Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Via Federal eRulemaking Portal: https://www.regulations.gov, Docket ID No. CEQ-2019-0003

March 6, 2020

Dear CEQ,

The following are the comments of the undersigned on the proposed revision of CEQ's rule implementing the National Environmental Policy Act (NEPA), 40 CFR 1500 et seq., as described at 85 Fed Reg 1684 et seq., January 10, 2020.

All of the endorsers of this comment letter have significant experience with NEPA, in that we regularly review and comment on projects, plans, and policies proposed by federal agencies, primarily the USDA Forest Service and USDI Bureau of Land Management. We believe that strong NEPA is essential to ensure conservation of the nation's natural resources and for ensuring public involvement in decisions affecting these resources.

I. **INTRODUCTION**

A. THE IMPORTANCE OF AND CONTINUING CRITICAL NEED FOR NEPA. The National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) is our bedrock environmental charter. Some even go so far as to say it is our environmental Magna Carta, i. e., the beginning of seriously considering and reducing the effects of actions and projects on the human environment, just as the Magna Carta in England in the 1200s A.D. forced the king to give up some of his power and is said to be the beginning of democracy.

In general, NEPA provides agencies with opportunities to: involve the public, explain why a proposed project is desired, find ways to minimize impacts, and work with all interested parties to make projects as acceptable as possible to the largest portion of the public. It allows interested members of the public to hold agencies accountable for minimizing impacts.

NEPA has certainly forced federal agencies to focus on the impacts their activities and programs may cause, and on ways to reduce such impacts. It does not prevent even the most damaging of actions from being approved and implemented, but it does require careful consideration of all potential impacts, and of ways to reduce those impacts. Though its precise impact would be very difficult to measure, it is highly likely that application of NEPA has helped to maintain and improve the physical environment in the United States for its residents and visitors, e. g., by slowing the rate of extinction of native plants and animals, protecting all biological diversity, and leading to cleaner air and water.

It is safe to say that application of NEPA has helped the federal government meet its legal responsibilities, including:

us[ing] all practical means to…

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

NEPA, section 101(b), 43 U.S.C. 4331.

NEPA certainly aids and helps ensure agencies' compliance with other laws, such as the Endangered Species Act, Clean Air Act, Clean Water Act, National Historic Preservation Act, and many others. NEPA will be even more important in the future, with global climate change, increasing human development, threats to the continued persistence of rare plant and wildlife species, and generally more challenges to the human environment.

B. PROBLEMS IN IMPLEMENTING NEPA STEM FROM PROBLEMS WITHIN THE AGENCIES. The Preamble states that CEQ has identified what it considers "matters of concern" on NEPA implementation, mainly long and detailed documents and a long time to prepare them. Id. at 1696. We believe that many of the problems with NEPA implementation stem from the agencies having insufficient funds and personnel to do the needed work. A consequence of this is that many agency offices do not have staff trained in implementing NEPA. Notably, the proposed rule would require agencies to ensure that:

Policies or designated staff are available to advise potential [private] applicants of studies or other information foreseeably required for later Federal action.

Proposed rule at 1501.2(b)(4). If staff need to be available to advise private applicants, agencies must also be directed to ensure that expertise is available to implement NEPA, as applicable, for all of each agency's projects possibly subject to NEPA.

A further and related problem is that agencies are often forced to reassign staff people to carry out essential duties, including those mandated by law. For example, U.S. Forest Service and BLM personnel are frequently assigned to fight fires in the snow-free season, the very time they need to gather the data in the field that is used in disclosing potential impacts of proposed actions. These situations undoubtedly prolong the time needed for preparation of NEPA documents

But even with the problems described above, agencies could likely sufficiently implement NEPA if they would simply devote enough resources toward doing so and give NEPA processes for their projects and activities the proper priority and attention they deserve.

C. STRONG REGULATIONS FOR IMPLEMENTING NEPA ARE NEEDED. Given the importance of NEPA in protecting biological diversity and human health, it is very important to have strong regulations for agencies' use of NEPA. Agencies mut be directed to carefully

consider all potential impacts and all reasonable alternatives. Overall, we believe that the existing CEQ rule has implemented NEPA well, and that no major changes are needed. We discussed this in detail in our response to comments on the Advanced Notice of Proposed Rulemaking. Our comments were dated August 14, 2018, and we incorporate them here by reference. We also include them with this comment submission for CEQ's convenience.

The CEQ and agencies must realize that impacts of projects and activities are complex. They can affect human health, such as from air and water pollution. They can lead to permanent impacts, such as extinction of wildlife, plant, and fish species. Thus it is very important that impacts be disclosed prior to approval of projects, both to the public and agency decisionmakers.

We believe it is better to take the time to identify impacts and design projects to eliminate, reduce, or mitigate them before projects are approved, rather than be forced to address unexpected impacts while a project or activity is being implemented. Spending a little more money and time up front may save time and money in implementation later. As the old saying goes "do it right the first time or do it over".

The proposed rule deletes the following important passage from the existing rule:

> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.

Existing rule at 1500.1(b); emphasis added. The language here sums up the most important function of NEPA: consider all relevant and credible information before approving any action that might have more than a very minor effect on the environment. It needs to be part of any rule implementing NEPA. This passage must be retained in the final rule.

The proposed rule might not even require agencies to do the bare minimum in implementing NEPA:

> The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision making process.

Proposed rule at 1500.1(a). This is incorrect and inappropriate. NEPA also requires disclosure of impacts and analysis of alternatives, not mere consideration of information.[1] It also requires disclosure of information to the public and others on impacts and reducing them, not just information on the "decision making process". See id., section 102(C) and (G), 42 U. S. C. 4332.

[1] This proposed section also conflicts with proposed paragraph 1507.3(b)(5), which requires that agency procedures mandate consideration by the decisionmaker of the range of alternatives in the relevant environmental document(s).

