November 22, 2021

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

RE: Comments on Proposed NEPA Regulations Revisions
CEQ-2021-0002

Dear Ms. Mallory:

Thank you for the opportunity to comment on the proposed revisions to the regulations implementing the National Environmental Policy Act (NEPA) issued by the Council on Environmental Quality (CEQ) in 2020. The 2020 NEPA regulations purport to limit the purpose of NEPA, drastically narrow the scope of analysis, undermine science-based decisionmaking, and put roadblocks in the way of community involvement. They are fundamentally incompatible with the nation's needs and this Administration's policies to address climate change, environmental justice and protection of public lands and oceans. The issues addressed in the October 2021 proposal related to purpose and need and alternatives, agency compliance, and direct, indirect and cumulative effects need swift, serious attention. However, the better pathway to restoring full NEPA compliance is to rescind the 2020 regulations and reinstate the 1978 regulations and then make needed improvements in the second round of rulemaking. We set forth our reasoning for our recommendation below, along with comments on CEQ's current proposal.

I. CEQ Should Adopt the 1978 Regulations as the Baseline

While the current rulemaking effort is well-intended, we believe that CEQ's proposal to leave the 2020 NEPA regulations in place and attempt to fix them in two rulemakings leaves serious issues unresolved for far too long while leaving the public, the affected agencies and CEQ itself with a formidable job in the proposed spring 2022 rulemaking. Given Congressional enactment of the Infrastructure Investment and Jobs Act, the need to provide regulatory certainty with respect to infrastructure projects is more critical than ever. We understand the preamble discussion regarding CEQ's approach to rulemaking to mean that CEQ intends to retain the remainder of the 2020 regulations except for selected changes in round one and potentially other selected provisions in round two. This approach is a significant concern for all of us. Importantly, as a legal matter, the 1978 regulations are a far better reflection of NEPA's statutory requirements and associated case law, even today, than the 2020 regulations. Further, selective changes to the 2020 regulations will likely focus on the most significant operative provisions but overlook numerous changes that are less sweeping but still consequential. Finally, the 1978 regulations provide a better platform for advancing the environmental, climate change and environmental justice objectives that CEQ has stated it intends to advance.

In the preamble to the proposed revisions, CEQ first explains that for this rulemaking, it focused on provisions that pose significant near-term challenges for federal agencies and would have the most impact to agencies' NEPA processes before a subsequent round of rulemaking (phase two) is completed. But there are additional provisions that also meet that standard. Examples of other provisions that will, in CEQ's words, "pose significant near-term interpretation or implementation challenges for Federal agencies"[1] as well as adversely affect the quality of analysis and environmental protection include the reversal of CEQ's long-standing interpretation of "major federal action,"[2] the deletion of the criteria defining "significantly,"[3] the purported repeal of any duty to ever undertake new scientific or technical research to inform agency analyses,[4] and the revised definition of categorical exclusions.[5]

Left out of this criterion entirely are the provisions that pose significant near-term challenges for the public and, in particular, environmental justice communities. Those provisions include, but are not limited to, the purported elimination of NEPA's applicability to loans and loan guarantees for projects such as Concentrated Animal Feeding Operations,[6] the purported elimination of NEPA to actions allegedly shielded under the "functional equivalence"[7] doctrine or an agency's perception of Congressional intent,[8] the provisions that make it more difficult to obtain information,[9] and be well informed prior to a public hearing,[10] measures that attempt to impose obstacles to commenting on NEPA analyses[11] and the purported restrictions on judicial review.[12]

Second, CEQ states in the preamble that it selected provisions for phase 1 rulemaking where it believed it made the most sense to revert to the 1978 regulations. However, in two of the three proposed subjects for change, what CEQ is proposing is not exactly a reversion to the 1978 regulations. Rather, the proposals do revert to some very important core principals, but by attempting to revert to the original meaning using the 2020 regulatory framework, the proposed changes incorporate troublesome new wording. Specifically, as we discuss below, the retention of the new definition for "reasonable alternatives" needs clarification, the rewording of the definition of "effects" incorporates a troubling new definition of the "human environment," and the amendment to the

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[1] 86 Fed. Reg. 55759 (Oct. 7, 2021).
[2] 40 C.F.R. § 1508.1(q).
[3] 40 C.F.R. § 1508.27 (1978).
[4] 40 C.F.R. § 1502.23.
[5] 40 C.F.R. § 1508.1(d).
[6] 40 C.F.R. § 1508.1(q).
[7] 40 C.F.R. §§ 1501.1(a)(6), 1507.3(d)(6).
[8] 40 C.F.R. §§ 1501.1(a)(3), 1507.3(d)(3).
[9] 40 C.F.R. §§ 1503.4, 1506.6(f).
[10] 40 C.F.R. § 1506.6(c).
[11] 40 C.F.R. § 1503.3.
[12] 40 C.F.R. §§ 1500.3(b)-(d), 1505.2(b).

regulation on agency NEPA procedures incorporates several invalid interpretations of "major federal action."

