EARTHJUSTICE
BECAUSE THE EARTH NEEDS A GOOD LAWYER

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August 4, 2025

VIA REGULATIONS.GOV
FEDERAL E-RULEMAKING PORTAL

U.S. DEPARTMENT OF AGRICULTURE
1400 Independence Avenue SW
Washington, DC 20250-0108

RE: EARTHJUSTICE COMMENTS ON U.S. DEPARTMENT OF AGRICULTURE'S INTERIM FINAL RULE AND REQUEST FOR COMMENTS REGARDING NATIONAL ENVIRONMENTAL POLICY ACT
Docket ID: USDA-2025-0008

U.S. Department of Agriculture,

Please see enclosed comments submitted by Earthjustice in response to U.S. Department of Agriculture's interim final rule and request for comments regarding National Environmental Policy Act, 90 Fed. Reg. 29632 (July 3, 2025), Docket ID: USDA-2025-0008.

Sincerely,

Jan E. Hasselman
Senior Attorney

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U.S. DEPARTMENT OF AGRICULTURE
1000 Independence Avenue SW
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I. Introduction

The following comments are being submitted to the Department of Agriculture (the "Agency" or "USDA") by Earthjustice, the nation's leading environmental law firm. For many decades, on behalf of hundreds of our clients and partners, Earthjustice has worked to implement the National Environmental Policy Act ("NEPA") in Congress, in the courts, and in the federal agencies to meet its ambitious goals and realize its promise.

The Agency has published an Interim Final Rule ("IFR") that comprehensively revises the Agency's department-level NEPA regulations and rescinds or revises regulations of the Agency's component agencies. *National Environmental Policy Act*, 90 Fed. Reg. 29632 (July 3, 2025). We ask that you carefully consider and respond to these comments, along with the attachments submitted herewith, before implementing this ill-advised plan.

NEPA is the lodestar of America's environmental conscience and actions. In NEPA, Congress articulated environmental policies and goals for the United States while acknowledging the "worldwide and long-range character of environmental problems." 42 U.S.C. § 4332(I). Fully implemented, NEPA can help the nation meet its central environmental challenges, including climate change, the collapse of biological diversity, and the ongoing failure to achieve environmental justice. While full implementation of NEPA has yet to be realized, NEPA's procedural requirements have changed the nature of federal decision making for the better by providing thorough analysis and public involvement. The prior administration's actions to update and modernize NEPA's implementing regulations were a crucial step in the right direction.

Through NEPA, communities have been able to learn ahead of time when their government is proposing to permit the expansion of an airport, a new management plan on a nearby national forest, or a new deepwater port for export of coal. Through NEPA, Americans living, working, and recreating near or on public lands have had an opportunity to consider proposed changes to land management plans and actions such as proposed timber harvest, oil and gas leasing, and road construction, and to influence those decisions. Through NEPA, communities have had an opportunity to have their voices heard before construction of a proposed highway that might divide it.

Receiving public comment is only part of the NEPA process. Those comments must be evaluated and considered by federal agencies when they are making decisions. Through compliance with the previously applicable regulations, federal agencies have learned that they are expected to stop, look, and listen to the public that they serve before committing resources. Through public comments and input from other agencies, lead agencies learn of better

alternatives to achieve a particular goal while minimizing harm to communities, public land, and the environment. Federal agencies have learned important new information about land that it manages or communities in which it operates. In short, while implementation has been far from perfect, Americans have benefitted from the important information and public involvement achieved through NEPA's implementation.

Even so, this administration has expressed relentless hostility towards NEPA and has taken unprecedented steps to undermine it. It declared that development of fossil fuel energy and other natural resources are a higher priority than environmental protection and community engagement. It revoked the Council on Environmental Quality's ("CEQ") long-standing implementing rules, leaving agencies on their own to come up with their own standards, and it has continually sent the message that compliance with NEPA should be kept to a bare minimum. Without the scaffolding and direction of the CEQ rules that have served that role for 50 years, it was incumbent on individual agencies to do more to fill in the gaps in the statute and provide clear standards and direction that will ensure that NEPA's goals are fulfilled.

This IFR does precisely the opposite. It does not include a suitable replacement for the clear standards that had been present in CEQ's most recent regulations. Instead, the Agency's approach leaves the public with little clarity on what will be considered and how they can participate, and it will require courts to evaluate NEPA compliance on a case-by-case basis. This will all but ensure that the Agency will fail to implement NEPA's ambitious goals of informed and transparent decision making. And it will do nothing to achieve the administration's goals of efficiency, certainty, and reduced controversy. To the contrary, it is well-demonstrated that taking the time to disclose impacts, consult with effected stakeholders, and assess alternatives yields great dividends in terms of reducing controversy and getting projects on the ground more efficiently.

We urge you to stop this relentless assault on Congressionally mandated principles. Start by withdrawing the IFR. Initiate a good faith public process to update and overhaul your NEPA implementation procedures. These should be issued as draft rules subject to comment, with a reasonable timeline for comments—far more than what was offered here. In the meantime, commit to adhering to its prior regulations and the 2024 version of CEQ's regulations—the last version adopted by CEQ prior to their revocation—while you engage with the public going forward.

II. The Agency's Process For Finalizing Revisions To NEPA Regulations Is Unlawful And Inadequate.

A. The Agency was obligated to undertake notice and comment before modifying its NEPA regulations.

The Agency's IFR announces sweeping revisions to the Agency's NEPA regulations, effective immediately. The Agency is using an interim final rule, providing a subsequent public

comment period with the potential for a final-final rule to follow. The Agency justifies its inversion of the process by invoking three exceptions to notice and comment rulemaking: for "rules of agency organization, procedure, or practice" ("procedural rules"); for guidance documents (interpretive rules and policy statements); and when the agency, for "good cause," finds that notice and comment is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(A)&(B). The Agency, however, fails to grapple with the limited nature of these exceptions and generally ignores the caselaw that defines their contours.

Courts have found that the Administrative Procedure Act's ("APA") notice and comment exceptions must be "narrowly construed and only reluctantly countenanced" in order to safeguard the underlying principles of the APA that favor public participation and agency information gathering. *New Jersey Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *see also Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984). Indeed, it is "antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later." *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005). Given the presumption favoring public comment in advance of a final rule, the Agency has not adequately justified bypassing the "primary method of assuring that an agency's decisions will be informed and responsive." *New Jersey*, 626 F.2d at 1045.

First, the APA's exception for procedural rules does not apply. The Agency relies heavily on the Supreme Court's recent decision in *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497 (2025), repeatedly citing the opinion's recognition that NEPA is itself a procedural statute. But *Seven County* broke no new ground: NEPA's approach to environmental review of agency action has been acknowledged by the courts since the statute's inception. *See, e.g.*, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (noting that NEPA's "mandate to the agencies is essentially procedural"). Nevertheless, the agency claims a newly articulated categorical rule that regulations that are for "implementing a purely procedural statute must be, by their nature, procedural rules." 90 Fed. Reg. at 29644. This formulation misconstrues the underlying nature of NEPA and the courts' common-sense approach to determining when the exception applies.

Congress's ambitions in passing NEPA were inarguably expansive, seeking to bring about substantively better outcomes for agency decisionmaking. *See, e.g.*, 42 U.S.C. § 4321 (noting that the purpose is "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man"); *id.* at § 4331(b)(1) (establishing that the federal government must "use all practicable means" to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations"). Furthermore, NEPA's procedural demands and its lofty ambitions are intimately linked: the "sweeping policy goals announced in § [4331] of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation omitted; citation modified). In this instance, the procedure *is* the substance. *See, e.g.*, *Seven*

County, 145 S. Ct. at 1510 ("Properly applied, NEPA helps agencies to make better decisions[.]").

In contrast, procedural rules exempted from the APA's notice-and-comment provisions are properly understood to relate primarily to "internal house-keeping measures organizing agency activities." *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Nat'l Lab. Rels. Bd.*, 57 F.4th 1023, 1034 (D.C. Cir. 2023) (discussing the "limited carveout" for procedural rules); *see e.g.*, *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (finding rules governing the processing of petitions to be procedural rules); *Lamoille Valley R.R. Co. v. Interstate Com. Comm'n*, 711 F.2d 295, 327–28 (D.C. Cir. 1983) (finding a modified scheduling deadline to be a procedural rule). The IFR here goes far beyond this narrow "housekeeping" function—for example—by regulating the threshold for applying NEPA, defining when the public will have an opportunity to comment, and establishing the bounds of the Agency's analyses.

Nor have courts applied a simple binary to an underlying statute in order to determine whether the APA's procedural exemption applies. Instead, the focus is on the rules themselves, and the question is "functional, not formal," requiring an examination of how rules affect "not only the 'rights' of aggrieved parties, but their 'interests' as well. *Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 174 F.3d 206, 212 (D.C. Cir. 1999) (citation omitted; citation modified).

The interests at stake here are plain. If the federal government as a whole is to meet the congressional aspirations expressed in NEPA as well as the public's concomitant interest in seeing those aspirations realized, then the Agency's implementing regulations are a critical component. The public has long relied on the influence of NEPA and its procedures to facilitate factual and scientific disclosures, allow communities—including regulated parties—to directly engage with government agencies, and shape outcomes by affecting how agencies address environmental effects and develop mitigation measures. Because appropriate implementing regulations are indisputably critical to NEPA's success, agencies cannot shoehorn their changes into the APA's "procedural" box in order to evade traditional public review.

Second, the Agency's claims fall well short of the stringent requirements needed to establish "good cause." The exception is not intended as an "'escape clause,'" and consequently, a court's inquiry is necessarily "meticulous and demanding." *New Jersey*, 626 F.2d at 1046 (quoting the Senate's APA Committee Report); *see also United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010) (an agency "must overcome a high bar if it seeks to invoke the good cause exception"). A finding of good cause generally should be limited to "emergency situations" or "where delay could result in serious harm," *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (citation omitted). Neither situation is present here.

The Agency contends that conventional rulemaking is "impracticable" and "contrary to the public interest." *See* 90 Fed. Reg. at 29654. The Agency maintains that it must act expeditiously following CEQ's rescission of its own NEPA rules in order to provide certainty and avoid a "makeshift framework" in which Agency regulations cite to and rely on the CEQ

regulations that no longer exist. *See* 90 Fed. Reg. at 29645. But courts have already rejected this very argument. An agency's desire to "eliminate more quickly legal and regulatory uncertainty is not by itself good cause." *California v. Azar*, 911 F.3d 558, 576 (9th Cir. 2018); *see also United States v. Cotton*, 760 F. Supp. 2d 116, 128 (D.D.C. 2011) (collecting cases).

The claimed urgency is entirely a matter of choice. As the Agency concedes, it has been relying on the previous regulatory scheme even after CEQ rescinded its rules. 90 Fed. Reg. at 29644 (has been "continuing to operate under its prior procedures as if the CEQ NEPA framework still existed"). The Agency has made clear that it expects to *continue* to apply the prior rules going forward. 90 Fed. Reg. at 29634 ("[R]evised agency procedures will have no effect on ongoing NEPA reviews . . . ."); *see also* 90 Fed. Reg. at 29644. This comports with CEQ's advice to agencies that they "should consider voluntarily relying on those regulations in completing ongoing NEPA reviews." Memorandum from Katherine R. Scarlett, CEQ Chief of Staff, Implementation of the National Environmental Policy Act, at 1 (Feb. 19, 2025).[1] Under the circumstances, the purported emergency is both legally and factually untenable.

Moreover, the agency could just as easily have used an IFR to temporarily continue relying on CEQ's NEPA regulations, while using traditional notice and comment to develop the next iteration of rules. That approach would minimize any perceived instability and confusion during the transition while allowing the public a greater degree of insight into and influence over the process. Instead, the agency imposed drastic revisions to its implementing regulations while inverting the public comment process under the cover of a manufactured emergency.

