



March 10, 2020

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

*Submitted via* <https://www.regulations.gov>

RE: Docket ID No. CEQ-2019-0003, Notice of Proposed Rulemaking, 40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

Dear Ms. Neumayr:

Thank you for the opportunity to provide comments on the Notice of Proposed Rulemaking, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (“NPRM”). This letter is submitted on behalf of the Moving Forward Network (“MFN”) and its members and allies, who rely on the National Environmental Policy Act (“NEPA”) to ensure thoughtful development of freight transportation projects. In addition to these comments, MFN joins the broad coalition letter signed by approximately 300 non-profit organizations.<sup>1</sup>

NEPA serves many critical functions, including establishing baseline protections for environmental justice (“EJ”) communities that are overburdened by multiple sources of pollution that have detrimental effects on community health. MFN is concerned that the Council for Environmental Quality’s (“CEQ”) proposed rule will severely curtail MFN member engagement in the NEPA process, and pave the way for more polluting projects to be sited in already overburdened neighborhoods. CEQ failed to consider the effect of its proposal on EJ communities, and how it will affect federal agency compliance with Executive Order 12898.

Accordingly, MFN urges CEQ to refrain from finalizing revisions that would roll back NEPA. Instead, we ask that CEQ focus on improving compliance with the current regulations, by working with federal agencies and environmental justice communities to ensure that the NEPA process is fully and effectively implemented.

## **I. MFN Mission and Membership**

MFN is a national network of environmental and climate justice organizations that seeks to improve the health and quality of life of communities impacted by the freight transportation system. MFN includes over 50 member groups from across the country, including groups from Southern California, Central California and the San Francisco Bay Area, Houston, Kansas City, Chicago, Mississippi, Alabama, South Carolina, Georgia, Florida, New York, Washington, and

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<sup>1</sup> A copy of the letter is included in Attachment 73.

New Jersey. These groups include community residents, more than half a dozen academic institutions, and community, environmental, legal, and media organizations that advocate in local, state, and federal policy arenas.<sup>2</sup>

MFN is focused on advancing EJ, including climate justice. MFN's members work with and/or represent EJ communities near ports, railyards, warehouses, heavily traveled truck corridors, and other freight facilities. These communities often experience more air pollution and associated health impacts from diesel-powered ships, trucks, and trains that move America's cargo. In addition to diesel exhaust and greenhouse gas emissions, the freight transportation sector can also create safety concerns when hazardous products are transported, water quality impacts, and noise, light, and vibration impacts, among other quality of life impacts.

Many communities near freight facilities are also exposed to pollution from *other* industrial and commercial operations that are sited in their communities, including oil and gas development, refineries, incinerators, and manufacturing. Many of these same communities are also on the frontlines of climate change, and are vulnerable to sea level rise, storm surges, increased air pollution, heat waves and elevated urban temperatures and other climate-related impacts. Many MFN members live in places where the combined impacts of industrial and transportation pollution sources and climate change take a toll on their health and quality of life.

## **II. MFN Relies on the NEPA Process to Address Environmental Justice and Climate Justice.**

### **A. NEPA Provides a Process to Examine, Disclose, and Mitigate Harm to EJ Communities.**

In 1994, President Clinton issued Executive Order (“EO”) 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and identified the NEPA process as one of the primary vehicles for achieving environmental justice.<sup>3</sup> EO 12898 directs federal agencies to make environmental justice part of their mission, and to identify and address the disproportionate environmental and health effects of their activities on “minority” and low-income populations.<sup>4</sup>

The Presidential memorandum that accompanied the EO recognized the critical role the NEPA process plays for identifying and addressing EJ concerns.<sup>5</sup> The memorandum directs federal agencies to utilize NEPA to: analyze environmental, health, economic, and social effects of

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<sup>2</sup> Attachment 2 includes a list of MFN members.

<sup>3</sup> Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994) [hereinafter “EO 12898”]; The White House, Memorandum for the Heads of All Departments and Agencies, Re: Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994), *available at* [https://www.epa.gov/sites/production/files/2015-02/documents/clinton\\_memo\\_12898.pdf](https://www.epa.gov/sites/production/files/2015-02/documents/clinton_memo_12898.pdf) [hereinafter “Presidential Memorandum re EO 12898”].

<sup>4</sup> E.O. 12898 at §§ 1-1, 1-101. Throughout this comment letter, we refer to communities of color and low-income communities who frequently face disproportionate exposure to environmental harms as “environmental justice” or “EJ” communities.

<sup>5</sup> Presidential Memorandum re EO 12898.

federal actions, including effects on “minority” and low-income communities; develop mitigation measures to address those effects; and provide opportunities for public input in decision making.<sup>6</sup>

Consistent with, and in furtherance of EO 12898, CEQ published guidance in 1997 to assist federal agencies with their NEPA procedures “so that environmental justice concerns are effectively identified and addressed.”<sup>7</sup>

## **B. MFN Members Utilize the NEPA Process.**

In 2016, EPA estimated that approximately 39 million people in the United States—mostly low-income people of color—live close to ports and are exposed to elevated levels of diesel emissions.<sup>8</sup> Communities living near inland freight-transportation facilities, such as truck corridors and rail yards, are also disproportionately exposed to diesel pollution.<sup>9</sup> Diesel exhaust contains smog precursors, fine particulate matter which can be inhaled and lodged in the lungs, and more than 40 known cancer-causing compounds. In 2012, the World Health Organization’s International Agency for Research on Cancer concluded that diesel engine exhaust is “carcinogenic to humans.”<sup>10</sup> Exposure to traffic-related pollution, including from diesel-powered vehicles, has also been linked to low birth rate, premature birth, lower IQ, diabetes, stroke, congestive heart failure, heart disease, obesity, asthma, and allergies.<sup>11</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> CEQ, Environmental Justice Guidance under the National Environmental Policy Act (Dec. 10, 1997), at 1, 8-9, available at [https://www.epa.gov/sites/production/files/2015-02/documents/ej\\_guidance\\_nepa\\_ceq1297.pdf](https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf) [hereinafter “CEQ EJ Guidance under NEPA”] (providing that federal agencies should consider environmental justice at “each and every step” of the NEPA process).

<sup>8</sup> EPA, National Ports Strategy Assessment, at 1, 4 (Sept. 2016) available at <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100PGK9.pdf>.

<sup>9</sup> See, e.g., Loma Linda University, Report, Project ENRRICH: A Public Health Assessment of Residential Proximity to a Goods Movement Railyard, available at [http://www.aqmd.gov/docs/default-source/clean-air-plans/clean-communities-plan/enrrich\\_final\\_report\\_29may2014.pdf](http://www.aqmd.gov/docs/default-source/clean-air-plans/clean-communities-plan/enrrich_final_report_29may2014.pdf).