CEQ's third criterion for identifying the regulatory changes it is currently proposing is the identification of provisions that CEQ believes are generally unlikely to warrant further revision in a phase two rulemaking. As noted above and explained in detail in the discussion of each proposed change, we urge CEQ to address in this rulemaking or the subsequent rulemaking regulatory changes that are integral to the alternatives requirements, the definition of "reasonable alternatives," and the definition of "human environment" referenced in the definition of "effects."

A fourth reason to initiate a new rulemaking to rescind the 2020 regulation and replace them with the 1978 regulations is to eliminate all of the provisions that purport to minimize the purpose of NEPA, narrow the overall responsibility for compliance, and restrict public involvement. Some of these changes may appear to be minor wording changes, but they convey important policy direction and their deletion in the 2020 regulations sends an unmistakable signal to agencies and the public. Deletions of phrases such as "all reasonable alternatives" and "to the fullest extent possible" have a cumulative effect on the public's perception and understanding of what is required and can undermine agencies' compliance. Indeed, the 2020 regulations narrow the NEPA process to essentially a "check the box" paperwork exercise rather than a mechanism that democratically provides a framework to improve decisionmaking.

Finally, we must point out that leaving most of the 2020 regulations in place leaves a situation in which all agency NEPA procedures are to some degree in conflict with provisions in CEQ's regulations (despite the lifting of the ceiling and extension of the time period for modifications of agency procedures) with some provisions in CEQ's regulations. This leaves agencies still facing, at the very least, the appearance of conflicting requirements and the dilemma of how to deal with them. Although CEQ has made some attempts to grapple with this issue, the possibilities for chaos, confusion and litigation abound.

Certainly, the 1978 regulations can be improved. For example, CEQ should elevate the role of tribal governments in the NEPA process, improve public involvement in the environmental assessment process, and make other improvements to address the efficient and effective analysis of environmental justice impacts and climate issues. However, as the first step towards getting back to basics, we urge CEQ to publish a new proposal that reverts to the original set of regulations. Otherwise, both CEQ and the public will be burdened with focusing on fixing the following issues in the 2020 regulations rather than focusing on new and improved regulations:[13]

[13] We incorporate herein the March 10, 2020 comments on the 2020 proposed revisions signed by 328 organizations and tribal nations for discussion of each of these issues, in the order listed above; letter available here: https://drive.google.com/drive/folders/1x26l-MoDZEvr7Hepp1KXfJGZTaNJe2Wl

A. § 1500.1 - Purpose and policy – reaffirm the purpose of the NEPA process as a means to make better decisions reflecting NEPA's policies (as opposed to "NEPA is a procedural statute" and "The purpose and function of NEPA is satisfied if Federal agencies have considered . . . information and the public has been informed regarding the decision-making process"). In fact, NEPA was not designed to be a neutral process but rather a declaration of, as the title says, this country's national environmental policies.

B. § 1500.2 - Reinstate this section that includes key linkages between NEPA process and NEPA policies, as well as the important direction to comply with NEPA's requirements "to the fullest extent possible."

C. § 1500.6 - Repeal the narrowed interpretation of NEPA and restore mandate to view agency actions, policies, procedures and regulations "to the fullest extent possible" in light of NEPA's national environmental objectives.

D. § 1502.9 and throughout - Reinstate the term "possible" (as in, "to the extent possible") where the 2020 regulations substitute the term "practicable."

E. § 1502.9(b) - Reinstate obligation to prepare new draft EIS if it so inadequate as to preclude meaningful analysis.

F. §1504.3 - Reinsert the provision to refrain from implementing proposed action in context of referral of matter to CEQ. Otherwise, environmental harm may already have taken place before the referral process concludes.

G. § 1506.1(b) - Repeal the expansion of authority to engage in pre-decisional activities, such as land acquisition, prior to completion of the NEPA process.

H. § 1506.2(d) - Delete the statement regarding lack of need to reconcile differences with state, tribal and local procedures.

I. § 1508.1(s) - Restore the 1978 definition of "mitigation" in place of the narrowed 2020 definition that unnecessarily discourages the adoption of mitigation measures.

J. §§ 1501.1 (NEPA thresholds), 1507.3(d), (Agency NEPA Compliance) and 1508.1(q) (Definition of "Major Federal Action") - Restore the long-standing interpretation of "major federal action"; delete the exclusion of loans, loan guarantees and other forms of financial assistance from NEPA; delete exclusion of federal actions abroad; revert to original articulation of actions for purposes of Administrative Procedure Act; restore long-standing requirement to comply with NEPA prior to treaty, international conventions and other international agreement negotiations/ratification; restore language regarding compliance with NEPA for adoption of formal plans that guide agencies.

K. § 1508.1(p) - Restore the original definition of "legislation." The narrowed 2020 definition would exclude, for example, the need to prepare an EIS on the Section 1002 report on the Arctic National Wildlife Refuge.

L. §§ 1502.4(b) - Restore the original language regarding requirements to prepare programmatic EIS rather than the purely discretionary option presented in the 2020 regulations.