D. MODERNIZE BUT DO NOT WEAKEN THE EXISTING RULE. While we believe the existing rule has served well to involve the public in agencies' decisions and to require that agencies carefully and fully consider potential environmental impacts and ways to mitigate them, we agree that some modernization of the rule is desirable. For example, we agree that agencies need to provide means for the public to comment both electronically and by other means. Proposed sections 1503.1(d) and 1508(y). Removing obsolete provisions from the rule is also appropriate.

Another good feature of the proposed rule is section 1507.4, Agency NEPA Program Information, under which each agency, in its NEPA procedures, would be required to maintain a website or other forum with info on the agency's ongoing NEPA reviews.

However, the proposed new rule would not require consideration of cumulative impacts. This is an unconscionably unacceptable provision of the proposed rule. See further discussion in section II below. The proposed rule would weaken NEPA in many other ways, as is also discussed below, and is, therefore, unacceptable.

II. **ANY NEPA RULE ABSOLUTELY MUST REQUIRE CUMULATIVE IMPACTS TO BE IDENTIFIED, ANALYZED, AND DISCLOSED**.

In the current rule, cumulative impact is defined as:

> impact on the environment which results from the incremental impacts[s] of the [proposed] action when added to other past, present, and reasonably foreseeable future actions, regardless of what other agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant impacts taking place over a period of time.

Existing rule at 1508.7. Cumulative impacts must be disclosed in EIS and EAs, along with other impacts.

It is very important to disclose such impacts to the public and agency decisionmakers because examining only the impacts of a currently proposed action would in many cases understate the overall impact. Examples include, but are not limited to:

--the cumulative loss or degradation of habitat for threatened or endangered species, where one project might not cause a significant impact, but the impacts of two or more actions (past, present, and foreseeable future) might further imperil the continued existence of one or more species, via, e. g., human encorachment or loss of habitat.

--a federal agency action to permit a facility that emits pollutants into the air that might not be a significant impact on its own, but when added to air emissions from existing and foreseeable future facilities, might cause a violation of air quality standards and make the air unhealthy for humans and other mammals.

--vegetation management involving clearcutting large areas. New cutting added to the effect of past projects and possible future ones might have a much more seriously adverse impact on slope stability, watershed integrity, intact wildlife habitat, scenery, primitive and semi-primitive recreational opportunity, etc. than any one project alone would have.

Indeed, in previous guidance, the CEQ noted how easily cumulative effects can occur, citing a few practical examples:

> Repeated actions may cause the effects to build up through simple addition (more and more of the same types of effects) and the same or different actions may produce effects that interact to produce cumulative effects greater than the sum of the effects.
>
> Cumulative effects may last for many years beyond the life of the action that caused the effects. Some actions cause damage lasting far longer than the action itself (e. g. acid mine drainage, radioactive waste contamination, species extinction). Cumulative impacts analysis needs to apply the best science and forecasting techniques to assess potential catastrophic consequences in the future.

CEQ, 1997a, at 8.

CEQ also recognized the importance of cumulative impacts:

> Perhaps the most significant environmental impacts result from the combination of existing stresses on the environment with the individually minor, but cumulatively major, effects of multiple actions over time.

CEQ, 1997b at 29; emphasis added.

We are thus shocked to discover that the proposed rule would not require disclosure of cumulative impacts, nor consideration of them in determining the scope of proposed agency action. See id. at 1501.9(e), 1508.8(i).

Specifically, part of the definition of "effects and impacts" states:

> A ''but for''[2] causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. Analysis of cumulative effects is not required.

1508.8(g)(2) Note that this conflicts with another part of the definition of effects or impacts:

[2] The CEQ should explain what this phrase means in its context here. The undersigned find the meaning unclear.

Effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance.

Proposed rule at 1508.8(g). Also, proposed section 1501.3(b)(1) states that "[b]oth short and long-term effects are relevant" in determining significance.

NEPA documents must disclose impacts on the "human environment" (NEPA section 102 C, 42 U.S. C. 4332), which the proposed rule defines as follows:

Human environment means comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment.

1508.8(m). Thus not requiring consideration of cumulative impacts conflicts with the responsibility to analyze and disclose impacts, which often occur in the future and/or away from the project site, on current and future generations of Americans. And it would put agencies contemplating actions subject to NEPA in the absurd position of being required to analyze significant impacts except for the type of impacts most likely to be significant.

The Preamble discusses the reasons for removing the requirement to consider cumulative impacts:

While CEQ has issued detailed guidance on considering cumulative effects, categorizing and determining the geographic and temporal scope of such effects has been difficult and can divert agencies from focusing their time and resources on the most significant effects. Excessively lengthy documentation that does not focus on the most meaningful issues for the decision maker's consideration can lead to encyclopedic documents that include information that is irrelevant or inconsequential to the decision-making process. Instead, agencies should focus their efforts on analyzing effects that are most likely to be potentially significant and be effects that would occur as a result of the agency's decision. Agencies are not expected to conduct exhaustive research on identifying and categorizing actions beyond the agency's control. With this proposed change and the proposed elimination of the definition of cumulative impacts, it is CEQ's intent to focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action.

To further assist agencies in their assessment of significant effects, CEQ also proposes to clarify that effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy causal chain. …

Preamble at 1708.

Just because determining cumulative impacts could be difficult, or that they are temporally or geographically remote, or at the end of a "lengthy causal chain", does not mean agencies can be relieved of their duty to analyze and disclose them. Nor does it mean that such impacts are not significant. Indeed, as the CEQ has already stated, cumulative impacts can be the most significant of all impacts, at least in part because of the synergistic effect, i. e., that the overall impacts from past, present, and reasonably foreseeable projects may be greater than the sum of the impacts from individual projects. See CEQ, 1997a and 1997b, quoted above. We agree that "agencies should focus their efforts on analyzing effects that are most likely to be potentially significant" and "the most meaningful". (Preamble at 1708, quoted above.) But it bears repeating: the most significant impacts will often be, or at least include, cumulative impacts!