<sup>10</sup> “Diesel Engine Exhaust Carcinogenic.” *International Agency for Research on Cancer*, World Health Organization, 12 June 2012, [www.iarc.fr/en/media-centre/pr/2012/pdfs/pr213\\_E.pdf](http://www.iarc.fr/en/media-centre/pr/2012/pdfs/pr213_E.pdf); see also Kristina W. Whitworth, Elaine Symanski, and Ann L. Coker, *Childhood Lymphohematopoietic Cancer Incidence and Hazardous Air Pollutants in Southeast Texas, 1995-2004*, *Envtl. Health Perspectives*, Vol. 116 No. 11 (Nov. 2008), 1576-1580 (describing cancer risk linked to air pollutants).

<sup>11</sup> Wilhelm, Michelle, et al. “Traffic-Related Air Toxics and Term Low Birth Weight in Los Angeles County, California.” *Environmental Health Perspectives*, vol. 120, no. 1, Aug. 2011, doi:10.3897/bdj.4.e7720.figure2f [exposure linked to low birth weight]; Christopher S. Malley, Johan C.I. Kuylenstierna, Harry W. Vallack, Daven K. Henze, Hannah Blencowe, Mike R. Ashmore. Preterm birth associated with maternal fine particulate matter exposure: A global, regional and national assessment. *Environment International*, 2017 [exposure linked to premature birth]; Perera, Frederica, et al. “Prenatal Airborne Polycyclic Aromatic Hydrocarbon Exposure and Child IQ at Age 5 Years.” *Pediatrics*, vol. 124, no. 2, Aug. 2009, pp. 195–203, doi:10.1542/peds.2008-3506; ZJ, Andersen, et al. “Diabetes incidence and long-term exposure to air pollution: a cohort study.” *Diabetes Care*, vol. 35, no. 1, Jan. 2012, pp. 92-98, doi: 10.2337/dc11-1155 [exposure linked to lower IQ]; ZJ, Andersen, et al. “Diabetes incidence and long-term exposure to air pollution: a cohort study.” *Diabetes Care*, vol. 35, no. 1, Jan. 2012, pp. 92-98, doi: 10.2337/dc11-1155 [exposure linked to diabetes]; T., To et al. “Chronic disease prevalence in women and air pollution--A 30-year longitudinal cohort study.” *Environmental International*, vol. 80, July 2015, pp. 26-32, doi: [10.1016/j.envint.2015.03.017](https://doi.org/10.1016/j.envint.2015.03.017) [exposure linked to diabetes, stroke, congestive heart failure, and heart disease in women]; Dong, Guang-Hui, et al. “Ambient Air Pollution and the Prevalence of Obesity in Chinese Children: The Seven Northeastern Cities Study.” *Obesity*, vol. 22, pp. 795-800, doi: doi:10.1002/oby.20198

Further, the transportation sector generates the largest share of greenhouse gas emissions in the United States. In 2017, that sector, which includes the movement of people and goods by cars, trucks, trains, ships, planes, and other vehicles generated nearly 30% of this country's greenhouse gas emissions.<sup>12</sup>

Many freight projects—like highway expansions, port terminal expansion projects, rail projects, channel deepening projects, logistics centers, and bridge raising projects—trigger the NEPA process. MFN members have engaged in numerous NEPA processes to promote better projects and more informed decision making. Below are some of the many examples<sup>13</sup>:

- 2007: Comments to the U.S. Army Corps of Engineers and Port of Los Angeles on the Final Environmental Impact Statement (EIS)/ Environmental Impact Report (EIR) for the Berths 136-147 (TraPac) Container Terminal Project
- 2007: Comments to the U.S. Army Corps of Engineers and Port of Long Beach on the Notice of Preparation (“NOP”), Initial Study (“IS”), and Notice of Intent (“NOI”) for the Pier S Marine Terminal and Back Channel Improvements Project
- 2008: Comments to the U.S. Army Corps of Engineers and Port of Los Angeles on the Draft Supplemental EIS/EIR for Port of Los Angeles Channel Deepening Project
- 2009: Comments to the Port of Long Beach on the Middle Harbor Redevelopment Project Final EIS/EIR and Application Summary Report
- 2009: Comments to the U.S. Army Corps of Engineers and the Port of Los Angeles on the NOI/NOP for the Draft EIS/EIR for Berths 302-306 (APL) Container Terminal Project
- 2009: Comments to the U.S. Army Corps of Engineers on the Draft Environmental Assessment (“EA”) for BNSF Railway Company’s Permit Application to Construct Intermodal Transportation Facility (Kansas).
- 2010: Comments to the Port of Long Beach on the Final EIR/EA for the Gerald Desmond Bridge Replacement Project
- 2013: Comments to the U.S. Army Corps of Engineers on the Draft EA for the Port of Houston Authority’s Application for a Permit to Dredge the Bayport Ship Channel
- 2013: Comments to the U.S. Army Corps of Engineers on Port of Houston Authority’s Application for a Permit to Dredge the Barbours Cut Ship Channel

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[exposure linked to obesity in children]; Finkelman, Fred. “Diesel exhaust particle exposure during pregnancy promotes development of asthma and atopy.” *The Journal of Allergy and Clinical Immunology*, vol. 134, issue 1, pp. 73-74, doi: 10.1016/j.jaci.2014.04.002 [exposure linked to development of asthma and atopy].

<sup>12</sup> “Sources of Greenhouse Gas Emissions, Overview.” *United States Environmental Protection Agency*, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last accessed: Feb. 11, 2020).

<sup>13</sup> Copies of the comment letters are included as Attachments 53-72.