M. §§ 1501.1 (and repeated in § 1507.3(d)) ("NEPA thresholds"), 1506.9 (proposals for regulations) - Delete entirely or at minimum, remove provisions regarding whether NEPA compliance would be "inconsistent" or in conflict with Congressional intent (as opposed to specifically exempt) and whether another statute serves as the "functional equivalent" of NEPA. Also delete §1506.9 which encourages use of functional equivalence doctrine for proposed regulations.

N. §1508.1(aa) - Delete the new definition of "reasonably foreseeable" – another attempt at grafting tort law into NEPA law.

O. § 1501.3 - Restore the well-understood and useful original definition of "significance" in place of the extremely confusing and incomplete explanation in the 2020 regulations.

P. § 1508.1(m) - Restore the original definition of "human environment"

Q. § 1502.14 - Restore the original language regarding "sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public," "rigorously explore and objectively evaluate all reasonable alternatives," "devote substantial treatment to each alternative considered in detail," "heart of the EIS process" and the requirement to consider reasonable alternatives outside of lead agency's jurisdiction, a long standing requirement under NEPA.

R. § 1502.21 - Restore the original requirements regarding incomplete and unavailable information, including the duty to obtain information if it is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant.

S. § 1502.23 - Delete the disturbing and unfounded statement that "agencies are not required to undertake new scientific and technical research to inform their analyses."

T. §§ 1501.4(a)(b)(1), 1508.1(d) - Restore the original definition of "categorical exclusions," thus reinstating the rule that cumulative effects as part of the definition as well as reinstating an agency's discretion to prepare an EA. Also delete the provision authorizing a mitigated categorical exclusion; in such a case, the agency should prepare an EA. While categorical exclusions have their place, the abuse of them over the years does not support generically broadening their use.

U. §1507.3(e)(5) - Delete the authorization to utilize another agency's categorical exclusion. As we discuss below,[14] there are already substantial concerns about the abuse of categorical exclusions and this provision enables further abuse.

V. § 1502.9(d) - Reinterpret preamble language to the 2020 regulation endorsing the use of Supplemental Information Reports (SIR), Determinations of NEPA Adequacy (DNA) and the like to prevent use of these mechanisms to avoid NEPA compliance and associated public involvement.

W. § 1501.10 - Significantly modify time limits provision to address problems with the 2020 rule, including use of the ROD as the end of the NEPA process when the period between the final EIS and the ROD is not a NEPA time period. In addition, the time limits create problems for land management agencies with pre-decisional processes in the context of a two-year period, and greater flexibility is required in face of lack of agency capacity.

X. §§ 1501.5(f), 1502.7 - Modify page limits for EAs and EISs to retain flexibility, especially given direction to integrate compliance with other requirements into the NEPA documentation.

Y. § 1506.5(c) - Restore conflict of interest provisions that prevented delegation of EIS preparation to applicants.

Z. § 1502.16 - Delete "economic and technical considerations" as part of required discussion of environmental effects since it is, in part, redundant and, in part, outside of NEPA's scope.

AA. § 1504.2(e) - Delete "economic and technical considerations" as criteria for referral of proposed actions to CEQ. While those factors may well be a consideration in the course of a referral, the statutory basis for referrals are proposed actions that are "unsatisfactory from the standpoint of public health or welfare of environmental quality."[15]

BB. § 1501.9 - Delete authorization to include pre-application work conducted prior to publication of the notice of intent as part of the scoping process. Of course, work needs to be done prior to scoping but scoping should begin when the public is notified of the proposed action.

CC. § 1506.6 (c) - Restore the required 15-day period between publication of EIS and date of public hearing on the EIS.

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[14] *Infra* at 10.
[15] 42 U.S.C. § 7609.

DD. § 1506.6(f) - Restore original language directing agencies to make comments available without regard to the FOIA exclusion for interagency memoranda.

EE. § 1503.4 - Restore original language regarding obligation of agencies to respond to comments both individually and collectively instead of making this important duty discretionary.

FF. §1506.3 - Rescind authorization for agencies to adopt categorical exclusions

GG. §§ 1504.3(e), 1504.3(f) - Reinstate provisions for public involvement in referrals of proposed actions to CEQ, both in the context of whether CEQ should accept the referral and, if it does, weighing in on the substance of the referred proposal.

HH. § 1503.3 - Rescind burdensome commenting requirements making it far less likely that private citizens will engage in the NEPA process.

II. § 1500.3(c) - Rescind definition of "final agency action" for purpose of judicial review and provision regarding bonds.

JJ. § 1503.3(b) - Rescind interpretation of "exhaustion" doctrine.

KK. § 1500.3(d) - Rescind purported direction to federal courts regarding causes of action, ripeness and remedies (also at §1500.3(b) and rescind specificity requirements at §1500.3(b).

LL. § 1505.2(b) - Rescind self-certification by agency and presumption of adequacy for certified EISs. Note that the provisions dealing with judicial review are generally beyond the scope of CEQ's authority.

