and natural resources in jeopardy, as well as increase risks to visitors. These treasured places must be protected and preserved, not only because they tell the stories of our nation’s diverse history and provide unforgettable experiences, but also because they are important to the health of the ecosystems of which they are a part, protecting the air we breathe and the water we drink. Nor are these impacts limited to our parks – they apply equally to our national forests, national wildlife refuges, national monuments, and other public lands and resources. In short, now is precisely the wrong time to limit the way our nation considers climate impacts through the proposed evisceration of the NEPA process.

\textsuperscript{19} http://www.ncai.org/policy-issues/land-natural-resources/climate-change.
II. CEQ’S PROCESS FOR PROPOSING REVISIONS TO ITS REGULATIONS HAS BEEN GROSSLY INADEQUATE AND INAPPROPRIATE. CEQ IS ALSO IN VIOLATION OF ITS OWN NEPA REGULATIONS AND THE ENDANGERED SPECIES ACT.

A. The Public Process Has Been Grossly Inadequate.

CEQ has demonstrated its unfortunate and newfound contempt for both the NEPA process and the public by its design of a deeply inadequate public process for this proposed revision. It has made no effort whatsoever to approach this effort in a thoughtful, collaborative manner or even in a way designed to allow the most affected individuals to engage in it.

Despite CEQ’s repeated public statements that it has engaged in significant public outreach, in fact, it has simply conducted the minimal processes. If there has been significant outreach, it has not been to the public. In no respect has this process mirrored the thoughtful process in which CEQ engaged when it developed the current regulations. As Nicholas Yost, former CEQ general counsel and the primary author of the current regulations has explained, that process involved not just soliciting ideas, but engaging in an iterative dialogue with a number of stakeholders with the goal of reaching common ground on a path forward. At that time, CEQ sought out complaints and concerns and discussed those concerns directly with the affected parties. As Mr. Yost observed, “The resulting public response to the final regulations was everything we had hoped for and worked to achieve,” with support for the regulations offered by both the public interest and the business community.23

The short ANPRM process was not a well-designed outreach effort but merely a list of broad and often repetitive questions, much more friendly to NEPA specialists than the public. The breadth of the questions provided no real focus what CEQ’s intentions really were in terms of its proposed rulemaking.

The process for the proposed revisions is considerably worse. We have identified over 80 issues that warrant comment in the proposed regulations, including the 23 extra questions CEQ poses in the NPRM. Indeed, we continue to find new issues and are not at all certain that all of the problematic text has yet been identified and analyzed. Most of the issues raised involve complex legal issues and decades of case law; some involve other areas of the law entirely, such as tort law and Constitutional law. CEQ took 18 months to develop this proposal behind closed doors. Any expectation that the public can comprehensively respond to this proposal in 60 days is appallingly wrong at best, and highly cynical at worst.

The public meeting arrangements were equally and dramatically inadequate. Since the proposal has national implications, public meetings should have been held in a number of different regions around the country and the failure to do so seriously eroded the ability

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of many who could not go to Denver or Washington, D.C. (and even if they had, might not have been able to secure a speaking slot) to directly address the agency. CEQ provided only a short, 90-minute notice of sign-up times on the website, during the daytime, thus making it almost impossible for anyone working and/or not at their computers during that time period to sign up. This is especially true given that all slots were signed up within 15 minutes. Indeed, the whole idea of holding meetings in restricted space with the need to get “tickets” to participate twists the ideals of democracy that NEPA represents into something more akin to a lottery.

All of us have been to dozens of NEPA scoping sessions and public hearings held in large auditoriums associated with various schools or community centers. CEQ’s choice of venue, especially in Denver, speaks loudly to its disinterest in hearing from the public.

Finally, CEQ’s refusal to respond to the requests of thousands of citizens and 167 Members of Congress for an extension of this comment period until five days before the end of the comment period is unfathomable and the response, when it finally came, extremely disappointing. By not providing a TIMELY response, CEQ breaks the bounds of rudimentary civility, let alone accountability and responsiveness to the public it was intended to serve.

B. CEQ Has Violated Its Own Regulations for this Proposed Revision and Must Prepare an Environmental Impact Statement (EIS) on this Proposal.

As CEQ noted in its preamble, it is disregarding its own past practices in failing to prepare NEPA analysis on these proposed revisions.24 More bluntly, for the first time, it is violating its own regulations.25 CEQ’s definition of “major federal action” specifically identifies proposed regulations and interpretations adopted pursuant to the Administrative Procedures Act. This proposed, massive revision, which would significantly alter how NEPA is implemented, clearly falls within the current definition as a major federal action.26 The current regulations and the proposed regulations also state that in the context of informal rulemaking, the draft EIS shall normally accompany the proposed rule.27 Thus, CEQ should have issued a draft EIS on January 10, 2020, when it published this proposal.28

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25 “CEQ, itself, of course, under established principles found in the Administrative Procedure Act, is required to adhere to its own regulations”. Wingfield v. Office of Management and Budget, 7 E.L.R. 20362 (D.D.C. 1977). In that case, the Court found that CEQ was not the cause of the plaintiff’s alleged injury. However, in this situation, all the action is CEQ’s and CEQ’s alone.
26 40 C.F.R. §1508.18(a) and (b)(1).
27 40 C.F.R. §1502.5(d); proposed 1502.5(d).
28 While we strongly believe that the impacts from this rulemaking rise well above the threshold for significance, as CEQ knows, it’s own regulations require, at a minimum, preparation of an EA for a proposed action that is not normally categorically excluded. 40 C.F.R. § 1501.4(b).
CEQ states that it need not comply with NEPA because the proposed rule would not authorize any activity or commit resources to a project that may affect the environment. Courts have established that an agency’s interpretation of a statute can be subject to NEPA review when that interpretation can lead to subsequent, significant effects on the environment. For example, in both 1987 and 1997, the Office of Surface Mining Reclamation and Enforcement prepared an EIS analyzing several alternative ways of interpreting Valid Existing Rights for coal mining. Similarly, attempts to use categorical exclusions to address regulations have been rejected. The Forest Service’s attempt to use its categorical exclusion for rules and regulations to avoid preparing a EA or EIS on its nation-wide forest planning regulations was unsuccessful. Among other changes, the 2005 planning regulations included a significantly different approach in regards to NEPA’s applicability to forest plans, arguing that EISs were not required for plans that did not authorize site specific actions. The Court found that the planning regulations did not come within the scope of the CE, not just because it was a nationwide rule, but because “the USDA appears to have charted a new path and adopted a new policy approach regarding programmatic changes to environmental regulations.” The Court stated that the issue was not just whether the action would cause significant impact but “whether the path taken to reach the conclusion was the right one in light of NEPA’s procedural requirements” The Court also noted that “No Ninth Circuit case involving invocation of a CE, that was upheld on appeal, involved broad, far-reaching programmatic actions such as the 2005 Rule.”

Here, CEQ has clearly not taken the right path. These revisions will change the environmental impact assessment process for the entire executive branch of government, covering millions of federal actions. The scope and impact of the Forest Service’s planning regulations, while very significant, pale beside the impact of CEQ’s regulations. The proposed regulations, clearly under the sole control and fully the responsibility of CEQ, a federal agency, will have a very significant effect on the quality of the human environment. We attach two set of examples that identify just a few of the differences between the current regulations and the proposed regulations in particular circumstances and demonstrate how these changes would affect birds and the ocean environment.

C. CEQ’s Proposed Revision Triggers the Need for Consultation under Section 7 of the Endangered Species Act

See also, Natural Resources Defense Council v. Duvall, 777 F. Supp. 1533 (E.D. Ca. 1991) (Bureau of Reclamation was required to prepare an EIS on its proposed regulations setting the price of water utilized from its irrigation infrastructure.) See also, Cal. Ex rel. Lockyer v. U.S. Dep’t. of Agriculture, 459 F. Supp. 2d 874, 1014 (N.D. Cal. 2006), affirmed, 575 F.3d 999 (9th Cir. 2009) (USDA’s reliance on categorical exclusion for repeal of roadless rule and promulgation of new state petitions rule for roadless area was improperly and unreasonably categorically excluded as merely a procedural rule).
31 481 F. Supp. 2d at 36.
32 Id. at 38.
33 Id. at 39.
34 Attachment B, “Impacts to Birds of Proposed Changes to NEPA.”
35 Attachment C, “Ocean Impacts of Proposed Changes to NEPA.”
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…”  

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.” 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.”

The trigger for consultation is very low. The “may affect” standard broadly includes “any possible effect, whether beneficial, benign, adverse or of an undetermined character.” 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. Only if an agency action truly has “no effect” on listed species, and the action agency makes such a finding, is the consultation requirement waived. The Services’ regulations clearly anticipate the use of “programmatic” consultations on federal, nationwide rulemakings that impact listed species that may affect listed species.

Since the decision to completely re-write the NEPA regulations clearly represents an agency action of the 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 consultations. 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, environmental impacts that occur downstream, downwind or otherwise outside the action areas of an agency’s proposed action will never be evaluated.

For example, the cumulative impacts of degraded water quality will harm listed species — such as salmon, steelhead and bull trout — in downstream waters through higher

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38 50 C.F.R. § 402.02 (emphasis added).
41 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.”)
43 See 50 C.F.R. § 402.02 (defining “action”); ld. (defining “programmatic consultation”).
pollution levels. Similarly, the failure to assess the cumulative effects of energy development projects on climate change will result in very significant impacts to all listed species. But because the NEPA regulations will allow federal agencies to ignore cumulative pollution impacts, these harms will never be assessed. And these impacts will not be consulted upon because the harm will occur beyond the scope of the NEPA assessment.

Under the joint regulations implementing the ESA, if an impact on a listed species may occur, then the EPA must complete consultations with the Services. If EPA 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. The Services define “NLAA” determination to encompass those situations where effects on listed species are expected to be “discountable, insignificant, or completely beneficial.” Discountable effects are very rare, and limited to situations where it is not possible to “meaningfully measure, detect, or evaluate” harmful impacts. Any harm or take of an individual member of a listed species crosses the LAA threshold and requires formal consultations with the Services.

During a programmatic formal consultation process, the Services would assess the environmental baseline, potential cumulative effects to the species, and determine if the CEQ’s regulatory changes would jeopardize any listed species or action jeopardizes the continued existence of each species impacted by the agency action. CEQ would be required to implement Reasonable and Prudent Measures for species that are not jeopardized by the rule change, and implement Reasonable and Prudent Alternatives for species that are jeopardized (or equally protective alternative measures).

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.” “Total inaction is not allowed.”

45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 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)).
51 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
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.”

“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. 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).

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[.]” Further, the existing CEQ NEPA 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 regulatory changes 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 NEPA regulation revisions take 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.

D. Proposed § 1506.13 - Effective Date.

CEQ proposes to give agencies the discretion to apply the revised regulations to activities and environmental documents begun before the effective date of the final rule. Given the emphasis in the proposal on efficiency and clarity, this proposed change is seriously counterproductive. This step would allow for agencies to change course in mid-stream. Under this proposed approach, an agency could decide to switch the regulatory approach after the public comment period has ended, creating confusion and wasting work already done.

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52 Fla. Key Deer v. Paulison, 522 F.3d at 1147.
55 50 C.F.R. § 402.02.
Here are just some of the EISs that could be subject to this sudden switch in rules:

- EISs for a number of national forests in the process of forest plan revision as required by the National Forest Management Act (NFMA). The forests are in various phases of the revision effort, and a number are about to release for public comment/administrative review the draft environmental impact statement or the final environmental impact statement and proposed Record of Decision. These national forests include: Custer-Gallatin, Helena-Lewis & Clark, Grand Mesa-Uncompahgre-Gunnison, Carson, Cibola, Gila, Santa Fe, Sequoia, and Sierra National Forests.

- The EIS for the Draft North Cascades Grizzly Bear Restoration Plan

- The EIS for the Columbia River System Operations

- The EIS for the SPOT Terminals LLC, Deepwater Port License Application, Texas.

A switch in the rules mid-stream would negate the public involvement purpose of NEPA and create massive confusion. Any such new regulations should apply only to NEPA processes begun after publication of any final rule in the Federal Register.

III. THE PROPOSED REVISIONS ARE FUNDAMENTALLY INCONSISTENT WITH THE PURPOSE OF NEPA AND CONGRESS’ CLEAR DIRECTION

CEQ’s proposed revisions wrongfully mischaracterize the very purpose of NEPA and CEQ’s implementing regulations. They do so by turning today’s substantively robust process with a clear purpose and linkage to NEPA’s policies into a paperwork “check the box” exercise. The current regulations make it clear that the President, the executive branch agencies and the courts “share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.” The current regulations remind all branches of government and the public of the statutory duty to “interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.” Their overriding focus is on utilizing a common

61 40 C.F.R. § 1500.2(a); 42 U.S.C. § 4332(1).
sense and public-friendly process as an “action-forcing” mechanism for achieving the goals of NEPA.\textsuperscript{62}

In contrast, the proposed revisions, beginning with the statement that NEPA is a procedural statute,\textsuperscript{63} fundamentally mischaracterize NEPA and strip the process of its true purpose. Despite a partial repetition of the current regulation’s admonition that NEPA’s purpose is to provide for informed decision making and to foster excellent action,\textsuperscript{64} a number of key changes make clear that the proposed regulations would dramatically undermine these critical goals. Such an intent runs throughout the proposed revisions but the proposed changes below particularly highlight this diminished, crabbed approach:

A. \textbf{Proposed § 1500.1 - Purpose and Policy.}

This section begins by characterizing NEPA as merely procedural and states that the “purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision making process.”\textsuperscript{65} In fact, going through the process in and of itself does not satisfy the purpose and function of NEPA as the current Section 1500.1 makes clear. Rather, the purpose and function of the process is reflected in decisionmaking informed by the NEPA process. If the process is completed only by virtue of a paperwork exercise, then the federal agency has not considered the information “before decisions are made and before actions are taken” as currently required.\textsuperscript{66}

Further, the proposed articulation of the “purpose and function of NEPA” would recast the role of the public from its current iterative form to a more passive role of merely being informed; compare “Accurate scientific analysis, expert agency comments and public scrutiny are essential to implementing NEPA”\textsuperscript{67} with “The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision making process.”\textsuperscript{68}

Both changes are a retrenchment from the current regulations and should be abandoned.

B. \textbf{Section 40 C.F.R. § 1500.2 - Policy.}

CEQ proposes to eliminate this section, which directs agencies to comply with various requirements of NEPA “to the fullest extent possible”, from the regulations entirely.

\textsuperscript{62} 40 C.F.R. § 1500.1(a).
\textsuperscript{63} Proposed C.F.R. § 1500.1(a).
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} 40 C.F.R. § 1500.1(b).
\textsuperscript{67} Id.
\textsuperscript{68} Proposed 40 C.F.R. § 1500.1(a).
Section 102(2) of NEPA directs agencies to interpret and administer the policies, regulations and public laws of the United States in accordance with NEPA’s policies “to the fullest extent possible”. In their deliberations on this provision of NEPA, Congress made it clear that:

… It is the intent of the conferees that the provision “the fullest extent possible” shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in Section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section “to the fullest extent possible” under statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

CEQ’s proposal to drop this section reinforces its inexplicable intention to define NEPA much more narrowly than the plain statutory language and Congressional require. Nothing in the preamble addresses the reason for doing this other than simplifying and eliminating redundancy and repetition, but the preamble never explains how dropping part of the law is justifiable simplification nor does it point the readers to provisions which make the current provision redundant or repetitious. Section 1500.2 should be restored in full to the regulations.

C. Proposed § 1500.3, “Mandate” and §1507.3(a) - Agency NEPA Procedures (retitled from “Agency Compliance”).

This section purports to forbid agencies from imposing additional procedures or requirements beyond those set forth in the CEQ regulations “except as otherwise provided by law or for agency efficiency.” Of course, CEQ cannot override statutory direction and thus we believe agencies are free to implement whatever procedures or requirements they believe will, in fact, implement NEPA “to the fullest extent possible.”

However, CEQ’s intent is clear even though the language is ambiguous. The proposed regulation is intended to strongly discourage any such efforts by line agency leadership who might actually want to implement the statute more robustly and comprehensively than outlined in the proposed regulations. It is appalling that CEQ, charged by Congress with overseeing implementation of all of NEPA, would characterize its regulations as a ceiling rather than a floor for agency NEPA implementation. CEQ has no authority to direct agencies to ignore the requirements of the law or to limit those agencies’ discretion. All federal agencies are charged with implementing their own

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72 Proposed 40 C.F.R. § 1500.3(a).
statutory responsibilities in a manner consistent with NEPA’s purposes and directives, whether CEQ’s regulations captures the statute’s requirements or not. 42 U.S.C. § 4332. CEQ states in the preamble that this is a clarifying change, but it presents no argument in the preamble that this proposed regulation and prohibition is warranted or justified. 85 Fed. Reg. at 1706. and it should be removed throughout the regulations.

D. Proposed § 1500.6 - Agency Authority.

Similar to the other provisions noted above, the proposed change in this regulation would narrow the concept of “full compliance with the purposes and provisions of the Act [NEPA]” to compliance with CEQ’s new regulations. The current regulations correctly explain that each agency must interpret the provisions of NEPA as a supplement to its existing authority and as a mandate to interpret its policies and mission activities in that light. Again, CEQ demonstrates its intent to strip the statute down to the bare bones of its own regulations rather than a follow the letter of the law. This change should be rejected.

E. Proposed § 1502.1 - “Environmental Impact Statement Purpose”.

Again reflecting its desire to reduce the NEPA process to paperwork, the proposed regulations abandon the current regulatory explanation that an EIS is intended to serve as “an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.” 40 C.F.R. § 1502.1. Instead, the proposal characterizes the “primary purpose” of an EIS as ensuring the agencies consider the environmental impacts of their actions in decisionmaking. No one disputes that agency consideration of environmental impacts is a major purpose of an EIS, but the question is to what end that consideration is intended to achieve. Once again, the preamble offers no justification for this proposed change. 85 Fed. Reg. at 1700. The current regulation should stand.

F. Proposed § 1502.9 - “Draft, Final and Supplemental EISs”.

As the preamble notes, CEQ proposes to substitute the word “practicable” for the term “possible” throughout the proposed regulations. Both words have an appropriate place in the regulations. CEQ provides one sentence on this proposed change, merely stating that practicable “is the more commonly used term in regulation.” 85 Fed. Reg. at 1692. CEQ should not conflate these two words as they have different definitions and different appropriate application in this context. According to Black’s Law Dictionary, “practicable” is defined to mean “[a]ny idea or project which can be brought to fruition or reality without any unreasonable demands.” In contrast, “possible” is defined to mean “[c]apable of existing or happening; feasible.” CEQ’s proposal disregards this distinction.

74 42 U.S.C. § 4332.
75 85 Fed. Reg. at 1706.
76 40 C.F.R. § 1502.1.
77 85 Fed. Reg. at 1700.
78 85 Fed. Reg. at 1692.
80 Id.
The current regulations use the word “practicable” for certain process requirements; for example, they require the lead agency to publish a notice of intent “as soon as practicable after its decision to prepare an EIS”.

However, the proposed regulatory change that states that a draft EIS “must meet, to the fullest extent practicable, the requirements established for final statements in section 102(2)(C) of NEPA” is directly contrary to the statutory language to comply with the requirements for the detailed statement now known as an EIS “to the fullest extent possible”. It must be revised to conform to the statutory language.

Additionally, we are concerned about proposed §1502.19(b) that directs agencies to prepare a supplemental draft if a draft EIS “is so inadequate as to preclude meaningful analysis.” The current regulations direct agencies to prepare a revised draft in these circumstances. The preamble does not explain why the proposed regulation makes this change so we are unable to comment on CEQ’s rationale if it has one. But if a draft EIS is fundamentally inadequate, the entire EIS needs to be revised and republished. If only one particular section is inadequate, a supplemental draft EIS would be appropriate.

In all these respects, the current regulation should stand.

G. Proposed § 1504.3 - “Pre-Decisional Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory”.

We are concerned about an omission in 1504.3(c)(1). The current regulation states that the agency referring a matter to CEQ should request that “no action be taken to implement the matter until the Council acts upon the referral.” The proposed revision does not include that requirement nor any direction to a lead agency to not proceed with the action during the course of the referral except in the instance of the lead agency requesting an extension of the time to respond at 1504.3(d).

When involved in a referral, CEQ considers the whole of NEPA’s policies and goals, not just an agency’s compliance with procedural requirements. Thus, CEQ’s recommendations have often dealt with whether a proposed action should proceed at all, or if it does, how it should proceed. Obviously, for the process to work, the proposed

81 40 C.F.R. § 1501.7.
82 40 C.F.R. § 1502.9(b).
84 For example, in late 1981, CEQ recommended that the proposed Dickey-Lincoln School Lakes Project that would have been built on the St. John River be deauthorized. President Reagan subsequently signed a bill deauthorizing the Dickey portion of the project and after a feasibility study, the rest of the project was dropped. Rand, Sally and Tawater, Mark, “Environmental Referrals and the Council on Environmental Quality”, Environmental Law Institute, February, 1986, pp. 248-266, available at: https://www.slideshare.net/whitehouse/august-1986-the-seventeenth-annual-report-of-the-council-on-environmental-quality.
action must not proceed while the referral is ongoing. Because there is no specific explanation for this omission in the preamble, it is impossible to tell if the omission was deliberate, and if so, what the rationale might be for removing this sentence. Whatever the reason for its omission, the underlying direction to the lead agency not to proceed with the action until the referral process has been concluded needs to be added back into this section.

H. Proposed § 1506.1(b) - “Limitations on Actions During the NEPA Process”.

The proposed revision to this section would expand the types of actions that can be taken before completion of the NEPA process. The current regulation was drafted both to minimize the possibility of biasing the decisionmaking process, including the possibility of foreclosing alternatives, and to address concerns that the limitations on pre-decisional action “would impair the ability of those outside the Federal government to develop proposals for agency review and approval.” Thus, the current regulation states that applicants are not precluded from developing plans or other work necessary to support an application for government permits or assistance and gives the Rural Electrification Administration authority to approve minimal expenditures not affecting the environment (e.g., long lead time equipment and purchase options) made by non-governmental entities seeking loan guarantees.

The proposed amendment to this regulation expands this by specifically proposing that agencies be authorized to engage in “such activities, including, but not limited to “acquisition of interests in land” while the NEPA process is still underway. This addition is of deep concern. Even with the best of intentions, advance acquisition of land is almost certainly going to bias the analytical and decisionmaking process. The preamble presents no justification for this dangerous addition other than a vague reference to making the process “more efficient and flexible . . . .” We question how an applicant expending resources prior to the conclusion of the NEPA process achieves either efficiency or flexibility. In fact, it makes the process more efficient only if one assumes that the outcome is predetermined. The flexibility it affords runs only to the applicant, not to the public’s interest in a fair and unbiased process.

Courts have made it clear, often in the context of deliberating on injunctive relief, that allowing action to proceed before the completion of an adequate NEPA process undermines the purposes of the law. As the Court of Appeals for the First Circuit said in Sierra Club v. Marsh, “The way that harm arises may well have to do with the psychology of decision makers, and perhaps a more deeply rooted human psychological instinct not to tear down projects once they are built.” As that Court noted, there is great “difficulty in stopping a bureaucratic steam roller, once started . . . .”

We believe that prior to the completion of the NEPA process project proponents should be limited to activities necessary to support their various applications for assistance,

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88 872 F.2d 497, 504 (1st Cir. 1989).
89 Id.
permits or approval and that this provision should not be broadened to acquisition of interests in land or other, unnamed activities that are not specifically for the purpose of supporting applications. Going beyond that fundamentally starts moving the horse behind the cart with likely bad results. No explanation for making these changes is offered in the preamble. The regulation should not be amended.

Whether it should make any additional changes to 1506.1, including whether there are circumstances under which an agency may authorize irreversible and irretrievable commitments of resources

We believe the answer to this question is no, there are no such circumstances. Should there be a bona fide emergency situation that requires an action that would normally require an EIS, CEQ can address that need through the development of alternative arrangements. The Act itself flags “irreversible and irretrievable commitments of resources” as an element that must be included in the “detailed statement” (now termed an EIS) so that those considering the decision would understand the gravity and permanence of their actions. To allow such actions to proceed without completion of the NEPA process would be an illegal mockery of the law.

I. Proposed § 1506.2(d) - Elimination of Duplication with State, Tribal and Local Procedures

While supporting the addition of tribal governments in the regulations, we note the addition of the sentence that reads, “While the statement should discuss any inconsistencies, NEPA does not require reconciliation.” Why this is this a desirable addition? What problem is it trying to solve? NEPA is replete with references to the need to cooperate with other levels of government to achieve NEPA’s goals. The preamble does not explain what advantage there is in including this addition. We oppose the provision.

J. Proposed § 1508.1(s), Definition of “Mitigation”

Similar to the addition noted above, CEQ has chosen to affirmatively state that NEPA does not mandate the form or adoption of any mitigation. The CEQ regulations have never stated that mitigation is required under NEPA, although the current regulations do require consideration of mitigation measures as part of the analysis of alternatives, environmental consequences, and when a cooperating agency requires certain mitigation measures to address concerns. Further, mitigation measures chosen by an agency must

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91 40 C.F.R. § 1506.11.
95 Id. § 1502.16(h).
96 Id. § 1503.3(d).
be included in any Record of Decision, Mitigation may also be utilized to support an agency’s Finding of No Significant Impact.

We believe that fifty years after NEPA’s passage, federal agencies are well aware that there is not an enforceable duty under NEPA to mitigate each adverse impact. However, NEPA encourages them to try to do so in its admonition to administer the policies, regulations and public laws of the United States in accordance with NEPA’s policies. As the Supreme Court stated, “omission of a reasonably complete discussion of possible mitigation measures would undermine the “action forcing” function of NEPA.” CEQ’s proposed statement undermines the core purpose of the analysis and should be struck. This new and narrowed view from CEQ undergraduates the law’s purposes and policies. Juxtapose these proposed prohibitory statements with this statement made during the Senate debate about NEPA:

“An environmental policy is a policy for people. . . Its basic principle of the policy is that we must strive in all that we do to achieve a standard of excellence in man’s relationships to his physical surroundings. If there are to be departures from this standard they will be exceptions to the rule and the policy. And as exceptions they will have to be justified in the light of public scrutiny.”

CEQ’s proposed statements about what NEPA does not require as a procedural matter inserted into the regulations reinforce the appearance that CEQ’s apparent goal to reduce NEPA to a paperwork process, untethered from environmental policy. Agencies will clearly get the message that they should do only the minimum required by these regulations and may, in fact, be prohibited from doing more. They should be removed from the regulations.

IV. CEQ UNJUSTIFIABLY PROPOSES TO ELIMINATE NEPA’S APPLICABILITY TO A WIDE VARIETY OF FEDERAL ACTIONS.

A. Proposed §§ 1501.1, 1507.3(c) and 1508.1(q) - Major Federal Action/Non-Major Federal Action.

CEQ proposes to reverse its long-standing position that if a proposed federal action has a significant impact, including a significant cumulative impact, it is a federal action significantly affecting the human environment. In place of the unitary reading of the
direction to agencies to “include in every recommendation or report on proposals for legislation and other major federal action significantly affecting the quality of the human environment,” CEQ wants to go back to a minority line of cases from the early 1970’s that interpreted the phrase “major federal actions significantly affecting the quality of the human environment” as meaning that first, a determination of whether an action is a “major federal action” needed to be made, followed by a determination of significance.

From the beginning of its formal interpretation of NEPA, CEQ explained that:

(b) The statutory clause “major Federal actions significantly affecting the quality of the human environment” is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed actions, the environmental impact of which is to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action.104

CEQ adopted a similar approach in the next iteration of guidelines published in 1973 after public review and comment.105 Those guidelines explained that even if a proposed action was localized in its potential impact, “if there is potential that the environment may be significantly affected, the statement is to be prepared.”106 The guidelines stated that the words “major” and “significantly” were intended to imply thresholds of importance and impact that had to be met before an EIS was required, discussed “federal control and responsibility” and pointed to the example of general revenue sharing funds as an example of when such control and responsibility did not exist.107

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106 Id. at 20551.
107 Id. at 20552.
Subsequently, CEQ specifically adopted the reasoning in *Minnesota Public Interest Research Group v. Butz.*

As that decision explained:

To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act, *i.e.*, to ‘attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences.’ By bifurcating the statutory language, it would be possible to speak of a ‘minor federal action significantly affecting the quality of the human environment,’ and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA; the activities of federal agencies cannot be isolated from their impact upon the environment. This approach is more consonant with the purpose of NEPA and is supported in S.Rep. No. 91-296, supra, and the CEQ Guidelines.

Thus, the preamble to the final regulations explained, “any Federal action which significantly affects the quality of the human environment is ‘major’ for purposes of NEPA.” CEQ proposes to remove the sentence, “[m]ajor reinforces but does not have a meaning independent of significantly”.

A close look at CEQ’s rationale set out in its preamble for removing this sentence and at the associated case law reveals that CEQ’s concerns with the current regulation are not well-founded. First, Congress itself characterized “major” actions quite broadly. Note the wording in Section 102(2)(C) which states that, “all agencies of the Federal Government shall . . . . include in every recommendation or report on proposals for legislation and other major Federal action significantly affecting the quality of the human environment, a detailed statement. . . . .” The use of the word “other” clearly means that Congress considered “every recommendation or report on proposals for legislation” to be major Federal actions. Consider also the Senate report language interpreting this provision that states:

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108 498 F.2d 1314, 1321 (8th Cir. 1974). As one commentator has pointed out, although the discussion in CEQ’s 1973 guidelines influenced some courts to think that there were dual standards, “[t]he unitary standard adopted by CEQ appears correct.” Daniel R. Mandelker, et al., *NEPA Law and Litigation*, 544 (2019) (citing *NAACP v. Medical Center, Inc.*, 584 F.2d 619, 627 (3rd Cir. 1978)). Further as noted below, the case CEQ relied upon for its current regulation, in turn, found support for the unitary approach in the 1973 CEQ guidelines.

109 Id. at 1321-22. Note that the Court found the 1973 Guidelines to be supportive of this interpretation.


111 40 C.F.R. § 1508.18. It is also important to note that the Guidelines addressed only Subsection (C) of Section 102(2) of NEPA. 43 Fed. Reg. 55978 (November 29, 1978). It was not until promulgation of the 1978 NEPA regulations that CEQ developed the categorical exclusion provision that allows agencies to designate certain classes of actions as typically not requiring preparation of either an EA or an EIS.

112 42 U.S.C. § 4332(C) (emphasis added).
Each agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs, shall make a determination as to whether the proposal would have a significant effect upon the quality of the human environment. If the proposal is considered to have such an effect, then the recommendation or report supporting the proposal must include statements by the responsible official of certain findings . . . . .”

This language simply does not support any interpretation of NEPA that suggests there is some subset of federal actions that have significant effects but are not “major”. Indeed, CEQ’s current regulation on this point is quite consistent with the Senate report language.

CEQ’s proposed reinterpretation of the phrase “major Federal actions significantly affecting the environment” focuses on giving independent meaning to a single word: “major” But “interpretation of a word or phrase depends upon reading the whole statutory text, considering the statute’s purpose and context.” CEQ’s existing interpretation is, moreover, more consistent with NEPA’s “overall statutory scheme,” That scheme starts with NEPA’s ambitious directive that the Federal government should “use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources” to, e.g., “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations,” “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,” and “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” 42 U.S.C. § 4331(b). It would not have been consistent with that goal for Congress to exempt federal actions with significant adverse impacts on the environment from NEPA’s action-forcing requirement simply because, by some non-environmental metric, an agency deemed the action not “major.” By far the more compelling interpretation is the one CEQ has held for decades, that any federal action significantly affecting the environment is, for purposes of NEPA, a major action.

Further, CEQ’s existing language does not make the term “major” meaningless, as the preamble alleges.114 Rather, the current regulation – a large portion of which CEQ proposes to retain – focuses on actions “that may be major and which are potentially subject to Federal control and responsibility.”115 That language is consistent with the Supreme Court’s in Department of Transportation v. Public Citizen116 that held that when an agency has no ability to prevent certain effects, the agency need not consider those effects when determining whether its action is a ‘major Federal action.”117 And, in fact, the Court cited the current regulatory definition of “major federal action” in explaining NEPA’s requirements and focusing on “federal control and responsibility” as a key element of the

113 Report of the Senate Committee on Interior and Insular Affairs to accompany S. 1075, No. 91-296, July 6, 1969, p. 20 (emphasis added).
114 85 Fed. Reg. at 1709.
115 40 C.F.R. § 1508.18.
117 Id. at 770.
Nothing in the Court’s unanimous opinion suggested in any way that CEQ’s current regulation was problematic.

The focus of the decision in *NAACP v. Medical Center, Inc.*, the case typically cited as authority for the so-called “dual standard” approach (that is, asking first whether a proposed federal action is “major” and second, whether it will have significant impacts) is actually consistent with the current regulatory definition. The case focused on the fact that the Department of Health, Education, and Welfare (HEW)’s involvement in approving a capital expenditure by the Wilmington Medical Center was *ministerial*. The underlying statute proscribed detailed standards by which HEW was obligated to reimburse states for certain health care and hospital costs. The decision observed that the regulations specifically excluded situations in which federal aid is distributed in a program such as revenue sharing, in which there is “no Federal agency control over the use” of the funds. We believe that Medicare, Medicaid, and child health payments are analogous to payments under revenue sharing because the Secretary may not control their disbursal. Rather, he pays the hospital for its services to its patient under certain prescribed programs. The agency’s decision as to allocation of those funds is controlled by the health care provider’s costs and the agency is obligated to make payment except in narrow circumstances.”

A careful reading of this case shows that the same result would likely be reached under CEQ’s current regulations. While there was federal involvement in the form of funding, as the court pointed out, it was analogous to general revenue funds, which are excluded from the language of the current regulations. The current regulations also define “proposal” in a manner that requires that an agency “has a goal and is actively preparing to make a decision one or more alternative means of accomplishing that goal.” That definition makes it clear that an agency has to have discretion to choose among alternatives, and thus the situation in *NAACP v. Medical Center* would likely be decided the same way under the current regulations.

In short, there is no sound rationale or non-arbitrary justification for the proposed deletion of the second sentence in Section 1508.18. There is also no case that we know of that holds a discretionary federal agency action—that is, a proposed action where an agency has sufficient control and responsibility—and that has significant environmental effects can be treated as “minor” and therefore outside of the scope of NEPA.

The major immediate impact of this proposed change would likely be massive confusion and uncertainty and certainly a great deal of litigation. If this standard were actually adopted, we anticipate agencies would identify some further subset of proposed federal actions with significant environmental impacts as not being actions for purposes of NEPA. We see the beginnings of this within the proposed definition itself with the specific exclusion of certain programs run by the Farm Service Agency and Small Business

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118 Id. at 763.
119 584 F.2d 619 at 629.
120 40 C.F.R. § 1508.18(a).
121 40 C.F.R. § 1508.23.
Administration. But the harm will not stop there. The proposed regulations invite all agencies to identify other actions that they deem to be “[n]on-major Federal Actions”. Within the context of this rulemaking, the harm includes the issues discussed below.

1. Proposed § 1508.1(q) – Excluding Projects with Minimal Federal funding or Minimal Federal Involvement.

CEQ’s proposal to exempt projects with minimal federal funding or minimal federal involvement (where the agency cannot control the outcome of the project) is extremely vague and could lend to significant environmental harm. Even the example given in the preamble raises questions. What if that “very small percentage” of federal funding actually is critical for a small community? How is an agency supposed to determine the value of a particular contribution to whether a proposed action will or will not proceed without federal involvement? Where and how does an agency draw the line on mining and oil and gas operations on split estate lands? For good neighbor/shared stewardship projects on national forest land? What are examples of the problem this provision is trying to solve?

2. Proposed § 1508.1(q) – Excludes actions that do not result in final agency action under the Administrative Procedure Act and specifically exempts an agency’s “failure to act” from “major federal action” definition.

CEQ proposes to narrow the definition of “major federal action” such that the NEPA process would exclude actions that do not result in final agency action under the APA. It would also strike from CEQ’s current definition circumstances where a responsible agency official fails to act “and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law” as agency actions. CEQ’s explanation for this proposed deletion is that in the circumstances described in the current regulation, “there is no proposed action and therefore no alternative that the agency may consider. S. Utah Wilderness All., 542 U.S. at 70-73.”

But CEQ’s proposal is based on a misreading of the Supreme Court’s holding in regards to the APA. The Court found that in that case, there was neither a proposal by the Bureau of Land Management to act nor a requirement to do so. NEPA did not apply, in the Court’s view, because there was no proposed action for it to apply to in the context of that particular land management plan. But the Court was extremely clear that the Section 706(1) of the APA did authorize courts to compel an agency to act when

123 Proposed § 1507.3(c)(1), 85 Fed. Reg. at 1728.
124 40 C.F.R. § 1508.18.
125 85 Fed. Reg. at 1709. We note that the case was actually titled as Norton v. Southern Utah Wilderness Alliance in the Supreme Court. But then, as we point out, CEQ misread the holding also.
agency action is required and is unlawfully withheld. And that is precisely the type of action to which CEQ’s current regulation applies:

The reference in that Section to a ‘failure to act’ was not intended by the Council to require the preparation of an EIS where no Federal decision was required and none had been made. The phrase ‘failure to act’ was intended rather to describe one possible outcome in those situations where a Federal decision has been or was required to be made.

CEQ’s proposal to remove this provision, which on its face is bounded by the APA or other applicable law, is actually inconsistent with the Supreme Court’s holding in Norton v. SUWA as well as the plain language of the APA. CEQ should withdraw this proposed deletion. Leaving it in violates agency responsibilities under the APA.

3. Proposed § 1508.1(q) - Exempts loans, loan guarantees and other forms of financial assistance

This section would specifically exclude farm ownership and operating loan guarantees by the Farm Service Agency (FSA) pursuant to 7 U.S.C. 1925 and 1941-1949 and Small Business Administration (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 actions do not include “loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of the action.”

There is no legal justification for CEQ proposing to exclude these broad classes of actions from NEPA. Indeed, NEPA specifically states that:

it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Courts have found sufficient federal control and responsibility in the context of financial loans and other forms of financial assistance to warrant application of NEPA for loans, loan guarantees and other forms of financially generally and for FSA and SBA actions specifically. For example, Buffalo River Watershed Alliance v. Department of

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126 542 U.S. at 63.
127 Defenders of Wildlife v. Andrus, 672 F.2d 1238, 1245 (D.C. Cir. 1980), quoting from letter by CEQ General Counsel Nicholas C. Yost to the Department of Justice.
128 542 U.S. at 63; 5 U.S.C. § 706(1).
130 42 U.S.C. § 4331(a) (emphasis added).
Agriculture dealt with a large hog farm (6,500 swine) backed by both a SBA and FSA loan guarantee. Importantly, a condition for eligibility for these guarantees was that the company could not obtain financing on reasonable terms from other institutions. In holding for the plaintiffs, the court distinguished the situation from a case where loan guarantees are given with no oversight and/or by virtue of nondiscretionary criteria. In enjoining FSA and SBA from making payment on their loan guarantees pending the agencies’ compliance with NEPA and the Endangered Species Act, the court stressed that on “balance, the interest in getting the environmental assessment right outweighs any harm that enjoining the guaranties will cause the federal agencies. And 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.” The court also found that plaintiffs’ injuries were redressable because of the agencies’ continuing oversight responsibilities.

In Food & Water Watch v. U.S. Department of Agriculture, the court faced a similar factual situation involving a FSA loan guarantee for a poultry concentrated animal feeding operation. Again, the court found that without the FSA loan, it was unlikely that that the operation could have proceeded, since “an applicant for an FSA loan guarantee must certify that the applicant is ‘unable to obtain sufficient credit elsewhere without a guarantee to finance actual needs at reasonable rates and terms.’ 7 C.F.R. § 762.120(h)(1).” Again, the court found the plaintiff’s injuries were redressable, whether through imposition of mitigation measures or through withdrawal of the loan guarantee.

Similarly, the actions of the Rural Utilities Service (RUS) within the Department of Agriculture were the subject of two decisions involving the proposed expansion of the Sunflower Electric Power Corporation’s coal-fired generating plant. The court determined that the RUS assistance in the form of debt forgiveness and consent to a lien subordination as well as approvals relating to the expansion of the power plant were major federal actions under NEPA and that an EIS was required.

The preamble to this proposed revision argues that these types of actions are not actions for purposes of NEPA because the federal agencies involved do not operate the facilities themselves, control the bank, expend funds unless there is a default, or take physical possession of the property. Those factors, by themselves, are not determinative. The case law demonstrates that in some of these situations, the agencies retain ample control and responsibility through their legal authority to impose conditions, including

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132 Id. at *6.
133 Id. at *3-4.
135 Id. at 54.
136 Id. at 55-57.
138 777 F. Supp. 2d at 56-64; 841 F. Supp. 2d 349, 357-360 (D.D.C. 2012) (enjoining RUS from granting additional future approvals or financial support for Holcomb Expansion prior to completing an EIS).
mitigation measures, as part of the terms of financial assistance or to decline to grant the assistance in the first place. CEQ’s revisionist interpretation is thus contrary to law.

CEQ also invites comment on whether any types of financial instruments, including loans and loan guarantees, should be considered non-major Federal actions and the basis for such an exclusion.

CEQ must not exclude financial instruments, such as loans and loan guarantees, from what may be considered major federal actions triggering NEPA review. As discussed above, CEQ must also not narrow the definition of major federal action so as to exclude certain financial instruments from NEPA’s reach. These proposed changes defy the purpose and language of NEPA, undermine longstanding precedent and agency practice, and generate confusion, rather than achieve clarity.\(^{139}\)

Excluding or otherwise narrowing CEQ regulations to exclude certain financial instruments would violate the language, structure, and purpose of NEPA.\(^ {140}\) NEPA’s substantive policy directs the federal government to “use all practicable means” to “improve and coordinate Federal plans, functions, programs, and resources” so that the nation may achieve its environmental policy goals.\(^ {141}\) Congress’s inclusion of the word “resources” recognizes that a commitment of significant federal funding may impact the environment, thus warranting NEPA review. Moreover, the statute explicitly states that the Federal Government is “to use all practical means and measures, including financial and technical assistance, . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . and fulfill the . . . requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a) (emphasis added). Thus, it is Congress’s clear, express intent that financial assistance, such as loans and loan guarantees, be included in NEPA review.

Congress’s intent for NEPA to apply to financial instruments is further supported by the statute’s explicit requirement that agencies comply with NEPA “to the fullest extent possible.”\(^ {142}\) Agency loans and loan guarantees can be substantial—even, at times, reaching billions of dollars. These large commitments of resources may have significant environmental impacts in that they can enable projects with enormous long-term environmental impacts that would not have come to fruition without federal agency financial support. In order for agencies to effectuate Congress’s national environmental policy, these financial instruments properly fall within NEPA’s reach.

\(^{139}\) See 85 Fed. Reg. 1684 (noting one of CEQ’s goals with the proposed rulemaking is to “provide greater clarity”).

\(^{140}\) See Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 609 (2013) (“It is a basic tenet that ‘regulations, in order to be valid, must be consistent with the statute under which they are promulgated.’”) (citation omitted).

\(^{141}\) 42 U.S.C. § 4331(b) (emphasis added).

\(^{142}\) 42 U.S.C. § 4332.
Courts and agencies have long-recognized that federal action triggering NEPA includes when a federal agency enables a private party to act.\textsuperscript{143} Commitments of federal financing to private parties falls within this category of NEPA-eligible actions.\textsuperscript{144} Applying NEPA to financial instruments makes sense given that NEPA “guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience that may also play a role in the decisionmaking process and the implementation of the decision.”\textsuperscript{145} In other words, because federal financial tools enable private projects that may have significant environmental effects, decisionmakers must have the relevant information available to inform their decision.\textsuperscript{146}

CEQ’s proposals to exclude certain types of financial instruments from NEPA’s reach, therefore, undermine decades of court precedent and agency practice. CEQ offers no explanation for eliminating these longstanding practices and consequent protections. Moreover, rather than providing clarity—one of CEQ’s purported goals in the rulemaking—CEQ’s proposed changes would instead result in confusion among courts, agencies, and private parties seeking financial assistance as these stakeholders scramble to adjust to new expectations.\textsuperscript{147} For these reasons CEQ must remove the proposed language relating to financial instruments.

In addition to soliciting comments on whether federal loans, loan guarantees, and other financial tools ought to be considered non-major federal actions, CEQ is proposing to redefine “Major Federal action” in such a way so as to unreasonably exclude certain financial instruments.\textsuperscript{148} CEQ’s proposed redefinition provides:

(q) Major Federal action . . . .

\textsuperscript{143} See Save Barton Creek Ass’n v. FHWA, 950 F.2d 1129, 1134 (5th Cir. 1992); Scientists’ Inst. for Pub. Info. v. Atomic Energy Comm’n, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (“there is ‘Federal action’ within the meaning of the statute not only when an agency [acts], but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment”).

\textsuperscript{144} Found. on Econ. Trends v. Heckler, 756 F.2d 143, 155 (D.C. Cir. 1985) (“Federal funding has long been recognized as an appropriate basis to enforce NEPA’s requirements on non-federal parties.”).


\textsuperscript{146} See, e.g., Scientists’ Inst. for Pub. Info. v. Atomic Energy Comm’n, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (“there is ‘Federal action’ within the meaning of [NEPA] . . . whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment”); Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept., 446 F.2d 1013, 1027 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972) (federal funding “triggered the advertisement for contract bids, the letting of contracts, and the commencement of construction,” thus implicating NEPA); NEPA Law and Litig. § 8:20 (federal financing of a private entity’s project is sufficient to require NEPA “because it is the federal agency that has ‘enabled’ the nonfederal entity to act.”).\textsuperscript{146}

\textsuperscript{147} See 85 Fed. Reg. 1684 (CEQ’s proposed rule “would modernize and clarify the regulations”).

\textsuperscript{148} Id. at 1729 (emphasis added).
(1) Actions do not include loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of the action.

The proposed language above—limiting NEPA applicability to financial instruments unless certain new criteria are met—is problematic for several reasons. First, agency control has historically been but one factor when evaluating whether NEPA applies to financial instruments; courts and agencies also evaluate the amount of financial assistance. It would be unreasonable for NEPA applicability to turn on control and responsibility alone. CEQ’s proposed language undermines established case law recognizing that agency control does not always equate “responsibility over” an action’s effects.¹⁴⁹ Last, CEQ fails to offer support for creating what amounts to an exclusion of many significant financial instruments from NEPA’s reach, and nor does CEQ explain or support this departure from past policy and practice.

CEQ’s proposed language creates a barrier to NEPA applicability based, unreasonably, solely on an agency’s “control and responsibility over the effects of an action.”¹⁵⁰ In contrast, CEQ’s existing regulations define “major Federal action” as an “action[ ] with effects that may be major and which [is] potentially subject to Federal control and responsibility.”¹⁵¹ Operating against CEQ’s existing requirement that control and responsibility may be possible—but not required—for NEPA to apply, courts have taken the approach of examining both the amount of a federal financial instrument and the potential for agency control.¹⁵² CEQ’s proposal eliminates one part of this evaluation—the financial instrument’s amount—without explanation. Given that federal financial commitments are often millions, and even billions, of dollars, it is unreasonable and irresponsible to remove this factor when evaluating whether an action may significantly affect the environment.

CEQ’s proposed language requiring control and responsibility over the effects also misconstrues the type of control relevant to NEPA and financial instruments. Typically, agencies exercise control in the context of financial instruments by, for example, evaluating whether a project meets certain eligibility criteria.¹⁵³ Agencies may then place conditions on a commitment of financial assistance.¹⁵⁴ Eligibility criteria and conditions on a financial

¹⁴⁹ Scientists’ Institute for Public Information, Inc. v. Atomic Energy Comm’n, 481 F.2d 1079 (D.C. Cir. 1973) (recognizing major federal action occurs when an agency enables a private party to act).
¹⁵¹ 40 C.F.R. § 1508.18 (emphasis added).
¹⁵² See, e.g., Ka Makani ‘O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 960 (9th Cir. 2002); Indian River Cty. v. Rogoff, 201 F. Supp. 3d 1, 18 (D.D.C. 2016) (“The Court does not have before it any persuasive authority that financial assistance at the level provided by the PAB allocation, when paired with federal-agency control, cannot make up major federal action.”) (emphasis in original).
¹⁵³ See, e.g., 10 C.F.R. § 611.100 (eligibility criteria for loan guarantees under the Department of Energy’s Title XVII program).
¹⁵⁴ See, e.g., Indian River Cty. v. Rogoff, 201 F. Supp. 3d 1, 19 (D.D.C. 2016) (noting that an agency’s “discretion to condition its loan award on the recipient’s compliance with various
instrument—sufficient controls to trigger NEPA—are nonetheless distinct from the kind of “responsibility over the effects” CEQ is prescribing. CEQ’s proposed language, therefore, fails to align with the realities of federal financial tools and must be removed.

Finally, CEQ’s proposed language is arbitrary and capricious on several grounds, necessitating its removal. CEQ’s docket accompanying this rulemaking offers no support for excluding financial instruments from NEPA’s reach, or otherwise narrowing the definition of major federal action so as to exclude financial instruments absent sufficient control and responsibility over the effects of the action. In this way, CEQ lacks reasonable grounds for making this change.

4. Proposed § 1508.1(q)(2)(i) - Recharacterizes the nature of “action” for treaties, international conventions and agreements.

This proposed revision would recharacterize the federal action for purposes of NEPA in the case of a treaty, international convention or agreement. Under the current regulation, agencies have prepared NEPA analyses either prior to negotiations or prior to ratification. The proposed revision change would delay NEPA compliance until a treaty, convention or agreement has already been negotiated and ratified or executed by the United States and is being implemented. The proposed revision also removes the statement that “Proposals for legislation include requests for ratification of treaties” from the current definition of “Legislation”. Thus, U.S. positions during negotiations and the decision whether to sign or ratify such an instrument would be devoid of analysis and public involvement. But if NEPA analyses are not conducted until after negotiations have been completed and agreements signed or ratified, those decisions will have been made uninformed by any NEPA analysis. For this reason, the proposed revision is contrary to law.

The proposed change is also contrary to decades of agency NEPA practice. CEQ fails to provide any explanation for the change. For example, in 1973, the Department of State prepared a draft and final EIS on the proposed ratification of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters. The National Oceanic and Atmospheric Administration prepared and a draft and final EIS in 1979-1980 in cooperation with the Department of State for the proposed Interim Convention on Conservation of North Pacific Fur Seals prior to its submission to the U.S. Senate. The Department of State prepared draft and final EISs in 1982 prior to negotiations for an international regime for Antarctic Mineral Resources, in 1984 prior to submitting the Compact of Free Association for Micronesia to Congress for ratification, and in 1988, prior to negotiations on the proposed Montreal Protocol on Substances that Deplete the Ozone

conditions, including environmental mitigation measures” proved sufficient to trigger NEPA); Friends of the Earth v. Mosbacher, 488 F. Supp. 2d 889, 915 (N.D. Cal. 2007) (when evaluating agency financing to a project, “the Court must consider carefully the nature of [agency] involvement in these projects and particularly what conditions, if any, the agencies impose in connection with financing.”).

155 40 C.F.R. § 1508.18 (b)(1).
156 40 C.F.R. § 1508.17.
Layer.  In 1988, the Department of the Army prepared an Environmental Assessment for the Intermediate Range Nuclear Forces Treaty. Any departure from that practice, as well as from Congress’s expressed intention that federal actions be informed by advance consideration of environmental impacts, demands a lawful and rational justification that the proposed rule’s preamble does not provide.

5. Proposed § 1501.8(q)(2) - Guidance Documents.

This provision proposes to strike the word “guide” from the current definition of major federal action in the context of stating that, “Adopting 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.”

The rationale for this proposed deletion is simply that “guidance is non-binding.” This statement significantly underestimates the impact of guidance. Guidance may vary in its nature and effect, but some guidance functions as the equivalent of a directive, setting a firm policy position that has legal effect. And “it is well established that an interpretative guidance issued without formal notice and comment rulemaking can qualify as final agency action.”\(^\text{158}\) In fact, CEQ’s own guidance has been given “substantial deference” by the federal courts.\(^\text{159}\)

CEQ should abandon this entire effort to re-interpret the most well known phrase in NEPA.

ADDITIONAL QUESTIONS RELATED TO “MAJOR FEDERAL ACTION”

Should CEQ make any further changes to this paragraph [the definition of “major federal action” paragraph], including changing “partly” to predominantly” for consistency with the edits to the introductory paragraph regarding “minimal Federal funding.” CEQ also invites comment on whether there should be a threshold (percentage or dollar figure) for “minimal Federal funding,” and if so, what would be an appropriate threshold and the basis for such a threshold.

\(^{157}\) 40 C.F.R. § 1508.18(b)(2) (emphasis added).
\(^{158}\) State of Arizona v. Shalala, 121 F. Supp. 2d 40, 48 (D.D.C. 2000), citing, among other cases, Bennett v. Spear, 520 U.S. 154, 177-78 (1997) for a two-prong test that (1) the action must first mark the “consummation” of the decisionmaking process and secondly must cause “legal consequences” or “determine rights or obligations.”
\(^{159}\) League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service, 549 F.3d 1211 (9th Cir. 2008) (giving Auer deference to CEQ guidance on consideration of past actions in cumulative effects analysis); Seattle Audubon vs. Lyons, 871 F. Supp. 1291, 1319-20 (W.D. Wash. 1994) (relying in part on CEQ General Counsel’s memo advising on correct formulation of the no action alternative to affirm Forest Service’s framing of no action alternatives in regards to the proposed Pacific Northwest Forest Plan).
For good reason, CEQ has never equated the amount of federal funding for a proposed action with the level of analysis required for NEPA compliance. It should not take that step now. The level of environmental impact may be relatively small despite a large amount of federal funding or quite significant despite a modest amount of federal funding. For example, federal approval of the introduction of a foreign species for purposes of biological control may not involve a large amount of federal funding, but has the potential for significant ecological impact. Conversely, a decision to invest a significant amount of federal funding for preservation of a historic site may, by maintaining the site in its current condition, not have a significant impact.

Creating a financial threshold to determine whether a proposed action should be analyzed under NEPA would not be wise or supported by any evidence or rationale identified in the proposed rule’s preamble. The threshold analysis for NEPA purposes turns on environmental and related social and economic effects, not funding levels. Categorical exclusions are the appropriate way to treat actions without significant impacts. Imposing funding limitations would invite efforts to avoid any such threshold and ultimately would be arbitrary and capricious. For the reasons stated above, we also oppose changing “partly” to “predominantly.”

Whether the definition of “major Federal action” should be further revised to exclude other per se categories of activities or to further address what NEPA analysts have called “the small handle problem.” Commenters should provide any relevant data that may assist in identifying such categories of relevant data that may assist in identifying such categories of activities.

As discussed above, we strongly disagree with CEQ’s proposed reinterpretation of the key phrase in Section 102(2)(C) of NEPA, “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment”. That proposed reinterpretation would reverse decades of consistent CEQ and case law interpretation to further the apparent goal of narrowing NEPA review. Thus, we do not support CEQ adding additional categories of federal actions allegedly exempt from NEPA review.

We also do not believe that the CEQ regulations should be revised to address what is informally characterized as the “small federal handle” issue. The preamble cites the discussion of this issue in a treatise by Professor Mandelker. As Professor Mandelker’s discussion illustrates, court decisions in this area depend largely on the facts of a particular case. For example, the 9th Circuit’s decision in Save Our Sonoran, Inc., v. Flowers affirmed the lower court’s determination that while the Corps’ direct jurisdiction was over the desert washes at a development site, these washes were like “capillaries through

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161 Id.
162 408 F.3d 1113 (9th Cir. 2004).
tissue”. Thus, “any development the Corps permits would have an effect on the whole property . . . [and] [t]he NEPA analysis should have included the entire property.” As the Court of Appeals decision explained, the Supreme Court’s decision in *Dept. of Transportation v. Public Citizen* is consistent with this reasoning:

In *Public Citizen*, the Supreme Court excluded from the scope of NEPA analysis any environmental effect that does not have a ‘reasonably close causal relationship’ to the proposed development. Here, the district court found that any development permitted by the Corps would affect the entire property. *Public Citizen’s* causal nexus requirement is satisfied.

Agencies have substantial guidance from case law. CEQ should not proceed to further rulemaking on this issue.

B. Proposed § 1508.17 - Legislation

The current definition of legislation that reads “‘[l]egislation’ includes a bill or legislative proposal to Congress” should be retained. The proposed revision of the definition substitutes the word “means” for “includes.” However, there are potentially other instruments that a department may send to Congress besides a bill or legislation. For example, the action at issue in *NRDC v. Lujan* was neither a bill nor legislation, but rather a report that Congress required the Secretary of the Interior to submit. The report had to include certain factual information, analysis and recommendations about the Arctic National Wildlife Refuge.

CEQ offers no explanation for this narrowing of the definition of legislation and it should be withdrawn.

CEQ also asks for comments on whether the legislative EIS requirement should be eliminated or modified because the President proposes legislation, and therefore it is inconsistent with the Recommendations Clause of the U.S. Constitution, which provides the President shall recommend for Congress’ consideration “such [m]easures as he shall judge necessary and expedient…” U.S. Constitution, Ar. II, 3. The President is not a Federal agency, 40 CFR 1508.12, and the proposal of legislation by the President is not an agency action. *Franklin v. Mass.*, 505 U.S. 788, 800-01 (1992).

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163 *Id.* at 1122.

164 *Id.* at 1122.


166 *Save Our Sonoran, Inc.*, 408 F.3d at 1122 (citation omitted). *See also*, White Tanks Concerned Citizens, Inc. v. Strock, 563 F.3d 1033 (9th Cir. 2009).


CEQ cannot eliminate the legislative EIS (LEIS) requirement. The sole type of action that Congress specifically identified as being the subject of the “detailed statement” required by Section 102(2)(C) of NEPA is a “report on proposals for legislation.”  

Nothing in the Supreme Court’s decision in *Franklin v. Massachusetts* stands for the proposition that Congress cannot require an agency to submit information to it in a systematic manner, which is exactly what Congress did in Section 102(2)(C) of NEPA. Rather, *Franklin* holds that in a situation in which the President’s “personal transmittal of the [decennial census] report to Congress settles the apportionment,” there is no final agency action for purposes of the APA. But as has been pointed out, “[o]f course, there is a big difference between saying that APA review is unavailable and saying that officials do not have to comply with NEPA when they suggest legislation.” As the Court in *Public Citizen* stated:

*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties... When the President’s role is not essential to the integrity of the process, however, APA review of otherwise final agency actions may well be available.  

C. Proposed §§ 1502.4(b), 1502.4(c)(3) - Programmatic EISs.

CEQ proposes to eliminate the language in the current regulation that states that programmatic EISs “are sometimes required” and to eliminate the requirement that programmatic EISs “shall” be prepared for federal or federally assisted research, development of demonstration programs for new technologies that, if applied, could significantly affect the quality of the environment. Both proposed changes are unlawful and unwarranted.

Many years before CEQ’s current regulations were promulgated, the U.S. Court of Appeals for the D.C. Circuit determined that a programmatic EIS may be “sometimes required” in the context of the development of new technology. In the seminal decision of *Scientists’ Institute For Public Info, Inc. v. Atomic Energy Commission*, the Court observed that the:

170 *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992). Note that the Court did not find that Congress was precluded from including the President under the Administrative Procedures Act. Rather, it found that “textual silence” was not enough to bring the Presidency within its purview and that out of respect for separation of powers, it “would require an express statement by Congress before assuming it intended the President’s performance of his statutory to be reviewed” under the APA. *Id.* at 800–01.
172 *Id.* at 552.
173 40 C.F.R. § 1502.4(b).
174 40 C.F.R. § 1502.4(c)(3).
175 481 F.2d 1079 (D.C. Cir. 1973).
Application of NEPA to technology development programs is further supported by the legislative history and general policies of the Act. When Congress enacted NEPA, it was well aware that new technologies were a major cause of environmental degradation. The Act’s declaration of policy states:


And the Senate report notes, as one of the conditions demanding greater concern for the environment:

A growing technological power which is far outstripping man’s capacity to understand and ability to control its impact on the environment. S.Rep. No. 91-296.

NEPA’s objective of controlling the impact of technology on the environment cannot be served by all practicable means, see 42 U.S.C. §4331(b) (1970), unless the statute’s action forcing impact statement process is applied to ongoing federal agency programs aimed at developing new technologies which, when applied, will affect the environment. To wait until a technology attains the stage of complete commercial feasibility before consideration the possible adverse environmental effects attendant upon ultimate application of the technology will undoubtedly frustrate meaningful consideration and balancing of environmental costs and other benefits. Modern technological advances typically stem from massive investments in research development, as is the case here. Technological advances are therefore capital investments and, as such, once brought to a stage of commercial feasibility the investment in their developments acts to compel their application. Once there has been, in the terms of NEPA, “an irretrievable commitment of resources” in the technology development stage, the balance of environmental costs and economic and other benefits shifts in favor of ultimate application of the technology.\textsuperscript{176}

The Court stated that it “tread firm ground in holding NEPA requires impact statements for major federal research programs . . . aimed at development of new technologies which, when applied, will significantly affect the quality of the human environment.”\textsuperscript{177} While as in all NEPA case law, holdings most typically depend on the facts of a particular situation, the articulation of NEPA law in the D.C. Circuit’s decision in \textit{Scientists’ Institute v. AEC} stands.