- 2013: Comments to the U.S. Coast Guard on the Draft EA for the Bayonne Bridge Navigational Clearance Program (Port Authority of New York/New Jersey)
- 2014: Comments to the U.S. Army Corps of Engineers and Port of Los Angeles on the Draft EIS/EIR for Berths 212-224 (YTI) Container Terminal Improvements Project
- 2016: Comments to the U.S. Army Corps of Engineers on the Draft EIR for the Navy Base Intermodal Container Transfer Facility at the Former Charleston Naval Complex in North Charleston, South Carolina
- 2017: Comments to CalTrans District 7 on the Recirculated Draft EIR/Supplemental Draft EIS and Section 4(f) Evaluation for the I-710 Freeway Expansion Project
- 2017: Comments to the U.S. Army Corps of Engineers on the Port of Newark Container Terminal Permit Application to Dredge Berths at the Port of Newark
- 2017: Comments to the U.S. Army Corps of Engineers on the Port Authority of New York and New Jersey's Permit Application to Deepen Berths 94 and 96 at Elizabeth Port Authority Marine Terminal
- 2017: Comments to the U.S. Army Corps of Engineers and Port of Los Angeles on the Final EIS/EIR for the Berths 226-236 (Everport) Container Terminal Improvements Project
- 2018: Comments to the U.S. Army Corps of Engineers on the Mobile Harbor General Evaluation Review and Supplement Environmental Impact Statement for the Mobile Harbor Ship Channel Enlargement Project.
- 2019: Comments to the San Bernardino International Airport Authority on the Draft EA for the San Bernardino International Airport Authority Proposed Eastgate Air Cargo Facility
- 2019: Comments to the Alabama Department of Transportation on the proposed I-10 Toll Bridge, Tunnel, and Bayway Project

As projections for national growth in the freight industry continue to rise, new projects will continue to be proposed in and around communities where MFN members work, play, and live.<sup>14</sup> NEPA will continue to be a critical tool for EJ communities to weigh in on projects.<sup>15</sup> A strong NEPA process is essential to ensuring that future facilities do not exacerbate and cause new, unmitigated harms in EJ communities.

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<sup>14</sup> See, e.g., U.S. Department of Transportation, Bureau of Transportation Statistics, "DOT Releases 30-Year Freight Projections," <https://www.bts.gov/newsroom/dot-releases-30-year-freight-projections> (last updated: Dec. 12, 2017) (last accessed: Feb. 21, 2020), (estimating that freight tons moving on the nation's transportation network will grow 40 percent in the next 30 years).

<sup>15</sup> U.S. Environmental Protection Agency, "Ports Primer: 7.3 Federal Environmental Regulations, Initiatives and Standards," <https://www.epa.gov/community-port-collaboration-and-capacity-building/ports-primer-73-federal-environmental-regulations> (last accessed: Feb. 18, 2020).

### **III. The Proposed Rule Will Have a Disproportionate Adverse Effect on EJ Communities, and CEQ Failed to Consider these Harms.**

EO 12898 directs federal agencies to take EJ concerns into account. While CEQ acknowledged in its NPRM that it must analyze the effect of its proposal on EO 12898, CEQ concluded—*without any analysis*—that the proposed rule will not have a disproportionately high and adverse effect on “minorities” and low-income populations, and moreover, that an analysis of any such effects would more properly occur during implementation of NEPA.<sup>16</sup> Both conclusions are incorrect.

CEQ should have analyzed how the development of its rule and the rule’s implementation would affect the directive of EO 12898. By way of example, in determining whether a rule will adversely affect EJ communities, EPA recommends considering factors such as the rule’s reporting requirements, public engagement, transparency, and citizen enforcement.<sup>17</sup> As detailed below, CEQA’s rulemaking process and the proposed rule itself, if implemented, will have disproportionate impacts on EJ communities by reducing opportunities for such communities to engage in the NEPA process, and by curtailing consideration of cumulative pollution sources and climate-change related impacts, which disproportionately burden EJ communities.

CEQ was on notice that the proposed rule could harm EJ communities. Thousands of comments were submitted in response to the Advanced Notice of Proposed Rulemaking, including comments raising concern over the unique impact that the rule would have on EJ communities. For example, MFN submitted comments raising concern that the rule would negatively impact the health and environment of EJ communities by limiting opportunities to comment on projects and gain access to information about projects.

#### **A. CEQ Failed to Consider Whether its *Rulemaking Process* Would Have Disproportionate and Adverse Effects on EJ Communities.**

Executive Order 12898 directs federal agencies to ensure that EJ communities can meaningfully participate in public processes and federal agency decisionmaking.<sup>18</sup> As part of this directive, federal agencies are to make public information and hearings “readily accessible.”<sup>19</sup> CEQ failed to follow this directive in designing its rulemaking process, and in fact, shut EJ communities out of the process. CEQ failed to even mention EJ communities in its opening statement during the D.C. hearing.

Over 20 years ago, CEQ acknowledged that traditional notice and comment procedures may insufficiently engage EJ communities.

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<sup>16</sup> CEQ, Notice of proposed rulemaking, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684, 1711-12 (Jan. 10, 2020) [hereinafter “NPRM”].

<sup>17</sup> U.S. Environmental Protection Agency, Guidance on Considering Environmental Justice During Development of Regulatory Actions (May 2015), at 11-12, *available at* <https://www.epa.gov/sites/production/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf>.

<sup>18</sup> EO 12898 at § 5-5; Presidential Memorandum re: EO 12898.

<sup>19</sup> EO 12898 at § 5-5.



Participation of low-income populations, minority populations, or tribal populations may require adaptive or innovative approaches to overcome linguistic, institutional, cultural, economic, historical, or other potential barriers to effective participation in the decision-making processes of Federal agencies under customary NEPA procedures. These barriers may range from agency failure to provide translation of documents to the scheduling of meetings at times and in places that are not convenient to working families.<sup>20</sup>

Similarly, EPA has issued guidance on how to consider EJ during the development of regulatory actions and recommended that “rule-writers will need to go beyond the minimum requirements of standard notice and comment procedures and engage minority populations, low-income populations, tribes, and indigenous people early in the process. It is often unrealistic to expect meaningful involvement if the rule-writers have not targeted outreach efforts to these populations or tribes prior to proposing the action.”<sup>21</sup>

To facilitate meaningful engagement EPA recommends conducting outreach to EJ stakeholders when developing rules, tailoring outreach materials to be accessible to EJ communities, providing translated materials, conducting additional meetings in convenient times and locations for EJ communities, and developing additional strategies to meaningfully engage EJ communities in the rule development process.<sup>22</sup> CEQ did not undertake these activities.

In fact, CEQ’s rulemaking process—as it has played out thus far—demonstrates that the agency did not take EJ considerations in mind when it sought input on its proposed rules. Instead, it plowed forward with a fast, cheap, and exclusionary process. For example:

**CEQ’s process for submitting written comments was inaccessible for EJ communities.** The agency provided only 60-days to comment on a 50-page complex rulemaking that completely overhauls NEPA’s implementing regulations. For MFN’s members—most of whom are small non-profit organizations that rely on local resident participation and volunteers—a 60-day comment period is not enough time to meaningfully engage in the rulemaking process. Even seasoned NEPA practitioners would struggle to digest the breadth of CEQ’s proposed changes and draft comments within that time.