II. Proposed Changes in the October 7, 2021 Publication

A. Section 1502.13 Purpose and Need

The 2020 revised regulation regarding purpose and need requires an agency to base its purpose and need "on the goals of the applicant and the agency's authority." We strongly concur in the proposed reversion to the original CEQ language outlining the need to briefly specify the purpose and need to which an agency is responding. We agree that, as stated in the preamble, purpose and need statements should reflect an agency's statutory responsibilities and the public interest. While an agency must understand an applicant's intent and circumstances, it should frame the analysis in the context of the "general goal of an action" rather than "an evaluation of the alternative means by which a particular applicant can reach his or her goals."[16] To adopt an applicant's goals as its own

[16] *Van Abema v. Fornell*, 807 F.2d 633, 638-39 (7th Cir. 1986).

diminishes the agency's important independent role granted to it by its authorizing legislation and impermissibly narrows the range of alternatives.[17]

Further, as stated in the preamble, we agree that the addition of the phrase "on the goals of the applicant and the agency's authority" in the 2020 regulations is potentially confusing, especially given the 1978 regulations and CEQ's prior guidance regarding the appropriate role of applicants in the NEPA process. CEQ has always acknowledged that agencies must understand an applicant's goals and work with the applicant throughout the process. In fact, the 1978 regulations directed agencies to ensure that they had policies or designated staff available to advise potential applicants on requirements of the process for particular proposals.[18] In addition, they provided for setting time limits at the request of an applicant[19] and provided for particular roles in the preparation of NEPA documents and commenting on them.[20]

As CEQ explains in the preamble, the opinion in *Citizens Against Burlington, Inc. v. Busey* did not require an agency to base its purpose and need on the applicant's purpose and need. More specifically, the Court said, among other things, that, "When an agency is asked to sanction a specific plan [citing to then 40 C.F.R. § 1508.18(b)(4) (1978)], the agency should *take into account* the needs and goals of the parties involved in the application."[21] The admonition to take an applicant's needs and goals into account is consistent with how CEQ has always approached the role of the applicant in the NEPA process. That is far different than a directive to always base the purpose and need on the applicant's goals, direction which has no basis in the statute CEQ is charged with overseeing. In short, each of CEQ's reasons for returning to the original purpose and need language is independently sufficient to justify the proposed change. We encourage CEQ to make that explicit.

B. Section 1508.1, Definition of "Reasonable alternatives"

For the reasons discussed above, we agree with the proposal to delete the phrase, "and, where applicable, meet the goals of the applicant" from the 2020 definition of "reasonable alternatives." If implemented by agencies, this language in the 2020 regulation would inevitably lead to an unlawful and unhelpful narrowing of the range of alternatives. Ultimately, such a constrained focus would not serve to make the NEPA process more effective; rather, it would lead to increased litigation due to federal agency relinquishment of their statutory obligations under NEPA. Most importantly, restricting the scope of alternatives in this manner debases the very point of the environmental impact assessment process – that is, to lead to better decisions in line with this country's national environmental policies as set forth in NEPA. Indeed, the mandate to analyze

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[17] *National Parks Conservation Ass'n. v. Bureau of Land Management*, 606 F.3d 1058 (9th Cir. 2010).
[18] 40 C.F.R. § 1501.2(d) (1978).
[19] 40 C.F.R. § 1501.8(a) (1978).
[20] 40 C.F.R. § 1506.5(a)(b) (1978).
[21] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991 (italics added).

alternatives is the only requirement in the statute that appears twice.[22] In particular, the 2020 definition presents a formidable barrier to alternatives developed outside of the agency,[23] including alternatives that might be developed by communities concerned about environmental justice.

While supporting CEQ's proposal in this regard, we note that CEQ's proposal retains the 2020 definition of "reasonable alternatives," which includes the phrase "technically and economically feasible." CEQ did not define "reasonable alternatives" in its 1978 regulations; however, CEQ did address the meaning of "reasonable alternatives" in guidance issued after the 1978 regulations went into effect. In that guidance, CEQ explained that, "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."[24] We strongly urge CEQ to incorporate this standard into the definition itself or alternatively, to reaffirm it in the preamble to the final phase 1 rulemaking action. This would be consistent with the proposed changes to the purpose and need and reasonable alternatives section and would provide further clarification for the agencies and the public.

Additionally, in this rulemaking or in the subsequent round, we urge CEQ to address other provisions that are intrinsically related to the phrase "reasonable alternatives" by reverting to the 1978 version of 40 C.F.R. § 1502.14. By doing so, CEQ would be restoring both the direction to "Rigorously explore and objectively evaluate all reasonable alternatives," and the provision requiring inclusion of reasonable alternatives not within the jurisdiction of the lead agency.[25] These are critical provisions for both agencies and the public and both are well supported and extensively explained in case law. Reverting to the 1978 version of Section 1502.14 would also eliminate the unsupported and confusing direction to agencies to, "Limit their consideration to a reasonable number of alternatives" – direction that lacks extensive interpretive context from case law, and that could therefore require further litigation to clarify its meaning. Finally, it would restore the description of alternatives as the "heart of the environmental impact statement," which comports with the statutory direction. Without robust, independent alternatives, the NEPA process merely documents the impacts of a decision rather than leading to a better decision.