Also before CEQ’s current regulations were promulgated, the U.S. Supreme Court recognized that in some cases, an EIS on a proposed program could be required. While

\textsuperscript{176} \textit{Id.} at 1089-90.
\textsuperscript{177} \textit{Id.} at 1091.
determining that in the particular case at hand, factually there was not a proposed program, the Court in *Kleppe v. Sierra Club*[^178] made it clear that in “certain situations,” a comprehensive EIS would be required.[^179] The Supreme Court further explained that “when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.”[^180]

Far from clarifying NEPA’s requirements or making the process more efficient, CEQ’s proposed deletion of the fact that programmatic EISs are “sometimes required” and the proposed change from “shall” to “should” in relationship to programmatic EISs at an appropriate stage of technological development will mislead and confuse agencies and likely result in violations of law. There is no explanation in the preamble for these changes[^81] and they should be rejected in any final rulemaking.

Whether the regulations should clarify that NEPA does not apply extraterritorially, consistent with *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-16 (2013), in light of the ordinary presumption against extraterritorial application when a statute does not clearly indicate that extraterritorial application is intended by Congress.

The regulations should not state that NEPA does not apply to federal agency decisions in regards to federal actions that would take place outside of the United States or with effects outside of the United States. The “extraterritoriality issue” is a red herring in the context of NEPA.

The presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”[^182] The presumption also “helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branch.”[^183] Examples of situations in which the presumption has been applied include the applicability of the Eight Hour Law to American workers in foreign countries where the U.S. law would have applied to citizens working in their own country for an American contractor were the statute applied abroad,[^184] the application of U.S. security laws when the statements at issue were made from a foreign company’s

[^179]: *Id.* at 409.
[^180]: *Id.* at 410. The Court went on to say that, “[c]umulative environmental impacts are, indeed, what requires a comprehensive impact statement.” *Id.* at 413.
[^183]: *Id.* at 116.
headquarters in its home country,\textsuperscript{185} and allegations that certain corporations violated the law of nations in a foreign country.\textsuperscript{186}

In contrast, implementation of NEPA does not regulate the conduct of either individuals or corporations. Where courts have found that application of NEPA would, in fact, have serious foreign policy implications, they have excused agencies from compliance.\textsuperscript{187} But in a case where the federal agency decisionmaking occurs primarily in the U.S. and a case does not present a conflict between U.S. and foreign sovereign law, the presumption against extraterritoriality does not apply to NEPA implementation of federal agency decisionmaking.\textsuperscript{188} Further, courts have analyzed the presumption differently when the proposed action in question has effects in the U.S.\textsuperscript{189}

NEPA’s legislative history and statutory language clearly evidence concern and awareness about environmental degradation of the worldwide environment and biosphere.\textsuperscript{190} Shortly after the law’s passage, Congressional Members and Congressional committees that had been involved in NEPA’s enactment stated that the EIS requirement was meant to apply to federal agency actions wherever they were proposed to occur. In responding to a suggestion made during an oversight hearing that perhaps NEPA did not apply fully to the international environmental effects of agency actions, a Merchant Marine and Fisheries Committee report contained the following admonition:

Stated most charitably, the committee disagrees with this interpretation of NEPA. The history of the Act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context.\textsuperscript{191}

When Congress was debating proposed legislation (which did not pass) to exempt the Export-Import Bank from NEPA, Senator Muskie stated that he was amazed at:

\begin{itemize}
\item \textsuperscript{186} \textit{Kiobel v. Royal Dutch Petroleum Co.}, 569 U.S. 108, 124–25 (2013).
\item \textsuperscript{188} \textit{Envtl. Def. Fund v. Massey}, 986 F.2d 528, 533 (D.C. Cir. 1993).
\item \textsuperscript{190} See, e.g., 115 CONG. REC. 29,082 (1969) (“Although the influence of U.S. policy will be limited outside its borders, the global character of ecological relationships must be the guide for domestic activities. Ecological consideration should be infused into all international relations.”); 115 CONG. REC. 26,576 (1969) (“It is an unfortunate fact that many and perhaps most forms of environmental pollution cross international boundaries as easily as they cross state lines.”). 42 U.S.C. § 4321 (“The purposes of this chapter are . . . to promote efforts which will prevent or eliminate damage to the environment and biosphere”); 42 U.S.C. § 4332(F) (recognizing the “worldwide and long-range character of environmental problems”).
\item \textsuperscript{191} \textit{Administration of the National Environmental Policy Act, Merchant Marine and Fisheries Committee}, H.R. REP. NO. 92-316, pt. 1, at 53 (1971).
\end{itemize}
bureaucratic descriptions of legislative intent 180 degrees opposite from what I know the actual legislative intent to have been. The thought never occurred to me that somewhere down the line nine years later the argument would be made that because major Federal actions impacting on areas outside the United States were not specifically referenced that, therefore, they were excluded.  

The Agency for International Development (A.I.D.) has followed regulations implementing NEPA since 1976 for projects such as irrigation projects, road construction, water and sewage projects and resettlement projects. When site specific NEPA analysis is prepared for actions in host countries, A.I.D. representatives hold consultations with the host government throughout the process, including appropriate public participation.

NEPA also applies to transboundary effects caused by U.S. federal agency actions. In *Backcountry Against Dumps v. Perry*, the Court held that NEPA required DOE to consider the effects in Mexico of a proposed transmission line that would be partly constructed in the United States and partly in Mexico. Similarly, the Bureau of Reclamation was required to analyze the impacts of transferring water from the Missouri River Basin to the Hudson Bay Basin and the associated concerns regarding biota transfer in Canada.

In short, in many circumstances that do not involve the presumption against extraterritoriality, agencies have a responsibility to assess actions and effects outside of the United States. CEQ should not proceed with rulemaking on this issue.

**D. Proposed §§1501.1(a)(2) and 1507.3(c) - NEPA Threshold Applicability, Non-Discretionary Actions.**

This proposed threshold would state that actions that are non-discretionary actions, in whole or in part, are not subject to NEPA. The CEQ regulations and applicable case law make it clear that an agency has to have some discretion for NEPA’s procedural requirements to apply. This makes sense given the relationship of the NEPA process to decisionmaking. On the other hand, far too often, we have found that agencies proffer a

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194 Id. at § 216.8.
196 Id. at 4–5.
198 A “proposal,” for purposes of NEPA “exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision one or more alternative means of accomplishing that goal. . . .” 40 C.F.R. § 1508.23. See also, *State of South Dakota v. Andrus*, 614 F.2d 1190, 1193 (8th Cir. 1980), *Milo Cmty. Hosp. v. Weinberger*, 525 F.2d 144, 148 (1st Cir. 1975).
much more modest view of their discretion when considering NEPA’s applicability than they do in other contexts. And agencies have sometimes incorrectly asserted that a statutory authorization to undertake an action excuses the need to comply with NEPA.199

Even if legislation directs an agency to construct a particular structure at a particular location, the agency typically retains considerable discretion as to design, construction and mitigation measures. While we believe it is unnecessary to include this provision in the CEQ regulations at all, we particularly object to the proposed language suggesting that an action is not subject to NEPA if there is a lack of discretion “in part”. If such a situation truly exists, the agency must still comply with NEPA for the remainder of the action and explain its rationale for not analyzing alternatives for the non-discretionary portion of the action. The current wording invites confusion and abuse and should be removed or modified.

E. Proposed §§ 1501.1(a)(4) and 1507.3(c) - NEPA Threshold Applicability and Congressional Intent.

This provision invites agencies to judge for themselves whether Congress intended there to be compliance with NEPA for a particular type of action. The preamble does not identify any legal authority or justification for this proposal and we do not believe there is any such authority. Congress included in NEPA the admonition, as we need to keep reminding CEQ, that agencies should implement the provisions of Section 102(2) “to the fullest extent possible.”200 Congress is quite capable of exempting either a class of actions or a particular project from NEPA and has done so unequivocally on several occasions. The U.S. Supreme Court has stated quite clearly that:

NEPA’s instruction that all federal agencies comply with the impact statement requirement – and with all the other requirements of § 102 – ‘to the fullest extent possible,’ 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. This conclusion emerges clearly from the statement of the Senate and House conferees, who wrote the ‘fullest extent possible’ language into NEPA” ‘The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in [§ 102(2)] unless the existing law applicable to such agency’s operations expressly prohibits or makes full compliance with one of the directives impossible. Thus, it is the intent of the conferees that the provision ‘to the fullest extent possible’ shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section ‘to the fullest extent possible’ under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid

compliance.’115 Cong. Rec. 39703 (1969) (House conferees. See id. at 40418 (Senate conferees). See also 40 CFR §1500.4(a) (1975). 201

Courts have also been clear that legislation authorizing a particular project does not relieve an agency from the obligation to evaluate the project under NEPA. In Izaak Walton League of America v. Marsh, 202 appellants argued that Congressional authorization for a particular lock and dam project on the Mississippi River demonstrated that Congress did not mean for the Corps to undertake the NEPA process subsequent to the authorization’s passage. Citing to the U.S. Supreme Court’s consistent position that repeal by implication is disfavored, the Court held that passage of the authorization bill did not relieve the Corps from its NEPA obligations. 203 As the Court said in Izaak Walton:

We note, however, that NEPA itself states that all government action must be taken in accordance with the goals set forth in the Act. [cite omitted] Moreover, Congress has shown that it is fully capable of expressing its desire to exempt projects from NEPA. . . . Given Congress’ clearly expressed desire to ensure that all government actions are taken in accordance with NEPA, and its ability to expressly override the requirements of the Act, we believe that, even when substantive legislation is involved, repeal by implication should be found only in the rarest of circumstances. Absent very strong evidence in the legislative history demonstrating a congressional desire to repeal NEPA, or a direct contradiction between that Act and the new legislation, claims under NEPA should be reviewed.”204

Thus, the law is already clear that the only statutory conflict that can excuse an agency from NEPA compliance is when Congress “expressly prohibits” or makes full compliance with some aspect of NEPA’s requirements “impossible”. CEQ’s proposed invitation to agencies to second guess Congress’ intent invites agencies to go down an unlawful pathway. This proposal should be withdrawn.

F. Proposed § §1501.1(5) and 1507.3(b)(6) - NEPA Threshold Applicability and Functional Equivalence.

These proposed sections invite all agencies to substitute any other analysis or process for NEPA. According to the proposed text, the analysis or process could be mandated by another law or by an executive order for proposed regulations or in the case of other proposed actions, apparently a process developed by the agency itself. The open invitation to abandon the NEPA process comes with three general criteria that are so broad and vague as to be open to multiple interpretations: 1) there are substantive and procedural standards that ensure full and adequate consideration of environmental issues; 2) there is public participation before a final alternative is selected, and 3) a purpose of the review

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203 Id. at 368. The court also noted that prior decisions had come to the conclusion that Congressional appropriations do not eliminate an agency’s responsibility to comply with NEPA. Id. at 367.
204 Id. at 367.
that the agency is conducting is to examine environmental issues. The preamble provides no legal rationale for this proposal.\textsuperscript{205}

While some public participation is required under CEQ’s proposal, it does not have to be equivalent to NEPA. Limiting public participation runs counter to CEQ’s long standing position that “public scrutiny [is] essential to implementing NEPA.”\textsuperscript{206} Allowing another statutory process that is not primarily focused on environmental issues to replace the NEPA process runs counter, of course, to the whole purpose of NEPA. And there is no requirement that reasonable alternatives, the very core of NEPA analyses, need to be analyzed. In fact, pretty much any process that includes some look at environmental issues and some modicum of public participation could, under the proposed rule, be substituted for NEPA.

There is neither a policy rationale nor a legal basis for this wholesale abandonment of NEPA in CEQ’s regulations. The government-wide implementation of the functional equivalence exemption would trigger considerable debate in every agency and within every affected community of interest. Is this meant to be the end of NEPA implementation for federal land management planning? For military installation planning? For fishery management plans? For all permit processes? Would all of these various other processes need to be supplemented with elements that they currently rely on the NEPA process for in reaching a decision? What level of public participation would suffice?

Throughout NEPA’s fifty years of implementation, the functional equivalence doctrine has been narrowly approved by federal courts for the Environmental Protection Agency (EPA) in the context of implementing certain pollution control laws such as particular activities under the Clean Air Act\textsuperscript{207} and RCRA.\textsuperscript{208} Those cases have rested on the notion that EPA’s mission in carrying out those particular statutory responsibilities was primarily environmental protection. That specific application of the functional equivalence doctrine has support in NEPA’s legislative history.\textsuperscript{209} But as the D.C. Circuit said in the context of a decision applying the functional equivalent doctrine to EPA’s cancellation of most uses of DDT, “We are not formulating a broad exemption from NEPA for all environmental agencies or even for all environmentally protective regulatory actions of such agencies. Instead, we delineate a narrow exemption from the literal requirements for those actions which are undertaken pursuant to sufficient safeguards so that the purpose and policies behind NEPA will necessarily be fulfilled.”\textsuperscript{210}

\textsuperscript{205} See, 85 Fed. Reg. at 1695.
\textsuperscript{206} 40 C.F.R. § 1500.1(b).
\textsuperscript{207} Portland Cement Ass’n v. Ruckelhaus, 486 F.2d 375 (D.C. Cir. 1973).
\textsuperscript{209} Colloquy between Senator Boggs and Senator Muskie, differentiating between “what we might call the environmental impact agencies rather than the environmental enhancement agencies”, identifying as the later the Federal Water Pollution Control Administration and the National Air Pollution Control Administration, later subsumed into EPA, 115 Cong. Rec. 40425 (December 20, 1969).
\textsuperscript{210} Environmental Defense Fund v. EPA, 489 F.2d 1247, 1257 (D.C. Cir. 1973).
In light of the Bureau of Land Management’s recent statement that they may promulgate regulations exempting the planning process under the Federal Land Policy and Management Act from NEPA,\(^{211}\) it is important to understand that when the Senate deliberated on the passage of NEPA, they were fully cognizant of the “procession of landmark conservation measures on behalf of recreation and wilderness, national recreational planning, national water planning and research . . . urban planning for open space . . .” and other related measures.\(^{212}\) However, Congress also perceived a “very real reason for concern” given the absence of an environmental policy that applied to all federal agencies and a procedure that would be used by “all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment. This would be true of the licensing functions of independent agencies as well as the ongoing activities of the regular Federal agencies.”\(^{213}\)

Courts have rejected attempts by other agencies to utilize the functional equivalence doctrine, including attempts by the Forest Service for timber harvests,\(^{214}\) the U.S. Fish and Wildlife Service for sport hunting regulations in national wildlife refuges around the country,\(^{215}\) and the National Marine Fisheries service for issuance of permits under the Marine Mammal Protection Act.\(^{216}\) As the District Court in Alaska said in the latter decision:

> The mere fact an agency has been given the role of implementing an environmental statute is insufficient to invoke the ‘functional equivalent’ exception. To extend the doctrine to all cases in which a federal agency administers a statute which was designed to preserve the environment would considerably weaken NEPA, rendering it inapplicable in many situations. Given that NEPA requires that ‘all agencies of the Federal Government’ shall ‘to the fullest extent possible’ incorporate the EIS into their decision making, it is clear Congress did not intend this result. See 42 U.S.C. §4332.\(^{217}\)

CEQ now proposes to go far beyond Congress’ intent and case law and open functional equivalence to every agency in the government, regardless of their mission. This is a prescription for a complete lack of predictability with agencies able to create ad hoc processes on a case by case basis. A less efficient way to manage the environmental review process can scarcely be imagined. This proposal should be withdrawn.

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\(^{213}\) Id.

\(^{214}\) Texas Committee on Natural Resources v. Bergland, 573 F.2d 201, 208 (5th Cir. 1978), reh’g denied, 576 F.2d 931 (5th Cir. 1978).

\(^{215}\) Id.


\(^{217}\) Id. at 13.
G. Proposed § 1506.9 - Use of functional equivalence doctrine for proposed regulations and Proposed § 1502.4, Deletion of regulations as a type of action appropriately subject to preparation of a programmatic EIS.

We strongly oppose proposed Section 1506.9 that authorizes the blanket utilization of other processes to replace the NEPA process for proposed regulations. CEQ’s stated rationale for this revision is that it would “promote efficiency and reduce duplication in the assessment of regulatory proposals.” To the contrary, the proliferation of a variety of processes would promote inefficiency. The proposed change is also unlawful.

There is no doubt that proposed regulations are actions for purposes of NEPA. The question, then, becomes why CEQ would seek to substitute other processes for the NEPA process for this entire class of actions. To the extent that any other processes applicable to rulemaking contain similar requirements as the NEPA process, just as for all other actions subject to NEPA, CEQ has consistently directed the NEPA process to be integrated into those processes. The current regulations themselves direct agencies to prepare draft EISs “concurrently with and integrated with” environmental impact analyses and other requirements of other laws and executive orders “to the fullest extent possible.”

CEQ has emphasized the need for agencies to comply concurrently, rather than sequentially, with all applicable requirements for a proposed action for many years. For example, CEQ’s Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act states in relevant part that:

Agencies must integrate, to the fullest extent possible, their draft EIS with environmental impact analyses and related surveys and studies required by other statutes or Executive Orders. Coordinated and concurrent environmental reviews are appropriate whenever other analyses, surveys, and studies will consider the same issues and information as a NEPA analysis. Such coordination should be considered when preparing an EA as well as when preparing an EIS. Techniques available to agencies when coordinating a combined or a concurrent process include combining the scoping, requests for public comment, and preparation and display of responses to public comments.

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218 85 Fed. Reg. at 1,705.
219 40 C.F.R. § 1502.25(a).
220 40 C.F.R. § 1502.25(a).

The goal should be to conduct concurrent rather than sequential processes whenever appropriate. In situations where one aspect of a project is within the particular expertise or jurisdiction of another agency an agency should consider whether adoption or incorporation by reference of materials prepared by the other agency would be more efficient.

A coordinated or concurrent process may provide a better basis for informed decision making, or at least achieve the same result as separate or consecutive processes more quickly and with less potential for unnecessary duplication of effort. In addition to integrating the reviews and analyses, the CEQ Regulations allow an environmental document that complies with NEPA be combined with a subsequent agency document to reduce duplication and paperwork. [fn.62, 40 C.F.R. 15006.4, 1500.4(k), 15004(n).]222

There is no legal authority or justification for a wholesale substitution of any other process for the NEPA process. Regulatory review and the NEPA process have fundamentally different purposes. The details of the processes differ; for example, regulatory review has no requirement for scoping, nor does it provide for public meetings held in affected communities. Substituting the executive order-based regulatory impact analysis process for the statutorily mandated NEPA process is unacceptable and this proposed regulation must not be carried forward in any final rulemaking. Such a substitution would likely also eliminate judicial review given that Executive Order 12866 and subsequent related executive orders, like most executive orders, includes language that states that it is not enforceable by law.223 As one federal court decision stated in response to an argument that the Administrative Procedures Act is sufficient to replace NEPA because it affords public notice comment, “An exception of such staggering breadth would render NEPA meaningless.”224

222 Id. at 14478-79. See also, Council on Environmental Quality and Governor’s Office of Planning and Research, State of California, NEPA and CEQA: Integrating Federal and State Environmental Reviews” (February, 2014) for a step-by-step guide to how to integrate compliance with NEPA and a state environmental quality review act to avoid duplication of both process and documentation.

223 E.O. 12866, 58 Fed. Reg. 51,735 (October 4, 1993)(“§10 Judicial Review. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person”); E.O. 13563, 76 Fed. Reg. 3,821 (January 21, 2011) (supplementing EO 12866 and reading “§ 7(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person”).

Finally, regulations should be included in Section 1502.4(b) describing the types of actions that are appropriately subject to preparation of a programmatic EIS.\footnote{225}

Neither of these proposed changes should go forward.

H. Proposed §1501.1(b) - NEPA threshold applicability analysis.

This provision would allow federal agencies to make determinations about whether particular actions are exempt from NEPA under one of the many theories discussed above either in their agency NEPA procedures or an individual basis for a particular proposed action. First, we strongly disagree that there are legally sound rationale for the proposed “exemptions” discussed above. To the extent an agency believes that there is a class of actions exempt from NEPA, the agency should identify that in its draft NEPA procedures subject to public review and comment. Inviting this type of analysis on an ad hoc basis invites behind-closed-door negotiations between agencies and project proponents and will lead to confusion, inconsistency, and inefficiency as well as likely resulting in an unprecedented proliferation of litigation.

V. FOR THOSE ACTIONS THAT WOULD REMAIN SUBJECT TO NEPA UNDER THE PROPOSED REVISIONS, CEQ’S PROPOSAL WOULD ILLEGALLY ELIMINATE KEY COMPONENTS OF EFFECTS ANALYSIS.

A. Proposed § 1508.1(g) - Cumulative Effects.

CEQ’s shocking and arbitrary proposal to delete cumulative impacts from all levels of NEPA analysis cannot stand. It is true, as the preamble states, that NEPA simply references environmental impacts and effects and does not use the “terms direct, indirect and cumulative impacts.” It also doesn’t contain the term “environmental impact statement,” or, for that matter, the term “reasonably foreseeable”. However, Section 102(2)(C) of NEPA directs agencies to provide a “detailed statement” on “the environmental impacts”. It doesn’t say a subset of impacts or impacts that are convenient to analyze.

NEPA’s legislative history is replete with references to the complexity of environmental impacts, the consequences of “letting them accumulate in slow attrition of the environment” and the “ultimate consequences of quiet, creeping environmental decline” - all of which pointed to the need for an analysis of proposed impacts beyond the immediate, direct effects of an action\footnote{226}. For 50 years, CEQ has interpreted the law to accomplish just that.

\footnote{225 We have further comments on the treatment of programmatic EISs in the proposed revisions, supra in Section IV (C).
\footnote{226 115 Cong. Rec. 29070 (October 8, 1969); see also, report accompanying S. 1075, National Environmental Policy Act of 1969, Senate Committee on Interior and Insular Affairs, July 9, 1969.}}
Within a few months of its establishment, CEQ explained that, “The statutory clause ‘major Federal actions significantly affecting the quality of the human environment’ is to be construed by agencies with a view to the overall, cumulative impacts of the action proposed (and of further actions contemplated).” It also explained that the requirement in Section 102(2)(C) of NEPA to identify “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity” in the detailed statement (now known as an EIS) required the agency “to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.” CEQ has consistently interpreted NEPA ever since then as requiring analysis and consideration of cumulative effects; indeed, it has been a primary focus of CEQ’s work. In 1973, CEQ’s revised Guidelines repeated the statement from the 1971 Guidelines with the additional admonition to agencies that:

In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulative considerable. This can occur when one or more agencies over a period of years put into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major decision. In all such cases, an environmental statement should be prepared if it reasonable to anticipate a cumulatively significant impact on the environment from Federal action.

Federal courts recognized the importance of cumulative effects analysis long before CEQ’s 1979 regulations. In 1975, the Court of Appeals for the Second Circuit reversed a lower court decision in part on the grounds that the analysis in the EIS at issue evaluated only the effects of the particular proposed action, a proposal for dumping two million cubic yards of polluted spoil in Long Island Sound. The Court made it clear that the Navy should have considered the cumulative environmental impacts of other closely related projects (e.g., the Corps’ further deepening of the Thomas River channel, the maintenance of that channel, the dredging of the Thames by the Electric Boat Division of General Dynamics and the Coast Guard’s Thames River dredging project in its NEPA analysis. Alluding to the legislative history referenced above, the Court pointed out that:

228 Id. at Section 7(a)(iv); see also. 42 U.S.C. § 4331(b)(1).
As was recognized by Congress at the time of passage of NEPA, a good deal of our present air and water pollution has resulted from the accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources. ‘Important decisions concerning the use and the shape of man’s future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.’  S. Rep. No. 91-296, 91 Cong., 1st Sess. 5 (1969). NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration. [cites omitted]. The fact that another proposal has not yet been finally approved, adopted or funded does not foreclose it from consideration, since experience may demonstrate that its adoption and implementation is extremely likely.\(^{231}\)

The Court explained that the fact that the other dredging projects in question had not been proposed by the Navy and, in fact, had not yet been approved were not the deciding factors. Rather, “all are to occur in the same geographical area, all are related in that they involve dredging and disposal of spoil, all present similar problems of pollution, and the spoil from each project is likely to be dumped in the New London area. Clearly the projects are closely enough related so that they can be expected to produce a cumulative environmental impact which must be evaluated as a whole.”\(^{232}\)

In 1976, the U.S. Supreme Court acknowledged the importance of cumulative impacts. While ruling that in the particular situation at issue an EIS was not required, the Court stated that, “when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequence must be considered together.\(^{233}\) The Court reasoned that “[o]nly through comprehensive consideration of pending proposals can the agency evaluate different courses of action.”\(^{234}\)

Given this long and consistent interpretation of NEPA, it likely surprised no one that CEQ included a regulatory definition of cumulative effects\(^{235}\) when it promulgated the current regulations. In fact, at the time the regulations were issued in final form in 1978, the preamble did not identify any comments critical of the requirement to analyze cumulative effects.\(^{236}\) Similarly, cumulative effects were not the subject of any of the “40 Most Asked Questions Regarding the NEPA Regulations.”\(^{237}\)

\(^{231}\) *Id.* at 88-89.

\(^{232}\) *Id.* at 89.


\(^{234}\) *Id.* (emphasis added).

\(^{235}\) 40 C.F.R. § 1508.7.


The Fifth Circuit Court of Appeals also provided important guidance to agencies by laying out a widely accepted step-by-step approach to analyzing cumulative effects in *Fritiofson v. Alexander*, a case involving permits for dredging canals around West Galveston Island, Texas.\(^\text{238}\) The Court’s direction was simple to understand and feasible to follow, consisting of 1) identifying the area in which effects of the proposed project will be felt; 2) identifying the impacts expected in that area from the proposed project; 3) identifying past, present, and reasonably foreseeable actions that have had or are expected to have impacts in the same area; 4) identifying the expected impacts from these other actions, and 5) considering the overall impacts that can be expected if the individual impacts are allowed to accumulate.\(^\text{239}\)

It is especially tragic that CEQ would attempt to abandon the requirement to analyze cumulative effects even as our country and our world are increasingly experiencing the impacts of cumulative change, for as one court stated, “the impact of greenhouse gas emission on climate change is precisely the kind of cumulative impacts analyses that NEPA requires agencies to conduct.”\(^\text{240}\) In fact, this proposed and wrenching change in the NEPA process is so fundamental and so ill advised that one has to ask why this is being proposed now. The preamble explanation is strikingly brief to justify the removal of the most important requirements in the NEPA regulations. The preamble alludes primarily to wanting agencies to focus their time and resources on the most significant effects rather than producing “encyclopedic documents” that include irrelevant or inconsequential information.\(^\text{241}\) But the direction to avoid producing encyclopedic documents and to focus on the most significant effects simply mirrors CEQ’s current regulations.\(^\text{242}\)

In fact, contrary to the preamble’s suggestion that the requirement to assess cumulative impacts diverts agencies from focusing their time and resources on the most significant effects, leading to excessively long documentation that includes irrelevant or inconsequential information, cumulative effects analysis has led to some important changes in agency decisionmaking. Sometimes cumulative impacts are, in fact, the most significant effects of an action.

One example is the U.S. Forest Service’s 2019 decision not to allow oil and gas leasing in the Ruby Mountains of Humboldt-Toiyabe National Forest in Nevada, expressly based on its analysis of cumulative impacts under NEPA. In response to a request from BLM to offer 52,533 acres of Forest Service lands in the Ruby Mountains for leasing, USFS initially proposed to make the lands available for leasing, subject to stipulations to

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\(^{239}\) Id. at 1245. See also, *Grand Canyon Trust v. FAA*, 290 F.3d 339 (D.C. Cir. 2002).

\(^{240}\) *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508 (9th Cir. 2007), amended at 538 F.3d 1172 (9th Cir. 2008).

\(^{241}\) 85 Fed. Reg. at 1708.

\(^{242}\) 40 C.F.R. § 1500.1.
protect surface resources. Based on the analysis in an EA that the Forest Service prepared, the Forest Supervisor concluded that, “Even with multiple No Surface Occupancy stipulations applied, the cumulative effects would be noticeable. These effects include increased noise, dust and light pollution, and disturbance to wildlife and fisheries. These adverse effects outweigh the benefits that could result from oil and gas development.” The Forest Supervisor stated that his final decision to select the No Leasing Alternative instead was based on the combined impact of a list of “primary factors” that included these cumulative effects. Notably, these impacts were not only cumulative, but also indirect effects in the Forest Service’s view, as the EA stated: “For the majority of resources analyzed, the effects from the leasing decision would be indirect since no ground disturbing activities are authorized at the leasing stage.” In sum, the analysis of indirect cumulative effects played a primary role in reversing the Forest Service’s position from proposing to allow leasing to instead making the lands unavailable for oil and gas development.

Another example is the Tennessee Valley Authority’s (TVA) 1993 decision to deny requests from three companies separately seeking authorization to build barge terminals along a 12-mile stretch of the Tennessee River in Alabama and Tennessee that would serve adjacent wood chip mills, which was expressly based on the analysis of cumulative impacts in its final EIS. Chip Mill Terminals on the Tennessee River—Record of Decision. TVA identified the no action alternative as the preferred one “after weighing the potential benefits of the requests with the likelihood of substantial, cumulative localized impacts and the risk of significant timber harvesting impacts.” Id. at 28,431. The cumulative impacts were traffic associated with the chip mills that would be served by the barge terminals. See id. at 28,432–33 (“In addition to the potential risk of significant timber harvesting impacts, localized impacts in the vicinity of the chip mill facilities themselves are of concern to TVA. TVA estimates that the movement of logs into the three chip mills would add approximately 1,080 truck movements to the daily average traffic flows in and around South Pittsburg. On State Route 156, approximately 93 trucks per hour (or more than one per minute) would be added…. the potential cumulative localized impacts, especially truck traffic impacts, are a serious concern.”). Although TVA recognized that an action alternative that required obtaining agreement from the state forestry agencies, the

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245 USDA Forest Service, Decision Notice and Finding of No Significant Impact for Ruby Oil and Gas Leasing Availability Analysis at 2-3.
246 USDA Forest Service, Ruby Mountains Oil and Gas Leasing Availability Environmental Assessment, March 2019, at 15.
247 One of the companies was also seeking permission from TVA related to building a chip mill facility.
mill operators, the forestry associations, and the timberland owners to employ better protective practices was environmentally preferable, it was unable to obtain the necessary agreements, and therefore selected the no action alternative. *Id.* at 28,431. Whereas the *cumulative* localized impacts were a key factor in the decision, the final EIS specifically noted that the “localized environmental impacts associated with each mill by itself are expected to be insignificant on an individual basis.”

Further, the TVA decision to deny the barge terminal authorizations also “weighed heavily” the indirect effects on ESA-listed wildlife from increased timber harvesting associated with the three chip mills. TVA explained that:

> Although TVA does not think that the Endangered Species Act precludes approving one or more of the requests, TVA has weighed heavily the Service’s technical determination of likely impacts to listed species if harvesting occurs. TVA’s own assessment of potential impacts to listed species concluded that some species could be significantly impacted depending on where and how timber harvesting may occur.

Thus, even though TVA believed that its decision to deny the authorizations for the barge terminals was not required by the ESA, the analysis of significant impacts of timber harvesting, along with the analysis of localized cumulative impacts, were the driving factors that led TVA to select the no action alternative.

Reference is also made in the preamble to the notion that determining the geographic and temporal scope of such effects “has been difficult.” Agencies already need to determine the appropriate geographic and temporal scope of all impacts, even for direct impacts. There is no explanation given as to why the guidance CEQ has provided in the handbook on cumulative effects is inadequate or what particular aspects of this work is the most challenging. Ironically, we note that E.O. 12866, “Regulatory Planning and Review” which CEQ suggests might be used as a substitute for the NEPA process for proposed regulations, requires agencies to assess the impact of cumulative regulations on a particular business sector, communities and government entities.

While federal courts have found some NEPA documents to be legally inadequate because of an agency’s failure to assess cumulative effects, the identified problems are quite amenable to being addressed (and often are in revised documents). Common failures include presenting general, broad statements “devoid of specific, reasoned conclusions” or identifying reasonably foreseeable actions that will affect the same resource as the

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253 See *id.* § 1(b)(11).
254 *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 811-12 (9th Cir. 1999)
proposed action but then failing to actually do the analysis.\textsuperscript{255} More recently, federal courts have held that agencies have failed to meet the challenge of assessing the incremental impacts of proposed oil and gas projects on climate change. For example, in its NEPA analyses for oil and gas leasing on federal land in three western states, the Bureau of Land Management’s (BLM) documents acknowledged that the additional oil and gas wells it was considering would contribute incrementally to total regional and global GHG emission levels.\textsuperscript{256} BLM declined to go further, arguing that in order to analyze or disclose cumulative climate impacts the agency would have to identify every past, present, or reasonably foreseeable project on earth to produce a separate cumulative impact analysis. The reviewing court correctly stated that NEPA does not require that feat. But as the court noted, there is often an option between global analysis and nothing, and here, the court directed BLM to quantify emissions from individual leasing decisions when added to GHG emissions from other BLM projects in the region and nation. “To the extent other BLM actions in the region – such as other lease sales – are reasonably foreseeable when an EA is issued, BLM must discuss them as well.”\textsuperscript{257}

Neither the vague statements in the preamble nor the fact that agencies have lost some cases because of their failure to follow the current regulation are justification for reversing CEQ’s long held position articulated through multiple notice and comment periods and upheld by dozens of court opinions. CEQ’s decision to bar consideration of cumulative effects will have real world environmental consequences by thwarting the development of information that has in the past altered agency decision-making. CEQ must withdraw this arbitrary proposal. If the agencies need further guidance on how to analyze cumulative effects, CEQ can provide that guidance. But it cannot obliterate a fifty-year-old legal requirement that is based on consistent interpretation of the law.

Additionally, CEQ asks whether it should codify any aspects of its proposed GHG guidance in the regulation, and if so, how CEQ should address them in the regulations.

We do not think CEQ should include its proposed GHG guidance in the regulations in any form. The courts have made it clear for many years that climate change is among the impacts to be assessed.\textsuperscript{258} CEQ’s draft guidance fell woefully short of the mark in many respects. Among other problems, it significantly failed to reflect relevant judicial decisions regarding issues such as quantification of GHG emissions and analysis of the

\textsuperscript{255} See, e.g., Sierra Club v. U.S. Dept. of Agr., 116 F.3d 1482 (7th Cir. 1997) (unpublished table decision) (“the discussion fails to analyze the effects of the various activities in combination . . . to determine whether the sum of these incremental disturbances will create a significant detrimental effect.”).


actual effects resulting from them, the scope of that analysis, upstream and downstream effects, alternatives, cumulative effects analysis, the effects of climate change on vulnerable populations and on the proposed action itself. We are including more comprehensive criticisms submitted during the comment period on that draft guidance as part of the record with this letter.\footnote{Letter from forty-one organizations in response to Docket No. 2019-0002, Attachment H.}

\section*{B. Proposed § 1508.1(g) - Indirect Effects.}

CEQ’s proposed deletion of the definition and references to indirect effects is unlawful and will lead to confusion and litigation. Like cumulative effects, indirect effects have long been the subject of CEQ direction and guidance and the need for agencies to analyze indirect or secondary effects has also been the subject of numerous federal court decisions. Analysis of indirect effects is required whether CEQ’s regulations specify them or not.

Along with the above-noted statements about cumulative effects, CEQ first addressed the need to analyze indirect or secondary effects in the 1970 Interim Guidelines.\footnote{35 Fed. Reg. 7390, 7391 (May 12, 1970).} Those guidelines explained that, “Both primary and secondary significant consequences for the environment should be included in the analysis”. The example given of secondary effects – the implications of a proposed action for population distribution or concentration and the effects of such a population change on resources such as water and public services in the area, was included in the 1971 Guidelines.\footnote{36 Fed. Reg. 7724, 7725 (Apr. 23, 1973). (“Significant adverse effects on the quality of the human environment include both those that directly affect human beings and those that indirectly affect human beings through adverse effects on the environment.”).} The 1973 Guidelines expanded on this discussion by explaining that:

“Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e.g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities, or through changes in natural conditions, may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects. Such population and growth impacts should be estimated if expected to be significant (using data identified as indicated in § 1500.8(a)(1) and an assessment made of the effect of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, of the area in question.”\footnote{40 C.F.R. § 1500.8(a)(3)(ii) (1973).}
CEQ succinctly explained the necessity and challenges of analyzing secondary, or what is now called indirect impacts, in its Fifth Annual Report. In that report, CEQ pointed out that:

“Impact statements usually analyze the initial or primary effects of a project, but they very often ignore the secondary or induced effects. A new highway located in a rural area may directly cause increased air pollution as a primary effect. But the highway may also influence residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth. For many projects, these secondary or induced effects may be more significant than the project’s primary effects.”

In the 1975 annual report, CEQ again pointed out that agencies needed to improve their analysis of secondary impacts as those impacts were often the public’s major concerns about various types of development projects, transportation plans and projects involving social and economic effects.

After a discussion of CEQ’s work in analyzing secondary effects of public infrastructure projects and sponsoring studies to investigate better methodologies for prediction, CEQ stated that:

“While the analysis of secondary effects is often more difficult than defining the first-order physical effects, it is also indispensable. If impact statements are to be useful, they must address the major environmental problems likely to be created by a project. Statements that do not address themselves to these major problems are increasingly likely to be viewed as inadequate. As experience is gained in defining and understanding these secondary effects, new methodologies are likely to develop for forecasting them, and the usefulness of impact statements will increase.”

CEQ then codified the current definition of indirect effects with no apparent objections or concerns evidenced in the preamble to the current regulations regarding the definition.

Federal courts affirmed that NEPA requires agencies to consider indirect or secondary effects in long before promulgation of the regulations. In *City of Davis v. Coleman,* the Court held that an EIS prepared for a proposed highway interchange in a hitherto agricultural area did not meet NEPA’s requirements because it failed to analyze the growth-inducing effects of the proposed interchange. Although the highway agencies

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265 Id. at 411.
266 40 C.F.R. § 1508.8(b) (2020).
267 521 F.2d 661 (9th Cir. 1975).
maintained that the proposed interchange was for highway safety reasons, there was considerable evidence leading the court to conclude that it was intended to help support what was elsewhere in the record characterized as a “rapid change to urban development.” The Court stated that:

“We think that this is precisely the kind of situation Congress had in mind when it enacted NEPA: substantial questions have been raised about the environmental consequences of federal action, and the responsible agencies should not be allowed to proceed with the proposed action in ignorance of what those consequences will be. NEPA and CEQA require that the interchange’s environmental impact be studied and analyzed in good faith before CDHW and FHWA decide whether the project is to be completed as planned, or to be modified or abandoned.”

Courts have been clear that when the record shows that growth-inducing impacts or other indirect impacts are reasonably foreseeable, agencies must analyze these impacts. Courts have also been clear that the Supreme Court’s holding in Department of Transportation v. Public Citizen did not obliterate the obligation to analyze indirect effects when they are reasonably foreseeable as a result of an agency’s proposed decision. For example, in Florida Wildlife v. U.S. Army Corps of Engineers, the court found the Corps’ reliance on DOT v. Public Citizen to be misplaced when the Corps had jurisdiction over a development and the record showed that the proposed development was explicitly anticipated to serve as a “catalyst for growth”. Similarly, the D.C. Circuit held that FERC should have considered potential downstream greenhouse gas emissions from power plants burning natural gas supplied by the proposed pipeline when conducting its NEPA analysis.

268 Id. at 674.
269 Id. at 675-76.
270 Friends of the Earth, Inc. v. U.S. Army Corps of Eng’rs, 109 F.Supp.2d 30, 41 (2006) (holding that the Corps’ practice of issuing individual environmental assessments on floating gambling casinos along the Mississippi coast without analyzing the indirect effects of what the Corps’ did concede would likely be future development resulting from the proliferating number of gambling barges along the coast).
271 541 U.S. 752 (2004). (It should be noted that the decision in Public Citizen also referenced with approval the lead agency’s assessment of cumulative effects); See also, id. at 769-70.
273 Id. at 46. See also, Barnes v. U.S. Dep’t of Transp., 655 F.3d 1124 (9th Cir. 2011) (finding that the indirect effects of permitting an additional runway at an airport 12 miles west of the City of Portland were so obvious that the FAA had a responsibility to analyze them even absent a comment specifically identifying concerns regarding “growth inducing effects.”).
274 Sierra Club v. Federal Energy Regulatory Comm’n., 867 F.3d 1357, 1374 (D.C. Cir. 2017) (“We conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.”). See also, Wilderness Workshop v. U.S. Bureau of Land Mgmt., 342 F. Supp. 3d 1145 (D. Colo. 2018) (“BLM failed, in part, to take a hard look at the severity and impacts of GHG pollution. Namely, it failed to take a hard look at the reasonably foreseeable indirect impacts of oil and gas.”).
The justification for striking the terms “direct” and “indirect” and deleting the definition of “indirect effects” from the regulations is as transparent and inadequate as the justification for deleting the requirement to analyze cumulative effects. The rationale is simply that it is too hard. In fact, we seriously disagree with that proposition.

To the extent agencies are truly having difficulty with how to go about assessing effects, CEQ should be working on further guidance or workshops or whatever would be the best mechanism for transmitting information on how to best and most efficiently meet the goals and requirements of the law. To the extent the difficulties are either self-imposed (for example, by agencies feeling pressured to omit references to climate change) or because they lack the capacity to prepare or oversee adequate NEPA analyses, CEQ should also address those problems. We remind CEQ that lack of agency resources is not a valid excuse for failing to comply with the law. But CEQ cannot arbitrarily delete requirements that would strip NEPA analyses down to solely direct effects, thereby recreating one of the fundamental problems that NEPA was intended to address.

For all of the reasons stated above, we strongly oppose both the deletion of the definition of indirect effects in CEQ’s regulation and any possible attempt in the final regulation or future rulemaking to affirmatively state that agencies are not required to analyze indirect effects. In fact, agencies are required to analyze the full array of reasonably foreseeable impacts, including indirect effects, along with direct impacts and cumulative impacts. The current regulatory provisions should stand.

C. Proposed § 1508.1(g) - Definition of “Effects or Impacts”.

The proposed revision of the definition of effects directs agencies to focus their efforts on an extremely narrow range of what effects would, under the proposed revision, remain to be analyzed once cumulative and possibly indirect effects are eliminated.

In support of amending the definition of effects, CEQ cites two Supreme Court cases with distinct fact patterns that apply proximate cause to NEPA cases. As laid out below, the holdings of Metropolitan Edison and Public Citizen narrowly apply to distinct factual scenarios and cannot be extrapolated to all NEPA cases.

In Metropolitan Edison, the Supreme Court attempted to give greater context to the meaning of the terms effects and impacts within NEPA. The Metropolitan Edison plaintiffs challenged the proposed restart of one of the reactors at the Three Mile Island Nuclear Power Plant and argued NEPA required the Nuclear Regulatory Commission to consider the threats to the psychological health of residents in an environmental impact

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277 460 U.S. at 774.
In describing the rationale for the effect and impact requirements, the court described the requirements as “like the familiar doctrine of proximate cause from tort law.” However, this description is dicta. The court’s holding focused on the congressional intent of promoting human welfare and effects on the physical environment. Given this, the court concluded that fear of a nuclear accident did not have a sufficiently close connection to the physical environment and NEPA does not apply. In making this ruling, the operative reasoning was not proximate cause, but the lack of a sufficiently close connection to the physical environment.

Like Metropolitan Edison, the facts of Public Citizen also involved unique circumstances. Public Citizen involved rules issued by the Federal Motor Carrier Safety Administration (FMCSA) that concerned safety regulations for Mexican motor carriers. After issuing the proposed rules, FMCSA issued a programmatic environmental assessment and made a finding of no significant impact. Environmental groups filed petitions for judicial review for FMCSA’s rules and argued that the rules were promulgated in violation of NEPA. Subsequently, the President lifted a moratorium on qualified Mexican motor carriers and the court of appeals held the EA was deficient for not considering the environmental impact of lifting the moratorium.

In making the holding, the Public Citizen court quoted language in Metropolitan Edison pointing to the proximate cause requirement in tort law. Ultimately, the court held the EA did not need to consider the environmental effects arising from the entry of Mexican motor carriers. The main reasoning behind this holding was not proximate cause, but that the lifting of the moratorium was a result of the President’s actions. The court concluded that FMCSA had no discretion to prevent the entry of Mexican trucks and therefore did not need to consider the environmental effects in its EA.

Courts are reluctant to apply a proximate cause requirement to NEPA based on Metropolitan Edison and Public Citizen. For example, in San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1029, the Ninth Circuit declined to apply Metropolitan Edison and its proximate cause analogy to its case. The Mothers for Peace court laid out a chain of three events at issue: (1) a major federal action; (2) a change in the physical environment; and (3) an effect. The court found that Metropolitan Edison was concerned with the relationship between events 2 and 3 (the change in the physical environment and the effect), whereas the case at bar concerned the relationship between events 1 and 2 (the

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278 Id. at 768–69.
279 Id. at 774.
280 Id. at 773.
281 Id. at 778.
283 Id.
284 Id.
285 Id.
286 San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n, 449 F.3d 1016, 1029 (9th Cir. 2006).
major federal action and the change in the physical environment).\textsuperscript{287} Mothers of Peace demonstrates the narrow application of Metropolitan Edison to cases where the impact is not on the physical environment and there is a missing link in the chain of causation.\textsuperscript{288}

Public Citizen also has a narrow application. For example, in the 2019 decision in Birkhead v. FERC,\textsuperscript{289} the D.C. Court of Appeals discussed FERC’s claim that it need not consider downstream greenhouse-gas emissions if it ‘cannot be considered a legally relevant cause’ of such emissions due to lack of jurisdiction over any entity other than the pipeline applicant. The court stated:

But this line of reasoning [from Public Citizen] gets the Commission nowhere. . . . Because the Commission may therefore ‘deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ of the direct and indirect environmental effects of pipelines it approves – even where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline. . . . Accordingly, the Commission is ‘not excuse[d] . . . from considering these indirect effects’ in its NEPA analysis.\textsuperscript{290}

Other courts recognize the limited application of Public Citizen and its holding.\textsuperscript{291} The proposed rule supports the changes using dicta from these two cases but ignores the fact patterns and reasoning behind the holdings. Importantly, the case law cited in the preamble represents narrow factual applications that do not provide an adequate legal basis for the new definition of effects in the regulations. The current definition of effects should be retained.\textsuperscript{292}

D. Proposed § 1508.1(aa) - Definition of “reasonably foreseeable”.

CEQ proposes to adopt a definition of “reasonably foreseeable” as being “sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”\textsuperscript{293} Although the preamble does not specifically say so, we assume this is another attempt to graft tort law onto NEPA law. In the context of tort law,

\begin{itemize}
\item \textsuperscript{287} Id. at 1029-30 (citing Metropolitan Edison, 460 U.S. at 775 n.9).
\item \textsuperscript{288} Id. (citing No Gwen All. of Lane County, Inc. v. Aldridge, 855 F.2d 1380, 1385 (9th Cir. 1988)).
\item \textsuperscript{289} 925 F.3d 510 (D.C. Cir. 2019).
\item \textsuperscript{290} Id. at 519.
\item \textsuperscript{291} Fla. Wildlife Fed’n v. United States Army Corps of Eng’rs, 401 F. Supp. 2d 1298, 1324-25 (S.D. Fla. 2005) (rejecting reliance of Public Citizen where the agency has discretion to prevent or manage indirect effects); Sierra Club v. Mainella, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (Public Citizen applies only to “situations where an agency has “no ability” because of lack of ’statutory authority’ to address the impact”); Humane Soc’y of the United States v. Johanns, 520 F. Supp. 2d 8, 25-26 (D.D.C. 2007) (“The holding in Public Citizen extends only to those situations where an agency has ”no ability” because of lack of ”statutory authority” to address the impact. NPS, in contrast, is only constrained by its own regulation from considering impacts on the Preserve from adjacent surface activities”).
\item \textsuperscript{292} 40 C.F.R. § 1508.8 (2020).
\item \textsuperscript{293} 85 Fed. Reg. at 1730.
\end{itemize}
however, the appropriate definition would specifically reference a “reasonably prudent
decision maker” and not an “ordinary person”. Under the Restatement 2d of Torts, “[i]f an
actor has skills or knowledge that exceed those possessed by most others, these skills or
knowledge are circumstances to be taken into account in determining whether the actor has
behaved as a reasonably careful person.”

In the context of NEPA compliance, the decision maker is an actor with a high level
of skills, which would be taken into account when determining whether the duty to discuss
impacts is present. In other words, the reasonable person is a reasonable decision
maker in the agency with the knowledge and skills to evaluate the impacts. And that decision
maker must remember that:

[the basic thrust of an agency’s responsibilities under NEPA is to predict the
environmental effects of proposed action before the action is taken and those effects
are known. Reasonable forecasting and speculation is thus implicit in NEPA, and
we must reject any attempts to shirk their responsibilities under NEPA by labeling
any and all discussion of future environmental effects as ‘crystal ball inquiry.’ The
statute must be construed in the light of reason if it is not to demand what is, fairly
speaking, not meaningfully possible . . . ‘ [cite omitted] But implicit in this rule of
reason is the overriding statutory duty of compliance with impact statement
procedures to ‘the fullest extent possible.’

We do not believe a definition of “reasonably foreseeable” is needed nor do we believe that this definition is either in conformance with the law nor helpful. It should not be retained.

CEQ also asks for comments on whether to include in the definition of effects the concept
that the close causal relationship is “analogous to proximate cause in tort law,” and if so,
how CEQ could provide additional clarity regarding the meaning of this phrase.”

CEQ should not attempt further imposition of tort law in the context of its
regulations implementing NEPA. The two bodies of law have quite different purposes.
Tort law is a system of determining liability for harm that has already occurred. A
fundamental purpose of NEPA and the NEPA process is to predict and prevent harm.
Given those differences, it is quite necessary for NEPA to require a broader analysis of
potential impacts than tort law’s post-event analysis of causation. Imposing tort concepts
into NEPA law narrows the agencies’ responsibilities and ultimately is likely to lead to the
harm to the environment and to present and future generations that NEPA seeks to prevent.

E. Proposed Deletion of Current Definition of Significance at 40 C.F.R.
§1508.27 and Proposed § 1501.3 - Definition of Significance and Appropriate Level of
NEPA Review.

295 Scientists’ Institute for Public Information, Inc. v. Atomic Energy Comm’n, 481 F.2d 1079,
1092 (D.C. Cir. 1973).
With one brief and unenlightening phrase in the preamble, “Because the entire definition of significantly is operative language,” CEQ proposes to eliminate without further explanation the long-standing factors of context and intensity and arbitrarily reference only a subset of the effects that are cognizable under NEPA. If the goal of this exercise is to foster uncertainty and confusion, these proposals are perfect. If, however, as articulated, the goal includes efficiency, these proposed changes are about the most unproductive measures imaginable. The question of whether a proposed action has “significant impacts” is the single most common inquiry in the context of NEPA compliance. CEQ’s proposal to remove clear direction on this point and substitute poorly drafted, inadequate text is irresponsible. For decades, agencies at all levels of government and the public at large have become familiar with the current criteria for significance and used them systematically as a roadmap to evaluate a proposed action. Courts have also used the criteria as a guide.

CEQ fails to justify its proposed change from its well-established previous position. How does the notion that “significantly” is an operational term in NEPA eliminate the need for regulatory direction on how the term should be interpreted? Further, the one brief sentence in the preamble directs the reader to proposed §1501.4 for a further discussion of significance. Proposed §1501.4 addresses categorical exclusions. We assume that the reference is meant to be to proposed § 1501.3 that discusses “the appropriate level of NEPA review”. However, that proposed regulation is similarly inadequate. The preamble acknowledges that “significance” is “central to determining the appropriate level of review”. But CEQ proposes to “simplify” the definition by omitting “context” and intensity”, two key terms with decades of utilization, and substituting “‘the potentially affected environment” for context and nothing at all for “intensity” with no explanation of whether there is some difference in meaning intended by the change in terms for “context” and and no substitute for “intensity”. Proposed §1501.3 then goes on to identify only two types of effects in this section. Specifically, the proposed revision omits or weakens (with no explanation in the majority of instances) the following criteria that are in CEQ’s current regulation in the definition of “significantly”:

The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

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297 For instance, in Friends of Back Bay v. U.S. Army Corps of Eng’rs, the court considered these factors in determining that consideration of a proposal that would impact an estuary designated as nationally significant by the EPA required preparation of an EIS. 681 F.3d 581, 589 (4th Cir. 2012). Similarly, in Fund for Animals v. Norton, the court used these factors to determine that preparation of an EIS was required before authorizing a permit to the state of Maryland to manage the population of mute swans. 281 F. Supp. 2d 209 (D.D.C. 2003).
298 Id. at 1714.
299 Id. at 1695.
(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. 300

Out of these ten factors for agencies to consider, CEQ weakens the first by deleting the second sentence explaining that a significant impact may exist even if the Federal agency official believes “that on balance the effect will be beneficial,” 301 and weakens the last consideration by changing “threatens a violation” to “violates” and then states affirmatively that there is no need to try to reconcile any such differences. 302 It completely abandons historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers and ecologically critical areas, highly controversial effects, highly uncertain, unique or unknown risks, precedential action, cumulatively significant impacts, significant scientific, cultural, or historical resources, endangered and threatened species and their habitat. In short, CEQ proposes to abandon seven of the criteria entirely, and weaken two of them, leaving only public health and safety intact. Are agency officials now supposed to assume that impacts on air, water, soil, wildlife, historic and cultural resources, aesthetic values, social effects, are now not to be evaluated for significance? This is both illogical

300 40 C.F.R. §1508.27(b).
301 40 C.F.R. § 1508.27(b)(1).
302 Proposed 40 C.F.R. § 1506.2(d).
and unlawful. Congress made it clear that consideration of all of the factors currently listed in the effects definition is part of the federal government’s continuing responsibility.\textsuperscript{303} What is the rationale for removing them as criteria for significance?

Astonishingly, the preamble only explains the deletion of two of these factors. First, CEQ states that it is removing controversy as a consideration “because this has been interpreted to mean scientific controversy.”\textsuperscript{304} But CEQ never explains why scientific controversy isn’t worthy of being a consideration in determining the significance of the effects of a proposed action. In fact, the current regulation already makes it clear that the controversy referenced is controversy about the effects and not about the action itself. What is the rationale for removing this factor?

Additionally, CEQ states that it did not include the seventh factor in the current regulation, dealing with individually insignificant but cumulatively significant impacts because it is addressed in two other regulations. But those regulations deal with scoping and EISs respectively, not the threshold question of whether an EIS is needed in the first place. Further, only a portion of the current criteria is addressed in those other sections while all references to cumulatively significant impacts are deleted. The preamble fails to note this. The preamble also fails to address any reason at all for removal of criteria (3), (4), (6), and (8), (9).

The current definition of “significantly” is extremely useful and should be retained.

F. The Proposed Revisions Gut the Alternatives Requirement – the Heart of the NEPA Process.

Two statutory provisions of NEPA clearly state that the required analysis must include: “a detailed statement by the responsible official on . . . alternatives to the proposed action”\textsuperscript{305} and that agencies must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources”.\textsuperscript{306} These requirements are essential to NEPA’s purpose of ensuring informed decision-making. The thoughtful and thorough consideration of reasonable alternatives ensures that federal agencies have considered the information “before decisions are made and before actions are taken”.\textsuperscript{307} A number of key

\textsuperscript{303} 42 U.S.C. § 4331(b)
\textsuperscript{304} 85 Fed. Reg. at1695; \textit{see also} NPCA v. Babbitt, 241 F.3d 722, 736 (9th Cir. 2000) (“Agencies must prepare environmental impact statements whenever a federal action is ‘controversial,’ that is, when ‘substantial questions raised as to whether a project may cause significant degradation of some environmental factor,’ . . . cites omitted. A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI . . . casts serious doubt upon the reasonableness of an agency’s conclusions”) (citations omitted); \textit{Sierra Club v. Bosworth}, 510 F.3d 1016, 1032 (9th Cir. 2007).
\textsuperscript{305} 42 U.S.C § 4332(C)(iii).
\textsuperscript{306} 42 U.S.C. § 4332 (E).
\textsuperscript{307} 40 C.F.R. § 1500.1(b).
changes make clear that CEQ intends to downgrade the importance of alternatives. The proposed changes below particularly highlight this diminished, crabbed approach:

1. **Proposed §1502.14 - Heart of the EIS Process.**

   CEQ begins its proposed revisions in this section by ripping from the current regulation the statement that alternatives are “the heart of the environmental impact statement.” The original phrase is there for a reason. Without a robust analysis of alternatives, the NEPA process becomes a process documenting the effects of a “done deal” rather than contributing to a decisionmaking process. There is no explanation in the preamble of why CEQ is proposing to delete the phrase. Deleting this phrase signals to agencies and to the public CEQ’s intent to downgrade the importance of alternatives and many of the other changes to this key regulation substantiate that intent.

2. **Proposed §1502.14(a) - “Rigorously explore and objectively evaluate all reasonable alternatives”.**

   The proposed text would (1) eliminate the direction to “rigorously explore and objectively evaluate” alternatives and, (2) would eliminate “all” before the phrase “reasonable alternatives.” The deletion of “rigorously explore and objectively evaluate” is another example of downgrading the importance of the alternatives analysis. CEQ has directed agencies to rigorously explore and objectively evaluate alternatives since at least April, 1970. The deletion of that direction does not “simplify and clarify” the regulations, as the preamble suggests, but rather weakens them.

   The preamble also states that CEQ’s proposes to delete “all” in this sentence because “NEPA itself provides no specific guidance concerning the range of alternatives an agency must consider.” But the preamble cites the very guidance CEQ issued to interpret the alternatives requirement in 40 C.F.R. § 1502.14 as the rationale for amending 40 C.F.R. §1502.14. As the very first question in CEQ’s 40 Most Asked Questions document makes clear, the interpretation of the alternatives requirement is informed by the rule of reason and has never required agencies to examine, for example, every single possible iteration of an alternative. There is no need to drop “all” from the direction to analyze “all reasonable alternatives.” Doing so would send a signal that the requirement to fully analyze

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309 In fact, many years before promulgation of the current CEQ regulations, a court characterized alternatives as the “linchpin” of the impact statement – a less elegant, but similar way of making the same point. *Monroe County Conservation Council, Inv. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).
312 85 Fed. Reg. at 1701.
and consider all reasonable alternatives, including those identified and presented in a timely manner from the public, is now less than it once was.\textsuperscript{314}

3. **Deletion of 40 C.F.R. § 1502.14(c) - Reasonable alternatives not within the jurisdiction of the lead agency.**

Once again, CEQ proposes to overturn a principle established long before the current NEPA regulations were promulgated by entirely removing the requirement for an agency to consider reasonable alternatives to the proposed action not within its own jurisdiction. The issue of whether Congress intended to bound an agency’s responsibility to analyze alternatives by its jurisdiction was decided early in NEPA’s history. In the landmark case of *Natural Resources Defense Council v. Morton*,\textsuperscript{315} the Court of Appeals for the District of Columbia considered whether the Department of the Interior was obliged to consider an alternative outside of its jurisdiction in the context of an EIS prepared for a proposed off-shore oil and gas lease sale off the coast of eastern Louisiana.\textsuperscript{316} As the court noted, the proposal was responsive to President Nixon’s directive on supply of energy. Alternatives analyzed within the EIS focused on possible changes to the proposed offering that would help mitigate environmental impacts.

Plaintiffs had argued that the EIS should include an alternative of eliminating oil import quotas. Department of the Interior officials rejected this idea, arguing in the EIS that such an alternative involved many complex factors and concepts, including foreign affairs and national security. Further, the Department officials argued that the alternatives required under NEPA were only those alternatives that could be adopted and implemented by the agency issuing the EIS.

The Court understood that NEPA’s broad purposes did not support this narrow approach. In reflecting on NEPA’s legislative history and statutory language, it said:

> What NEPA infused into the decisionmaking process in 1969 was a directive as to environmental impact statements that was meant to implement the Congressional objectives of government coordination, a comprehensive approach to environmental management, and a determination to face problems of pollution ‘while they are still of manageable proportions and while alternative solutions are still available’ rather than persist in environmental decision-making wherein ‘policy is established by default and inaction’ and environmental decisions

\textsuperscript{314} See, e.g., *Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233 (D. Colo. 2012), in which the Court found that the Bureau of Land Management failed to analyze a reasonable “community alternative.”

\textsuperscript{315} 458 F.2d 827 (D.C. Cir. 1972).

‘continue to be made in small but steady increments’ that perpetuate the mistakes of the past without being dealt with until ‘they reach crisis proportions.’

Given this background, the court felt that it would be “particularly inapposite” for the Department to limit its analysis of alternatives by jurisdictional lines of authority. The issue of energy supply was a national one with a broad scope, broader than that of any one particular entity in the federal government. The court held that, “When the proposed action is an integral part of a coordination plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened.”

While it was true that the Department of the Interior did not have the authority to modify or eliminate oil import quotas, the court noted that both the Congress and the President did have such authority. A broad examination of alternative ways of fulfilling a goal would be useful, not just for the “exposition of the thinking of the agency” but also for the guidance of other decision-makers who would be provided with the environmental effects of all reasonably achievable alternatives.

Finally, the court noted that there were pragmatic ways to address concerns about the challenge of analyzing alternatives outside of an agency’s jurisdiction. In a frequently-quoted discussion, the court stated:

We reiterate that the discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned. As to alternatives not within the scope of authority of the responsible official, reference may of course be made to studies of other agencies – including other impact statements. Nor is it appropriate, as Government counsel argues, to disregard alternatives merely because they do not offer a complete solution to the problem. If an alternative would result in supplying only part of the energy that the lease sale would yield, then its use might possibly reduce the scope of the lease sale program and thus alleviate a significant portion of the environmental harm attendant on offshore drilling.