The proposed rule does not define "reasonably close causal relationship". Agencies would likely have a difficult time determining what impacts needed to be analyzed and disclosed in NEPA documents. It is much simpler, and greatly much more legally compliant, to require agencies disclose all impacts possibly related to the project or activity that is the subject of the NEPA document.

The rule would specifically remove the distinction between direct, indirect, and cumulative impacts, as it would

> simplify the definition of effects by consolidating the definition into a single paragraph and striking the specific references to direct, indirect, and cumulative effects.

Preamble at 1708; see also 1508.8(q). Agencies, in their zeal to approve projects, could forget to consider indirect effects, which are "later in time or farther removed in distance". Existing rule at 1508.8(b). As discussed above, cumulative effects are usually indirect. Thus we believe it is useful and appropriate for the CEQ rule to describe all three types of impacts in the rule to make it clear that all impacts must be disclosed. We ask that the definitions of the three types of effects/impacts in the current rule be retained and stated in the definition of "effects or impacts" at proposed rule section 1508.8(g).

Not requiring a careful examination of all impacts, especially cumulative ones, is a gross violation of the spirit and letter of NEPA. This is absolutely unacceptable!

III. **USE OF CATEGORICAL EXCLUSIONS AND EXEMPTIONS FROM NEPA**.

We are concerned about the use of categorical exclusions (CEs) for projects where impacts could be significant. For example, the Forest Service, in a proposed revision to its NEPA procedures, would allow the use of a CE for projects that would authorize vegetation treatment on up to 7300 acres of land. See 84 Fed Reg 27544 et seq., June 13, 2019. See also Attachment A for examples of large projects approved and implemented with CEs.

Proposed section 1501.4 describes the use of categorical exclusions (CEs) for projects shown to have minimal impacts. It provides the following procedure in cases where extraordinary circumstances (ECs) are present:

> If extraordinary circumstances are present for a proposed action, the agency should consider whether mitigating circumstances or other conditions are sufficient to avoid significant effects and therefore categorically exclude the proposed action.

Proposed rule at 1501.4(b)(1). This is the type of analysis that should occur in an EA or EIS. The CEQ rule should require that agencies generally prepare at least an EA when ECs are present. An analysis in an EA with full public involvement is needed to demonstrate that "mitigating circumstances or other conditions" are expected to keep impacts below the level of significance. Indeed, the proposed rule has the following provision:

> The finding of no significant impact shall state the means of and authority for any mitigation that the agency has adopted, and any applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.

Proposed rule at 1501.6(c). With no EA and no finding of no significant impact (FONSI), there would be no accountability for agencies to enforce mitigation necessary to keep impacts from possibly becoming significant.

Section 1507.3(e)(5) would allow agencies to specify when they could use CEs established by other agencies. Such use of other agencies' CEs would not even be limited to situations where two or more agencies were jointly developing a project, and one agency's CE was jointly selected to be applied. This is totally inappropriate, as an agency would be using a CE it did not develop, and thus was never intended for that agency's use. It would confuse the public, as people and organizations monitoring agency projects and activities would not know exactly what procedures could be used in what circumstances to document agency decisions. If an agency wishes to use a CE for its own projects, it must state that in its own procedures. In fact, if an agency would, under the proposed rule, state that it could use another agency's CE, it could just as easily adopt, in its procedures, developed with public involvement, the CE for its own use.

CEQ should not attempt to formulate nationwide CEs for agency actions. (See Preamble at 1696.) The individual agencies can better determine in their procedures what actions can be categorically excluded from NEPA. But they must not be given license to exclude from NEPA consideration actions that might have more than very minor impact.

Section 1507.3(c) would encourage agencies to identify in their procedures what projects are exempt from NEPA. This could include proposed non-major federal actions. Id. at (c)(1). An action cannot be excluded from NEPA just because it is considered to be a "non-major" action.

Many proposed actions have impacts that may not appear to be significant, but still need analysis in an EA. See further discussion below in section IX.

IV. **DETERMINING SIGNIFICANCE OF EFFECTS**

The existing rule has a detailed definition of significance at 1508.27, in which an important part of determining significance is the following, under *intensity*:

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

Existing rule at 1508.27(b)(7); emphasis added.

The proposed rule would remove 1508.27 in whole and replace it with weaker criteria for determining significance (proposed 1501.3(b)) and an inferior definition of "effects or impacts" (proposed 1508.8(g)). We feel very strongly that the language in the current rule must be retained. It is especially important to retain all of 1508.27(b), which requires consideration of, inter alia: threatened and endangered species and their habitat, historic and cultural resources, park lands, prime farm lands, wetlands, wild and scenic rivers, and ecologically critical areas, public health and safety, and possible cumulatively significant impacts. These resources are very important to the public. The endorsers of this comment letter work hard every day to protect these features.

Agencies need direction to consider all impacts, including cumulative ones (see section II above), and that they must not avoid consideration of significance and the associated need to prepare an EIS by analyzing smaller parts of a greater whole. Most inappropriately, the proposed rule would encourage and ratify exactly this type of piecemeal, incomplete analysis by not requiring agencies to look at the big picture.

V. **CLIMATE CHANGE IMPACTS MUST BE CONSIDERED AND DISCLOSED, AS APPLICABLE**

The impacts of climate change are becoming ever more evident, with fires, hurricanes and other huge precipitation events, steadily increasing average temperatures, etc. In response to comments received "requesting that the regulations address analysis of greenhouse gas emissions and potential climate change impacts", CEQ responds: "CEQ does not consider it appropriate to address a single category of impacts in the regulations". Preamble at 1710.