Most of MFN’s members do not have teams of full-time staff, or even enough staff to shift other priority work to make time to review and comment on the NPRM within the proposed 60-day comment period. Many MFN members rely on volunteers who must take time-off of work to engage in the NPRM process, and who can only review the proposed rule at night after their full-time jobs. Given these concerns, MFN requested a 180-day comment period on the NPRM but CEQ did not grant this request.

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<sup>20</sup> CEQ EJ Guidance under NEPA at 13.

<sup>21</sup> U.S. Environmental Protection Agency, Guidance on Considering Environmental Justice During Development of Regulatory Actions (May 2015), at 9, 10, *available at* <https://www.epa.gov/sites/production/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf>.

<sup>22</sup> *Id.* at 32-35.

**CEQ's hearings shut EJ communities out of the process.** Nothing about CEQ's hearings – the number, timing, location, or registration process – indicates CEQ took EJ considerations in mind. In fact, CEQ's approach can only be interpreted as an intentional effort to shut EJ communities out of the process. For instance,

- Despite having received over 12,500 comments on the Advanced Notice of Proposed Rulemaking,<sup>23</sup> CEQ noticed only two hearings.
- The two hearings were in Denver, CO and Washington, D.C.—requiring expensive travel for those who wanted to attend the hearings. No hearings were scheduled in EJ communities.
- The Denver hearing took place only one month after the 50-page NPRM was released, and the Washington, D.C. hearing occurred less than two-months after release of the NPRM, leaving very little time for MFN members to review and digest the NPRM before testifying.
- Both hearings were held during the work week and mostly during work hours. No hearings were noticed for a weekend.
- The public was notified 2.5 hours before registration for the hearings opened. Speaking slots for the Denver hearing were gone in under 5 minutes. Speaking slots for the Washington, D.C. hearing were gone in under 2 minutes. Moreover, there were only 105 speaking spots available at the Denver hearing and 105 spots at the Washington, D.C. hearing.
- CEQ's approach to public engagement benefitted those with resources who could sit by a computer and race to grab a speaking slot. It was virtually impossible for any working member of the public to obtain a speaking slot. Even for those MFN members who have access to computers during the day and who had advanced notice that registration was opening, the majority of MFN members who tried to obtain a speaking slot could not.
- Although additional speaking spots became available for the Denver hearing, notice of these additional sessions were provided only 7 days before the hearing, and those speaking slots were also taken within 2 minutes.
- The Washington D.C. hearing took place on the same day that the U.S. EPA convened a National Environmental Justice Advisory Council (NEJAC) meeting in Florida. This scheduling conflict limited EJ community participation in CEQ's D.C. hearing.

CEQ's rulemaking process was nothing short of an unfair competition that benefited paid NEPA practitioners and consultants, industry, and the wealthy. Those who could spend entire weeks reviewing the NPRM and drafting comments—or hire someone to do so, pay to travel to

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<sup>23</sup> NPRM at 1691.



hearings, and secure speaking slots on the turn of a dime, got to participate in the process. Low-income communities and communities of color who lack these resources were excluded from the process. CEQ made no effort to consider communities that have been historically underrepresented in decisionmaking and disregarded how its rulemaking process exacerbated that underrepresentation.<sup>24</sup>

**B. CEQ did not consider whether the proposed rule will have disproportionate and adverse effects on EJ communities when *implemented*.**

**1. Proposed changes to NEPA’s public participation requirements will limit EJ community participation.**

The proposed changes in CEQ’s NPRM thwart EO 12898’s mandate that agencies provide robust public participation opportunities for EJ communities.<sup>25</sup> President Clinton’s memorandum accompanying the EO specifically directs that agencies provide opportunities for community input in the NEPA process, and that agencies “identify[] potential effects and mitigation measures in consultation with affected communities, and improv[e] the accessibility of meetings, crucial documents, and notices.”<sup>26</sup> CEQ’s proposed rule would accomplish the reverse of this directive, notwithstanding the fact that the agency is well-aware that EJ communities face barriers to engaging in the NEPA process.<sup>27</sup>

Indeed, if one considers the “regulatory baseline,” the changes in the proposed rule decrease public participation and will have disproportionate and adverse effects on EJ communities. CEQ failed to consider this reality in its NPRM.

**CEQ’s focus on faster, cheaper, reviews would decrease public disclosure and undermine the ability of EJ communities to participate in NEPA processes.** For example:

- Imposing page limits on environmental review documents will lead to poorer analyses, less public disclosure, and reduced consideration of environmental justice impacts.<sup>28</sup> An arbitrary page limit would restrict the ability of agencies to conduct robust analyses of environmental justice impacts and would curtail meaningful consideration of community-preferred alternatives and mitigation measures. The page limit would also restrict the ability of the agency to develop a comprehensive narrative of the project, making it more difficult for the public to understand what is being proposed. The NPRM’s provision that a senior agency official could approve a longer page limit is insufficient to address these issues because: 1, other provisions of the NPRM that limit analysis of cumulative effects and public participation in NEPA means that agencies and the public are less likely to identify situations where a more in-depth EJ analysis would be appropriate, and 2, EJ

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<sup>24</sup> EO 12898 at § 2-2 (“Each Federal agency shall conduct its . . . activities that substantially affect human health or the environment, in a manner that ensures that such . . . activities do not have the effect of excluding persons (including populations) from participation in . . . such . . . activities because of their race, color, or national origin.”)

<sup>25</sup> EO 12898 at §§ 5-5 (b), (c).

<sup>26</sup> Presidential Memorandum re EO 12898.

<sup>27</sup> CEQ EJ Guidance under NEPA at 13.

<sup>28</sup> NPRM at §§ 1501.5, 1502.7, 1501.10.

communities are unlikely to have access to senior agency officials who make those determinations.

- Imposing time limits on environmental review processes would similarly diminish public disclosure and provide fewer opportunities for community input.<sup>29</sup> Strict time limits would incentivize agencies to rush their analyses, and disincentivize agencies from conducting tailored outreach to culturally diverse stakeholders and disproportionately harmed communities. Placing a time limit on the process will also arbitrarily curtail the ability of agencies to engage in meaningful dialog with communities, or to revise projects in response to community input. Providing senior agency officials with discretion to approve longer time limits on environmental reviews would be insufficient to protect EJ communities for the same reasons as stated above.