As CEQ explained in its guidance about this requirement:

An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may

318 Id. at 835
319 The CEQ regulations explicitly permit adoption of other agencies’ EISs, 40 C.F.R. § 1506.3, and incorporation by reference of other publicly available material, 40 C.F.R. § 1502.21.
320 458 F.2d at 836.
serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).\textsuperscript{321}

In our collective experience, this issue tends to be raised more in the abstract than in the actual NEPA administrative process. Most of the time, most of us are focused on reasonable alternatives that are within the lead agency’s jurisdiction. But there are situations in which it is reasonable to evaluate alternatives outside of an agency’s jurisdiction. CEQ's preamble actually cites two such examples - when preparing a legislative EIS and to respond to specific Congressional directives.\textsuperscript{322} But there are also other times when it is reasonable to consider such alternatives. For example, in the context of the NEPA process for a proposed land exchange between the Forest Service and Weyerhaeuser Co., the Muckleshoot Indian Tribe raised the possibility of the Forest Service purchasing the land it desired through the Land and Water Conservation Fund. Although the funds to do so would have had to have been appropriated by Congress, the Forest Service could have made a request for them to do so. Given that such an acquisition appeared compatible with the agency’s goal, consideration of that alternative was required.\textsuperscript{323} CEQ should not rescind this requirement.

CEQ also asked for 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. CEQ seeks comment on (1) specific categories of actions, if any, that should be identified for the presumption or for exceptions to the presumption; and (2) what the presumptive number of alternatives should be (e.g., a maximum of three alternatives including the no action alternative).

CEQ should not establish a maximum number of alternatives for proposed actions or for certain categories of proposed actions. There is neither a rationale nor legal support for such an approach. Setting an artificial number could, on the one hand, encourage the development of ‘strawman” alternatives (that is, made up alternatives that are not actually reasonable but created for the sake of having a certain number of alternatives) and, on the other, would certainly discourage legitimately reasonable alternatives. It could certainly discourage development, analysis and consideration of community-developed alternatives, an important mechanism for members of the public to meaningfully and constructively engage in the NEPA process in a solutions-oriented fashion.

H. Proposed §1502.22 - Incomplete and Unavailable Information.

CEQ proposes two ill-advised and unsupported changes to this important section. First, it proposes to remove the word “always” from the first statement in the current regulation that reads, “When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such

\textsuperscript{322} 85 Fed. Reg. at1702.
\textsuperscript{323} Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 814 (1999).
information is lacking.” The sole reason given in the preamble for this proposed deletion is that the word “always” is “unnecessarily limiting”. Indeed, the word “always” is supposed to be prescriptive and that is precisely why it should stay in the regulation. As the Court of Appeals for the D.C. Circuit made clear early in its consideration of NEPA’s requirements, “one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown.”

This is no adequate justification proffered in the preamble as to why “always” should be deleted nor is there any indication of what criteria an agency should use to determine in what instances incomplete or unavailable information about reasonably foreseeable significant adverse effects should, per the proposed revision, not be identified. This proposed change runs counter to CEQ’s avowed goal of efficiency by creating uncertainty over when an agency has to make clear that such information is lacking.

The second proposed change to this regulation is to replace the term “exorbitant” with “unreasonable” in the portion of the regulation that excuses an agency from obtaining complete information relevant to reasonably foreseeable significant adverse impacts. In other words, under the current regulation, an agency has to obtain such information if that is possible unless the overall costs of obtaining it are “exorbitant”; the proposed amendment would change the criteria to “unreasonable costs.” We oppose the change in terminology. “Exorbitant” is a term that is more objectively evaluated than “unreasonable”. The preamble cites no actual problems that the term “exorbitant” has caused any agencies.

In both instances, the original language of 40 C.F.R. § 1502.22 should be retained. CEQ also asks for comments on whether the ‘overall costs’ of obtaining incomplete or unavailable information warrants further definition to address whether certain costs are or are not unreasonable.

The preamble cites no problems with implementation of the current language in the regulation. We believe that language should be retained and that additional regulatory language on “overall costs” is not needed.

I. Proposed § 1502.24 - Methodology and scientific accuracy.

CEQ proposes to amend this regulation by adding the astonishing statement that, “Agencies . . . are not required to undertake new scientific and technical research to inform their analyses.”

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324 40 C.F.R. § 1502.22 (bolding added).
NEPA’s legislative history evidences a high degree of interest in scientific and technical research to inform decisionmaking.\textsuperscript{328} And while there was increasing awareness in the late 1960’s of the need for much more scientific research on environmental issues, NEPA was unique:

An important difference between the proposals before the 90\textsuperscript{th} Congress and the efforts and proposals described in the preceding paragraphs is that in pending legislation the knowledge assembled through survey and research would be systematically related to official reporting, appraisal and review. The need for more knowledge has been established without doubt. But of equal and perhaps greater importance at this time is the establishment of a system to insure that existing knowledge and new findings will be organized in a manner suitable for review and decision as matters of public policy.\textsuperscript{329}

Indeed, the first mandate to agencies in NEPA is that “all agencies of the Federal Government shall . . . . utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man’s environment.”\textsuperscript{330}

Judicial decisions reflect the importance of obtaining information prior to making a decision, even if that involves undertaking new scientific research. “NEPA requires each agency to undertake research needed adequately to expose environmental harms.”\textsuperscript{331} For example, when the National Park Service proposed to significantly increase cruise ship traffic in Glacier Bay National Park and Preserve, the EA it prepared to support that decision identified numerous gaps in information about the impacts on marine mammals and other wildlife. There was evidence that there would be environmental effects but uncertainty over the intensity of those effects. However, the agency issued a Finding of No Significant Impact (FONSI). As the Court of Appeals for the 9\textsuperscript{th} Circuit described the situation:

The Park Service proposes to increase the risk of harm to the environment and then perform its study. . . . . This approach has the process exactly backwards. See \textit{Sierra Club}, 843 F.2d at 1995. Before one brings about a potentially significant irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges. A part of the preparation process here could well be to conduct the studies that the Park Service recognizes are needed. . . . .


\textsuperscript{330} 42 U.S.C. § 4332(2)(A).

\textsuperscript{331} \textit{Save Our Ecosystems v. Clark}, 747 F.2d 1240, 1248 (9th Cir. 1984).
The Park Service’s lack of knowledge does not excuse the preparation of an EIS; rather it requires the Park Service to do the necessary work to obtain it.\textsuperscript{332}

Obtaining new science in the context of NEPA can also be extremely useful in developing for future proposed actions. For example, The Northwest Forest Plan requires the Forest Service to survey for rare species, and to protect them with no-harvest buffers prior to implementing ground-disturbing activities such as logging. These surveys are then used in the agency’s effects analysis and the general location, number, and prevalence of the species occurrence is disclosed to the public. In many cases, citizens have collected survey data and provided it to the Forest Service for consideration during the NEPA process. Often, the surveys and related effects analysis results in “new research” that not only limits project effects (because acres are buffered from harvest), but also results in new information about rare species that is relevant to future projects and scientific study more broadly.

The proposed amendment to Section 1502.24 is wrong as a matter of law and contrary to the purpose and policies of NEPA. There is explanation for this proposed regulation in the preamble.\textsuperscript{333} It must be withdrawn.

J. Proposed §§ 1501.4(a), 1508.1(d) - Categorical Exclusions Definition.

CEQ proposes to revise the definition of categorical exclusion (CE) by deleting the explanation that these are categories of actions “which do not individually or cumulatively have a significant effect on the human environment” and adding the word “normally”. It also deletes the sentence in the current definition that states that an agency may decide, in its procedures or otherwise, to prepare environmental assessments to aid its compliance with NEPA even if the actions falls within a CE. All three changes are problematic.

As explained earlier,\textsuperscript{334} cumulative impact analysis is an integral part of NEPA compliance and cannot be ignored or removed. That is just as true in the context of an agency’s promulgation of a CE as it is for an EA or an EIS. For example, the Forest Service was required to take into consideration the cumulative effects of promulgating a categorical exclusion for certain fuel reduction projects on national forests.\textsuperscript{335} The notion that the agency might catch cumulative effects in the context of project level analysis (presumably, as an extraordinary circumstance) was not adequate. The court pointed to specific aspects of the CE that could result in significant cumulative effects and held that “In order to assess significance properly, the Forest Service must perform a programmatic cumulative impacts

\textsuperscript{332} NPCA v. Babbitt, 241 F.3d 722, 733 (9th Cir. 2001); see also Sierra Club v. Norton, 207 F. Supp. 2nd 1310, 1335 (S.D. Ala. 2002) (“NEPA was designed to prevent uninformed action. . . . Defendant’s argument in this case would turn NEPA on its head, making ignorance into a powerful factor in favor of immediate action where the agency lacks sufficient data to conclusively show not only that proposed action would harm an endangered species, but that the harm would prove to be ‘significant.’”).

\textsuperscript{333} See, 85 Fed. Reg. at 1703.

\textsuperscript{334} Supra at Section V. (A).

\textsuperscript{335} Sierra Club v. Bosworth, 510 F.3d 1016 (9th Cir. 1007).
analysis for the Fuels CE.”\textsuperscript{336} The court stated that if “assessing the cumulative impacts of the Fuels CE as a whole is impractical, then use of the categorical exclusion mechanism was improper.”\textsuperscript{337} Cumulative impacts must go back into the definition of a CE.

The addition of the word “normally” to the definition of a CE is also troublesome. The rationale for this change given in the preamble is to take into account the possibility of extraordinary circumstances that may require an agency to prepare an EA or an EIS. But that provision already exists in the current definition\textsuperscript{338} so the need to change the definition and delete the specific reference to extraordinary circumstances only to insert “normally” into it to reference what was deliberately deleted is not well reasoned.\textsuperscript{339} A reader could easily interpret this change to indicate that the standard for a CE has been changed and weakened. The current definition should be retained.

Finally, the preamble gives no reason for the deletion of the statement that agencies can choose to do EAs even if an action might potentially qualify as a CE. We can think of no good reason for this deletion ourselves. The sentence should be retained.

K. \textbf{Proposed § 1501.4(b)(1) - Extraordinary Circumstances.}

We are concerned with the proposed regulatory language and associated preamble language that would authorize an agency to consider whether “mitigating circumstances or other conditions are sufficient to avoid significant effects and therefore categorically exclude the proposed action.” Obviously, we want to see effects on resource conditions mitigated. However, doing so in the context of a categorical exclusion allows an agency to essentially do the type of analysis that is required for an EA without any public notice or involvement. If the proposed action truly will have no effect on a particular resource, there should not be a need for analysis. If it appears that the proposed action may have an impact on a resource, the agency should move to an EA. If it appears that it may have a significant impact, the agency must do an EIS.\textsuperscript{340} This language should be withdrawn.

L. \textbf{Proposed § 1507.3(e)(5) - Borrowing Another Agency’s CE.}

This proposed provision would allow agencies to apply another agency’s categorical exclusion. This is a dangerous erosion of the whole concept of CEs which has

\textsuperscript{336} Id. at 1029.
\textsuperscript{337} Id. at 1028.
\textsuperscript{338} 40 C.F.R. § 1508.4 (“Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”)
\textsuperscript{339} 40 C.F.R. § 1508.4.
always been based on each individual agency’s experience with its normal activities in its normal context and organization and based on its administrative record.  

There is no reasonable legal or policy justification for this provision. CEQ has issued comprehensive, detailed guidance on how to establish or revise a CE, how to apply CEs and how to conduct periodic reviews of CEs. The guidance also addresses an appropriate way to use another agency’s experience with a particular categorical exclusion.

Clearly, given the number of CEs in the executive branch, it is simply not that difficult to go through the regular process of documenting the justification for a CE, consulting with CEQ, going out for public notice and comment and, as appropriate, finalizing the CE. We are already concerned that many CEs rest on insufficient record and are subject to being misused. That concern is widespread. This proposed endorsement of co-mingling CEs throughout the executive branch will exacerbate that concern about misuse and abuse. Furthermore, as we discuss below, this proposal would enable an agency to use a CE without even the minimal public notice provided in situations where agencies use other agencies’ analysis. CEQ should withdraw the regulation and disavow this direction in the preamble.

Additionally, CEQ asks whether there are any other aspects of CEs that CEQ should address in its regulations. Specifically, CEQ invites comment on whether it should establish government-wide CEs in its regulations to address routine administrative activities, for example, internal orders or directives regarding agency operations, procurement of office supplies and travel, and rulemakings to establish administrative processes such as those established under FOIA. Alternatively, CEQ invites comment on whether and how CEQ should revise the definition of major Federal action to exclude these categories from the definition, and if so, suggestions on how it should be addressed.

Since its establishment, CEQ has avoided making determinations about the level of analysis needed for specific categories of proposed actions and we would advise CEQ to maintain that posture unless there is a compelling reason to do otherwise. No such reason has been cited here. In regards to major Federal action, as discussed earlier, we oppose CEQ’s unwarranted interest in reversing decades of law and agency practice to impose a two-step process.

341 We note that CEQ does not propose that each agency be bound by other agency’s categories of actions that require the preparation of EISs.
343 Id. at 9.
345 Infra at Section VI. (H).
M. Proposed §§ 1501.6(a) and 1508.1(l) - Finding of No Significant Impact.

There is a discrepancy in the definition of a Finding of No Significant Impact (FONSI) between proposed § 1501.6(a), where it describes a FONSI as being appropriate when the proposed action is “not likely to have significant effects” and the definition of a FONSI at § 1508.1(l) that correctly explains that a FONSI briefly presents the reason why a proposed action will not have a significant effect. The provision in §1501.6(a) needs to conform to the definition. There is no rationale or justification for changing the phrase “will not” to “not likely”. Since the preamble itself uses the “will not” construct in relationship to the proposed § 1501.6(a) regulatory language, we trust this is a mistake that will be corrected if and when the regulations become final.

N. Proposed §§ 1502.9(c)(4), 1507.3 - Changes to Proposed Action or New Circumstances and Information Deemed Not Significant

A proposed addition to the current provisions for supplementing EISs would, as the preamble notes, codify the existing practice of some federal agencies that prepare a non-NEPA document to determine whether a supplemental NEPA analysis is required. We oppose those agencies’ use of this type of documentation. For example, the Bureau, avoid NEPA review and, in effect, to inappropriately justify a distinct implementation-level “proposal” on the basis of an existing NEPA analysis developed for a separate, typically programmatic level decision. For example, BLM has sought to use DNAs to justify the sale of geographically discrete oil and gas leases on the basis of land use plan-level NEPA analyses. But BLM’s programmatic NEPA analyses—which can cover millions of acres—does not provide the requisite site-specific analysis of impacts or consider alternatives calibrated to geographically specific proposed oil and gas leases, including the option not to issue the oil and gas lease or to condition the lease on site-specific stipulations or mitigation measures. A DNA, which is not a NEPA document, cannot be used to provide for that analysis. It should therefore be no surprise that these DNAs—because of conflicts with NEPA’s statutory framework—have triggered litigation.

We have seen this attempted dodge of analysis before by agencies trying to rely on a programmatic NEPA analysis that simply does not cover a proposed site-specific action. The DNA process is simply putting a new label on it. To the degree that agencies think implementation-level actions should not require further NEPA review, the proper course is not to contrive a new, non-NEPA mechanism, but to correctly utilize the tiering process improve the robustness of programmatic NEPA analyses that address these implementation-level issues in advance or to consider and justify appropriate categorical exclusions.

Similarly, for many years, some agencies, such as the U.S. Army Corps of Engineers, have utilized a Supplemental Information Report (SIR) as a mechanism for evaluating new information related to an action analyzed in an EIS. Except for new information that clearly has no potential for significance relevant to environmental concerns or substantial changes related to the proposed action, this type of analysis should be evaluated through the NEPA process. The analysis could be presented in an EA available for public review or, of course, through a supplemental EIS. Further, an SIR is not an appropriate place to present new analysis of information available at the time the original NEPA documentation was provided. As one court explained:

The Forest Service may use a [supplemental information report] to analyze the significance of information that is ‘truly new”, but may not use a [supplemental information report] for information that it ‘knew or should have known’ at the time it prepared the original [NEPA document]. It is ‘inconsistent with NEPA for an agency to use [a supplemental information report], rather than a supplemental [environmental assessment] or [environmental impact statement], ‘to add information it knew or should have known. Environmental consideration documents must be ‘prepared early enough so that [they] can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.’

Generally, the default mechanism for evaluating new information, especially in the context of a proposed action analyzed in an EIS, should be, at a minimum, an EA with public involvement. Agencies continue to lose cases by relying on the very types of documents that CEQ proposes to authorize. A brief EA with public involvement is the most appropriate and efficient way to assess the significance of new information or changed circumstances.

O. Proposed § 1501.10 - Time Limits

CEQ proposes to set time limits of one year for preparation of an EA and two years for preparation of an EIS. Time is to be measured from the date of a decision to prepare an EA to the publication of a final EA or publication of a Notice of Intent (NOI) for an EIS until publication of a Record of Decision. A senior agency official of the lead agency may approve a longer period based on certain enumerated factors.

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349 See, e.g., Triumvirate LLC v. Bernhardt, 367 F. Supp. 3d 1011 (D. Alaska 2019) (in forgoing an EA, BLM improperly relied on DNA to issue another outfitter’s permit even though the permits would have had similar effects); W. Watersheds Project v. Zinke, 336 F. Supp. 3d 1204, 1212 (D. Idaho 2018) (enjoining oil and gas leasing in sage grouse habitat via DNAs without additional public notice and comment); Friends of Animals v. BLM, 232 F. Supp. 3d 1204, 1212 (D. Idaho 2018) (approving use of DNA where the new gather was part of an ongoing action in the same herd management area); Friends of Animals v. BLM, 2015 WL 555980 (D. Nev. 2015) (reliance on DNA violated NEPA where the new gather was an action of different scope and intensity).
350 85 Fed. Reg. at 1717; proposed § 1501.10.
There are several problems with this proposed regulation. First, the measurement of time for EISs is glaringly wrong. An accurate assessment of how long an EIS takes should begin with the NOI and end with the publication of the final EIS. The time period between publication of a final EIS and a Record of Decision is not driven by NEPA, but rather by a variety of factors that the decision maker may or may not even control. For example, there may be change in leadership and a change in policy direction or direction to delay making certain decisions. A project proponent may ask for a “time out” because of changed circumstances (including changed project economics). National security concerns may dictate a different course of action. The possibilities are many, but they are not driven by NEPA since absent the unusual circumstance of an agency being required to supplement a final EIS, there are no procedural requirements under NEPA between a final EIS and the Record of Decision.

Second, the proposed regulation’s use of the ROD as the end of the two-year period is arbitrary because it will put at particular disadvantage those agencies that provide by regulation a pre-decisional period in which draft decisions may be protested or objected to. Both the Forest Service and the Bureau of Land Management have adopted such procedures as a way to identify areas of disagreement with stakeholders, and to provide the agency an opportunity to modify draft proposals to reduce the potential for future litigation. The purpose of increasing public support and reducing litigation would seem to be one CEQ would support.

BLM regulations mandate that after a final EA or an EIS on a land use plan or amendment is filed, the public has 30 days to file a protest.\(^{351}\) BLM regulations set no deadline for completion of agency review of protests, stating only that “[t]he Director [of BLM] shall promptly render a decision on the protest.”\(^{352}\) BLM guidance states that “[i]t will be the BLM’s goal to resolve all protests within 90 days.”\(^{353}\) Only “after protests are resolved” does BLM issue a ROD.\(^{354}\) Thus, assuming that BLM prepares an EIS on a land use plan revision, agency regulations and guidance anticipate that the pre-decisional administrative protest process will take 120 days, all of which occur prior to the ROD’s issuance.\(^{355}\) This post-analysis process thus could consume roughly one-sixth (or more) of

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\(^{351}\) 43 C.F.R. § 1610.5-2(a)(1).

\(^{352}\) Id. § 1610.5-2(a)(3).


\(^{354}\) Id. at Appendix F, page 20.

\(^{355}\) In practice, BLM can take many months to resolve all objections and issue a ROD. For example, BLM issued its Final EIS and proposed Resource Management Plan for the Uncompahgre Field office in June 2019; eight months later, the agency still has not ruled on the protests or issued a ROD. See BLM, Uncompahgre Field Office Resource Management Plan webpage, available at https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=86003 (last viewed Mar. 8, 2020).
the entire two-year period the draft rule provides for an agency to complete the EIS from notice of intent to ROD.

The Forest Service provides for pre-decisional challenges to agency decisions both at the plan and project implementation level. Forest Service regulations permit interested parties to file written objection to a new plan, plan amendment, or plan revision within 60 days of the proposed decision, and following completion of the FEIS.356 The Forest Service “must issue a written response … within 90 days,” but “[t]he reviewing officer has the discretion to extend the time when it is determined to be necessary to provide adequate response to objections or to participate in discussions with the parties.”357 Thus, the time period between completion of a Forest Plan FEIS and a ROD can be 150 days or longer, or more than 20% of the two-year period provided in the draft rule.

For projects implementing a forest plan, Forest Service regulations require the agency to provide the public 30 days after the Final EIS to file a pre-decisional objection if the proposal is an authorized hazardous fuel reduction project, and 45 days for all other projects.358 The Forest Service has the following 45 days to issue a written decision, although the regulations permit “[t]he reviewing officer … to extend the time for up to [an additional] 30 days when he or she determines that additional time is necessary to provide adequate response to objections or to participate in resolution discussions with the objector(s).”359 The Forest Service regulations do not require the Forest Service to issue the ROD by a certain deadline after the objection decision is issued. All told, the Forest Service may take 120 days or longer after the FEIS is complete to issue the ROD.

By placing a two-year cap on the period between the Notice of Intent and the ROD, the proposed rule may thus have the perverse effect of compressing the time to prepare NEPA analysis for numerous BLM and Forest Service decisions when compared to other agencies who do not provide a pre-decisional protest or objection period. We request that CEQ explain why it takes this position, and that CEQ identify all agencies that have a pre-decisional protest, objection, or appeal period so that the public and CEQ can understand the disparate (and so far undisclosed) impact of this proposed rule on agencies with such processes.

A third problem is agency capacity. Today, many agencies lack sufficient capacity to competently execute their NEPA responsibilities, whether preparing their own analyses and conducting their own public involvement or overseeing contractors. In that context, forcing a “one size fits all” timeframe will likely result in longer time periods before compliance is actually completed. Rushed NEPA documents will result in badly flawed results, increased litigation, decreased agency credibility with the public and distorted, poorly reasoned decisionmaking.

356 Id. § 219.56(a).
357 Id. § 219.56(g).
358 Id. §§ 218.7(c)(2)(iv) & 218.26(a).
359 Id. § 218.26(b).
The exception to the proposed rule allowing for an extended period to be approved by a senior agency official does not fix the problem. Understanding the pressure to produce faster and faster, agency staff will be reluctant to even ask for an extension. Further, the criteria for a senior agency official to consider regarding time period considerations\textsuperscript{360} have been revised to delete the time required for obtaining information.\textsuperscript{361}

This proposed regulation should be withdrawn.

P. Proposed §§ 1501.5(e), 1501.7, 1502.7 – Page Limits

While recognizing that the length of environmental review documents are influenced by, “the complexity and significance of the proposed action and environmental effects the EIS considers,”\textsuperscript{362} CEQ proposes to afford agencies less flexibility to navigate these factors by setting more rigid “presumptive” page limits and adding more bureaucracy by adding a requirement for senior agency officials to approve lengthier documents in writing. The additional requirement of written approval only adds time to the environmental review process and does not serve CEQ’s stated purpose of advancing regulatory changes that will reduce delay. Additionally, if implemented as currently proposed, it appears the preparers of an EIS may seek the additional pages late in the drafting process, once it is realized it may not be possible to comply with the set limits. The time to consider and set page limits reflecting the complexity of review is early in the process, which is why the current regulations wisely encourage agencies to set page limits during the scoping process in § 1501.7.

The proposed regulation also fails to acknowledge the direction at both current and proposed 40 C.F.R. § 1502.25 regarding integration of an EIS with other information required by other environmental review requirements.

CEQ should withdraw the proposed changes to page limits. To reduce the length of environmental review documents, CEQ should retain the current flexibility of the regulations and focus on ensuring agencies have the resources necessary to produce timely reviews.

V. CEQ PROPOSES A NUMBER OF CHANGES INTENDED TO ELEVATE THE ROLE OF A PRIVATE SECTOR APPLICANT WHILE DIMINISHING THE ROLE OF THE PUBLIC.

A. Proposed § 1506.5(c) – Agency Responsibility for Environmental Documents.

This now misnamed section would reverse CEQ’s prohibition against private sector applicants preparing EISs for their own projects. It would also delete the current conflict of interest provisions prohibiting consultants who have a financial interest or other interest

\textsuperscript{360} 40 C.F.R. § 1501.8(b).
\textsuperscript{361} 85 Fed. Reg. at 1717; also see, discussion proposed § 1502.24
\textsuperscript{362} 85 Fed. Reg. at 1700.
in the outcome of the proposed action to prepare EISs for their own projects. The proposal attempts to assuage concerns about the bias that would be introduced by requiring that the agency provide guidance, participate in its preparation, independently evaluate the EIS and take responsibility for its scope and content.

CEQ’s preamble states that, “These changes are intended to improve communication between proponents of a proposal for agency action and the officials tasked with evaluating the effects of the action and reasonable alternatives, to improve the quality of NEPA documents and efficiency of the NEPA process.”

In the immortal words of Ludovico Ariosto, “This dog won’t hunt. This horse won’t jump.” CEQ’s solicitude for contractor-agency communication is misplaced. The current regulations already direct agencies to designate policies or staff to advise potential applicants of studies or other information foreseeably required for later Federal action, to involve applicants to the extent practicable in preparing environmental assessments, set time limits at the request of an applicant, assist the applicant by outlining the types of information required, and specifically states that nothing is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency. In short, it is hard to identify any barriers to communication with an applicant. Importantly, CEQ neither identifies any such barriers nor explains why this change is needed to improve communications.

This change would negate the purpose of EISs by allowing a biased party to conduct the analysis. CEQ clearly understands the risks of conflict of interest because it previously published guidance interpreting Section 1506.5(c) and the conflict of interest provision. That guidance addressed the importance of this provision:

Some persons believe these restrictions are motivated by undue and unwarranted suspicion about the bias of contractors. The Council is aware that many contractors would conduct their studies in a professional and unbiased manner. However, the Council has the responsibility of overseeing the administration of the National Environmental Policy Act in a manner most consistent with the statute’s directives and the public’s expectations of sound government. The legal responsibilities for carrying out NEPA’s objectives rest solely with federal agencies. Thus, if any delegation of work is to occur, it should be arranged to be

363 Id. at 1705.
364 Ariosto, Ludovico, Orlando Furioso, Canto VII (1532). See also, Jennings, Waylon, “That Dog Won’t Hunt”, © Sony/ATV Music Publishing LLC (1986) (“You think you can say some words, take away the hurt, . . . But when it ain’t working out we got a saying down South, Baby that dog won’t hunt”).
365 40 C.F.R. § 1501.2(d)(1).
366 Id. § 1501.4(b).
367 Id. § 1501.8(a).
368 Id. § 1506.5(a).
369 Id. § 1506.5(c).
performed in as objective a manner as possible. Preparation of environmental impact statements by parties who would suffer financial losses if, for example, a "no action" alternative were selected, could easily lead to a public perception of bias. It is important to maintain the public’s faith in the integrity of the EIS process, and avoidance of conflicts in the preparation of environmental impact statements is an important means of achieving this goal.\footnote{48 Fed. Reg. 34,263, 34,266 (July 28, 1983).}

In that guidance, CEQ again stressed that there was no barrier to applicants communicating with agencies by providing them with information, nor were consulting firms barred from competing because they might have a future interest in the action.\footnote{Id.} Thus, CEQ sought to walk a careful line between balancing the public interest and acknowledging the role of outside consultants to supplement the agency’s capacity, or lack thereof to prepare EISs.

CEQ now proposes to erase that line entirely. It fails to address the complete elimination of the conflicts of interest provisions in the regulations other than a vague reference to commenters urging that CEQ allow “greater flexibility for the project sponsor to prepare NEPA documents.” But CEQ never explains why it proposed to reverse its position on conflict of interest and why it thinks doing so is in the public interest.

In \textit{Davis v. Mineta},\footnote{302 F.3d 1104 (10th Cir. 2002).} the Court of Appeals identified precisely the type of harm that can occur when an applicant prepares a NEPA document. In that case, the applicant for several connected highway projects hired a consultant to distribute an EA. The contract with the consultant also required that a FONSI be signed and distributed by a date certain. The Court unsurprisingly found that the consultant had an “inherent, contractually-created bias in favor of issuance of a FONSI rather than preparation of an EIS.”\footnote{Id. at 1112.}

It is true that federal agencies themselves are proponents of actions for which they prepare EISs. State and local governments may also act as both proponent and as a joint preparer under CEQ’s current regulations.\footnote{40 C.F.R. § 1506.2.} But there is an important difference. The responsibility of government agencies is to act in the public’s interest. The responsibility of companies is to act in their shareholders’ interest. Both segments of society have legitimate – but quite different roles to play and NEPA law has recognized that difference.

CEQ’s proposes to eliminate the conflict of interest provision and in its place institutionally codifies an inherent conflict of interest. This is counter to widely accepted ethical standards that restrict people with a conflict of interest from influencing important government decisions. That is why senior level federal government employees must file public financial disclosure statements and why conflicts of interests are broadly interpreted and regulated by the Office of Government Ethics. Indeed, a federal employee who fails to recuse him or herself from a particular matter if it would have a direct and predictable

\begin{itemize}
\item \footnote{48 Fed. Reg. 34,263, 34,266 (July 28, 1983).}
\item \footnote{Id.}
\item \footnote{302 F.3d 1104 (10th Cir. 2002).}
\item \footnote{Id. at 1112.}
\item \footnote{40 C.F.R. § 1506.2.}
\end{itemize}
effect on that employee’s own financial interests or certain other financial interests that are treated as the employee’s own are subject to potential criminal prosecution.\textsuperscript{375} That is why there are rules about judges recusing themselves from cases in which they have an interest\textsuperscript{376} and why the American Bar Association’s Model Rules of Professional Conduct, adopted by a number of jurisdictions, have detailed rules and prohibitions related to conflict of interest.\textsuperscript{377} It is why responsible newspapers identify any conflict of interest inherent in their reporting, such as interests of their ownership.\textsuperscript{378} There are also important considerations regarding conflicts of interest in the medical field, especially pharmaceutical industry, the financial industry and many other spheres of modern life. People generally understand that no matter how good one’s intentions are, self-interest is a powerful motivation and that therefore, conflict of interest rules have an important public policy purpose. It is difficult to think of any context in which conflicts of interest provisions have been eliminated once imposed. CEQ should not aim at setting a precedent in this regard.

CEQ’s proposal, if finalized, would undermine the integrity of the NEPA process. It should be withdrawn.

B. Proposed § 1502.13 - Purpose and Need

CEQ proposes to reword the brief definition of purpose and need to highlight the needs of the applicant and diminish the role of alternatives. Specifically, the definition would be altered to direct an agency to base the purpose and need “on the goals of the applicant and the agency’s authority.” It also changes the context for purpose and need from alternatives to the proposed action.\textsuperscript{379} Neither change is acceptable.

The purpose and need of a proposed action is fundamentally related to the public purpose underlying a federal agency’s authority to act on a particular proposal. Every time a federal agency considers whether to grant permit or license, approve funding or take some other federal action at the request of an applicant, it does so because Congress decided there was a national interest in a federal agency making a decision in the public’s interest. The public interest is what the agency needs to be considering when conducting a NEPA analysis, not the goals of the applicant.\textsuperscript{380}

\textsuperscript{375} 18 U.S.C. § 208.
\textsuperscript{376} See 28 U.S.C. § 455 for recusal rules for Supreme Court Justices, federal judges, and federal magistrate judges.
\textsuperscript{377} American Bar Ass’n., Model Rules of Professional Conduct, §§ 1.7 – 1.12.
\textsuperscript{379} 85 Fed. Reg. at 1720.
\textsuperscript{380} Obviously, the agency has to communicate with the applicant about the project, and as we have discussed immediately above, there is no barrier to doing that. The agency needs to do due diligence in understanding the applicant’s purposes for the process to make sense.
Obviously, the agency has to communicate with the applicant about the project, and as we have discussed immediately above, there is no barrier to doing that. The agency needs to do due diligence in understanding the applicant’s purposes for the process to make sense.

In proposing this change, the preamble cites a 2003 letter sent by Chairman James Connaughton to Secretary of Transportation Norman Mineta discussing CEQ’s interpretation of purpose and need. The specific quote utilized from that letter is that, “Thoughtful resolution of the purpose and need statement at the beginning of the process will contribute to a rational environmental review process and save considerable delay and frustration later in the decision[-]making process.” We agree, especially given that the purpose and need statement frames the alternatives that an agency evaluates. But what the letter does not do is support the notion of putting an applicant’s needs up front in the purpose and need statement. Indeed, the entire letter is in the context of transportation projects where local and state governments have specific statutory roles in the planning process. It does not address purpose and need in the context of an applicant from the private sector. But even in the transportation context, the Connaughton letter cautions that agencies must not “put forward a purpose and need statement that is so narrow as to ‘define competing “reasonable alternatives” out of consideration(and even out of existence),’” Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664 (7th Cir. 1997); [see also,] Alaska Wilderness Recreation & Tourism Ass’n v. Morrison, 67 F.3d 723 (9th Cir. 1995).

Several federal court decisions have addressed the appropriate way to frame the purpose and need when an agency is considering an application for a federal permit, approval or benefit of some sort. For example, in Simmons v. U.S. Army Corps of Engineers, the Corps argued that they were restricted to analyzing the particular alternative that the applicant proposed. The Court disagreed and explained that:

This is a losing position in the Seventh Circuit. . . . The general goal of Marion’s application is to supply water to Marion and the Water District –not to build (or find) a single reservoir to supply that water. . . . An agency cannot restrict its analysis to those ‘alternative means by which a particular applicant can reach his goals.’ [cites omitted] This is precisely what the Corps did in this case. The Corps has ‘the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.’” [cite omitted] And that is exactly what the Corps has not shown in its wholesale acceptance of Marion’s definition of purpose.

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381 Id. at 1701.
383 Id.
384 120 F.3d 664 (7th Cir. 1997).
385 Id. at 669 (internal citations omitted).
In *National Parks & Conservation Ass’n v. Bureau of Land Management*, the proposed action was construction of a landfill near Joshua Tree National Park. A land exchange with the Bureau of Land Management (“BLM”) was part of the applicant’s plan. The purpose and need statement in the EIS included three goals of the proponent and one goal of BLM. BLM did not dispute “that the majority of these purposes and needs respond to Kaiser’s goals, not those of the BLM.” While the court acknowledged that agencies had to consider the goals of a private applicant, it pointed out that it “is a far cry from mandating that those private interests define the scope of the proposed project.” The Court held that the purpose and need statements unlawfully narrowed BLM’s examination of other alternatives to meet Kaiser’s objectives and thus eliminated from analysis reasonable alternatives that would have been responsive to BLM’s own purpose and need. “The BLM adopted Kaiser’s interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange.”

These decisions make clear that an agency should not confine the purpose and need to an applicant’s goals. Rather, an agency should frame the purpose and need to be responsive to the public purpose as well. Thus, the proposed revision of the purpose and need definition should not be finalized because it unduly elevates the goals of an applicant over needs of the public. The current definition should be retained.

**C. Proposed § 1508.1(z) - Definition of “Reasonable Alternatives”**

CEQ proposes to add a definition of “reasonable alternatives” to the regulations. The proposed definition would, among other things, state that reasonable alternatives “meet the purpose and need for the proposed action, and, where applicable meet the goals of the applicant.”

Similar to our position on the insertion of the applicant’s goals into the definition of purpose and need, we oppose including an applicant’s goals as an intrinsic criterion for the definition of “reasonable alternatives.” CEQ articulated the correct position in its “Forty Most Asked Questions”, published shortly after promulgation of the current regulations. In that guidance, in response to the question of whether an agency had the responsibility for analyzing alternatives outside of the capability or the applicant, CEQ stated:

Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is “reasonable” rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic

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386 606 F.3d 1058 (9th Cir. 2010).
387 Id. at 1070.
388 Id. at 1072.
389 Id.; see also, Backcountry Against Dumps v. Chu, 215 F. Supp. 3d 966, 977–80 (S.D. Cal. 2015) (finding the purpose and need statement for a permit to construct an electric transmission line was unlawful because it limited consideration of alternatives to the project).
standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.  

A number of federal court decisions have affirmed this approach. For example, in *Van Abbema v Fornell*, the Court of Appeals for the Seventh Circuit focused on the Corps of Engineers’ evaluation of alternatives prior to its decision on a permit application for coal loading facility proposed for construction on the Mississippi River. The Court found the Corps’ evaluation of alternatives to be inadequate and stated that:

> At the outset we note that the evaluation of “alternatives” mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals. In the current proposal the general goal is to deliver coal from mine to utility. . . . In some discussion of alternatives to the proposal, the Corps has suggested that an alternative may not be feasible at least partly because the applicant does not own the necessary land or perhaps cannot gain access to it. . . . The fact that this applicant does not now own an alternative site is only marginally relevant (if it is relevant at all) to whether feasible alternatives exist to the applicant’s proposal. This is particularly true because an existing facility in Quincy, Illinois is presently transloading the mine's coal from truck to barge.

The Court of Appeals for the First Circuit issued a similar holding in *Dubois v. U.S. Department of Agriculture*. In that case, instead of “rigorously exploring” various alternatives raised by members of the public, the Forest Service evaluated only alternatives that provided an advantage to that particular applicant. The court found that the agency’s evaluation was not in accordance with the law.

Agencies must independently assess whether an alternative is a reasonable alternative to meeting the purpose and need and not rely solely on the assessment of the applicant. For example, in *Southern Utah Wilderness Alliance v. Norton*, the Bureau of Land Management’s “unquestioning acceptance” of the project proponents for oil and gas

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391 807 F.2d 633 (7th Cir. 1986).
392 807 F.2d 633, 638–39 (7th Cir. 1986) (emphasis in original) (internal citations omitted).
393 102 F.3d 1273 (1st Cir. 1996).
394 *Id.* at 1288–90. To the extent CEQ’s 1983 guidance on alternatives suggested that the First Circuit’s decision in the earlier case of *Roosevelt Campobello International Park Commission v. U.S. EPA*, 684 F.2d 1041 (1st Cir. 1982), is contrary to the decisions in *Dubois* or *Van Abbema*, we must point out that CEQ’s analysis failed to note a critical part of court’s reasoning. Plaintiffs in that case did not identify and suggest to the lead agency any alternatives it thought should be studied in the EIS during the administrative process. The Court concluded that, “petitioners’ argument that EPA erred by restricting its consideration to alternative sites in Maine must fail, because they did not suggest any reasonable alternatives to EPA during the comment period.” *Id.* at 1047.
leasing inappropriately limited the agency’s alternative analysis.\textsuperscript{396} And in the context of restoration projects funded by British Petroleum (BP) in the wake of the Deepwater Horizon disaster, the responsible federal agencies erred by limiting the alternatives to only those alternatives that BP and the Trustees thought were reasonable.\textsuperscript{397}

Requiring alternatives to meet the purpose and need of an applicant also overlooks the importance of alternatives developed outside of the agency but which must be considered by the agency. For example, in 2008, the Bureau of Land Management leased the entire Roan Plateau for oil and gas development. That decision was challenged by a coalition of sportsmen and conservation groups. In 2012, a federal court ruled that BLM had violated NEPA by failing to consider a reasonable alternative of protecting the top of the plateau while allowing oil and gas development on less sensitive areas around the base of the plateau.\textsuperscript{398} Following that ruling, the parties to the lawsuit reached a settlement that led BLM to prepare a supplemental NEPA analysis considering an alternative protecting almost the entire top of the plateau, while allowing drilling around the base. In 2016, the agency selected that alternative in a new resource management plan for the Roan. Under that plan, the wildlife, pristine lands and other resources atop the plateau are protected, while oil and gas development is currently proceeding on less sensitive lands around the base.

The proposed definition of reasonable alternatives is fatally flawed and must be withdrawn.

D. Proposed § 1501.9(a) – Scoping

CEQ proposes to reverse its long-standing position that the publication of a NOI triggers the scoping process. Our concern with the proposed section is the sentence that reads, “Scoping may include appropriate pre-application procedures or work conducted prior to publication of the notice of intent.”

This sentence is confusing in part because the term “pre-application procedures” generally refers to what an applicant needs to do to submit a complete application to a federal agency. Some agencies have very detailed pre-application procedures that includes distribution of information to other agencies and to the public,\textsuperscript{399} but other have a much

\textsuperscript{396}Id. at 52–53.

\textsuperscript{397} See Gulf Restoration Network v. Jewell, 161 F. Supp. 3d 1119, 1130 (S.D. Ala. 2016) (“The Trustees point to the PEIS’s ‘purpose and need’ statement—to accelerate meaningful restoration—and argue that they have fulfilled their duty to consider a reasonable range of restoration alternatives. Since there could be no early restoration project absent an agreement with (and funding from) BP, no other project could achieve the stated goal. . . . This is the paradigm of a self-fulfilling prophecy. While ‘no minimum number of alternatives’ must be considered, [] agencies must present a reasoned alternatives analysis.” (internal citation omitted)).


\textsuperscript{399} See, e.g., 18 U.S.C. § 5.6 (detailing the Federal Energy Regulatory Commission’s pre-application procedures).
more informal process that is basically conducted between the agency and the applicant. However, either a formal or informal pre-application process does not serve the same purposes as scoping.

CEQ has previously stated that scoping can be a useful tool prior to publication of an NOI, “so long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.” Further, CEQ stated that “scoping that is done before the assessment, and in aid of its preparation, cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.”

CEQ should not allow agencies to count communications between it and an applicant to be considered scoping unless the public has notice and opportunity to also participate in scoping at the same stage.

E. Proposed §§ 1502.16, 1504.2 - Environmental Consequences and Criteria for Referral to CEQ

CEQ proposes to add to the environmental consequences that must be evaluated in an EIS, “where applicable, economic and technical considerations, including the economic benefits of the proposed action” as a required part of the discussion of environmental consequences in an EIS. This is confusing, redundant and in part, outside of the scope of NEPA. Economic effects interrelated with environmental effects are currently included in the definition of effects and would remain in the definition in the proposed revision of that regulation. Technical considerations are not really “effects”, but would normally be part of an agency’s assessment as to whether an alternative was a reasonable alternative.

The proposed additions of economic and technical considerations as a required part of effects analysis in an EIS are troubling and misguided. The preamble says that this section is being proposed “[t]o align with the statute.” Presumably, the reference is to Section 102(2)(B) of NEPA which directs agencies to:

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations...
CEQ appears to misunderstand the meaning of this provision. The Senate report accompanying NEPA explains its purpose:

In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them in comparison with economic and technical factors. As a result, unless the results of planning are radically revised at the policy level and this often means the Congress-environmental enhancement opportunities may be forgone and unnecessary degradation incurred. A vital requisite of environmental management is the development of adequate methodology for evaluating the full environmental impacts and the full costs of Federal actions.\(^{405}\)

In other words, this provision was included in NEPA to try to even out the playing field by directing agencies to develop “methods and procedures, in consultation with CEQ,” to insure that environmental values and impacts were given consideration along with (not as part of) economic and technical considerations. Congress was not worried that economic and technical considerations weren’t being considered; it was concerned that environmental impacts were not being considered. To the extent that economic factors are referenced, the Senate report refers to the “full costs” of federal actions. This could appropriately include analysis of the costs of environmental attributes such as natural barriers to flooding that could be adversely affected by federal actions. CEQ’s proposed addition turns Congress’ intent on its head.\(^{406}\)

The federal courts have correctly understood for many years that purely economic interests do not fall within NEPA’s zone of interest. Because NEPA claims are brought under the APA, plaintiffs must show that they are “adversely affected or aggrieved by agency action within the meaning of a relevant statute”.\(^{407}\) Courts “have long described the zone of interests that NEPA protects as being environmental.”\(^{408}\) In the words of the D.C. Circuit Court of Appeals, “NEPA is meant to supplement federal agencies’ other nonenvironmental objectives.”\(^{409}\)

For the same reasons, CEQ should delete proposed § 1504.2(g), which would add economic and technical considerations as a criteria for agencies to weigh in deliberating on whether to refer a proposed action to CEQ.

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\(^{406}\) It is also dismaying to see that under this proposed provision, the economic benefit need only be assessed for the proposed action, typically the preferred alternative and/or the applicant’s proposal. For other types of impacts in Section 1502.16 (environmental consequences), analysis is to be undertaken for the proposed action and reasonable alternatives. This difference clearly reinforces the notion that this proposed revision is intended to be for the benefit of private proponents.
\(^{408}\) Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005) (citations omitted).
CEQ should delete these proposed additions from any final rulemaking.

F. **Proposed § 1506.6(c) - Public Involvement – 15 Days**

CEQ says it is proposing to update the public involvement section to give agencies “greater flexibility to design and customize public involvement to meet the specific circumstances of their proposed actions.” 410 We can think of no circumstances which would require holding a public hearing on an EIS immediately after the publication of an EIS, nor does the preamble or proposed regulation identify any such circumstances. 411 We are left without any rational explanation, then, of why the proposed regulation deletes the current requirement for an agency to make an EIS available to the public for at least 15 days prior to such a hearing. This is outrageously unfair. The EIS needs to be released in sufficient time before the hearing so that the public can properly prepare. The current requirement at Section 1506.6(c)(2) should be retained.

G. **Proposed § 1506.6(f) - Public Involvement - FOIA Exemption**

CEQ proposes to delete the provision in the current regulations that makes agency comments on EISs available to the public pursuant to the Freedom of Information Act (FOIA) without regard to the exclusion for interagency memoranda. 412 The preamble explains this deletion by stating that FOIA has been amended numerous times since NEPA was enacted. That is a true statement but it fails to explain the rationale for this deletion. The only amendment to the provision for exclusion for interagency memoranda caps the time period in which the exclusion can be claimed to twenty-five years. Twenty-five years is obviously not a relevant timeframe for NEPA purposes and that time limit has no rational connection to the deletion that CEQ proposes. 413 This proposed deletion should be withdrawn.

H. **Proposed § 1503.4 – Response to Comments**

CEQ’s current regulations state that agencies “shall assess and consider comments both individually and collectively.” 414 The proposed revision “clarifies” that agencies “may respond individually and collectively.” To be clear, this proposed revision is not a clarification; it is a rollback of agency’s responsibility to address each substantive comment (or summaries thereof, if the response has been exceptionally voluminous). Does this mean that any response to comments whatsoever is optional? Does it mean that an agency can

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410 85 Fed. Reg. at 1,705; see also 40 C.F.R. § 1506.6(f).
411 Emergency situations involving proposed actions that would normally require an agency to prepare an EIS are, of course, already covered under current 40 C.F.R. § 1506.11 or proposed § 1506.12.
412 40 C.F.R. § 1506.6(f).
413 5 U.S.C. § 552(b)(5) (“[I]nter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested[.]”).
414 40 C.F.R. §1503.4(a).
choose to summarize their responses to comments collectively even if there were only 65 comments? CEQ needs to explain rationale for changing “shall” to “may” and for removing the responsibility to assess comments both individually and collectively.

Additionally, there is no explanation as to why CEQ is proposing to remove the “detailed language”, from paragraph 5(a), governing an agency’s response when it believes comments do not require an agency response. The current language requiring an agency to cite sources, authorities, or reasons which support the agencies position that no response is warranted and setting out what might change an agency’s thinking is intended gives the public some level of assurance that all comments are being considered.

Neither of these changes should be adopted and the current regulation regarding response to comments should be retained.

I. Proposed § 1506.3 – Adoption

CEQ proposes to amend the section on one agency adopting another agency’s EIS to allow adoption of both EAs and CEIs. But it fails to provide the safeguard that is built into the adoption process for EISs – public notification – for either EAs or CEIs and fails to explain that omission. We want to emphasize how extraordinarily disturbing this is from the public’s perspective.

For EAs, the proposed regulation states at § 1506.3(d) that notice will be given “consistent with § 1501.6.” But proposed §1501.6 deals solely with FONSIIs and FONSIIs are not a type of document subject to adoption. Any such adoption provision should specifically state that EAs can only be adopted after appropriate public involvement is afforded in compliance with §1506.6, at a minimum.

As discussed earlier, we strongly oppose the proposal to allow one agency to use another agency’s categorical exclusion. The provision at § 1506.3(f) dramatically highlights our concern. This provision would transform the adoption process – up until now, a relatively transparent one – into a process shielded from any outside scrutiny. This process is much worse than the current categorical exclusion process, where at least the public can reference an agency’s approved NEPA procedures to determine what type of actions are likely to be categorically excluded. This proposed adoption provision, however, leaves the public totally in the dark, without any sense of which of the some 2,000 categorical exclusions that exist might be utilized by an agency.

We strongly object to categorical exclusion “adoption” and urge that it be withdrawn entirely.

J. Proposed §§ 1504.3(e), 1504.3(f) - Procedures for Referral and Response.

416 Supra at Section V. (L).
The proposed revision to the referral procedure drops the provisions that currently provides for an opportunity for the public to submit written comments on the matter under referral, as well as deleting the specific option of “holding public meetings or hearings.” No rationale is offered for these changes in the preamble other than a vague, general allusion to simplification and efficiency.

Matters referred to CEQ are among the most highly visible and potentially significant federal actions. CEQ has always entertained outside comments under this regulation and depending on the nature of the referral, held public meetings or hearings, conducted site visits and/or provided for a written public comment period. For example, during the referral process for the proposed Manteo (Shallowbag) Bay Project located in Dare County, North Carolina (more commonly referred to as the Oregon Inlet matter), CEQ sought public comments on the referral and received extensive comments from the public, their elected representatives, and interested state agencies. CEQ also held a public meeting in Manteo, North Carolina.418

In other words, while retaining flexibility CEQ has customarily conducted the referral process in a manner consistent with the basic NEPA principles of public involvement and transparency. It is very disturbing and consistent with the current CEQ’s disdain for the public, that CEQ is proposing to remove all provisions for public involvement are being removed. CEQ should retain the current provisions for public involvement.

VI. THE PROPOSALS TO LIMIT OR ELIMINATE JUDICIAL REVIEW ARE OUTSIDE OF THE SCOPE OF CEQ’S AUTHORITY.

A. Proposals to Limit or Eliminate Judicial Review

CEQ proposes multiple regulatory changes that are clearly intended to limit or eliminate judicial review under the APA’s judicial review provisions, 5 U.S.C. § 701–706. For example, the proposed regulations attempt to: establish burdensome commenting requirements (§ 1503.3); purport to define “final agency action” for purposes of judicial review (§ 1500.3(c)); purport to interpret the judicially-created exhaustion doctrine (§ 1503.3(b)); purport to instruct federal courts on what causes of action exist and what remedies are available (§1500.3(d)); and direct agencies to self-certify compliance with the regulations with the notion that said certification would act as a shield from courts’ traditional “hard look” at agency compliance by creating a “conclusive presumption” of compliance (§ 1502.18). CEQ also invites agencies to structure their decision making

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processes in a manner that would allow for a stay pending judicial review, possibly contingent on a bond and security requirements or other conditions (§1500.3(c)).

CEQ lacks statutory authority to interpret the APA through its NEPA regulations in a manner that would bind other federal agencies or that would warrant judicial deference, let alone limit by regulation judicial review of NEPA challenges. It is black letter law that courts do not defer to regulations construing statutes that the agency does not administer. Where courts have afforded deference to CEQ regulations, they have done so solely within the confines of interpreting NEPA’s requirements. Nothing in NEPA or the APA bestow upon CEQ the authority to interpret the APA in the NEPA regulations to be followed by the entire executive branch. Since no single agency oversees administration of the APA, the courts do not defer to agencies’ interpretation of the statute. As the Supreme Court said in United States v. Florida East Coast Railroad Co.:

[The Administrative Procedure Act] is not legislation that the Interstate Commerce Commission, or any other single agency, has primary responsibility for administering. An agency interpretation involving, at least in part, the provisions of that Act does not carry the weight, in ascertaining the intent of Congress, that an interpretation by an agency “charged with the responsibility” of administering a particular statute does.419

See also Adams Fruit Co. v. Barrett420 (“A precondition to deference under Chevron is a congressional delegation of administrative authority.”); Envirocare of Utah, Inc. v. Nuclear Regulatory Comm’n421 (“[W]hen it comes to statutes administered by several different agencies—statutes, that is, like the APA []—courts do not defer to any one agency’s particular interpretation.”).

This principle is at its strongest when applied to Chapter 7 of the APA. The APA’s judicial review provisions are administered solely by the courts. Congress did not delegate to CEQ or any other agency authority to speak with the force of law in administering and interpreting this chapter. Because any final regulation purporting to interpret the APA’s provisions as applied to NEPA challenges does not fall within CEQ’s delegated interpretive authority to resolve ambiguities and fill gaps in NEPA, it would warrant no deference whatsoever.422

The proposed regulations are replete with instances where CEQ oversteps its bounds and intrudes on the authority of the judiciary to administer, interpret, and apply the APA’s judicial review provisions. Proposed § 1500.3(c) states CEQ’s “intention” that

419 410 U.S. 224, 252 n.6 (1973) (citations omitted).
420 494 U.S. 638, 649 (1990) (citing Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988)).
421 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (citation omitted).
422 See Crandon v. United States (Chevron deference inappropriate where “[t]he law in question . . . is not administered by any agency but by the courts”); Sorenson Communications Inc. v. FCC (“To accord deference would be to run afoul of congressional intent [in enacting the APA] From the outset, we note an agency has no interpretive authority over the APA. . .we cannot find that an exception applies simply because the agency says we should.”).
judicial review “not occur before an agency has issued the [ROD] or taken other final agency action.” The federal judiciary, however, has developed an extensive body of caselaw on what constitutes final, reviewable agency action under 5 U.S.C. § 704.423 A reviewing court will not be bound by CEQ’s regulation in determining whether the action at issue in a particular NEPA challenge is final and reviewable. Federal agencies cannot limit the subject matter jurisdiction of federal courts under the APA by regulation.424

Similarly, CEQ’s language in this subsection regarding agencies’ authorities to structure their decision making to incorporate administrative procedures for private parties to seek stays, including procedures establishing bond or other security requirements, encroaches on a well-developed body of caselaw interpreting and applying the language of 5 U.S.C. § 704 and § 705. CEQ’s opinion as to the propriety of such rulemaking will neither expands federal agencies’ authorities to promulgate rules structuring their NEPA decision making nor meaningfully inform a court determining whether a party’s compliance (or lack thereof) with such rules has affected the finality of an agency decision. Likewise, CEQ’s “intention” that “minor, non-substantive errors that have no effect on agency decision making shall be considered harmless,” proposed § 1500.3(d), is superfluous to the harmless error doctrine that the courts have developed under 5 U.S.C. § 706(2). To the extent CEQ seeks to expand this doctrine, it is without authority to do so.

Just as CEQ lacks delegated interpretive authority for the APA, so too does it lack authority to interpret the body of statutory and common law that establishes the judiciary’s powers and limits thereto and enshrine this interpretation in the NEPA regulations. CEQ may not instruct a reviewing court sitting in equity as to what it may or may not presume when determining whether a NEPA violation is a basis for irreparable harm or injunctive relief under applicable judicial precedents, although CEQ purports to do so in proposed § 1500.1(d). Nor may CEQ impose binding regulatory exhaustion requirements that originated in judicially-created and prudential doctrines subject to exceptions to restrict judicial review, as it attempts to do in proposed § 1500.3(b)(3) (“Comments or objections not submitted shall be deemed exhausted and forfeited.”). Finally, CEQ cannot create a “conclusive presumption” that restricts a reviewing court’s discretion to determine whether an agency “has considered the information in the submitted alternatives, information, and analyses section submitted by public commenters,” as stated in proposed § 1502.18, merely because the agency decision maker has certified in the ROD that she has done so. See also proposed § 1500.3(b)(4) (certification requirement). These draft regulatory changes inappropriately encroach on the judiciary’s constitutional functions to interpret and apply the law, including both statutory and common law.

Any federal agency relying on CEQ’s regulations purporting to interpret the APA or the federal judiciary’s powers and constraints as applied to NEPA challenges to defend its actions or support its arguments does so at its peril. That agency will be unable to take advantage of the pass-through deference courts otherwise accord to CEQ’s NEPA regulations (where valid). CEQ’s attempts to stick its oar into what are plainly—and exclusively—judicial waters will only lead to potential confusion within agencies,

424 See Munsell v. Dep’t of Agric., 509 F.3d 572, 580 (D.C. Cir. 2007).
inconsistencies in amendments to agency-specific NEPA regulations, and protracted litigation. CEQ should abandon these attempts.

VII. CEQ’S PROPOSAL FUNDAMENTALY UNDERMINES ENVIRONMENTAL JUSTICE CONSIDERATIONS AND PUTS FRONTLINE COMMUNITIES AT RISK.

It is accepted fact that frontline communities are disproportionately impacted by pollution and other environmental and health hazards. However, it is these low-income, rural, and minority communities that would be most severely impacted by CEQ’s proposed revisions, placing them at extreme risk by ignoring cumulative impacts, limiting scientific analysis, narrowing the scope of review, shielding significantly impactful projects from any type of meaningful public input or disclosure of impacts, limiting consideration of alternatives, and making it much more difficult for environmental justice (“EJ”) communities to hold the government accountable by limiting or eliminating judicial review.

While the substance of these technical comments writ large contains a litany of concerns with the effect that CEQ’s draft rule will have on EJ communities, we wish to use this section to bond them together in greater detail in order to better illustrate CEQ’s shameful disregard of the frontline communities most at risk by ill-considered projects or decisions.

In NEPA, Congress presciently placed environmental justice concerns at the core of the statute by recognizing that each person “should enjoy a healthful environment” and by premising the entire requirement for an environmental impact statement on “major Federal actions significantly affecting the quality of the human environment.”

The term “environmental justice” formally entered the federal lexicon in 1994 when President Clinton signed an Executive Order addressing “Environmental Justice in Minority and Low-Income Populations.” Critically, the Executive Order was the first acknowledgment that exposure to environmental hazards is related to race and income levels, mandating federal agencies to develop strategies for “identifying and addressing...[the] disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations.” That President Clinton, in a memorandum subsequently cited by CEQ itself its “Environmental Justice Guidance Under the National Environmental Policy Act” (“EJ Guidance), recognized “the importance of procedures under NEPA” and emphasized “the importance of NEPA’s public participation process” in implementing later EO 12898

426 42 U.S.C. § 4332(C)
(“Federal Action to Address Environmental Justice in Minority Populations and Low-Income Populations”) lends great strength to the statement that NEPA and the current regulations are the most effective way to identify and address environmental justice concerns.

CEQ notes in its EJ Guidance that EJ issues “may arise at any step of the NEPA process and agencies should consider these issues at each and every step of the process.”\(^{428}\) In this sweeping proposal that will fundamentally change nearly every step of the NEPA review process, CEQ has provided no explanation or analysis of how the development and implementation of this rule would affect implementation of EO 12898 and, consequently, EJ communities. The potential for disproportionate impacts should have been considered in a NEPA analysis on this proposal, but as noted above\(^{429}\), CEQ has disregarded its own responsibility to comply with NEPA and prepare an EIS on the proposal.\(^{430}\) Further, without providing the analysis CEQ says it prepared under EO 12898 for review by the public at large or the affected environmental justice communities,\(^{431}\) CEQ cursorily concluded that the proposed rule “would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income.”\(^{432}\) Further, CEQ’s EJ Guidance, which outlines environmental justice principles and considerations in the NEPA process, would be rescinded.

Of particular concern is CEQ’s proposal to eliminate the requirement to consider cumulative impacts, which CEQ identifies as one of the six general principles that agencies should consider in environmental reviews as they seek to incorporate environmental justice concerns under EO 12898.\(^{433}\)\(^{434}\) Eliminating cumulative effects analysis will disproportionately and adversely affect EJ communities. As CEQ noted, “Evidence is increasing that the most devastating environmental effects may not result from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.”\(^{435}\) This is particularly true with EJ communities. The EPA recently found that people of color and the poor are much more likely to be exposed to pollution, impacting their health. The pollution to which communities are exposed does not come from a single action or source, but rather from multiple actions over a period of time. Cumulative effects analysis under NEPA is one of the few tools available to agencies to consider exactly how a proposed project may contribute to past, present, and future pollution burdens.\(^{436}\)

\(^{429}\) Supra at Section II (B).
\(^{430}\) Id.
\(^{431}\) 85 Fed. Reg. at 1711-1712.
\(^{432}\) Id.
\(^{433}\) Id.
\(^{434}\) Id. (“Agencies should consider relevant public health data and industry data concerning potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards.”)
\(^{435}\) Ibid.
\(^{436}\) See Louisiana Energy Servs, L.P. (Claiborne Enrichment Center), CLI 98-3, 47 N.R.C. 77 (1998); Private Fuel Storage, L.L.C. The Louisiana Energy Services Corporation applied to the U.S. Nuclear Regulatory Commission for a license to construct and operate a nuclear fuel
The current proposal not only eliminates critical cumulative impact analysis on which EJ communities rely, it sidelines these communities by multiple provisions with the current proposal which would limit or entirely eliminate meaningful public input. Specifically, CEQ narrows the scope of review and unjustifiably proposes to eliminate NEPA’s applicability to a wide variety of federal actions. Additional measures, such as new limitations on additional scientific analysis, the proposal to gut the alternatives requirement, elimination of the requirement to give the public 15 days to review an EIS, and establishing burdensome commenting requirements will severely limit the public’s access to information on impacts to their communities and make it nearly impossible to meaningfully engage in the decisionmaking process.