Without direction in the rule, there is confusion on whether agencies must disclose impacts of climate change. However, various recent court decisions have said that NEPA requires such

disclosure.[3] For clarity, we believe the NEPA rule should require agencies to disclose, as applicable: a) the impacts of climate change on the ability of agencies to implement actions and manage the impacts therefrom, and b) how the effects of agency actions might exacerbate or alleviate the impacts of climate change.

For actions or projects that may affect or be affected by climate change, agencies should be directed to formulate alternatives that would reduce climate impacts. They should also be directed to consider reasonable mitigation measures that would reduce climate change impacts.

Agencies should be directed to determine how to identify, analyze, and disclose climate change impacts in their own procedures. This is especially important for agencies like the Forest Service and Bureau of Land Management that approve projects, such as oil and gas production and vegetation management, that lead to emission of greenhouse gases or that affect carbon sequestration.

Climate change will be a cumulative impact resulting from implementation of many federally-permitted or -funded projects and activities.[4] Deleting the requirement to identify, analyze and disclose cumulative impacts would thus eliminate any requirement or encouragement for agencies to consider climate change impacts.[5] This is yet another reason the proposal to no longer require consideration of cumulative impacts is absolutely unacceptable. See section II for further discussion of the importance of cumulative impacts.

VI. **ALTERNATIVES**.

An important section of the existing rule reads as follows: Agencies shall…(a) [r]igorously explore and objectively evaluate all reasonable alternatives…". The corresponding section in the proposed rule reads: "Agencies shall…[e]valuate reasonable alternatives to the proposed action".

To ensure every EIS covers the entire range of possible reasonable alternatives and explores all reasonable ways to reduce impacts while accomplishing a project, the language from the current rule should generally be retained. It could be modified to say that sufficient alternatives must be considered in detail to cover the complete range of alternative methods of accomplishing the purpose and need of the proposed action.

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[3] See, e. g., High Country Conservation Advocates v. US Forest Service, 52 F. Supp. 3d 1174 (D. Colo. 2014); Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining, 274 F. Supp. 3d 1074 (D. Mont. 2017); Wild Earth Guardians v. BLM, 870 F.3d 1222 (10th Cir. 2017); Western Org. Res. Councils v. BLM, 2018 U.S. Dist. LEXIS 48500 (D. Mont. Mar. 23, 2018); Wild Earth Guardians v. Zinke, 368 F. Supp. 3d 41 (D. D.C. 2019); and Citizens for Clean Energy and The Northern Cheyenne Tribe v. U.S. Dep't of the Interior, 2019 U.S. Dist. LEXIS 67259 (D. Mont., Apr. 19, 2019).

[4] In previous guidance, CEQ stated "All [greenhouse gas] emissions contribute to cumulative climate change impacts." CEQ, 2016, at 17.

[5] Notably, in its most recent Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, CEQ stated: "a separate cumulative effects analysis [for climate change] is not required". 84 Fed Reg 30098, June 24, 2019.

Any revised rule should also retain language, currently at 1502.14(c) , requiring agencies to consider alternatives not within the jurisdiction of the agency, if part of the purpose and need could be met under such an alternative and the impacts would likely be less than with other alternatives that are under the agency's authority.

VII. **TIME AND PAGE LIMITS, AND "SENIOR AGENCY OFFICIALS"**.

The Preamble discusses the perceived problem of NEPA documents taking too long a time to prepare. (See, e. g., id. at 1685.) There are many reasons for why it takes time to prepare environmental documents, including: 1) projects and associated potential impacts are complex; 2) agency field offices often lack personnel trained in NEPA compliance; 3) agencies often lack sufficient personnel to perform the data gathering and analysis needed to prepare an EA or EIS; and 4) agency personnel are often diverted to other tasks such as firefighting[6].

CEQ even recognizes that various factors can affect agencies' ability to complete environmental documents:

> CEQ recognizes that agency capacity, including those of cooperating and participating agencies, may affect timing, and that agencies should schedule and prioritize their resources accordingly to ensure effective environmental analyses and public involvement.

Preamble at 1699. However, CEQ needs to also recognize that agencies have a limited ability to "schedule and prioritize" their resources due to the factors described above. If personnel are not available due to detail, transfers, retirement, family leave, etc., resources will simply not be available for some projects, regardless of how well the agency schedules and prioritizes.

Nevertheless, the proposed rule would establish a "presumptive time limit for EAs of 1 year and a presumptive time limit for EISs of 2 years". Preamble, ibid.; proposed section 1501.10(b) would establish these limits. Similarly, proposed section 1502.7 would limit EISs to 150 pages, or to 300 for projects of "unusual scope or complexity". A "senior agency official" could establish a new time and/or page limits in writing. (See further discussion below.)

We do not believe it is appropriate to set time limits for completing a NEPA document or page limits for the size of the resulting documents. Artificial deadlines may force, or at least strongly encourage, agency staff to rush completion of data gathering, analysis, and document writing in order to meet the completion date. The result may be an incomplete and/or inaccurate analysis of impacts and ways to avoid or mitigate them. It could also lead to a less than full analysis of reasonable alternatives.

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[6] As discussed in section I, this is a major issue for land management agencies such as the USDA Forest Service and the US DOI Bureau of Land Management, whose personnel are mobilized to fight fires during increasingly long fire seasons. This can leave many of these agencies' offices much understaffed during parts or all of the fire season.

Under the proposed 1501.10(b) and 1502.7, a "senior agency official" could establish a longer time for EIS preparation or longer page limit for documents, respectively. "Senior agency official" is defined as follows:

Senior agency official means an official of assistant secretary rank or higher, or equivalent, that is designated for agency NEPA compliance, including resolving implementation issues and representing the agency analysis of the effects of agency actions on the human environment in agency decision-making processes.

Proposed rule at 1508.8(dd).