Finally, the claim to the APA's exception for statements of policy and interpretive rules does not withstand even the slightest scrutiny. The Agency appears to believe that its prefatory and definitional sections "may" qualify as guidance documents. The Agency suggests that "[a]n interpretative rule provides an interpretation of a statute, rather than make discretionary policy choices that establish enforceable rights or obligations for regulated parties under delegated congressional authority." 90 Fed. Reg. at 29644. It then explains that the "definitions" it had chosen "may be classified as such." 90 Fed. Reg. at 29644. And it explains that the prefatory sections of the new procedures may be classified as general statements of policy, because they "provide notice of an agency's intentions as to how it will enforce statutory requirements, again without creating enforceable rights or obligations for regulated parties under delegated congressional authority." 90 Fed. Reg. at 29644. Other than asserting it must be so, the Agency does not explain why these portions of the prior and new regulations must be classified this way—after all, the definitions and prefatory components of CEQ's NEPA regulations long have played a role in determining whether the Agency has met its NEPA obligations. In any event, even assuming this thinly reasoned and tentatively expressed claim has merit, there is no

[1] https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf (last visited July 30, 2025).

justification—and the Agency provides none—for exempting an entire rule based on select portions qualifying as guidance documents.

B. A 30-day comment period is insufficient.

Nonetheless, the Agency has "elected voluntarily to solicit comment." 90 Fed. Reg. at 29645. Solicitation of comments after the rules have been changed is hardly an indicator of good faith. And the selected process—a brief 30-day comment period that commenced just before a holiday weekend—is the opposite of good government.

This revision to the Agency's NEPA process was substantial, amounting to a comprehensive, substantive revision of the Agency's approach to implementing NEPA. And yet, the Agency has called for substantially less public engagement than CEQ allowed with past revisions to NEPA regulations. When CEQ initiated the rulemaking that resulted in the 2020 regulations, it first issued an advance notice of proposed rulemaking, where it ultimately gave commenters 61 days to respond. *Update to the Regulations Implementing the Procedural Provisions of NEPA*, 85 Fed. Reg. 1684, 1690 (Jan. 10, 2020). CEQ then issued a notice of proposed rulemaking, which provided for another 60 days of public comment. *Id.* at 1684. When CEQ kicked off the Phase 1 NEPA rulemaking in 2021, it offered a 45-day comment period. *See* NEPA, *Implementing Regulations Revisions*, 87 Fed. Reg. 23453, 23455 (Apr. 20, 2022) (final rule describing commenting process). For the Phase 2 rulemaking in 2023, CEQ again used a 60-day comment period. NEPA, *Implementing Regulations Revisions Phase 2*, 88 Fed. Reg. 49924, 49924 (July 31, 2023) (notice of proposed rulemaking). On top of longer comment periods, these rulemakings also called for public meetings. *Id.* (Phase 2, four public meetings); 86 Fed. Reg. at 55757 (Phase 1, two public meetings); 85 Fed. Reg. at 1684 (2020 ANPRM, two public hearings). Here, by contrast, no public meetings have been called for.

Giving the public less time to digest and respond makes little sense. It would take considerable time just to understand the regulatory changes any given agency has made. The Agency has disregarded the most recent NEPA regulations, and it replaced them with a hodgepodge of the most recent CEQ regulations, portions of the 2020 CEQ regulations that had been discarded, and some new provisions. It has made its changes all the more undecipherable by including only a short regulatory preamble that describes the changes in only the most general terms. There is no clear explanation of all the ways the current approach differs from the regulations—both Agency-specific and CEQ—that came before, let alone an explanation for why the Agency believes this approach to be preferable. In other words, it will take time to digest what issues the new NEPA process raises and are worth commenting on.

The challenge is multiplied in light of the number of agencies modifying their guidance at the same time. It would be difficult enough to work through these kinds of changes for a single agency. That effort is more challenging still where, as here, the public is expected to respond to at least fifteen distinct agency actions, each of which purports to make sweeping changes from what came before. Any expectation that the public can comprehensively respond in 30 days is

wrong at best and cynical at worst. On behalf of our clients and partners we have asked for an extension of the comment deadline but have not even received the courtesy of a response, let alone an explanation for why an extension was denied.

III. The Agency Has Not Adequately Explained Its New Approach To NEPA Review.

When an agency makes a decision, it must "give adequate reasons" for that decision. *Encino Motorcars v. Navarro*, 579 U.S. 211, 221 (2016). It must at least "articulate a satisfactory explanation for its action." *FCC v. Fox Television Stations*, 556 U.S. 502, 513 (2009). Where an "agency has failed to provide even that minimal level of analysis," its decision cannot stand. *Encino Motorcars*, 579 U.S. at 221. The Agency has not sufficiently explained its new NEPA rules here. While we provide specific examples of this failure to explain throughout this comment letter, three general points bear emphasis.

First, despite comprehensively rewriting the Agency's NEPA rules, the explanation it has given is extraordinarily thin. There is no real explanation in the short regulatory preamble, and the few scraps of reasoning in the IFR do not support the sweeping changes the Agency has made.

Second, the Agency has failed to acknowledge, yet alone explain why, it has deviated from the NEPA review process required by either its prior rules or the 2024 CEQ regulations. The Agency is not writing on a blank slate, so it was required to explain why it took a different approach here.

Finally, the Agency has not resolved tensions between the approach it has adopted to NEPA review and differing approaches adopted by other agencies.

A. The Agency did not sufficiently explain its new rules for implementing NEPA.

To explain its new NEPA process, the Agency has included only a short regulatory preamble that refers to rules it has adopted in the most general of terms. What is lacking is any "reasoned explanation for its action." *Fox*, 556 U.S. at 515; *cf. Tourus Records v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) ("That is not a statement of reasoning, but of conclusion. It does not 'articulate a satisfactory explanation' for the agency's action."). The "conclusory" explanations contained in the preamble—pitched at a general level and not to justify any specific rules it has adopted—"fall[] far short of what is required" for non-arbitrary decisionmaking. *See Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 253 (D.C. Cir. 2013).

Indeed, as to its overall explanation for the changes, the Agency asserts that its "new implementing procedures . . . are a more faithful implementation of the statute . . . than its old procedures." 90 Fed. Reg. at 29634. It then offers the conclusory assertion that "[w]here USDA has retained as aspect of its preexisting NEPA implementing procedures, it is because that aspect is compatible with these guiding principles; where USDA has revised or removed an aspect, it is

because that aspect is not so compatible." 90 Fed. Reg. at 29635. None of this suffices to meet the Agency's obligation to explain its decision. The Agency does provide some explanation for certain (though not all) provision-level changes, but in many instances, it merely describes the provision without offering any explanation for its choice. *E.g.*, 90 Fed. Reg. at 29637 (describing elimination of the requirement to prepare a draft environmental impact statement, without any explanation for this change). The Agency should explain all of the provisions it has adopted (or omitted).

B. The Agency has failed to adequately explain its change in position from its prior NEPA rules and CEQ's approach to NEPA review.

That lack of explanation also violates another cornerstone of administrative law. Agencies are "free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars*, 579 U.S. at 212. An agency must at least "display awareness that it *is* changing position." *Fox*, 556 U.S. at 515. It cannot "depart from a prior policy sub silentio." *Id.* And, in the end, the Agency "must show there are good reasons for the new policy," and where an explanation was given for the prior policy, "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515–16. Indeed, where an agency contradicts an earlier discussion or earlier findings, it must explain its approach. *See U. S. Sugar Corp. v. EPA*, 830 F.3d 579, 650–51 (D.C. Cir. 2016). The Agency has failed to satisfy this obligation, on two levels.

First, the Agency has departed from what its prior NEPA rules required. Those changes have been substantive—eliminating, for example, the requirement that the Agency prepare a draft environmental impact statement ("EIS") and solicit public comment on the same. Despite these substantive shifts, the Agency has not offered a word of explanation for them. In fact, it has conceded that it takes no "position on the Department's or any USDA agency's prior interpretations of NEPA's procedural requirements." 90 Fed. Reg. at 29645. Even if some changes may require little explanation—for example, removal of references to CEQ regulations that are no longer on the books—substantive changes in the Agency's NEPA process surely do.

Second, the Agency has not just removed references to CEQ's implementing regulations but has, in many respects, departed from the substantive approach CEQ has used for decades. Yet it has not explained why it changed its approach to implementing NEPA from what the most recent CEQ regulations required. Since 1979, CEQ's regulations have been the touchstone agencies have looked to in establishing their own process for implementing NEPA. A version of those regulations have been in place until earlier this year, when CEQ rescinded them. *See Removal of National Environmental Policy Act Implementing Regulations*, 90 Fed. Reg. 10610, 10611 (Feb. 25, 2025).

It cannot be disputed that the Agency has departed, in multiple ways. For example, while the CEQ regulations required that the agency "shall . . . [r]equest the comments of . . . [t]he

public" when preparing a "draft environmental impact statement," 40 C.F.R. § 1503.1, [2] the Agency now has made that step optional. 90 Fed. Reg. at 29666 (7 C.F.R. § 1b.7(m)). The Agency has not sufficiently explained that shift. *See* 90 Fed. Reg. at 29637 (merely describing the shift). Similarly, the CEQ regulations provided clear definitions about the types of environmental effects agencies should consider. 40 C.F.R. § 1508.1(i) (describing "direct effects," "indirect effects," and "cumulative effects" and the role for considering "environmental justice concerns" and "climate-change-related effects"). These were considered choices made by CEQ and long implemented by the Agency and backed up with pages of reasoning. *See National Environmental Policy Act Implementing Regulations Revisions Phase 2,* 89 Fed. Reg. 35442, 35538–39 (May 1, 2024). And yet the Agency has eliminated those portions of the regulations, leaving nothing to replace them, and it did so without a word of explanation.

In still other examples, the Agency has included provisions that CEQ previously rejected as inappropriate, confusing, or unwise. Take, for example, the provision that indicates that the Agency will prepare a supplemental environmental impact statement only if "a major Federal action remains to occur." 90 Fed. Reg. at 29670 (7 C.F.R. § 1b.9(r)). Just last year, CEQ explained that it was using a different phrase "incomplete and ongoing," precisely because "remains to occur" was "vague" and the latter phrase provided "more clarity." 89 Fed. Reg. at 35499. While the two terms have the "same substantive meaning," the agency's failure to display any awareness that it was making a shift, let alone explain its reason for doing show, is strong evidence that the Agency has not contended with the prior regulations. *See Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582, 598 (D.C. Cir. 2023) (agency displayed no "awareness of its own flip flop").

In another example, the Agency has exempted actions from NEPA review where the "proposed action is an action for which another statute's requirements serve the function of the Federal agency's compliance with the act." 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2((e)(6)). That approach conflicts with the statute, but it also conflicts with recent CEQ guidance. Just last year, CEQ declined to include such a requirement because it goes "beyond the scope of the NEPA statute and case law" and "could be construed to expand functional equivalence beyond the narrow contexts in which it has been recognized." 89 Fed. Reg. at 35459–60. CEQ explained that decision across two pages, and yet again, the Agency here took the opposite approach but offered no explanation or engagement with these formidable issues. These are just a few examples out of many where the Agency abruptly changed course without explaining why.

Nothing the Agency said in its limited explanation for its new NEPA rules could support refusing to engage with CEQ's regulations and reasoning.

[2] All citations to the NEPA regulations in 40 C.F.R. refer to the 2024 version of the regulations, unless otherwise specified.

To start, the Agency's explanation that that there are no "reliance" interests does not justify its failure to explain its changed position. 90 Fed. Reg. at 29634. That argument operates from the flawed premise—addressed above—that the rules implementing NEPA are procedural. In any event, the absence of reliance interests does not mean that the Agency would owe no explanation. All that means is that the "agency need not . . . provide a *more* detailed justification than what would suffice for a new policy created on a blank slate." *Fox*, 556 U.S. at 515 (emphasis added). But it still must "show that there are good reasons for the new policy." *Id.* The agency has not met even that bare minimum requirement here.

Second, the fact that CEQ's regulations have been rescinded does not justify ignoring its latest guidance and reasoning on the appropriate way to implement NEPA. CEQ did not remove its NEPA regulations because they represented an improper interpretation of the statute. Rather, as CEQ explained, it removed the regulations because Executive Order 14154 directed their removal and CEQ could identify no other authority for issuing binding NEPA regulations. *See* 90 Fed. Reg. at 10613. Even if CEQ's approach to implementing NEPA no longer can be binding, its views on the best way to implement the statute and extensive explanation for those views have not gone away. The "reasons for the old" policy are still on the books, so the Agency must "show that there are good reasons for the new policy." *Fox*, 556 U.S. at 515. Declining to consider decades of CEQ experience with the statute also no doubt "entirely fail[s] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Accordingly, the Agency was obligated to explain any differences in the approach it took.