**The proposed rule elevates industry interests and excludes EJ communities from the public process.** More barriers to public engagement in the NEPA process will favor industry at the expense of communities. For example, the proposed rule would:

- Allow project applicants to prepare their own environmental documents and eliminate the requirement that contractors disclose financial stakes in a project.<sup>30</sup> Corporations that are also project proponents are less likely to disclose full environmental impacts or analyze a full range of alternatives, because their prerogative is to convince decision makers to approve their project without incurring additional costs. These changes would also contradict, without explanation, CEQ's previous recognition that the conflict of interest provision is essential, and would erode public trust in the NEPA process.<sup>31</sup>
- Increase exhaustion requirements and place new burdens on the public to specifically analyze environmental issues in comments.<sup>32</sup> The NPRM proposes to add a new exhaustion hurdle requiring that the public comment on the adequacy of alternatives, information, and analyses in a final Environmental Impact Statement or waive their arguments, even if they had previously commented on a draft EIS.<sup>33</sup> This would unfairly disadvantage environmental justice communities that have fewer resources to participate in each and every step of the public comment process.
- Make it so that some categories of projects no longer have to include any public participation process under NEPA by narrowing NEPA's applicability. The NPRM proposes to redefine "major federal action" and to redefine how agencies determine how actions are categorically excluded from NEPA review.<sup>34</sup> This would remove many projects from the NEPA process, widening the ability of industry to build projects with

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<sup>29</sup> NPRM at §§ 1501.10 (b)(1), 1501.10 (b)(2) (restricting time period to one year for completion of Environmental Assessments, and two years for completion of an Environmental Impact Statement, unless a senior agency official approves a longer time period in writing and establishes a new limit).

<sup>30</sup> NPRM at § 1506.5(c).

<sup>31</sup> CEQ Guidance regarding NEPA Regulations, 48 Fed. Reg. 34263, 34266 (Jul. 28, 1983), [https://www.energy.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/G-CEQ-GuidanceRegulations.pdf](https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-GuidanceRegulations.pdf).

<sup>32</sup> NPRM at §§ 1500.3 (b), 1503.3.

<sup>33</sup> *Id.* at §§ 1500.3(b), 1503.3 (b).

<sup>34</sup> *Id.* at §§ 1500.4(a), 1501.1, 1501.4, 1507.3(c), 1508.1(q).

no public participation component. These measures would disproportionately impact already-overburdened EJ communities, both because facilities are more likely to be sited in low-income communities and communities of color, and because the proposed rule would specifically eliminate consideration of cumulative impacts when determining whether a category of projects should be exempt from NEPA review.

Overall, limiting the length of environmental review documents, rushing the process, creating barriers to public involvement, and handing the reigns to industry, will result in less information disclosed, less-informed decision making, less consideration of public input, and approval of worse projects. Limiting the length of environmental review documents would also limit the ability to reach consensus on any given project. These proposals go against CEQ's own guidance.<sup>35</sup> The proposed rule threatens to accelerate the siting of more polluting projects in already overburdened environmental justice communities.

## **2. The Proposed Rule Narrows the Scope of NEPA Review and Will Result in Unstudied, Undisclosed, and Unmitigated Harms to EJ Communities.**

CEQ's proposed rule, if implemented, threatens to reduce the number of projects subject to NEPA review. It will also narrow the scope of environmental review when NEPA is triggered, and thereby limits public information about how proposed projects may harm human health and the environment. Again, if one considers NEPA's "regulatory baseline," CEQ's proposed changes will drastically reduce the amount of public information about a proposed project's consequences.

Of utmost concern is CEQ's proposal to eliminate the requirement that agencies study the cumulative effects of their actions.<sup>36</sup> Eliminating this analysis will have disproportionate and adverse effects on EJ communities. As detailed below, NEPA's cumulative effects analysis is critical to analyzing pollution burdens in EJ communities because EJ communities more frequently have multiple pollution sources within their boundaries. CEQ failed to consider these concerns in its NPRM.

As CEQ previously acknowledged, "evidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the

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<sup>35</sup> CEQ's 1997 Guidance specifically states that agencies should include a robust EJ impacts analysis, community-friendly and translated materials, and careful consideration of community preferred alternatives in NEPA documents. CEQ EJ Guidance under NEPA at 9, 13 (agencies should schedule meetings at times and places that are convenient for communities; coordinate with institutions and organizations in the affected community to educate the public; provide opportunities for public participation outside of written comments, such as personal interviews or use of audio or video recording devices to capture oral comments; circulate periodic newsletters or summary updates for the public; and create specialized materials reflecting concerns of particular populations); *see also id.* at 4, 11-13, 14-17.

<sup>36</sup>CEQ's NEPA implementing regulations currently defines cumulative impacts as follows: "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 CFR § 1508.7.

combination of individually minor effects of multiple actions over time.”<sup>37</sup> It is a statistical fact that low-income communities of color are disproportionately burdened by pollution in comparison to the wealthy or its white counterparts.<sup>38</sup> Following a history of segregation, redlining, and down-zoning (i.e., changing zoning from residential to industrial designation to allow industry to expand near where people live), low-income communities and communities of color tend to be faced with the greatest amounts of pollution, while also being more impacted by each ounce or pound of that pollution than better-off, white communities due to their heightened vulnerability.<sup>39</sup> Compounding these issues, environmental justice communities have also historically had fewer opportunities to access and participate in government decisionmaking processes.

Even Trump’s EPA found that people of color and the poor are much more likely to live near polluters and breathe polluted air. In 2018, EPA’s National Center for Environmental Assessment released a study indicating that Black people are exposed to about 1.5 times more particulate matter than White people, and that Hispanics had about 1.2 times the exposure of non-Hispanic whites. The study found that people in poverty had about 1.3 times more exposure than people above poverty.<sup>40</sup>

These pollution levels did not occur from a single action. They accumulated incrementally over time from many individual and independent sources of pollution. A cumulative effects analysis discloses how a single project may contribute to this accumulation—providing an opportunity to decide “enough is enough” and stop “the tyranny of small decisions.”<sup>41</sup> Preserving this opportunity is particularly important for EJ communities, which cannot absorb additional pollution due to existing pollution loads and socio-demographic factors that make them particularly vulnerable.

These are not theoretic concerns. EJ communities are experiencing “death by a thousand cuts.” MFN members represent communities from across the country that are shouldering multiple pollution burdens from the freight transportation industry – diesel ships trucks, trains, and equipment at ports, railyards, truck corridors and warehouses, *and* toxic pollution from other

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<sup>37</sup> Council on Environmental Quality, Cumulative Impacts Guidance under NEPA (1997), at 1, *available at* [https://ceq.doe.gov/publications/cumulative\\_effects.html](https://ceq.doe.gov/publications/cumulative_effects.html) [hereinafter “CEQ Cumulative Impacts Guidance under NEPA”].