Assistant secretaries are usually political appointees. Officials that high in an agency's hierarchy have many tasks to perform, but are not necessarily knowledgeable about, or experienced in, application of NEPA. Adding NEPA responsibilities might overburden them. This proposed rule requirement might even delay NEPA document preparation, as agencies' staffs will realize, well into document preparation, that more time and/or a longer document are in some cases needed to fulfill NEPA and other legal responsibilities, then request more time or permission to prepare a longer document, and have a long wait for a decision on that request by the high agency official.

Certain Presidential administrations, not limited to the current one, have placed emphasis on approving and implementing projects as opposed to carefully identifying, analyzing, mitigation, and disclosing the possible impacts. This means that approval of longer times for document preparation and for longer documents might seldom be approved. The resulting NEPA documents could be expected to be incomplete, leading to unforeseen impacts, which in turn could cause costly project delays.

It might be beneficial for each agency to designate an official who would "be responsible for overall review of agency NEPA compliance". Proposed rule at 1507.2(a). However, it must be someone with some knowledge of, and experience with, applying NEPA. Each agency should be able to find a person within its ranks that has such knowledge and experience and could serve as the overseer of NEPA for his/her respective agency

In any case, time and page limits for preparing NEPA documents are inappropriate and must be removed from the rule.

VIII. **LEGISLATION**.

The proposed rule would change this definition, currently at 1508.17, to remove treaties, because "the President is not a Federal agency, and therefore a request for ratification of a treaty would not be subject to NEPA". Preamble at 1708. However, the Senate would consider ratification of any treaty, per the Constitution. A proposed ratification would generate some public interest, which could, depending on the specific treaty being considered, include environmental impacts. One or more agencies of the federal government would implement provisions of the treaty,

which may generate some environmental impacts. It would thus be valuable to implement NEPA in these situations. The existing language should be retained.

CEQ also proposes to insert ''implementation of'' before ''treaties'' in paragraph (b)(1) to clarify that the major Federal action is not the treaty itself, but rather an agency's action to implement that treaty.

Preamble at 1709. However, an analysis of the possible impacts of a treaty needs to be available to Senators and the public so it can be considered in determining whether to ratify the treaty. Waiting until after ratification would make NEPA moot.

IX. **MAJOR FEDERAL ACTION**.

The proposed rule would clarify the definition of "major federal action:"

…this term does not include non-Federal projects with minimal Federal funding or minimal Federal involvement such that the agency cannot control the outcome on the project.

Preamble at 1709; see also proposed rule at 1508.8(q)(1).

And similarly, the Preamble at 1708 states:

Further, CEQ proposes to codify a key holding of *Public Citizen* relating to the definition of effects to make clear that effects do not include effects that the agency has no authority to prevent or would happen even without the agency action, because they would not have a sufficiently close causal connection to the proposed action.

This concept would be codified at 1508.8(g)(2).

If there is any federal connection to a project, chances are the lead agency does have some control of the outcome, as a needed permit or federal money are likely required before the project can proceed. Determining some projects to be non-major federal actions if they are not completely funded or carried out by federal agencies could allow big projects with substantial funding from state and local governments and/or private interests to escape consideration of impacts. Such projects could have significant impacts, just as a totally federally funded and implemented project can. The cited language would promote confusion as to what projects might be major federal actions.

Part of the proposed rule's definition would also exclude statutorily mandated actions: "Major Federal action does not include nondiscretionary decisions made in accordance with the agency's statutory authority." Proposed rule at 1508.8(q). Just because an agency is required by law to approve and implement a certain activity does not mean the action isn't major, as it would still have some impacts, which in some cases could be significant. Any activity, including those

required by law to be implemented, could still have a significant effect on the human environment, in which case an EIS would have to be prepared. But the proposed rule would not require this for any mandatory activity, no matter how impacting. This is not acceptable.

All projects with any federal involvement, whether that be agency action or funding, and even if legally mandatory, must still be subject to NEPA. Excluding certain projects with more than very minor impacts from NEPA consideration as proposed subverts the intent of NEPA.

X. **NOTICE OF INTENT**

The new description of "notice of intent" would include the following:

> Consistent with CEQ and OMB guidance, agencies should begin scoping and development of a schedule for timely completion of an EIS prior to issuing an NOI.

Preamble at 1699. Indeed, 1501.9(d)(5) states that NOIs must contain "[a] schedule for the decisionmaking process". We believe it is inappropriate to require development of a schedule for decisionmaking before scoping has even begun. The purpose of scoping, after all, is to help the agency determine the depth and breadth of issues to be examined, and which issues might be significant. (see proposed section 1501.9(a). By definition,

> *Scope* consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement.

Proposed rule at 1508.8(cc).

Comments during scoping by the public and other agencies may identify alternatives, issues, and possible impacts the issuing agency was not previously aware of. This could force revision of any schedule established prior to the completion of scoping. If any schedule is needed[7], it should not be established prior to completion, and analysis of the results, of scoping.

The proposal for a notice of intent to include a schedule for completion of the NEPA and decisionmaking processes must be removed from the final rule.

XI. **ENVIRONMENTAL ASSESSMENTS**.

Under the proposed rule at 1505(a), EAs could be used when the significance of the effects of a proposed project or activity is unknown. In many such cases, an EIS should be prepared, such as when there is some indication that impacts could be significant.

The proposed rule would minimize the value of an EA by limiting the discussion of alternatives:

[7] As we argue elsewhere in these comments, we do not believe time limits should be established for completing environmental documents.

An agency does not need to include a detailed discussion of each alternative in an EA, nor does it need to include any detailed discussion of alternatives that it eliminated from study.

Preamble at 1697. As discussed below, EAs are sometimes used to describe the impacts of sizable projects with considerable possible impacts. In these situations, any EA needs to consider alternate means of accomplishing the project or activity's purpose and need while minimizing impacts. Not requiring a detailed description of alternatives considered and those eliminated from detailed study would encourage agencies to not consider alternatives that could reduce impacts. This could also provide less than complete information to the agency decisionmaker and the public about a proposed project.