Taken together, the proposed changes in CEQ’s proposal will institutionalize a decisionmaking process across the federal government that unconscionably shields EJ communities from the most relevant information on impacts to their communities and unconscionably silences their voices in the decisionmaking process.

VII. CONCLUSION

We urge CEQ to withdraw this entire regulatory proposal and work to enforce the sensible and lawful provisions of the current CEQ regulations. We remind CEQ again that studies conducted to determine the cause of delay in federal actions coming under NEPA have consistently found that NEPA is not the primary driver of delay. Further, we believe that the outcome of upending five decades of NEPA law and attempting to redesign the process will actually result in more, not less, time spent on NEPA. But most urgently, the consequences of finalizing these proposed revisions will be to do lasting damage to the quality of our human environment and will restrict the public’s ability to actively engage in decisionmaking.

enrichment facility near the small rural community of Homer, Louisiana. The proposed site was located near two unincorporated communities populated primarily by low-income, minority families that were descendants of freed slaves. Among other social and economic impacts, the facility would have eliminated a road connecting the two communities, causing residents to experience greatly increased travel times to work, school, and other activities.

437 Supra, Section IV.
438 Supra at Section V (I).
439 Supra at Section V (F).
440 Supra at Section VI (F).
441 Supra at Section VI.
Sincerely,

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Canyon Council • Greater Yellowstone Coalition • Green Party of TN • Green River Action Network • GreenLatinos • Greenpeace USA • Greenway Transit Service • Growing Alternative Resource Development and Enterprise Network (GARDEN), Inc. • Harambee House, Inc. • Hawaii Audubon Society • Health Professionals for a Healthy Climate • Healthy Communities & Environmental Justice Conservation Law Foundation • Heartwood • Hispanic Federation • Houston Audubon • Howling For Wolves • Humboldt Baykeeper • Idaho Rivers United • In Defense of Animals • In the Public Interest • Indiana Forest Alliance • Citizen • Inland Ocean Coalition • Institute for Applied Ecology • Institute for Fisheries Resources (IFR) • International Marine Mammal Project, Earth Island Institute • Islesboro Islands Trust • Kentucky Heartwood • Kettle Range Conservation Group • Klamath Forest Alliance • Labor Council for Latin American Advancement • Law Office of David H Becker, LLC • League of Conservation Voters • Living Rivers & Colorado Riverkeeper • Long Beach Alliance for Clean Energy • Long Beach Panthers • Los Angeles Audubon Society • Los Padres ForestWatch • Louisiana Audubon Council • Lower Brazos Riverwatch • Lower Columbia Basin Audubon Society • Lower Ohio River Waterkeeper • Madrone Audubon Society • Maine Coalition to Stop Smart Meters • Malach Consulting • Mankato Area Environmentalists • Marin Audubon Society • Marine Conservation Institute • Maryland Ornithological Society • Mass Audubon • Miami Waterkeeper • Midwest Pesticide Action Center • Mining Action Group of the Upper Peninsula Environmental Coalition • Minnesota Native Plant Society • Mission Blue / Sylvia Earle Alliance • Moab Solutions • Mojave Desert Land Trust • Monmouth County Audubon Society • Montana Wilderness Association • National Audubon Society • National Latino Farmers & Ranchers Trade Association • National Parks Conservation Association • National Whistleblower Center • National Wolfwatcher Coalition • Native Plant Conservation Campaign • Native Plant Society for the United States • Natural Heritage Institute • Natural Resources Council of Maine • NC WARN • Natural Resources Defense Council • Nature Abounds • Nature Coast Conservation, Inc. • Nevada Native Plant Society • Nevada Nuclear Waste Task Force • New Mexico Audubon Council • New Mexico Environmental Law Center • New Mexico Horse Council • New Mexico Law Center • New Mexico Wilderness Alliance • New Mexico Sportsmen • New York City Audubon • New York Lawyers for the Public Interest • Night Sky Conservancy • North Cascades Audubon Society • Northeast Colorado Environmental Center • Northeast Oregon Ecosystems • Northeastern Minnesotans for Wilderness • Northern Alaska Environmental Center • Northern Plains Resource Council • Northwest Animal Rights Organization (NARN) • Oasis Earth • Occidental Arts and Ecology Center • Oceana • Ocean Conservation Research • Ocean Conservancy • Ocean Conservation Research • Ohio Valley Environmental Coalition • Okanogan Highlands Alliance • Orca Conservancy • Oregon Natural Desert Association • Oregon Wild • Pacific Coast Federation of Fishermen's Associations (PCFFA) • Partnership for the National Trails System • Paula Lane Action Network • Pelican Media • Pennsylvania Alliance for Clean Air and Water • People for Protecting Peace River, Inc Peoria Audubon Society • Pesticide Free Zone • Point Reyes Safaris • Ponca Tribe of Oklahoma • Powder River Basin Resource Council • Predator Defense • Progressive Caucus Action Fund • Public Employees for Environmental Responsibility (PEER) • Public Lands Project • Quad City Audubon Society • Rainforest Relief • Raptors Are The Solution • Resource Renewal Institute • RESTORE: The North Woods • Richardson Grove Coalition • Richmond Trees • Rock Creek Alliance • Rocky Mountain Wild • RootsAction.org • Russian Riverkeeper • Sacramento Audubon Society • Safe Alternatives for our Forest Environment • Salem Audubon Society • Safina Center • San Francisco Baykeeper • San Juan Citizens Alliance • Santa Barbara Audubon Society • Santa Cruz Climate Action Network • Save Nevada's Water: Ban Fracking In Nevada • Save Our Cabinets • Save Our Saluda • Save Our Shores • Save Our Sky Blue Waters • Save Richardson Grove Coalition • Save the Bay •
Ms. Mary Neumayr, Chief of Staff  
Council on Environmental Quality  
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RE: Advance Notice of Proposed Rulemaking  
40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508  
[Docket No. CEQ-2018-0001]

Dear Ms. Neumayr:

This letter represents the collective response of 341 public interest organizations, representing millions of members and supporters, to the Council on Environmental Quality’s (CEQ) recent Advance Notice of Proposed Rulemaking (ANPRM). Given the critical importance of the National Environmental Policy Act (NEPA) regulations, some of our organizations will also be submitting separate comments emphasizing particular issues.

We begin by emphasizing that CEQ’s regulations provide a well-crafted, comprehensive framework for implementing the procedural provisions of NEPA. The regulations have stood
the test of time well. Rather than contemplating a rewrite of the regulations, we urge that CEQ invest its modest resources, and most importantly, its leadership position, in a systematic initiative to enforce them. Changes to the regulations will not result in improvements unless federal agencies have the organizational structure and resources that facilitate their implementation. In our considered view, the single most important key to efficiency and effectiveness is having competent, trained, and adequate staff in agencies to implement the regulations. As we demonstrate below, the existing regulations already address many of the questions the ANPRM raises in regard to reducing paperwork and delay. What is lacking is the capacity and will to fully implement the regulations.

CEQ has an essential leadership role in ensuring that agencies receive the appropriate direction and resources. As the agency with NEPA oversight responsibility, CEQ should lead an effort to identify the real-world obstacles to implementing those provisions along with ensuring that the goals of inclusive analyses and informed decisionmaking are met. Only after undertaking such an effort should CEQ consider whether any regulatory revisions are warranted.

**Concerns with the ANPRM Process**

NEPA is rightfully referred to as the environmental “Magna Carta” of this country. Like that famous charter, NEPA enshrines fundamental values into government decisionmaking. NEPA is a proven bulwark against hasty or wasteful federal decisions by fostering government transparency and accountability. The NEPA process achieves the law’s stated goal of improving the quality of the human environment by, most importantly, requiring the analysis of reasonable alternatives to a proposed action and by empowering people affected by agency decisions to participate in that analysis. Under NEPA, the identification and evaluation of alternatives must be grounded in sound science and transparency.

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

The implementing regulations now under consideration were thoughtfully developed and serve as the principal means by which American communities, individuals, and organizations are informed about and participate in federal agency decisionmaking. They have ensured that federal decisions are, at their core, democratic by guaranteeing meaningful public involvement and transparency in government decisionmaking. CEQ developed the regulations to provide a uniform, consistent approach that promotes effective decisionmaking in accord with the policies set forth in NEPA. Critically, the regulations provide the public and other federal, state, tribal and environmental justice communities with an essential voice in that process. The regulations
reflect case law developed through the federal courts, accounting for the complexities and opportunities that arise in specific places and contexts. Additionally, the regulations manifest a concerted effort to expedite the process without losing either substantive value or public involvement. The regulations also provide considerable flexibility to agencies in regard to their implementation. CEQ must consider how any changes to the NEPA regulations, after decades of experience with the current process, might lead to confusion and litigation.

The promise of the NEPA process—that the government will consider the environmental impacts of its decisions, disclose those impacts to those affected, and ensure the public has an opportunity to meaningfully weigh in—is at the heart of democracy. These democratic principles enshrined in NEPA explain why it is among the most widely exported laws the United States has ever passed, with over 160 countries adopting similar legislation. NEPA’s role in protecting communities is why it is the primary mechanism by which environmental justice considerations are incorporated into government decisions.

In light of other administrative actions taken over the course of the last year, it is clear this rulemaking is part of a broader and deeply troubling ideological effort to reduce or eliminate public contributions to decisionmaking by agencies expending public funds. Those efforts include processes to dismantle NEPA regulations in order to cater to special interests of developers and industry polluters — rather than the interests of the public for whom these regulations are intended to benefit. Misguided efforts to rescind or revise regulations, policies, and guidance across the federal government will put the environment and public health at risk by overemphasizing the supposed “burden” of review and oversight and ignoring the many enormous benefits that environmental rules and regulations secure for the public.

This administration’s narrow focus on eliminating regulatory protections and restricting the scope of environmental review is disturbingly clear in actions it has taken government-wide. Last spring, President Trump revoked CEQ’s guidance for agencies on the consideration of climate change in NEPA reviews, indicating an effort to institutionalize climate denial into government decisionmaking. Then, in a series of actions over the next several months, agencies such as the Bureau of Land Management (BLM), Department of Transportation, Department of Energy, United States Forest Service, and others issued notices with the intention to review their NEPA regulations in a manner that seems intended to help project proponents “overcome” the “obstacles” of environmental review. These efforts systematically fail to acknowledge the critical benefits that review, disclosure, and public input under NEPA provide to all peoples’ health, quality of life, and relations to their surroundings. See Attachment 1, NEPA Success Stories. Critically, they also systematically fail to identify or begin to address the actual causes of delay in federal agency processes. The proposed “cures” generally miss the mark, focusing on a forced pathway to project approval rather than a solution based on addressing real world problems.

Our concerns are amplified by the breadth of the questions posed in this ANPRM, which seem to reflect an intention to fundamentally change the NEPA process. Such a fundamental change is not only unwarranted, but also unwise. The fundamentals of the NEPA regulations are sound and thoughtful. We do, however, have serious concerns about the failure of many agencies to adequately implement the regulations. Those concerns will be assuaged not by
changing the rules, but by enforcing them, and by providing the funding, resources, and training that agency staff need to effectively implement them.

The questions posed in the ANPRM and related documents issued by the current administration suggest a singular focus on “efficiency.” Sadly, the administration appears to equate efficiency solely with speed. Our understanding of efficiency is a process implemented in a manner consistent with three basic principles:

(1) Consideration of the environmental and related social and economic impacts of proposed government actions on the quality of the human environment is essential to responsible government decisionmaking;

(2) Analysis of alternatives to an agency’s proposed course of action is the heart of meaningful environmental review and indeed of good government more broadly; and

(3) The public plays an indispensable role in the NEPA process.

Changes to NEPA’s implementing regulations are not warranted at this time. However, to the degree that CEQ does move forward with a rulemaking, we offer two suggestions for improving implementation of the regulations in ways that we believe would efficiently employ the three principles articulated above. As we demonstrate below, the existing regulations already address many of the questions the ANPRM raises. What is lacking is the will and assurance of capacity to fully implement the regulations.

Our position that changes to NEPA’s implementing regulations are not warranted is premised on the lack of public outreach and careful analytical groundwork that is essential to justify what will likely prove to be a time and resource consuming process. NEPA’s implementing regulations have withstood the test of time and should not be revised absent good cause. While we appreciate the extension of the comment period deadline from the original 30 days, we still feel that CEQ’s process falls short. Even with the extension, the process appears designed more for NEPA experts than for the public. Certainly, the extra time will allow more people to respond, but many of the questions, while perhaps appearing simple, involve decades of agency and judicial interpretation. We remind CEQ of its own admonition to agencies that, “Members of the public are less likely to participate or engage in the commenting process if they do not fully understand how a particular project affects them. It is critical that agencies provide context and as much information as possible in the beginning of the public involvement process.” Memorandum for Heads of Federal Departments and Agencies on Effective Use of Programmatic NEPA Reviews, December 28, 2014, fn. 33.

CEQ has customarily engaged in substantial public outreach, especially when considering the regulations as a whole. That outreach has included public meetings with many specific, identifiable constituencies. In this instance, CEQ has provided no forum for an overall discussion of the NEPA process, no public meetings, and indeed, no public outreach that we are aware of other than the publication of the notice in the Federal Register and a link on CEQ’s website. This lack of engagement of the public at this initial step limits the role of the public in informing and shaping this process as it moves forward. Should CEQ decide to propose amendments to its regulations, we urge it to follow its own guidance and engage in more
comprehensive outreach, an appropriate comment time frame, and inclusion of multiple accessible public hearings. If it does not, CEQ risks the credibility of its decision-making process and increases the risk of uninformed action—action that would render agency decisions reached in accord with any new regulations vulnerable to failure and cause harm to our country’s health, environment, and economy.

Finally, we remind CEQ that if it proceeds to proposed rulemaking, it must consider the appropriate level of NEPA compliance for its proposal.

Questions and Responses

**NEPA Process:**

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

   No. CEQ’s regulations already require that “to the fullest extent possible,” agencies prepare draft EISs “concurrently with and integrated with environmental impact analyses and related surveys and studies” required by other environmental laws. See 40 C.F.R. § 1502.25; see also 40 C.F.R. § 1500.2(c) (requiring, to the fullest extent possible, that federal agencies “[i]ntegrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively”); 40 C.F.R. § 1500.4(k) (agencies should reduce paperwork by “[i]ntegrating NEPA requirements with other environmental review and consultation requirements”); 40 C.F.R. § 1500.5(i) (agencies shall reduce delay by “[c]ombining environmental documents with other documents”). Since promulgation of the regulations, CEQ has consistently stressed the need for environmental review processes to run concurrently rather than sequentially. This makes sense, not just from the point of view of meeting a particular timeline, but also because availability of analyses required by other laws such as the National Historic Preservation Act and the Clean Water Act will result in a more informative EIS. The current regulations and guidance are sound in this respect. These mechanisms to reduce delay and paperwork are also applicable to EAs, per CEQ’s guidance on “Improving the Process for Preparing Efficient and Timely Environmental Review under the National Environmental Policy Act” (Mar. 12, 2012).

   We are aware that in practice, compliance is not always “concurrent, synchronized, timely and efficient.” We suggest that a first step to addressing that concern is to systematically survey the federal agencies that typically prepare the majority of EISs and identify the actual on-the-ground barriers that prevent CEQ’s existing regulations and guidance from being implemented, and then propose steps to address the actual problems. This information should then be shared with the public for input: often the public and affected stakeholders can identify specific barriers (particularly adequate staffing, training, and funding) to efficient coordination among federal agencies.
2. Should CEQ’s NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?

No. Under CEQ’s current regulations, agencies are already directed to use available environmental studies and analyses, whose scientific and professional integrity they can assure, in the course of implementing NEPA, whether those studies and analyses were prepared in the context of an earlier federal, state, tribal or local environmental review or outside of such a review. A study that is relevant to the proposed action and judged to be credible by a federal agency (and does not contain proprietary information) – whether or not it was produced in the course of an agency environmental review process – can and should be incorporated by reference. The only additional requirement is that the study be available to the public during the comment period, which is reasonable. See 40 C.F.R. § 1502.21.

If the existing study is a formal environmental review document prepared in the course of another federal, state, tribal or municipal environmental review process for substantially the same action as the proposed action at hand, the analysis upon which it is based remains current, and the document was prepared to meet NEPA requirements with the involvement of at least one federal agency, then it can be adopted by the lead federal agency by simply recirculating the statement as a final EIS (with no comment period). If the proposed action is not substantially the same as that covered under the earlier review but is still relevant, an agency can circulate it as a draft EIS (40 C.F.R. §1506.3.), (after reviewing to determine whether the EIS needs to be supplemented) or the agency may incorporate the document by reference.

Further, agencies should make much better use of tiering from existing NEPA documents, as we discuss in response to Question 12. This is an underutilized and often misused mechanism that – when coupled with the development of more effective higher-level EIS-level NEPA analyses – has the potential for greatly increasing efficiency and effectiveness of NEPA reviews.

Regulatory changes are unwarranted because the current provisions work. They maximize use of available analyses, reviews, and reports. They provide the public and other agencies with the ability to track and understand what analyses are being relied upon in the decisionmaking process. These regulations are successfully implemented by many agencies. When they are not it is often because agency staff do not understand how to use them. The solution to this problem is not regulatory changes, but training for all agency NEPA staff on an annual basis would help ensure greater awareness of these mechanisms.

This question also includes a reference to “decisions.” We interpret that to mean decisions related to the implementation of an earlier environmental review process, resulting in a determination of adequacy. We would oppose a revision of the CEQ
regulation to waive or exempt a lead federal agency from independently evaluating and
taking responsibility for an environmental document being used for compliance with
NEPA. Indeed, CEQ cannot take such action through rulemaking because it is a
fundamental change to statutory direction, whether the document is prepared by a federal
agency or a state agency. Compare 42 U.S.C. § 4332(2)(C) with § 4332(D)(iii). We
believe the same standard should apply if the document is prepared by a municipality or a
tribe. This issue is best addressed by engaging in joint environmental review processes.

We further caution CEQ to remember that the NEPA process hinges on a specific
“proposal” and the agency’s consequent “purpose and need” for a particular agency
action. See 40 C.F.R. §§ 1502.13, 1508.23. This is acutely important relative to the
agency’s hard look at impacts and the identification and consideration of alternatives with
the public, in particular where there are “unresolved conflicts” (which requires
consideration of alternatives even where impacts are not expected to be significant). 42
U.S.C. § 4332(2)(E). Unfortunately, certain agencies, namely the BLM, have invented
mechanisms (so-called “Determinations of NEPA Adequacy,” or “DNAs”) to avoid
public input and NEPA review and, in effect, to inappropriately justify a distinct
implementation-level “proposal” on the basis of an existing, often decades-old, NEPA
analysis developed for a separate, typically programmatic level decision. For example,
BLM has sought to use DNAs to justify the sale of geographically discrete oil and gas
leases on the basis of land use plan-level NEPA analyses. Neither BLM’s programmatic
NEPA analyses—which typically cover millions of acres—nor BLM’s DNAs provide the
requisite site-specific analysis of impacts or consider alternatives calibrated to
geographically specific proposed oil and gas leases, including the option not to issue the
oil and gas lease or to condition the lease on site-specific stipulations or mitigation
measures. Accordingly, leases issues pursuant to DNAs are of dubious legal validity at
best and voidable. These DNAs also undercut public involvement, undermining agency
credibility with local communities and leading to distrust. It should therefore be no
surprise that these DNAs—because of conflicts with NEPA’s statutory framework—have
given rise to litigation.

We have seen this attempted dodge of analysis before by agencies trying to rely on a
programmatic NEPA analysis that simply does not cover a proposed site-specific action.
The DNA process is simply putting a new label on it. To the degree that agencies think
implementation-level actions should not require further NEPA review, the proper course
is not to contrive a new, non-NEPA mechanism, but to improve the robustness of
programmatic NEPA analyses that clearly and explicitly address these implementation-
level issues in advance, properly tier to those programmatic NEPA analyses (while
ensuring appropriate analysis of any site-specific impacts not covered by the earlier
programmatic analysis), or to consider and justify appropriate categorical exclusions.

Similarly, for many years, some agencies have utilized a Supplemental Information
Report (SIR) as a mechanism for evaluating new information related to an action
analyzed in an EIS. Except for new information that clearly has no potential for
significance relevant to environmental concerns or substantial changes related to the
proposed action, this type of analysis should be evaluated through the NEPA process.
The analysis could be presented in an EA available for public review or, of course, through a supplemental EIS. Further, an SIR is not an appropriate place to present new analysis of information available at the time the original NEPA documentation was provided. Generally, the default mechanism for evaluating new information, especially in the context of a proposed action analyzed in an EIS, should be, at a minimum, an EA with public involvement.

CEQ guidance is needed to address this issue throughout the executive branch. Such guidance should reiterate the importance of evaluating environmental consequences and providing for public review before making commitments of public resources and provide strict limitations on uses of DNAs. The guidance should emphasize that if there is not an available categorical exclusion, a DNA is not the next best option.

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

CEQ’s regulations provide a solid framework for interagency coordination between federal, state and local agencies. As set forth below in our responses to questions 6a and 18, we support improving the regulations dealing with coordination with tribal governments, because the existing regulations do not adequately ensure appropriate coordination over issues that affect tribal members.

The existing regulations allow a lead agency to fund analyses from cooperating agencies, mandate that lead agencies include such funding requirements in their budget requests, and require that agencies notify CEQ when they are unable to cooperate in the NEPA process because of other program commitments. Further, as made clear by CEQ many years ago, if a potential cooperating agency’s involvement in the NEPA process is precluded because of other commitments, it is barred from further involvement with the project under the CEQ regulations (although other laws may require its involvement in some form). See 40 C.F.R. § 1501.6. and *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Register 18026 (March 23, 1981), Q. 14a. It is not clear the extent to which these provisions of the regulations are typically applied by federal agencies in the course of implementing NEPA for proposed actions.

We are aware that there is concern that agencies do not always provide comments in a timely manner. We question how much of that concern is based on anecdotes and myths versus systematic surveys of factual information. Indeed, the Government Accountability Office (GAO) underscored the paucity of information about NEPA implementation in a 2014 report, *Little Information Exists on NEPA Analysis* (GAO-14-369). Existing research relates almost exclusively to federal highway actions. Since at least the mid-1990s, the GAO and the Congressional Research Service (CRS), have prepared a series of reports, remarkably consistent in their findings, regarding the construction of highway projects and the relationship of environmental laws generally—and NEPA specifically—to decisionmaking timelines. This type of analysis is needed more broadly so that
agencies and legislators are able to formulate successful approaches to reducing delays. In short, the GAO and CRS reports find that a number of federal projects have indeed been delayed or stopped, but for reasons unrelated to NEPA. “Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope.” Congressional Research Service, The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress, R42479, (Apr. 11, 2012). Nonetheless, NEPA usually gets the blame. CEQ is in the ideal position to conduct a systematic study throughout the executive branch to determine the actual, as opposed to perceived, causes of delay in interagency coordination.

**Scope of NEPA Review:**

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

**Format:** No. We are not aware of a rationale for changing the regulation at § 1502.10 on recommended format. As the title of the regulation makes clear, this is a recommendation and an agency may use a different format so long as it addresses all required sections and there is a compelling reason to change the format.

**Page length:** No. We support the current suggested page limits in the CEQ regulation at §1502.7 (150 pages for an EIS or for proposals of unusual scope of complexity, no more than 300 pages). These limits help encourage brevity and clarity and focus agencies on those issues that could significantly affect the environment, as the regulations already require. See §§ 1500.1(b) and 1501.7. However, as the important qualifier “normally” makes clear, situations will arise in which adequate disclosure of potential impacts requires additional pages. One size does not fit all when it comes to effective and efficient NEPA analysis. Avoiding excess verbiage will improve the quality of environmental review. But elevating page length over effective disclosure of potential impacts as the ultimate criterion of adequacy would lead to less informed public participation, poorer decisionmaking, and more violations of NEPA.

We also support the suggested limits with the understanding that as stated in the regulation, these page limits only include the substantive portions of an EIS and do not include appendices, which are vital to providing technical information. Without excluding appendices from the page count, it is virtually impossible for an agency

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1 See also, Government Accountability Office Report No.14-370, National Environmental Policy Act: Little Information Exists on NEPA Analyses, (Noting that “there could be a number of ‘non-NEPA’ reasons for the ‘start,’ ‘pause,’ and ‘stop’ of a project, such as waiting for funding or a non-federal permit, authorization, or other determination.”), (August, 2014); see also, Department of Treasury report by Toni Horst, et al., 40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance, (Noting that “a lack of funds is by far the most common challenge to completing” major transportation infrastructure projects)(December, 2016).
preparing an EIS to implement the regulatory direction to integrate other environmental review requirements with NEPA. 40 C.F.R. § 1502.25.

**Time limits:** No. We support the existing regulation that sets forth the factors to be considered in setting timeframes for analysis and agree with CEQ’s determination that prescribing universal time limits is inflexible and unwise. 40 C.F.R. § 1501.8. As CEQ noted in its preamble to the current regulations, “The factors which determine the time needed to complete an environmental review are various, including the state of the art, the size and complexity of the proposal, the number of Federal agencies involved, and the presence of sensitive ecological conditions. These factors may differ significantly from one proposal to the next.” National Environmental Policy Act, Implementation of Procedural Provisions; Final Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978). The preamble goes on to note that the same law that applies to a Trans-Alaska pipeline applies to a modest federally funded building and that the individual agencies are in the best position to judge the appropriate time needed. We also note that the current regulation allows applicants to ask an agency to set time limits for a particular proposed action. The scoping process is the appropriate time for an agency to set both page and time limits if necessary. 40 C.F.R. § 1501.7(b) and (c).

We are concerned about the “one size fits all” approach now being implemented at, for example, the Department of the Interior. Secretarial Order 3355, “Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807” (August 31, 2017); Additional Direction for Implementing Secretary’s Order to Assistant Secretaries, Heads of Bureaus and Offices and NEPA Practitioners (April 27, 2018). This management direction ignores critical considerations of context, 40 C.F.R. § 1508.27(a), and the importance of carefully considering alternatives with the public and other stakeholders which may require time, in particular where there are “unresolved conflicts,” 42 U.S.C. §§ 4332(2)(C)(ii), 4332(2)(E). Rushed NEPA analyses, especially given severe staff shortages in a number of agencies, will result in badly flawed results. Rushed public processes may result in increased litigation, decreased agency credibility with the public, and distorted, poorly reasoned decisionmaking. See Attachment 2, Statement Geoffrey Haskett, former U.S. Fish & Wildlife Service Director for Alaska (On rushed NEPA process for proposed oil and gas development in the Arctic National Wildlife Refuge).

As President Nixon once said:

> The National Environmental Policy Act has given new dimension to citizen participation and citizen rights as is evidenced by the numerous court actions through which individuals and groups have made their voices heard. Although these court actions demonstrate citizen interest and concern, they do not in themselves represent a complete strategy for assuring compliance with the Act. We must also work to make government more responsive to public views at every stage of the decisionmaking process. Full and timely public disclosure of environmental impact statements is an essential part of this important effort. President’s Message to Congress, August, 1971.
Ultimately, the key to robust compliance with NEPA that empowers the public, inform input from sister agencies and elected officials, and guide better, more durable, and less wasteful decisions is proper staffing and training of the agency personnel principally responsible for compliance.

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

No. No one would be more delighted than our millions of members to review NEPA documents that provide greater clarity and better analysis of significant issues relevant to the proposed action. Much of our advocacy in the context of NEPA relates to this very topic. However, improved clarity will not be achieved by changes to CEQ’s regulations but, rather, by better implementation of CEQ’s existing regulations.

CEQ regulations already call for: concentrating “on the issues that are truly significant to the action in question, rather than amassing needless detail,” 40 C.F.R. § 1500.1(b), reducing the accumulation of extraneous background data, § 1500.2(b), using the scoping process to identify significant issues and de-emphasize insignificant issues, § 1501.7, the often-overlooked regulation calling for clear writing and appropriate graphics, § 1502.8, and the mandate to ensure professional integrity of analyses, § 1502.24, and all associated CEQ guidance. Fully implemented, these provisions would go far in achieving greater clarity and better informing both decisionmakers and the public.

CEQ’s Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping, (April 30, 1981), is excellent guidance that focuses on ways to effectively and efficiently undertake the scoping process. We suggest that CEQ revisit that guidance with an eye to updating it to account for new approaches to communication and lessons learned since publication of the original guidance.

Most importantly, CEQ, working with agencies that regularly implement NEPA, needs to provide training to the agencies on effective scoping processes. Efficiency in the NEPA process must begin at the start of the process with a good internal and external scoping process that results in agencies identifying the important issues that must be analyzed, the information they need to obtain, the parties who are interested in and may be affected by the proposed action, and at least the initial appropriate spatial and temporal scope boundaries of the analyses for each significant issue. As agencies plan for scoping processes for particular types of actions, they should also educate and solicit input from the interested public regarding the NEPA process generally and the purpose of scoping in particular. Simply noticing a meeting and expecting well crafted, thoughtful scoping comments is not sufficient.

6. Should the provisions in CEQ’s NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?
Our members consistently support robust public involvement throughout the NEPA process. While the overall framework for public involvement set forth in §1506.6 is sound, there are several improvements that should be made:

a. Consistent with 40 C.F.R. § 1501.7(a)(1) and with our response to question 18 below, the restrictions in 40 C.F.R. § 1503.1(a)(2)(ii), regarding inviting comments on an EIS, and 40 C.F.R. § 1506.6(b)(3)(ii), regarding the requirement to notify tribal governments of proposed agency actions with effects primarily of local concern, should be modified to substitute “affect tribal interests” for the phrase “occur on reservations” as the trigger.

b. CEQ should issue guidance directing agencies to use all available technology as well as (not as a substitute for) the mechanisms already identified in § 1506.6. Given modern communications technology, there is no reason that notification of actions falling under an agency’s categorical exclusions cannot be easily provided; indeed, the Department of Energy and Forest Service do just that; See 36 C.F.R. § 220.4(e)(1) and https://www.energy.gov/nepa/nepa-documents/categorical-exclusion-determinations. Other agencies should follow that example. Certainly, agency websites and other means of communication should be employed to reach all potentially interested parties. We recommend that CEQ reference such mechanisms generally so that the guidance stays current.

That said, we emphasize that not everyone uses the internet, let alone social media. According to 2018 studies by the Pew Research Center, home broadband access is around 50% for African Americans and Hispanics and also low for low-income populations, older adults and rural residents. http://www.pewinternet.org/fact-sheet/internet-broadband/. Indeed, as of January 2018, 30% of all US adults do not have home broadband access. With an estimated 200 million adults in the US, this means that 60 million people rely on phones, work, or libraries for internet access. These alternative means of access, such as use of computers in public libraries, are typically quite restricted. Approximately 11% of American adults don’t use the internet at all. http://www.pewresearch.org/fact-tank/2018/03/14/about-a-quarter-of-americans-report-going-online-almost-constantly/. Moving all notifications and documents to the internet in anticipation of the day when all Americans are on it would restrict involvement by many individuals in affected communities or in remote, rural areas. It would also ignore the potential for online outages that make documents unavailable or unsearchable for critical periods of time during public review. To ensure that public involvement is conducted in a manner that is truly inclusive, the regulations should expressly require that in providing notice about the availability of documents and scheduling public meetings, agencies consider whether the format and timing equitably provides notice, information, and meaningful opportunities to participate to vulnerable and traditionally marginalized populations.

c. As noted previously, the emphasis on meaningful public input and careful consideration of environmental impacts outlined in NEPA and its implementing regulations is why it is one of the principal tools in ensuring environmental justice.
principles guide government decisionmaking. The NEPA process provides one of the primary forums for agencies to openly consider the composition of affected areas, relevant public health impacts, exposure risks, and solicit meaningful public input with the aim of avoiding disproportionate impacts on vulnerable and traditionally marginalized communities. In the memorandum to departments and agencies on Executive Order 12898 (Feb. 16, 1994)(“Federal Actions to Address Environmental Justice in Minority and Low-Income Populations”) President Clinton emphasized the importance of NEPA in addressing environmental justice issues, which led CEQ to issue guidance on environmental justice under NEPA in 1997. The guidance provides an excellent model for how agencies should incorporate environmental justice considerations into government decisionmaking. However, an update is needed given that guidance is now twenty years old and is in need of an update. Specifically, the guidance should be updated to include strong recommendations to agencies to consider opportunities in the NEPA process to accommodate individuals with limited English proficiency, consistent with Executive Order 13166 (Aug. 11, 2000)(“Improving Access to Services for Persons with Limited English Proficiency”). In addition CEQ should update the guidance to reflect the roles of new technologies and supplement the guidance to align with the 2016 report of the Federal Interagency Working Group on Environmental Justice and NEPA Committee entitled “Promising Practices for EJ Methodologies in NEPA Reviews,” and its more recent (March 2018) report entitled “Community Guide to Environmental Justice and NEPA Methods.” Updated and formalized guidance would better promote transparency, disclosure, collaboration, and meaningful input of environmental justice communities.

d. Per our response to question 9c below, we also recommend a new provision in 40 C.F.R. § 1501.4 to enhance public participation in the context of environmental assessments.

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

In general, the existing definitions are sound and have stood the test of time. They are based on case law, best practices, and considerable experience and are well understood by practitioners. Revisions are not warranted.

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

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


The existing definitions are sound and have stood the test of time. Revisions are not warranted. The definitions are based on case law, best practices, and considerable experience and are well understood by practitioners. CEQ will bear a heavy burden if it proposes changes in definitions to fundamental concepts such as these.

a. Alternatives - No.
b. Purpose and Need - No.
c. Reasonably Foreseeable - No.
d. Trivial Violation - No.
e. Other NEPA terms - No.

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

a. Notice of Intent - No.
b. Categorical Exclusions – No.
c. Environmental Assessments - The nature of public involvement for EAs varies a great deal. CEQ’s regulations currently offer minimal guidance specific to EAs, stating that agencies “shall involve environmental agencies, applicants and the public to the extent practicable” in the preparation of EAs. 40 C.F.R. § 1501.4(b). In practice, agencies seldom involve the public in the preparation of EAs, although some agencies routinely provide a comment period on EAs and some provide a comment period in particular situations. Frequently, however, EAs are prepared for actions that may have significant effects or actions for which the nature of those effects is in dispute, there are “unresolved conflicts” compelling consideration of alternatives (42 U.S.C. § 4332(2)(E)), or there are sensible opportunities to engage the public with an eye towards further mitigating impacts beyond what the agency has already considered. We propose the following as an additional sentence to be added to the end of 40 C.F.R. § 1501.4(b): “Agencies shall make an EA available for public review for a minimum 30 days.”
d. Findings of No Significant Impact – No.
e. Environmental Impact Statements – No.
f. Records of Decision – No.
g. Supplements – CEQ’s current regulatory direction on supplementing EISs is excellent and we support retaining it. 40 C.F.R. §1502.9(c)

However, we strongly recommend CEQ consider issuing guidance on the types of documents that individual agencies are currently using to determine whether to supplement NEPA analyses, including Supplemental Information Reports (SIRs) and Determinations of NEPA Adequacy (DNAs). We understand, of course, the need to
review earlier NEPA documents in light of new or revived proposals and the desirability of documenting an agency’s rationale. However, we reiterate the concerns about the Bureau of Land Management’s use of DNAs noted in response to Q. 2. CEQ guidance regarding use of both SIRs and DNAs should reiterate the importance of evaluating environmental consequences, permitting public review, and making commitments of public resources. CEQ should provide strict limitations on the use of non-NEPA documents to bypass public involvement. A brief EA with public involvement is the most appropriate way of assessing the significance of new information or possible changed circumstances.

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

No. We support the existing regulation on timing of agency action at 40 C.F.R. § 1502.5. The regulation lays out a common-sense approach for linking the NEPA process to the agency’s consideration of a proposed action.

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

CEQ’s existing provisions regarding agency responsibility and preparation of NEPA documents by contractors and project applicants, including the conflict of interest provision, are the minimum of what should be required and certainly must be retained, if not strengthened. We are very concerned about conflicts of interest when agencies use contractors paid for by an applicant to prepare an EIS—the so-called “third-party EIS” situation. CEQ’s requirements that a federal agency select the contractor and that contractors execute disclosure statements regarding any conflict of interest are essential. The disclosure statement should be executed prior to signing the contract and should always be publicly available. It must also be understood that the agency continues to have the legal responsibility for any and all NEPA documents prepared by an outside contractor. It cannot shift NEPA compliance duties to an outside entity, in particular given that outside entities may lack an understanding of local community dynamics to help balance competing needs and issues and ensure that public input is properly accounted for. It is also essential to maintain strong oversight and enforcement of the prohibition on utilizing contractors that would benefit in some manner by the proposed action (for example, additional contracts implementing a particular proposed action) that is the subject of the NEPA process at issue.

We understand that agencies need to be able to communicate directly with the applicant regarding the proposed action. However, agencies must take special care in the context of a third-party EIS. For example, applicants should not be invited to regularly attend interdisciplinary team meetings or interagency meetings. Agencies must draw a bright line distinguishing their role of evaluation and regulation from the role of the applicant.
We strongly believe the integrity, effectiveness, and efficiency of the NEPA process are much-better served when agencies conduct the NEPA process themselves, as the law intended. This is particularly the case where the NEPA process operates as a critical decisionmaking tool for agencies with complex, diverse missions—e.g., land management agencies that operate under a “multiple use” framework or where local community dynamics require careful attention to ensure that the agency listens to public concerns. Contractors and project applicants are simply not in a position to effectively apply this framework to resolve conflicts or to balance competing values and agency mandates.

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

No. CEQ’s guidance document on “Effective Use of Programmatic NEPA Reviews” is comprehensive, current, and useful. It accurately reflects the concerns of many of our members regarding the challenges the public often faces in the context of programmatic NEPA documents and tiering. Chief among these concerns is the difficulty of determining when an agency will do a particular type of analysis. As noted in CEQ’s guidance, agencies sometimes say they are deferring a particular type of analysis to a later stage, only to improperly refer back to a programmatic document when that later stage arrives to justify the implementation-stage action. We certainly support tiering a more detailed and site-specific analysis at the project level to a programmatic EIS, but only when the programmatic analysis is sufficient to support such tiering by providing a site-specific hard look at impacts to inform alternatives and mitigation. As discussed in the guidance, it is imperative for agencies to be clear about what type of analysis they will do at what stage of a tiered process—and then to do it, absent changed circumstances accompanied by a clear explanation to the public.

For specific observations on the implementation problems with programmatic EISs and tiering, we incorporate by reference the discussion presented in the context of the Forest Service’s Advance Notice of Proposed Rulemaking on its NEPA regulations. See, Letter from The Wilderness Society and 82 other organizations to Chief Tony Tooke, February 1, 2018, pp. 18-21 (Attachment 3). As stated in that discussion, which we believe is applicable to other agencies’ NEPA implementation, especially in the land management and installation management context, agencies are often not taking advantage of efficiencies that the tiering process provides. Rather, there is a tendency to push analysis and decisionmaking off to a later time. Unfortunately, when that later time comes, agencies are often under even more pressure to “streamline” the process.

We see no reason for regulatory change in this area. Rather, we recommend CEQ invest resources into training and assisting agencies to shape programmatic NEPA analyses so that the resulting documents will facilitate appropriate tiering. Indeed, we think more effective programmatic analyses—i.e., “smart from the start” thinking to shape and inform implementation-level action that tiers from a programmatic analysis—provides one of the single greatest opportunities to improve the efficiency of the NEPA process.
and to cultivate good-will and public buy-in for actions that meet a project applicant’s goals while also protecting our country’s health, environment, and economy.

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

No. We oppose changes to the regulations regarding an appropriate range of alternatives. Changes are not warranted and could do tremendous damage to the value of NEPA. NEPA calls for analysis of alternatives twice, emphasizing their importance. See 42 U.S.C. §§ 4332(2)(C)(ii), 4332(2)(E). Consistent with these statutory mandates and per the regulations, alternatives are indeed the “heart” of the NEPA process. 40 C.F.R. § 1502.14. Without them, NEPA review cannot perform its core function of creating informed reflection so that agencies do not simply pursue their first reflexive idea about discharging a mandate or responsibility. Without a bona fide examination of alternatives, the NEPA process would do nothing more than document the impacts of the agency’s or applicant’s preferred course of action with the possible addition of some mitigation measures. In numerous examples, the alternatives developed—whether by a lead agency or externally—have truly improved decisionmaking. Further, agencies have benefitted from alternatives proposed by members of the public or by other agencies. Even where alternatives offered by members of the public are not chosen, agencies create public buy-in and acceptance when they show they have taken public input seriously. See Attachment 1 for examples of where alternatives analysis has benefitted decisionmaking.

CEQ and the courts have consistently made it clear that the range of reasonable alternative varies with the facts of each situation, resting on public input and key notions of reasonableness and feasibility. Any effort to constrain the requirement to analyze alternatives, including the no action alternative and reasonable action alternatives not within the jurisdiction of the lead agency, would directly undercut a central mandate of NEPA and be met with significant public backlash. If anything, we would strongly encourage agency training for making better and more expansive use of alternatives as a tool to better engage and work with the public on the design of action alternatives that eliminate or mitigate impacts. Done well, the careful identification and consideration of alternatives—with the public—will improve the credibility and acceptability of agency action and better protect our country’s health, environment, and economy.

We also oppose changes to Section 1506.1 regarding limitations on actions during the NEPA process, which is essential to the analysis of alternatives. The very purpose of limiting action while the NEPA process is ongoing is to avoid the “real environmental harm [that] will occur through inadequate foresight and deliberation.” See Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989) (noting the difficulty of stopping a “bureaucratic steam roller” once started). The regulation already allows the development of plans, designs, or performance of other work necessary to support compliance with other legal requirements. Allowing additional work to be done on a preferred alternative would eviscerate the value of alternatives in actually influencing the agency’s decision for the better. It would relegate NEPA analysis to a post-hoc justification for a decision.
the agency had already made, rather than a process for determining the best course of action. NEPA itself contemplates its role before a decision is made. See 42 U.S.C. § 4332(c)(v) (requiring the “detailed statement” to discuss “any irreversible and irretrievable commitments of which would be involved in the proposed action should it be implemented”) (emphasis added).

**General:**

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

The references to EPA’s publication of the 102 Monitor in § 1506.6(b)(2) and § 1506.7 are obsolete.

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

Utilization of existing and new technologies could greatly enhance the quality of analyses and the communication of those analyses to all interested parties. However, this goal requires leadership and resources, not regulatory changes. Section 1502.24 dealing with “Methodology and scientific accuracy” emphasizes scientific integrity and disclosure of methodologies rather than endorsing particular methods; this is a sound approach in terms of technology. It would not be practical for regulations to prescribe particular types of technology for every agency. Doing so would no doubt result in obsolete regulations within a short amount of time. This is another instance in which leadership and resources make the NEPA process more effective and efficient through increasing information access to all involved.

Per our response to question 6, CEQ could issue guidance both encouraging the use of technology to provide information and as a tool for public involvement. However, CEQ should also provide for communities and individuals who by choice or necessity do not have access to computers. In addition, to the extent that technology is referenced, it must be clear that there is an obligation to ensure clear pathways for use (including advisors to provide assistance) and to ensure that the technology is fully functioning at all times.

Again, most important gains to be achieved through technology do not require regulatory revisions, but rather financial investments and leadership. For example, all available EISs and EAs should be available electronically on a single website that permits searching by types of actions, locations, and impacts. Such a tool could greatly facilitate preparation of NEPA documents, particularly in assessing cumulative impacts and increasing public understanding of particular topics. Additionally, Geographical Information Systems data utilized in NEPA analysis should be readily available to the public (subject to any legal requirements to keep certain locational information confidential).
16. Are there additional ways CEQ’s NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?

No. CEQ regulations and guidance already provide for and encourage combining NEPA documents with other relevant decision documents. For example, the requirements for a Record of Decision can and should be integrated into the preamble for a final rule. See 40 C.F.R. § 1502.2. However, many agencies lack staff who have received enough training to identify these opportunities. Regular training of agency NEPA staff would help the agencies, our members, the public in general, and applicants.

We caution against a move to promote combining a final EIS (FEIS) and a Record of Decision, except in the limited instance provided for in Section 1506.10(b)(2). An EIS, and especially an EIS that carries with it the full weight of compliance with all environmental review laws, contains a considerable amount of information, which the decisionmaker must consider. Allowing the decision to be made simultaneously with publication of the FEIS creates pressure to make the decision in haste without thoughtful consideration of all relevant issues. It would also eliminate a window for additional outside input in light of changes to analysis and alternatives in the FEIS that in our experience can improve agency decisions and increase public acceptance. Put differently, combining the FEIS and ROD into a single document strikes us a “penny wise, pound foolish” gimmick that would degrade the ability of agencies to make reasoned and informed decisions.

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

If improving the effectiveness and efficiency of the implementation of NEPA is truly a goal, then CEQ should reinstate the sensibly written guidance for agencies on the consideration of climate change in NEPA reviews. Planning projects and investing taxpayer dollars without considering the risks associated with rising sea levels, increased droughts, and more severe weather is irresponsible and ignores the statutory mandate to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321. As CEQ noted in the now revoked guidance, “[c]limate change is a fundamental environmental issue, and the relation of Federal actions to it falls squarely within NEPA’s focus.” It is now well established by courts that climate change is precisely the type of environmental impact agencies should consider. Moreover, it is utterly impractical to ignore climate change relative to virtually any project, in particular public infrastructure, that is designed and built with public funds and must be durably built to withstand climate and environmental realities. Revocation of the climate guidance did not relieve agencies of their responsibility to consider climate impacts; its sole accomplishment was to introduce tremendous regulatory uncertainty for both agency officials and project sponsors and increase the risk that projects will fail, wasting taxpayer and private sector resources.

The climate guidance therefore rightly provided much needed clarity to agencies on how
to not only consider how federal projects and decisions impact the climate, but also how climate change impacts federal projects and infrastructure. To truly ensure the regulations implement NEPA’s goal of preserving the human environment for future generations, CEQ should reinstate the guidance. The guidance will provide agency staff, project sponsors, and communities the confidence that the government is investing taxpayer dollars on critical infrastructure that is resilient and built to withstand the future impacts of climate change. By providing guidance to agencies on how to consider the fundamental environmental challenge of this century, CEQ will not only provide consistency across agencies and further the purposes of NEPA, but will also better fulfill its responsibility under Executive Order 12898 (“Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”) to identify and address “disproportionately high and adverse human health or environmental effects” on minority and low-income communities. It is now well known that minorities, low-income communities, immigrants, and people who are not fluent in English suffer disproportionate health impacts due to climate change, have less ability to relocate or rebuild after a disaster, and are generally exposed to greater risks – all due to climate change. Reinstatement of the guidance will help to ensure that the potential health, environmental, and economic impacts of climate change are mitigated if not prevented and are better disclosed to disproportionately impacted communities.

In addition to reinstating the climate change guidance, CEQ’s should focus on enforcing and ensuring adequate funding for implementation of the existing regulations, not expending limited resources through what will likely prove to be a time-consuming and contentious rulemaking. CEQ’s regulations state that, “Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements [of the regulations.] Such compliance may include use of other’s resources, but the using agency shall itself have sufficient capability to evaluate what others do for it.” 40 C.F.R. § 1507.2. Accordingly, we urge systematic oversight of agency compliance with this provision. In our considered view, the single most important key to efficiency and effectiveness is having competent, trained, and adequate agency staff to implement NEPA.

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

Yes. Tribal governments should be accorded the same status as state or local agencies, including, specifically, the ability to be designated as a cooperating agency. The current regulations narrowly focus tribal government participation on circumstances where the effects of a proposed action are located on a reservation. Not all tribal lands are, however, reservations. Moreover, less than 22% of Native Americans and Alaska Natives live on reservations, (https://www.census.gov/newsroom/releases/archives/facts_for_features_specialEditions/cb11-ff22.html) and a number of reservations are not in the traditional homeland of a tribe, or represent a small fraction of the original homeland. Further, with one exception, Alaska Natives do not have reservations at all because of the provisions of the Alaska Native Claims Settlement Act of 1971 and Pueblo peoples are located on sovereign,
ancestral lands. Perhaps most importantly, the Federal government holds a legal trust obligation towards Native peoples that is not delimited by the location of either reservations or tribal lands, period. Indeed, Native peoples hold protected rights to and interests in non-reservation and non-tribal lands that are rooted in their individual histories, vibrant cultural and land protection practices and ethics, and economic vitality.

Section 1508.5 should be amended to delete the phrase, “when the effects are on a reservation” so that the relevant sentence reads, “A state, tribal, or local government agency of similar qualifications may by agreement with the lead agency become a cooperating agency.”

Per our response to question 6, the restriction in § 1506.6(b)(3)(ii), regarding the requirement to notify tribal governments of actions with effects primarily of local concern, should be modified to delete the phrase “when effects may occur on reservations” and substitute “affect tribal interests” for the phrase “occur on reservations” as the trigger.

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

CEQ’s guidance on “Improving the Process for Preparing Efficient and Timely Environmental Review under the National Environmental Policy Act” (Mar. 12, 2012) made it clear that existing CEQ regulations intended to reduce delay and paperwork in preparation of EISs (for example, incorporation by reference, adoption, supplements) could also apply to EAs. Again, this is an issue in which the key to improvement is training within the agencies.

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

CEQ’s guidance on “Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact” is an excellent document. Mitigation and monitoring are often the neglected part of the NEPA process. It is essential to the integrity of the process that mitigation be capable of being implemented, that it is implemented and that it is monitored. We are concerned that ineffective mitigation measures have been used as a means to overlook environmental and community harms having significant impact.

Thank you for the opportunity to comment. Representatives of our organizations would be pleased to discuss any of these responses with CEQ representatives. Our contact for this purpose is Stephen Schima at the Partnership Project, (503) 830-5753 or by email at sschima@partnershipproject.org.

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<th>Title/Position</th>
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Bird-related Impacts from Proposed Revisions to NEPA Regulations

With its 23 statewide programs and nearly 500 local chapters nationwide, the National Audubon Society’s mission is to “protect birds and the places they need, today and tomorrow.”

The proposed revisions to the NEPA regulations (85 Fed. Reg. 1684, January 10, 2020), if adopted as final, could have catastrophic impacts on bird species and their habitats and the economies that depend on them.

Concerns with Limiting Climate and Indirect and Cumulative Impacts Analysis – Perhaps the most disastrous provisions in the proposed rule are those that eliminate consideration of indirect and cumulative impacts. This will translate into a failure to consider climate change impacts and on-the-ground results likely to adversely affect bird species across the nation – iconic species such as the American goldfinch, American robin, brown pelican, common loon, whooping crane, Baltimore oriole, northern pintail, the sandhill crane, and many others.

These and hundreds of additional species are identified as at risk in Audubon’s recent study, “Survival by Degrees: 389 Bird Species on the Brink” October 2019.\(^1\) Based on a study of 604 bird species and 140 million bird records, the study concluded that **two-thirds** of North American birds are at risk of extinction due to climate change.

It is crucial that federal decision makers consider the climate impacts of their decisions. The regulations appear directed at eliminating inclusion of exactly these potentially dire impacts in the required analysis under NEPA.

Specific Examples/Discussion of Likely Harm to Birds from Proposed Revisions

The following are examples of adverse impacts on birds and habitats that could result if the proposed revisions are adopted, which are based on cases that involved potential impacts to birds. We provide these examples to show both the potential significant adverse impacts on birds and how deeply the proposed revisions contravene the letter and intent of NEPA.

Example #1: Authorizing Increased Sport Hunting of Migratory Game Birds in Wildlife Refuges to the Detriment of the Bird Species without Adequate Environmental Analysis

Summary: By eliminating cumulative impacts analysis and substituting less comprehensive analyses, the proposed rules could jeopardize the effective regulation of sport hunting of migratory game birds in wildlife refuges.


The National Wildlife Refuge System Administration Act of 1966 closes national wildlife refuges to all uses until opened. The Secretary of the Interior may open refuge areas to any use, including hunting and fishing, upon a determination that such uses are compatible with the purposes of the refuge. The U.S. Fish and Wildlife Service (FWS) reviews refuge hunting and fishing programs annually to determine

\(^1\) Available at: [https://www.audubon.org/climate/survivalbydegrees](https://www.audubon.org/climate/survivalbydegrees)
whether to include additional refuges or whether individual refuge regulations governing existing programs need modification due to changing environmental conditions and other factors affecting fish and wildlife populations. The FWS opens refuges to hunting or expands or modifies migratory game bird hunting opportunities by final refuge-specific regulation.

In addition, the Migratory Bird Treaty Act authorizes the Secretary to determine when hunting of migratory game birds can take place. In order to implement this authority, the FWS prescribes final Migratory Bird Hunting Frameworks from which states may select season dates and limits for the annual migratory bird hunting season. According to the FWS, these frameworks are necessary to allow recreational harvest at levels compatible with population and habitat conditions. The FWS also conducts consultations regarding migratory bird hunting under section 7 of the ESA.

The evaluation under NEPA of proposed regulations allowing or conditioning migratory bird hunting at specific National Wildlife Refuges allows the FWS to consider both the bird populations and habitat conditions and also the overall environmental impact of this hunting.

In this case, the FWS proposed to create or expand recreational hunting activities in an additional 60 refuges based on Environmental Assessments (EAs) done by each individual refuge. The court found that cumulative impacts of hunting were not adequately considered. In addition, the court rejected the FWS arguments that the Migratory Bird Hunting Frameworks and ESA section 7 consultations were the “functional equivalent” of NEPA analysis. Subsequently, the FWS had each affected refuge amend its EA to include cumulative impact analyses, and in addition, issued a Supplemental EA on the Wildlife Refuge System Hunting Programs for the relevant years, addressing the impacts to the Refuge System as a whole. (Fund for Animals v. Hall, 777 F. Supp. 2d 92 (D.D.C. 2011). Based on this additional analysis, the court found that the defendants had complied with NEPA.

The NEPA Analysis:

Under Current Regulations:

1. **Cumulative Impacts** – Under current law, if an agency is involved in several actions that, cumulatively, have a significant impact on the environment, then these actions should be considered in the same environmental document. The existing regulations define "cumulative impact" as:

   ‘‘Cumulative impact’ is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

Under existing regulations, to open additional Refuges to migratory game bird hunting, the NEPA analysis must include cumulative impacts on migratory birds, the impacts on the affected refuge, and the impacts on the overall National Wildlife Refuge System. Furthermore, without considering impacts on the bird species from all relevant conditions (including climate change) in addition to the hunting impacts, the agency cannot make an informed decision about the effect of increased hunting.

2. **Functional Equivalency** -- Under existing law and regulation, an agency may be exempt from conducting a NEPA environmental review if a statute provides, "procedurally and substantively," for the "functional equivalent" of compliance with NEPA. However, to be functionally equivalent under existing law, the analysis must analyze substantively the same factors as an analysis under NEPA (e.g., cumulative impacts). Public participation opportunities in the development of the “functional equivalent”
must be the same as under NEPA. Thus, Migratory Bird Hunting Frameworks and ESA Section 7 consultations that did not consider cumulative impacts in the manner required under NEPA and provided different public participation opportunities, were held not to be the functional equivalent of NEPA compliance.

3. **Climate change** – Under existing regulations, the potential effect of climate change on bird species and their habitats where increased hunting may be authorized would have to be evaluated and considered. For example, if projected climate change impacts would make the vegetation of the area less attractive to a bird species, adding additional hunting to that impact could cause grave problems for bird reproduction or populations.

**Under the Proposed Regulations:**

1. **Cumulative Impacts** – Cumulative impacts will not be considered. Under the proposed regulations, “Analysis of cumulative effects is not required.” Proposed regulation at § 1508.1(g). This could allow additional units of the National Wildlife Refuge System to be opened or hunting opportunities created or increased without considering the cumulative impacts on migratory birds or the other resources of the Wildlife Refuge or the Refuge System.

2. **Functional Equivalency** – A finding that another process or analysis is the functional equivalent of NEPA is much more likely. The proposed regulations require a “NEPA threshold applicability analysis” which specifically provides that in assessing whether NEPA applies, agencies should consider “Whether the proposed action is an action for which the agency has determined that other analysis or processes under other statutes serve the function of agency compliance with NEPA.” Proposed regulation at § 1501(a)(5). This grants the agency broad discretion to determine that another analysis is the functional equivalent of NEPA.

In the case of migratory bird hunting, the proposed regulations could pave the way for agencies to use the Migratory Bird Hunting Frameworks, the section 7 ESA consultations, or some other analysis as the “functional equivalents” of NEPA with their lack of considering cumulative impacts on the migratory bird species habitats, the specific Refuge involved, and overall National Wildlife Refuge System. Public participation opportunities could also be reduced, undermining a key purpose of NEPA. Further, if the analysis for regulations was carried out under an Executive Order (for example E.O. 12866), those orders generally specifically state that they do not create a cause of action, and therefore would preclude judicial review of the analysis.

3. **Climate change** – Under the proposed regulations, evaluation of climate change is not mentioned or required. Without the information about how climate change may affect a bird species or the habitat for the particular bird species, a decision maker cannot effectively apply standards for evaluating effect of hunting on species.

**Example #2: Allowing Issuance of Section 404 Clean Water Act Dredge and Fill Permits, Attendant Damage to Wetlands, and Habitat Fragmentation without Adequate Environmental Analysis.**

**Summary:** Section 404 Permits are likely to be easier to obtain resulting in sharply increased wetland habitat degradation and fragmentation due to the proposed regulations limiting alternatives, not requiring cumulative impacts analysis, and undermining collaboration in finding solutions. Bird species could well be seriously adversely affected.
Section 404 of the Clean Water Act requires that the U.S. Army Corps of Engineers (COE) issue a permit prior to dredge and fill activities. In one case, the COE issued a dredge and fill permit for the construction of a golf course on 200 acres part of which was wetlands that served as habitat for neotropical songbirds. In this instance, NEPA required the COE to consider the cumulative and indirect impacts of the filling of the wetlands. Subsequently, on remand, in order to comply with the court’s ruling, the COE considered additional information regarding cumulative impacts on habitat and native and migratory birds and issued a Supplement to the Environmental Assessment. Stewart v. Potts, 126 F. Supp. 2d 428 (S.D. Tex. 2000).

In another example involving section 404 permits, the NEPA process served to motivate citizens of Eugene, Oregon, to come together to successfully consider cumulative impacts and alternatives to construction of a four-lane road to be cut through a remnant wetland habitat for the great blue heron.

The NEPA Analysis:

Under the Current Regulations:

1. **Cumulative Impacts** – The cumulative impacts on the wetlands and neotropical songbirds and their habitat must be considered. The CEQ regulations define “cumulative impact” as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions." 40 C.F.R. § 1508.7. The current regulations require consideration of the cumulative actions, such as the filling of wetlands – past, present and in the reasonably foreseeable future.

2. **Range of Alternatives** – The government agency must consider a reasonable range of alternatives to the proposal. NEPA demands that the agencies rigorously explore and objectively evaluate all reasonable alternatives. Under existing law, the alternatives analysis is the "heart of the environmental impact statement." 40 C.F.R. § 1502.14.

3. **Climate change** -- Under present regulations, if an area being considered for a wetlands permit will be changed or affected by climate change in the foreseeable future, that effect must be evaluated. Climate change may cause warming or drought that makes an area more problematic for a bird species, for example, and permitting wetlands development in that area may have an enhanced adverse effect on the birds.

Under the Proposed Regulation:

1. **Cumulative Impacts** – The cumulative impacts of successive Section 404 permits allowing the fill of wetlands will not be considered. The proposed rules explicitly state that the consideration of these impacts is not required.

2. **Range of Alternatives** - The consideration of alternatives will be significantly curtailed to the detriment of the environment. Under the revised definitions, alternatives must “meet the goals of the applicant” and be “technically and economically feasible.” Proposed regulation at § 1508.1(z) (definition of “Reasonable alternatives”). For some actions, consideration of alternatives outside the agency’s authority may provide a preferable approach, but the proposed regulations would prohibit such analysis (under present court decisions such analysis is not required but is also not precluded). Under these limitations, the range of alternatives may be limited to the proposed action and the no action
alternative. These limits on reasonable alternatives to be analyzed limit useful information for the
decision-maker and should be rejected. Further, the proposed regulations delete the provision that the
alternatives analysis is the "heart of the environmental impact statement." 40 C.F.R. 1502.14, as well as
dropping the language that requires agencies to "[r]igorously explore and objectively "evaluate all
alternatives". 40 C.F.R. 1502.14(a). Those omissions devalue the importance of the alternatives analysis
and cause the proposed regulations to undermine an important approach of NEPA.

3. Climate change – Under the proposed regulations, the magnifying effect on species
problems that climate change may have in conjunction with development in an area would not be
considered, and attendant potentially devastating adverse effects on bird species would occur.

4. Bias Toward the Permit Applicant – First and foremost, the proposed rules provide that
an applicant may prepare the EIS for that applicant’s project. Proposed regulation at § 1506.5(c). In
addition, another significant provision favoring the permit applicant under the new regulations include
the requirement that the alternatives considered must meet the “goals of the applicant.” Alternatives also
must be “technically and economically feasible.” Proposed regulation at § 1508.1(z).

5. NEPA Collaboration.-- The role of NEPA in incentivizing parties with divergent points
of view to come together to find collaborative solutions will be undermined by the new regulations which
weaken the implementation of the law.