If CEQ chooses not to reinstate the 1978 version of Section 1502.14, it should reinstate the introductory language that, as noted above, states that, "This section is the heart of the environmental impact statement." It should also reinsert "all" before "reasonable alternatives" and reinstate the direction to "rigorously explore and objectively evaluate" alternatives. The removal of these three phrases that were in the 1978 regulation seriously

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[22] 42 U.S.C. §§ 4332(2)(C)(iii) and (E).

[23] *See, for example, Colorado Environmental Coalition v. Salazar*, 875 F. Supp. 2d 1233 (D. Colo. 2012).

[24] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, Q. 2a, 46 Fed. Reg. 18026 (March 23, 1981) available at: https://www.energy.gov/sites/default/files/2018/06/f53/G-CEQ-40Questions.pdf.

[25] 40 C.F.R. 1502.14(a)(d) (1978).

undermines the statutory emphasis in NEPA on the requirement to analyze alternatives, whether in an EIS or in many EAs. Further, we strongly urge the re-adoption of the original § 1502.14(c), including reasonable alternatives not within the jurisdiction of the lead agency that has been a bedrock requirement for nearly half a century.[26] The reinsertion of these provisions in this section would be an important step for communities, public health and the environment.

C. Section 1507.3(a)(b) – Agency NEPA Procedures

We concur with the need to lift the "ceiling provisions" in the 2020 regulations on agency compliance with NEPA. We also recommend that a conforming change be made to Section 1506.13. As noted in the preamble, all agencies have a responsibility to implement NEPA. Agencies should be free to do so "to the fullest extent possible"[27] in the context of their specific mission activities. Further, CEQ's required review of all agency NEPA procedures stands as a mechanism for assuring appropriate compliance and consistency while still allowing for flexibility. The current provisions put the agencies in the impossible position of either promulgating agency procedures that are fundamentally inconsistent with NEPA or running afoul of CEQ's 2020 regulations. All of these reasons are independently sufficient to remove this artificial ceiling from agency compliance.

During the transition period, we urge CEQ to scrutinize proposed changes to agency NEPA procedures with special care to ensure that such changes conform to CEQ's current - and the courts' longstanding - interpretation of NEPA. In particular, we urge CEQ to reinitiate the systematic review of categorical exclusions called for in CEQ's guidance on "Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act."[28] In the words of that guidance document, "The assumptions underlying the nature and impact of activities encompassed by a categorical exclusion may have changed over time. Different technological capacities of permitted activities may present very different risk or impact profiles."[29] CEs also need to be reviewed in light of the climate change crisis as well as a greater understanding of impacts of certain types of actions on environmental justice communities. And as noted above, we strongly urge a return to the 1978 definition of categorical exclusions.

D. Definitions of Direct, Indirect and Cumulative Effects

We strongly support the proposed reinstatement of the original definitions of direct, indirect and cumulative effects. The rationale given for the deletion of these terms in the final 2020 regulations is seriously flawed. The preamble to the 2020 regulations states that CEQ deleted these definitions to address commenters' concerns and reduce

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[26] *NRDC v. Morton*, 458 F.2d 827 (D.D.C. 1974).
[27] 42 U.S.C. § 4332.
[28] Memorandum for Heads of Federal Departments and Agencies from Nancy H. Sutley, Nov. 23, 2010, still in effect and available at: https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf.
[29] *Id*. at 16.

confusion and unnecessary litigation.[30] While there is definitely room for judgment in the original definitions, there are also five decades of NEPA case law, and five decades of agency practice, interpreting these terms in particular situations. The 2020 regulations' deletion of these long-standing and we believe generally well-understood terms would, unless reversed, cause considerably more confusion. We also believe that the 2020 definition of effects, if retained, would lead to far greater instances of litigation as courts and litigants would seek to "reinterpret" well-understood concepts based on the new 2020 regulatory framework. We encourage CEQ to expand on its rationale for returning to the pre-2020 definitions.

As set forth in extensive comments on the draft 2020 regulations and explained in CEQ's preamble in this proposed rulemaking, the analysis of indirect and cumulative impacts has been a required part of NEPA compliance since NEPA's enactment, and the purported rationale for excluding the definitions to "simplify" or "clarify" the requirements is misleading and counterproductive. The necessity of analyzing reasonably foreseeable indirect and cumulative effects of proposed actions and alternatives was affirmed by CEQ and federal court cases long before the promulgation of the 1978 regulations. As CEQ states in the current preamble, reinstating these definitions is also a better reflection of NEPA's statutory purposes and intent. Understanding the reasonably foreseeable effects of a proposed action and alternatives is essential to informing the public and decision makers. The confusion caused by the deletion of these terms is much more likely to lead to the exclusion of required analysis, thus, in turn, leading to more litigation and delay as an agency is required to supplement its original analysis. Each of these reasons is independently sufficient to reinstate CEQ's original regulatory definition of effects, including indirect and cumulative effects and we encourage CEQ to make that independent sufficiency determination expressly.