<sup>38</sup> Vann R. Newkirk II, Trump’s EPA Concludes Environmental Racism is Real, *The Atlantic*, (Feb. 28, 2018), *available at* <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/>; Arlene Rosenbaum, Seth Hartley, Chris Holder, Analysis of Diesel Particulate Matter Health Risk Disparities in Selected US Harbor Areas, *Am. J. Public Health*, 101(S1) (2011), at S221-22.

<sup>39</sup> The New School, Tishman Environment and Design Center, Local Policies for Environmental Justice: A National Scan (Feb. 2019), at 8-12, *available at* <https://www.nrdc.org/sites/default/files/local-policies-environmental-justice-national-scan-tishman-201902.pdf>.

<sup>40</sup> Ihab Mikati, Adam Benson, Thomas Luben, Jason Sacks, Jennifer Richmond-Bryant, Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status, *Am. J. Public Health* 108, 480-85, (Apr. 2018), *available at* <https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304297>.

<sup>41</sup> CEQ Cumulative Impacts Guidance under NEPA at 1, 3 (“Without incorporating cumulative effects into environmental planning and management, it will be impossible to move towards sustainable development, i.e., development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”)

industrial sources such as refineries, oil and gas development, chemical plants, and hazardous storage facilities to name a few. To give just a few examples:

- **Ports of Los Angeles and Long Beach:** The Ports of Los Angeles and Long Beach (also known as the “San Pedro Bay Ports”) are the entry point of 40% of all imports that enter the U.S. by sea. The Ports’ operations concentrate an enormous amount of diesel pollution in neighboring communities due to the diesel-powered ships, cargo handling equipment, locomotives, and trucks used to transport cargo. According to U.S. EPA’s EJ Screen data, all of the neighborhoods directly adjacent to the Ports rank in the 95-100<sup>th</sup> percentile for exposure to diesel particulate matter compared to other communities in the United States.<sup>42</sup> Many sensitive sites are located in the area, including schools and public and subsidized housing projects. In addition to the diesel-emitting sources generated by the Ports, in zip codes within 4 miles of the Port area, there are 3,200 toxic release, water discharge, air pollution, and brownfield sites that report to EPA.<sup>43</sup> EJ Screen data shows that these communities are exposed to elevated cancer risk and respiratory health risk as compared to other communities in the United States.<sup>44</sup> These communities are disproportionately communities of color and low-income communities.<sup>45</sup>
- **Port of New York and New Jersey:** The Port of New York & New Jersey (“Port of NY NJ”) is the largest Port on the East Coast, and the third largest Port in the country. Communities surrounding the Port complex are disproportionately exposed to diesel emissions from Port-serving trucks, ships, trains, and cargo handling equipment. A high density of residents live in close proximity to roads with heavy truck traffic. Their neighborhoods rank in the 95-100<sup>th</sup> percentile for exposure to diesel PM compared to other communities in the United States according to EJ Screen.<sup>46</sup> These communities are also burdened with a high concentration of other facilities that release toxic chemicals in addition to air and water pollution. Over 3,200 Superfund sites, toxic release facilities, brownfield sites, hazardous waste sites, and air and water polluters are located in zip codes within a 6 mile radius of the Port.<sup>47</sup> EJ Screen data shows that these communities are disproportionately communities of color and low-income communities.<sup>48</sup>
- **Houston Ship Channel:** The Houston Ship Channel is home to the Port of Houston, which is one of the country’s largest export hubs. In addition to the impacts of diesel pollution from freight transportation, residents are impacted by a high concentration of oil and gas facilities and chemical plants that line the 52-mile Houston Ship Channel. The impacts of these sources are growing due to increased demand for energy production, export of crude oil, and increasing global demand for chemicals produced in the region. EJ Screen data shows that residents in the Houston Ship Channel area rank in the 95-100<sup>th</sup>

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<sup>42</sup> Attachment 3. The maps and demographic data included in attachments 3-5 were generated from EPA’s EJ Screen website, <https://ejscreen.epa.gov/mapper/>. The names and addresses of facilities were downloaded from EPA’s ECHO website, <https://echo.epa.gov/facilities/facility-search>.

<sup>43</sup> Attachment 3.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Attachment 4.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



percentile for cancer risk compared to other communities in the United States.<sup>49</sup> The Harrisburg/Manchester neighborhood is a 5.8 square mile neighborhood located at the mouth of the Houston Ship Channel. In zip codes within a 2 mile radius of the neighborhood, there are more than 420 polluting facilities.<sup>50</sup> EJ Screen data shows that these pollution burdens are disproportionately shouldered by people of color, low-income people, and limited-English speaking households.<sup>51</sup>

NEPA's cumulative effects analysis is one of the few tools available that aims to disclose how a proposed project may add to past, existing, and upcoming pollution burdens, like those enumerated above. Cumulative impacts analysis is also one of the few tools that allows agencies to consider social and economic vulnerabilities in NEPA reviews.<sup>52</sup> Many EJ communities are more vulnerable to the impacts of pollution compared to the general population because of socio-demographic stressors, including racial segregation, high rates of poverty, lack of access to affordable foods, and lack of access to healthcare.<sup>53</sup> Eliminating cumulative impacts analysis will allow project proponents—and our federal government—to hide a project's real-world effects since communities do not experience a project's pollution in isolation.

Accordingly, that is why CEQ previously underscored the need for agencies to identify cumulative effects to advance EJ, “even if certain effects are not within the control or subject to the discretion of the agency proposing the action.”<sup>54</sup> Indeed, CEQ considered cumulative impacts so important that it published an extensive report on how to assess cumulative impacts under NEPA in 1997.<sup>55</sup> Now, CEQ's proposal to limit information on a project's full range of environmental consequences will undermine the design and selection of smarter alternatives and meaningful mitigation.<sup>56</sup>

Finally, it is long-settled that agencies are required to consider not only the impacts a federal decision may have on the climate crisis, but also the impacts of climate change on federal projects. The primary way federal agencies have considered climate impacts is through

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<sup>49</sup> Attachment 5.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> CEQ Cumulative Impacts Guidance under NEPA at 2, 13, 15, 24-29; CEQ EJ Guidance under NEPA at 4, 8-9, 26; U.S. Environmental Protection Agency, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis (Apr. 1998), at §§ 3.1, 5.2, 5.3, *available at* [https://www.epa.gov/sites/production/files/2014-08/documents/ej\\_guidance\\_nepa\\_epa0498.pdf](https://www.epa.gov/sites/production/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf); Presidential Memorandum re EO 12898 (agencies must ensure that NEPA reviews appropriately analyze environmental effects on minority and low-income populations, including human health, social, and economic effects).