In fact, as discussed further below, Congress has repeatedly signaled its acquiescence in CEQ's regulations, reflecting that CEQ's prior interpretation would be the best interpretation of NEPA. Likewise, as CEQ itself acknowledged in rescinding its regulations, the Supreme Court has looked to those regulations as appropriately implementing the statute. 90 Fed. Reg. at 10613 (collecting cases). For both of these reasons, the Agency would be expected to engage with CEQ's interpretations before it changes course.

There are additional reasons that an Agency must heed CEQ's views. NEPA instructs agencies that when they are "develop[ing]" their "methods and procedures," they must do so "in consultation with the Council on Environmental Quality." 42 U.S.C. § 4332(B). This reflects a continuing obligation to account for CEQ's approach to implementing NEPA. Indeed, CEQ recognized as much in its interim final rule rescinding its regulations. 90 Fed. Reg. at 10612. Moreover, it always is CEQ's obligation to "formulate and recommend national policies to promote the improvement of the quality of the environment." 42 U.S.C. § 4342. Where CEQ has spoken clearly, and repeatedly, on what policies achieve those goals, agencies must take notice. And even if the Agency were free to disregard CEQ's guidance, the Agency still must at least explain why it has come to a different view.

Third, the Agency also is wrong that the need to implement the Fiscal Responsibility Act could justify starting from scratch and ignoring CEQ's regulations. After all, the Act incorporated longstanding features of CEQ's regulations, *see* 89 Fed. Reg. at 35443 ("The amendments codify longstanding principles drawn from CEQ's NEPA regulations . . . ."), and CEQ already had made extensive "revisions to the regulations to implement the amendments to NEPA made by the Fiscal Responsibility Act," 89 Fed. Reg. at 35447. If anything, throwing out CEQ's considered response to the FRA with nothing to replace it violates Congress's directive.

Finally, the Supreme Court's decision in *Seven County* also does not justify abandoning CEQ's regulations. To the extent that decision required any "course correction of sorts," it was not for the executive branch, but for courts, "some" of which "ha[d] assumed an aggressive role in policing agency compliance with NEPA." *See Seven County*, 145 S. Ct. at 1511, 1514. It makes no sense to read that decision as calling for changing—let alone abandoning—the longstanding regulatory approach embodied in CEQ's regulations. The validity of CEQ's regulations was not before the Court. To the contrary, the Court held that the agency's application of those regulations produced a decision that warranted deference because the agency's "approach complied with NEPA and this Court's longstanding NEPA precedents." *See id.* at 1511, 1515. Indeed, the Court affirmed one component of CEQ's regulations—that "indirect effects can sometimes fall within NEPA," *id.* at 1515—that this Agency has left on the cutting room floor. There is nothing in the decision to suggest that it invites the executive branch to revisit CEQ's regulations, or even that the Court would approve of the approach to environmental review—an approach that removes process that ensured "the agency has addressed environmental consequences and feasible alternatives," *id.* at 1511—the Agency has adopted here.

C. The Agency has not explained inconsistencies between its approach to implementing NEPA and other agencies' approaches.

There is one other glaring lack of explanation present in the Agency's IFR: There are unexplained inconsistencies between this Agency's approach to implementing NEPA and approaches adopted by other agencies. While some modest difference for administrative efficiencies and the Agency's unique missions is warranted, these distinctions transcend such purposes and get to the core issues that should be consistent across agencies.

To take just one example, this Agency is inconsistent with other agencies on whether agencies are required to provide the public an opportunity to comment on draft EISs. Indeed, the Agency does not require issuance of a draft EIS, raising the possibility that a core feature of NEPA will be circumvented at the discretion of the Agency. Yet other agencies still mandate the preparation of a draft EIS. FERC Staff Guidance Manual C.1(d). If other agencies can mandate these features in their NEPA process, why has this Agency omitted it? It does not say.

IV. The IFR Unlawfully And Arbitrarily Weakens The Public's Role In NEPA's Implementation.

Public participation in the NEPA process, "in cooperation" with the government, has been central to the execution of NEPA since its inception. 42 U.S.C. 4331(a). By its very text, NEPA requires public participation in the processes it creates. But the Agency has reshaped the process in a way that weakens or eliminates the guarantee of public participation that is at the heart of the statute. Not only does this violate both the letter and spirit of NEPA itself, but the Agency's failure to explain its reasoning for this drastic change is arbitrary and unlawful. The Agency has indicated, without explanation, that it intends to pull back on public participation that has long been a guaranteed part of NEPA review, including during the process of developing an EIS. The Agency should ensure that public participation—through comment on scoping, draft EISs, and other NEPA documents—remains a core part of the process.

A. Seeking out and considering public input on NEPA documents represents the very core of NEPA.

The Supreme Court has long recognized the centrality of public participation in NEPA. The Court has noted that NEPA guarantees that "relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson*, 490 U.S. at 349. In this way, it's not enough to simply publish an environmental document that the public may passively review. "Publication of an EIS, both in draft and final form . . . serves a larger informational role." *Id.* It gives the public "assurance that the agency has indeed considered environmental concerns in its decisionmaking process" and "*more significantly*, provides a springboard for public comment." *Id.* (emphasis added) (citations omitted); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (EIS designed to "provide a springboard for public comment" (citation modified)). Allowing the public to participate early on addresses NEPA's "manifest concern with preventing uninformed action," because it is through the "broad dissemination of information" that "the public" can "react to the effects of a proposed action at a meaningful time." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). Such disclosure allows the public to meaningfully participate in NEPA, as Congress intended. To strip this mandate from NEPA would be "incongruous with [NEPA's] approach to environmental protection." *Marsh*, 490 U.S. at 371.

The Courts of Appeals have reached the same conclusion. For example, the Second Circuit held that NEPA required "an environmental full disclosure" so that the public could "weigh a project's benefits against its environmental costs." *Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1049 (2d Cir. 1985). Allowing the public to weigh costs against benefits is meaningless if the public cannot provide comments to the relevant agencies with that weighing in mind. Rather, an agency must invite comment, and respond; doing so "insures the integrity of the agency process by forcing it to face those stubborn, difficult-to-answer objections without ignoring them or sweeping them under the rug." *Id.* Likewise, the Ninth Circuit has recognized the "crucial role" that public engagement plays in "realizing NEPA's policy goals." *Prutehi*

Litekyan: Save Ritidian v. U.S. Dep't of Airforce, 128 F.4th 1089, 1101 (9th Cir. 2025). Both public notice and the public participation it supports "are at the heart of the NEPA review process." *California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982). This emphasis on public participation reflects the "paramount Congressional desire to internalize opposing viewpoints into the decision-making process" before an agency arrives at a final decision. *Id.* at 771. To that end, it is not enough to provide "public notice," because NEPA requires "public participation in the evaluation of the environmental consequences of a major federal action." *Id.*

B. Data demonstrates that public input improves government decisionmaking.

Beyond its centrality to the purpose and function of NEPA, it is well-demonstrated that public participation in the NEPA process improves the quality of agency action. A recent empirical study of 108 EISs over a period of 22 years indicates that public comment influences agency decision making and provides valuable information for agencies. *See* Ashley Stava et. al, *Quantifying the Substantive Influence of Public Comment on United States Federal Environmental Decisions Under NEPA*, 20 Env't Rsch. Letters, Jun. 10, 2025, at 1. Public comments submitted under NEPA procedures were linked to substantive decision alterations in 62% of cases. *Id.* Federal agencies credited changes in project alternatives to public comments in nearly 90% of cases. *Id.* And where mitigation plans were modified, agencies credited the public comment process 100% of the time. *Id.*

The data, and consistent behavior of agencies across various administrations and over two decades, shows the value of public comment in the NEPA process. Agencies modify their actions in response to public participation because public participation is *valuable*. *Cf.* Admin. Conf. of the U.S., *Public Participation in Agency Adjudication (Final Report)* 6 (2025) ("[Agencies]" frequently need information from regulated entities, regulatory beneficiaries, unaffiliated experts, and citizens with situated knowledge to fully understand regulatory problems and potential solutions, to make fully informed decisions."). Removing the public's ability to participate in the NEPA process will certainly reduce the quality of future agency action because it will cut off a supply of valuable perspectives, critiques, and insights that agencies do not have the capacity to investigate themselves. *Cf.* Admin. Conf. of the U.S., *Public Engagement in Rulemaking (Final Report)* 1 (2019) ("Robust public participation is vital to the rulemaking process. By providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules.").

Substantial evidence demonstrates that public participation "improves the substantive quality, legitimacy, and accountability of environmental assessments and decisions," in addition to fulfilling "norms of popular sovereignty." Nat'l Rsch. Council, *Public Participation in Environmental Assessment and Decision Making* 226 (Thomas Dietz & Paul C. Stern eds., 2008). Public participation in the NEPA process "at the outset ensures a more productive and efficient outcome." United States Env't Prot. Agency, *Better Decisions Through Consultation and*

Collaboration 2 (2008); *see also* Nat'l Rsch. Council, *supra*, at 51 ("[P]articipation increases public understanding of science and scientists' and agency officials' understanding of public concerns, thus enabling future participatory processes to proceed more efficiently.").

C. Public participation has long been central to agency NEPA procedures.

Of course, prior to now, the federal government has long recognized the value, and necessity, of public participation in the NEPA process. CEQ's 1978 implementing regulations announced the centrality of public participation to NEPA. CEQ's implementing regulations were crafted to "tell federal agencies what they must do to comply with the procedures and achieve the goals of [NEPA]." *National Environmental Policy Act—Regulations*, 43 Fed. Reg. 55978, 55990 (Nov. 29, 1978). As such, CEQ's 1978 regulations highlighted that, among other things, "public scrutiny [is] essential to implementing NEPA." *Id.* Recognizing that NEPA was designed to make "better decisions" and "not better documents," CEQ's initial policy statement directed federal agencies to "encourage and facilitate public involvement in decisions which affect the quality of the human environment" to the fullest extent possible. *Id.* at 55991.

This public involvement in NEPA procedures must entail information sharing *and* public input to agencies if it is to help create "better decisions." To fulfill this requirement, CEQ mandated that when drafting an EIS an agency must "[r]equest comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected." *Id.* at 55998. This public involvement in the EIS process was not one-sided: an agency was required to "assess and consider comments both individually and collectively" and "respond," ensuring that public participation in the NEPA process was not just aesthetic, but in fact substantial. *Id.* Elsewhere, CEQ made clear that where public participation is concerned, agencies have an affirmative duty to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." *Id.* at 56001. This language highlights the intent that NEPA foster cooperation between the government and the public through public participation—as highlighted in NEPA itself. *See* 42 U.S.C. 4331(a). To facilitate these efforts, CEQ required agencies to "solicit appropriate information from the public," solidifying the understanding that NEPA affirmatively demands public participation. 43 Fed. Reg. at 56001.

This emphasis on public comment and input continued even during periods when administrations sought to streamline NEPA processes. In its 2020 overhaul of its regulations, for instance, which significantly weakened NEPA's reach in ways we and other organizations explained were unlawful, CEQ nonetheless focused on maintaining public access to agencies by increasing agency flexibility in doing public outreach. *Update to the Regulations Implementing the Procedural Provisions of NEPA*, 85 Fed. Reg. 43304, 43337 (July 16, 2020); *see also id.* at 43356 ("The final rule expands the already wide range of tools agencies may use when providing notice to potentially affected communities and inviting public involvement."). CEQ's manifest concern was for maximizing the ability of the public to participate in NEPA proceedings. *See, e.g.*, *id.* at 43371 ("When selecting appropriate methods for public involvement, agencies shall

consider the ability of affected entities to access electronic media."). To that end, CEQ required agencies to "provide for agency websites or other means to make available . . . relevant information for use by agencies, applicants, and interested persons." *Id.* at 43374. CEQ's focus on facilitating public participation confirms its importance in NEPA's procedural scheme.