Given CEQ's recognition of the long-standing and absolutely essential role of cumulative effects analysis in NEPA compliance and the proposed restoration of the definition of cumulative effects, we strongly urge CEQ to also immediately restore in this round of rulemaking the reference to cumulative effects in the definition of categorical exclusions.[31] Consistent with our reasoning above, we believe that the 1978 definition of categorical exclusion should be reinstated, but if CEQ chooses not to do that at this time, it is imperative that cumulative effects be reinserted into the definition in Phase 2 rulemaking.

To ensure that the NEPA process compels agencies to take a "hard look" at all the reasonably foreseeable environmental consequences of major actions, we suggest that CEQ clarify, in the definitions of effects, that analysis of climate and environmental justice effects, when they are reasonably foreseeable effects of the proposed action or alternatives, is not discretionary, but obligatory.

[30] 85 Fed. Reg. 43343 (July 16, 2020).
[31] *Compare* 40 C.F.R. § 1508.1(d) *with* 40 C.F.R. § 1508.4 (1978).

Additionally, the definition of cumulative effects should include examples related to climate and environmental justice. CEQ could explicitly commit agencies to consider "downstream and upstream greenhouse gas emission effects" and "cumulative exposures disproportionately affecting overburdened populations." The examples of indirect effects should include effects related to induced changes in the pattern of climate, including the reasonably foreseeable effects disproportionately borne by overburdened populations. By providing explicit examples of reasonably foreseeable indirect and cumulative effects in climate and environmental justice contexts, CEQ clarifies that the scope of effects analysis is only limited by foreseeability, not extraneous jurisdictional, temporal, or geographical boundaries. In the context of climate effects, it is important that the effects of climate change on proposed actions and the affected environment are included in NEPA analyses, as well as the effects of the proposed action and alternatives on climate change.

An explicit reference to environmental justice impacts is especially important because some courts have suggested that an agency has "discretion to include the environmental justice analysis in its NEPA evaluation"[32] and at least one federal court found that it lacked jurisdiction to review the environmental justice analysis in a final EIS because of the language in EO 12898.[33] The findings and recommendations of the White House Environmental Justice Advisory Council also speak to the need to elevate awareness of the importance of including environmental justice effects in the context of NEPA implementation.[34]

This specificity is important because the review process all too often skates over major impacts on minority communities. In one current, striking example, a massive planned expansion at Los Angeles International Airport, which is surrounded by historically low-income and minority neighborhoods, will allow the airport to accommodate 76% more passengers by 2045, yet the draft Environmental Assessment released in May 2021 resulted in a Finding of No Significant Impact across several categories, including air quality, climate and environmental justice. Meanwhile, a significantly smaller expansion with no major effects on environmental justice communities at Burbank Airport received a full EIS.[35]

Additionally, because these proposed reversions to the original language describing direct, indirect, and cumulative effects are being proposed in the framework of the 2020 regulation, the term "human environment" becomes important as the 2020 definition of

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[32] *Communities Against Runway Exp. v. F.A.A*, 355 F.3d 678 (D.C. Cir. 2004).
[33] *Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582, 604 (E.D. Va. 1999), aff'd, 217 F.3d 838 (4th Cir. 2000). *See also, Addressing Environmental Justice Through NEPA*, updated 9/21/2021, available at https://crsreports.congress.gov/product/pdf/LSB/LSB10590
[34] Final Recommendations: Justice40 Climate and Economic Justice Screening Tool & Executive Order 12898 Revisions, May 21, 2021, available at https://www.epa.gov/sites/default/files/2021-05/documents/whiteh2.pdf
[35] *Turbulence Ahead: What LAX's Expansion Means for the City of Los Angeles' Legacy on Racial Equity & Environmental Justice*, SEIU-USWW, June 2021, available here: http://www.seiu-usww.org/wp-content/uploads/2021/06/turbulenceahead.pdf

effects uses that term ("Effects or impacts means changes to the human environment from the proposed action or alternatives . . . .)"[36] Unfortunately, the 2020 regulations included an unnecessary and problematic rephrasing of the definition of the human environment. More than at any other time in human history, we need to recognize that what we do in this country affects humans throughout the world. The authors and co-sponsors of NEPA were certainly aware of that fact, observing that, "It is an unfortunate fact that many and perhaps most forms of environmental pollution cross international boundaries as easily as they cross state lines."[37] Or, as Senator Muskie stated a number of years later, "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 of the United States were not specifically referenced that, therefore, they were excluded."[38]

E. Removing Limitations on Effects Analysis

We concur with the proposed removal of the various limitations[39] on effects analysis. These limitations potentially narrow the scope of analysis such that many of the most important, long-lasting environmental effects of agency action could be overlooked. The 2020 regulation's efforts to narrow the analytical focus significantly undercuts efforts to protect vulnerable environmental justice communities and also undercuts our commitments to address climate change.