Example #3: Undermining Science and the Consideration of Increased Bird Strikes and Bird
Displacement in the Regulation of Airspace and Aircraft Facilities

Summary: The proposed regulations could result in serious adverse impacts on bird species and
their habitat due to undermining the use of sound science and indirect and cumulative impacts
analysis when regulating airspace and aircraft facilities.

[Example based on: National Audubon Society v. Dept. of the Navy, 422 F.3d 174 (4th Cir. 2005)].

When a branch of the military or the Federal Aviation Administration approves new landing facilities or
use of airspace, NEPA requires an analysis of environmental impacts, often entailing an EIS with its
attendant “hard look” at impacts on the environment, including on bird species. This hard look requires
the use of sound science, including site-specific analysis of the bird species that may be impacted. This
can include site visits, radar studies, other scientific surveys, and modeling (such as bird avoidance
modeling and bird strike studies), as well as a literature search. In addition, an EIS that considers indirect
and cumulative impacts will analyze the incremental effect of adding additional facilities and additional
flights (with noise and other disruption to the species) to an area.

The NEPA Analysis:

Under the Current Regulations:

1. Climate Change – Existing regulations require the consideration of indirect and
cumulative impacts. “Indirect effects” caused by the Federal action “are later in time or farther removed
in distance but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Under existing law, the climate
change impacts from a federal action must be considered in the environmental analysis. In this instance,
climate change impacts of the new landing facilities and the increase in flights (including climate impacts
on the bird life) should be considered. In addition, if climate change is projected to affect the land or
habitat on which the new facility is to be developed, evaluating that change may lead to information that
an area may become prone to flooding, for example, and is thus not suitable for an aircraft facility.
2. **Science** -- Consideration of sound science is required in the EIS. This “hard look” analysis requires reasonable methodology and a robust consideration of the science. Under existing regulations, agencies often undertake on-the-ground scientific analysis such as site visits, surveys and other relevant site-specific science. Further, under existing regulation (40 C.F.R. § 1502.22), the agency is to identify incomplete or unavailable information, and under specified circumstances must develop that information for the environmental review.

3. **Cumulative Impacts** -- The current regulations require the consideration of cumulative impacts – in this instance, an analysis of other flights, facilities and air space requirements that may together with the proposed action, impact bird species. Also climate change impacts must be considered.

**Under the Proposed Regulations:**

1. **Climate Change** – The proposed regulations explicitly eliminate the consideration of indirect and cumulative impacts, stating:

   “A ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal change. Effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. Analysis of cumulative effects is not required.” Proposed regulation at § 1508.1(g)(2).

   This appears to be directed to eliminating the need to consider the impacts of climate change. Climate change will have huge impacts on bird species and their habitats as exhaustively documented in the Audubon report, “Survival by Degrees: 389 Bird Species on the Brink” October 2019 (see discussion, supra, on p. 2). Failure to consider those impacts will lead to poor decisions and serious adverse effects on birds.

2. **Science** – The proposed regulation would undermine the consideration of relevant science. The proposed revisions to section 1502.24 of the regulation inserts the following new statements: “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. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models.” [Emphasis added]. Rather than availing itself of on-the-ground data and information, the agency can exclusively use remotely gathered information or modeling. It may also be aware that certain data is essential for an effective decision—as for example what happens to birds in the area during breeding season—without having to develop that data before deciding. As a result, decisions will not be as environmentally sound.

3. **Cumulative Impacts** – Because the proposed regulations explicitly do not require the consideration of cumulative impacts there is unlikely to be any analysis of the incremental impacts on birds of new air facilities when combined with existing facilities and flights or those anticipated in the future, or when combined with other assaults on the birds such as climate change.

**Example # 4: Siting and Operation of Communications Towers without Providing Adequate Consideration by the FCC and the FAA of Alternatives to Reduce Bird Kill.**

**Summary:** The proposed regulations may undermine consideration of options for siting and operation of communications towers and lead to millions of bird deaths.
The Federal Communications Commission (FCC) regulates the placement and lighting of communications towers. It shares responsibility with the Federal Aviation Administration (FAA) that by statute focuses on airplane safety. Studies have indicated that collisions with communications towers may be responsible for millions of bird deaths a year.

Initially the FCC declined to undertake an environmental review of the effects of its regulations for operation and siting of communications towers on birds. In a strong decision, the Court of Appeals for the District of Columbia Circuit held that the FCC’s approach was “arbitrary and capricious.” Thereafter, the FCC appears to have undertaken a more serious environmental review, modified its requirements for NEPA evaluations and its lighting requirements for towers to assure better bird protection. The FCC has acknowledged the benefits of its present approach and the significant reduction in bird mortality from better tower lighting systems. It received a Presidential award for the improvements.

In addition to the lighting requirements, the FCC has identified a set of conditions that require EAs or environmental analyses and do not fit into its categorical exclusions. This approach assures better protection, including for birds.

Despite this success, the FCC has again attempted to exempt siting—this time of 5G towers—from NEPA compliance, and been rebuffed by the D.C. Circuit. See United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC, 933 F. 3d 728 (D.C. Cir. 2019).

The NEPA analysis:

Under Current Regulations:

1. **Cumulative impacts** — Under current regulations, the FCC must evaluate the effect on birds and bird species of both individual cell towers and cell towers collectively. Since the effects on birds and bird species (i.e., deaths) at a single tower is greatly magnified when towers are looked at collectively, this requirement is essential to effective decision-making about siting and lighting.

2. **Alternatives** -- Through evaluation of a range of reasonable alternatives, including those proposed by members of the public, the FCC identified different approaches to lighting of communications towers and different approaches to NEPA compliance.

3. **Climate Change** -- Under existing law, cumulative and indirect impacts must be considered, thus requiring that the climate change impacts from a federal action must be considered in the environmental analysis.

Under the proposed regulations:

1. **Cumulative impacts** – Cumulative analysis is no longer required. As a result, the significant impact of communications siting and lighting on bird populations across the country would be lost if analysis is only site-by-site. In addition, the significant benefits of a broad-based analysis taking into account cumulative impacts and providing a basis for tiering for site-specific projects would be lost.

2. **Alternatives** -- Under the proposed regulations the requirements for seeing a broader range of alternatives is eliminated. Further, alternatives are not to be considered unless they serve the purposes of the permit applicant and are technically and economically feasible. Alternatives protective to
birds, or for which the public may not have information as to cost or feasibility, would be ruled out. We cannot know whether the current lighting approach would have emerged under this limited approach, but in general more creative and thoughtful approaches are less likely to be identified and evaluated under the proposed regulations.

3. **Climate change** -- Climate change is not considered. Thus the impacts of communications towers placement and lighting on birds when combined with the effect of climate change on those species as outlined in the National Audubon Society Report cited above will not be considered, leading to far less informed decision making and regulation.

**Summary of communications tower siting and lighting:** Because of its obligations to comply with several laws including NEPA, the FCC (and FAA) have been required to evaluate more effective approaches to protecting bird populations from colliding with communications towers by requiring more effective lighting on those towers. Without the thoughtful examination required by the present NEPA regulations—particularly the cumulative impacts requirements—these protections may not have developed. Moreover, if the proposed regulations are adopted and upheld, the types of protections developed here may not be identified or considered for placement of 5G communications facilities.

**Example #5:** Approving Oil and Gas Leases on Public Lands that Have Been Identified as Important to Protect Sage-Grouse Without Adequate Environmental Analysis, Including Examination of Climate Change, May Endanger the Sage-Grouse.

**Summary:** By failing to meet the requirements of NEPA for effective and comprehensive environmental analysis, Federal government decisions and actions are likely to endanger the sage-grouse, a species in grave danger.


The Greater sage-grouse is a bird species that is greatly in danger because of the loss, degradation, and fragmentation of its native sagebrush habitats across the interior West. The Department of the Interior and the Forest Service developed a significant planning strategy to protect the sage-grouse that the agencies believed, if implemented, would avoid the need to list the sage-grouse as threatened or endangered under the ESA. The Federal agencies worked extensively with Governors and others throughout the West to develop the plan. This September 2015 Greater Sage-Grouse Planning Strategy was implemented through a series of Federal agency plan amendments; based on those actions, the FWS determined that listing of the sage-grouse was “not warranted” under the ESA. 80 Fed. Reg. 59858, 59876 (Oct. 2, 2015).

After the individual plan amendments were developed and put into place under the Sage-Grouse Strategy, the new Administration took actions to revise the Strategy and the individual plans to permit leasing and development of oil and gas resources on public lands that had been set aside from development under the sage-grouse protection strategy. In addition, the Trump Administration took action to delete requirements for mitigation for certain surface disturbances. Plaintiffs Western Watersheds and others challenged the Supplemental Plans issued in March 2019 as adversely affecting habitats and populations of sage-grouse and sought and obtained a preliminary injunction because the agencies in developing the Plan Amendments failed to comply with several federal laws including NEPA. An appeal is pending.
The NEPA Analysis:

Under Current Regulations:

1. **Cumulative impacts** -- Presently agencies must evaluate and consider cumulative impacts of both oil and gas development and of the multiple other threats to sage-grouse at the regional and range-wide level. This includes the consideration of connectivity between sage-grouse populations and habitat across state lines.

2. **Climate change** -- Climate change may affect the current and prospective habitats of sage-grouse. In addition, the oil and gas developed may have an impact on climate change (burning fossil fuels is a significant contributor). Consideration of information related to climate change would inform the decision-maker and could well require steps to better protect sage-grouse habitat and populations.

3. **Alternatives** -- A range of reasonable alternatives must be considered, including no or limited leasing for each of the leasing actions at issue in the case. In particular, a meaningful no action alternative and more alternatives than simply the one the agency wants to select must be evaluated.

4. **Hard look** -- An agency must examine and respond to comments on the EIS, especially those that, for example, raise serious concerns about the effect of the action on environmental problems or raise questions about applicable science.

5. **Bias/conflict of interest** -- The agency itself must develop or closely supervise the environmental analysis under NEPA.

Under the Proposed Regulations:

1. **Cumulative impacts** -- The proposed regulations do not require consideration of cumulative impacts. Given the imperiled status of the sage-grouse, failure to look at all the assaults to the species—not just those from a lease-by-lease impact analysis—is the only way meaningfully to make sound decisions. As the court noted in issuing an injunction, cumulative impacts include connectivity of habitat and scope of the sage-grouse’s range across state lines that are essential components of protective sage-grouse habitat and must be included in a sound NEPA analysis.

2. **Climate change** -- Climate change information and analysis is not required under the proposed regulations. The impacts of climate change when combined with other habitat changes outlined above would not be evaluated, to the detriment of the sage-grouse and the public more generally.

3. **Alternatives** -- Under the proposed regulations, consideration of alternatives will be significantly curtailed to the detriment of the environment. Under the revised definitions, alternatives must “meet the goals of the applicant” and be “technically and economically feasible.” Proposed regulation at 1508.1(z) (definition of “Reasonable alternatives.”). Thus alternatives that may be more protective of the sage-grouse, such as no or limited leasing, may not be evaluated. The Administration in the 2019 Plan Supplement preliminarily enjoined by the court has already failed to look at the range of reasonable alternatives the Court found important for protection. Such limits will lead to less informed decisions and may well lead to decisions that cause far greater harm to sage-grouse populations and to the public.

4. **Hard look** -- Under the time and page constraints of the proposed regulations (see Proposed regulation at §§ 1501.5, 1501.10, 1502.7), careful review of concerns raised and effective
response --falling under the category of “hard look”—will be constrained. The failure of the agency to take this hard look concerned the court that issued a preliminary injunction against the Supplemental Plan because it would lead to less effective protection for the sage-grouse.

5. **Bias/conflict of interest** -- Under the proposed regulations, the permit applicant may develop the EIS or EA (see Proposed regulation at § 1506.5(c)). Particularly coupled with other limits such as those on alternatives and limits on the requirements for developing new, needed, and scientifically sound information such EAs and EISs may be problematic.

**Conclusion**

As the foregoing examples demonstrate, the proposed regulations, if adopted and not overturned by the courts, could have significant, disastrous impacts on bird species and their habitats. Given the grave threats to bird species posed by climate change as documented in “Survival by Degrees: 389 Bird Species on the Brink” October 2019, this is not the time to gut one of our bedrock environmental laws. The proposed amendments to the NEPA regulations should not be adopted.
Ocean Impacts of Proposed Changes to NEPA

Analysis prepared for Ocean Defense Initiative by Lois Schiffer, former U.S. Assistant Attorney General for the Environment and Natural Resources Division of the U.S. Department of Justice and former General Counsel for the National Oceanic and Atmospheric Administration

On January 10, 2020, the Trump administration proposed revisions to regulations that guide the implementation of the National Environmental Policy Act (NEPA)—the law that requires the federal government to consider the environmental impacts of its decisions and provides opportunity for public input in that review process.1

The proposed rules, if adopted, would impact the ocean in at least two ways. First, they would make it easier for projects to go forward that can and will damage the marine environment and harm marine mammals and endangered species. Second, by excluding the need to assess climate impacts during the NEPA review of federal projects and ignore greenhouse gas emissions, the rules would likely lead to more emissions at a time when dramatic reduction is needed. As scientists from around the world have noted, the most important action we can take for the ocean right now is to reduce greenhouse gas emissions so the world remains below 1.5C of warming.

Below are a number of examples of federal actions and projects related to the ocean with analysis of how they are treated under the present NEPA regulations and how they could be treated under the proposed revised regulations. These examples illustrate how implementation of the proposed NEPA revisions could lead to serious adverse effects on the ocean environment.

Of note, the problems described here are based on the regulations as proposed. It is possible that the regulations may be modified before adoption. Further, if the regulations are adopted (either as proposed or in a modified form), it is almost certain they will be challenged in court. 3

1 Lois Schiffer has had extensive experience with NEPA for over forty years. As Chief of the General Litigation Section in the Land and Natural Resources Division at the U.S. Department of Justice (1978-1981) and as Assistant Attorney General for that Division (renamed Environment and Natural Resources Division)(1993-2001), she was responsible for work with a wide range of federal agencies on hundreds of NEPA cases. As General Counsel at the National Capital Planning Commission (2005-2010), she advised that federal agency on the effective use of NEPA to inform its decisions. As General Counsel at NOAA (2010-2017), she advised the agency on NEPA in a range of contexts, and helped revise NOAA’s NEPA guidance and NEPA program. She has taught the principles of NEPA to myriad students as an Adjunct Professor of Environmental Law at Georgetown University Law Center for 30 years. She has spoken and written about NEPA for many years.
3 The regulations would most likely be challenged for failing to comply with the statute; as a change in regulations for which adequate reasons are not given (see Motor Vehicle Manufacturers Assn. v. State Farm, 463 U.S. 29 (1983); or as arbitrary and capricious. Some of those suits may well succeed and require revision of the regulations as adopted.
Background

In analyzing the proposed regulations, it is useful to keep NEPA purposes and approaches in mind. NEPA leads to better agency decisions because it:

- informs the decision-maker;
- provides for orderly agency decision-making (for example alternatives are considered at one time rather than seriatim);
- requires the agency to consider effects of the action on the environment, including social and economic environment; and
- involves the public in agency decision-making.

These approaches benefit both the agencies and members of the public. It is important to point out the detriment to agencies and the public if, under the proposed regulations, decision-making becomes less informed and more disordered, this method for public involvement is foreclosed, and the purposes of NEPA for future generations are ignored.

NEPA is a useful tool for the agencies, but much of that usefulness would be undermined by these proposed regulatory changes. Under current NEPA regulations, agencies may use NEPA as a helpful tool even if not required to do so. The current Council on Environmental Quality (CEQ) regulations at Sec. 1501.3(b) provide that agencies may prepare an environmental assessment at any time in order to assist agency planning and decision-making; and Sec. 1501.3(a) provides that an assessment is not necessary if the agency has decided to prepare an environmental impact statement (EIS). For example, the agency may do an EIS even if it is not certain about major impacts or may do an Environmental Assessment (EA) even if a categorical exclusion applies. This “when-in-doubt do an environmental review” approach is discouraged by some of the provisions in the proposed regulation (e.g. the requirement that agency procedures may not generally go beyond these proposed regulations; the requirement for listing costs of the EIS; the provision for using more categorical exclusions including those from other agencies and unjustified by the experience of the using agency; and time and page limits).

Methodology

This analysis uses primarily examples drawn from actual cases that evaluated or applied NEPA where ocean resources would be affected. In addition, the proposed revisions to the NEPA regulations are indeed extensive. In the interests of clarity and brevity, this analysis focuses on several of the more significant changes and does not undertake an exhaustive analysis of all changes.

Analysis

The following are examples of potential detriment to the ocean environment if the proposed regulations are applied as written and not successfully challenged.
A. Seismic blasting to map the ocean floor for oil and gas exploration may harm species.

Seismic blasting is used to map oil and gas reserves on the ocean floor for oil and gas development. The Department of the Interior (DOI) issues permits for such testing accompanied by an incidental harassment authorization issued by the National Oceanic and Atmospheric Administration (NOAA) under the Marine Mammal Protection Act. Such testing, particularly if conducted without regard to when or where species may be present, may adversely affect marine species, including fish, whales, and sea turtles, across a wide geographic range. Evaluation of proposed seismic blasting under NEPA enables the agency to determine the risks to species and to provide appropriate conditions if the blasting is to go forward.

When the Trump administration lifted the moratorium on oil and gas development in waters off the East Coast, companies sought permits for seismic blasting. NOAA issued the necessary authorizations (though the final Bureau of Ocean Energy Management permits have not been issued), and in late 2018 ten conservation groups and a number of east coast states sued to block that testing until, among other things, an adequate analysis of the proposed activity under NEPA had been completed. In this instance, the parties argue that the endangered North Atlantic right whale and other species may be affected adversely by seismic blasting. Such disruption may cause adverse effects for the species, as well as for the people who depend on those species for their livelihoods—fishermen, tour companies, whale watchers, and other components of coastal economies.

As noted in an article about the lawsuit:
“But seismic testing threatens the recovery of marine mammals and the health of fish and shellfish. And oil drilling, with the possibility of leaks and spills, brings additional threats.”

The ongoing lawsuit underscores the importance of effective evaluation of seismic blasting effects to determine how to protect species. This lawsuit and the importance of protection for species from seismic blasting is set forth in more detail in this article:

Under current regulations:

1. **Scope:** Under current regulations, an EIS would be required to evaluate the effects of all five seismic authorizations because the cumulative actions of each authorization individually and collectively will have a significant impact, an endangered species is involved, and there is controversy over the science related to impacts. (At issue in the lawsuit is the fact that NOAA did not prepare an EIS, and instead prepared only an EA that only considered no action and the preferred alternative--blasting.) Further, seismic

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5 https://www.njconservation.org/new-jersey-moves-to-block-seismic-blasting/

6 In early 2020, the State of South Carolina joined the lawsuit. https://abcnews4.com/news/lowcountry-and-state-politics/south-carolina-joins-lawsuit-fighting-seismic-offs hore-drilling-tests. Also in early 2020, the Court ordered the Department of Commerce to provide documents related to the decision.
blasting at five sites is a major federal action significantly affecting the human environment and requires an EA or an EIS. Definitions at 1508.18 (major federal action); 1508.27 (significantly); 1508.25 (Scope, includes connected and cumulative actions).

2. **Cumulative and indirect impacts analysis**: The five authorizations to allow seismic blasting are connected and would have cumulative impacts on marine species, including an endangered species. Under current NEPA regulations, analysis of those cumulative effects, as well as direct effects to the environment and indirect effects of producing more oil and gas, is required. That information may well affect whether requirements for issuance of an incidental harassment authorization are met. For example, the actions here will be cumulative to a number of tests using seismic blasts already being done by the Navy that NOAA has authorized.

3. **Impacts more distant in space or time**: Impacts that the action may cause but are not closely connected in space or time, such as impairments to species that show up only after a number of years, are direct or indirect impacts that would need to be evaluated.

4. **Climate change**: Under present law as developed by courts, climate change must be evaluated in the NEPA analysis. This would include the effects on species due to climate change combined with seismic blasting, and the potential indirect effects that would result from the climate change impacts caused by more oil and gas development.

5. **Alternatives**: A reasonable range of alternatives must be considered, and no alternative is precluded from analysis because of technical or economic infeasibility. Because requirements help drive technology, analysis of alternatives that rely on developing or future technology is important.

6. **Bias / Conflict of interest**: Current regulations require that the EIS be prepared by the agency, not by the permit applicant.

Under the proposed regulations:

1. **Scope**: The proposed regulations would change the definition of “major federal action” so that non-federal projects (projects conducted by private permit applicants such as the applicants seeking to conduct seismic blasting in the Atlantic) with minimal federal funding or minimal federal involvement where the agency cannot control the outcome of the project--sometimes called a small federal handle--will not require an EIS. Therefore, it could eliminate the requirement for EA or EIS altogether with respect to seismic blasting authorizations.

2. **Cumulative and indirect impacts analysis**: NOAA would no longer be required to look at seismic blasting permitted in one area in the context of blasting in other or nearby areas despite the potential aggregated effects on species. Nor would analysis of the combined effects of this blasting with other projects in the area or more broadly be required.

3. **Impacts more distant in space or time**: Under the proposed regulations, impacts to be studied are to be proximate in space and time. Thus, impacts that do not occur for a
number of years or occur at a distance and may not be “proximately caused” by the action need not be studied. Since species as well as human effects may not be known for some time, this provision limits important assessments.

4. **Climate change:** Such analysis would no longer be required. Because the point of seismic testing is to enable oil and gas development in the oceans, this omission is serious. For example, if a projection of the need for oil and gas a number of years out because of efforts to regulate climate change shows lowered demand, that affects the economic/conservation balance. That balance cannot be effectively made without climate change analysis.

5. **Alternatives:** Alternatives would be limited—some may not be considered. Under the proposed rules, an alternative must consider the goals of the third-party applicant. Thus, an alternative that is more difficult for the oil and gas company may be precluded even if it is more environmentally protective of the species. Further, under the proposed rules alternatives must be technically and economically feasible. For example, to consider an alternative of not blasting during breeding season, the agency must undertake an assessment of the oil company’s economics (or in another context like the Arctic, propose only alternatives the oil company could meet, such as testing at certain seasons even if that conflicted with species needs). Most important, one of the ways to evaluate an alternative is to assess its technical and economic feasibility—that is an evaluation factor, not a selection criterion.

6. **Bias / Conflict of interest:** Under the proposed rules, the oil and gas developer/permit applicant would be permitted to undertake the review, creating attendant bias (conflict of interest).

7. **Page and time limits:** The rule would impose page limits and the amount of time that can be spent on an analysis. While page limits that lead to more effective analysis are good, page limits that constrain use of effective scientific reporting, alternatives, or evaluation of important information limits usefulness of the environmental review and public input. Here it could lead to multiple state-by-state reviews instead of a composite that would better reflects cumulative impacts. Finally, arbitrary time limits do not consider the fact that scientific study of species to determine effects of the action may require, for example, a breeding season evaluation that may not be completed during the specified time. *(NOTE: The problems associated with the arbitrary page and time limits found in the proposed rules would apply to any NEPA analysis described here.)*

**Summary**

The change in regulations could eliminate the need for environmental review of seismic blasting authorizations. In cases where a review was conducted, it would seriously constrain the information to be developed and made available to the public and the decision-makers, including the information related to cumulative effects as well as the potential impacts of climate change. The limited information could easily change the decision about whether authorizations for seismic blasting are granted. Without cumulative effects information, for example, blasts may seem acceptable for marine mammals whereas an analysis that considers the cumulative effects of seismic blasts and other environmental impacts would come to a different conclusion.
B. Plans for offshore oil and gas development may be less protective of the environment.

Under the *Outer Continental Shelf Lands Act* (OCSLA), DOI is required to develop plans for offshore oil and gas leasing every five years. Those plans require an EIS that may then be used as the basis for tiering analysis later in the leasing process. DOI has suspended the five-year plans currently under development, in part, because of a court ruling related to an onshore leasing plan that found the EA to inform the issuance of leases must analyze climate change impacts, including those impacts that would result from the oil and gas produced by leases issued under the plan. *WildEarth Guardians v Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). In addition to the political risks of moving ahead with a five-year leasing plan in an election year, many speculate the Department seeks to reverse that ruling before it moves ahead with the current offshore plans, no doubt concerned that similar analyses would be required.

The Congressional Research Service (CRS) has written a helpful analysis of the five-year planning process that incorporates NEPA. That report notes that OCSLA requires: “In preparing each program, DOI must balance national interests in energy supply and environmental protection. [footnote omitted].” Evaluation of proposed five-year plans for offshore oil and gas leasing would change significantly if the proposed regulations are adopted.

Under current regulations:

1. **Scope:** Currently, the development of a Programmatic EIS (PEIS) for a five-year plan requires analysis of the full range of environmental information necessary to inform the balance between energy needs and environmental protection. As the Summary to the CRS Report above states: “the PEIS examines the potential environmental impacts from oil and gas exploration and development on the outer continental shelf (OCS) and considers a reasonable range of alternatives to the proposed plan.”

2. **Tiering:** Under the current regulations, five-year plans are informed by Programmatic EISs (PEIS) because significant environmental impact is assumed, and specific leasing and sales are pegged to those PEISs.

3. **Cumulative and indirect impacts analysis:** Such analyses are currently required. For example, if oil and gas development impacts and wind development impacts occur in the same area, the cumulative affects on the environment and marine ecosystems provides useful information in evaluating conservation vs. energy development. Alternatively, the effects of oil and gas development combined with other impacts, such as fishery

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7 43 USC 1331 et seq.
long-lines, may cumulatively have significant impact on marine mammals and would require analysis under the current regulations.

4. **Climate change:** Under present law as developed by courts, climate change must be evaluated in the NEPA analysis. This would include the effects on marine species due to climate change combined with oil and gas leasing, and the potential indirect effects that would result from the climate change impacts caused by more oil and gas development.

5. **Bias/Conflict of interest:** Current regulations require that the EIS be prepared by the agency, not by the permit applicant.

6. **Alternatives:** Under current regulations, a good range of reasonable alternatives must be assessed, without the threshold determining whether an alternative is technologically or economically feasible. This opens the process to a wider range of alternatives and encourages technological development.

Under the proposed regulations:

1. **Scope:** In the case of oil and gas leasing, the scope of the environmental review (balancing energy needs and conservation) is established by statute, so it is likely for now to remain unchanged. However, the proposed regulations permit greater use of what is known as a “functional equivalent” analysis (i.e., does a review of the five-year plan without NEPA provide sufficient environmental analysis to be a “functional equivalent” to an EA or EIS)\(^\text{10}\). In light of the long history of EIS preparation with five-year plans, use of the five-year plan as the functional equivalent may seem unlikely. However, when combined with the fact that the regulations allow the permit applicant to conduct the analysis, perhaps not. Under that approach effective environmental, social, and economic analysis could be lost.

2. **Cumulative and indirect impacts analysis:** Analysis of indirect and cumulative effects would no longer be required. So, for example, if a lease sale is proposed in the same area as other ocean uses, analysis of the cumulative effect of drilling and trawling for fish or laying a pipeline on the ocean ecosystem and species is not required. Similarly, indirect effects on fishermen’s jobs possibly lost because of impact on fishing caused by drilling need not be analyzed. Without that analysis, it is difficult to understand how the agency will make the statutorily required determination that the proposed leases balance energy security and conservation.

3. **Climate change:** Because the proposed regulations do not require the examination of climate change, analyses would not have to evaluate direct or downstream impacts that the leases may have on climate change. Nor would they have to analyze the effect climate change may have on the leases—when a drilling season may change in the Arctic, for example—or on marine species that may be in the area of the drilling. Further, as federal and state actions to address climate change affect demand for fossil fuels, this will in turn affect the need for oil and gas to assure energy security. Without these

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\(^\text{10}\) The OCSLA specifically requires an analysis under NEPA; however, how that may be interpreted in light of the proposed regulations if they are adopted may be problematic.
analyses, it is unclear how the agency will make the required statutory determinations that proposed leases balance energy security and conservation.

4. **Bias/Conflict of interest:** As would be the case with seismic authorizations, allowing the permit applicant to prepare the EA or EIS would allow for inherent bias in the results. Under the proposed regulations, the oil and gas industry could prepare the five-year plan EIS, with potential attendant bias of scientific information, alternatives, and selection of preferred alternatives.

5. **Alternatives:** A number of factors in the proposed regulations would limit alternatives to be considered. Specifically, only alternatives in control of the action agency (here DOI) are to be considered; only alternatives meeting the requirements of technological and economic feasibility are to be evaluated; and the agency must consider the goals of the applicant (unclear whether this includes the ultimate oil and gas leasing permit applicant) in selecting alternatives to analyze. This approach seems to reduce the likelihood that five-year plans will examine the alternative of withdrawing areas from leasing or drilling at times or with techniques that are more protective of ecosystems and species.

**Summary**

Under the proposed regulations, the analyses to be conducted and the information that is provided to the decision-maker are likely to be sufficiently incomplete that the statutory balancing requirement will be applied with a significant tilt toward more oil and gas development under less protective terms, rather than toward conservation in the energy/conservation balance. In addition, the real economic evaluation of oil and gas development over the longer term in light of climate change would be missing. The regulations will likely result in more leasing plans being approved that are less protective of the environment, less economically sensible, and more likely to exacerbate climate change.
C. Pipeline projects may be less protective of the environment.

The Federal Energy Regulatory Commission (FERC) is the agency that grants permits for interstate pipelines under the Natural Gas Act as amended by the Energy Policy Act of 2005. FERC regulation extends to offshore pipelines. In that permitting, the relevant statute specifies the factors that must be taken into account. A sound NEPA analysis informs FERC’s application of those factors. For gas pipelines, the NEPA analyses must look at the “whole of the pipeline.”

Under current regulations:

1. **Cumulative and indirect impacts analysis:** A court has found that NEPA requires an analysis of indirect effects that may result from the approval of a pipeline. In other words, the analysis must seek information about and examine upstream production and downstream consumption effects of gas transmission. Because FERC has authority to deny such pipeline certifications based on environmental factors, the information is essential to FERC’s decision-making.

2. **Climate change:** Under current regulations, an examination of indirect effects and cumulative effects would be required to include an analysis of the effect of climate change that will result from the gas to be transmitted and burned. The current regulations would also require an analysis of the impacts that climate change might have on the pipeline (for example, would sea level rise risk the integrity of the pipeline).

3. **Bias/Conflict of interest:** Currently, an EIS is required to be developed by the agency, and EAs are developed under the supervision and control of the agency.

Under the proposed regulations:

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11 See regarding NEPA and NGA the following: https://www.epa.gov/nepa/natural-gas-pipeline-guidance-national-environmental-policy-act-reviews.

12 For an interesting map of one company’s offshore pipelines see https://www.enbridge.com/~/media/Enb/Documents/Factsheets/FS_Offshore_Pipelines_FINAL.pdf.


14 Because oil pipelines have no central permitting authority, courts have held that no “whole of the pipeline” analysis is required for those pipelines. https://www.pipelinelaw.com/2015/10/05/d-c-circuit-rules-that-nepa-does-not-require-whole-pipeline-review-for-oil-pipelines/.


1. **Cumulative and indirect impacts analysis:** Such an analysis would not be required. In short, the effects on the environment, on users, and on climate change of producing additional natural gas need not be analyzed or assessed.

2. **Climate change:** A significant factor in evaluating the downstream effects of pipelines is the connection between natural gas use and greenhouse gas emissions. Under the proposed regulations, that analysis would not be required. Nor would an analysis of the potential climate change impacts on the project (such as sea level rise) be required.

3. **Bias/Conflict of interest:** The certification applicant (pipeline company) may prepare the EA or EIS, with attendant bias effects on alternatives development, identification of scientific studies and information, and selection of preferred alternative.

**Summary**

As a result of less rigorous environmental analyses and no information about climate change, decision-makers will have less information on which to base good decisions about pipelines and are more likely to take action that impairs ecosystems and the environment.

**D. Protecting endangered marine species from fishing impacts will be more challenging.**

The *Magnuson Stevens Act* (MSA) regulates federal fisheries management, and the *Endangered Species Act* requires protection of threatened and endangered species and their habitat. Together, they require that specifications for fishing in federal waters—Fishery Management Plans (FMPs) and fishing regulations issued to implement the plans—protect certain marine species.

As it works with Fishery Management Councils to develop FMPs and regulations for fishing under MSA, NOAA evaluates proposed actions under NEPA. For example, in the Pacific Ocean, lucrative high seas long-line and coastal driftnet fisheries for tuna and swordfish may entangle sea turtles. Several reports and studies have noted the value of effective NEPA evaluation in this context to enable agencies to adopt requirements that protect marine turtles and other species. Without a thorough and broad-based NEPA analysis, decision-making would become more fragmented and the species less protected.

The importance of effective NEPA analysis to inform agency decisions is detailed in a 2006 Report of the Western Pacific Fisheries Management Council. The report emphasizes the importance of taking into account social and economic effects of proposed alternatives, as well as a full range of action alternatives. In another report, by Pew Charitable Trusts, use of effective NEPA for species protection is also emphasized:

“NEPA provided a means to protect endangered marine turtles from bycatch on swordfish long-lines in the West Pacific. Following a full exploration of alternatives to protect sea turtles and albatrosses in a supplemental EIS, changes from “J” to circle hooks and

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modified bait techniques enabled the resumption of the swordfish fishery that had been closed by court injunction. Managers praised the collaboration of industry, government and environmental groups which produced the alternatives that incorporated protection for turtles and seabirds”.

In evaluating FMPs and regulations, NOAA uses both EAs and EISs, depending on the circumstances.

Under current regulations:

1. **Cumulative and indirect impacts analysis:** The effects on marine species and ecosystems of different types of fishing in the same fishery management area, even if regulated through different FMPs, must be addressed as cumulative impacts.

2. **Climate change:** Under present requirements, the agency must evaluate the effect of its plan on climate change and the effect of climate change on the marine species being analyzed. For example, if sea turtles or other marine species are at risk because of climate change, greater protections in the fishing process may be called for.

3. **Alternatives:** A reasonable range of alternatives must be developed and evaluated, including alternatives proposed by the public. For example, the “j-hooks” described in the report above is the type of alternative that scientists may develop and encourage but may not be identified by the fishers who are eventual permittees under FMPs. Similarly, alternatives may be identified by environmental groups, including timing of fishing or alternative methods or gear types.

Under the proposed regulations:

1. **Cumulative and indirect impacts analysis:** Because analysis of indirect and cumulative affects is not required, development of information about risks on turtles and other marine mammals that might be caused by two different fisheries, or by fishing, tourism, and foreseeable shipping together, would not be required.

2. **Climate change:** Scientific analysis clearly supports the concept that climate change is seriously affecting the ocean, and that changes in the ocean in turn affect the fish and wildlife that live there. The proposed regulations do not require analysis of the effect of the FMP or regulations on climate change, or the effect of climate change on elements of the plan. If marine mammals affected by the fishery are under threat from climate change, risks from methods of fishing, timing, or amounts of fish to be taken may have a differing or more serious effect on the mammals. Without this information and analysis, NOAA’s decision-making is less sound and likely more harmful to marine species.

3. **Alternatives:** The proposed regulations constrain alternatives in a number of ways. Of particular relevance here, alternatives must be technically and economically feasible—a set of information that may not be available to those who are not engaged in fishing, and

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the requirement for which may limit new ideas and approaches. For example, restrictions on fishing during breeding season for marine mammals may be ecologically important but information about its cost may not be available to outside groups proposing alternatives. Similarly, fishing with different kinds of gear to avoid by-catch may be appropriate but have an economic impact known to the fishing industry, but not members of the public. Under the revised rules, it would be eliminated as an alternative to be evaluated.

Summary

Under the proposed regulations, significant information that would lead to informed decisions about conducting fishing in a manner that avoids or reduces by-catch and provides more protection to marine mammals and ecosystems now and into the future would not be available to NOAA, and likely will lead to decisions that do not effectively combine strong fisheries management with effective marine mammal protection.

E. Coastal Texas Ecosystem Protection and Restoration Would be Undermined.

Because the ocean interacts extensively with coasts, development of sound approaches to coastal protection and restoration is important. Under a provision of the Water Resources Development Act of 2007,\textsuperscript{19} the Corps of Engineers is required to develop a plan for restoration of the Texas Coast that has been assaulted by floods, hurricanes, and storms. The Report that the Corps issued in 2018 includes an EIS. The purpose of the plan, as specified, is:

“Sec. 4091. Coastal Texas Ecosystem Protection and Restoration, Texas. (a) In General. — The Secretary shall develop a comprehensive plan to determine the feasibility of carrying out projects for flood damage reduction, hurricane and storm damage reduction, and ER in the coastal areas of the State of Texas. (b) Scope. — The comprehensive plan shall provide for the protection, conservation, and restoration of wetlands, barrier islands, shorelines, and related lands and features that protect critical resources, habitat, and infrastructure from the impacts of coastal storms, hurricanes, erosion, and subsidence.

The EIS (Plan) informs decisions on how to reduce the risk of coastal storm damage and restore the coast. The Plan addresses both structural and non-structural alternatives. While not specified in the legislation, these coasts are also affected by climate change. The combined Feasibility Study and EIS is set forth here (https://www.courthousenews.com/wp-content/uploads/2018/10/CoastalTX.pdf) and has a detailed environmental analysis. A substantial range of alternatives are examined (see Plan and EIS summary, p. 4-30). The Plan specifies a preferred recommendation to prevent future damage and to restore the specified portion of the Texas coast for both environmental and economic purposes.

\textsuperscript{19} P.L.110-114 (Nov. 8, 2007), 121 Stat. 1041.
Under current regulations:

1. **Scope:** The purpose and need is to fulfill the broad purposes of the statute to reduce flood and storm damage and to restore the Texas coast. The Plan uses an EIS because of the scale and clear environmental impacts of the types of projects examined. The point of this approach is to affect the environment by reducing risk and repairing damage.

2. **Cumulative and indirect impacts analysis:** The Plan looks extensively at direct, indirect, and cumulative impacts of the proposed alternatives and actions.

3. **Climate change:** The Plan examines throughout the effect of climate change on the environment that would be impacted by the Plan. It does not appear to examine the effect of the Plan on climate change, though that may be less relevant in this context.

4. **Alternatives:** The Plan examines a substantial range of alternatives including no action, structural approaches, and non-structural approaches, as well as how those two different approaches may overlap or sequence (non-structural approaches may be implemented more quickly and thus limit future damage while structural approaches, such as levees, are developed and implemented.)

Under the proposed regulations:

1. **Functional equivalence problem:** Under the proposed regulations, agencies can look for analysis under a statute that is the functional equivalent of NEPA. Here, where the Feasibility Study includes environmental analysis, there is a question whether the Corps of Engineers and its non-federal partner could simply skip a NEPA analysis (including the public process required by NEPA and the present regulations) in developing the Feasibility Study.

2. **Cumulative and indirect impacts analysis:** Throughout this EIS there is information about indirect and cumulative effects, yet under the proposed regulations that information would not be required.

3. **Climate change:** There would be no requirement to address climate change. An analysis for coastal risk reduction and restoration that did not take into account the effect of climate change on the coast would be far less informative to the decision-makers and could result in selection of projects that went under water as sea level rose due to climate change.

4. **Page limits and timeframes:** Under the proposed regulations, there are limits on pages and time for development of EISs, and while provision for combined documents such as this one that effectively puts information before the public and the decision-maker in one place is made in the proposed regulations, no page limit adjustment that would easily

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20 Note: This Plan and EIS were developed under existing regulations.
allow or encourage such combinations is provided. This combined Feasibility Study/EIS is beyond the page limit in the proposed regulations at 442 pages, and with an extensive index of scientific studies. While a waiver is possible under the proposed regulations, and while analysis rather than page volume is helpful to decision-makers and the public, the message of the page limits and time limits is that effective development of important scientific information and analysis is less important than speed.

Summary

A thorough and thoughtful EIS that examines indirect and cumulative effects, climate change, a full range of alternatives, and is prepared by the action agency is most likely to lead to orderly consideration, effective and fair involvement of the public in analysis and information development, and in sound agency decision-making. The proposed regulations would substantially cut back on the availability to the agency of the information needed to make sound decisions about protecting and restoring coasts.

F. Coral Reef Conservation Would be Undermined.

Coral reefs all over the world—an essential component of ocean ecosystems—are seriously threatened by climate change and other impacts on coral health. For a number of years federal agencies have focused on how to avoid further destruction of coral reefs and steps to improve them. Over a number of years, agencies have identified and relied on NEPA, including the environmental reviews required by current regulations as an important tool in this process. The proposed regulation revisions would seriously upset these approaches.

Examples of federal agency approaches to coral reef conservation that rely on NEPA are:

- The U.S. Coral Reef Task Force identifies NEPA as a tool to its work on coral reef conservation.  
- The EPA Handbook on Coral Reef Impacts (2016), which emphasizes reliance on NEPA alternatives analysis, direct and indirect impacts analysis, and other NEPA analysis.
- Department of Defense Coral Reef Implementation Plan (2000), especially at pp. 18 and 44.

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21 A composite Natural Resources Damage Assessment and EIS to inform decisions about restoration of the Gulf Coast after the BP Deepwater Horizon oil spill of 2010 is also an example of a combined programmatic evaluation and EIS that provided important information to the public and decision makers. An introduction and executive summary of the plan is here: https://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Front-Matter-and-Chapter-1_Introduction-and-Executive-Summary_508.pdf.


24 See Handbook especially at pp. 44-46.

The National Oceanic and Atmospheric Administration’s Coral Reef Conservation Program has recently issued a draft Programmatic Environmental Impact Statement to inform implementation of its programs. NOAA notes in the Federal Register:

“NOAA has prepared a draft PEIS for coral reef conservation and restoration activities conducted by NOAA’s Coral Reef Conservation Program (CRCP) throughout parts of the United States, including the South Atlantic Ocean, Gulf of Mexico, and Remote Pacific Islands, and priority international areas (i.e., wider Caribbean, Coral Triangle, South Pacific, and Micronesia). The draft PEIS assesses the direct, indirect, and cumulative environmental impacts of NOAA’s proposed action to continue funding and otherwise conducting coral reef conservation and restoration activities through the CRCP’s existing programmatic framework and related procedures. The CRCP is implemented consistently with the requirements of the Coral Reef Conservation Act of 2000 (CRCA) and Executive Order 13089.”

Under current regulations:

1. **NEPA as a tool**: Agencies are required and collaboratively recognize the need to develop sound scientific analysis to protect coral reefs, develop effective alternatives for proposed actions affecting coral reefs, and conduct analysis of a full range of impacts of actions. NEPA is a critical tool in this analysis.

2. **Best available and up to date science**: Federal manuals and policies acknowledge the importance of identifying good science when evaluating proposed projects and their potential impacts on coral. Legal challenges have sought to ensure that agencies use the best, up to date scientific information including numbers of corals and effect of dredging and sedimentation or other proposed activities during their analysis.

3. **Cumulative and indirect impacts analysis**: Under current law, the Corps or any agency permitting a project that may impact corals must examine effects on corals of the dredging, and also of sedimentation, ocean warming, ocean acidification, agricultural activity in the area and development.

4. **Climate change**: Coral reefs are significantly threatened by climate change, including ocean warming and acidification. Currently, analysis of any proposed actions in light of climate change is required and is essential to coral reef protection.

Under the proposed regulations:

1. **NEPA as a tool**: The proposed regulations would disrupt the settled and useful approach to coral reef protection recognized by multiple agencies and the public as described above. Manuals, guidance, and approaches to NEPA analysis taken throughout the government that rely on important components of present regulations would likely be modified and the protective value of the NEPA analysis would likely be diminished.

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26 Full Federal Register Notice at 84 FR 68146 (December 13, 2009).
2. **Current and best available science:** Agencies would no longer be required to undertake new scientific or technical research, or to use the experiences from other projects to inform their analysis.

3. **Cumulative and indirect impacts analysis:** Analysis of the cumulative impacts that would result from a project would no longer be required, leading to decisions that are less protective of corals; analysis of impacts such as dredging affects considered cumulatively with other ocean changes, agriculture, and human development, would also not be required.

4. **Climate change:** Extensive scientific analysis has demonstrated the threats that climate change poses for coral reefs. Development of that information and analysis as alternatives are identified and assessed would not be required.

5. **Bias/Conflict of interest:** Like most other examples in this memo, the permit applicant would be permitted to undertake the EIS with the attendant effects on identification of scientific information, development of alternatives, and thoroughness of analysis.

**Summary**

NEPA analysis using the best and most current scientific information to inform decision-makers is a critical tool to protect these fragile ecosystems and species. Making permitting decisions without taking into account cumulative impacts or climate change and by allowing permit applicants to write their own EISs, the proposed regulations hasten decline rather than protection of coral reefs. Further, by specifying that further scientific studies for difficult decisions are not required, the regulations would permit decisions without the best science. Moreover, because federal agencies have relied on existing regulations in developing approaches to reef protection, major changes set forth in the proposed regulations will upset important and settled approaches agencies are taking for protection and conservation of coral reefs.
Decision Notice and Finding of No Significant Impact for the Ruby Mountains Oil and Gas Leasing Availability Analysis

Photo: Ruby Mountains, Elko County, Nevada

USDA Forest Service
Humboldt-Toiyabe National Forest
Mountain City, Ruby Mountains, Jarbidge Ranger District
Elko County, Nevada

May 2019

Lead Agency: USDA Forest Service, Humboldt-Toiyabe National Forest

Responsible Official: William A. Dunkelberger, Forest Supervisor

Cooperating Agencies: US DOI Bureau of Land Management
Elko County, Nevada
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INTRODUCTION

The Humboldt-Toiyabe National Forest, Mountain City, Ruby-Jarbridge (MCRJ) Ranger District received a request dated August 1, 2017 from the Nevada Bureau of Land Management (BLM) State Office asking the Forest Service for oil and gas leasing concurrence, along with any stipulations to protect surface resources. The request originated from an expression of interest received by the BLM from a member of the public and included National Forest System (NFS) lands. In response to the BLM request, the MCRJ Ranger District prepared an Environmental Assessment (EA) to determine the availability of the requested NFS lands located within 90 land sections, totaling approximately 52,533 acres\(^1\), along with determining resource protection measures (stipulations) for future oil and gas leasing by the BLM. The lands within the analysis area are located in the Ruby Mountain Range, Elko County, Nevada and legally described in Appendix A of the EA and attached to this decision.

Elevations of the analysis area range from 6,000 to 10,800 feet above sea level. The Ruby Mountains are well-known for their scenic, glaciated U-shaped valleys and mountainous peaks, alpine clear blue lakes, alpine vistas, waterfalls and hanging valleys. These glaciated landscapes are nationally renowned and can be seen from the Lamoille Canyon Scenic Byway and the nearby valleys. Valleys to the north are occupied by the residential housing subdivisions of Spring Creek, NV and Lamoille, NV with views of the glaciated peaks of the Ruby Mountains. The South Fork Indian Reservation, South Fork reservoir and the town of Jiggs are located to the west. Adjacent ranching communities and the Ruby National Wildlife Refuge, which encompasses Ruby Lake (a major bird flyway migration corridor), and are located to the east. The Ruby Mountains are bisected by the popular Ruby Crest National Recreational Trail.

In accordance with the National Environmental Policy Act (NEPA) and the Minerals Leasing Act, the MCRJ Ranger District prepared an EA for oil and gas leasing availability for these lands within the analysis area. William Dunkelberger, Forest Supervisor and responsible official, must decide: 1) what NFS lands within the analysis area administered by the Humboldt-Toiyabe National Forest would be made administratively available or not available to the BLM for future oil and gas leasing in accordance with 36 CFR 228 and 2) for those lands made available for future leasing, what stipulations and notices needed to protect resources (36 CFR 228.102(d)) would be attached to a future lease. The Forest Service will notify the Nevada BLM State Director of its Final Decision.

BACKGROUND

The purpose of this action is to determine what lands, as requested by the BLM and located on the Humboldt-Toiyabe National Forest MCRJ Ranger District, would be available or not available for future oil and gas leasing conducted through lease sales by the BLM. For NFS lands made available, the Forest Service would provide consent to the BLM for leasing of lands, along with any stipulations/lease notices to protect surface resources. The need for action is to respond to the Nevada State BLM Office request asking for leasing concurrence and to satisfy the Forest Service’s respective statutory and policy mandates of responding to such requests for the environmentally responsible development of energy resources.

The BLM and Forest Service have shared responsibilities for oil and gas leasing on NFS lands. The BLM is responsible holding sales and issuing oil and gas leases on Federal lands, including NFS lands. The BLM cannot offer NFS lands and issue leases for oil and gas leasing without the Forest Service first providing a consent to lease decision.

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\(^1\) Acreage figures based on GIS calculations of analysis area and is an approximate calculation. Acreage figures subject to change based on actual surveyed acres within each section.
Leasing is authorized under the Mineral Leasing Act of 1920, as amended and modified by subsequent legislation, and Department of the Interior BLM regulations found at 43 CFR 3100. Oil and gas leasing is recognized as an acceptable use of public lands under the Federal Land Policy Management Act. The Nevada BLM conducts quarterly lease sales. Once a parcel is leased, the lessee has the ability to develop the lease by exploring, drilling, and producing all of the oil and gas within the lease boundaries extended vertically below the surface, subject to stipulations and notices attached to the lease (Title 43 CFR 3101.1–2). Leases are issued for a 10-year period and continue as long as oil or gas is produced in paying quantities. Leasing availability decisions by the Forest Service and leasing issuance by the BLM do not approve any ground disturbing activities. Any future ground disturbing activities proposed following post-leasing would require additional NEPA.

During the environmental analysis, all of the NFS lands within the analysis area were determined to be encumbered by No Surface Occupancy (NSO) stipulations to conform to the Forest Plan, as amended, in order to protect resource values (as discussed in the EA and shown in Appendix B of the EA). The rationale behind applying No Surface Occupancy is to protect the high value resources in the analysis area including, but not limited to, the presence of Threatened Lahontan Cutthroat Trout and its habitat, lands lying within inventoried roadless areas (IRAs), occurrence of steep slopes, streams, riparian areas, crucial and transition range mule deer habitat, proximity to greater sage-grouse leks and greater sage-grouse priority habitat, as described in the EA analysis. A NSO stipulation is restrictive to the surface and no surface drilling activity can occur where applied, however, NSO does not prohibit subsurface exploration and development beneath NFS lands accessed by directional drilling or well spacing from leases on adjacent lands. Oil and gas reserves may be tapped without disturbing the surface through directional drilling or well spacing. For example, where a lessee holds a lease without NSO stipulations on BLM/private lands and also holds a lease on adjacent NFS lands with NSO stipulations, the lessee has the right to extend directional drill legs from nearby leased lands beneath the surface of NFS leased lands with NSO stipulations. Types of activities that can still occur from adjacent leases and extend beneath leased NSO lands include horizontal or directional drilling legs and any of the stimulation or completion techniques (includes hydraulic fracturing) along those legs.

In Huntington Valley, approximately seven miles to the west of the analysis area on BLM-managed lands, there is moderate to high oil and gas potential and some past interest in oil and gas. In the past fifteen years, three wells have been drilled and subsequently plugged and abandoned (2007, 2008 and 2017). One of these wells was drilled by Noble Energy, Inc., and produced approximately 3,000 barrels of crude oil in 2015. The well was plugged and abandoned in 2017 due to Noble Energy electing to discontinue exploration in northeastern Nevada after assessing the commercial viability in the commodity environment. In March 2018, the BLM offered three parcels in Huntington Valley in a competitive oil and gas lease sale in close proximity to the analysis area; none of these nearby parcels received bids. Currently, there are no active oil and gas drill rigs or operations on public lands in Elko County.

DECISION

I have decided to select the No Leasing Alternative (as described below and analyzed in the Final EA for the Ruby Mountains Oil and Gas Availability Analysis) for all of the NFS lands within the analysis area, totaling approximately 52,533 acres. Under the No Leasing Alternative, the lands within the analysis area will not be available to the BLM for oil and gas leasing. The Forest Service will convey this decision to the BLM to not consent to oil and gas leasing for any lands within the analysis area.

These NFS lands are legally described in Appendix A of the Final EA and attached to this decision and shown in Figure 1 below. The No Leasing Alternative will meet the purpose and need by: responding to
the BLM request to satisfy statutory and policy mandates, making a decision to determine the leasing availability of these lands, and providing environmentally responsible management of NFS lands.

**DECISION RATIONALE**

My decision is based on the analysis in the EA, the findings in the Finding of No Significant Impact and the supporting documentation in the Project record. No single factor lead to my decision, and the primary factors that I considered are listed below:

- **Public Concerns** – The Forest received thousands of comments from the local area, the state of Nevada, and from across the nation. The majority of these commenters expressed strong opposition to the project, and many provided clear rationale for selecting the No Leasing Alternative. The overwhelming majority of public comments align with my decision to select the No Leasing Alternative.

- **Geologic Conditions** – With the overall unfavorable, non-conducive oil and gas geologic conditions and the No to Very Low to Low Potential for oil and gas, these lands have low energy resource values. In addition, with the lands encumbered and restricted by NSO stipulations to protect surface resources as determined by the analysis, the surface use is restricted and less desirable for leasing from an industry viewpoint. Offering low energy resource value and high resource value lands with restrictive stipulations to the BLM for leasing would not serve the best interest of the public from an industrial or environmental perspective. The unsuccessful oil and gas development history of the adjacent leased lands in Huntington Valley additionally supports my decision to not make these NFS lands available for oil and gas leasing.

- **Natural Amenities** – The analysis highlights the amenities that the Ruby Mountains provide including outstanding recreational opportunities, high quality scenery, biodiversity, watershed values, and grazing resources. The importance of these amenities to the local community, State residents and tourists was clearly articulated in the public comments received. I believe that protecting these amenities is best met by selecting the No Leasing Alternative.

- **Consideration of Environmental Effects** – The analysis summarizes the adverse environmental effects that would occur if the lands were to be available for leasing. Even with the multiple No Surface Occupancy stipulations applied, the cumulative effects would be noticeable. These effects include increased noise, dust and light pollution, and disturbance to wildlife and fisheries. These adverse effects outweigh the benefits that could result from oil and gas development.

- **Tribal Concerns** - I understand that the analysis area is within the traditional homeland of the Western Shoshone people who have strong ties to the Ruby Mountains, including those tribal members who live on the South Fork Reservation. I believe my decision best respects tribal values that have been expressed throughout the analysis.

- **Economic Considerations** – I have weighed the economic benefits that could be realized if these lands were leased. Based upon the Reasonably Foreseeable Development Scenario detailed in the Environmental Assessment, I believe the economic benefits would be limited in comparison to the economic benefits that are presently realized by the economic contributions currently being provided by the Ruby Mountains. These contributions to the local and state economy are coming primarily from tourism, recreation, and livestock grazing. Any monetary losses from the No Leasing Alternative are strongly outweighed by benefits presently provided.
PUBLIC INVOLVEMENT SUMMARY

The Forest Service initiated public scoping on September 29, 2017 with the mailing of a scoping letter to potentially interested parties. The project was listed in the Forest’s Schedule of Proposed Actions in September 2017. Concurrently with scoping, the Forest Service published a legal notice on October 3, 2017 initiating a 30-day comment period as required under its regulations at 36 CFR 218 parts A and B. The legal notice for this project was published in the Elko Daily Free Press on October 3, 2017. Due to the high interest of this project and to ensure that the public’s comments were heard and considered, an additional 15 day comment period was initiated on April 6, 2018.

From these two comment periods, the Forest Service received thousands of public comments (written and verbal), the majority of which were form letters from non-governmental organizations. I appreciate the hundreds of hours that people (including many local residents, non-governmental organizations and Tribal members) spent providing comments expressing their concerns, opinions and opposition. This input was helpful and factored in my decision. An overwhelming majority of the comments received were opposed to oil and gas leasing in the Ruby Mountains on NFS lands. Public comments consistently stated that the Ruby Mountains are widely recognized for their high quality resource and recreational values and that they should be protected from oil and gas leasing and development. Comments from local scientists and State agencies questioned the speculative interest in an area of no to low likelihood for oil and gas occurrence. Comment highlights included opposition letters from numerous citizens, residents of Elko County, environmental groups, Western Shoshone Defense Project, a U.S. Senator, and the printing of a full page color ad in the Elko Daily Free Press by a coalition of business leaders, outdoor enthusiasts and environmental groups opposing the project.

TRIBAL INVOLVEMENT SUMMARY

Native American tribal coordination was initiated on September 27, 2017 with the mailing of a letter to local tribal governments. An information sharing meeting was held with representatives of the Te-Moak Tribe of Western Shoshone and Elko Band on October 23, 2017. Consultation with the Duck Valley Tribe occurred on October 24, 2017 and May 22, 2018 during the Wings and Roots meeting. An additional information sharing meeting was held between USFS, Elko Band, South Fork Band, Te-Moak Tribe, and Inter-Tribal Council of Nevada on March 22, 2017. Recent outreach to the Elko Band, Battle Mountain, and Te-Moak Tribes occurred in May 2018. Consultation with the Wells Band was held on June 13, 2018 during the closed session of their regular council meeting. Tribal representatives voiced opposition to the proposed action for several reasons including the potential for impacts to cultural resources, the potential for impact to ground and surface water, and the potential to impact wildlife and fisheries. All the Tribes that the Forest Service met with are in support of the No Leasing Alternative. Tribal consultation is ongoing.

OTHER ALTERNATIVES CONSIDERED

I also considered the Proposed Action and the No Action Alternative.

Proposed Action: Under the Proposed Action, all of the NFS lands within the analysis area (totaling approximately 52,533 acres) would be made available for future oil and gas leasing by the BLM, subject to surface resource protection stipulations/lease notices. The Forest Service would authorize the BLM to offer the NFS lands for lease.

No Action Alternative: Under No Action, a decision on whether the requested lands are available or not for future oil and gas leasing would not be made by the Forest Service and the lands would remain unresolved in pending status with the BLM and in need of future environmental analysis. Current management plans would continue to guide management of the analysis area.
Figure 1. Draft Decision Map
FINDING OF NO SIGNIFICANT IMPACT

As the responsible official, I am responsible for evaluating the effects of the project relative to the definition of significance established by the CEQ Regulations (40 CFR 1508.13). I have reviewed and considered the EA and documentation included in the project record, and I have determined that selecting the No Leasing Alternative will not have a significant effect on the quality of the human environment. As a result, no environmental impact statement will be prepared. My rationale for this finding is as follows, organized by sub-section of the CEQ definition of significant cited above.

Context

Context is a measure of the scale of effects. I have considered the context of my decision to make all lands unavailable for leasing and have determined that the effects of this decision are local in nature.

Intensity

Intensity is a measure of the severity, extent, or quantity of effects, and is based on information from the effects analysis of this EA and the references in the project record. The effects of this project have been appropriately and thoroughly considered with an analysis that is responsive to concerns and issues raised by the public. The agency has taken a hard look at the environmental effects using relevant scientific information and knowledge of site-specific conditions gained from field visits. My finding of no significant impact is based on the context of the project and intensity of effects using the ten factors identified in 40 CFR 1508.27(b).

1. Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

Making all lands unavailable for leasing does not create any adverse or beneficial effects. Consideration of both beneficial and adverse effects related my decision were taken into account during the analysis.

2. The degree to which the proposed action affects public health or safety.

Making all lands unavailable for leasing does not affect public health or safety.

3. Unique characteristics of the geographic area such as the proximity to historical or cultural resources, parklands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

Making all lands unavailable for leasing does not affect any unique characteristics of the analysis area.

4. The degree to which the effects on the quality of the human environment are likely to be highly controversial.

Controversy in this context refers to situations where substantial dispute as to the effects of the action rather than opposition to the project. Making all lands unavailable for leasing does not involve any effects that are considered controversial.

5. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

Making all lands unavailable for leasing does not involve any highly uncertain effects or involve unique or unknown risks.
6. The degree to which the action may establish precedent for future actions with significant effects or represents a decision in principle about a future consideration.

Making all lands unavailable for leasing does not set any precedent for future actions.

7. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

Making all lands unavailable for leasing does not involve any significant cumulative effects.

8. The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

Making all lands unavailable for leasing will not adversely affect any significant scientific, cultural, or historical resources.

9. The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

Making all lands unavailable for leasing will not adversely affect any endangered or threatened species or its habitat.

10. Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Making all lands unavailable for leasing is in compliance with all Federal, State, or local law or requirements imposed for the protection of the environment.

CONCLUSION

After considering the environmental effects described in the EA and specialist reports, I have determined that making all lands unavailable for leasing by selecting the No Leasing Alternative will not have significant effects on the quality of the human environment considering the context and intensity of impacts (40 CFR 1508.27). Thus, an environmental impact statement will not be prepared.

FINDINGS REQUIRED BY OTHER LAWS AND REGULATIONS

My decision is consistent with all applicable laws, regulations and policies for the protection of the environment. My decision is an administrative action that does not involve any ground disturbing activities. My decision is consistent with the intent of the Forest Plan's long term goals and objectives for minerals management and protection of surface resources.

ADMINISTRATIVE REVIEW/ RESULTS OF PRE-DECISIONAL OBJECTION PROCESS

Those who submitted substantive formal comments related to the proposed action during the 30-day opportunity to comment period were eligible to file an objection pursuant to 36 CFR 218. The 45-day objection period began with the publication of the legal notice for the draft decision in the Elko Daily Free Press, the newspaper of record, on March 16, 2019. The publication date in the newspaper of record is the exclusive means of calculating the time to file an objection. The objection period ended on April 30, 2019. Several comments in support of the alternative proposed for authorization in the draft
Decision were received. No objections were submitted that opposed the alternative proposed for authorization.

IMPLEMENTATION

Because no such objections were received, the final decision may be signed on, but not before, the fifth business day following the end of the objection period (see: 36 Code of Federal Regulations 218.12(c) (2)).