Similarly, in its 2024 revisions to the NEPA implementing regulations CEQ repeatedly stressed its interest in ensuring "full and fair public participation [in NEPA procedures] and a process that informs the public about the potential environmental effects of agency actions." 89 Fed. Reg. at 35447. CEQ sought to increase the ability of the public to participate in NEPA procedures, recognizing the value and necessity of such participation. *See, e.g.*, *id.* at 35476 (expanding public comment requirements for EAs in order "to reflect current agency practice and provide the public with a clearer understanding about potential public participation opportunities"). In the end, the 2024 regulations included multiple provisions on notice and comment on EISs, 40 C.F.R. §§ 1503.1–1503.4; *see also* 40 C.F.R. § 1501.5(e) (comment on environmental assessments). While the CEQ implementing regulations have been revoked, the fact that public participation in the NEPA process was mandated for over fifty years—across a spectrum of changing administrative goals and ideologies—demonstrates the value and importance of public participation in NEPA and highlights the importance of agency-specific rules and procedures that accomplish this key objective.

D. Congress has accepted that public input is crucial to NEPA's implementation.

While the statute itself contains relatively little explicit direction on public comment and input, the fact that Congress acquiesced to CEQ and the Court's long-standing interpretation of NEPA confirms that it is in fact statutorily mandated. "[C]ongressional acquiescence" to a practice or interpretation of an administrative agency indicates its approval under two conditions: the practice must be "long-standing," *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980); *cf. NLRB v. Noel Canning*, 573 U.S. 513, 524–25 (2014) (explaining that "long settled and established practice is a consideration of great weight" in ascertaining whether the coordinate branches have respected the separation of powers), and the circumstances must illustrate Congress's "extensive awareness" of the interpretation or action to which it has allegedly acquiesced. *Schism v. United States*, 316 F.3d 1259, 1289, 1295–96 (Fed. Cir. 2002); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983).

An "unusually strong" showing of Congressional acquiescence can be made when Congress considers and rejects alternative proposals and when its enactments reference or take for granted the agency practice. *See Schism*, 316 F.3d at 1259 (quoting *Bob Jones*, 461 U.S. at 599); *see also Bob Jones*, 461 U.S. at 600–01 (referencing Congressional hearings "on th[e] precise issue" making Congress's "non-action . . . significant"); *Dames & Moore v. Regan*, 453 U.S. 654, 678–60 (1981) ("By creating a procedure to implement" claims settlement by executive agreement, Congress "implicitly" "placed its stamp of approval on such agreements."); *Five Lakes Outing Club v. United States*, 468 F.2d 443, 446 (8th Cir. 1972) (procedure long

employed by Commissioner had gained court approval, and was "acquiesced in by Congress" before "expressly incorporated into the Code"); *Farmers Coop. Co. v. Comm'r of Internal Revenue*, 288 F.2d 315, 323–24 (8th Cir. 1961) ("over forty years" of "rulings and administrative practices" followed by congressional action "at least impliedly approved" that interpretation).

Congress has shown longstanding, extensive awareness of CEQ's NEPA regulations and authority and has at least implicitly agreed that they constitute appropriate interpretations of the statute. Indeed, in a few places, Congress done even more, directly incorporating CEQ's regulations by reference in many places. *See, e.g.*, 33 U.S.C. § 2348a(a) (defining categorical exclusion, environmental assessment, and finding of no significant impact with reference to CEQ's implementing regulations); 23 U.S.C. § 139(d)(5) (defining a cooperating agency with reference to CEQ's implementing regulations); 16 U.S.C. § 6511(7)(C) (defining a decision document with reference to applicable CEQ regulations). Congress has also legislated against the backdrop of CEQ's NEPA regulations many times, such as with the recent Fiscal Responsibility Act, through which Congress enacted the first major statutory changes to NEPA in fifty years. *See* Pub. L. No. 118-5, 137 Stat. 10 (June 3, 2023). That legislation clarified certain procedural aspects of NEPA's implementation, incorporating some of CEQ's prior regulations into statutory text, without any indication that Congress looked askance at CEQ's interpretations of NEPA's requirements to seek out and consider public input on NEPA documents. Other examples include requiring agencies to comply with the regulations for specific projects or exempting agencies from the regulatory requirements altogether. *See, e.g.*, Building Chips in America Act of 2023, Pub. L. 118-105, 138 Stat. 1587 (Oct. 2, 2024).

All of this illustrates that Congress has accepted that the longstanding CEQ regulations reflect the appropriate interpretation of NEPA as a general matter. There is even more evidence that Congress has accepted CEQ's public participation requirements. Congress has directly legislated against the backdrop of CEQ's public participation requirements. Through the Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. No. 114-94, 129 Stat. 1312 (Dec. 4, 2015), Congress, in part, streamlined the review process for certain federal infrastructure projects. For example, Congress expressly required agencies to establish public comment periods of 45 to 60 days for all draft EISs, and public comment periods not exceeding 45 days for all other environmental review and comment periods. 42 U.S.C. § 4370m-4(d)(1)–(2). But even though streamlining was the goal, these provisions still took for granted that public comment periods were *required* under NEPA: a statutory minimum indicates that public comment periods are not optional. The 45-day minimum it legislated came from CEQ's rules. 85 Fed. Reg. at 43372 ("[A]gencies shall allow at least 45 days for comments on draft statements."). By legislating in this way, Congress confirmed the necessity of public participation to NEPA.

E. NEPA requires agencies to respond to public comment.

Finally, it is not enough to allow the public to comment. The law is clear that agencies must also respond. Under the APA, agencies are required to "adequately explain [their] result and

respond to relevant and significant public comments." *Pub. Citizen, Inc. v. F.A.A.*, 988 F.2d 186, 197 (D.C. Cir. 1993) (citation modified); *see also W. Coal Traffic League v. Surface Transp. Bd.*, 998 F.3d 945, 954 (D.C. Cir. 2021) ("[F]ailure to respond to significant comments . . . violates a substantive guarantee of the APA."); *Ohio v. EPA*, 603 U.S. 279, 293–94 (2024) (finding EPA was likely to have acted arbitrarily and capriciously because it failed to respond to concerns raised in the notice and comment period). Failure to respond to public comments "generally demonstrates that the agency's decision was not based on a consideration of relevant factors." *Liliputian Sys., Inc. v. Pipeline and Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (citation modified). Indeed, these principles apply with equal force when an agency engages in the NEPA process. *See Block*, 690 F.2d at 773. Agencies are "obliged to provide a meaningful reference to all responsible opposing viewpoints concerning the agency's proposed decision." *Id.* (citation modified). Agencies must produce "good faith, reasoned analysis in response" to public comments. *Id.*

F. The Agency's new approach is unlawful because it is contrary to statute and unexplained.

All of this long history and well-established understanding of NEPA has been eviscerated by the Agency. No longer is there any requirement to seek out and consider public comment. Indeed, it appears that issuance of a draft EIS and consideration of public comment is now optional. By cutting the public out of NEPA review, agencies are undermining the very purpose of NEPA, in direct contradiction of Congressional, Judicial, Administrative, and public understanding of the role the American people play in safeguarding the environment at the federal level.

The Agency's choice is not only contrary to statute, but it also has failed to explain why it has made this dramatic shift. *See, e.g.*, 90 Fed. Reg. at 29637. A recent Ninth Circuit decision illustrates precisely why the Agency's new procedures are arbitrary and capricious and inconsistent with NEPA. In *Montana Wildlife Federation v. Haaland*, 127 F.4th 1 (9th Cir. 2025), the court considered a challenge to a BLM policy that reduced the comment period for oil and gas lease sales from 30 days to only ten days, and eliminated any public participation for determinations of NEPA adequacy. The court ruled that the change was arbitrary and capricious because:

> the justification offered for a change in policy . . . cannot be inconsistent with the purpose of the requirement being implemented. Here, the agency's decision to prioritize administrative efficiency and expedition of oil and gas production over deliberative decision-making that takes into account informed public comments is in direct tension with NEPA's goal of informing the public and facilitating public participation. . . . By curtailing the opportunities available for public input in land management decisions for the sole purpose of more expeditious offerings of oil and gas leaseholds, the agency 'entirely failed to consider an important aspect of the problem,' one embedded in NEPA.

Id. at 39 (citation modified). The court also held that the change was inconsistent with NEPA, holding that "whether the agency's new policy is permissible under the statute" as interpreted by longstanding regulations and practice "is also doubtful when considered in the context of [BLM's] earlier policy." *Id.* at 39–40.

The same is true here: The Agency's gutting of public participation in the NEPA process fails to consider the law's goal of facilitating public information and participation. And the Agency's long-standing practice of providing public participation opportunities under NEPA underscore how inconsistent with the statute the new procedures are.

Of course, the Agency may point to provisions in the statute and its NEPA process that call for comment at the notice of intent stage. But this is wildly insufficient. At that stage, there is usually little or no detailed information about the proposed action, its potential impacts, and the range of potential alternative for the public to comment on. While we agree that comment on a notice of intent is valuable, it is no substitute for participation in scoping proceedings, let alone comment at the draft EIS stage, when the project has been fully fleshed out and the Agency has taken a first look at its potential impacts and alternatives. We urge the Agency to revisit its rules and guidance and in the meantime continue to maximize public engagement and comment in order to comply with NEPA.

V. The IFR Unlawfully Conflicts With The Forest Service's Pre-Decisional Objection Processes.

The IFR creates an unlawful catch-22 for members of the public potentially affected by proposed Forest Service actions for which the agency prepares an EA. On one hand, the IFR allows the Forest Service to complete the NEPA process without providing the public any opportunity to comment on such proposed actions. But on the other hand, the Forest Service's mandatory pre-decisional objection processes allow objections to be filed only by those who have previously "submitted timely, specific written comments . . . during any designated opportunity for public comment." 36 C.F.R. § 218.5(a) (2017); *see also id.* § 219.53 (2017). And anyone who fails to file an objection via the pre-decisional process is barred from seeking judicial review. 7 U.S.C. § 6912(e). The IFR does not explain how the Forest Service will reconcile these provisions. Will the absence of a "designated opportunity for public comment" relieve the public of the Forest Service's "specific written comments" prerequisite for administrative objections? Or will agency officials instead seek to rely on the interaction between the Interim Final Rule and the Forest Service's objection process to deprive members of the public of their right to seek judicial review of agency action as guaranteed by the APA, 5 U.S.C. § 702. The latter would be unlawful. To avoid such an unlawful result, the Agency must afford the public an opportunity to comment, prior to the objection process, on all proposed actions.

Further, the IFR creates a similar catch-22 even for actions where the Forest Service affords some opportunity for public comment. For actions requiring an EIS, the IFR authorizes

the Forest Service to limit the public's opportunity to comment to the "notice of intent" stage, before the agency has made available to the public detailed information about the project, environmental analyses, and potential alternatives under consideration. Yet, the Forest Service's objection processes require that any "[i]ssues raised in objections must be based on previously submitted specific written comments regarding the proposed project or activity." 36 C.F.R. § 218.8(c); *see also id.* §§ 219.54(c)(7), 219.55(a)–(b) (2017). This "specific written comments" requirement impermissibly burdens the public with an obligation to comment with a level of specificity that likely will be impossible to achieve at the notice of intent stage. Moreover, while the objection process contains an exception to this restriction for issues "based on new information that arose after the opportunities for comment," *id.* § 218.8(c), the IFR does not explain how the Forest Service will interpret this provision when the only opportunity for comment is at the notice of intent stage. *See also id.* § 218.8(d)(6) (requiring objectors to show that each objection was raised in a prior comment, "unless the objection concerns an issue that arose after the designated opportunity(ies) for comment"); *id.* § 219.54(c)(7) (same). Will objections to conclusions drawn in a final EIS or EA be barred if those objections rely on pre-existing information or "issues," even if the objector could not have known that the agency would reach a conclusion to which that pre-existing information was relevant, that misapplies that information, or that implicates a particular issue? Will commenters at the "notice of intent" stage be required to load their comments with every piece of potentially relevant information and every conceivable "issue" to avoid being precluded from relying on such information or raising such "issues" in a subsequent objection? The IFR does not answer these questions.