We also believe that the attempted integration of tort law concepts into NEPA implementation was a mistake. Questions of after-the-fact personal or corporate liability for various types of injuries involve fundamentally different considerations than does the pre-decisional responsibility of the federal government to analyze, consider and disclose the effects of decisions on communities, individuals, tribes, local and state governments and our shared environment. Indeed, a broader look at anticipated impacts before taking action should often lead to less harm and associated potential liability later.

CEQ's interpretation of *Public Citizen v. Department of Transportation*[40] to justify these limits on effects analysis in the 2020 regulations was overly narrow. For example, in *Sierra Club v. FERC,*[41] the court held that FERC should have either quantitatively estimated the downstream greenhouse gas emissions that would result from burning natural gas transported by pipelines it was being asked to approve, or explain why it could not. The Court correctly explained that, consistent with the principle set out in

[36] 40 C.F.R. § 1508.1(g) (2020).

[37] House Report 91-378 (July 1969). This is even more true today as we face the rapidly evolving climate crisis.

[38] Hearing before the Subcommittee on Resource Protection, Senate Committee on Environment and Public Works, 95th Cong., 2d Session (1978), p. 220. This comment was in the context of debating proposed legislation to exempt the Export-Import Bank from NEPA. The amendment was defeated.

[39] 86 Fed. Reg. at 55765-55767 (Oct. 7, 2021).

[40] 541 U.S. 752 (2004).

[41] 867 F.3d 1357 (D.C. Cir. 2017); rehearing denied, 1/31/18).

Public Citizen, FERC had the obligation to consider the reasonably foreseeable downstream effects of the pipeline, in part because it had the authority, if it so chose, to deny a pipeline certificate on the grounds that those downstream effects would be too harmful to the environment.[42] We strongly agree with CEQ that, for example, analysis of proposed fossil fuel extraction should encompass its transport and combustion.[43] Failure to do so conflicts with NEPA's statutory text requiring agency analysis to address "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity."[44] In the final preamble to this rulemaking, we suggest that CEQ provide some additional specific examples of "reasonable foreseeability" in various factual contexts, with particular attention to climate and environmental justice impacts.

III. Additional Proposals for Rulemaking

We believe the immediate priority must be to address the 2020 regulations by rescinding them and reinstating the 1978 regulations. CEQ should use a spring 2022 rulemaking to make changes to the 1978 regulations to address improvements to the NEPA process, including those identified below.

A. Tribal Governments

The regulations must be revised to reflect the fact that tribal governments have a unique relationship with the federal government and that role should be reflected in the NEPA regulations. This elevated recognition of tribal governments is the one positive step taken in the 2020 regulations and we recommend that those provisions be retained and potentially enhanced through CEQ consultation with tribes regarding their priorities.

B. Environmental Justice and Climate Impacts

As stated earlier, we recommend that both environmental justice and climate should be added to the definition of "effects" in Section 1508.1(g)(4).[45]

Additionally, we recommend that CEQ direct agencies to consider differences in GHG emissions and effects on climate resilience as especially important dimensions of alternatives analysis. Through an amendment to 40 C.F.R. § 1502.2(d), agencies should be directed to identify how each alternative would support or not support meeting the nation's climate change goals, including, specifically, its GHG emission reduction targets.

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[42] *Id*. at 1372-73. *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.")

[43] 85 Fed. Reg. 55766 (Oct. 7, 2021).

[44] 42 U.S.C. § 4332(2)(C).

[45] *Supra* at 11-12.

C. Public Involvement in the EA Process

The flexibility afforded to agencies regarding public involvement in the EA process too often results in no public awareness or involvement in the process. For agencies that typically use EAs for their NEPA compliance, this issue can seriously undermine public confidence in agency analyses and public involvement. We propose that the regulations include a provision that requires agencies to make an EA available for public review for a minimum of 30 days.

D. Public Notice of Categorical Exclusions

For years, the Forest Service has routinely given public notice of actions that are subject to a categorical exclusion and afforded an opportunity for comment. We propose that the regulations require agencies to provide similar public notice of the use of categorical exclusions with an opportunity for comment.

E. Interrelated Social and Economic Effects on the Human Environment

While we recommend reverting back to the original definition of the "human environment" in this rulemaking as a logical outgrowth of the definition of "effects,"[46] we urge CEQ to take one additional step in future rulemaking. The definition in the 1978 regulation[47] and similar language in the 2020 regulations[48] are in the context of environmental impact statements. Agencies can and frequently do misinterpret the text to mean that social and economic effects that are interrelated with environmental effects do not need to be analyzed in an environmental assessment (EA). That is incorrect; both EAs and EISs need to include analysis of social and economic impacts interrelated with physical environmental effects. Omission of interrelated economic and social impacts in EAs adversely affects communities, including environmental justice communities and tribal nations, affected by proposed federal actions. We recommend the following modest revision (new language in bold):

> "Human environment. "Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. **While** this means that economic or social effects are not intended by themselves to require preparation of an EIS [delete period], [**w]**hen an environmental impact statement **or an environmental assessment** is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement **or environmental assessment** will discuss all of these effects on the human environment."