CONTACT

For further information concerning this Project and decision, contact Josh Nicholes at (775) 778-6109 or email at jnicholes@fs.fed.us during normal business hours.

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Appendix A: Legal Description of NFS Lands within the Analysis Area pertaining to this Decision

All lands are located within the Mount Diablo Meridian, Nevada, and further described as follows:

T. 26 N., R. 56 E.,
Sec. 1, Lots 1 thru 4;
  1, S1/2NE1/4, S1/2NW1/4, S1/2;
  2, Lots 1 thru 4;
  2, S1/2NE1/4, S1/2NW1/4, S1/2;
  3, Lots 1 thru 3;
  3, S1/2NE1/4, SE1/4NW1/4, SE1/4.

T. 26 N., R. 56 E.,
Sec. 4, Lots 3 thru 8;
  4, SW1/4NE1/4, S1/2NW1/4, SW1/4,
    NW1/4SE1/4;
  5, Lots 1 thru 4;
  5, S1/2NE1/4, S1/2NW1/4, S1/2.

T. 26 N., R. 56 E.,
Sec. 8,
  9, Lots 1 thru 4;
  9, SW1/4NE1/4, NW1/4, SW1/4,
    NW1/4SE1/4;
  16, W1/2NE1/4, NW1/4, SW1/4, NW1/4SE1/4;
  17.

T. 26 N., R. 56 E.,
Sec. 10,
  15, N1/2, NE1/4SW1/4, N1/2NW1/4SW1/4,
    N1/2NE1/4SE1/4, S1/2SW1/4SW1/4,
    S1/2SE1/4SW1/4SW1/4, N1/2NE1/4SE1/4,
    N1/2SE1/4SE1/4, S1/2N1/2SE1/4SE1/4.

T. 26 N., R. 56 E.,
Sec. 11 thru 14.

T. 27 N., R. 56 E.,
Sec. 1, Lots 1 thru 4;
  1, S1/2NE1/4, S1/2NW1/4, S1/2;
  2, Lots 1, 2, 5;
  2, SE1/4NE1/4, SE1/4;
  11, NE1/4, E1/2NW1/4, NW1/4NW1/4,
    N1/2SW1/4NW1/4, N1/2SE1/4SW1/4,
    S1/2SW1/4SW1/4, N1/2NE1/4SE1/4,
    N1/2SE1/4NE1/4SE1/4,
    SE1/4SE1/4NE1/4SE1/4,
    N1/2SW1/4NE1/4SE1/4;
  12, N1/2, N1/2SW1/4, SE1/4.
T. 27 N., R. 56 E.,
Sec. 13, S1/2, S1/2NW1/4, NE1/4
23, and 24,
14, S1/2NE1/4, S1/2NW1/4, S1/2NW1/4NW1/4,
NW1/4NW1/4NW1/4,
S1/2NE1/4NW1/4NW1/4,
NW1/4NW1/4NW1/4NW1/4,
S1/2NE1/4NW1/4NW1/4,
SW1/4NE1/4NW1/4,
SW1/4NW1/4NW1/4NW1/4,
S1/2SE1/4NW1/4NW1/4,
SW1/4NE1/4NW1/4NW1/4,
S1/2SE1/4NW1/4NW1/4,
S1/2SW1/4

T. 27 N., R. 56 E.,
Sec. 25, and 26;
35, N1/2, N1/2SW1/4, SW1/4SW1/4, N1/2SE1/4;
36, N1/2, N1/2SW1/4, SE1/4SW1/4, SE1/4.

T. 28 N., R. 57 E.,
Sec. 1, 11, and 12 PROT ALL;
2, NE1/4, NW1/4, SW1/4, N1/2SE1/4,
SW1/4SE1/4.
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 3, 4, 9 and 10.
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 5, (EXCLUDING HES228, HES229);
6, (EXCLUDING HES228, HES229,
HES230);
7, and 8.
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 13, 14, 23, and 24.
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 15, 22, 27, and 34.
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 16, and 17;
18, (EXCLUDING HES193).
Lands unsurveyed, Protraction Diagram 131
Sec. 19, 20 and 21.
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 25, 26, 35;
36, PROT ALL (EXCLUDING HES190);
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 31, 32, and 33.
Lands unsurveyed, Protraction Diagram 131

T. 29 N., R. 57 E.,
Sec. 3, NW1/4NW1/4, SW1/4NW1/4,
NW1/4SW1/4, SW1/4SW1/4;
Lands unsurveyed, Protraction Diagram 130
4, S1/2N1/2, S1/2;
5, S1/2NE1/4, SE1/4NW1/4, SW1/4, SE1/4;
8.

T. 29 N., R. 57 E.,
Sec. 10, NW1/4NW1/4, SW1/4NW1/4,
NW1/4SW1/4, SW1/4SW1/4;
Lands unsurveyed, Protraction Diagram 130
9 and 16;
15, NW1/4NW1/4, SW1/4NW1/4,
NW1/4SW1/4, SW1/4SW1/4;
Lands unsurveyed, Protraction Diagram 130
18, NE1/4, NE1/4NW1/4, SE1/4NW1/4,
NE1/4SW1/4, SE1/4SW1/4, SE1/4.

T. 29 N., R. 57 E.,
Sec. 19, NE1/4, NE1/4NW1/4, SE1/4NW1/4,
NE1/4SW1/4, SE1/4SW1/4, SE1/4;
20, 21, and 28.

T. 29 N., R. 57 E.,
Sec. 29 and 32;
30, NE1/4, NE1/4NW1/4, SE1/4NW1/4,
NE1/4SW1/4, SE1/4SW1/4, SE1/4;
31, NE1/4, NE1/4NW1/4, SE1/4NW1/4,
E1/2SE1/4.

T. 29 N., R. 57 E.,
Sec. 33 thru 34;

T. 29 N., R. 57 E.,
Sec. 35 thru 36;

T. 32 N., R. 57 E.,
Attachment D

Sec. 12, Lots 1 thru 7;
12, S1/2NE1/4, SE1/4NW1/4, NE1/4SW1/4, 
SE1/4SW1/4, SE1/4;
13, Lots 1 thru 4;
13, S1/2NE1/4, S1/2NW1/4, S1/2.

T. 32 N., R. 57 E.,
Sec. 24 thru 27;

T. 32 N., R. 57 E.,
Sec. 34, N1/2, SE1/4;
35, N1/2, N1/2SE1/4, N1/2SW1/4, S1/2SW1/4;
36, N1/2NE1/4, N1/2NW1/4, SW1/4NW1/4.
Ruby Mountains Oil and Gas Leasing Availability Analysis

Environmental Assessment

Mountain City, Ruby Mountains, Jarbidge Ranger District, Humboldt-Toiyabe National Forest, Elko County, Nevada

March 2019

Lead Agency: USDA Forest Service, Humboldt-Toiyabe National Forest

Responsible Official: William A. Dunkelberger, Forest Supervisor

Cooperating Agencies: US DOI Bureau of Land Management
Elko County, Nevada
Nevada Department of Wildlife

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Appendix E- Oil and Gas Leasing Glossary
1.0 Introduction

The Forest Service received a request dated August 1, 2017 from the Nevada Bureau of Land Management (BLM) State Office asking the Forest Service for leasing concurrence, along with any stipulations to protect surface resources. The request included lands from an expression of interest received by the BLM from a member of the public. The lands are located in the Ruby Mountain Range, Elko County, Nevada, (as shown in Figure 1 and legally described in Appendix A).

In response to the BLM request, the Humboldt-Toiyabe National Forest, Mountain City, Ruby-Jarbidge (MCRJ) Ranger District proposes to determine the availability of approximately 52,533 acres1 of National Forest System (NFS) lands along with resource protection conditions (stipulations) for future oil and gas leasing by the BLM.

The Forest Service prepared this environmental assessment (EA) to determine whether making these specific NFS lands available for oil and gas leasing by the BLM may significantly affect the quality of the human environment and thereby require the preparation of an environmental impact statement. By preparing this EA, we are fulfilling agency policy and direction to comply with the National Environmental Policy Act (NEPA). For details of the proposed action, see the Proposed Action and Alternatives section of this document. The Forest Service will evaluate and disclose the effects of the proposed action and alternatives for oil and gas leasing availability in the EA, consistent with the requirements of NEPA and Federal Regulations 36 CFR 228.102(c). The EA will serve as the basis for the Forest Service and the BLM for making their respective decisions.

1.1 Background

The BLM and Forest Service have shared responsibilities for the issuance and administration of oil and gas leases on NFS lands. The BLM is responsible for selling and issuing oil and gas leases on Federal lands, including NFS lands. The BLM cannot offer NFS lands and issue leases for oil and gas leasing without the Forest Service first providing a consent to lease decision.

The Forest Service authorized officer will decide what federal lands administered by the Humboldt-Toiyabe National Forest with federal oil and gas ownership will be administratively available for oil and gas leasing by the BLM and for any offered lands, the Forest Service will identify required lease stipulations for specific areas (36 CFR 228.102(d)). The authorized officer will also authorize the BLM to offer available lands for lease, subject to the Forest Service identified stipulations (36 CFR 228.102(e)).

Leasing is authorized under the Mineral Leasing Act of 1920, as amended and modified by subsequent legislation, and regulations found at 43 CFR 3100. Oil and gas leasing is recognized as an acceptable use of public lands under FLPMA. The Nevada BLM conducts quarterly lease sales. Once a parcel is leased, the lessee has the ability to develop the lease by exploring, drilling, and producing all of the oil and gas within the lease boundaries extended vertically below the surface, subject to the stipulations and notices attached to the lease (Title 43 CFR 3101.1–2). Leases are issued for a 10 year period and continue for as long as oil or gas is produced in paying quantities. If a lessee fails to produce oil and gas, does not make annual rental payments, does not comply with the terms and conditions of the lease, or relinquishes the lease, ownership of the lease reverts back to the federal government and the lease can be resold.

Any development of the leased parcels will be subject to additional future NEPA analysis by the appropriate agency. In order for a lessee to exercise their rights to explore or develop a lease, an

---

1 Acreage figures based on GIS calculations of analysis area and is an approximate calculation. Acreage figures subject to change based on actual surveyed acres within each section.
Application for Permit to Drill (APD) describing the proposal must be submitted and approved by the federal agency. Additional NEPA analysis is conducted for these site specific ground-disturbing APD activities. Site-specific mitigation measures would be attached as Conditions of Approval (COAs) for each proposed activity. The level of NEPA analysis would depend upon the results of scoping and proposed activities of the APD.

1.2 Cooperating Agencies

The cooperators will provide information, comments, and technical expertise to the Forest Service where they have special expertise or where the Forest Service requests their assistance. These activities include, but are not limited to: providing guidance on public involvement strategies, data needs, suggesting management actions to resolve planning issues, identifying effects of alternatives, suggesting mitigation measures, and providing written comments on working drafts of the EA and supporting documents. The following are a list of cooperators:

- BLM: As the agency responsible for federal lease issuance and administration, the BLM is a cooperating agency in this NEPA analysis and has direct authority for leasing the public mineral estate for the development of energy resources, including oil and gas, as listed in 43 CFR 3160.0-3. The BLM can offer guidance and expertise, along with reviewing the reasonably foreseeable development scenario.

- Elko County: Elko County can offer information on the local economy, natural resources management, and local recreation.

- Nevada Department of Wildlife (NDOW): NDOW can offer data and information on natural resources management, wildlife, and local recreation.

1.3 Purpose and Need for Action

The purpose of this action is to determine if the lands requested by the BLM and located on the Humboldt-Toiyabe National Forest MCRJ Ranger District would be available or unavailable for future oil and gas lease sales conducted by the BLM. For NFS lands made available, the Forest Service would provide consent to the BLM for leasing of lands, along with any stipulations/lease notices to protect surface resources.

The need for action is to respond to the Nevada State BLM Office request, dated August 1, 2017, asking for leasing concurrence and to satisfy the Forest Service’s respective statutory and policy mandates of responding to such requests for the environmentally responsible development of energy resources. Specifically, the Federal Onshore Oil and Gas Leasing Reform Act of 1987 requires the Forest Service to analyze NFS lands that are legally open to leasing for potential oil and gas development, in accordance with the NEPA. Leasing on NFS lands is done under the authority of the Mineral Leasing Act of 1920 (MLA), as amended, and Federal Regulations contained in 43 CFR 3100 and 36 CFR 228, Subpart C. The MLA provides that all public lands are open to oil and gas leasing unless a land and resources management plan specifies otherwise. This analysis will be conducted in accordance with the National Energy Policy, the Forest Service Energy Implementation Plan, and the Energy Policy Act of 2005 (Public Law 109-58).

Only NFS lands legally open to oil and gas leasing can be evaluated. Lands not legally open to leasing include:

- Lands withdrawn from mineral leasing by an act of Congress;
- Lands recommended for wilderness designation by the Secretary of Agriculture;
• Lands designated by statute as Wilderness study areas, unless oil and gas leasing is specifically allowed by statute designating the study area;
• Lands within an area allocated for wilderness or further planning in Executive Communication 1504, Ninety-Sixth Congress (House Document No. 96-119), unless such lands subsequently have been allocated to uses other than wilderness by an approved Forest land and resource management plan or have been released to uses other than wilderness by an act of Congress.

Note that there are no wilderness lands included within the analysis area, however, there are wilderness lands adjacent to, but outside of the area of analysis.

1.4 Decision to be Made

The Forest Supervisor (authorized officer) must decide 1) what lands within the analysis area administered by the Humboldt-Toiyabe National Forest would be made administratively available or not available to the BLM for future oil and gas leasing in accordance with 36 CFR 228 and 2) for those lands made available for future leasing, what stipulations and notices to protect resources (36 CFR 228.102(d)) would be attached to a future lease. Stipulations/notifications would be written to conform to the approved land use plans governing Forest Service management of resources in the area to be leased, and consistent with laws, regulations, policies, rules, and orders. The Forest Service will notify the Nevada BLM State Director of their decision, per 43 CFR 3101.7.

As a result of this analysis, the Nevada BLM State Director must decide whether to offer any NFS lands made available by the Forest Service for leasing, along with associated lease stipulations/notifications to protect resources. This decision made by the Forest Service does not authorize any ground disturbance. Deciding what NFS lands would be available for potential future leasing by the BLM does not, in itself, cause surface environmental impacts. The decisions of making lands available for leasing by the Forest Service and any subsequent decision by the BLM to issue a lease does not authorize any ground disturbance or development of any leased parcels. Future NEPA would be required for any ground-disturbing proposal proposed by a lessee.

1.5 Scoping and Tribal Coordination

The Forest Service initiated public scoping on September 29, 2017 with the mailing of a scoping letter to potentially interested parties. The project was listed in the Forest’s Schedule of Proposed Actions in September 2017. Concurrently with scoping, the Forest Service published a legal notice on October 3, 2017 initiating a 30-day comment period as required under its regulations at 36 CFR 218 parts A and B. The legal notice for this project was published in the Elko Daily Free Press on October 3, 2017. Due to the high interest of this project and to ensure that the public’s comments were heard and considered, an additional 15 day comment period was initiated on April 6, 2018. From these two comment periods, the Forest Service received thousands of public comment letters, the majority of which were form letters from a non-governmental organization. An overwhelming majority of the comments received were opposed to oil and gas leasing in the Ruby Mountains on NFS lands. Public comments consistently stated that the Ruby Mountains were widely recognized for their high quality resource and recreational values and that they should be protected from oil and gas leasing and development.

Native American tribal coordination was initiated on September 27, 2017 with the mailing of a letter to local tribal governments. An information sharing meeting was held with representatives of the Te-Moak Tribe of Western Shoshone and Elko Band on October 23, 2017. Consultation with the Duck Valley Tribe occurred on October 24, 2017 and May 22, 2018 during the Wings and Roots meeting. An additional information sharing meeting was held between USFS, Elko Band, South Fork Band, Te-Moak Tribe, and Inter-Tribal Council of Nevada on March 22, 2017. Additional outreach to the Elko Band, Battle
Mountain, and Te-Moak Tribes occurred in May 2018. Consultation with the Wells Band was held on June 13, 2018 during the closed session of their regular council meeting. Tribal representatives voiced opposition to the proposed action for several reasons including the potential for impacts to cultural resources, the potential for impact to ground and surface water, and the potential to impact wildlife and fisheries. All the Tribes that the Forest Service met with are in support of the No Leasing Alternative. Tribal consultation is ongoing.

1.6 Summary of Issues

Issues serve to highlight effects or unresolved conflicts that may occur through implementation of the proposed action. As the proposed action is discussed and developed through both public and internal scoping and Interdisciplinary Team (IDT) discussions, potential impacts to specific resources may arise. Often these potential impacts can be addressed and either minimized or eliminated through adjustments to the design of the proposed action. If the effect cannot be adequately addressed in the proposed action, it may then become an unresolved issue or conflict, in which case an alternative to the proposed action would be developed which reduces or eliminates the impact or conflict. Issues and concerns expressed during the agency and public scoping period were grouped by topic. Issue statements were then developed to describe the relevant issues identified to be further analyzed.

The following relevant issues were identified during internal and external scoping and based on input from the IDT, local governments, interested publics, environmental groups, and tribal interests and are further described in Chapter 3: surface water quantity and quality, ground water quantity and quality, wildlife and fisheries, recreation and access, cultural resources, tribal resources and values. In addition, several public members including professional geologists, IDT resources specialists, and Nevada state agencies raised concerns that the geologic rock types (lithology) and structure of the Ruby Mountains area are not conducive to oil and gas deposits. Consideration of geologic resources is also discussed in Chapter 3.

While many issues may be raised during internal and external scoping, not all issues warrant analysis. The issues identified below were raised during scoping. Any adverse impacts associated with these issues would not result directly from the Proposed Action or alternatives. Because issues listed below are speculative at this level of analysis and are not directly related to the Proposed Action, they have been dismissed from detailed analysis. In addition, the Resource Concerns Analysis (Appendix B) completed by the IDT specialists identified resource concerns and applied No Surface Occupancy (NSO) stipulations (see Appendix B) to protect various surface resources. As a result, the analysis area is encumbered by NSO stipulations. With no surface occupancy, there would be no surface disturbance allowed on NFS lands. For these reasons, the following list of issues raised during scoping were not carried forward for detailed analysis: wilderness, inventoried roadless areas, environmental justice and socioeconomics, climate change, visual quality, air quality, rare plants, paleontological resources, human health and safety, and range resources.

1.7 Conformance with Forest Plan

The Land and Resource Management Plan (Forest Plan) for the Humboldt National Forest, as amended, embodies the provisions of the National Forest Management Act, its implementing regulations, and other guiding documents. Management direction from the Forest Plan that affects oil and gas leasing pertinent to this project are described below.
Forest Plan Desired Conditions:

The number of leases, permits and operating plans is expected to increase slightly throughout the life of the plan. Withdrawals and legislative requirements will restrict mineral development on 356,888 acres.

The Forest will expedite the processing of oil and gas lease applications and locatable mineral proposals.

Leasable mineral/energy applications will be evaluated on an individual basis. The decision to lease and site-specific stipulations will be determined on a site-by-site basis. Development activities will be addressed by an interdisciplinary field analysis and environmental assessment.

Forest Plan Goals:

Goal #36- Administer the mineral resources of the Humboldt National Forest to provide for the needs of the American people and to protect and conserve other resources.

Goal #38- Expedite oil/gas and geothermal activities.

Goal #39- Reduce the backlog of oil and gas lease applications.

Goal #40- Integrate the exploration and development of mineral and energy resources with the use and protection of other resources. Use special stipulations identified in Appendix H (of the Forest Plan) for mineral leases.

Ruby Mountains Management Area Direction:

The analysis area is within the Ruby Mountains Management Area. The management prescription for minerals is to “Encourage lawful minerals activities while protecting renewable surface resources and allowing other resource activities to occur.”

Appendix H – Special Stipulations for Minerals Leases

This appendix contains required stipulations that would be applied to all NFS land made available for leasing. See attached Appendix C of this document.

Greater Sage-grouse Record of Decision-Nevada Plan Amendment

The Forest plan was also amended in 2015 for greater sage-grouse habitat protection guidelines for Fluid Minerals-Unleased. These applicable standards are:

**GRSG-M-FMUL-ST-089-Standard** – In priority habitat management areas, any new oil and gas leases must include a no surface occupancy stipulation. There will be no waivers or modifications. An exception could be granted by the authorized officer with unanimous concurrence from a team of agency greater sage-grouse experts from the Fish and Wildlife Service, Forest Service, and State wildlife agency if:

- There would be no direct, indirect, or cumulative effects to greater sage-grouse or their habitats or
- Granting the exception provides an alternative to a similar action occurring on a nearby parcel and
- The exception provides a clear net conservation gain to greater sage-grouse.

**GRSG-M-FMUL-ST-090-Standard** – In general habitat management areas, any new leases must include appropriate controlled surface use and timing limitation stipulations to protect sage-grouse and their habitat.
GRSG-M-FMUL-ST-093-Standard – In priority and general habitat management areas and sagebrush focal areas, only allow geophysical exploration or similar type of exploratory operations that are consistent with vegetation objectives in table 1a or 1b, as appropriate, and include applicable seasonal restrictions.

2.0 Proposed Action, Alternatives and Reasonably Foreseeable Development Scenario

2.1 Lands Involved and Analysis Area

The analysis area is located on the MCRJ Ranger District, Humboldt-Toiyabe National Forest in Elko County, Nevada. The lands are legally described in Appendix A, shown in Figure 1 and within the following sections: Sec. 12, 13, 24, 25, 26, 27, 34, 35, and 36, T.32N. R.57E.; Sec. 3, 4, 5, 8, 9, 10, 15, 16, 18, 19, 20, 21, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T.29N. R.57E.; Sec. 1 thru 27 and 31 thru 36, T.28N. R.57E.; Sections 1, 2, 11, 12, 13, 14, 23, 24, 25, 26, 35 and 36, T. 27N. R. 56E.; and Sec. 1 thru 5 and 8 thru 17, T.26N., R.56E., MDB&M.

Elevations of the analysis area range from 6,000 feet to 10,800 feet above sea level. The Ruby Mountains are well-known for their scenic, glaciated U-shaped valleys and mountainous peaks, alpine clear blue lakes, alpine vistas, waterfalls and hanging valleys. These glaciated landscapes are nationally renowned and can be seen from the Lamoille Canyon Scenic Byway and the nearby valleys. Valleys to the north are occupied by the residential housing subdivisions of Spring Creek, NV and Lamoille, NV with views of the glaciated peaks of the Ruby Mountains. The South Fork Indian Reservation, South Fork reservoir and the town of Jiggs are located to the west. The Ruby National Wildlife Refuge, which encompasses Ruby Lake (a major bird flyway migration corridor), and adjacent ranching communities are located to the east. The Ruby Mountains are bisected by the popular Ruby Crest National Recreational Trail.

Vegetation consists of dominant sagebrush intermixed with pinyon-juniper woodland in the lower elevations and aspens, limber pine, and whitebark pines in the upper elevations. Alpine forbs and flowers bloom from May through August. Yearly snowfall averages about 8-10 feet and winter average lows of 15°F. Summer months see temperatures ranging from average lows of 45°F to highs of 80°F. Thunderstorms can develop over the Mountains during the summer.
Figure 1. Location Map of Analysis Area
2.2 Proposed Action

The MCRJ Ranger District is tasked with analyzing the environmental impacts from making approximately 52,533 acres of NFS lands available for oil and gas leasing, per a written request for leasing concurrence from the Nevada State BLM Office. The lands within the leasing availability request are located in the Ruby Mountains as shown in Figure 1.

An Interdisciplinary Team comprised of District and Supervisor’s Office resource specialist staff are examining the potential consequences to resources including: water resources (surface waters, springs, groundwater and riparian areas); recreation; Inventoried Roadless Areas (Significant Primitive Values); wildlife, including greater sage grouse and its habitat, key wildlife habitat, and mule deer habitat/migration corridors; cultural resources and Tribal values; fisheries, including the presence of the threatened Lahontan Cutthroat Trout (LCT) and sensitive Colombia Spotted Frog (CSF); Steep Slopes greater than 40%; geologic resources including oil and gas potential; scenic values and scenic areas (visual quality and preservation). In order to identify resource concerns (Resource Concerns Analysis) present, the resource specialists examined each section of land within the analysis area. Results from the Resource Concerns Analysis are shown in Appendix B. From scoping, the following resources are carried forward for analysis: Water Quantity and Quality, Groundwater Quantity and Quality, Geologic Resources, Wildlife and Fisheries, Recreation and Access, Cultural Resources, Tribal Resources and Values.

2.2.1 Forest Service Proposed Action

The Humboldt-Toiyabe National Forest MCRJ Ranger District proposes to make available to the BLM approximately 52,533 acres of NFS lands for future oil and gas leasing by the BLM, subject to surface resource protection stipulations as determined by this analysis. The Forest Service also proposes to authorize the BLM to offer NFS lands for lease, subject to lease stipulations and notices.

Resource Protection Stipulations

Special stipulations are in addition to the lease terms and are necessary to protect specific resource values in the lease area and developed to conform to approved Forest Plan and ensure post-leasing activities comply with pertinent laws and policies. Stipulations that restrict surface occupancy (No Surface Occupancy and Controlled Surface Use) or impose seasonal restrictions (Timing Limitations) on post-leasing activities would be applied to parcels where necessary to protect resources or uses.

Land sections in the analysis area would be encumbered by NSO stipulations to protect surface resources based on the guidance outlined in the current Humboldt-Toiyabe National Forest LRMP. The NSO stipulations are based on 1) applying required Special Stipulations for Mineral Leases from the Forest Plan (Appendix H as shown in Appendix C of this document), 2) applying the 2015 Greater Sage-grouse Record of Decision- Nevada Plan Amendment that provides direction for sage-grouse habitat, and 3) the Resource Concerns Analysis conducted by the Interdisciplinary team for each section of land within the analysis area (shown in Appendix B). The NSO Stipulation Coverage Map in Appendix B shows the application of NSO to the analysis area for resource protection. NSO stipulations would be applied to ensure protection for the following resources: Greater Sage Grouse (Priority Habitat Management Area and lek buffers), Inventoried Roadless Areas (shown in IRA map in Appendix D), Steep Slopes greater than 40% (shown in Steep Slopes map in Appendix D), crucial mule deer summer/winter/transition range habitat and migration corridors, 400 foot Riparian/Stream buffers, and Threatened and Endangered Species Habitat (threatened Lahontan Cutthroat Trout).
In addition, the Forest Service would identify other special stipulations. Any future leases on Forest Service lands would also be subject to BLM terms on the standard lease form SF-3100-11 Section 6 and BLM State of Nevada Standard Stipulations/Notices (see Appendix C). Once a parcel is leased by the BLM, the lessee has the right to explore for and develop oil and gas resources, subject to terms and stipulations pertaining to the conduct of operations.

**General Explanation of an NSO Stipulation**

Per the Uniform Format for Oil and Gas Lease Stipulations (March 1989), NSO means that the “use or occupancy of the land surface for fluid mineral exploration or development is prohibited to protect identified resource values.” The NSO stipulation is intended for use only when other stipulations are determined insufficient to adequately protect the public interest. Under an NSO stipulation, no surface occupation or surface disturbance would be allowed on the subject parcels. Oil could be extracted from the subsurface using a directional drill from lands outside of the area designated as No Surface Occupancy. Examples of types of activities that can still occur off NSO lands, but extend underneath leased NSO lands, include horizontal or directional drilling legs and any of the stimulation or completion techniques (includes hydraulic fracturing) along those legs. Directional drilling allows for multiple wells from the same vertical well bore, to better reach and produce oil and gas reserves while minimizing the wells' surface footprint. Horizontal drilling, a type of directional drilling, is used to increase production.

**2.3 No Leasing Alternative**

Under the No Leasing Alternative, the lands within the analysis area would not be available to the BLM for future oil and gas leasing. The Forest Service would make a decision to not consent to oil and gas leasing for any lands identified in the BLM request. These lands would not be available for future BLM oil and gas leasing. The No Leasing alternative is different from not taking any action (as in the No Action Alternative) since a decision would be made that would prohibit oil and gas leasing in the analysis area.

**2.4 No Action Alternative**

In order to respond to the request, the Forest Service must determine through an environmental analysis if the lands are available or not for leasing, and if available, with what associated lease stipulations/notices to protect surface resources. The current administrative status of the requested lands in the BLM database is “pending lease issuance”. Under No Action, a decision on whether the requested lands are available or not for future oil and gas leasing would not be made by the Forest Service and the lands would remain unresolved in pending status and in need of future environmental analysis. The agencies believe it is appropriate to take administrative action to resolve the leasing status of the lands by conducting this environmental analysis and reaching a decision. Taking No Action would not respond to the purpose and need nor the BLM request regarding the availability of the specific NFS lands for future leasing.

**2.5 Reasonably Foreseeable Development Scenario**

Operational and development activities that occur after a lease is issued can have environmental, social, and economic impacts. To assess these potential effects of leasing, it is necessary to project the type and amount of activity that is reasonably foreseeable as a result of authorizing the BLM to make lands under this analysis available for leasing. This reasonably foreseeable development scenario (RFDS) is used to approximate the anticipated level of exploration, development, and initial production activity over the next 15 years (the BLM issues both competitive and noncompetitive leases for a 10-year period) in order to estimate environmental impacts including direct, indirect, and cumulative impacts.
Historically, Nevada is a low oil and gas producing State, but advances in technology, including directional (including horizontal) drilling and hydraulic fracturing, could allow industry to access hydrocarbon deposits. In 2016, 3,000 mcf (thousand cubic feet) of natural gas and 277,000 barrels of oil were produced in Nevada compared to 364,665,000 mcf of natural gas and 43 million barrels of oil in Utah (ONRR, 2017). In Nevada, oil and gas occurrence is mostly confined to shale units in the valleys within the basin and range topography and mostly on lands managed by the BLM. Metamorphism related to mountain building tectonics (such as what formed the Sierra Nevada and Ruby Mountains) often alters and eliminates any potential sedimentary source and host rock needed for oil and gas deposits. Railroad Valley, Nevada (BLM lands) is the location of the first producing oil field within Nevada and is located about 130 miles south of the analysis area. Pine Valley, located about 40 miles to the west of the analysis area, is where discoveries on BLM lands have occurred in the past. For geologic reasons, the further east and north from Pine Valley and the more mountainous the region, the less likely the possibility of economic quantities of oil and gas. Historical data and other geologic information from the Nevada Bureau of Mines and Geology (NBMG) was used in this RFDS. The Ruby Mountains are predominantly composed of igneous and metamorphic rock, but early Paleozoic sedimentary formations are exposed along the southern margin of the range. Unlike the oil-bearing shale units beneath the valleys, the stratigraphic units of the Ruby Mountains are much older and were metamorphosed millions of years ago several miles beneath the surface. The high temperatures at depth drive off any oil and gas.

The Ruby Mountains Oil and Gas Leasing Availability Analysis area can be geographically separated into three areas, the northern area (T.32N. R.57E.), the central area (T.29N. R.57E., T.28N. R.57E.), and the southern area (T.27N. R. 56E., T.26N. R.56E.). The following RFDS is based in part on the oil and gas exploration and development history observed in Huntington Valley located just west of the Ruby Mountain analysis area and situated on BLM and private lands within Elko County, Nevada. The geology of the northern and central portion of the analysis area (highly metamorphosed core complex with No to Very Low oil and gas potential) contrasts with the geologic province of the Huntington Valley (Quaternary alluvium with underlying sedimentary rocks). The southern portion of the analysis area is dominated by shale, dolomite and limestone.

Figure 2 shows the analysis area, oil and gas potential, 15 of the preliminary BLM parcels offered in a March 2018 lease sale, and past oil and gas wells, including the year that the well was plugged and abandoned (indicated by the label next to the well). According to the NBMG Oil and Gas Potential map, the majority of the analysis area (97%) lies within No to Very Low Potential (metamorphic and intrusive igneous rocks of a core complex area) and Low Potential (carbonate and sedimentary rocks).

To the west of the central and southern portion of the analysis area, there are three nearby existing oil and gas leases. Three parcels of the 15 preliminary BLM parcels are located adjacent to the central analysis area and were offered in the March 2018 Elko District Office sale. Since 1954, there have been 13 wells drilled (NBMG, 2013), but all have since been plugged and abandoned. All of the oil and gas shows and past production occur about six miles away to the west of the analysis area in central Huntington Valley on BLM lands. The most active exploration period occurred from 1979 to 1985, where six wells were drilled. Within the past 15 years, only three wells have been drilled and subsequently plugged and abandoned (2007, 2008 and 2017).

The most recent oil and gas drilling in Huntington Valley was conducted by Noble Energy, Inc. This well (K1L-1V and labeled as 2017 in Figure 2) was located approximately seven miles west of the Ruby Mountains in Huntington Valley and drilled to a depth of 9,800 feet. The production zone was from the Elko Shale unit, and Noble produced approximately 3,000 barrels of crude oil (bbls) during...
February 2015. This well was hydraulically fractured vertically in the Elko Shale unit to improve yield of oil. Noble Energy elected to discontinue exploration in northeastern Nevada after assessing the commercial viability in the commodity environment, the company states in its 2015 annual report (verbal BLM communication, T. Schmidt, 2017). Noble was the first company to utilize hydraulic fracturing stimulation in Nevada with three wells located in Elko County. Hydraulic fracturing is a common practice to improve exploration and production results in the oil and gas industry.

Based on resource concerns present in the analysis area and with application of Forest Plan Appendix H Special Stipulations for Mineral Leases and the 2015 Greater Sage-grouse Record of Decision, the analysis area is encumbered by NSO stipulations to ensure protection of: Greater Sage Grouse and its habitat, Inventoried Roadless Areas (Significant Primitive Values), adjacent to Congressionally designated Ruby Mountains Wilderness, Steep Slopes greater than 40%, crucial mule deer winter/summer habitat, transition range and migration corridors (Key Wildlife Habitat), 400 foot Riparian/Stream buffers, Threatened And Endangered Species Habitat (threatened Lahontan Cutthroat Trout), Scenic Areas (visual quality and preservation), traditional-cultural use areas used by native peoples, and High Use Recreation Areas.

For this analysis it is assumed that 1) the reasonably likely activity that could impact the analysis area would be oil and gas exploration and 2) all exploration would occur off-Forest on BLM and private lands within one mile of the analysis area in Huntington Valley. Exploration activities would not directly impact surface resources of NFS lands. This assumption is based on the following: the analysis area is encumbered by NSO stipulations to protect surface resources; a non-conducive oil and gas geologic setting exists in the Ruby Mountains; the one and only past oil and gas production well was located over seven miles away from the analysis area, an absence of known oil and gas expressions in the Ruby Mountains and the analysis area; there are no active oil and gas operations on public lands in Elko County; there are no existing oil and gas leases in the Ruby Mountains, and the oil and gas potential in the analysis area is primarily No, Very Low, to Low as designated by NMBG.

Assumptions for Exploration Drilling occurring on Adjacent Lands (off-Forest)

The exploration drilling assumptions that are used in this RFDS are based on review of the oil and gas drilling history in the adjacent (within 10 miles of analysis area) Huntington Valley between 1954 to present and described in the paragraph above. The following assumptions about reasonably foreseeable development were used for this analysis:

1. Based on drilling history, oil production in Huntington Valley has been unsuccessful for economically recoverable reserves. Elko County, Nevada, historically has a low probability for economic oil reserve discoveries.
2. Oil and gas exploration and development would occur off-Forest on BLM/Private lands adjacent to the analysis area in Huntington Valley and would not directly impact surface resources of NFS lands.
3. NSO stipulations to protect surface resources would encumber the analysis area. There would be no surface drilling activity on NFS lands because of NSO restrictions, however, NSO does not prohibit subsurface exploration and development accessed by directional drilling from adjacent lands.
4. Over a fifteen year projection, there would not be any direct impact to NFS surface resources from oil and gas activities.
5. If leases were obtained on non-Forest adjacent lands, the RFDS assumes that two off-Forest exploration wells with pads located within one mile to the west of the analysis area could be directionally drilled from BLM/Private lands to explore for oil reserves beneath the NFS.
surface, as long as the lessee also held a lease on NFS lands. The most likely location of these two wells would be 1) the central analysis area and 2) the southern analysis area. The northern analysis area has no nearby leases and no oil and gas potential.

6. Impacts to resources on BLM/private lands would be minimal and short-term. If leasing were to occur off-Forest for the purpose of drilling below NFS-leased land, impacts would be addressed in detail at a later date under site-specific EA conducted by the BLM.

7. If permitted by the BLM, hydraulic fracturing could occur at the two off-Forest exploration wells. Hydraulic fracturing can occur vertically or directionally within the geologic unit. Where a lessee holds a lease on both BLM/private and adjacent NFS lands, the lessee would have to right to extend directional drill legs associated with hydraulic fracturing beneath the surface of leased NFS lands.

8. Most drill legs used for hydraulic fracturing do not exceed one mile, so indirect impacts from nearby fracturing could potentially extend approximately one mile beneath NFS lands located along the western border of the analysis area.

9. Drilling time would average 60 to 90 days per exploration well.

10. Wells would be plugged and abandoned properly according to the Nevada Administrative Code 522 and BLM 43 CFR 3160 oil and gas regulations in order to protect groundwater.

It is important to note that the projected number of wells/pads and occurrence of exploration hydraulic fracturing and directional drilling in this scenario are for analysis purposes only and should not be construed as a prediction of actual future exploration and development that may occur on existing or future Federal oil and gas leases. In addition, if and when activity is proposed on a future lease, the site-specific activity would require additional environmental analysis and technical review prior to authorizing any ground disturbance.

General Explanation of Well Stimulation/ Hydraulic Fracturing

Hydraulic fracturing (HF) is a form of well stimulation used in exploration and production to enhance oil and/or natural gas recovery. HF is the process of applying water under high pressure to a subsurface formation via a wellbore, to the extent that the pressure enhances and induces fractures in the rock. Typically, the enhanced fractures will be propped open with a granular “proppant” to improve fluid connection between the well and the formation. The process was developed experimentally in 1947 and has been used routinely since 1950. The Society of Petroleum Engineers estimates that over one million HF procedures have been pumped in the United States and tens of thousands of wells have been drilled and hydraulically fractured. It can greatly increase the yield of a well, and development of HF methods and the drilling technology (in particular, horizontal legs drilled within the targets) have enabled production of oil and gas from tight formations formerly not considered economically feasible.

A general description of the hydraulic fracturing technology follows:

- All exploratory, testing, and production wells have multiple layers of casing that are sealed with cement between the wellbore and the formation. Well integrity is tested throughout the process.
- Drilling and HF fluids can be contained in a closed loop drilling system (aboveground tanks) or a lined pit. Cuttings could be contained in roll-off boxes for hauling to disposal or surface casing interval cuttings could be spread over the site during reclamation.
- HF fluids are recovered to a large degree in “flowback” or produced water when the well is tested or produced.
- All recovered fluids are generally handled by one of four methods.
  - Underground injection
- Captured in steel tanks and disposed of in an approved disposal facility.
- Treatment and reuse
- Surface disposal pits
- Drill cuttings could be buried on site 3 feet below root zones. Any cuttings that do not fit this waste profile will be disposed of at an approved disposal facility.
Figure 2. Oil and Gas Activity Map of Ruby Mountain Area

Legend
- Major Roads
- Adjacent Known Oil & Gas Wells through 2017
- Oil Leases with Year of Pag & Amendment
- Dry Hole
- Gas Show
- Oil Show
- Oil and Gas Show
- Oil Field
- Nevada Oil & Gas Leases
- BLM March 2018 Lease Sales: Petroleum Parcels
- 70# Landmark Project Action
- Identified Sandstone
- Identified Mancos Shale
- Nevada Oil & Gas Potential
- Low Probability
- Moderate Probability
- High Probability
- Arche, Las Vegas, and Patagonia Geologic Units
- Las Vegas and Black Mountain Geologic Units
- Major Features: Rivers, Roads
- Beta of Lease to Oil Potential

Oil & Gas Lease Analysis
Oil & Gas Activity of Ruby Mountain Area
Data acquired from BLM & UNR-NBMG
3.0 Affected Environment and Environmental Effects

3.1 Introduction
This chapter provides sufficient evidence and analysis, including environmental impacts of the proposed action and alternatives, to determine whether to prepare either an Environmental Impact Statement (EIS). The purpose of an EA is not only to disclose impacts, but to evaluate those impacts in the context of NEPA significance. In order to tie directly to a Finding of No Significant Impact (FONSI), the EA shall describe the impacts of the proposed action and any alternatives in terms of context (society as a whole (human, national), the affected region, the affected interests, and the locality) and intensity (severity of the impact) as described in the definition of “significantly” at 40 CFR 1508.27.

The analysis relies on the RFDS developed for the proposed action to estimate potential effects. For the majority of resources analyzed, the effects from the leasing decision would be indirect since no ground disturbing activities are authorized at the leasing stage. Impacts to resources on BLM/private lands would be minimal and short-term. If leasing were to occur off-Forest for the purpose of drilling below NFS leased land, impacts would be addressed in detail at a later date under site-specific EA conducted by the BLM. The detailed analysis in the EA focuses on impacts to NFS resources on the sections proposed for leasing.

There are no Federal permits, licenses, or other entitlements that must be obtained to implement the proposed action. Offering Federal lands for leasing does not authorize any surface disturbing uses, activities or development. If and when activity is proposed by a lessee, the site-specific activity would require additional environmental analysis and technical review by the appropriate agency prior to authorizing any ground disturbance. All Federal, State and local laws would be followed.

3.2 Resources
This section summarizes the potential impacts of the proposed action and alternatives for each impacted resource and determines impacts to the analyzed resources and mitigation that could be applied that would reduce those impacts. Many impacts would already be reduced with the application of the NSO stipulation. Mitigation measures proposed in this section could be carried forward as a COA in the Decision Notice to prevent potentially significant impacts. The following sections evaluate resources for the potential of significant impacts to occur, either directly or indirectly, due to implementation of the proposed action.

No Action Alternative Effects
For all resources listed below, under the No Action Alternative there would be no impacts because no action would be taken to decide if the subject lands are available or unavailable for leasing. The lands would remain in a pending status awaiting future NEPA analysis.

3.2.1 Surface Water Quantity & Quality
Affected Environment
The Ruby Mountains are located in the United States Geological Survey (USGS) Great Basin Region and Basin and Range physiographic region. These areas are defined by their faulting, multiple mountain forming events and having the largest number of closed basins in the United States. Closed basins are basins that do not drain to the ocean. The precipitation in the analysis area is dominated by snow and later season rains with a mild monsoonal influence in the summer (PRISM, 2018). The analysis area is within three watersheds classified by the USGS as sub-basins and designated by eight digit hydrologic unit codes...
(HUC) (Seaber, et al. 1987). These include the South Fork Humboldt, Upper Humboldt, and Long Ruby Valleys Sub-Basins (see Hydrologic Map in Appendix D). In order to limit the area of analysis for both current conditions and cumulative effects the hydrologic and groundwater are being limited to the following subset of watersheds HUC5 (10 digit) where the proposed lease areas are:

<table>
<thead>
<tr>
<th>Watershed code</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>1604010302</td>
<td>Headwaters Huntington Creek</td>
</tr>
<tr>
<td>1604010303</td>
<td>Upper Huntington Creek</td>
</tr>
<tr>
<td>1604010304</td>
<td>Smith Creek</td>
</tr>
<tr>
<td>1604010305</td>
<td>Middle Huntington Creek</td>
</tr>
<tr>
<td>1604010307</td>
<td>Tenmile Creek</td>
</tr>
<tr>
<td>1604010309</td>
<td>South Fork Humboldt River</td>
</tr>
<tr>
<td>1606000709</td>
<td>Ruby Lake</td>
</tr>
<tr>
<td>1604010106</td>
<td>Lamoille Creek</td>
</tr>
<tr>
<td>1604010305</td>
<td>Middle Huntington Creek</td>
</tr>
</tbody>
</table>

The streams from the analysis area flow to Huntington Creek then to South Fork Humboldt River through the South Fork Reservoir and then down the Humboldt River to the Humboldt Sink. According to the National Hydrologic Dataset there are about 55 miles of perennial streams, over 100 miles of ephemeral/intermittent streams, and one lake in the sub-basins where the analysis area is located. Surface flows from the analysis areas are measured at various USGS stream gages including, but not limited to, Lamoille Creek and South Fork. The Humboldt River System is over-allocated in terms of water rights. This means that there are more rights to water than water available. Water rights are administered by the state of Nevada.

Water quality within the affected sub-basins is the result of a wide variety of natural and anthropogenic characteristics, occurrences and activities. Geology, topography, climate, vegetative cover, wildfire and land use are all factors in determining the chemical, physical, and biological properties of these natural waters. Some surface waters may have naturally high levels of various dissolved solids, nutrients, or high temperature naturally while others express these attributes as a result of a combination of natural conditions and anthropogenic influence (Hem, 1970). The state of Nevada is responsible for setting the water quality parameters pursuant to the Clean Water Act. Any stream is held to the thresholds established by the State based on the beneficial uses that are identified for that waterbody. A complete listing can be found in the 2014 integrated Water Quality Report published by the Nevada Department of Environmental Protection. (NDEP, 2014).

Land use has been documented to have a considerable direct and indirect impact on water quality. Some land uses such as mining, and sewage treatment facilities discharge water directly into waterbodies and are known as point-sources. There are no active mining or mineral exploration operations on NFS lands within the Ruby Mountains. Most sources of anthropogenic water quality degradation in the affected sub-basins however, are the result of inputs throughout the watershed and are known as non-point sources. Livestock grazing is the most common and widespread land use on NFS lands in the affected sub-basins and likely is the greatest anthropogenic impact on water quality from these lands. Wildlife use causes similar but less impact to water quality.

Water quality standards, as contained in the Nevada Administrative Code (NAC) 445A, define water quality goals for waterbodies in the State of Nevada. These standards are based on the beneficial uses for these waterbodies and contain both narrative and numeric criteria. Narrative standards contained in NAC 445A.121 apply to all surface waters of the state, including streams and springs and require waters to be
“free from” various pollutants. Numeric standards also found in NAC 445A designate specific criteria so that water is suitable to use for irrigation, domestic, stock water, or any other beneficial use (NDEP 2012).

**Effects of Proposed Action**

The proposed action is to make approximately 52,533 acres of NFS lands available for oil and gas leasing, subject to resource protection stipulations and notices as determined by analysis.

This is strictly an administrative decision of whether to allow the areas to go forward for lease or not. It is not a decision of lease issuance or development; as such there would be no direct, indirect, or cumulative effects.

If the area is leased then there would be an additional environmental assessment for any ground disturbing activity. These potential impacts would be assessed as part of the authorization process for those potential future activities. The RFDS discussion below is a brief discussion of what those activities may be and the related impacts.

**Effects of Reasonably Foreseeable Development Scenario**

Actions described in the RFDS could result in oil and gas resources being explored adjacent to and beneath the surface of NFS lands, if the lessee held a lease on both adjacent and NFS lands. The proposed action states that the all of the land sections in the analysis area would be encumbered by NSO stipulations to protect surface resources. With NFS lands located upstream from the lands foreseen to have potential oil and gas exploration activity, there are not any direct or indirect effects to surface water resources on NFS lands. Due to potential directional drilling underneath NFS lands, there is a potential of groundwater flow paths and connectivity to the surface including potential to impact the quantity and quality of the water in springs and seeps including gaining reaches of streams.

Actions described in the RFDS could result in oil and gas resources being explored on lands adjacent to NFS lands (up to one mile). Subsequent development of a lease may result in short term impacts to the hydrologic regime depending upon the intensity of the exploration activity. Clearing, grading, and soil stockpiling activities associated with exploration actions could alter short term overland flow on adjacent lands resulting in low risk, be subject to a Soil and Water Protection Plan and, would be temporary in nature, returning to background levels 3 to 5 years after reclamation depending on level of disturbance and the quality of growing seasons. Potential impacts include removal of vegetation and surface soil compaction caused by construction equipment and vehicles, which would likely reduce the soil’s ability to absorb water, increasing the volume and rate of surface runoff. New oil and gas roads and pads could cut slopes and alter channel and floodplain characteristics at drainage crossings. The total scale of these impacts are unknown until the exploration or leasing activity proposals are received and will be analyzed in more depth at the time they are received. The combination of increased surface disturbance, surface runoff, decreased infiltration and changes in drainage features could result in increased peak flows detectable at the reach scale. Short-term direct and indirect impacts to the watershed and hydrology from erosion of unimproved access roads could occur and effects would likely decrease in time due to reclamation efforts.

**Cumulative Effects of Forest Service Proposed Action**

Cumulative effects of any lease exploration or development related activities cannot be fully evaluated in this document, but would be analyzed in detail if future exploration or development was proposed on the adjacent lands to potential NFS-leased lands. State and federally-imposed sedimentation and storm-control measures, implementation of best management practices and reclamation strategies would provide adequate means to effectively prevent substantive off-site transport and delivery of sediments or fluids.
that may impair downstream riparian or aquatic conditions. The cumulative effects could include an
decrease in equivalent road acres in the analysis area watersheds. Based on watershed conditions a
threshold of concern would be established at the time a proposal for development is received and all
existing and potential impacts would be compared to the threshold of concern.

Effects of No Leasing Alternative

The No Leasing alternative would limit the exploration activity to adjacent lands and no oil and gas
activity would occur on or below NFS lands. As described above in the Affected Environment section,
water resources are over-appropriated in these basins. These impacts would continue to occur under the
No Leasing Alternative.

3.2.2 Ground Water Quantity & Quality

Affected Environment

The hydrologic system in the analysis area is interconnected to the groundwater system. This connectivity
is both through recharge zones and also through faults and upwellings, including springs and seeps.

Beneath the surface, groundwater interacts with surface water. Surface water gradually infiltrates into the
ground and replenishes aquifers in most of the affected watershed area, but there are some areas where
groundwater replenishes surface flow (Plume, 2013). Water budgets that quantify the various inputs and
outputs to groundwater resources have been studied and published by USGS and Nevada Department of
Water Resources (NDWR, 2013). Groundwater flow in affected sub-basins generally flows in the same
direction as surface water, however, there is some flow between basins (Heilweil, 2011).

A small amount of precipitation that falls within affected sub-basins infiltrates into the ground and
resurfaces as springs. Some spring flow also comes from other sub-basins. According to Forest Service
data, there are about 117 springs on NFS lands within the affected sub-basins and about 50 springs in and
within one mile of the analysis area (see Hydrologic Map in Appendix D). These springs exhibit the full
range of water chemistry and other water quality characteristics as determined by their flow paths through
local, intermediate, or regional aquifers (Sada, et al. 2001). Water wells within and near the analysis area
parcels are mostly stock watering wells, but there are a few domestic drinking water wells.

Water diversion and use in Nevada is regulated and permitted by the NDWR and information regarding
presence and availability of water is provided by the USGS. These agencies report that many of the
hydrographic areas in Elko County, including those in the analysis area, are fully appropriated or over-
appropriated.

The analysis area is within the State Engineer defined hydrographic basins (ground water):

<table>
<thead>
<tr>
<th>Hydrographic Area Number</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>045</td>
<td>Lamoille Valley</td>
</tr>
<tr>
<td>176</td>
<td>Ruby Valley</td>
</tr>
<tr>
<td>048</td>
<td>Dixie Creek-Tenmile Creek Area</td>
</tr>
<tr>
<td>046</td>
<td>South Fork Area</td>
</tr>
<tr>
<td>047</td>
<td>Huntington Valley</td>
</tr>
</tbody>
</table>
Effects of Proposed Action

The proposed action is to make approximately 52,533 acres of NFS lands available for oil and gas leasing, subject to resource protection stipulations and notices as determined by analysis of the undertaking. This is strictly an administrative decision of whether to allow the areas to go forward for lease or not. It is not a decision of lease issuance or development; as such there would be direct, indirect, or cumulative effects.

If the area is leased then there would be an additional environmental assessment for any ground disturbing activity. These potential impacts would be assessed as part of the authorization process for those potential future activities. The RFDS discussion below is a brief discussion of what those activities may be and the related impacts.

Effects of Reasonably Foreseeable Development Scenario

Actions described in the RFDS assume that directional drilling with the potential of using the method of hydraulic fracturing to stimulate results could occur off-NFS lands, if the lessee held a lease on both adjacent and NFS lands. The proposed action states that the all of the land sections in the analysis area would be encumbered by NSO stipulations to protect surface resources. All well stimulation or Hydraulic Fracturing operations would be conducted to the standards of the State of Nevada, Hydraulic Fracturing Regulations NAC 522.700. Hydraulic Fracturing (HF) is designed to change the producing formations’ physical properties by increasing the permeability (flow of water and gas) of the producing formation. HF may also introduce chemical additives into the producing formations. Chemical additives used in completion activities for the well would be pumped into the producing formations through production casing or a high pressure tubing liner. The quantity and nature of the chemicals coming back to the surface as “flow back” is dependent on several factors, including what type of rock formation being injected. Production zones generally do not contain freshwater.

HF is designed to change the producing formations’ physical properties by increasing the flow of water, gas, and/or oil around the well bore. This change in physical properties may open up new fractures or enhance existing fractures that could result in freshwater aquifers being contaminated with natural gas, condensate and/or chemicals used in drilling, completion and hydraulic fracturing. Impacts to groundwater resources could occur due to failure of well integrity, failed cement, surface spills, and/or the loss of drilling, completion and hydraulic fracturing fluids into groundwater. Types of chemical additives used in drilling activities may include acids, hydrocarbons, thickening agents, lubricants, and other additives that are operator and location specific. Concentrations of these additives also vary considerably and are not always known since different mixtures can be used for different purposes in gas development and even in the same well bore.

Loss of drilling fluids may occur during the drilling process due to changes in permeability, porosity, formation pressure or other properties of the rock being drilled through for both the surface casing and the intermediate or production casing. When this loss of circulation occurs, drilling fluids may be introduced into the surrounding formations, which could include freshwater aquifers if the loss occurs while drilling the surface casing. Some or all of the produced water from these leases may be injected in designated injection wells for disposal. Petroleum products and other chemicals could result in groundwater contamination through a variety of operational sources including but not limited to pipeline and well casing failure, well (gas and water) construction, and spills.

Oil and gas wells are cased and cemented at a depth below all usable water zones; consequently impacts to water quality at springs and residential wells are not expected. However, faulty cementing or well casing could result in methane migration to upper zones. Should hydrocarbon or associated chemicals for
oil and gas development in excess of EPA/NDEP standards for minimum concentration levels migrate into drinking water supply wells, springs, or systems, it could result in these water sources becoming non-potable.

The potential for negative impacts to groundwater caused from HF, are currently being investigated by the Environmental Protection Agency. Authorization of the proposed projects would require full compliance with local, state, and federal directives and stipulations that relate to surface and groundwater protection. All Hydraulic Fracturing operations would be conducted to the standards in NAC 522.

If unauthorized contamination of freshwater aquifers from oil and gas development occurs, changes in groundwater quality could impact springs and residential wells if these springs and residential wells are sourced from the same aquifers that have been affected. However, this is not part of the Proposed Action and BLM does not allow unauthorized contamination of freshwater aquifers. All HF operations would be conducted to the standards in NAC 522.

Impacts to groundwater would be less evident and occur on a longer time scale. Construction activities would occur over a relatively short period (commonly less than a month); however, natural stabilization of the soil can sometimes take years to establish to the degree that will adequately prevent accelerated erosion caused by compaction and removal of vegetation. Spills or produced fluids (e.g., saltwater, oil, fracking chemicals, and/or condensate in the event of a breech, overflow, or spill from storage tanks) could result in contamination of the soil onsite, or offsite, and may potentially impact surface and groundwater resources in the long term.

Wells that employ the HF process typically use greater amounts of water than do conventional completions. Nevada Division of Minerals reported that Hydraulic Fracturing in Nevada has used between 250,000 gallons and 350,000 gallons of water per well for the three hydraulic fracturing operations conducted to date (Lowell Price—Nevada Department of Minerals, personal communication).

**Cumulative Effects of Forest Service Proposed Action**

Actions described in the RFDS could result in oil and gas resources being explored on lands adjacent to NFS lands (up to one mile) and potentially under the NFS lands. If there is exploration drilling on adjacent lands, tens of thousands of gallons of water would be used for drilling operations that would be subject to Nevada Water Rights laws and regulations. The RFDS assumes that two exploration wells would possibly employ fracturing and water consumption which would be temporary for the life of the wells. This use could also have impacts to connected surface water expressions such as seeps and springs. Any negative impacts would be detected in the required best management practices monitoring by the project proponent.

More specific impacts analysis would occur once a proposal for exploration or development is received by the respective agencies. The potential for draw down through water use is subject to State Water Rights Law.

**Effects of No Leasing Alternative**

The No Leasing Alternative would limit the exploration activity to be off-Forest and with no oil and gas activity occurring on NFS lands. This would include limiting the underground oil and gas drilling activity within 330 feet of an active lease boundary that is adjacent to NFS lands.
3.2.3 Geologic Resources

Affected Environment

The Ruby Mountains are part of the Basin and Range Province and are comprised of a Ruby-East Humboldt metamorphic core complex. The fault-block mountain has steep, rugged, Pleistocene glaciated terrain with peaks reaching over 11,000 feet. U shaped valleys and glacial moraines, cirques, tarns and horns reflect the extensive glaciation.

The analysis area contains High, Low and Very Low to No Potential areas for oil and gas as shown in Figure 2. Three percent (3%) of the analysis area contains High Potential for oil and gas (in Huntington Valley to the west of the Ruby Mountains), 42% is Low Potential (southern portion of the Ruby Mountains), and 55% is Very Low to No Potential (central and northern portion of the Ruby Mountains). None of the analysis area is within the moderate potential area (northwest portion of the map). Ninety-seven percent (97%) of the analysis area lies within the Very Low to No Potential (geologic units of metamorphic and intrusive igneous rocks of a core complex area) and the Low Potential (carbonate and sediment type of rocks).

The northern portion of the analysis area is comprised of Precambrian to Devonian carbonate and quartzite units with Mesozoic intrusives. These units are part of the metamorphic core complex that were metamorphosed, injected by a granitic pluton, and recumbently folded (Howard, 1980). This area has Very low to No oil and gas potential because of the extensive faulting and folding from metamorphism.

The Ruby detachment fault (Figure 3a) runs along the west side of the range. Detachment faults often have very large displacements (tens of kilometers) and juxtapose unmetamorphosed hanging walls against medium to high-grade metamorphic footwalls known as metamorphic core complexes (Davis, 1988). Detachment faulting is associated with large-scale extensional tectonics. The Ruby Valley fault zone runs along the east side of the range. Numerous thrust faults and normal faults bisect the highly metamorphosed and structurally altered range.

As shown in Figure 3a and Figure 3b, the central portion of the analysis area is comprised mostly of Paleocene to Late Miocene granodiorite and is mapped as Very Low to No potential for oil and gas. The four anomalous sections (sec. 19, 30 and 31, T.29N. R.57E., sec. 6, T.28N. R.57E.) in the analysis area mapped as high potential are along the boundary edge between high and low potential. The termination of the eastern edge of high potential boundary is most likely a result of following the geologic quaternary alluvium boundary for mapping. With the Ruby detachment fault running the length of the range and through these four sections, it is unlikely that geologic conditions for High potential of oil and gas truly exist below these sections. These sections are overlain by alluvium from erosional fans extending from the Ruby Mountains, but are most likely underlain by the adjacent Tertiary granodiorite pluton bounded by the Ruby detachment fault. Because of the close proximity to the metamorphic and intrusive rocks, this contact is also unlikely to yield hydrocarbons. Granodiorite is not conducive to oil and gas deposits. More favorable conditions for oil and gas potential increase further to the west in Huntington Valley as supported by area of past oil and gas activity (Figure 2).

The southern portion of the Ruby Mountains is mapped as Low Potential for oil and gas. Devonian to Mississippian shale units, Cambrian limestone and Tertiary sandstones exist. With the right structural conditions, these rock types can be considered potential source rock for oil and gas (Crafford, 2007).

Since 1954, in the adjacent Huntington Valley there have been 13 oil and gas wells drilled (NBMG, 2013), but all have since been plugged and abandoned. The most active exploration period occurred from 1979 to 1985, where six wells were drilled during those six years. Within the past fifteen years, only three wells have been drilled and subsequently plugged and abandoned (2007, 2008 and 2017). Currently, there...
are no active oil and gas drill rigs on public lands in Elko County. Near the central and southern portion of
the analysis area, there are three existing oil and gas leases. Figure 2 also shows fifteen of the BLM
parcels that will be offered in the March 2018 Elko District Office competitive oil and gas sale, with three
of the parcels near the analysis area. The most recent nearby oil and gas drilling operation was conducted
by Noble Energy, Inc. This well (K1L-1V and labeled as ‘2017’ in Figure 2) was located approximately
seven miles west of the Ruby Mountains in Huntington Valley and drilled to a depth of 9,800 feet. The
production zone was from the Elko Shale and Noble produced approximately 3,000 barrels of crude oil in
2015. The well was eventually plugged and abandoned in 2017 due to high production costs (Schmidt,
2017). Extraction of oil would deplete geologic resources.

Approximately 25% (12,800 acres) of the sections in the analysis area have a high erosion hazard (>40%
slope) in the mountainous areas. Surface disturbance would lead to ongoing erosion and increased mass
wasting potential. Slopes greater than 40% would be subject to NSO.

In general, natural gas or oil produced may release Naturally Occurring Radioactive Material. There are
no occurrences of any known radioactive material in the Ruby Mountains or, specifically, in the analysis
area.
Figure 3a. Geologic map of south-central Ruby Mountains (Colgan, et. al. 2010)
Figure 3b. Guide to Stratigraphic Units and Map Symbols (Colgan, et. al 2010)

Effects to Geologic Resources

Geologic resources are considered because several public members, including professional geologists, IDT resource specialists, and Nevada state agencies raised concerns that the geologic rock types (lithology) and structure of the Ruby Mountains area are not conducive to oil and gas deposits. There are no direct, indirect or cumulative effects to geologic resources caused by the proposed action or alternatives.