Moreover, limiting public comment to the notice of intent stage runs contrary to the purpose of the exhaustion provisions of the Forest Service's objection process, which is to "encourage early and active involvement by the public in project planning and analysis." *See Final Rule, Project-Level Predecisional Administrative Review Process*, 78 Fed. Reg. 18481, 18487 (Mar. 27, 2013). The best way to achieve meaningful "early and active involvement by the public" would be to require agencies to publish draft EAs and EISs on their proposed projects and afford opportunities for public comment on those documents—not to narrow the public's involvement opportunities to the minimum extent possible, as the IFR has done here.

VI. Executive Order 14154 Does Not Justify The Approach Taken By The IFR.

The Agency has made clear that its revision to its NEPA regulations and guidance has been animated by "President Trump's direction in E.O. 14154 to, '[c]onsistent with applicable law, prioritize efficiency and certainty over any other objectives, including those of activist groups, that do not align with the policy goals set forth in section 2 of [that] order or that could otherwise add delays and ambiguity to the permitting process.'" 90 Fed. Reg. at 29635 (quoting Executive Order 14154, §5(c) (Jan. 20, 2025)).

Section 2, in turn, emphasizes policy goals like "encourag[ing] energy exploration and production," Executive Order 14154, § 2(a), "establish[ing] our position as the leading producer

and processor of non-fuel minerals," § 2(b), "protect[ing] the United States's economic and national security and military preparedness," § 2(c), and "promot[ing] true consumer choice,"§ 2(e); *see also* § 2(f). There are two problems with the Agency's reliance on this executive order to justify its new NEPA processes: (1) The executive order is inconsistent with NEPA's requirements; and (2) the procedures implemented by the Agency fail to satisfy the executive order on its own terms.

A. Executive Order 14154 is inconsistent with NEPA.

A NEPA process that seeks to achieve "efficiency and certainty over any other objective" and aims to implement only the policy goals enumerated in section 2 of the executive order are fundamentally inconsistent with NEPA. While efficiency and more assurances as to outcomes are worthy objectives, the statute does not allow them to be prioritized over the protection of human and environmental health, as the executive order demands.

NEPA, not the executive order, declares the relevant policy of the federal government. It serves to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321, and it establishes that the "continuing policy of the Federal Government" is to "use all practicable means and measures . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans," 42 U.S.C. § 4331(a). The whole of the "Federal Government" thus must "use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources" to various "end[s]," including, among others, "assur[ing] for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," and "preserv[ing] important historic, cultural, and natural aspects of our national heritage." 42 U.S.C. § 4331(b). Accordingly, if the Agency took the executive order to allow it to disregard these policies and goals, its NEPA revisions cannot stand.

Indeed, to the extent NEPA gestures at any of the goals embraced by section 2 of the executive order, it reflects a need to balance those ends with other goals. *See* 42 U.S.C. § 4331(b)(3) ("attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences"); § 4332(b)(4) (balancing "maintain[ing]" "variety of individual choice" with the need to "preserve important historic, cultural, and natural aspects of our national heritage"); § 4332(b)(5) ("achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities"). There is no statutory support for considering "efficiency and certainty," or the policy goals enumerated in section 2, to the exclusion of all other aims—especially the ones called out in the statute itself, including NEPA's express purpose of environmental protection, *see* 42 U.S.C. § 4321.

The statute also confirms the marching orders the "agencies of the Federal Government" must follow. *See* 42 U.S.C. § 4332(B). Agencies are not directed to prioritize "efficiency and

certainty" or to pursue the specific aims discussed in section 2 of the executive order above all else. Rather, "[a]ll agencies of the Federal Government" have long been required to be in "full compliance with the purposes and provisions of this chapter," including those just discussed. 42 U.S.C. § 4333. They must "identify and develop methods and procedures . . . which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." 42 U.S.C. § 4332(B).

The Agency's adherence to this executive order, rather than NEPA's statutory text, also places it on the wrong side of Supreme Court precedent. While agencies are "not constrained by NEPA from deciding that other values outweigh the environmental costs," they must ensure that they have followed "the necessary process," which in turn includes ensuring that "adverse environmental effects of the proposed action are adequately identified and evaluated." *Robertson*, 490 U.S. at 350. It is through NEPA's public-facing procedures—not a process that seeks efficiency and certainty over all else—that the "sweeping policy goals" found in § 4331 are implemented. *Id.* To that end, the "twin aims" of NEPA are an "obligation to consider every significant aspect of the environmental impact of a proposed action" and "ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (citation modified). The goal of "[a]dministrative efficiency and consistency of decision" should give way if NEPA's requirements are not otherwise met. *See id.* at 101.

In short, NEPA identifies the policy goals it intends agencies to pursue in promulgating regulations implementing it, and they are not those goals that agencies have elected to pursue by relying on Executive Order 14154. The Agency should reconsider its NEPA implementation decisions for that reason alone.

B. The NEPA process the Agency adopted does not achieve the efficiency and certainty goals of the executive order, in any event.

In any event, as evidenced further in these comments, the Agency has failed to implement the President's command.

To start, among the policies enumerated in the executive order is a "guarantee that all executive departments and agencies (agencies) provide opportunity for public comment and rigorous, peer-reviewed scientific analysis." Executive Order 14154, § 2(h). But these NEPA rules provide no guarantee of such public comment. The Agency has declined to require public comment when it establishes or revises any categorical exclusion. 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(b)). When it does engage in environmental review, it has declined to guarantee public comment where the Agency determines that a categorical exclusion applies, or where the Agency uses an environmental assessment ("EA"). *See generally* 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3) (categorical exclusions); 90 Fed. Reg. at 29659–61 (7 C.F.R. § 1b.5) (environmental assessments). Indeed, the Agency has declined to guarantee public involvement

in any scoping proceedings preceding environmental review. 90 Fed. Reg. at 29662 (7 C.F.R. § 1b.7(c)). And the Agency has curtailed the level of public involvement in the environmental impact statement process, requiring comment only at the notice of intent stage while omitting the guarantee of public participation on any draft environmental impact statement. 90 Fed. Reg. at 29662–63 (7 C.F.R. § 1b.7(d)); *see also* 90 Fed. Reg. at 29662 (7 C.F.R. § 1b.7(b)). Accordingly, the Agency's approach to NEPA review fails to the Executive Order by its own terms.

Moreover, these choices, and others, have undermined "efficiency and certainty" and will produce "delay and ambiguity" in the permitting process. Executive Order 14154, § 5(c). There is ambiguity and uncertainty about when, exactly these new rules will start to apply. Notwithstanding the Agency's insistence that it proceed by interim final rule, the Agency also has indicated that the "revised agency procedures will have no effect on ongoing NEPA reviews" where the old rules still will apply. 90 Fed. Reg. at 29634. The Agency stacks confusion on confusion, including in one part of the preamble a suggestion that the "revised agency procedures will have no effect on ongoing NEPA reviews" because "it will continue to apply" the old rules, 90 Fed. Reg. at 29634, while suggesting elsewhere that "USDA subcomponents have discretion to continue using the versions of USDA and agency-specific NEPA regulations" that existed before the IFR, *id.* at 29644. Still more, the Agency provides that it would be free to apply the "2020 version of the CEQ NEPA regulations," *id.*, which are not the most recent version of the CEQ NEPA regulations. So, it's a mystery about what rule is going to apply to any given NEPA review.

There also is nothing efficient about different components of the federal government, the public, and project proponents having to navigate a complex web of ever-changing rules that vary from agency to agency. There is a reason that CEQ is meant to "formulate and recommend national policies to promote the improvement of the quality of the environment." 42 U.S.C. § 4342. CEQ could draw on the experience of all of government to develop best practices, and it could at least recommend a consistent set of practices that would produce those results. One of the primary drivers of the government establishing consistent, uniform regulations across the federal government in the first place was to address the ways "inconsistent government-wide practices" had "impeded Federal coordination and made it more difficult for those outside government to understand and participate in the environmental review process." 43 Fed. Reg. at 55978. It was that difficulty that "caused unnecessary duplication, delay and paperwork." *Id.* Where each agency, including this one, has elected to go it alone, compliance with NEPA will be less efficient. With CEQ's regulations rescinded and no assurance that agencies are following a common set of principles, all involved will have to account for differences across agency NEPA review processes. In other words, this Agency—along with others—have recreated problems that the government solved nearly 50 years ago.

The substance of the Agency's NEPA rules further demonstrates it has embraced an ambiguous approach. Underscoring that the governing rules are subject to change, it has made clear that even the universe of available categorical exclusions remains fluid: Even if no

currently available categorical exclusion would cover a proposed action, the Agency will consider whether "the proposed action warrants the establishment of a new categorical exclusion, or the revision of an existing categorical exclusion." 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2(f)(2)). And in other areas, the Agency has elected not to provide clear, substantive criteria that will inform the public, project proponents, or other components of the federal government. For example, it may, but is not required to, consider certain environmental effects. 90 Fed. Reg. at 29660 (7 C.F.R. § 1b.5(b)); 90 Fed. Reg. at 29664 (7 C.F.R. § 1b.7(g)(3)). In many key areas, the Agency has provided little guidance. It instead emphasizes that resolving issues that arise in those areas is a matter of the Agency's expert judgment or discretion. That is the guiding principle on significance, 90 Fed. Reg. at 29662 (7 C.F.R. § 1b.7(a)), what issues are addressed, 90 Fed. Reg. at 29660 (7 C.F.R. § 1b.5(b)); 90 Fed. Reg. at 29664 (7 C.F.R. § 1b.7(g)(3)), and whether an action is a "major Federal action" in the first place. 90 Fed. Reg. at 29647 (7 C.F.R. § 1b.2(e)(1)). The Agency has not explained the basis for all this newfound discretion, and it's an approach that amplifies the risk of inconsistent environmental review that NEPA was meant to address.

This approach amplifies the risk of inconsistent environmental review that NEPA was meant to address.

In the past, public comment—and the Agency's response to those comments—could be relied on to shape an Agency's analysis. But there is uncertainty about the level of public involvement the Agency will choose. It may, but is not required to, "request" comments from the "public" during "the process of preparing an environmental impact statement." 90 Fed. Reg. at 29663 (7 C.F.R. § 1b.7(d)). Even where it takes comment, the Agency has explained that "[t]here is no requirement in NEPA to address comments in writing," and thus has retained "discretion for addressing substantive comments in writing." 90 Fed. Reg. at 29638. While it says elsewhere that it "shall consider and should address in writing that raise substantive issues and/or recommendations," 90 Fed. Reg. at 29663, it is unclear whether the Agency is committed to do so. So, there is uncertainty about whether the Agency will accept comment and, if it does, whether it will respond.

In short, no one will know what NEPA review will look like for any given project, and given the possibility that the Agency will not fully respond to comments, there will be uncertainty about what the Agency actually considered. And there will be no way to rely on what an Agency has done in the past to inform what material might be useful to the Agency going forward. Where discretion and flexibility is the guiding principle, the Agency may be left to start from scratch whenever they encounter a new proposal.

Finally, there is yet another efficiency cost of the Agency electing to proceed without public involvement. As discussed above, public involvement *helps* the Agency identify the relevant universe of environmental effects and alternatives, potential mitigation options, and other information the Agency would be expected to evaluate. Public involvement surfaces

"reliable data source[s]" necessary for evaluating environmental impacts, 42 U.S.C. § 4336(b)(3), so that the Agency does not have to locate that material all by itself. And experience shows that engaging the public and listening to their concerns reduces controversy and boosts the likelihood that projects will be timely permitted and built. Public involvement saves agencies' time while producing better environmental reviews.

In other words, whatever time savings might be gained by cutting corners in the environmental review process will be overcome by the time lost to inefficiencies, uncertainties, and controversies resulting from the new rules. To be sure, the Agency has in places retained its discretion to do more than the bare minimum. But this just reinforces the point that the goals of certainty and efficiency are better served by having a consistent and predictable set of rules that project proponents and the public, and the Agency itself, know up front will apply.

Moreover, the data reflects that the need for time savings is overstated. Recent data showed that, in the wake of the 2023 amendments and the regulatory reforms of the previous administration, the trend towards longer and longer EIS and EA timelines had been reversed. For example, in a 2025 Report, CEQ found that federal agencies "benefitted from recent statutory, regulatory, and executive reforms to the NEPA process and significant cross-government investments to expedite permitting processes." CEQ, Environmental Impact Statement Timelines (2010-2024), at 1 (Jan. 13, 2025). Progress is also documented in a 2024 fact sheet that explained how thoughtful reforms and investments accelerated the timeline for project permitting. White House, Fact Sheet: Biden-Harris Administration Takes Action to Deliver More Projects More Quickly, Accelerates Federal Permitting (Aug. 29, 2024).[3] Rather than rush to gut NEPA altogether, the administration should have given these reforms time to work. At a minimum, the Agency should explain its reasoning for its action in light of this documented success.