As with EISs, the public should be given ample and timely opportunities to provide input. However, the proposed rule would limit that with the following provision:

Agencies shall involve relevant agencies, applicants, and the public, <u>to the extent practicable</u> in preparing environmental assessments.

Proposed section 1501.5(d); emphasis added. The highlighted clause should be removed. The public and other interested entities should be involved as much as they wish to be, and agencies should accommodate such parties.

Some EAs are fairly long and detailed, disclosing the impacts of sizable projects with considerable impact.[8] The rule should be amended to require that agencies provide in their procedures an opportunity for the public to review and comment on EAs and any proposed FONSI prior to the FONSI and the decision on the project being issued. The proposed rule would require agencies to provide an opportunity for public review of only FONSIs (not EAs), and only when the proposal is similar to one that would normally require an EIS or the nature of the proposal is one without precedent. Proposed rule at 1501.6(a)(2)(i) and (ii).

EAs, proposed FONSIs, comments received, and any documents used, directly or indirectly in preparation of EAs must be available for public review. The proposed rule only requires this for EISs. See 1506.6(f).[9] But notably, even this paragraph does not require agencies to make available to the public any agency <u>responses</u> to comments on draft EISs. This must be required for both EAs and EISs – comments and responses to them (or summaries of each if they are

[8] For example, the Jack's Gulch project on the Arapaho-Roosevelt National Forest in Colorado has proposed to treat up to 28,095 acres of land, including some in designated wilderness. Impacts would be disclosed in an EA. Go to: www.fs.usda.gov/goto/arp/jacksgulch. The Lake George Area Vegetation Management Project on the Pike-San Isabel National Forest proposes to treat 32,521 acres, 3222 acres of which would be in roadless areas; the impacts were disclosed in an EA. Go to: https://www.fs.usda.gov/project/?project=45969 . On the Grand Mesa-Uncompahgre-Gunnison National, the Taylor Park Project, which would treat 17,714 acres, has been tentatively approved with an EA. Go to: https://www.fs.usda.gov/project/?project=53662 .

[9] The Preamble at 1697 states that: "the proposed rule would not specifically require publication of a draft EA for public review and comment".

especially lengthy[10]) must be part of final EISs and EAs. Responses to comments show the public, cooperating agencies, and other involved parties if, how, and why the agency made or didn't make changes to proposed actions, alternatives, and/or disclosures of impacts.

CEQ long ago recognized the need for adequate public involvement when EAs are prepared:

With the increased use of EAs, often to the overall benefit of the environment, comes the danger that public involvement will be diminished and that individually minor actions will have major adverse cumulative effects. Therefore, as agencies rely more heavily on EAs, agencies need to ensure that they forge true partnerships with other agencies and the surrounding communities. Only then will stakeholders trust that EAs are honestly serving to protect the environment. …

Avoiding an opportunity for public comment on draft EAs and FONSIs can create mistrust and add costs and time as projects are delayed by ensuing controversy and legal challenges. When agencies do not seek interagency and public review of an EA, a fundamental opportunity is lost to build trust with the neighboring community.

CEQ 1997b at 19; emphasis added.

See further discussion on the need for comment opportunities in section XIII below.

The limit of 75 pages (proposed rule at 1501.5(e)) must be removed. As discussed above, some EAs describe fairly large and complex projects and their possible impacts, many of which cannot be adequately addressed in 75 pages. See more detailed discussion in section VII above.

XII. **RETAIN LANGUAGE REQUIRING MATERIAL INCORPORATED BY REFERENCE TO BE AVAILABLE DURING COMMENT PERIODS**

Commendably, the proposed rule retains the following language from existing rule at 1502.21:

No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

Proposed rule at 1501.12.

We strongly encourage the CEQ to retain this language. Incorporating material by reference in NEPA documents is acceptable, as long as that material is available to all potential commenters in time for them to meaningfully review the referenced material and prepare comments on the

[10] If summaries of either comments and responses, or both, are used, the full, unedited version of each must be available to the public upon request at the time of final document issuance.

proposal. Since referenced materials can be lengthy and detailed, they should be available at the very beginning of any public comment period for both EAs and EISs, if not sooner.

XIII. **CERTIFICATION OF CONSIDERATION OF SUBMITTED INFORMATION**

Proposed section 1502.18[11] would require every record of decision to certify that the agency had

> considered all of the alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement. Agency environmental impact statements certified in accordance with this section are entitled to a conclusive presumption that the agency has considered the information included in the submitted alternatives, information, and analyses section.

Emphasis added. See also Preamble at 1703.

This appears to be an attempt to immunize agencies from legal liability over failure to consider information submitted by the public. However, a statement that the agency has considered all information does not mean that such a statement is true, or that "consideration" has been sufficient. In our experience, agencies sometimes give no more than perfunctory consideration to reasonable alternatives suggested by commenters. Some agencies officials may, e. g., in their haste to approve a favored project, fail to consider information that: argues against the proposed project, shows it may have more or more intense impacts than the document indicates, or indicates the project should be modified and/or needs additional mitigation measures. Indeed, the proposals for page and time limits on EISs may, as argued above, lead to incomplete or less than diligent consideration of relevant information.

A much better way to assure that agencies consider all relevant information is to simply require them to do so and to show how they did it in the response to comments. The comments and responses (or summaries if appropriate) should be required to be part of every final EIS and EA. (See further argument in section XI above.) The proposed change to section 1503.4(a)(5), which would eliminate the language highlighted in the quote below, does not help in this regard:

> Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

Existing section 1503.4(a)(5); emphasis added. This language should be retained. In our experience, agencies are sometimes too quick to dismiss issues raised by commenters, often with little or no explanation. Agencies should say why comments do not warrant responses.

[11] This is also found at proposed section 1500.3(b)(4).