Effects of No Leasing Alternative

The No Leasing Alternative would result in none of the sections identified in the analysis area being made available for future oil and gas leasing. This decision would result in no direct effect to surface or subsurface resources associated with NFS lands, however, future oil and gas activity could still occur off-Forest on adjacent lands.

3.2.4 Wildlife & Fisheries

Affected Environment

The NFS lands proposed for leasing are known to provide habitat for a large number of wildlife species. Wildlife and fisheries including many species of birds, mammals, reptiles, amphibians, fish, and invertebrates find suitable habitat within the Ruby Mountains. A species list was received on November 4,
2017 (USFWS 2017, Consultation Code: 08ENVD00-2018-SLI-0073). There are no federally listed or candidate terrestrial wildlife species in the analysis area. The USFWS noted that Lahontan cutthroat trout (threatened) are known to occur in the area.

This leasing analysis is an administrative decision and does not authorize any ground disturbance. Baseline surveys were not conducted by Forest Service biologists for this analysis. If lands are made available for leasing by the Forest Service and leased through a future BLM lease sale, detailed environmental analyses would be conducted for any ground-disturbing proposal submitted by a future lessee.

**Greater Sage-Grouse**

Greater sage-grouse, a Regional Forester sensitive species, are known to occur in the analysis area with one active lek in the analysis area and seven leks within four miles of the analysis area; all are considered to be active leks. A significant portion of the area being considered for leasing availability is sage-grouse Priority Habitat Management Area (See Greater-Sage Grouse Habitat Map in Appendix D) and therefore No Surface Occupancy would apply according to the 2015 GRSG Record of Decision-Nevada Plan Amendment for Fluid Minerals- Unleased with no waivers or modifications. An exception could be granted by the authorized officer with unanimous concurrence from a team of agency greater sage-grouse experts from the US Fish and Wildlife Service, US Forest Service, and Nevada Department of Wildlife if:

- There would be no direct, indirect, or cumulative effects to greater sage-grouse or their habitats or
- Granting the exception provides an alternative to a similar action occurring on a nearby parcel and
- The exception provides a clear net conservation gain to greater sage-grouse.

In general habitat management areas, any new leases must include appropriate controlled surface use and timing limitation stipulations to protect greater sage-grouse and their habitat.

**Big Game**

The lands in the analysis area are utilized by pronghorn antelope and elk. Bighorn sheep occur in the analysis area particularly at higher elevations and around Lamoille Canyon. All of the analysis area being considered for leasing are within occupied mule deer habitat within Hunt Units 102 and 103 of NDOWs Area 10 management herd. The Area 10 deer herd is the largest deer herd in the State of Nevada and provides more recreational opportunity to residents and non-residents than any other herd in the state. Within the analysis area approximately 40,119 acres have been designated as crucial winter and summer habitat for mule deer, as well approximately 4,000 acres have been designated as transition range (see Crucial Mule Deer Habitat Map in Appendix D).

**Raptors**

There are no known active raptor nests in the analysis area but there are known historic raptor nests. Nesting habitats vary between species and vary with available features. Rock ledges, high cliffs, tree tops, bare ground, and burrows are all examples of where raptor nests may be found within the analysis area.
Fisheries and Aquatic Species

The analysis area support populations of the threatened Lahontan cutthroat trout (Oncorhynchus clarkii henshawi) and support a combination of Lahontan cutthroat trout (LCT) habitat including LCT occupied habitat and LCT recovery waters (see Hydraulic Map in Appendix D). LCT were listed by the U.S. Fish and Wildlife Service as “endangered” in 1970 (Federal Register Vol. 35, p. 13520) and then reclassified as “threatened” in 1975 to facilitate management and allow angling (Federal Register Vol. 40, p. 29864). LCT inhabit both lakes and streams, but are obligatory stream spawners. LCT habitat is characterized by well-vegetated and stable streambanks, stream bottoms with relatively silt-free gravel/rubble substrate, cool water, and pools in close proximity to cover and velocity breaks (USFWS 1995). LCT is an inland subspecies of cutthroat trout endemic to the Lahontan basin of northern Nevada, eastern California, and southern Oregon. The analysis area includes Humboldt Geographic Management Unit (GMU) as defined by the U.S. Fish and Wildlife Service, which includes the South Fork Humboldt River that drains the Ruby Mountains.

The analysis area contains four stream systems that are occupied by Colombia Spotted Frog (CSF), which are a Regional Forester’s sensitive species. The population in South Fork Green Mountain Creek is a sentinel site where the population has been surveyed annually since 2004. This long term monitoring shows a stable population trend (USFS 2016). The CSF is a highly aquatic species found in vicinity of relatively cold, perennial water, such as streams, rivers, springs and small lakes of both woods and meadows (Stebbins 1966). In Nevada, CSF are closely associated with slow-moving or ponded waters which are clear and have little or no canopy cover. Such habitats are usually beaver-created ponds, stock ponds, or small lakes, but springs, wet meadow seeps, and river oxbows and backwaters are also potentially utilized.

Migratory Birds

The different plant communities in the analysis area support numerous species of migratory birds, specifically during breeding season.

Effects of Proposed Action

Because the project is an administrative decision, there would be no direct effects from issuing new oil and gas leases, since it does not directly authorize oil and gas exploration, development, production, or any other ground disturbing activities.

Effects of Reasonably Foreseeable Development Scenario

With the NSO stipulations encumbering the NFS lands, no surface-disturbing activities could occur on future leased NFS lands. If nearby off-Forest lands were leased and exploration activities occur, the general direct and indirect effects to terrestrial and avian wildlife and habitat on NFS lands include temporary avoidance of the analysis area during exploration drilling. Site-specific analysis of exploration activities would be done at a later date if plans for exploration were submitted by a lessee.

All the currently known populations of LCT and CSF occur within the sections that have attributes that qualify them for the no surface occupancy. The RFDS shows that there is no to low potential for oil and gas production within the analysis area. If a section with LCT or CSF were to be leased there would be NSO protection, however, drilling could occur below the ground by directional or horizontal drilling from outside the NSO section. Any action with a leased section would be approved through a separate NEPA document. There would be no direct or indirect effects on LCT or CSF.
**Cumulative Effects of Forest Service Proposed Action**

The cumulative effect of the past present and reasonably foreseeable future actions may impact Regional Forester sensitive species (sage-grouse, pygmy rabbit, northern goshawk, bighorn sheep and flammulated owl), but would not contribute to a trend toward federal listing. Mule deer may also be impacted, but stable populations would be maintained. Cumulative effects cannot be fully evaluated in this document but would be analyzed in detail if future exploration or development was proposed on the leased lands.

**Effects of No Leasing Alternative**

Under this alternative there would be no direct, indirect, or cumulative impacts to this resource within the analysis area.

### 3.2.5 Recreation and Access

**Affected Environment**

The analysis area is within the Ruby Mountains that has over 400,000 acres of public land open to a variety of recreational pursuits. The Ruby Mountains receive thousands of visitors to public lands in the analysis area. There are numerous dispersed camping sites, over 89 miles of designated roads and 79 miles of hiking and OHV trails in the analysis area. The analysis area includes: scenic byways, wildlife viewing areas, historic mining districts, many fishable lakes, reservoirs and streams, recreation trails and various other opportunities for dispersed recreation. Popular dispersed recreation activities include hunting, riding off highway vehicles OHVs, photography, wildlife viewing, fishing, sightseeing, boating, mountain-biking, camping, and hiking. Commercial outfitter and guides offer various hunting services and guided recreation opportunities on public lands.

Vehicles are limited to designated routes within the analysis area. Users are strongly encouraged to practice accepted outdoor ethics such as Leave No Trace and Tread Lightly whenever they recreate on public lands to preserve recreational resources for future generations of outdoor enthusiasts.

**Effects of Proposed Action**

Year round activities occur in the proposed area, such as, hiking, dispersed camping, hunting, equestrians, hiking, OHV riding, bird watching, site seeing, and snow sports exist in the proposed areas. Noise, scenery, solitude, and recreation experience would have no direct effect by this proposed action in the analysis area.

**Effects of Reasonably Foreseeable Development Scenario**

Considering the RFDS, it is assumed that there would be no direct impact to recreation or access on NFS lands as no exploration or development would occur on the surface of the analysis area. The drilling that may occur outside of the analysis area on adjacent BLM or private land has the potential to impact recreationists. The quality of recreational experiences can be degraded by the presence of drill rigs and other facilities. This in turn could lead to some users, such as campers and hunters avoiding the area and recreating elsewhere. This displacement would be short-term.

Depending on the placement of the drill sites proposed under the RFDS, access to NFS lands could be affected by the closure of access roads while the drilling operations take place.

**Cumulative Effects of Forest Service Proposed Action**

The cumulative effect of the past, present, and reasonably foreseeable future actions may impact the recreational setting. These actions, including additional oil and gas exploration or development on nearby
lands and the Overland Pass fuels reduction project can cause some recreationists to avoid the area and recreate elsewhere. Cumulative effects cannot be fully evaluated in this document but would be analyzed in detail if future exploration or development was proposed for any leased lands.

**Effects of No Leasing Alternative**

No Leasing of oil and gas in the proposed area would have a positive effect to recreation and access by not having an impact.

### 3.2.6 Cultural Resources

**Affected Environment**

Cultural resources may include prehistoric or Native American sites, historic sites, buildings, structures, objects, and traditional cultural properties; all resources that represent the remains of past human activity. Lands within each PLSS Township/Range/Section identified for leasing availability are included within the Area of Potential Effect (APE) for cultural resources. The RFDS described below informs the extent of analysis for determining potential indirect effects to properties on NFS lands under that potential scenario. This extent considers potential exploration up to one mile west of the analysis area boundary.

The Ruby Mountains vicinity has been the subject of several archaeological studies, but there is little comprehensive research on the prehistory and no cultural chronology of the immediate area has been done. Some comprehensive research has been done off forest in rock shelters and open-air sites in the vicinity. Up to historic contact, the Ruby Mountains were likely used by mobile family groups moving seasonally within a consistent foraging territory. Evidence of use of the mountainous analysis area reflects hunting and resource gathering activity sites (lithic scatters, hunting blinds, pine nut and other plant resource collection, etc.) as well as some potential seasonal habitation. Research from the southeast margin of the range at the Fort Ruby site, indicates that people utilized the marsh-adjacent zone as early as ten thousand years prior to historic contact.

The 52,533 acre analysis area encompasses the location of 66 previously recorded cultural resource sites and 82 isolate finds on NFS lands. Available information indicates that 12 of the cultural resource sites are historic artifact scatters or features while 46 of the sites are prehistoric/Native American activity locations dominated by lithic scatters, but also including hunting blinds or rock shelter features. Isolate finds, defined as two artifacts or less and certain types of solitary features, include flakes and projectile points, cans and bottles, carved trees, mineral claim markers, and prospect pits. A very small portion of the analysis area has been subject to cultural resource survey. A total of 180 project survey areas intersect the analysis area, altogether encompassing approximately 2,000 acres or just less than 4% of the analysis area. Therefore, most of the proposed locations for oil and gas leasing have not been subject to cultural resource survey.

Previously identified cultural resources in the analysis area have primarily been determined ineligible for listing on the National Register of Historic Places. However, two have been determined eligible and 39 remain unevaluated. The two eligible sites were both determined significant under Criterion D.

Existing ethnography and discussions with local Native American groups indicate the likely presence of traditional cultural properties in the analysis area. Areas within the analysis boundary have been used for many years as important hunting, resource gathering, and otherwise traditionally important locations. While some site types have been preliminarily identified, not all of the sites have been evaluated for consideration as traditional cultural properties and available information is incomplete for all analysis areas. We acknowledge the potential exists for the Native American community to identify heritage-related issues in the future if specific development actions are proposed.
Effects of Proposed Action

The proposed action aims to make approximately 52,533 acres of NFS lands available for oil and gas leasing, subject to resource protection stipulations and notices as determined by analysis of the undertaking. The proposed action represents an administrative decision only and it would not directly result in on-the-ground disturbance regardless of availability determinations. As such, there can be no direct effect to eligible and unevaluated cultural resource sites or traditional cultural properties located within the analysis area. However, a Reasonably Foreseeable Development Scenario (RFDS) has been developed by the Forest Service to guide analysis of potential future effects of leasing decisions with the entire analysis area encumbered by NSO stipulations.

While specific potential effects cannot be analyzed until exploration/development activity is proposed, literature review results help identify known areas of concern where the scale of future identification needs and potential for protection or mitigation may inform leasing decisions. Given the known information, a Cultural Resources and Tribal Consultation Lease Notice would accompany all sections proposed for lease (See Appendix C with BLM Standard Stipulations).

Effects of Reasonably Foreseeable Development Scenario

The RFDS assumes limited future development potential associated with oil and gas leasing of analysis area lands as well as BLM or private lands adjacent to the analysis area in Huntington Valley. It is expected both that all of NFS lands in the analysis area will be encumbered with a NSO stipulation and that no exploration or development activities would actually occur on the surface of NFS lands. Under this assumption, there would be no direct effect to cultural resources located in the analysis area. However, the RFDS suggests that up to two drill pads and two wells may be developed on adjacent lands in high potential areas within one mile west of the analysis area and that these wells could utilize directional drilling to explore oil or gas reserves beneath the NFS surface. While well development on adjacent lands and even subsurface directional drilling does not have the potential to directly affect surface cultural resources, indirect effects are possible.

Indirect effects that may result from oil or gas well drilling on lands adjacent to the NFS analysis area could include impacts that mar visual landscapes, auditory changes that affect setting and feeling of historic properties, or even the introduction of vibrations that could threaten sensitive or fragile structures. There are no known sites with fragile structures located in areas adjacent to potential development zones according to the RFDS, so vibratory effects are possible but not expected. A visual analysis of potential development on adjacent lands outside of the Forest Service boundary suggests that only four known cultural resource sites located up to two miles within the Forest Service boundary would be visible from potential development activities. These properties include two unevaluated lithic scatters, one ineligible lithic scatter, and one unevaluated historic feature. The potential exists for unevaluated sites to be determined eligible for historic setting characteristics. However, the RFDS indicates that drilling activities would likely be a finite activity, lasting only 60-90 days of drilling per well, and that this preliminary exploration would not lead to longer-term production. Therefore, based on available resource information, development of two exploration wells assumed in the RFDS would represent only a temporary and negligible visual or auditory effect.

It is determined that there would be no direct effect to historic and cultural resources as a result of the Proposed Action for leasing availability analysis in the Ruby Mountains in compliance with NEPA and Section 106 of the NHPA and its implementing regulations 36 CFR 800. Assuming that all NFS lands of the analysis area would be encumbered with NSO stipulations as a result of other resource protection concerns, the RFDS would have the potential to contribute to indirect effects to cultural resources;
however, these effects would be temporary and are determined to represent no adverse effect to cultural resources.

**Cumulative Effects of Forest Service Proposed Action**

The analysis area encompasses much of the Ruby Mountains range. Ongoing activities that typically occur here, which may have the potential to affect cultural resources include grazing and grazing developments, hunting, camping and recreation, wildland fire and suppression, wood cutting, artifact collection near roads and developed areas, and background erosion or deflation resulting from normal and changing weather patterns. Non-routine project types with potential to affect cultural resources and that could develop by ground disturbing activities may include fence construction, road maintenance, dispersed camp area rehabilitation, and hazardous fuels management.

Decisions resulting from the oil and gas availability analysis would authorize no ground disturbing activity and so would have no direct or indirect effects to cultural resources. RFDS conditions have the potential to contribute to indirect but non-adverse cumulative effects on cultural resources. Any future proposal for development or exploration would require more detailed analysis of cumulative effects. While avoidance through project redesign or relocation is the preferred method of mitigation, data recovery or other mitigations may become necessary. Therefore, future cumulative effects analysis should consider the impact of mitigation methods in addition to proposed exploration or development activities.

**Effects of No Leasing Alternative**

The No Leasing Alternative would result in none of the sections identified in the analysis area being made available for future oil and gas leasing. This decision would result in no direct effect to surface resources associated with NFS lands, including cultural resources or properties of religious or cultural significance to Native American tribes. Potential indirect or cumulative effects of this decision would be described as in the RFDS if future development occurred only on adjacent lands as a result of a decision to not lease sections in the analysis area.

**3.2.7 Tribal Resources & Values**

**Affected Environment**

The analysis area falls within the aboriginal Western Shoshone territory and is also included in Western Shoshone Indian land areas that have been judicially established by the U.S. Indian Claims Commission. The South Fork Indian Reservation, at Lee, is adjacent to the lands being proposed for leasing. Many tribal members of the Te-Moak Tribe of Western Shoshone visit and recreate on National Forest System land in the Ruby Mountains. Tribal members gather plants, hunt, fish, and take part in traditional practices.

**Effects of Proposed Action**

Because the project is an administrative decision, there would be no direct effects from making lands available for leasing or issuing new oil and gas leases, since it does not directly authorize oil and gas exploration, development, production, or any other ground disturbing activities.

**Effects of Reasonably Foreseeable Development Scenario**

The drilling of up to two drill exploratory wells on lands adjacent to the National Forest would not affect the ability of tribal members to gather plants, hunt, and fish or take part in traditional practices on NFS lands.
Cumulative Effects of Forest Service Proposed Action

Since there would be no direct or indirect impacts to tribal resources or values, there would be no cumulative effect on tribal resources or values.

Effects of No Leasing Alternative

The No Leasing Alternative would result in none of the sections identified in the analysis area being made available for future oil and gas leasing. This decision would result in no direct effect to surface resources associated with NFS lands, including properties of religious or cultural significance to Native American tribes.

4.0 Agency and Group Coordination

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<th>Name</th>
<th>Purpose &amp; Authority for Consultation or Coordination</th>
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<tr>
<td>Bureau of Land Management (BLM)</td>
<td>Authorizing Agency for Oil and Gas Leasing</td>
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<td>Elko County</td>
<td>Economics, Natural Resource Management, and Local Recreation</td>
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<td>State Authorizing Agency for Oil and Gas Permitting</td>
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4.1 List of Preparers

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<tr>
<th>Name</th>
<th>Title</th>
<th>Role</th>
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<tbody>
<tr>
<td>Bill Dunkelberger</td>
<td>Forest Supervisor</td>
<td>Responsible Official (Decision Maker)</td>
</tr>
<tr>
<td>Josh Nicholes</td>
<td>District Ranger</td>
<td>Line Officer, Tribal Relations</td>
</tr>
<tr>
<td>John Baldwin</td>
<td>Former District Ranger through Oct. 30, 2017</td>
<td>Former Line Officer</td>
</tr>
<tr>
<td>Susan Summer Elliott</td>
<td>H-T Minerals Program Manager</td>
<td>Supervisors Office Project Manager-Interdisciplinary Team Lead, Geology, Minerals IRA lead</td>
</tr>
<tr>
<td>Name</td>
<td>Position</td>
<td>Responsibilities</td>
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<tr>
<td>Jenna Padilla</td>
<td>NE Zone Geologist</td>
<td>District Interdisciplinary Team Lead, Geology, Project Record Management, GIS support</td>
</tr>
<tr>
<td>Doug Clarke</td>
<td>NEPA Planner</td>
<td>NEPA Support</td>
</tr>
<tr>
<td>Chimalis Kuehn</td>
<td>NE Zone Archeologist</td>
<td>Heritage Resources, Tribal Relations</td>
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<td>Jeremy Evans</td>
<td>Natural Resource Specialist</td>
<td>Recreation and Wilderness, IRA lead for non-minerals</td>
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<tr>
<td>Kyra Reid</td>
<td>NE Zone Wildlife Biologist</td>
<td>Wildlife</td>
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<td>Dirk Netz</td>
<td>Forest Botanist</td>
<td>Botany</td>
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<td>Juanita Mendive</td>
<td>GIS Specialist</td>
<td>GIS support</td>
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<tr>
<td>Robin Wignall</td>
<td>NE Zone Hydrologist</td>
<td>Hydrology- Surface and Groundwater</td>
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<tr>
<td>Annie Dixon</td>
<td>Supervisory Rangeland Management Specialist</td>
<td>Range Resources</td>
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<tr>
<td>Rachel Van Horne</td>
<td>Fisheries Biologist</td>
<td>Fisheries and Aquatics, USFWS coordination</td>
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<tr>
<td>Becky Hammond</td>
<td>Regional Office Geologist</td>
<td>Support-leasing process, oil and gas, and RFDS concurrence</td>
</tr>
<tr>
<td>Tom Schmidt</td>
<td>BLM Elko District Geologist</td>
<td>Reviewer, geology, oil and gas leasing process, technical guidance, agency coordination, RFDS concurrence</td>
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5.0 References

Bureau of Land Management (BLM), 2018, March 2018 Oil & Gas Lease Sale Environmental Assessment


Office of Natural Resources Revenue (ONRR), 2017, Natural Resources Revenue Data. Retrieved from https://revenuedata.doi.gov/explore/#federal-disbursements


______, 2017, List of threatened and endangered species that may occur in your proposed project. Consultation Code: 08ENVD00-2018-SLI-0073.

All lands are located within the Mount Diablo Meridian, Nevada, and further described as follows:

T. 26 N., R. 56 E.,
Sec. 1, Lots 1 thru 4;
  1, S1/2NE1/4, S1/2NW1/4, S1/2;
  2, Lots 1 thru 4;
  2, S1/2NE1/4, S1/2NW1/4, S1/2;
  3, Lots 1 thru 3;
  3, S1/2NE1/4, SE1/4NW1/4, SE1/4.

T. 26 N., R. 56 E.,
Sec. 4, Lots 3 thru 8;
  4, SW1/4NE1/4, S1/2NW1/4, SW1/4,
    NW1/4SE1/4;
  5, Lots 1 thru 4;
  5, S1/2NE1/4, S1/2NW1/4, S1/2.

T. 26 N., R. 56 E.,
Sec. 8,
  9, Lots 1 thru 4;
  9, SW1/4NE1/4, NW1/4, SW1/4,
    NW1/4SE1/4;
  16, W1/2NE1/4, NW1/4, SW1/4, NW1/4SE1/4;
  17.

T. 26 N., R. 56 E.,
Sec. 10,
  15, N1/2, NE1/4SW1/4, N1/2NW1/4SW1/4,
    N1/2NE1/4SE1/4, S1/2SW1/4SE1/4,
    S1/2SE1/4SE1/4, S1/2N1/2SE1/4SE1/4.

T. 26 N., R. 56 E.,
Sec. 11 thru 14.

T. 27 N., R. 56 E.,
Sec. 1, Lots 1 thru 4;
  1, S1/2NE1/4, S1/2NW1/4, S1/2;
  2, Lots 1, 2, 5;
  2, SE1/4NE1/4, SE1/4;
  11, NE1/4, E1/2NW1/4, NW1/4NW1/4,
    N1/2SW1/4NW1/4, N1/2SE1/4SW1/4NW1/4,
    S1/2SW1/4SW1/4NW1/4, N1/2NE1/4SE1/4,
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SE1/4SE1/4NE1/4SE1/4,
N1/2SW1/4NE1/4SE1/4
12, N1/2, N1/2SW1/4, SE1/4.

T. 27 N., R. 56 E.,
Sec. 13, S1/2, S1/2NW1/4, NE1/4
23, and 24,
14, S1/2NE1/4, S1/2NW1/4, S1/2NW1/4NW1/4,
NW1/4NW1/4NW1/4,
S1/2NE1/4NW1/4NW1/4,
NW1/4NE1/4NW1/4NW1/4,
SW1/4NE1/4NW1/4NW1/4,
SW1/4NW1/4NE1/4NW1/4,
S1/2SE1/4NE1/4NW1/4,
S1/2SW1/4

T. 27 N., R. 56 E.,
Sec. 25, and 26;
35, N1/2, N1/2SW1/4, SW1/4SW1/4, N1/2SE1/4;
36, N1/2, N1/2SW1/4, SE1/4SW1/4, SE1/4.

T. 28 N., R. 57 E.,
Sec. 1, 11, and 12 PROT ALL;
2, NE1/4, NW1/4, SW1/4, N1/2SE1/4,
SW1/4SE1/4.
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 3, 4, 9 and 10.
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 5, (EXCLUDING HES228, HES229);
6, (EXCLUDING HES228, HES229, HES230);
7, and 8.
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 13, 14, 23, and 24.
Lands unsurveyed, Protraction Diagram 131
T. 28 N., R. 57 E.,
Sec. 15, 22, 27, and 34.
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 16, and 17;
18, (EXCLUDING HES193).
Lands unsurveyed, Protraction Diagram 131

T. 28 N., R. 57 E.,
Sec. 19, 20 and 21.
Lands unsurveyed, Protraction Diagram 131

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Sec. 25, 26, 35.
36, PROT ALL (EXCLUDING HES190);
Lands unsurveyed, Protraction Diagram 131

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Sec. 31, 32, and 33.
Lands unsurveyed, Protraction Diagram 131

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Sec. 3, NW1/4NW1/4, SW1/4NW1/4,
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4, S1/2N1/2, S1/2;
5, S1/2NE1/4, SE1/4NW1/4, SW1/4, SE1/4; 8.

T. 29 N., R. 57 E.,
Sec. 10, NW1/4NW1/4, SW1/4NW1/4,
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Lands unsurveyed, Protraction Diagram 130
9 and 16;
15, NW1/4NW1/4, SW1/4NW1/4,
NW1/4SW1/4, SW1/4SW1/4;
Lands unsurveyed, Protraction Diagram 130
18, NE1/4, NE1/4NW1/4, SE1/4NW1/4,
NE1/4SW1/4, SE1/4SW1/4, SE1/4.

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20, 21, and 28.
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Sec. 29 and 32;
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   31, NE1/4, NE1/4NW1/4, SE1/4NW1/4,
      E1/2SE1/4.

T. 29 N., R. 57 E.,
Sec. 33 thru 34;

T. 29 N., R. 57 E.,
Sec. 35 thru 36;

T. 32 N., R. 57 E.,
Sec. 12, Lots 1 thru 7;
   12, S1/2NE1/4, SE1/4NW1/4, NE1/4SW1/4,
      SE1/4SW1/4, SE1/4;
   13, Lots 1 thru 4;
   13, S1/2NE1/4, S1/2NW1/4, S1/2.

T. 32 N., R. 57 E.,
Sec. 24 thru 27;

T. 32 N., R. 57 E.,
Sec. 34, N1/2, SE1/4;
   35, N1/2, N1/2SE1/4, N1/2SW1/4, S1/2SW1/4;
   36, N1/2NE1/4, N1/2NW1/4, SW1/4NW1/4.


Appendix B

Resource Concerns Analysis Table
NSO Stipulation Coverage Map
### Resource Concerns Analysis for Ruby Mountains Oil & Gas Lease Analysis EA

**NSO Stipulation Coverage**

- PHMA: Greater Sage-grouse Priority Habitat Management Area
- LK: Within 4-mile GRSG Lek Buffer
- CMDH: Crucial Mule Deer Habitat (winter/summer/transition)
- IRA: Inventoried Roadless Area
- SS: Steep Slopes (>40%)
- LCT: Lahontan Cutthroat Trout Habitat
- SW: Surface Water Feature (Stream/Riparian Buffer 400 feet)

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Attachment E
Appendix C

Humboldt National Forest Land Management Plan- Appendix H
Terms from the Standard Lease Form (SF-3100-11 Section 6), and
BLM Standard Stipulations
APPENDIX H
SPECIAL STIPULATIONS FOR FOREST SERVICE MINERAL LEASES

The following special stipulations are in addition to the lease terms and standard stipulations (forms 3109-5, 3109-3, and Forest Service supplement to 3109-3), and are necessary to protect specific resource values on the lease area. If found to be in the public interest, these stipulations may be made less restrictive when specifically approved in writing by the District Engineer, Geological Survey (GS), and the authorized officer of the Federal surface management agency.

1. All of the land in this lease is included in (recreation area, special area, etc.). Therefore, no occupancy or disturbance of the surface of the land described in this lease is authorized. The lessee, however, may exploit the oil and gas resources in this lease by directional drilling from sites outside this lease. If a proposed drilling site lies on land administered by the Bureau of Land Management, or by the Forest Service, a permit for use of the site must be obtained from the BLM District Manager or the Forest Service District Ranger, before drilling or other development begins. (Note: Use of stipulation requires GS concurrence.)

2. No access or work trail or road, earth out or fill, structure or other improvement, other than an active drilling rig, will be permitted if it can be viewed from the (road, lake, river, etc.). (Note: Use of stipulation requires GS concurrence.)

3. No occupancy or other activity on the surface of (legal subdivision) is allowed under this lease.

4. No occupancy or other surface disturbance will be allowed within ___ feet of the ___ (road, trail, river, creek, canal, etc.). This distance may be modified when specifically approved in writing by the District Engineer of the Geological Survey, with the concurrence of the authorized officer of the Federal surface management agency.

5. No drilling or storage facilities will be allowed within ___ feet of (live water, the reservoir, the archaeological site, the historical site, the paleontological site, etc.) located in (legal subdivision). This distance may be modified when specifically approved in writing by the District Engineer of the U.S. Geological Survey, with the concurrence of the authorized officer of the Federal surface management agency.

6. No occupancy or other surface disturbance will be allowed on slopes in excess of ___ percent, without written permission from the District Engineer of the U.S. Geological Survey, with the concurrence of the authorized officer of the Federal surface management agency.

7. In order to (minimize watershed damage, protect important seasonal wildlife habitat, etc.) exploration, drilling, and other development activity will be allowed only (during the period from ___ to ___ during dry soil period, over a snow cover, on frozen ground). This limitation does not apply to maintenance and operation of producing wells. Exceptions to
this limitation in any year may be specifically authorized in writing by the
District Engineer of the U.S. Geological Survey, with the concurrence of the
authorized officer of the Federal surface management agency.

8. In order to minimize watershed damage, during muddy and/or wet periods,
the authorized officer of the Federal surface management agency, through the
District Engineer of the U.S. Geological Survey, may prohibit exploration,
drilling, or other development. This limitation does not apply to
maintenance and operation of producing wells.

9. The _____ (Trail/Road) will not be used as an access road for activities
on this lease, except as follows: (No exceptions, weekdays during
recreation season, etc.).

10. To maintain esthetic values, all semi-permanent and permanent
facilities may require painting or camouflage to blend with the natural
surroundings. The paint selection or method of camouflage will be subject
to approval by the District Engineer of the Geological Survey, with the
concurrency of the authorized officer of the Federal surface management
agency.

11. No occupancy or other activity on the surface of the following
described lands is allowed under this lease:

Reasons for this restriction are:

Examples of appropriate reasons for this restriction are:

1. Steep slopes.
2. Specific ecosystems, ecological land unit, land type of geologic
formation which presents hazards such as mass failure.
3. Roadless or essentially roadless area (includes Chevron and Rainbow
stipulations).
4. Special management units such as: Recreation Type I, water supply,
administrative site, etc.

( ) Approximately % of lease

Note: This stipulation could be used in place of stipulations Nos. 1, 3,
and 6.

12. No _____ will be allowed within _____ feet of the ____. This area
contains _____ acres and is described as follows:

Reasons:
First blank to be filled in with one or more of the following: drilling, storage, facilities, surface disturbance, or occupancy. Second and third blanks to be filled in with one or more of the following:

1. _____ feet wildlife habitat essential to specific species.
2. _____ feet peripheral or unique vegetation type.
3. 200 feet either side of centerline of roads or highways.
4. 500 feet of normal high waterline on all streams, rivers, ponds, reservoirs, or lakes.
5. 600 feet of all springs.
6. 400 feet of any improvements.

Note: stipulation no. 12 could be used in place of stipulation numbers 4 and 5 to eliminate that line.

13. In order to (minimize) (protect) __________, __________ will be allowed only during __________. This does not apply to maintenance and operation of producing wells and facilities. Lands within leased area to which this stipulation applies are described as follows:

Reasons:

First blank to be filled in with one or more of the following:

1. Watershed damage.
2. Soil erosion.
3. Seasonal wildlife habitat (winter range, calving/lambing area, etc.).
4. Conflict with recreation.

Second blank to be filled in with one or more of the following:

1. Surface disturbing activities.
2. Exploration.
3. Drilling.
4. Development.

Third blank to be filled in with one or more of the following:

1. Period from _____ to _____.
2. Dry soil periods.
3. Over the snow
4. Frozen ground.

Note: Stipulation No. 13 could be used in place of stipulation no. 7, giving greater definition as to restriction.

14. Controlled or Limited Surface Stipulation. This stipulation may be modified when specifically approved in writing by the District Engineer, Geological Survey, with concurrence of the Federal surface management agency. Distances and/or time periods may be made less restrictive depending on the actual on ground conditions.
The lessee/operator is given notice that all or portions of the lease area may contain special values, may be needed for special purposes, or may require special attention to prevent damage to surface and/or other resources. Any surface use or occupancy within such special areas will be strictly controlled or, if necessary, excluded. Use or occupancy will be authorized only when the lessee/operator demonstrates that the special area is essential for operations in accordance with a surface use and operations plan which is satisfactory to the Geological Survey and the Federal surface management agency for the protection of such special areas and existing or planned uses. Appropriate modifications to imposed restrictions will be made for the maintenance and operation of producing oil and gas wells; however, in extremely critical situations, occupancy may only be allowed in emergencies.

After the Federal surface management agency has been advised of specific proposed surface use or occupancy on these lands, and on request of the lessee/operator, the agency will furnish more specific locations and additional information on such special areas which now include:

(Legal land description to lot and/or quarter, quarter section.)

Reason for Restriction:

Duration of Restriction: (year-round, month(s)).

15. Activity Coordination Stipulation. This lease includes lands within which has resource values sensitive to high levels of activity. In order to minimize impacts to these resources, special conditions, such as unitization, prior to approval of operations, and/or other limitations to spread surface disturbance activities over time and space may be required prior to approval and commencement of any operations on the lease.

* Wilderness Areas, Further Planning Areas, Areas of Threatened and Endangered Species.

16. Protection of Endangered or Threatened Species. The Federal surface management agency is responsible for assuring that the area to be disturbed is examined, prior to undertaking any surface-disturbing activities on lands covered by this lease, to determine effects upon any plant or animal species listed or proposed for listing as endangered or threatened, or their habitats. If the findings of this examination determine that the operation may detrimentally affect an endangered or threatened species, some restrictions to the operator's plans or even disallowances of use may result.

The lessee/operator may, at his discretion and cost, conduct the examination on the lands to be disturbed. This examination must be done by or under the supervision of a qualified resource specialist approved by the surface management agency. An acceptable report must be provided to the surface management agency identifying the anticipated effects of the proposed action on endangered or threatened species or their habitat.
<table>
<thead>
<tr>
<th>U.S. Forest Service Standard Stipulations</th>
<th>Steep Slopes</th>
<th>Riparian Areas</th>
<th>Key Wildlife Habitat</th>
<th>Treaty Habitat</th>
<th>Administrative Sites</th>
<th>Research Natural Areas</th>
<th>Cultural Resources (Cultural Landscape)</th>
<th>Natural Bed</th>
<th>Scenic Areas</th>
<th>Significant Pristine</th>
<th>Ecological Areas</th>
<th>Unusable Soils</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. No occupancy/disturbance for [rec./spec.-ial area/etc.]</td>
<td>X</td>
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<td>2. No facilities viewed from [road/lake/etc.][*]</td>
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<td>3. No surface occupancy</td>
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<td>4. No occupancy/disturbance within [__] feet of [rd./tr./creek/etc.][*]</td>
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<td>X</td>
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<tr>
<td>5. No drilling/facilities with [__] feet of [live water/archaeological/etc.][*]</td>
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<tr>
<td>6. No occupancy/disturbance, steep slopes</td>
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<td>7. Exploration/development allowed [specific time/over snow/etc.][*]</td>
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<td>8. Prohibit exploration development for watershed damage</td>
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<td>9. Limits use of roads/trails</td>
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<td>10. Esthetic painting of facilities</td>
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<td>X</td>
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<tr>
<td>11. No occupancy/activity for [steep slope/ ecosystem/etc.][*]</td>
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</tbody>
</table>
**TABLE H-1**

Special Stipulations for Mineral Leases

(Continued)

<table>
<thead>
<tr>
<th>U.S. Forest Service Standard Stipulations</th>
<th>High Use Recreation Area</th>
<th>Steep Slopes</th>
<th>Riparian Areas</th>
<th>Key Wildlife Areas</th>
<th>T&amp;I Habitat</th>
<th>Administrative Sites</th>
<th>Natural Areas</th>
<th>Cultural Resources (Culinary)</th>
<th>Scenic Areas</th>
<th>Significant Natural Values</th>
<th>Aesthetic Areas</th>
<th>Stable Soils</th>
</tr>
</thead>
<tbody>
<tr>
<td>12. No [state activity] allowed because of [wildlife/imprnt/etc.]*</td>
<td>X</td>
<td>X</td>
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<td>14. Controlled/limited surface use</td>
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<td>X</td>
<td>X</td>
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<td>15. Activity coordination</td>
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<td>X</td>
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<tr>
<td>16. Protect T&amp;E species</td>
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</tbody>
</table>

*To be completed when lease is issued.
Terms from the Standard Lease Form (SF-3100-11 Section 6)

The conduct of operations by the lessee on all parcels would be subject to the following terms from the back of the standard lease form (SF-3100-11) that state:

“Conduct of Operations (SF-3100-11, Section 6)

Lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological and other resources, and to uses or users. Lessee shall take reasonable measures deemed necessary by the lessor to accomplish the intent of this section. To the extent consistent with lease rights granted, such measures may include, but not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. Lessor reserves the right to continue existing uses and to authorize future uses upon or in leased lands, including the approval of easements or right-of-way. Such uses shall be conditioned so as to prevent unnecessary or unreasonable interference with rights of lessee.

Prior to disturbing the surface of the leased lands, lessee shall contact lessor to be apprised of procedures to be followed and modifications or reclamation measures that may be necessary. Areas to be disturbed may require inventories or special studies to determine the extent of impacts to other resources. Lessee may be required to complete minor inventories or short-term special studies under guidelines provided by lessor. If in the conduct of operations, threatened or endangered species, objects of historic or scientific interest or substantial unanticipated environmental effects are observed, lessee shall immediately contact lessor. Lessee shall cease any operations that would result in destruction of such species or objects.”
BLM Nevada Standard Stipulations

These stipulations and notices apply to all parcels all lands and represent standard Best Management Practices for ensuring compliance with extant Federal Laws and resource protection.

T&E, Sensitive and Special Status Species

The lease area may now or hereafter contain plants, animals, or their habitats determined to be threatened, endangered, or other special status species. BLM may recommend modifications to exploration and development proposals to further its conservation and management objective to avoid BLM-approved activity that will contribute to a need to list such a species or their habitat. BLM may require modifications to or disapprove proposed activity that is likely to result in jeopardy to the continued existence of a proposed or listed threatened or endangered species or result in the destruction or adverse modification of a designated or proposed critical habitat. BLM will not approve any ground-disturbing activity that may affect any such species or critical habitat until it completes its obligations under applicable requirements of the Endangered Species Act as amended, 16 U.S.C. §1531 et seq., including completion of any required procedure for conference or consultation.

Migratory Birds

The Operator is responsible for compliance with provisions of the Migratory Bird Treaty Act by implementing measures to prevent take of migratory birds. Operators should be aware that any ground clearing or other disturbance (such as creating cross-country access to sites, drilling, and/or construction) during the migratory bird (including raptors) nesting season (March 1 - July 31) risks a violation of the Migratory Bird Treaty Act. Disturbance to nesting migratory birds should be avoided by conducting surface disturbing activities outside the migratory bird nesting season.

If surface disturbing activities must be implemented during the nesting season, a preconstruction survey for nesting migratory birds should be performed by a qualified wildlife biologist, during the breeding season (if work is not completed within a specified time frame, then additional surveys may be needed). If active nests are found, an appropriately-sized no surface disturbance buffer determined in coordination with the BLM biologist should be placed on the active nest until the nesting attempt has been completed.

If no active nests are found, construction activities must occur within the survey validity time frame specified in the conditions of approval.

Cultural Resources and Tribal Consultation

This lease may be found to contain historic properties and/or resources protected under the National Historic Preservation Act (NHPA), American Indian Religious Freedom Act, Native American Graves Protection and Repatriation Act, Executive Order 13007, or other statutes and executive orders. The BLM will not approve any ground-disturbing activities that may affect any such properties or resources until it completes its obligations (e.g., State Historic Preservation Officer (SHPO) and tribal consultation) under applicable requirements of the NHPA and other authorities. The BLM may require modification to exploration or development proposals to protect such properties, or disapprove any activity that is likely to result in adverse effects that cannot be successfully avoided, minimized, or mitigated.

Fossils

This area has low to moderate potential for vertebrate paleontological resources, unless noted to have higher potential in a separate stipulation. This area may contain vertebrate paleontological resources. Inventory and/or on-site monitoring during disturbance or spot checking may be required of the operator.
In the event that previously undiscovered paleontological resources are discovered in the performance of any surface disturbing activities, the item(s) or condition(s) will be left intact and immediately brought to the attention of the authorized officer of the BLM. Operations within 250 feet of any such discovery will not be resumed until written authorization to proceed is issued by the Authorized Officer. The lessee will bear the cost of any required paleontological appraisals, surface collection of fossils, or salvage of any large conspicuous fossils of significant scientific interest discovered during the operations.

**Water**
The Operator is responsible for compliance with provisions of the Clean Water Act, Safe Drinking Water Act, and applicable State laws and regulations regarding protection of state water resources. Operators should contact Nevada Division of Water Resources and Nevada Division of Environmental Protection regarding necessary permits and compliance measures for any construction or other activities.

**Mining Claims**
This parcel may contain existing mining claims and/or mill sites located under the 1872 Mining Law. To the extent it does, the oil and gas lessee must conduct its operations, so far as reasonably practicable, to avoid damage to any known deposit of any mineral for which any mining claim on this parcel is located, and should not endanger or unreasonably or materially interfere with the mining claimant's operations, including any existing surface or underground improvements, workings, or facilities which may have been made for the purpose of mining operations. The provisions of the Multiple Mineral Development Act (30 U.S.C. 521 et seq.) shall apply on the leased lands.

**Fire**
The following precautionary measures should be taken to prevent wildland fires. In the event your operations should start a fire, you could be held liable for all suppression costs.

- All vehicles should carry fire extinguishers and a minimum of 10 gallons of water.
- Adequate fire-fighting equipment i.e. shovel, pulaski, extinguisher(s) and a minimum 10 gallons of water should be kept at the drill site(s).
- Vehicle catalytic converters should be inspected often and cleaned of all brush and grass debris.
- When conducting welding operations, they should be conducted in an area free from or mostly free from vegetation. A minimum of 10 gallons water and a shovel should be on hand to extinguish any fires created from the sparks. Extra personnel should be at the welding site to watch for fires created by welding sparks.
- Report wildland fires immediately to the BLM Elko Nevada Interagency Dispatch Center (EIDC) at (775) 748-4000. Helpful information to reported is location (latitude and longitude if possible), what's burning, time started, who/what is near the fire and direction of fire spread.
- When conducting operations during the months of May through September, the operator must contact the BLM Elko District Office, Division of Fire and Aviation at (775) 753–0200 to find out about any fire restrictions in place for the area of operation and to advise this office of approximate beginning and ending dates for your activities.
Appendix D

Analysis Maps
The Forest Service uses the most current and complete data available. GIS data and products may vary. They may be certain scales, based on modeling or interpretation, incomplete developed from sources of differing accuracy, accurate only while being created or revised, etc. Using GIS products for purposes other than those for which they were created, may yield inaccurate or misleading results. The Forest Service reserves the right to correct, update, modify, or replace, GIS products without notification.

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The Forest Service acknowledges that its products and associated data exist for the purpose of supporting the public in determining what may be available. All data is presented "as is" and may be incomplete. Users should consult appropriate data producers for more complete data. The data and associated products are subject to change and may not be accurate or up-to-date. The user assumes the responsibility for the application of this information and the results obtained.

Legend:
- Colombia Spotted Frog
- LCT Occupied Habitat (NDOW)
- LCT Recovery Waters (NDOW)
- Seeps & Springs
- NHD- Flowline
  - Stream/River: Perennial
  - Stream/River: Intermittent
- NHD- Waterbody
  - Lake/Pond
  - Playa
  - Swamp/Marsh
- Major Roads
- P10 Lands- Proposed Action
- Identified Sections
- Township & Range
- Forest Service Boundary
- BIA

Ruby Oil & Gas Lease Analysis
Hydrologic Map- HUC5 Watersheds, Streams, & Springs
LCT & Colombia Spotted Frog Habitat- Proposed Action
The Forest Service uses the most current and complete data available. GIS data and products may vary. They may be developed from sources of differing accuracy, accurate only at certain scales, based on modeling or interpretation, incomplete while being created or revised, etc. Using GIS products for purposes other than those for which they were created, may yield inaccurate or misleading results. The Forest Service reserves the right to correct, update, modify, or replace GIS products without notification.
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Legend
- Major Roads
- FS Lands - Proposed Action
- Identified Sections
- Township & Range
- Mule Deer Habitat
  - Crucial Winter
  - Crucial Summer
  - Transition Range
- Ownership
  - FS
  - BIA
  - BLM
  - PVT
  - Wilderness

Ruby Oil & Gas Lease Analysis
Crucial Mule Deer Habitat Map - Proposed Action

Attachment E
Appendix E

Oil and Gas Leasing Glossary

STANDARD LEASE TERMS-General resource protection language (see Section 6 of DOI BLM lease form) is included in all leases:

Standard lease terms (SLTs) are contained in BLM Lease Form 3100-11 (BLM 2006a), Offer to Lease and Lease for Oil and Gas. As a minimum, all leases must contain SLTs. Under the SLTs, the lessee has the right to use as much of the leased lands as is necessary to explore or drill for, extract, remove, and dispose of oil and gas deposits that may be in the leased lands, together with the right to build and maintain necessary improvements thereon. Section 6 of the standard lease form requires the operator to conduct operations in a manner that minimizes adverse impacts to the land, air, water, cultural, biological, visual, and other resources and land uses or users. In addition, if threatened or endangered species; objects of historic, cultural, or scientific value; or substantial unanticipated environmental effects are encountered during operations, all work affecting the resource must cease, and the land management agency contacted. Standard lease term operations cannot violate any other federal environmental protection laws (e.g., Clean Air Act, Clean Water Act, Endangered Species Act, etc.). Measures to avoid impacts to specified resources include, but are not limited to, the modification to the siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. Prior to disturbing the surface of leased lands, lessee must contact lessor to be apprised of procedures to be followed and modifications or reclamation measures that may be necessary. Areas disturbed may require inventories or special studies to determine the extent of impacts.

STIPULATIONS

A lease does not convey an unlimited right to explore or to develop any oil or gas resources found under the land. In areas where the exploration and development of oil and gas resources would conflict with the protection or management of other resources and public land uses, terms and conditions may be applied to the lease to manage how operations are conducted or where they can be located. These terms and conditions, derived from legal statutes and measures to minimize adverse impacts to other resources, are defined in a lease as stipulations. Stipulations modify the rights the government grants to a lessee. However, the terms and conditions in a stipulation would only apply to the lessee and not to all potential land uses. All applicable stipulations are provided to by potential lessees prior to any lease sale.

The Rocky Mountain Regional Coordinating Committee published the Uniform Format for Oil and Gas Lease Stipulations in March 1989 (RMRCC 1989). This guidance provides uniform definitions, format, and wording for federal oil and gas leasing stipulations including No Surface Occupancy (NSO), Timing (or seasonal) Limitations (TL), and Controlled Surface Use (CSU). This guidance also includes the use of Lease Notices (LN). There is also provision for special administration or unique stipulations, such as those required by prior agreements between agencies or other instances when standardized forms are not appropriate. These formats have been adopted for nationwide use and are as follows:

1) NO SURFACE OCCUPANCY (NSO)

Per the Uniform Format for Oil and Gas Lease Stipulations (March 1989), NSO means that “use or occupancy of the land surface for fluid mineral exploration or development is prohibited to protect identified resource values.” Under an NSO stipulation, no surface occupation or surface disturbance would be allowed on the subject parcels.
2) **TIMING LIMITATIONS (TL)**

The TL stipulation (often called seasonal restrictions) prohibits surface use during specified time periods to protect identified resource values. A TL applies for restrictions longer than 60 days and shorter than one year. This stipulation does not apply to the operation and maintenance of production facilities unless the findings of analysis demonstrate the continued need for such mitigation and that less stringent, project-specific mitigation measures would be insufficient. Examples of a TL stipulation include, but are not limited to, limitations developed to protect wildlife habitat during critical time periods or prevent erosion during periods of high soil erodibility. The TL may also specify that the restrictions apply when certain surface conditions exist, such as water-saturated soils or during spring thaws when road beds are too soft to allow traffic without unacceptable damage to the road.

3) **CONTROLLED SURFACE USE (CSU)**

The CSU stipulation is intended to be used when fluid mineral occupancy and use are generally allowed on all or portions of the lease area year-round, but because of special values, or resource concerns, lease activities must be strictly controlled. The CSU stipulation is used to identify constraints on surface use or operations that may otherwise exceed the mitigation provided by Section 6 of the standard lease terms and the regulations and operating orders. The CSU stipulation is less restrictive than the NSO or TL stipulations, which prohibit all occupancy and use on all or portions of a lease for all or portions of a year. The CSU stipulation should not be used in lieu of an NSO or TL stipulation. The use of this stipulation should be limited to areas where restrictions or controls are necessary for specific types of activities rather than all activity. The stipulation should explicitly describe the activity that is to be restricted or controlled or the operation constraints required, and must identify the applicable area and the reason for the requirement.

4) **LEASE NOTICE (LN)**

A LN is attached to leases to transmit information at the time of lease issuance to assist the lessee in submitting acceptable plans of operation or to assist in administration of leases. A LN is attached to leases in the same manner as stipulations; however, there is an important distinction between a LN and stipulations – a LN does not involve new restrictions or requirements. Any requirements contained in a LN must be fully supported in a law, regulation, SLT, or onshore oil and gas order.

**MITIGATION MEASURES**

Mitigation is employed in three major areas. First, standard terms of BLM Lease Form 3100-11, 43 CFR 3100, and 36 CFR 228E, contain basic mitigation measures to protect the environment. Second, at the time lands are offered for lease, special stipulations may be added to protect specific resource values. Examples are NSO on steep slopes or TL for big game winter range. Finally, after a lease is issued, at the Application Permit to Drill stage additional site-specific mitigation measures may be required or incorporated through negotiations with the applicant to protect site-specific resources. Additional mitigation measures may be required or negotiated at this stage as a result of on-the-ground examination and NEPA analysis. Conditions of Approval (COA) can be required if they are within the terms of the lease and negotiated if they are outside the terms of the lease. These are determined on a site-specific, case-by-case basis. Any post-lease mitigation applied must be approved and may not change the intent of the lease or impose undue constraint upon the lessee or their operator. Authority to require such standards is provided by the Mineral Leasing Act of 1920, as amended, Federal Regulations at 36 CFR 228.106-108 (Submission, Review, and Requirements of Surface Use Plans of Operations) and 43 CFR 3162.3 (BLM procedures for approval of post-lease applications for operations).
LEASE TERMS AND CONDITIONS

The lease grants the lessee the right to explore and drill for, extract, remove, and dispose of oil and gas deposits, except helium, that may be found in the leased lands. Subject to special stipulations as noted above, the leases are granted on the condition that the lessee will obtain BLM and Forest Service approval before conducting any surface-disturbing activities. The oil and gas lease conveys the right to develop those resources on the leased land. The lessee or their operator cannot build a house on the land, cultivate the land, or remove any minerals other than oil and gas from the leased land (BLM 2007a).

SUMMARY: Notice is hereby given in accordance with the National Environmental Policy Act (NEPA) and Section 5.4.9 of TVA's implementing procedures, 45 FR 54111-54115 (1980), that TVA has decided to adopt the preferred alternative identified in its final environmental impact statement (EIS), “Chip Mill Terminals on Tennessee River.” This final EIS was made available to the public on March 4, 1993. TVA has decided to deny all requests associated with these proposed chip mill terminals.

FOR FURTHER INFORMATION CONTACT: Jon M. Loney, Project Director, Chip Mill Environmental Impact Statement, Tennessee Valley Authority, 601 Summit Hill Drive, OCH 1E, Knoxville, Tennessee 37902, or by calling (615) 632-3012. Copies of the final EIS may be obtained from M. Paul Schmierbach, Manager, Environmental Quality Staff, Tennessee Valley Authority, 400 Summit Hill Drive, WT 8B, Knoxville, Tennessee 37902-1499.

SUPPLEMENTARY INFORMATION: In 1990 and 1991, TVA received requests from three companies proposing to build barge terminals on a 12-mile stretch of the Tennessee River in Alabama and Tennessee. These terminals would serve adjacent wood chip mills. The requests, in order of receipt, were from Parker Towing Company, Donghae Pulp Company of Alabama, and Boise Cascade Corporation. Requests were also received from Canal Chip Corporation, but this company and Parker Towing decided to proceed jointly with the Parker Towing proposal.

In 1990, Parker Towing was selected by the Nickajack Port Authority to lease and operate the Port of Nickajack which is located within the city limits of New Hope, Tennessee, at Tennessee River Mile 424.0. Parker Towing proposed to build additional barge mooring facilities and a covered conveyor to load chips at the port. This requires TVA's approval under Section 26a of the TVA Act because it would be an obstruction affecting navigation, flood control, or public lands on the Tennessee River. In addition, Parker Towing proposed to build a chip mill on Nickajack Port Industrial Park property which was previously owned by the United States and under TVA's custody and control (TVA property). TVA approval is needed to locate in the industrial park under the terms of TVA's agreement with the Port Authority. In order for a chip mill to be located in the park, TVA would also have to waive small manufacturing development standards, which TVA and the Port Authority established for the industrial park when TVA transferred the property to the Port Authority.

Donghae applied for Section 26a approval for a barge terminal to be located near Bridgeport, Alabama, at Tennessee River Mile 412.5. In addition, Donghae requested an easement across 2.4 acres of TVA property to access the terminal from its chip mill facility. TVA was also asked to provide a new electrical delivery point so that the North Alabama Electric Corporation could supply electricity to the facility. The chip mill facility itself would be located on private property and could be constructed without TVA approval. However, as configured, the facility would impact a jurisdictional wetland and would require the approval of the U.S. Army Corps of Engineers (Corps).

Boise Cascade requested Section 26a approval for a barge terminal to be located across the river from South Pittsburg, Tennessee, and within the city limits of New Hope, Tennessee, at Tennessee River Mile 418.4. In addition, Boise Cascade requested an easement across 1.25 acres of TVA property to access the terminal from its chip mill facility. This facility would also be located
on private property and can be constructed without TVA's approval. However, an access road to the facility would impact a jurisdictional wetland and would require a Corps permit.

In addition to wetland-related approvals under Section 404 of the Clean Water Act (assuming Donghae and Boise Cascade do not avoid the wetlands on their property), Corps approval of the three proposed barge terminals is required under Section 10 of the Rivers and Harbors Act of 1899. The Corps chose to cooperate in the preparation of the EIS evaluating these requests because of its permit responsibilities. The U.S. Fish and Wildlife Service (Service) also decided to cooperate in the preparation of the EIS because of the potential impacts to fish and wildlife resources, including endangered and threatened species. The Service subsequently determined that because of increased timber harvesting, approval of any of the requests would likely jeopardize the continued existence of 16 or 17 listed species and would result in the destruction or adverse modification of designated critical habitat for three species (depending on the alternative).

Public Involvement and Review Process
Opportunities for public review of and involvement in TVA's consideration of the barge terminal and land use requests have been extensive. Prior to the decision to prepare an EIS evaluating all three proposals, TVA and the Corps had prepared and released for public comment an environmental assessment on the Donghae proposal. The agencies also held separate public meetings on the Donghae and Parker Towing proposals that were attended by a total of 430 people. (The Boise Cascade proposal had not yet been received.)

Initially very few people objected to the Donghae proposal. EPA voiced concerns about potential impacts to wetlands on Donghae's site, but these were resolved to EPA's satisfaction and were withdrawn. However, following the Parker Towing meeting, TVA received over 200 letters objecting to both the Parker Towing and Donghae proposal, largely because of potential impacts of timber harvesting to supply the chip mills. Letters were subsequently received from both EPA and the Service demanding that an EIS on all of the proposals be prepared and that this EIS evaluate timber harvesting impacts. The Service also asserted that the Endangered Species Act required consideration of timber harvesting impacts and that consultation was required under section 7 of that Act.

In light of the growing public interest, the comments received, and the desire to promote a better understanding of the potential impacts of the proposals and timber harvesting, TVA decided to prepare an EIS. A Notice of Intent to prepare the EIS and request for comments on the scope of the EIS was published in the Federal Register (56 FR 14410, April 9, 1991). Notice was also provided directly to almost 450 individuals. TVA, the Corps, and the Service held a public scoping meeting on May 4, 1991, in South Pittsburg, Tennessee. Seventy individuals attended this meeting, and the agencies received more than 100 letters providing comments on the scope of the EIS. Most of the comments focused on timber harvesting issues and the economic effects of the chip mills. However, a number of comments were also received on the potential truck traffic impacts of the proposals and on TVA's “authority” to prepare an EIS which considered timber harvesting issues.

A draft EIS was released for public comment on June 16, 1992, and notice of its availability was announced in the Federal Register by EPA on June 26, 1992 (57 FR 28664). The agencies provided an extended public review period (over 60 days) and held two day-long public hearings on the draft EIS in Chattanooga and South Pittsburg, Tennessee, respectively. The agencies received 1,200 written responses, and approximately 200 individuals made statements at the public hearings. All of the comments received were summarized and responded to in the final EIS. These comments were considered by TVA in its decision. Most of the comments addressed potential timber harvesting impacts. However, a large number of people commenting also objected to TVA's consideration of alternatives to the proposals which evaluated possible timber harvesting mitigation measures. These latter commenters asserted that TVA lacked the authority to consider or implement such mitigation measures. A limited number of comments raised concerns about localized impacts of the chip mills such as truck traffic and noise.

The final EIS was made available to the public on March 4, 1993, and notice of its availability was announced in the Federal Register by EPA on March 12, 1993 (58 FR 13597). As required by the Corps NEPA procedures, the public was provided
30 days to comment on the final EIS. These comments were considered by TVA before a decision was made but were not individually addressed.

Alternatives Considered
The following alternatives were evaluated in the EIS and were considered by TVA in reaching its decision:

(1) No action (denying all of the requests).

(2) Approving one or more of the requests with typical, “onsite” environmental protection conditions.

(3) Approving one or more of the requests with both onsite environmental conditions and conditions which would reduce the risk of adverse timber harvesting impacts. This latter alternative encompassed three variations.

(3a) Under Alternative 3a, the chip mill operators would be required to purchase timber exclusively from landowners which participated in existing federal and state forest management programs, and from logging operations which adhered to forestry best management practices (BMPs). TVA would commit additional resources to further enhance landowner participation in these programs with this alternative.

(3b) Under Alternative 3b, TVA would require the chip mill operators to use or to employ loggers who use specifically identified environmental protection measures when procuring timber for their mills. These include BMPs and the preparation of preharvest plans which identify potentially impacted sensitive resources such as endangered and threatened species, karst features, and wetlands and measures to protect such resources.

(3c) Under Alternative 3c, TVA proposed to approve only one of the requests for a limited 5-year term subject to certain minimum protection measures and such additional protection measures as each operator itself identified and agreed to meet. During this 5-year period, TVA and other interested federal and state agencies would intensively monitor the timber procurement area to better ascertain the significance of the impacts associated with harvesting and the success of employed protection measures.

Preferred Alternative
TVA's preferred alternative in the final EIS was Alternative 1, no action. TVA identified this as preferred after weighing the potential benefits of the requests with the likelihood of substantial, cumulative localized impacts and the risk of significant timber harvesting impacts. During the EIS process, TVA staff made a strong effort to reach a consensus on an approach that would protect the environment while allowing expanded harvesting. However, positions among interested groups (the chip mill operators, forestry associations, state forest management, wildlife and environmental interest groups) were extremely polarized and TVA was unsuccessful.

The environmental organizations strongly opposed alternatives which would have facilitated the construction of any of the chip mills. The forest industry groups, as well as the state forest management agencies, which are critical to implementing any conditioned or mitigated alternative, objected to establishing any mandatory harvesting protection measures. A group of local forest industries also opposed chip mill operations because they considered them a threat to their economic viability. The chip mill operators either opposed special limitations on their timber procurement activities or indicated a willingness only to encourage the use of voluntary protection measures.

Environmentally-Preferred Alternative
TVA has determined that there is no clear environmentally preferable alternative here. Alternative 1, denying all requests, may avoid near-term intensified timber harvests by spreading these out over time and, from this standpoint, is environmentally
preferable. However, denying all of the requests would not preclude chip mill operation and is not likely to prevent increased timber harvesting in the identified procurement area or the Tennessee Valley region over the longer term. TVA approval is not needed to construct and operate two of the chip mills (Boise Cascade and Donghae), and TVA has no regulatory control over or responsibility for timber harvesting activities. If chip mills are constructed and they choose to truck their chips either to rail terminals, previously approved public ports, or to market, environmental impacts could be worse than one of the mitigated alternatives.