<sup>53</sup> Environmental Justice Health Alliance for Chemical Policy Reform, Coming Clean, and Campaign for Healthier Solutions, *Life at the Fenceline: Understanding Cumulative Health Hazards in Environmental Justice Communities* (Sept. 2018), *available at* <https://new.comingcleaninc.org/assets/media/documents/Life%20at%20the%20Fenceline%20-%20English%20-%20Public.pdf>; Rachel Morello-Frosch et al., “Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy,” *Health Affairs* 30, no. 5 (2011): 879-998.

<sup>54</sup> CEQ EJ Guidance under NEPA at 9.

<sup>55</sup> CEQ Cumulative Impacts Guidance under NEPA.

<sup>56</sup> *Id.* at v (“Generally it is also critical to incorporate cumulative effects analysis into the development of alternatives for an EA or EIS. Only by reevaluating and modifying alternatives in light of the projected cumulative effects can adverse consequences be effectively avoided or minimized. Considering cumulative effects is also essential to developing appropriate mitigation and monitoring its effectiveness.”).



consideration of indirect and cumulative impacts, which this proposal explicitly eliminates. By eliminating indirect and cumulative impact analysis, this proposal allows the government to approve environmentally destructive proposals, such as oil pipelines, with no consideration of their impact on climate change or the communities on the frontlines of climate change impacts.

CEQ failed to take these considerations into account in its NPRM.

#### **IV. The Proposed Rollback Will Undermine Federal Agency Compliance with EO 12898.**

CEQ is charged with overseeing federal agency compliance with EO 12898 and NEPA.<sup>57</sup> For decades, federal agencies have utilized the NEPA process as the primary venue to address EJ issues in compliance with EO 12898. The stripped down NEPA process envisioned by the NPRM would disable agencies from incorporating robust EJ considerations in their NEPA analyses. Put simply, agencies would no longer be able to rely on the NEPA process as their method of complying with the EO.

Over the last 25 years, CEQ and over a dozen federal agencies have developed policies, strategies, and workplans that rely on advancing EJ through NEPA as a primary way of complying with EO 12898. For example:

- In 1994, President Clinton identified the NEPA process as one of the primary vehicles for achieving the EO 12898's directive. His Presidential memorandum specifically recognized the importance of NEPA's procedures for identifying and addressing EJ, and for providing opportunities for community input in decision making.<sup>58</sup>
- In 1997, CEQ published guidance that identified the NEPA process as the primary method for federal agencies to comply with EO 12898. The guidance set forth ways for agencies to advance EJ through NEPA by providing meaningful mechanisms for public participation, and by conducting robust analysis of cumulative impacts.<sup>59</sup>
- In 1997, the Interagency Working Group established by EO 12898 issued Guidance for Federal Agencies on Key Terms in Executive Order 12898. The guidance specifically provided that when determining whether health and environmental effects are disproportionately high and adverse in effectuating the EO, agencies are to consider whether communities are "affected by cumulative or multiple adverse exposures from environmental hazards."<sup>60</sup>
- In 2011, the heads of 17 federal agencies and White House offices took a landmark step recommitting to advancing EJ by signing a Memorandum of Understanding (MOU) on Environmental Justice and Executive Order 12898. The MOU identifies NEPA as a focus area for identifying and addressing disproportionately high and adverse human health or

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<sup>57</sup> CEQ EJ Guidance under NEPA at 1.

<sup>58</sup> Presidential Memorandum re: EO 12898.

<sup>59</sup> CEQ EJ Guidance under NEPA at 8-16.

<sup>60</sup> *Id.*, Appendix A, 26-27; *see also id.* at 30 (defining multiple and cumulative environmental exposures).

environmental effects of its programs, policies and activities on minority populations and low-income populations.<sup>61</sup>

- At least fourteen federal agencies rely on the NEPA process to fulfill the EO's requirement to analyze and address EJ issues. Several of the agencies specifically rely on NEPA to effectuate the EO's directive to engage EJ communities in effective public participation processes, and to analyze and address disproportionate impacts via NEPA's cumulative effects analysis.<sup>62</sup>

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<sup>61</sup> Memorandum of Understanding on Environmental Justice and Executive Order 12898 (2011), at § III. D., available at <https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf>.