Please replace proposed section 1502.18 with the following or similar language:

> Agencies shall consider all timely and relevant comments from any source, and shall discuss in the final documents how they did so. Final EISs and EAs shall include all comments received and agency responses to them. If comments and/or responses are exceptionally lengthy or technically complex, summaries of either or both may be used, but the full, unedited versions of each must be available by the time the final NEPA documents are published to any interested parties upon request. Comments and responses may be placed in appendices to the EIS.

This would reinforce the requirement that agencies must consider public comment, and complement proposed section 1502.17, which requires all EISs to:

> include a summary of all alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement.

The language recommended above could also be used in addition to, or in place of, proposed section 1503.4(b), but both of these sections need to have language requiring agencies to consider public comments.

Under the proposed rule, interested parties might have to file a request under the Freedom of Information Act (FOIA) to obtain comments, responses and other documents:

> Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act, as amended…

Proposed section 1506.6(f).

Interested members of the public must not be required to file a FOIA to obtain comments, responses, or other documents. Agencies have 20 working days to respond to FOIA requests. This would consume a good portion of any administrative review period for most final EISs issued by agencies that allow administrative review of decisions that accompany publication of a final EIS, such as the USDA Forest Service and the USDI Bureau of Land Management. Also, agencies routinely delay fulfillment of FOIA requests. To prevent agencies from withholding documents that interested parties are entitled to, the proposed rule must make it clear that all documents associated with EISs and EAs are easily available to all interested parties no later than the time the final NEPA documents are published.

XIV. **METHODOLOGY AND SCIENTIFIC ACCURACY**

The proposed rule appropriately retains section 1502.24, which requires agencies to ensure the scientific integrity of their analyses. However, it adds the following:

Agencies shall make use of reliable existing data and resources and are not required to undertake new scientific and technical research to inform their analyses.

In some cases, new analyses may be necessary to ensure the full disclosure of impacts, as required by NEPA. For example, projects that might affect threatened, endangered, or other rare wildlife, plant, and fish species may first need surveys to detect these species before potential impacts could be accurately assessed. Please remove the above-quoted statement from the final rule, or reword to state that: agencies can use existing data and analyses to the extent possible, but should undertake new data gathering and studies to the extent needed to ensure full disclosure of all impacts, as well as methods to mitigate such impacts.

CEQ noted in previous guidance the problem of insufficient information:

Unfortunately, in many [] cases, the current lack of quality environmental baseline data severely hampers the requisite thorough scientific comparison of alternatives.

CEQ, 1997b at 27.

Any rule for implementing NEPA must state that agencies are required to obtain and use data as needed to allow full analysis and disclosure of impacts, as required by NEPA.

XV. **ENSURING THE INTEGRITY OF NEPA DOCUMENTS**

The current rule, under a section entitled "Agency Responsibility", contains the following direction:

Environmental impact statements. Except as provided in Secs. 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under Sec. 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

Existing rule at 1506.5(c); emphasis added.

Troublingly, the proposed rule (1506.5) does not contain this requirement to eliminate conflicts of interest. Such conflicts can easily arise with a private applicant's selection of a contractor to prepare all or part of an EIS or EA. The applicant is likely to select only companies that will conclude the applicant's proposal has fewer and/or less major impacts than it may really have.

Indeed, the proposed rule is specifically designed to give private applicants more control over the NEPA process:

> Applicants and contractors would be able to assume a greater role in contributing information and material to the preparation of environmental documents, subject to the supervision of the agency.

Preamble at 1705.

The proposed rule does have the following language, which is similar to the existing rule, for information submitted by an applicant: "The agency shall independently evaluate the information submitted and shall be responsible for its accuracy." Proposed rule at 1506.5(a).

But this is not sufficient to ensure that a contractor doesn't have a financial stake in the outcome of the agency's NEPA and decisionmaking processes. Also, if a contractor hired by the applicant is preparing an entire EIS, it means the agency might not be directly involved in much of the document preparation. Thus the agency's ability to evaluate the information used in the document might be limited.

We believe it is appropriate and necessary, given the increasing use of contractors for NEPA preparation, to require these contractors to sign a disclosure statement certifying they have no interest in the outcome. <u>The language from the existing rule must be retained</u>.

XVI. **CONTROVERSY**.

The existing rule contains a provision that controversy, meaning disagreement by credible experts about the possible impacts of a proposed action or alternative, is a factor in determining whether impacts from that proposed action are likely to be significant, thus requiring preparation of an EIS. Existing rule at 1508.27(b)(4). However, the proposed rule would remove this provision:

> CEQ did not include a consideration regarding controversy ([existing rule at] 40 CFR 1508.27(b)(4)) because this has been interpreted to mean scientific controversy.

Preamble at 1695. This makes no sense. Stating the common interpretation of this provision is not a reason for removing it from the rule.

We believe it should be retained. When there is disagreement among scientists and other credible experts about the potential impacts of a proposed action, an EIS may be necessary to ensure that all relevant studies are considered and that all scientific/expert points of view are represented.

XVII. **EFFECTIVE DATE**. Under proposed section 1506.13, the new rule, if it is finalized, could be applied to documents whose preparation was already in progress. This is inappropriate. The public expects consistency. Dropping analysis of cumulative impacts in projects for which environmental documents are being prepared, e. g., would not be appropriate.

XVIII. **ENVIRONMENTAL DOCUMENT**

The proposed rule provides the following definition at 1508.8(i):

Environmental document means an environmental assessment, environmental impact statement, finding of no significant impact [FONSI], or notice of intent.

Documents that confirm issuance of a categorical exclusion, such as decision memos issued by the U. S. Forest Service, must also be considered environmental documents, as they detail the lack of significant impacts, much as an FONSI does, and the lack of need to prepare more detailed NEPA documents (EA or EIS) .