TVA believes that conceptually Alternative 3 promises to be the most environmentally acceptable approach. This alternative would heighten the protection of sensitive resources and could serve as a model for timber harvesting activities throughout the Tennessee Valley region. However, to be successful, the state forestry agencies, the mill operators, the forestry associations, and the timberland owners would have to support this approach. They do not. Without such support, Alternative 3 is not feasible. (The Service identified a variation of Alternative 3 that would require extensive TVA oversight of timber harvesting on private lands. We have concluded that this variation is not feasible or prudent.)

**Basis for Decision**

TVA, as a regional resource agency of the United States, has been given broad responsibilities for navigation, flood control, reforestation, improvement of marginal lands, and agricultural and industrial development in the Tennessee Valley and adjoining territories. These responsibilities are all directed toward the development and conservation of the natural resources of the region in order to foster an orderly and proper physical, economic, and social development of the Tennessee Valley region.

TVA has sought to use its broad authorities and discretion in a manner which promotes the unified development of the Tennessee River and the natural resources of the Tennessee Valley region. In its 1936 report to Congress on “The Unified Development of the Tennessee River System,” TVA stated that to succeed in its mission, it must approach the Tennessee Valley region as a whole, that “(w)ater control on the Tennessee River in a system of unified development can best begin where the rain falls” (i.e., the lands and watersheds of the Tennessee Valley region). As a harbinger of comprehensive planning statutes such as the National Environmental Policy Act, TVA in its 1936 report rejected an approach which considered the single ends of specific projects or activities without regard to the attendant impacts of those activities and to the possibility of realizing additional benefits through a more comprehensive understanding of all of the ramifications of an action.

In the context of this tradition and TVA's mission, determining the best course of action here has been very difficult. The potential benefits and impacts of increased timber harvesting have been the dominant focus of the EIS review process. However, timber harvesting activities depend on decisions to be made by the 100,000 private timberland owners in the projected timber procurement area of the chip mills and are beyond TVA’s regulatory control. Timber harvesting is occurring and is expected to increase without TVA involvement. Consequently, projecting potential benefits and impacts is subject to substantial uncertainties and speculation.

Potential benefits are not as critically site-specific as potential impacts and can be projected with somewhat greater certainty. The more certain or direct economic benefits of the proposals are the chip mill and transportation jobs associated with the construction and operation of the chip mill barge terminals and chip mill facilities. Approximately 17 employees with annual earnings of $12,000 each would be hired to work at a single mill. The more important incidental benefits of mill operation are the harvesting-related jobs which could be created and the stumpage fees paid to timber owners. TVA estimates that an additional 182 harvesting jobs would be created with average annual incomes of $14,000 each. Total annual stumpage payments of about $750,000 would be paid to timber owners (stumpage payments would increase with more competition). Approximately 35 to 70 jobs would be associated with the barge transportation of chips produced at one mill. Based on an econometric model of the region, approximately 1.2 persons would eventually be hired for every new job created and there would be an additional $1.40 for every $1.00 of new income.

With three chip mills operating, a total of 636 mill and harvesting jobs could be created with total direct income of about $30 million. Application of the regional multipliers results in total jobs added of about 1,400 and income of approximately
$71 million. Barge-related jobs would range from 80 to 160. These are important benefits in a region with relatively high unemployment, but should still be viewed as somewhat uncertain because they depend on the hiring and procurement practices of the chip mill operators and on the willingness of timber owners to sell their trees.

Another important potential benefit is the positive effect that chip mill timber procurements could have on the commercial quality of the area's forests. It has been TVA's experience that providing timberland owners economic incentives to better manage their forests results in better forests. In the region, twice as much hardwood is being grown as is being currently harvested. However, high-grade timber is not increasing in volume, and the region's forests appear to be in a high-grading cycle in which the higher-grade trees are removed, leaving lower-grade hardwoods. Analysis show that if the current situation remains unchanged, high-grading practices will continue to diminish hardwood quality and threaten the long-term economic viability of many of the area's existing forest industries.

Improvements in the quality of the area's timber are projected because more harvesting would be done by clearcutting to supply the chip mills (sustainable yields would not, however, likely be exceeded assuming other users do not increase their removals). Clearcutting improves the likelihood that higher quality, commercially attractive hardwoods would regenerate naturally. The selective/high-grading harvesting which dominates now tends to promote the growth of shade-tolerant tree species at the expense of the more commercially attractive species such as oaks. The potential benefits of clearcutting are relatively clear albeit dependent on the decisions of others over whom TVA has no control. What is not clear, largely because of the substantial uncertainty here, are the potential environmental costs of clearcutting and more intensive harvesting.

Opinions on the likely impacts of more intensive harvesting vary widely. BMPs are designed to protect water quality by reducing sediment runoff from harvested lands. TVA's EIS concludes that when adequately used, BMPs do substantially lessen potential water quality impacts. Water flows and sediment releases would increase from clearcut areas initially, but these would be relatively minimal if adequate BMPs are used and within two to five years would be within preharvest levels. TVA's analysis also indicate that nutrient losses, air quality impacts, and global temperature changes would not likely be meaningful (much less significant) even with the projected harvesting rates of all three chip mills.

However, this assumes adequate use of BMPs. BMP use in the three states, portions of which comprise the projected procurement area, is voluntary. The U.S. Forest Service, the Tennessee Department of Agriculture, the Alabama Forestry Commission, the Georgia Forestry Commission, national and regional forestry associations, and many timberland owners commented that voluntary BMPs are working well because silvicultural activities are contributing little to stream pollution and the impairment of water quality standards (only an estimated 6.6 percent of the impaired stream miles in the procurement area are affected by forestry activities). Although good data on BMP compliance rates are not available for the procurement area, compliance rates of 70 to 90 percent have been estimated in the few states which have compiled such estimates.

EPA, on the other hand, commented that BMP compliance cannot be realistically ensured as long as use remains voluntary. The U.S. Department of the Interior stated that Alabama's BMPs are inadequate to achieve the environmental protection it thinks is necessary. The Alabama Department of Environmental Management expressed concerns about water quality degradation associated with timber harvesting because of low compliance rates and the resistance of timber interests to use of BMPs. The Tennessee Wildlife Resources Agency recommended that the requests not be approved until a mandatory forest harvesting
A regulatory program is established. Environmental organizations and many individuals also opposed approving the requests, in part, because of the voluntary nature of forestry BMPs.

The lack of mandatory BMPs adds to the substantial uncertainties here. TVA is confident that state forest management programs such as the Stewardship programs will increase BMP use. However, these programs are relatively new and will take some time to be implemented widely. In the interim, noncompliance with BMPs could result in significant water quality and related impacts at least in localized areas. TVA's technical analysis also suggest that even with adequate BMP use, there could be unusual site-specific situations, such as the presence of an endangered species, that could result in unacceptable impacts. TVA has also concluded that forestry BMPs do not protect (nor are they intended to protect) all possibly impacted resources. Aesthetics, biodiversity, ecologically sensitive areas, and archaeological sites are good examples. Also, hard mast production (acorns and other nuts), which is important to the health of many wildlife species, is likely to decrease as a result of increased timber harvesting although the significance of this is uncertain because of the lack of data on current mast use and production.

As stated, the Service has determined that increased harvesting is likely to jeopardize the continued existence of 16 or 17 threatened or endangered species and adversely impact the critical habitats of three of those species. The Service also concluded that significant impacts on listed species could still occur under Alternative 1 (would probably occur in some situations) but that these should not be attributable to TVA's denial of the requests because such impacts would result from the decisions of Boise Cascade or Donghae to build their chip mills anyway and to procure timber. Timber harvesting under the other two alternatives would also result from the possible decisions of third parties (the 100,000 timberland owners) over the TVA has no regulatory control and responsibility, and in TVA's opinion, should also not be attributable to any action it may take here.

Although TVA does not think that the Endangered Species Act precludes approving one or more of the requests, TVA has weighed heavily the Service's technical determination of likely impacts to listed species if harvesting occurs. TVA's own assessment of potential impacts to listed species concluded that some species could be significantly impacted depending on where and how timber harvesting may occur.

In addition to the potential risk of significant timber harvesting impacts, localized impacts in the vicinity of the chip mill facilities themselves are of concern to TVA. TVA estimates that the movement of logs into the three chip mills would add approximately 1,080 truck movements to the daily average traffic flows in and around South Pittsburg. On State Route 156, approximately 93 trucks per hour (or more than one per minute) would be added. Of these, 43 (or almost one per minute) would proceed down State Route 156 to Parker Towing's chip mill. Because of the steep hills and sharp turns on this route, such a movement would be very noticeable to residents and likely to be very irritating since loaded log trucks would have difficulty maintaining speed on the highway. Although TVA's analysis concluded that minimally acceptable service levels could still be maintained, EPA commented that it viewed such impacts as significant. Regardless of one's perception of the significance of truck movement impacts, such movements would be a noticeable contribution to traffic congestion in the area. (These truck traffic impacts could be worsened if Boise Cascade and/or Donghae decide to proceed and truck out their chips despite denial of their requests.) TVA believes that potential noise impacts associated with operation of the chip mills can be mitigated to acceptable levels, but some residents near the facilities could still find resulting noise unacceptable.

Approving only one of the requests could lessen localized impacts in most cases (truck traffic increases would likely still be objectionable to some residents), but each of the proposals poses unique concerns. The Boise Cascade proposal is opposed by the City of South Pittsburg and some residents of New Hope. The Parker Towing facility would be sited in an industrial park which was established for small manufacturing uses. Applicable development standards are intended to promote such uses and to make the park attractive to high-quality small industry. A chip mill would not be compatible with the development standards. Although the park has yet to successfully attract the desired kind of manufacturing entities and users, the promise of its doing so remains. The Donghae facility would impact the most wetlands and truck movements associated with its facility would impact the historic districts of South Pittsburg. Alternative 3c was intended to improve TVA's means of choosing among the applicants, but none of the applicants endorsed this.
An additional factor which TVA considered is the substantial public opposition to and controversy over the pending requests. Although some of this opposition is undoubtably due to a misunderstanding of the potential impacts of increased timber harvesting and clearcutting, it is apparent that many people are philosophically opposed to the harvesting of trees, especially clearcutting.

In summary, TVA believes that there are real benefits associated with improved markets for the low-grade hardwoods in the region. Compared to other industries, the forest industry and timberland owners have done a good job from an environmental perspective. TVA believes that timber harvesting can be conducted in a manner which adequately safeguards the environment and its sensitive resources. However, harvesting can also severely impact the environment if conducted improperly and as generally conducted now does not adequately safeguard all sensitive resources. Society appears less willing to accept the risk of serious environmental impacts. Finally, the potential cumulative localized impacts, especially truck traffic impacts, are a serious concern.

**Decision**

With fewer applicants or stronger, more certain environmental safeguards, TVA's decision could easily have been different. But, in light of the above, the more detailed assessments in the EIS, and the comments received on the proposals, we have decided not to make TVA's lands available to Boise Cascade and Donghae to access their proposed barge terminals. Nor will we approve the siting of the proposed Parker Towing chip mill in the Nickajack Port Industrial Park or agree to waive the development standards of the park to permit such a use. Absent the ability to access their proposed barge facilities and for the other reasons stated above, TVA also disapproves all three applicants' requests for approval under Section 26a of the TVA Act. With these decisions (no action), there are no practicable environmental mitigation measures to be taken.

TVA views the forest products industry—including transportation of forest products on the Tennessee River system—as an important component of the Valley's economy. We will continue our efforts to promote good forest management practices. TVA believes that the environmental concerns which have been identified in this review process can be resolved and it remains willing to work with the forest industry, the environmental community, and other interest groups toward a common-sense solution to these concerns.

Norman A. Zigrossi,

President, Resource Group.

(FR Doc. 93-11368 Filed 5-12-93; 8:45 am)

BILLING CODE 8120-01-M
Attachment G

Included Separately Due to Length

Ms. Mary Neumayr, Chairman  
Council on Environmental Quality  
730 Jackson Place, N.W.  
Washington, D.C. 20503  

August 25, 2019

ATTENTION: DOCKET NO. CEQ-2019-0002

Dear Ms. Neumayr:

This letter represents the collective views of forty-one organizations representing millions of people. Our members urge the Council on Environmental Quality (CEQ) to act responsibly and wisely in its interpretation of the National Environmental Policy Act (NEPA) so that future generations may live on this planet in “productive and enjoyable harmony” with the environment as envisioned by Congress when it passed NEPA.¹

I. INTRODUCTION

CEQ’s draft “NEPA Guidance on Consideration of Greenhouse Gas Emissions,” published in the Federal Register on June 26, 2019, fails to meet the challenges that our nation and the world face in regards to the climate crisis and associated environmental effects of Greenhouse Gas (GHG) emissions.² It does not acknowledge that climate change is relevant to virtually all federal decisions, whether or not those decisions cause greenhouse gas emissions, because of the hotter and drier conditions, rising sea levels, ocean acidification, declining mountain snowpack, disappearing Arctic sea ice, and an unraveling of ecological systems. It fails to inform agencies of the latest scientific analyses regarding climate change and relevant judicial decisions. It fails to offer practical guidance about methodology, scope of analysis, and upstream and downstream effects. It fails to identify the clear requirement to consider alternatives that would lessen climate change and GHG emissions impacts and to identify and analyze reasonable mitigation measures. It omits any discussion of agency consideration of resilience and adaptation measures that might be integrated into an agency’s proposal or considered through alternatives analysis. It fails to address particular issues associated with land and resource management actions, such as how to approach the analysis of biogenic sources of carbon. It omits any discussion of the need for special attention to the impacts of climate change and GHG emissions, including health impacts, on vulnerable populations. It fails to do more than allude to the possibility of programmatic analyses and tiering. It fails to address the issue of incomplete and unavailable information. It even fails to offer much information about the NEPA process itself. Devoid of substance, the draft guidance fails to even acknowledge or use the phrase “climate change” entirely.

¹ 42 U.S.C. § 4321.  
² We remind CEQ that in NEPA, Congress directed federal agencies to “recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, [to] . . . maximize international cooperation in . . . preventing a decline in the quality of the environment.” 42 U.S.C. § 4332(2)(2)(F).
Below we present our specific concerns and recommendations for improving the guidance in its final form. We urge CEQ to consider each of these issues carefully in light of, in NEPA’s words, your responsibility as “trustee of the environment for succeeding generations.”

II. THE DRAFT GUIDANCE FUNDAMENTALLY FAILS TO RECOGNIZE THE PURPOSE OF NEPA AND THE GRAVITY OF THE CLIMATE CRISIS

Contrary to the tone and content of the draft guidance, NEPA is not just a procedural statute and climate change is not just another environmental impact. The NEPA process has a specific purpose, which is to ensure not only that government agencies make informed decisions, but also that “federal agencies act according to the letter and spirit of the Act.” CEQ must remember that the purposes of the Act include promoting “efforts which will prevent or eliminate damage to the environment and biosphere” and that “protect, restore, and enhance the environment.” It is equally important to reflect on this country’s national environmental policies, set forth in NEPA. Those policies include fulfilling the responsibilities of each generation as trustee of the environment for succeeding generations. Without robust consideration of climate change and GHG emissions in federal decisions, the government abdicates its statutory responsibility to use all practicable means and measures to act as a trustee for future generations.

NEPA itself mandates that “the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act,” and NEPA’s implementing rules further provide that NEPA is intended “to foster excellent action” and to “take actions that protect, restore, and enhance the environment.” Sadly, the draft guidance, which characterizes NEPA as only a procedural statute and seeks to assure agencies that they need not give greater consideration to climate effects than any other potential types of effects, undermines the intent of the law. Federal courts’ focus on enforcement of NEPA’s procedural requirements does not prevent this administration from robust utilization of NEPA’s authorities to identify opportunities to mitigate current climate trends and environmental impacts from GHG emissions.

NEPA’s mandate and mission are especially critical in the context of the climate crisis. Hardly a new phenomenon, global warming as a possible result of GHG emissions was predicted in 1896 by Svante Arrhenius, a Swedish chemist. By the 1950’s, scientists began better understanding the implications of the release of GHGs and realized that ocean

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3 42 U.S.C. §4331(b)(1).
4 40 C.F.R. § 15001(a).
5 40 C.F.R. § 1500.1(c).
6 42 U.S.C. § 4331 (b)(1).
7 42 U.S.C § 4332(1).
8 40 C.F.R. § 1500.1(c).
absorption would not stabilize the level of rising gases\textsuperscript{10} and would additionally lead to highly problematic impacts on ocean ecology through consequent ocean acidification.\textsuperscript{11} CEQ’s first Annual Report, transmitted by President Nixon to Congress in August, 1970, contained a chapter discussing human-caused climate change. The recommendations contained in CEQ’s report encompassed not only additional research efforts, but also recommended that “[w]orldwide recognition should be given to the long-term significance of manmade atmospheric alterations.”\textsuperscript{12} Indeed, President Nixon’s prophetic message to Congress in 1970 stated that:

The basic causes of our environmental troubles are complex and deeply imbedded. They include: our past tendency to emphasize quantitative growth at the expense of qualitative growth; the failure of our economy to provide full accounting for the social costs of environmental pollution; the failure to take environmental factors into account as a normal and necessary part of our planning and decisionmaking; the inadequacy of our institutions for dealing with problems that cut across traditional political boundaries; our dependence on conveniences, without regard for their impact on the environment; and more fundamentally, our failure to perceive the environment as a totality and to understand and to recognize the fundamental interdependence of all its parts, including man himself.\textsuperscript{13}

Many decades and hundreds of scientific reports later, there is consensus regarding the causes and effects of global climate change and GHG emissions and the urgent need to act to avert dangerous disruptions. In the latest report from the United Nation’s Intergovernmental Panel on Climate Change (IPCC)\textsuperscript{14}, scientists from around the globe explained with “high confidence” that, among other things:

- Global warming is likely to reach 1.5°C between 2030 and 2052 if it continues at the current rate.\textsuperscript{15}
- Warming greater than the global annual average is being experienced in many land regions and seasons, including two to three times higher in the Arctic. Warming is generally higher over land than over the ocean.\textsuperscript{16}

\textsuperscript{13} Id. at vii.
\textsuperscript{14} Global Warming of 1.5°C, an IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, October 8, 2018, available at https://www.ipcc.ch/sr15/download/#full.
\textsuperscript{15} Id. at 4.
\textsuperscript{16} Id.
Impacts on natural and human systems from global warming have already been observed. Many land and ocean ecosystems and some of the services they provide have already changed due to global warming. Future climate-related risks may be long-lasting or irreversible, such as the loss of some ecosystems. High-latitude tundra and boreal forests are particularly at risk of climate change-induced degradation and loss, with woody shrubs already encroaching into the tundra.

Any increase in global warming is projected to affect human health, with primarily negative consequences. Lower risks are projected at 1.5°C than at 2°C for heat-related morbidity and mortality. Risks from some vector-borne diseases, such as malaria and dengue fever, are projected to increase with warmings from 1.5°C to 2°C, including potential shifts in their geographic range.

Pathways limiting global warming to 1.5°C with no or limited overshoot would require rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems.

Future climate-related risks would be reduced by the upscaling and acceleration of far-reaching, multilevel and cross-sectoral climate mitigation and by both incremental and transformational adaptation.

Ocean acidification and ocean chemistry changes associated with GHG emissions and global temperature changes are projected to intensify at 1.5°C to 2°C warming results and have already increased the frequency of “dead zones” where oxygen is not sufficient to support oxygenic life.

Climate change – and all of its implications for natural systems, our public lands, wildlife, livability of major urban areas and communities, human health, the economy and social systems – is the overarching environmental issue of this century. It is not just another environmental effect.

III. THE DRAFT GUIDANCE FAILS TO OFFER CLEAR GUIDANCE REGARDING THE AGENCIES’ OBLIGATION TO QUANTIFY GHG EMISSIONS AND TO ASSESS THEIR EFFECTS ON THE HUMAN ENVIRONMENT

a. Overview

As the draft guidance acknowledges, the guidance does not and cannot change the nature or scope of legal requirements associated with NEPA and climate change effects. What the guidance does not but should do is offer appropriate, useful guidance to the agencies on how to go about complying with those requirements. It fails to discuss either the significance of climate change and associated environmental impacts as identified by

17 Id. at 5.
18 Id. at 8.
19 Id. at 9.
20 Id. at 15.
21 Id. at 5.
22 Id. at 38.
evolving science or the growing body of NEPA caselaw on the issue. It offers almost none of the guidance and assistance that CEQ’s earlier guidance provided.

Indeed, the removal of the term climate change from the title sets the tone for the remainder of the guidance: a very cursory approach seemingly intended to allow agencies to shirk their responsibilities and affording largely unbridled deference to the agencies’ judgment. The draft text provides minimum direction and maximum flexibility to agencies. For example, the statements that agencies should “assess effects when a sufficiently close casual relationship exists between the proposed action and the effect,” that agencies should attempt quantification of projected direct and indirect GHG emissions when the potential amount of the projected emission is “substantial enough to warrant quantification,” and “when practicable to quantify them” should be starting, not ending, points of the discussion. Lacking that discussion, the guidance risks arbitrary and inconsistent approaches by agencies.

The guidance is notable for its absence of any discussion about the very issues that agencies are clearly struggling with today. For example, the guidance fails to address the extent to which upstream and downstream GHG emissions of pipelines intended to transport various types of fuel should be analyzed under NEPA. Despite reasonably clear guidance from federal court decisions, the draft guidance leaves it up to agencies to determine when a “sufficiently close causal relationship exists between the proposed action and the effect.” But how does the agency know if such a relationship exists? The draft should note, for example, the obligation of agencies under both CEQ’s own regulations and relevant case law to make reasonable efforts to obtain quantitative information that would facilitate meaningful analysis.

Similarly, the guidance is silent on the fact that NEPA directs agencies to “provid[e] a clear basis for choice among options by the decisionmaker and the public.” CEQ should explain that, in the context of comparing the climate impacts between action and no action alternatives, this regulation frequently requires analysis of relevant energy markets and how changes in supply can affect price and use of a commodity such as coal, oil, or gas. The guidance should also explain that agencies cannot avoid analysis of climate change impacts for a particular proposal by arguing that should the “no action” alternative be chosen, another development would be substituted to meet market demand and that

25 40 C.F.R. §1502.22(a); Birkhead v. FERC, No. 18-1218 (D.C. Cir. 2019) (in a situation where the agency has the authority to act on information about environmental impacts, it has the obligation to attempt to obtain information necessary for the analyses of those impacts). See also, Sierra Club v. FERC, 867 F. 3d 1357, 1374-5 (D.C. Cir. 2017) (FERC is not excused from quantifying GHG because of the impossibility of knowing precisely what the quantity will be from a particular project or because some of the emissions might be partially offset by reductions elsewhere.)
development would produce an equal or similar amount of GHG emissions, thus making the net effect of the proposed action’s contribution to climate change zero. The guidance should also remind agencies that they must utilize available tools and methodologies to analyze a common set of facts regarding both the beneficial and adverse impacts of the proposed action.

b. Quantification of Emissions

The draft guidance continues to sanction the use of GHG emissions as “a proxy for assessing potential climate effects.” However, agencies have the obligation to quantify GHG emissions, if feasible, from proposed actions and compare them to local, regional, and national emissions.

The draft guidance also states that, “Agencies are not required to quantify effects where information necessary for quantification is unavailable, not of high quality, or the complexity of identifying emissions would make quantification overly speculative.” While this statement is followed by a reference to CEQ’s regulation on “Incomplete or Unavailable Information,” it fails to accurately characterize that regulation’s content. The term “overly speculative” is not found in that regulation. While there are times when a qualitative analysis and an explanation of why a quantitative analysis is not warranted is appropriate and sufficient, the other relevant requirements in that same regulation need to be highlighted in the final guidance.

The courts have warned against agencies hiding behind the rubric of uncertainty to avoid any type of analysis of climate change. For example, in Mid States Coalition for Progress v. Surface Transportation Board, the Court of Appeals for the Eighth Circuit dealt with the proposed expansion of a railroad specifically intended to transport low-sulfur coal. The Court addressed the lead agency’s reluctance to characterize climate change impacts because of uncertainty as to its extent. The Court stated that:

... when the DM E [the applicant] argues in its brief that "if the increased availability of coal will ‘drive' the construction of additional power plants . . . the [Board] would need to know where those plants will be built, and how much coal these new unnamed power plants would use. Because DM E has

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27 WildEarth Guardians v. U.S. Bureau of Land Management, 870 F.3d 1222, 1236 (10th Cir. 2017); Montana Environmental Information Center v. OSMRE, 274 F.Supp.3d 1074, 1098 (D. Mont. 2017); Sierra Club v. FERC, 867 F.3d 1375.
30 WildEarth Guardians v. Zinke, Id. at 83.
32 40 C.F.R. § 1502.22.
33 345 F.3d 520 (8th Cir. 2003).
yet to finalize coal-hauling contracts with any utilities, the answers to these questions are pure speculation — hardly the reasonably foreseeable significant impacts that must be analyzed under NEPA.” Even if this statement is accurate (the Sierra Club has asserted that it is not), it shows only that the extent of the effect is speculative. The nature of the effect, however, is far from speculative. As discussed above, it is reasonably foreseeable — indeed, it is almost certainly true — that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal.

Contrary to DM E’s assertion, when the nature of the effect is reasonably foreseeable but its extent is not, we think that the agency may not simply ignore the effect. The CEQ has devised a specific procedure for "evaluating reasonably foreseeable significant adverse effects on the human environment" when "there is incomplete or unavailable information." 34 First, "the agency shall always make clear that such information is lacking." Id. Then, "[i]f the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known," the agency must include in the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.35

The final document published by CEQ should provide meaningful guidance on these requirements.

c. Analysis of Environmental Impacts, Including Related Economic, Health, and Social Effects

All agencies must do far more than simply quantify GHGs. Agencies must communicate the “actual environmental effects resulting from … emissions” of greenhouse gasses, not just quantify them.36 Today, with far better analysis of climate

34 40 C.F.R. 1502.22.
35 345 F.3d at 549-50 (emphasis in original).
36 Sierra Club v. FERC, 867 F.3d at 1374 (“As we have noted, greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate. [cite omitted] The EIS accordingly needed to include a discussion of the 'significance' of this indirect effect, see 40 C.F.R. § 1502.16(b), as well as ‘the incremental impact of the action when added to other past, present, and reasonably future actions, see WildEarth Guardians, 783 F.3d at 309 (quoting 40 C.F.R. § 1508.7);” Center for Biological
change and the associated environmental effects from increased GHG emissions at national and regional levels, the agencies, in many situations, should be able to move from the identification of and quantification of GHG emissions to the analysis of the effect of those emissions, such as quantified environmental and economic impacts of ocean acidification on fisheries and tourism.

The administration’s own U.S. Global Change Research Program produced its Fourth National Climate Assessment in November 2018 (NCAS4). The NCAS4 is an extremely useful, comprehensive report that analyzes environmental and related social and economic effects of climate change for 10 regions of the United States.\(^{37}\) The report is specifically written to help inform decisionmakers, among others, about the effects of climate change in ways that are relevant and informative to NEPA analyses. While it is necessary and appropriate for agencies to identify gaps in current knowledge and reflect on the strength of confidence about predictive analysis, to suggest at this point that a projection of GHG emissions is the default standard for an adequate analysis of climate change and associated environmental effects is grossly inadequate.\(^{38}\)

One simple example from NCAS4 underscores the gross inadequacy of this default standard: if fishpond managers on the island of Molokai in the state of Hawaii can take it upon themselves to integrate knowledge from climate scientists with their traditional knowledge to adjust management of the ponds,\(^{39}\) then large federal agencies, such as the Bureau of Land Management and U.S. Army Corps of Engineers, can certainly do better than routinely fixating on GHG emission calculations to the exclusion of a hard look at climate change and associated environmental impacts, and they need to do so.

We want to stress that ocean acidification resulting from GHG emissions has been demonstrated through quantified studies, models, and as well as currently observable

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\(^{37}\) Diversity v. NHTSA, 538 F.3d. 1172, 1216 (9th Cir. 2008), (“The EA does not discuss the actual environmental effects resulting from those emissions or place those emissions in context of other CAFE rulemakings” (emphasis in original)).

\(^{38}\) Fourth National Climate Assessment, U.S. Global Change Research Program (2018). The report includes analysis of water, energy supply, delivery and demand, land cover and land use change, forests, ecosystems, ecosystem services and biodiversity, coastal effects, oceans and marine resources, agriculture and rural communities, the built environment, urban systems and cities, transportation, air quality, human health, tribes and indigenous peoples, sectoral interactions and climate itself in the Northeast, Southeast, U.S. Caribbean, Midwest, Northern Great Plains, Southern Great Plains, Northwest, Southwest, Alaska and Hawaii and U.S. affiliated Pacific Islands.

\(^{39}\) Another important report that considers these issues is Federal Lands Greenhouse Gas Emissions and Sequestration in the United States: Estimates for 2005-14, U.S. Geological Survey Scientific Investigations Report 2018-5131 (2018). [https://doi.org/10.3133/sir20185131](https://doi.org/10.3133/sir20185131). This report shows that emissions from fossil fuels produced on Federal lands represent, on average, 23.7 percent of national emissions for CO\(_2\), 7.3 percent for CH\(_4\), and 1.5 percent for N\(_2\)O over the 10 years included in the study relative to emissions from extraction and combustion of federally produced oil, natural gas, and coal. Estimates of the amount carbon sequestered on federal lands are also provided.

\(^{39}\) NCAS4, Chapter 27, p. 22.
effects, to drastically impact fisheries around the world, including grave economic damage to Pacific, Atlantic, and Gulf of Mexico fisheries in the United States.\textsuperscript{40} Oyster farms on the west coast in Oregon have already experienced large die-offs from pH changes\textsuperscript{41} and scallop fisheries in the Atlantic have been projected to suffer losses from ocean acidification at various modeled levels of GHG emissions including one where emissions fall due to aggressive climate change policy.\textsuperscript{42} Ocean acidification is not addressed by the social cost of carbon protocol so its impacts must be addressed separately, should the final guidance include direction on use of that methodology.\textsuperscript{43}

The bald statement that, “[a] ‘but for’ causal relationship is not sufficient” is not helpful in providing agencies the guidance they need on when to assess climate effects. Obviously, every proposed federal action that comes under NEPA, including, for example, an agency’s own proposed regulations or land management plan – actions that inarguably require compliance with NEPA – would not be federal actions “but for” the federal agency’s involvement. As the Court of Appeals for the Ninth Circuit stated in a case dealing with a proposed housing development in the Sonoran Desert:

Although the Corps’ permitting authority is limited to those aspects of a development that directly affect jurisdictional waters, it has responsibility under NEPA to analyze all of the environmental consequences of a project. Put another way, while it is the development’s impact on jurisdictional waters that determines the scope of the Corps’ permitting authority, it is the impact of the permit on the environment at large that determines the Corps’ NEPA responsibility. The Corps’ responsibility under NEPA to consider the environmental consequences of a permit extends even to environmental effects with no jurisdictional waters at all.\textsuperscript{44}


\textsuperscript{41} Ocean Acidifications impact on oysters and other shellfish, available at https://www.pmel.noaa.gov/co2/story/Ocean+Acidification's+impact+on+oysters+and+other+shellfish (last visited Aug 6, 2019); Oceana, supra note 41.


\textsuperscript{44} Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1122 (9th Cir. 2004). See also, White Tanks Concerned Citizens, Inc. v. Strock, 564 1033 (9th Cir. 2009) (viability of proposed housing development dependent on Army Corps of Engineer permit). The Supreme Court’s decision in Department of Transportation v. Public Citizen, 541 U.S. 752 (2004) is not to the contrary; rather,
The guidance needs to be modified to not only provide for quantification of GHG emissions, but to also clearly require analysis of the consequences of climate change.

d. **The Social Cost of Carbon**

The guidance provides inaccurate and counterproductive direction advising agencies to omit analysis of societal impacts of a project’s GHG emissions in most circumstances. As noted above, after a federal agency discloses the amount of GHG emissions associated with a proposed project, the agency must then also assess the impact that those emissions have on the environment. The social cost of carbon protocol\(^45\) and social cost of methane protocols\(^46\) (referred to collectively here and in the guidance as “social costs” or “social cost of carbon”) are appropriate tools for federal agencies to use in project-level NEPA reviews. Developed by more than a dozen federal agencies and offices, the Interagency Working Group on the Social Cost of Greenhouse Gases’ (“IWG”) social cost of carbon protocol is an extremely conservative estimate – i.e., its models and assumptions substantially **underestimate** the actual costs of carbon pollution.\(^47\)

These protocols provide a conservative estimate of the economic damage, in dollars, caused by each incremental ton of carbon dioxide (or methane, respectively) emitted into the atmosphere, including impacts such as increased drought, wildfires, decreased agricultural productivity, and sea level rise, among others. By translating climate impacts, and tons of GHG emissions in particular, into dollars, the social cost of carbon offers federal agencies an easy to use and easy to understand tool that would allow the public and decisionmakers to better understand the climate impacts of agency decisions.

In cases addressing the climate impacts of coal mine expansions or natural gas pipelines, where the agency’s NEPA analysis quantified GHG emissions but claimed that

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it was impossible to discuss the effects thereof, federal courts have not only noted the availability of the social cost of carbon methodology but have either found that plaintiff’s argument that the agency should have utilized it were “more persuasive than the arguments of Defendants”\footnote{Montana Envt’l Info. Ctr. v. U.S. Office of Surface Mining, 274 F. Supp. 3d 1074, 1097 (D. Mont. 2017).} or that the agency was obligated to explain why it was not using it.\footnote{Sierra Club v. FERC, 867 F.3d 1357, 1374 (D.C. Cir. 2017); High Country Conservation Advocates v. United States Forest Serv., 52 F. Supp. 3d 1174, 1190-91 (D. Colo. 2014).}  

CEQ’s draft guidance offers only unavailing justifications for directing agencies not to use the social cost of carbon protocol to analyze the climate impacts of federal actions. First, CEQ notes that NEPA does not require agencies to prepare a cost-benefit analysis.\footnote{84 Fed. Reg. 30097, 30098 (June 26, 2019).} This statement is true but irrelevant. NEPA does not, of course, require agencies to monetize adverse impacts in all cases,\footnote{40 C.F.R. § 1502.23.} but agencies need not prepare a cost benefit analysis for the social cost of carbon to be useful to the public and decisionmakers. NEPA requires agencies to analyze the reasonably foreseeable effects of their decisions. These effects necessarily include an analysis of economic and social effects interrelated to environmental effects,\footnote{40 C.F.R. § 1508.8(b).} and the social cost of carbon provides one method for agencies to conduct this analysis. In the absence of another available method, and the guidance offers none, the social cost of carbon remains a useful way to analyze and understand the climate and environmental impacts of agency action. Thus, an agency’s duty to use the social cost of carbon is operative even in the absence of a traditional cost-benefit analysis. The social cost of carbon is, in these instances, a way to assess, on a monetized basis, the “actual environmental effects” of a proposed action and its alternatives,\footnote{Ct. for Biological Diversity v. NHTSA, 538 F.3d. at 1216.} and is certainly a more reasonable proxy for climate impacts then merely quantifying emissions. In this way, the social cost of carbon may be a necessary tool for an agency to fulfill NEPA’s mandates to take a hard look at impacts, use “[a]ccurate scientific analysis,”\footnote{40 C.F.R. § 1500.1(b).} and ensure the “scientific integrity” of NEPA documents.\footnote{I d. § 1502.24. See Or. Nat. Desert Ass’n v. Jewell, 840 F.3d 562, 570 (9th Cir. 2016) (“The defendants maintain that the BLM is owed special deference when undertaking scientific or technical analysis within its purview, which it is. See Lands Council, 537 F.3d at 993. But deference does not excuse the BLM from ensuring the accuracy and scientific integrity of its analysis, a NEPA requirement. See 40 C.F.R. §§ 1500.1(b), 1502.24.”} While NEPA may not mandate any particular methodology,\footnote{See, e.g., WildEarth Guardians v. Zinke, 368 F.Supp.3d 41, 79 (D.D.C. 2019).} it does mandate that agencies use state of the art science to make sound scientific decisions in the course of taking the requisite hard look at impacts.\footnote{Id. at n.31; 40 C.F.R. §§ 1500.1(b), 1502.22(b), 1502.24.}

Second, the guidance states that the social cost of carbon was developed for regulatory actions rather than site-specific NEPA reviews.\footnote{84 Fed. Reg. 30097, 30099 (June 26, 2019).} Although the draft guidance is correct that the social cost of carbon was originally developed for use in evaluating the

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\begin{itemize}
  \item \footnote{Montana Envt’l Info. Ctr. v. U.S. Office of Surface Mining, 274 F. Supp. 3d 1074, 1097 (D. Mont. 2017).}
  \item \footnote{Sierra Club v. FERC, 867 F.3d 1357, 1374 (D.C. Cir. 2017); High Country Conservation Advocates v. United States Forest Serv., 52 F. Supp. 3d 1174, 1190-91 (D. Colo. 2014).}
  \item \footnote{84 Fed. Reg. 30097, 30098 (June 26, 2019).}
  \item \footnote{40 C.F.R. § 1502.23.}
  \item \footnote{40 C.F.R. § 1508.8(b).}
  \item \footnote{Ct. for Biological Diversity v. NHTSA, 538 F.3d. at 1216.}
  \item \footnote{40 C.F.R. § 1500.1(b).}
  \item \footnote{I d. § 1502.24. See Or. Nat. Desert Ass’n v. Jewell, 840 F.3d 562, 570 (9th Cir. 2016) (“The defendants maintain that the BLM is owed special deference when undertaking scientific or technical analysis within its purview, which it is. See Lands Council, 537 F.3d at 993. But deference does not excuse the BLM from ensuring the accuracy and scientific integrity of its analysis, a NEPA requirement. See 40 C.F.R. §§ 1500.1(b), 1502.24.”}
  \item \footnote{See, e.g., WildEarth Guardians v. Zinke, 368 F.Supp.3d 41, 79 (D.D.C. 2019).}
  \item \footnote{Id. at n.31; 40 C.F.R. §§ 1500.1(b), 1502.22(b), 1502.24.}
  \item \footnote{84 Fed. Reg. 30097, 30099 (June 26, 2019).}
\end{itemize}
climate impacts of federal rulemakings, nothing about the tool itself precludes its use in evaluating project-level impacts. The tool measures the economic harm caused by each additional ton of carbon dioxide emitted into the atmosphere without regard to whether those emissions result from an agency rulemaking or an agency’s approval of an individual project. The social cost of carbon protocol operates the same in either scenario: it offers decisionmakers and the public a way to understand the climate impacts of a proposed course of action and alternatives. The tool does not distinguish between those carbon dioxide emissions that result from agency rulemakings and those that result from project-level or programmatic-level decisions.

The final guidance should direct agencies to utilize the social cost of carbon methodology so that the economic effects interrelated with the environmental effects of GHG emissions are fully considered in agency NEPA analyses.

e. **Cumulative Impacts**

The guidance falls well short of providing adequate guidance on the necessary analysis of cumulative impacts. It is not sufficient to dismiss the need for cumulative effects analysis “because the potential effects of GHG emissions are inherently a global cumulative effect.” As CEQ itself has pointed out, dismissing effects from individual actions that may in and of themselves seem small or trivial can lead to the “tyranny of small decisions.” And, as the Ninth Circuit has explained, “[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”

For example, in its NEPA analyses for oil and gas leasing on federal land in three western states, the Bureau of Land Management’s (BLM) documents acknowledged that the additional oil and gas wells it was considering would contribute incrementally to total regional and global GHG emission levels. BLM declined to go further, arguing that in order to analyze or disclose cumulative climate impacts the agency would have to identify every past, present, or reasonably foreseeable project on earth to produce a separate cumulative impact analysis. The reviewing court correctly stated that NEPA does not require that feat. But as the court noted, there is often an option between global analysis and nothing, and here, the court directed BLM to quantify emissions from individual leasing decisions when added to GHG emissions from other BLM projects in the region and nation. “To the extent other BLM actions in the region – such as other lease sales – are reasonably foreseeable when an EA is issued, BLM must discuss them as well.”

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60 WildEarth Guardians v. Zinke 368 F. Supp. at 76, 40 C.F.R. §§ 1508.7 and 1508.25(c).
63 Id. at 77. See also, “Measuring the climate impact of Trump’s careless leasing of public lands,” The Wilderness Society, July, 2019, available at https://www.wilderness.org/sites/default/files/media/file/TWS%20Report_Measuring%20the%20
The final guidance should make clear that it is not sufficient, either as a factual or legal matter, to discuss cumulative climate change exclusively in global terms. NEPA requires an agency’s analysis to include “[a]ccurate scientific analysis” and “high quality” information.64 Thus, while the cumulative effects of GHG emissions are certainly global, those impacts are also discrete, with local and regional impacts that likely will be of particular importance to decisionmakers and the public. For example, an analysis of a proposed action along the Atlantic coast will necessarily have to take into account sea level rise, a proposed action in the Intermountain West will necessarily have to deal with the synergistic effects resulting in declining snowpack, and a proposed development in the arid Southwest needs to consider synergistic impacts on streamflow and groundwater. Those regional impacts should be disclosed for projects in those respective regions, particularly where federal agencies acknowledge that the agency’s approval of a particular project will incrementally add to those impacts.

III. THE DRAFT GUIDANCE FAILS TO ADEQUATELY DISCUSS THE NEED FOR ANALYSIS OF CLIMATE CHANGE IMPACTS ON THE AFFECTED ENVIRONMENT

Section B of the draft guidance purports to address “current and the reasonably foreseeable future state of the environment as affected by the proposed action and its reasonable alternatives.” However, the guidance provides virtually no useful direction to agencies about how to assess the state of the future environment in the context of a changing climate and GHG emissions impacts. The guidance is silent on a vitally important topic: the identification and evaluation of interactions between a changing climate and the environmental impacts from a proposed action. This is a potentially important source of cumulative impacts65 and should be treated as such. For instance, a road’s impact to a coastal wetland will be cumulatively larger if that wetland is also being degraded by sea level rise. Similarly, a project involving water withdrawals will have a greater effect on aquatic species if high temperatures, drought, or reduced snowpack also lead to reductions in flow. Given that these and other effects of climate change are not only “reasonably foreseeable” but indeed already impacting the United States,66 it is firmly within the purview of a NEPA review to consider an action in the context of the future state of the environment. Failing to do so adequately during the NEPA process misses an opportunity for decisionmakers to improve environmental outcomes and contribute to safeguarding communities and their infrastructure against the effects of extreme weather events and

climate%20impact%20of%20Trump%20reckless%20leasing_July%20202019.pdf (last checked July 28, 2019).

64 40 C.F.R. § 1500.1(b).
other climate-related impacts. The guidance should acknowledge that it is necessary for agencies to disclose the ways in which climate change impacts may interact with the effects of the proposed action and alternatives, consider the action’s environmental effects over the lifetime of those effects, and evaluate means to alter the overall environmental implications of such actions.

Without adequate direction, agencies risk failing to adequately consider climate change and other GHG emissions impacts — like sea level rise, extreme heat, ocean acidification, severe droughts and intense storms — when they examine the environmental consequences that proposed projects will have on biological resources, imperiled wildlife, vulnerable communities and other aspects of the human environment. Without such analysis, agencies risk, in the words of one court, “failure to consider an important aspect of the problem.” The document should be improved by giving agencies actual guidance on how to appropriately analyze reasonably foreseeable climate effects and consider alternatives that would make the affected communities and resources more resilient to the effects of a changing climate and environmental impacts.

There is also a problem with the draft guidance document’s blanket statement that, “[i]n accordance with NEPA’s rule of reason and standards for obtaining information regarding reasonably foreseeable effects on the human environment, agencies need not undertake new research or analysis of potential changes to the affected environment.” Of course, it is reasonable to evaluate the need for independent research in the context of the probable severity of potential impacts. However, the obligations of the agencies to obtain information that is essential to a reasoned choice among alternatives and relevant to reasonably foreseeable significant adverse impacts cannot be categorically dismissed by invoking the rule of reason. It might be quite reasonable, for example, for an agency to undertake independent research for a programmatic EIS on energy development over the next fifty years in the United States.

IV. THE DRAFT GUIDANCE OMITS DISCUSSION OF THE NEED TO ANALYZE CLIMATE RESILIENCE AND ADAPTATION

Some level of climate change and its impacts are here to stay—regardless of the efficacy of efforts to slow and mitigate that change. Given that reality, NEPA analyses must, in addition to seeking opportunities that mitigate greenhouse gas emissions, address adaptation and resiliency strategies and opportunities. The guidance should advise agencies to incorporate the components of any relevant agency’s adaptation and resiliency plans, policies, goals, or strategies into purpose and need statements as well as the agency’s range

69 40 C.F.R. § 1502.22(a).
of alternatives and mitigation measures. Such measures might include, for example, adjusting management of forage or wildfire due to expected long-term drought in semi-arid ecosystems; planning for landscape connectivity to facilitate new and changing wildlife migration patterns and habitat needs; prohibiting vectors of impacts within an agency’s control that, combined with climate change impacts, contribute to adverse cumulative impacts; or removing, re-siting, or altering infrastructure that is prone to flooding or erosion. Consideration of mitigation opportunities for adaptation and resiliency is especially important in the land use planning context and for other broad, programmatic NEPA analyses of long duration.

V. THE DRAFT GUIDANCE OMITS DISCUSSION OF THE CRITICAL ROLE OF THE PUBLIC IN THE NEPA PROCESS

The sole reference to the public in the draft guidance is the statement that, “NEPA is a procedural statute that serves the twin purposes of ensuring that agencies consider the environmental consequences of their proposed actions and inform the public about their decision-making process.” Presumably, this sentence is intended to echo the Supreme Court’s statement in Baltimore Gas & Electric Co. v. NRDC that the second of NEPA’s “twin aims” is to ensure, “that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking.” But it is different for an agency to simply “inform the public about the [agency’s] decision process” as opposed to informing “the public that it has indeed considered environmental concerns in its decisionmaking process.” The distinction is especially glaring in the context of this draft which contains no other mention of the public at all, despite the prominence of public involvement requirements in CEQ’s own regulations and the regulation’s acknowledgement that, “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” Agencies should be reminded of the need to constructively engage the public at each step of the NEPA process.

VI. THE DRAFT GUIDANCE OMITS DISCUSSION OF THE NEED TO ANALYZE CLIMATE EFFECTS ON VULNERABLE POPULATIONS

Two days after CEQ released this draft guidance, the United Nations’ Special Rapporteur on Extreme Poverty and Human Rights issued an advanced edition of a report

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72 See, e.g., 40 C.F.R. §§ 1501.7(a), 15103.(4), 1506.6.
73 40 C.F.R. §1500.1(b) (emphasis added).
74 See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (noting an EIS “serves a larger informational role. It gives the public the assurance that the agency "has indeed considered environmental concerns in its decisionmaking process," and, perhaps more significantly, provides a springboard for public comment.”) (quoting Baltimore Gas & Electric Co.).
on “Climate Change and Poverty.”\footnote{Available at https://srpovertyorg.files.wordpress.com/2019/06/unr-poverty-climate-change-a_hrc_41_39.pdf (25 June 2019).} The report highlights what the draft guidance never addresses: the extreme disproportionate impacts that climate change is having and will increasingly have on those people least able to cope with it. Citing World Bank studies, the report states that, “Climate change threatens to undo the last fifty years of progress in development, global health, and poverty reduction. Middle-class families, including in developed countries, are also being rendered poor. The World Bank estimates that without immediate action, climate change could push 120 million more people into poverty by 2030 – likely an underestimate, and rising in subsequent years.”\footnote{Id. at 5.} The United States is not immune from these impacts; indeed, the report points out that since 1980, there have been 241 weather and climate disasters in the United States that have resulted in over one billion dollars in damage costs attributable to each event.\footnote{Id. at 12.}

Additionally, ocean acidification poses a disproportionate threat to vulnerable populations dependent upon fish, one of the cheapest and most abundant sources of protein for many coastal and small island developing nations.\footnote{NOAA Fisheries, Understanding Ocean Acidification (June 28, 2017), available at https://www.fisheries.noaa.gov/insight/understanding-ocean-acidification (last visited Aug 5, 2019); Oceana, supra note 41.} Residents of those countries have fewer socioeconomic resources to replace lost seafood due to changing ocean conditions from GHG emissions.\footnote{Id.} Marine tourism jobs may also suffer from likely detrimental effects to coral reefs and marine life.\footnote{Id.} Consequently, food insecurity and adverse tourism industry impacts could have a cascading effect on the global economy and harm developing nations too.\footnote{Id.} The United States would also be impacted by these changes directly, however. Millions of American jobs and billions of dollars in revenue are at risk from projected losses in fish capture and sales due to changing ocean conditions from GHG emissions and climate change.\footnote{Id.} Fisheries in the Gulf of Mexico, Pacific Coast, and the North and Southeast Atlantic are particularly threatened with an average projected 12% loss in American fishery catch potential by the middle of the century due to rising temperatures.\footnote{Id.} Current science has projected that Alaska’s fisheries will be harmed by ocean acidification with disproportionate effects on individuals with relatively lower incomes and employment alternatives, as well.\footnote{J. T. Mathis et al., Ocean acidification risk assessment for Alaska's fishery sector Progress in Oceanography (2014), available at https://www.sciencedirect.com/science/article/pii/S0079661114001141?via=ihub (last visited Aug 2, 2019).}
Federal agencies are already obliged to consider environmental justice impacts pursuant to NEPA in accord with Executive Order 12,898 and CEQ’s 1997 guidance, and must therefore address the confluence of climate change and environmental justice as well or risk arbitrary and capricious action. CEQ needs to direct agencies to take into account the impacts of climate change on particularly vulnerable populations in the United States in the course of decisionmaking. Special efforts must be made in regards to Native American populations, including the conduct of government to government consultations on how GHG emissions and climate change effects are impacting their lands and communities.

VII. THE DRAFT GUIDANCE’S SERIOUSLY INCOMPLETE DISCUSSION OF AGENCIES’ OBLIGATIONS TO ANALYZE ALTERNATIVES AND MITIGATION MEASURES UNDERMINES THE PURPOSE OF NEPA

Given the severity of current and projected climate change and environmental impacts, it is particularly egregious to see the meager discussion of both alternatives and mitigation in the draft guidance. As characterized in CEQ’s own regulations, alternatives are the “heart of the environmental impact statement.” The same can be said of alternatives in the context of many environmental assessments (EAs), given NEPA’s separate statutory mandate to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” More than any other aspect of the NEPA process, it is the analysis of alternatives and the comparison of the effects of those alternatives – including the no action alternative – that lead agency officials to making better decisions. Whether an alternative other than the original proposed action is brought

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86 CEQ, Environmental Justice, Guidance Under the National Environmental Policy Act 9 (1997), available at https://ceq.doe.gov/guidance/guidance.html (instructing agencies to “consider whether there may be disproportionately high and adverse human health or environmental effects” on Native Americans and to “recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action”).
87 See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs, 255 F. Supp. 3d 101, 140 (D.D.C. 2017) (holding agency’s “bare-bones” environmental justice analysis concluding that Tribe would not be disproportionately harmed violated NEPA’s hard look requirement); see also Sierra Club v. FERC, 867 F.3d 1357, 1369 (D.C. Cir. 2017) (upholding EIS that fully discussed disproportionate impacts on environmental-justice communities while recognizing plaintiffs “[p]erhaps … would have a strong claim if the agency had refused entirely to discuss the demographics of the populations that will feel the pipelines’ effects”).
to the table internally,\textsuperscript{90} by another agency,\textsuperscript{91} or by citizens,\textsuperscript{92} the requirement to analyze reasonable alternatives to meet the purpose and need of a proposed action is the key to ensuring that the NEPA process does more than document expected impacts, but rather meets the statute’s intent of informing decisionmaking.

Federal courts have made it clear that agencies must take this responsibility seriously, both across the board and in the context of climate change. Agencies that have persisted in presenting alternatives with narrow or no difference in projected GHG emissions have been ordered to revisit their identification and analysis of alternatives. For example, the Court of Appeals for the Ninth Circuit found that the National Highway Traffic Safety Administration failed to analyze an alternative raised by an outside commentator in its EA for CAFE standards that would have decreased emissions.\textsuperscript{93} More recently, the Bureau of Land Management’s EISs authorizing coal, oil and gas leasing in the Powder River Basin were found to be inadequate because all of the alternatives for coal had the same acreage available for leasing.\textsuperscript{94} “BLM’s failure to consider any alternative that would decrease the amount of extractable coal available for leasing rendered inadequate the Buffalo EIS and Miles City EIS in violation of NEPA.”\textsuperscript{95}

CEQ should make it clear that Federal agencies must account for GHG pollution and climate change in EAs, not just EISs, in particular relative to an agency’s consideration of alternatives and mitigation measures. As the Ninth Circuit has explained:

[C]onsideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action, 42 U.S.C. § 4332(2)(C)(iii) (1982), the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement. See id. § 4332(2)(E). The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have

\textsuperscript{90} See, e.g., Testimony of Energy Secretary Admiral James Watkins, “Looking back on it, thank God for NEPA because there were so many pressures to make a selection for a technology that it might have been forced upon us and that would have been wrong for the country.” Hearings on National Defense Authorization Act for Fiscal Year 1993 - H.R. 5006, and Oversight of Previously Authorized Programs before the House Committee on Armed Services, 102nd Cong. 912 (1992).

\textsuperscript{91} See, e.g., discussion of how NEPA process was responsible for development of mitigation measures that proved valuable in a major fire in the vicinity of the Department of Energy’s Los Alamos National Laboratory: https://www.energy.gov/nepa/articles/los-alamos-site-wide-eis-analyzed-wildfire-impacts-prompted-mitigation-actions

\textsuperscript{92} Colorado Environmental Coalition v. Salazar, 875 F. Supp. 2d 1233 (2012).

\textsuperscript{93} Center for Biological Diversity v. NHTSA, 538 F.3d. at 1217-1219.


\textsuperscript{95} Id. at 9.
significant environmental effects. An EIS is required where there has been an irretrievable commitment of resources; but unresolved conflicts as to the proper use of available resources may exist well before that point. Thus the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement. See City of New York v. United States Department of Transportation, 715 F.2d 732,742 (2d Cir. 1983), cert. denied, 465 U.S. 1055, 104 S.Ct 1403, 79 L.Ed.2d 730 (1984); Environmental Defense Fund, Inc. v. Corp of Engineers, 492 F.2d 1123, 1135 (5th Cir.1974); California v. Bergland, 483 F. Supp. 465, 488 (E.D. Cal.1980), aff'd sub nom. California v. Block, 690 F.2d 753 (9th Cir.1982). In short, any proposed federal action involving unresolved conflicts as to the proper use of resources triggers NEPA's consideration of alternatives requirement, whether or not an EIS is also required.96

Another critical factor in decisionmaking under NEPA is an agency's responsibility to identify and consider mitigation measures. The guidance devotes precisely two sentences to mitigation, one of which states that NEPA does not require agencies to adopt mitigation measures. The guidance inexplicably omits mention of agencies' important responsibility to identify and analyze reasonable mitigation measures. To quote the U.S. Supreme Court:

The requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from the language of the Act and, more expressly, from CEQ’s implementing regulations. Implicit in NEPA's demand that an agency prepare a detailed statement on “any adverse environmental effects which cannot be avoided should the proposal be implemented [cites omitted] is an understanding that the EIS will discuss the extent to which adverse effects can be avoided. [cite omitted] More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the “action-forcing” function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects. . . . . Recognizing the importance of such a discussion in guaranteeing that the agency has taken a ‘hard look’ at the environmental consequences of proposed federal action, CEQ regulations require that the agency discuss possible mitigation measures in defining the scope of the EIS, in discussing alternatives to the proposed action, and consequences of that action, and in explaining its ultimate decision [cites omitted].97

96 Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988). Similarly, the Tenth Circuit has stated that, “An agency's obligation to consider reasonable alternatives is “operative even if the agency finds no significant environmental impact.” Highway J Citizens Group v. Mineta, 349 F.3d 938, 960 (7th Cir.2003) (internal quotation marks omitted); see Davis v. Mineta, 302 F.3d [1104,] 1120 [(10th Cir. 2002)] (“A properly-drafted EA must include a discussion of appropriate alternatives.” (citing 40 C.F.R. § 1508.9(b)).
The final guidance must remind agencies of these obligations if it is to faithfully reflect NEPA’s purpose of preventing and eliminating damage to the environment.

VIII. THE DRAFT GUIDANCE SHOULD RECOGNIZE AND RETAIN DIRECTION REGARDING CEQ’S OVERSIGHT OF INDIVIDUAL AGENCY NEPA PROCEDURES

Both the 2016 final guidance and this draft guidance state that new NEPA implementing procedures are not required in association with climate change effects. However, the draft guidance omits the direction given in the 2016 guidance to agencies to review their NEPA procedures and propose updates necessary or appropriate to facilitate consideration of climate change along with CEQ’s responsibility to review such revisions. We urge CEQ to recommit to guiding and overseeing the necessary updates to agency NEPA procedures in light of the evolving science and law discussed in this comment.

IX. CONCLUSION

The draft guidance is wholly inadequate in light of the climate crisis. The guidance fails to give agencies and the public useful guidance based on current case law and science and is a major step backwards from CEQ’s 2016 guidance. To be clear, we are not suggesting that the final 2016 guidance on GHG emissions and the effects of climate change was perfect. It was, however, a good faith effort to provide reasonable direction and assistance to agencies. This draft guidance clearly signals a diminishment of the importance of climate change analysis. It should be withdrawn and rewritten.

Sincerely,

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Sara Cawley  
Washington, DC Representative
Western Organization of Resource Councils

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Conservation Analyst and Attorney
Wilderness Workshop
March 10, 2020

Re: Attachment I—NEPA Archive

Dear Chairman Neumayr:

The following compiled materials, included as Attachment I to the environmental coalition letter, are pertinent to the National Environmental Policy Act (NEPA) process as it has existed since the statute’s enactment in 1970. They show the Council on Environmental Quality’s (CEQ) understanding of the statute as expressed in two sets of guidelines that preceded the 1978 regulations, as well as numerous guidance documents published through the years. The Archive also contains all of CEQ’s official NEPA publications and annual reports, as well as a compendium of “success stories” showing how the NEPA process, when done correctly, improves federal decisions.

We are submitting Attachment I via a DVD because of the documents’ large file size (roughly one gigabyte). We have also provided a link to a Dropbox folder, accessible online, which contains the same documents.\(^1\) A list of the documents comprising Attachment I is included below. We request that these documents be included in the administrative record.

Sincerely,

Alex Hardee
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Denver, CO 80202
303-996-9612

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\(^1\) Available at
A. Statute

B. Regulations
   1. CEQ Regulations: Preamble (1978)
   2. CEQ Regulations (1978)

C. CEQ guidelines on NEPA implementation

D. CEQ 1986 amendment to 40 C.F.R. § 1502.22

E. CEQ guidance documents
   1. Section 1424(e) of the safe Drinking Water Act of 1974 and its Relationship to NEPA (1976)
   3. Environmental Effects Abroad of Major Federal Actions, EO 12114; Implementing and Explanatory Documents (1979)
   4. Agency Implementing Procedures Under CEQ’s NEPA Regulations (1979)
   5. Wild and Scenic Rivers and National Trails (1979)
   6. Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the Nationwide Inventory (1980)
  10. NEPA Liaisons and Participants in Scoping (1981)
  11. CEQ Guidance Regarding NEPA Regulations (1983)
  15. NEPA Analyses for Transboundary Impacts (1997)
  17. Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of NEPA (1999)
24. Establishing, Applying, and Revising Categorical Exclusions under NEPA (2010)
25. Appropriate Use of Mitigation and Monitoring and Mitigated FONSIs (2011)
26. Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act (2012)
28. NEPA and NHPA; A Handbook for Integrating NEPA and Section 106 (2013)
29. Effective Use of Programmatic NEPA Reviews (2014)
30. Emergencies and NEPA (2016)
32. Implementing One Federal Decision Under EO 13807 (2018)
33. Applicability of EO 13807 to States with NEPA Assignment Authority Under the Surface Transportation Project Delivery Program (2019)
34. Applicability of EO 13807 to Responsible Entities Assuming HUD Environmental Review Responsibilities (2019)

F. CEQ and related publications
6. NEPA and CEQA: Integrating Federal and State Environmental Reviews (2014)
8. CEQ Writeup of Major NEPA Cases (1997)
11. Memorandum for Heads of Federal Agencies: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of NEPA (July 1999)
15. Referrals of inter-agency disagreements to CEQ under the National Environmental Policy Act (2016)
16. NEPA Litigation Surveys (2001–13)
G. CEQ annual reports
   1. 1970
   2. 1971
   3. 1972
   4. 1973
   5. 1974
   6. 1975
   7. 1976
   8. 1977
   9. 1978
  10. 1979
  11. 1980
  12. 1981
  13. 1982
  14. 1983
  15. 1984
  16. 1985
  17. 1986
  18. 1987–88
  19. 1990
  20. 1991
  21. 1992
  22. 1993
  23. 1994–95
  24. 1996
  25. 1997

H. NEPA “success stories”
   1. Environmental Law Institute, NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government (Aug. 2010)
   2. NRDC, Never Eliminate Public Advice: NEPA Success Stories (Feb. 1, 2015)
   3. BLM, Roan Plateau Oil and Gas Leasing EIS (Aug. 2016)
   4. USDA, C&H Hog Farms EA/FONSI (Dec. 2015)
   5. Lee County Mining EIS Determinations (2010)
   9. 2019 U.S. Forest Service decision not to allow oil and gas leasing in Ruby Mountains
  10. 1993 TVA decision not to authorize barge terminals for chip mills
I. National Association of Environmental Professionals (NAEP) reports
  1. 2008 Report
  2. 2009 Report
  3. 2010 Report
  4. 2011 Report
  5. 2012 Report
  6. 2013 Report
  7. 2014 Report
  8. 2015 Report