<sup>62</sup> Environmental Protection Agency, EJ 2020 Action Agenda: The U.S. EPA's Environmental Justice Strategic Plan for 2016-2020, at iii, iv, 7-8, 32-34, 37 available at [https://www.epa.gov/sites/production/files/2017-10/documents/ej\\_2020\\_action\\_agenda.pdf](https://www.epa.gov/sites/production/files/2017-10/documents/ej_2020_action_agenda.pdf) (goal to strengthen ability to take action on environmental justice and cumulative impacts will be implemented, in part, through environmental analyses in NEPA reviews); U.S. Department of Agriculture Environmental Justice Strategic Plan: 2016-2020, at 16, 20, available at <https://www.dm.usda.gov/emd/responserestoration/EnvironmentalJustice.htm> (relying on NEPA process: to identify, avoid, minimize, and mitigate potential environmental justice concerns; to support goal of expanded public participation in decision-making processes to benefit environmental justice communities; and to ensure that potential actions adequately identify and avoid or mitigate disparate impacts on environmental justice communities, including increased vulnerabilities to climate change); U.S. Department of Commerce, Department of Commerce Environmental Justice Strategy, at 5, 10, 16, available at <http://www.osec.doc.gov/opog/OG/Archive/news/2013/02/21/departement-commerce-environmental-justice-strategy.html> (relying on NEPA process to conduct analysis of environmental justice issues); U.S. Department of Defense, Strategy on Environmental Justice (March 24, 1995), at Appendix I, page 2, 4, 5, 11, 14-19 available at <https://www.denix.osd.mil/references/dod/> (describing NEPA as the "primary mechanism" to implement EO 12898, including to promote public participation and analyze cumulative exposures and risks); U.S. Department of Energy, Environmental Justice Strategy (2017), at 7-9, 15, available at [https://www.energy.gov/sites/prod/files/2017/01/f34/201708\\_EJStrategy.pdf](https://www.energy.gov/sites/prod/files/2017/01/f34/201708_EJStrategy.pdf) (goal to integrate environmental justice into the NEPA process); U.S. Department of Energy, Environmental Justice Second Five-Year Implementation Plan (May 2019), at 8, 11, available at [https://www.energy.gov/sites/prod/files/2019/05/f62/2019FiveYearImplementationPlan\\_ONLINE.pdf](https://www.energy.gov/sites/prod/files/2019/05/f62/2019FiveYearImplementationPlan_ONLINE.pdf); U.S. Department of Health and Human Services, Environmental Justice Strategy and Implementation Plan (2012), at 24-25, 29, available at <https://www.hhs.gov/sites/default/files/environmentaljustice/strategy.pdf> (NEPA process provides opportunities for public participation and addressing significant disproportionate impacts on EJ communities); U.S. Department of Homeland Security, Environmental Justice Strategy (2012), at 4-5, 9, available at <https://www.dhs.gov/xlibrary/assets/mgmt/dhs-environmental-justice-strategy.pdf> (environmental justice considerations are accomplished through NEPA process); U.S. Department of Housing and Urban Development, 2012-2015 Environmental Justice Strategy (2012), at 15-16, available at <https://www.hudexchange.info/programs/environmental-review/environmental-justice/> (environmental justice is considered through environmental review process); U.S. Department of the Interior, Environmental Justice Strategic Plan, at 11-18, available at [https://www.doi.gov/sites/doi.gov/files/uploads/doi\\_ej\\_strategic\\_plan\\_final\\_nov2016.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/doi_ej_strategic_plan_final_nov2016.pdf) (environmental justice effectuated via NEPA process both in identification and mitigation of impacts, and in public participation); U.S. Department of Justice, Environmental Justice Strategy (2014), at 10, available at [https://www.justice.gov/sites/default/files/ej/pages/attachments/2014/12/19/doj\\_ej\\_strategy.pdf](https://www.justice.gov/sites/default/files/ej/pages/attachments/2014/12/19/doj_ej_strategy.pdf); U.S. Department of Justice, Guidance Concerning Environmental Justice (2014), at 2, 5-9, available at [https://www.justice.gov/sites/default/files/ej/pages/attachments/2014/12/19/doj\\_guidance\\_concerning\\_ej.pdf](https://www.justice.gov/sites/default/files/ej/pages/attachments/2014/12/19/doj_guidance_concerning_ej.pdf); U.S. Department of Labor, FY 2016 Environmental Justice Annual Implementation Progress Report, at 10, available at <https://www.dol.gov/sites/dolgov/files/OASP/ej/2016-report.pdf> (environmental justice is evaluated as part of the NEPA process); U.S. Department of Transportation, Environmental Justice Strategy (2016), available at <https://www.transportation.gov/transportation-policy/environmental-justice/environmental-justice-strategy> (to comply with EO 12898, NEPA should be administered "so as to identify the risk of disproportionately high and adverse effects early in the development of the program, policy, or activity so that positive corrective action can be

- In 2016, the Federal Interagency Working group on EJ & NEPA Committee issued a report titled “Promising Practices for EJ Methodologies in NEPA Reviews.” The report provides detailed guidance for agencies to conduct meaningful public engagement and environmental analyses under NEPA, in order to comply with EO 12898’s directive. Specifically, the report provides guidance for agencies to: engage EJ communities at multiple stages of the NEPA process; conduct outreach to local EJ leaders; make public meetings accessible; evaluate multiple pollution sources and exposures; analyze climate-change related impacts on EJ communities; identify inter-related health and socio-economic factors that can amplify environmental impacts; and consider cumulative and indirect impacts when formulating mitigation measures.<sup>63</sup>

The sweeping changes proposed in the NPRM will undermine agencies’ ability to perform the robust public engagement and analysis of EJ impacts that is provided for under the current regulations. By eliminating the process that agencies have relied on for decades to comply with the EO, CEQ will frustrate and confuse agency compliance going forward.<sup>64</sup> Ultimately, if finalized, the proposed rule would undermine compliance with the EO, and result in further health and environmental harms in EJ communities.

## V. Conclusion

In sum, CEQ’s process for developing its proposed changes to the NEPA regulations has insufficiently engaged EJ communities, failing to comply with the directive of EO 12898. If implemented, the proposed rule would have disproportionate impacts on environmental communities. CEQ should withdraw its proposal to roll back NEPA regulations. Instead, CEQ should focus on working with EJ communities to ensure that the current NEPA regulations are fully and effectively protected, promoted, and implemented.

Sincerely,

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taken.”); U.S. General Services Administration, Fiscal Years 2016-2018 Environmental Justice Strategy (May 2016), at 8, *available at* [https://www.gsa.gov/cdnstatic/Final\\_Approved\\_EJ\\_Strategy\\_FY16\\_-\\_FY18%28Final%29.pdf](https://www.gsa.gov/cdnstatic/Final_Approved_EJ_Strategy_FY16_-_FY18%28Final%29.pdf); 62 Fed. Reg. 18377-03, Department of Transportation (DOT) Order to Address Environmental Justice in Minority Populations and Low-Income Populations (Apr. 15, 1997) (setting forth a process for DOT to address EO 12898 through existing laws, primarily through NEPA); Nuclear Regulatory Commission, Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52040, 52042-44, fn. 2 (Aug. 24, 2004) (stating that “NEPA is the only available statute under which the NRC can carry out the general goals of E.O. 12898” including through consideration of cumulative impacts).

<sup>63</sup> Federal Interagency Working Group on Environmental Justice & NEPA Committee, Promising Practices for EJ Methodologies in NEPA Reviews (March 2016), at 10, 13, 15-16, 18-20, 29-32, 36-37, 39, 41-46, 48-50, *available at* [https://www.epa.gov/sites/production/files/2016-08/documents/nepa\\_promising\\_practices\\_document\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-08/documents/nepa_promising_practices_document_2016.pdf)

<sup>64</sup> The proposed rule would cause further delay, expense, confusion, and inefficiency, as agencies would have to come up with new EJ strategies and new avenues to comply with EO 12898. This would not conform with CEQ’s rationale for the rule articulated in the NPRM. CEQ has failed to consider the inefficiencies and expense that would be created if this rule was promulgated.

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#4	Data downloaded from U.S. EPA EJ Screen and ECHO websites for communities near Port of New York & New Jersey.
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#6	Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994).
#7	The White House, Memorandum for the Heads of All Departments and Agencies, Re: Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994), available at <a href="https://www.epa.gov/sites/production/files/2015-02/documents/clinton_memo_12898.pdf">https://www.epa.gov/sites/production/files/2015-02/documents/clinton_memo_12898.pdf</a> .
#8	Memorandum of Understanding on Environmental Justice and Executive Order 12898 (2011), available at <a href="https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf">https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf</a> .
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#10	CEQ Guidance regarding NEPA Regulations, 48 Fed. Reg. 34263 (Jul. 28, 1983), <a href="https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-GuidanceRegulations.pdf">https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-GuidanceRegulations.pdf</a> .
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