CONCLUSION

While we agree that some modernization of the current rule would be appropriate, the proposed rule is simply unacceptable. It would reduce requirements for agencies to consider all impacts of their proposals and weaken application of NEPA across the board. Removing the requirement to consider cumulative impacts is especially egregious. The rule must not be finalized in anything resembling its current form.

Please be sure we are notified if a final rule or a new draft rule is issued.

Sincerely,

Rocky Smith, Independent Natural Resources Consultant
1030 N. Pearl St. #9
Denver, CO 80203
303 839-5900
2rockwsmith@gmail.com

Tehri Parker, Executive Director
Rocky Mountain Wild

1536 Wynkoop St.
Denver, CO 80202
tehri@rockymountainwild.org

Anna Lee Vargas, Director, Project Management and Community Outreach
Conejos Clean Water
PO Box 153
Antonito, CO 81120
(719) 580-4833
annalee@cccwater.org

Christine Canaly, Director
San Luis Valley Ecosystem Council
P.O. Box 223
Alamosa, CO 81101
(719) 589-1518 (office)
(719) 256-4758 (hm office)
slvwater@fairpoint.net

David Nickell, Council Chair
Heartwood
West Kentucky Community & Technical College
4810 Alben Barkley Drive
Paducah, Ky 42001
(270) 534-3269
davidl.nickell@kctcs.edu

Jason Christensen, Director
Yellowstone to Uintas Connection
P.O. Box 280
Mendon, UT 94325
435-881-6917
jason@yellowstoneuintas.org

Paul Sieracki, M.S.
Geospatial Analyst/Wildlife Biologist
77 E. Lincoln Ave.
Priest River, Id 83856
Paul.sieracki@gmail.com

Matthew Koehler, Director
WildWest Institute
POB 7998
Missoula, MT 59807
mattykoehler@gmail.com

Keith Hammer, Chair
Swan View Coalition
3165 Foothill Road
Kalispell, MT 59901
406-755-1379 (ph/fax)
406-253-6536 (cell phone)
keith@swanview.org

Gary Macfarlane, Ecosystem Defense Director
Friends of the Clearwater
PO Box 9241
Moscow, ID 83843
(208) 882-9755
gary@friendsoftheclearwater.org

Robyn Cascade, Volunteer Leader
Northern San Juan Chapter/Ouray County
Great Old Broads for Wilderness
c/o PO Box 2924
Durango, CO 81302
northernsanjuanbroadband@gmail.com

Arlene Montgomery, Program Director
Friends of the Wild Swan
PO Box 103
Bigfork, MT 59911
arlene@wildswan.org

Denise Boggs, Director
Conservation Congress
2234 Sierra Vista Cir
Billings, MT 59105
406-707-7007
denise@conseervationcongress-ca.org

Frank Robey
309 Farragut Ave
Mays Landing NJ 08330
Frobey62@gmail.com
207-402-6896

Larry Campbell, Conservation Director

Friends of the Bitterroot
PO Box 442
Hamilton, MT 59840
lcampbell@bitterroot.net

Rosalind McClellan
Rocky Mountain Recreation Initiative
1567 Twin Sisters Rd.
Nederland, CO 80466
720 635-7799
Rosalind.mcclellan@colorado.edu

Bayard Ewing, Chair, Conservation Committee
Colorado Native Plant Society
P. O. Box 200
Fort Collins, CO 80522
970-663-4085
conpsoffice@aol.com

Larry Edwards, President
Alaska Rainforest Defenders
P.O. Box 6484
Sitka, AK 99835
defenders@akrainforest.org

Ernie Reed
Nelson County Board of Supervisors
971 Rainbow Ridge Road
Faber, VA 22938
friendsandforests@gmail.com
434-249-8330

Leslie Lovejoy
Friends of the Routt Backcountry
PO Box 713
Clark, CO 80428
970-879-8710
970 846-9710
leslie@lovejoygraphics.com

Carol Fischer
POB 729
Clark 80428
970-870-1435
alpinecj@aol.com

Matt Reed, Public Lands Director
High Country Conservation Advocates
POB 1066
Crested Butte, CO 81224
866 349-7104
matt@hccacb.org

Franz Froelicher, Member of Board of Directors
Colorado Wild Public Lands
PO Box 1772
Basalt, CO 81612
coloradowildpubliclands@gmail.com

Larry Desjardin, President
Keep Routt Wild
1815 Central Park Drive
Suite 110, PMB 156
Steamboat Springs, CO 80487
larrydesjardin@yahoo.com

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ATTACHMENT A

EXAMPLES OF CATEGORICAL EXCLUSIONS BEING USED FOR LARGE PROJECTS

These examples have been provided by endorsers of this comment letter.

Alamo Mountain II Fuel and Vegetation Treatment Project
Los Padres National Forest
Mt. Pinos Ranger District
12,960 acres
Forest Service CE 6 (approved in 2004)
Prescribed burning and thinning trees less than 16" diameter, including 300 acres within an IRA.

Brookshire Hazardous Fuels Reduction Project
Los Padres National Forest
Santa Lucia Ranger District
30,000 acres
Prescribed burning in chaparral already suffering from overly-frequent burns

Santa Cruz Prescribed Burn Project
Los Padres National Forest
Santa Barbara Ranger District
9,960 acres
CE 6 (approved in 2006)

Tepusquet Fuels Treatment Project
Los Padres National Forest
Santa Lucia Ranger District
19,300 acres
CE 6 (approved in 2009 but withdrawn after a watchdog group filed suit)

Chainsaw cutting, dozers, mechanical treatments including masticator or brush mower, and prescribed burning. Chainsaw cut material would either be piled and burned or chipped.

Ashley NF Aspen Restoration Project - 177,077 acres. Mechanical treatments, thinning and prescribed burning.

Burnt Beaver Restoration Project - 70,772 acres. Mechanical treatments, thinning and prescribed burning.

Middle Fork Henry's Aspen Enhancement Project - 49,000 acres. Mechanical treatments, timber harvest, thinning.