In the end, these skipped steps in the environmental review will contribute to yet another kind of delay and uncertainty. There will be serious questions about whether the Agency's NEPA decisions will withstand judicial scrutiny. If an agency has failed to "address[] environmental consequences and feasible alternatives as to the relevant project," it casts doubt on whether the Agency's decision is "reasonably explained." *Seven County*, 145 S. Ct. at 1511. Granted, the Agency enjoys some discretion about what to do with "new potential information" it receives, in terms of "determin[ing] whether and to what extent" to address that information. *Id.* at 1512 (quoting *Pub. Citizen*, 541 U.S. at 767). But there is no refuge for an agency that creates processes that allow it to "entirely fail[] to consider an important aspect of the problem" or "articulate a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43. Indeed, now, just as before, NEPA cannot be implemented to allow an agency to "act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 371. Because the

[3] https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/08/29/fact-sheet-biden-harris-administration-takes-action-to-deliver-more-projects-more-quickly-accelerates-federal-permitting/ (last visited July 30, 2025).

Agency gives NEPA's processes short shrift, project proponents will have less certainty, not more, that their projects can go forward, and there will be an increased likelihood of delay resulting from an agency needing to redo an inadequate environmental review. That benefits no one.

For all these reasons, the Agency should reevaluate its decision to eliminate many of the features of the existing regulations that ensured efficiency and certainty in their NEPA reviews.

VII. The Agency Adopted Impermissible Threshold Limitations On When NEPA Applies.

NEPA specifies four "threshold" circumstances where an "agency is not required to prepare an environmental document with respect to a proposed agency action." 42 U.S.C. § 4336(a). The Agency has attempted to inject two additional restrictions as threshold issues. The Agency should revisit its approach to these requirements.

A. The Agency should revisit its approach to the major Federal action requirement.

The Agency has explained that NEPA review is not required where "[t]he proposal is not a 'major Federal action,'" where the "terms 'major' and 'Federal action' each have independent force." 90 Fed. Reg. at 29647 (7 C.F.R. § 1b.2(e)(1).).

The Agency does not explain why adding such a statement is necessary or appropriate. *See* 90 Fed. Reg. at 29635. The earliest cases interpreting NEPA—including those that predated CEQ's regulations—declined to give the "magnitude of the federal action"—that is, the "major" in "major Federal action" much additional bite. *Minn. Pub. Int. Rsch. Grp. v. Butz*, 498 F.2d 1314, 1321 (8th Cir. 1974). When a major Federal action "significantly affect[s] the quality of the human environment," an EIS is required. 42 U.S.C. § 4332(C).

Congress added its own definition of the major Federal action requirement with the recent statutory amendments. 42 U.S.C. § 4336e(10). But that provision did not adopt the Agency's approach. Instead, it provided only that the term "means an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility." 42 U.S.C. § 4336e(10). When CEQ implemented the statutory amendments in the 2024 regulations, it defined the requirement the same way. 40 C.F.R. § 1508.1(w); 89 Fed. Reg. at 35543–48. The Agency has not explained whether this statement is meant to be a change from what came before, and if it is, why such a change is necessary or even advisable.

In fact, the Agency offers little in the way of guidance about how to apply the major Federal action requirement. Whereas the 2024 regulations provided examples of what constitutes "substantial Federal control and responsibility" and what does not, 40 C.F.R. § 1508.1(w), the Agency here has stated only that "[s]uch a determination is dependent upon the facts and circumstances of each situation, and is thus reserved to the judgment" of the Agency. 90 Fed. Reg. at 29647 (7 C.F.R. § 1b.2(e)(1)). But the Agency does not have unlimited discretion to

determine what constitutes a major Federal action; where an action constitutes major Federal action within the meaning of the statute, NEPA requires the Agency to go through environmental review, and the statute does not provide offramps except where specified. *See* 42 U.S.C. § 4332(C). And that is true even if the Agency initially exercises its judgment to conclude otherwise. *See, e.g.*, *City of Dania Beach v. FAA*, 485 F.3d 1181, 1189 (D.C. Cir. 2007); *Wild Fish Conservancy v. Thom*, 2021 WL 8445587, at *18 (W.D. Wash. Sept. 27, 2021).

In the meantime, the omission of guidance about what constitutes a major Federal action is sure to sow confusion and uncertainty, which in turn will result in litigation about whether actions are, in fact, major Federal actions. By including what could appear to be a narrower threshold to the major Federal Action requirement while omitting the examples CEQ once included, 40 C.F.R. § 1508.1(w)(1), has the Agency indicated that it no longer considers those to be major Federal actions? There is no way to know since there is no explanation offered. There is no need for this confusion, and the Agency should clarify that it continues to consider these actions as qualifying as major Federal actions under the statute.

B. The Agency has created a functional equivalence exception that is not supported by the statute.

The Agency also has sought to exempt from NEPA review situations where "[t]he proposal is an action for which another statute's requirements serve the function of the Federal agency's compliance with the Act." 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2(e)(6)). The Agency's creation of a blanket "functional equivalence" exception to NEPA review is unlawful and unfounded.

When Congress amended NEPA in the Fiscal Responsibility Act, Pub. L. No. 118-5, 137 Stat. 10, it foreclosed reliance on the "functional equivalence" doctrine to exempt Agency proposals from NEPA. Congress amended NEPA section 102(2)(C), 42 U.S.C. § 4332(2)(C), to clarify that agencies can avoid the broad mandate to prepare NEPA analyses of "every" proposal for "major Federal action[]" "where compliance would be inconsistent with other statutory requirements." Pub. L. No. 118-5, § 321(a)(3)(A), 137 Stat. at 38. The revised NEPA section 106 explains that narrow exemption, limiting the circumstances where another statute relieves agencies of their duty to "prepare an environmental document" under NEPA to only where (1) "the proposed agency action is excluded pursuant to … another provision of law" or (2) "the preparation of such document would clearly and fundamentally conflict with the requirements of another provision of law." 42 U.S.C. § 4336(a)(2), (3).

The Fiscal Responsibility Act adopted "elements of the BUILDER Act." 169 Cong. Rec. S1,877 (daily ed. June 1, 2023) (statement of Senator Capito); *see* Pub. L. No. 118-5, § 321, 137 Stat. at 38. Congress declined, however, to endorse the functional equivalence exemption, which the BUILDER Act, as originally proposed, would have codified. *See* H.R. 1577, 118th Cong. § 2(b) (2023) (proposed section 106(a)(6)).

Congress's codification of express, narrow exemptions from NEPA's mandate that federal agencies prepare NEPA documents for proposed actions precludes agencies from creating an implied "functional equivalence" exemption, which Congress considered and declined to adopt. *See United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, . . . [t]he proper inference . . . is that Congress . . . limited the statute to the ones set forth"). The inclusion of *any* functional equivalence requirement cannot be squared with the statute. It thus should be excluded from the rules for that reason alone.

Moreover, CEQ in the past has expressly declined to create this categorical functional equivalence exception to NEPA review, as it would go "beyond the scope of the NEPA statute and case law" and "could be construed to expand functional equivalence beyond the narrow contexts in which it has been recognized." 89 Fed. Reg. at 35459–60. Indeed, while in the past, some courts applied a judge-created "exemption from [NEPA's] literal requirements" to a narrow subset of "environmentally protective regulatory actions" taken by federal "environmental agencies" like U.S. Environmental Protection Agency, that exemption has never been extended to proposals to conduct destructive activities made by non-environmental agencies. *Env't Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973); *see Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973) ("NEPA must be accorded full vitality as to non-environmental agencies."). The Agency has not acknowledged CEQ's prior explanation, let alone explained its basis for deviating from it. Accordingly, it is unlawful for the agency to include such a requirement.

VIII. The Agency Has Impermissibly Expanded the Use Of Categorical Exclusions.

A. The Agency's process for adopting categorical exclusions inappropriately excludes public comment.

In the 2024 CEQ regulations, agencies were required to "substantiate" any "proposed new or revised categorical exclusion with sufficient information to conclude that the category of actions does not have a significant effect, individually or in the aggregate, on the human environment." 40 C.F.R. § 1507.3(c)(8). Importantly, the agency is meant to "provide this substantiation in a written record that is made publicly available as part of the notice and comment process." *Id*. The Agency has abandoned that commitment here. 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(b)). The Agency has not explained the reason for making public comment optional, nor has it explained why a change from the prior approach is justified. And such a shift makes little sense—in determining whether a "category of actions . . . *normally* does not significantly affect the quality of the human environment," 42 U.S.C. § 4336e(1) (emphasis added), the Agency should solicit broad feedback about the effects a particular type of action can have. The Agency should guarantee public comment or at least explain its reasoning for turning around long-settled standards.

B. The Agency has placed its thumb on the scale of applying categorical exclusions.

The Agency also appears to have modified its standards to make it easier to apply categorical exclusions, without justification or explanation. For example, the Agency has given itself multiple bites at applying categorical exclusions. Even where an existing categorical exclusion might not apply to the action, the Agency then must "consider whether to adopt" a categorical exclusion that "another agency has already established" or even to "establish[]" a "new" exclusion (or revise an old one) to cover the action. 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2(f)(2)). This stands at sharp odds with past practice: CEQ had provided only limited authority to adopt categorical exclusions in the context of a particular action, permitting agencies to do so in the context of more "programmatic" environmental review, where agencies would necessarily be taking a broader view. 40 C.F.R. § 1501.4(c); *see* 89 Fed. Reg. at 35472.

Extending this authority to reach a single action undermines the whole point of a categorical exclusion—that the Agency has assured itself that across a category of actions, that the category "normally does not significantly affect the quality of the human environment." 42 U.S.C. § 4336e(1). When the Agency can reach out to find a categorical exclusion to resolve its environmental review in the context of a specific case, that puts a thumb on the scale of finding that the categorical exclusion applies, and it creates a risk that the Agency will not appropriately consider the broad set of contexts in which that category of actions can arise. Accordingly, the Agency should limit the circumstances where it can adopt new categorical exclusions, or at least ensure that the normal safeguards for proper adoption of such exclusions will apply with equal force when categorical exclusions are adopted in case-specific contexts.

C. Agencies impermissibly permit combining application of multiple categorical exclusions to exempt actions not covered by a single exclusion.

The Agency indicated that it may be authorizing the unlawful combining or "stacking" of categorical exclusions to preclude environmental review of actions that would not be covered by a single exclusion. The Agency explained that, "[t]o apply a categorical exclusion, a responsible official must determine that one or more categorical exclusions apply to a proposed action and that no extraordinary circumstance exists." 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(g)); *see also* 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(e)). The IFR's reference to "one or more categorical exclusions" could be read as an invitation to combine multiple categorical exclusions to short circuit environmental review of a project, even though no single exclusion would cover the entire project.

This workaround, also known as "stacking" categorical exclusions, is unlawful because it runs contrary to NEPA's structure and purpose by allowing agency actions with potentially significant impacts to evade NEPA review. *See* 42 U.S.C. §§ 4336(a)(2), (b)(2); *Friends of the Inyo v. U.S. Forest Serv.*, 103 F.4th 543, 556–57 (9th Cir. 2024).

Starting with the statutory text, NEPA requires an agency to prepare an EIS or EA unless "the proposed agency action is excluded pursuant to *one of* the agency's categorical exclusions, another agency's categorical exclusions consistent with section 4336c of this title, or another provision of law." 42 U.S.C. § 4336(b)(2) (emphasis added); *see also* 42 U.S.C.§ 4336(a)(2) (same). By specifying that, to be exempt from the EA or EIS requirement, the agency action must be covered by "one of" the categorical exclusions, Congress made clear that agencies may not combine multiple categorical exclusions to exclude a single proposed action. *Cf. Friends of the Inyo*, 103 F.4th at 554–55 (plain text of Forest Service regulations requiring proposed action to fall within "one of' the categorical exclusions or within "a" categorical exclusion does not permit "the agency to combine CEs when no CE alone could cover a proposed action").