[46] *Supra* at 12.
[47] 40 C.F.R. §1508.14 (1978).
[48] 40 C.F.R. § 1502.16(b).

F. Effective Mitigation.

Identifying mitigation of adverse impacts can be a highly constructive outcome of the NEPA process. CEQ's guidance on "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact"[49] provides important direction. CEQ should codify several core concepts included in the guidance in its regulations. It is essential to the integrity of the process that mitigation be capable of being implemented, that it is in fact implemented and that implementation is monitored. To that end, we suggest the following additions to CEQ's NEPA regulations:

> Adding a sentence that states, "The EIS must identify how each mitigation measure would be funded and monitored and any uncertainties regarding the mitigation measures' implementation."
>
> Adding a provision that would require agencies to consider mitigation measures, including compensatory mitigation, for the reduction of GHG emissions when analyzing proposed actions that would otherwise lead to increased GHG emissions.
>
> Adding a definition of monitoring after the definitions of mitigation that states:
>
> "(a) Enforcement monitoring ensures that mitigation is being performed as described in the Record of Decision or other decision document and in any legal document implementing the action (for example, contracts, leases, permits or grants).
>
> (b) Effectiveness monitoring measures the success of the mitigation effort in achieving the desired outcome."
>
> Adding language that addresses the role of implementing mitigation measures in Findings of No Significant Impact:
>
> "If an agency incorporates measures into a Finding of No Significant Impact such that those particular measures are relied upon, in whole or in part, to reduce environmental impacts to the degree that they are no longer significant, it must identify and mandate those specific mitigation measures. If any of the identified mitigation measures appear unlikely to occur and significant adverse environmental effects could reasonably be expected to result, the agency must prepare an EIS."

IV. Conclusion

[49] Available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf

In conclusion, for the reasons stated above, we strongly urge CEQ to repeal the 2020 regulations and revert to the 1978 regulations, with improvements to those regulations proposed in the phase two rulemaking. However, if CEQ chooses not to do so, we believe the proposed amendments, along with the additional changes we have suggested, should be finalized in the near future.

Sincerely,

Alabama Rivers Alliance
Alaska Wilderness League
Alberta Wilderness Association
The American Alpine Club
American Rivers
Animal Welfare Institute
Bold Alliance
California Native Plant Society
Center for Biological Diversity
Center for Large Landscape Conservation
Charles River Watershed Association
Citizens for Environmental Justice
The Clinch Coalition
Congaree Riverkeeper
Dakota Resource Council
Defenders of Wildlife
Eagle Summit Wilderness Alliance
Earthworks
Earthjustice
Endangered Habitats League
Environmental Confederation of Southwest Florida
Environmental Defense Fund
Environmental Justice Clinic at Vermont Law School
Environmental Law & Policy Center
Environmental Protection Information Center
Food & Water Watch
Forest Keeper
Friends of Big Ivy
Friends of Big Morongo Canyon Preserve
Friends of Animals
Friends of the Sonoran Desert
Gallatin Wildlife Association
GreenLatinos
Great Old Broads for Wilderness
Harambee House
Harpeth Conservancy
Hispanic Federation
Holitna River Watch

Hoosier Environmental Council
Humane Society Legislative Fund
The Humane Society of the United States
Information Network for Responsible Mining
International Marine Mammal Project of Earth Island Institute
Kentucky Heartwood
League of Conservation Voters
Long Beach Alliance for Clean Energy
Los Padres ForestWatch
Miami Waterkeeper
Midwest Environmental Advocates
Moms Clean Air Force
MountainTrue
Multicultural Alliance for a Safe Environment
National Parks Conservation Association
National Trust for Historic Preservation
National Wildlife Federation
Natural Resources Defense Council
Nature Coast Conservation, Inc.
New Mexico Wild
Northern Alaska Environmental Center
Nuclear Information and Resource Service
Oceana
Ocean Conservancy
Ocean Conservation Research
Openlands
Operation HomeCare, Inc.
Outdoor Alliance California
Peoria Audubon Society
Partnership for Policy Integrity
Pilchuck Audubon Society
Public Lands Project
Preservation Virginia
Project Eleven Hundred
RESTORE: The North Woods
Rio Grande International Study Center
Salem Audubon Society
San Juan Citizens Alliance
Save Our Springs Alliance
Save the Scenic Santa Ritas
Service Employees International Union
Sierra Club
Southern Environmental Law Center
South San Juan Broadband
South Umpqua Rural Community Partnership
Spottswoode Winery, Inc.

Sustainable Obtainable Solutions
Western Environmental Law Center
Western Organization of Resource Councils
Willamette Law Group
The Wilderness Society
Upper Peninsula Environmental Coalition
Waterkeeper Alliance
Western Watersheds Project
Wild Arizona
WildEarth Guardians
Wilderness Watch
Winter Wildlands Alliance
Wyoming Wildlife Advocates