NEPA's structure and purpose leads to the same conclusion. Under NEPA, categorical exclusions serve to streamline the environmental process while still ensuring that actions with potentially significant environmental effects receive adequate review, by allowing agencies to forego preparation of an EA if an agency has already determined that the type of action at issue does not normally have significant environmental effects. *See id*. at 556; 42 U.S.C. § 4336e(1). But combining multiple categorical exclusions to avoid preparing an EA for an action that would not be covered by a single categorical exclusion undermines this function. As the court in *Friends of the Inyo* explained: "Any project can be broken down into seemingly innocuous independent acts. The fact that the Forest Service has found CEs normally do not have a significant effect on the human environment, does not mean they have no effect, and combining carefully defined exclusions renders these calculated risks unknown." *Friends of the Inyo*, 103 F.4th at 557 (internal quotation marks and citation omitted).

Consider this example drawn from the categorical exclusions discussed in the IFR. While the Forest Service may have determined that certain mineral or energy investigations lasting less than a year normally lack a significant environment effect, 90 Fed. Reg. at 29657 (7 C.F.R. § 1b.4(d)(32)), it has not made such a determination for a project that includes such an investigation *as well as* activities covered by other categorical exclusions, such as conducting initial oil and gas development activities involving up to four drill sites and three miles of pipelines, 90 Fed. Reg. at 29658 (7 C.F.R. § 1b.4(d)(39)), constructing new telephone and utility lines within a right of way, 90 Fed. Reg. at 29657 (7 C.F.R. § 1b.4(d)(27)), widening up to eight miles of road shoulders, 90 Fed. Reg. 29659 (7 C.F.R. § 1b.4(d)(45)), modifying a dam, 90 Fed. Reg. at 29658 (7 C.F.R. § 1b.4(d)(40)), constructing administrative buildings at administrative sites 90 Fed. Reg. at 29659 (7 C.F.R. § 1b.4(d)(43)), and conducting up to 2,800 acres of timber harvesting, prescribed burning, and vegetation thinning, 90 Fed. Reg. at 29659 (7 C.F.R. § 1b.4(d)(47)).

Combining such categorical exclusions to avoid preparing an EA or even an EIS circumvents NEPA's information-forcing function and undermines the statute's core environmental protection purpose. Accordingly, the Agency should make clear in the final rule

that combining categorical exclusions is impermissible where a single exclusion does not cover the entire project.

D. The Agency circumvented NEPA by authorizing the Agency's subcomponents to use dozens of categorical exclusions established by another agency.

The IFR violates NEPA by making dozens of previously subcomponent-specific categorical exclusions applicable to all of the Agency's subcomponents without complying with NEPA's procedures for doing so, including inter-agency consultation and a reasoned determination that the use of the exclusions in each agency's particular context is appropriate. *See* 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(e)); 90 Fed. Reg. at 29650–59 (7 C.F.R. § 1b.4). For example, any of the Agency's subcomponents may now use the omnibus "Construction or ground disturbance" categorical exclusion, originally authorized by the Farm Service Agency (FSA), which is applicable without limitation to construction of roads, bridges, dams, dikes, levees, diversions, irrigation systems, farm storage facilities, water pipelines, and tanks, as well as to excavation, grading, leveling, shaping, and filling in previously undisturbed areas. 90 Fed. Reg. at 29654 (7 C.F.R. § 1b.4(d)(1)). But while such activities might have been determined by the FSA normally not to have a significant environmental effect on the types of farming projects the FSA is involved with, those activities take on an entirely different tenor when conducted, for instance, in National Forests. Indeed, categorical exclusions originally developed by the Forest Service expressly limit many of these activities, such as road construction and dams, to prevent significant impacts on sensitive National Forest environments. *See* 90 Fed. Reg. at 29659 (7 C.F.R. § 1b.4(d)(46)) (road construction categorical exclusion limited to two miles); *id.* at 29658 (7 C.F.R. § 1b.4(d)(40)) (categorical exclusion limited to removing, replacing, or modifying dams to restore wetlands or other water bodies). No similar limitations appear in the FSA's "Construction or ground disturbance" categorical exclusion. And there is no reason to believe that the Forest Service has determined, or would determine, that any of the other activities listed in this FSA-originated omnibus exclusion normally have no significant environmental impact in the National Forest context. Yet, under the IFR, the Forest Service could choose to apply the FSA-originated omnibus categorical exclusion and ignore the limitations imposed by the similar categorical exclusions it had developed for itself. More broadly, under the IFR, any of the Agency's subcomponents can now use any of the categorical exclusions listed in § 1b.4 of the IFR, regardless of whether they cover activities that normally have significant environmental effects in those agencies' particular contexts.

This violates NEPA. While NEPA authorizes agencies to adopt each other's categorical exclusions, it imposes guardrails to prevent the sort of unconsidered and inappropriate mass cross-adoption of exclusions exemplified in the IFR. Specifically, NEPA authorizes an agency to "adopt a categorical exclusion listed in another agency's NEPA procedures" so long as the adopting agency "consult[s] with the agency that established the categorical exclusion to ensure that the proposed adoption of the categorical exclusion to a category of actions is appropriate." 42 U.S.C. § 4336c. But there is no indication that this procedure was followed by the Agency

here when it converted dozens of subcomponent-specific categorical exclusions into ones that can be applied by any of the Agency's subcomponents. Rather, the only explanation the Agency provides in the IFR's preamble is that "[g]iven the issuance of one set of departmental NEPA regulations to provide consistency for all USDA subcomponents implementing NEPA, the recission of agency-specific NEPA regulations, and the overlap of similar programs and activities across USDA mission areas and agencies, the Department finds it is appropriate for USDA subcomponents to apply the same categorical exclusions where it makes sense to do so for the actions proposed by the subcomponent." This conclusory non-explanation meets neither the letter nor the spirit of NEPA's provision for inter-agency adoption of categorical exclusions. Accordingly, § 1b.4 of the IFR unlawfully circumvents NEPA and must be eliminated.

E. The Agency violates NEPA by expanding agency discretion in deciding extraordinary circumstances.

In addition to expanding the sweep of categorical exclusions, the IFR attempts to inject excessive discretion into Agency determinations of extraordinary circumstances, in at least two ways. Both attempts are unlawful.

First, the IFR defines an extraordinary circumstance as "a unique situation . . . in which actions that normally do not have significant impacts . . . create uncertainty whether the degree of the effect is significant, or certainty that the degree of effect is significant, for the relevant resources considered." 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(a)(17)). "Resources for consideration for extraordinary circumstances will be determined at the responsible official's sole discretion and shall be based on the nature of the actions proposed and in the context of the potentially affected environment." 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(f)). This language unlawfully purports to make the determination of which resources to consider entirely discretionary, in violation of NEPA. For example, the IFR's new provision leaves it to the responsible official's "sole discretion" whether even to consider if the action to which a categorical exclusion is being applied would impact such resources as "federally listed threatened or endangered species;" "special sources of water . . . that are vital in a region;" federal or state "wilderness areas, parks, or wildlife refuges;" "prime agricultural, forest, or range lands;" or historically significant sites or structures designated by Federal, Tribal, State or local governments. 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(f), (f)(1)(i), (iii), (iv), (vii)). NEPA does not commit such choices to unreviewable agency discretion but instead demands that "presently unquantified environmental amenities and values . . . be given appropriate consideration in decisionmaking," 42 U.S.C. § 4332(B), in order to "preserve important historic, cultural, and natural aspects of our national heritage," 42 U.S.C. § 4331(b)(4). Thus, § 1b.3 is unlawful and ineffective to the extent it purports to make officials' resource consideration determinations discretionary and will lead to confusion and ill-considered agency decisions.

Second, the IFR lacks language mandating the agency must find extraordinary circumstances in some situations, unlike most of the prior agency regulations. For example, the

prior Natural Resources Conservation Service regulations provide that "[a]ctions that have *potential for significant impacts* on the human environment *are not* categorically excluded," and list eight additional specific extraordinary circumstances with the language of "cannot," including that "[t]he effects of the proposed action on the quality of the human environment cannot be highly controversial." *See* 7 C.F.R. § 650.6(b), (c)(2)(i)–(vii) (2025) (emphasis added); *see also id.* § 799.33(a) (listing six circumstances that trigger an extraordinary circumstances finding). Without this clear list of actions that cannot be categorically excluded, it is more likely that agencies will inappropriately apply categorical exclusions to situations that the agency has previously determined are likely to result in a significant environmental impact that would otherwise require EIS or EA review. Thus, the IFR appears to allow agencies to render decisions exempt from analysis and public input, in violation of NEPA.

These features of the new regulations fail on their own terms. But they also represent significant departures from the prior sub-agency regulations and how they treated extraordinary circumstances review. Yet, the agency does not provide any explanation for them. It at most says that existing regulations "discussed extraordinary circumstances in a way that created confusion as to when an extraordinary circumstance existed." 90 Fed. Reg. 29632, 29639. But it does nothing to address either of these specific changes and how they may eliminate confusion. This level of explanation and acknowledgement is inadequate. *See Fox*, 556 U.S. at 515.

IX. The Agency Has Impermissibly Altered The Scope Of Effects It Must Consider.

NEPA's core requirement is that an agency provide a "detailed statement" on "reasonably foreseeable environmental effects of the proposed agency action," and any "reasonably foreseeable adverse environmental effects which cannot be avoided." 42 U.S.C. § 4332(C)(i)–(ii). The scope of these requirements turns on what effects of the proposed agency action the agency must consider. For 50 years, CEQ interpreted that scope in a stable, common-sense way, leading to a broad shared understanding among courts, the regulated community, and the impacted public. The Agency has now abandoned that framework, without any explanation for doing so and without any conceivable basis for doing so. The Agency should not abandon such stable guidance. Nor should the Agency abandon its guidance on the need to consider climate-related effects or environmental justice considerations. Those effects fall squarely within NEPA's requirements, and the Agency should not abandon their consideration without explanation.

A. The Agency omitted the familiar framework that has governed the scope of NEPA review since just after NEPA's passage.

CEQ's regulations have always included three types of effects: (1) direct effects, "which are caused by the action and occur at the same time and place"; (2) indirect effects, "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," and (3) cumulative effects, "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.1(i)(1)–(3). The agency's new process makes no mention of this familiar framework. It is not clear whether

the Agency intended to abandon consideration of these kinds of effects—its IFR does not acknowledge that it has disregarded this framework, let alone explain why it makes sense to do so. The Agency should clarify whether it will continue to consider these kinds of effects, and, if it does not, explain the basis for that change in position. *See Fox*, 556 U.S. at 515

Direct Effects. There could be no basis for eliminating the consideration of direct effects. They are, by definition, the effects "caused by the action and occur at the same time and place." 40 C.F.R. § 1508.1(i)(1). Nothing in the Agency's rules suggest those would be excluded, as it embraces considering effects that are not "remote in time, geographically remote, or the product of a lengthy causal chain." 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(a)(12)(ii)). By design, direct effects satisfy that standard. The Agency should clarify that is so.

Indirect Effects. The Agency also should retain consideration of indirect effects, which are a crucial but often contentious set of impacts with which agencies and courts must grapple. The deletion of the definition and references to indirect effects is unlawful and will lead to confusion and litigation.

The statute itself contemplates consideration of indirect effects. NEPA reflects Congress's recognition of the "impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances." 42 U.S.C. § 4331(a). The statute directs the federal government to look beyond the immediate intended effects of an action, and specifically directs agencies to consider "undesirable and unintended consequences," 42 U.S.C. § 4331(b)(3), and even "presently unquantifiable environmental amenities and values," 42 U.S.C. § 4332(B). NEPA calls on agencies to recognize "the worldwide and long-range character of environmental problems." 42 U.S.C. § 4332(I). Thus, agencies must consider the relationship between "local short-term uses" of the environment and "long-term productivity," all with an eye toward "any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented." 42 U.S.C. § 4332(C)(iv)–(v).

In other words, consideration of indirect effects ensures that the effects of an agency action are not "overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349. Artificial constraints on the effects the Agency can consider creates the risk the Agency will "act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 371. The act's "manifest concern with preventing uninformed action" demands as much. *Id.*

Adhering to this statutory direction, CEQ has long interpreted NEPA to require consideration of indirect effects. CEQ first addressed the need to analyze indirect or secondary effects in the 1970 Interim Guidelines. *Statements on Proposed Federal Actions Affecting the Environment*, 35 Fed. Reg. 7390, 7391 (May 12, 1970) ("Interim Guidelines"). Those guidelines explained that "[b]oth primary and secondary significant consequences for the environment

should be included in the analysis." *Id.* As an example, the guidance chose "the implications, if any, of the action for population distribution or concentration" and "any possible changes in population patterns upon the resource base." *Id.* CEQ repeated that guidance in 1971, *Statements on Proposed Federal Actions Affecting the Environment*, 36 Fed. Reg. 7724, 7725 (Apr. 23, 1971), and expanded on it in the 1973 guidelines. Those guidelines explained that "[s]econdary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis." *Preparation of Environmental Impact Statements: Guidelines*, 38 Fed. Reg. 20550, 20553 (Aug. 1, 1973). Indeed, the guidance recognized, these indirect effects "may often be even more substantial than the primary effects of the original action itself." *Id.*

The annual reports CEQ prepared reached the same conclusion. CEQ drew on examples where agencies considered the indirect effects of their proposed actions when they were implementing the statute. CEQ, *Environmental Quality, the Second Annual Report of the Council on Environmental Quality* 25–26 (1971). And it lamented those instances where agencies would "ignore the secondary" effects, because they "may be more significant than the project's primary effects." CEQ, *Environmental Quality, the Fifth Annual report of the Council on Environmental Quality* 410–11 (1974); *see also* CEQ, *Environmental Quality, the Sixth Annual Report of the Council on Environmental Quality* 656 (1975). CEQ anticipated that as agencies continued to develop "experience" in "defining and understanding" indirect effects, their analysis would play a useful role in environmental impact statements. CEQ, *The Fifth Annual Report of the Council on Environmental Quality* 411.

During this same period, courts consistently interpreted NEPA to require consideration of indirect effects. An early district court decision recognized that NEPA directs agencies to consider the predictable "ripple" effects of their actions. *Citizens Organized to Def. Env't v. Volpe*, 353 F. Supp. 520, 540 (S.D. Ohio 1972). And in *City of Davis v. Coleman*, for example, the court held that the agency needed to consider the effects that a proposed highway interchange could spur urban development that occurs as a result of the project. 521 F.2d 661, 674–77 (9th Cir. 1975). That was "precisely the kind of situation Congress had in mind when it enacted NEPA." *Id.* at 675. That court was not alone in concluding that NEPA requires consideration of at least some indirect effects. *See, e.g.*, *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 973–74 (2d Cir. 1976) (concluding that NEPA requires consideration of indirect effects); *Jackson Cnty. v. Jones*, 571 F.2d 1004, 1013 (8th Cir. 1978) ("Under NEPA, indirect, as well as direct, costs and consequences of the proposed action must be considered.").

CEQ codified this early consensus in the 1978 regulations, defining effects to include "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. 1508.8; 43 Fed. Reg. at 56004. This definition of effects proved remarkably durable. CEQ omitted it in 2020, but less than two years later, CEQ returned to the original definition because it "better reflects NEPA's statutory purpose, policy, and intent and is more consistent with the case law interpreting NEPA's requirements." 87 Fed. Reg. at 23464. Moreover, the omission of this requirement in the 2020 rule had created

"disruption and uncertainty," in part because it suggests that agencies should depart from the "context-specific inquiry that they have undertaken for more than 40 years." 87 Fed. Reg. at 23466. To that end, while the omission of those requirements still might allow agencies to "continue to consider indirect . . . effects, an agency could misunderstand the language of the rule to prohibit considering" such effects. 87 Fed. Reg. at 23466–67.

CEQ also addressed any concerns with continuing to use the indirect effects standard. It observed that "longstanding CEQ and Federal agency experience and practice ha[d] demonstrated that th[is] interpretation[] promote[s] the aims of the NEPA statute and [is] practical to implement." 87 Fed. Reg. at 23466. The inclusion of indirect effects would "not result in consideration of a limitless universe of effects," and any concern that consideration of such effects would "lead[] to longer timelines" was unfounded "given the long history of agency and practitioner experience with analyzing" such impacts as "well as modern techniques leveraging science and technology to make environmental reviews comprehensive yet efficient." 87 Fed. Reg. at 23463, 23467. And, in the end, it is "critical that analyses are complete and scientifically accurate to ensure that decision makers and the public are fully informed." 87 Fed. Reg. at 23467.

But now, the Agency has omitted reference to indirect effects. Again, the agency has not explained the reason for this omission, so it is not possible to say whether the agency omitted this explanation because it is no longer going to consider indirect effects or merely because it wanted to remove this express reference. So, at a minimum, the Agency's approach is going to lead to confusion. And more fundamentally, to the extent the agency has changed its approach, it has done so without engaging with the statutory authority, caselaw, or CEQ's extensive explanation for expressly including indirect effects analysis in NEPA review. *See Fox*, 556 U.S. at 515. The Agency must at least explain why it has chosen a different path here.

The Agency cannot justify its omission of the indirect effects provisions with any of the recent developments the IFR generally references. The recent statutory amendments could not justify abandoning indirect effects analysis. CEQ retained its definition of indirect effects in the regulations it promulgated after those statutory amendments. With good reason: with respect to effects, the statute added the "reasonably foreseeable" qualifier, 42 U.S.C. § 4332(C)(i)–(ii), but that limitation had long been present in CEQ's regulations and thus was consistent with CEQ's "indirect effects" analysis. *See, e.g.*, 87 Fed. Reg. at 23467 ("[T]he final rule will retain language on reasonable foreseeability.").

The decision in *Seven County* likewise does not alter the need for agencies to consider indirect effects. As discussed above, the validity of CEQ's regulations was not before the Court. More fundamentally, the premise of the Court's analysis was that indirect effects must be considered, recognizing that there is a question as to "how far" down the causal chain an agency must "go in considering the indirect effects that might occur outside the area of the immediate project." *Seven County*, 145 S. Ct. at 1512. What was "clear" is that "the environmental *effects* of

the project at issue may fall within NEPA even if those *effects* might extend outside the geographical territory of the project or might materialize later in time"—that is, if they are not direct effects. *Id.* at 1515 ("[I]ndirect effects can sometimes fall within NEPA."). While agencies have some discretion about where to draw the line, *Seven County* surely does not stand for the proposition that indirect effects can be set aside altogether, as the Agency's omission of an express requirement to consider indirect effects could be read to suggest. The Agency should make clear that indirect effects still may be considered.

Cumulative Effects. Any mention of cumulative effects—another critical set of environmental impacts that can be as contentious as it is crucial—has likewise evaporated from the Agency's new standards. Cumulative effects are those that appear minor when considered in isolation but are significant when added to numerous other seemingly minor impacts. The Agency also should reverse this omission.

The same features of the statute discussed in the context of indirect effects analysis support consideration of cumulative effects. Again, in NEPA, Congress meant to situate effects analysis in the context in which they arise, which reflects a set of complex "interrelations of all components of the natural environment." 42 U.S.C. § 4331(a). And again, NEPA seeks to capture all "undesirable and unintended consequences," 42 U.S.C. § 4331(b)(3), that flow from a project, and embraces consideration of problems that are more global and "long-range" in scope, *see* 42 U.S.C. § 4332(I). To that end, agencies act as "trustee of the environment for succeeding generations," 42 U.S.C. § 4331(b)(1), and so should explore the "relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," 42 U.S.C. § 4332(C)(iv). Consideration of cumulative effects is necessary to ensure that the Agency is acting on complete information.

NEPA's legislative history confirms the point, surfacing the complexity of environmental impacts and the consequences of "letting them accumulate in slow attrition of the environment" and the "ultimate consequences of quiet, creeping environmental decline." 115 Cong. Rec. 29070 (Oct. 8, 1969); *see also* Report Accompanying S. 1075, National Environmental Policy Act of 1969, Senate Committee on Interior and Insular Affairs (July 9, 1969).

Shortly after NEPA's passage, CEQ's interim guidelines explained that the statute should be "construed by agencies with a view to the overall, cumulative impacts of the action proposed." Interim Guidelines, § 5(b) (Apr. 30, 1970); *see also* 36 Fed. Reg. at 7724. CEQ rooted its interpretation in the statute. *See* Interim Guidelines, § 7(a)(iv) (agency must "Assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations."). In its 1973 guidelines, CEQ repeated the earlier guidance but further explained that "agencies should bear in mind that the effect of many Federal decision about a project . . . can be individually limited but cumulatively considerable." 38 Fed. Reg. at 20551. NEPA review solves that problem by requiring agencies to

consider how that limited effect fits into a broader context where decisions made over "a period of years" can result in significant impacts on the environment. *Id.*

At the same time (just after NEPA's passage), federal courts quickly and repeatedly recognized that environmental effects should not be considered in a vacuum. In 1972, the Second Circuit acknowledged the common-sense idea that "even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant." *Hanly v. Kleindienst*, 471 F.2d 828, 831 (2d Cir. 1972). At a minimum, then, it is important to consider effects against the backdrop of "the existing environment of the area which is the site of a major federal action" because "[o]ne more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel." *Id.* In 1975, the Second Circuit once again explained that Congress had recognized that a "good deal of our present air and water pollution has resulted from the accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources." *Nat. Res. Def. Council v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975). The court thus interpreted the statute to account for this problem, explaining that NEPA was "in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated or accepted as the price to be paid for the major federal action under consideration." *Id.* Other courts likewise embraced the idea that "cumulative effects can and must be considered on an ongoing basis." *Swain v. Brinegar*, 517 F.2d 766, 775 (7th Cir. 1975); *see also Balt. Gas & Elec. Co.*, 462 U.S. at 106–07 ("[W]e agree with the Court of Appeals that NEPA requires an EIS to disclose the significant health, socioeconomic and cumulative consequences of the environmental impact of a proposed action."); *Sierra Club v. Morton*, 510 F.2d 813, 824 (5th Cir. 1975) ("CEQ guidelines, Interior regulations, Bureau of Land Management regulations, and prior court decisions all require that federal agencies consider the cumulative effect of similar actions."); *cf. Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) ("Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending before an agency, their environmental consequences must be considered together.").

As with indirect effects, CEQ codified the need to consider cumulative impacts in its 1978 regulations. The definition of effects included cumulative effects, *see* 40 C.F.R. § 1508.8 (1978), which were defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions," 40 C.F.R. § 1508.7. The regulations further clarified that such impacts "can result from individually minor but collectively significant actions taking place over a period of time." *Id.*

CEQ's approach to cumulative effects again remained consistent ever since. Once again, CEQ omitted this reference to cumulative effects in the 2020 regulations, a massively contentious decision that resulted in extensive litigation, but (once again) less than two years

later, CEQ returned to the original definition, because it "better reflects NEPA's statutory purpose, policy, and intent and is more consistent with the case law interpreting NEPA's requirements." 87 Fed. Reg. at 23464. Indeed, the same rationales that justified restoration of indirect effects (described above) applied with equal force to cumulative effects. 87 Fed. Reg. at 23462–23467. CEQ made plain that it disagreed with the conclusion that "cumulative effects analyses divert agency resources from analyzing the most significant effects to effects that are irrelevant and inconsequential." 87 Fed. Reg. at 23467. To the contrary, "consideration of reasonably foreseeable cumulative effects allows agencies and the public to understand the full scope of potential impacts," and thus are "critical to sound agency decision making." *Id.*[4]

The Agency removed any direction or discussion of cumulative effects, but here again, it is unclear what this omission means. And here again, its failure to engage with key provisions of the statute, caselaw interpreting it, or CEQ's extensive explanation for including cumulative effects analysis in its NEPA review renders its exclusion of cumulative effects unsupported. *See Fox*, 556 U.S. at 515. The Agency must at least explain why it has chosen a different path here.

Indeed, the recent statutory amendments and the Supreme Court's decision in *Seven County* no more displace the obligation to consider cumulative effects than they replace the obligation to consider indirect effects. As with indirect effects, CEQ retained its definition of cumulative effects in the regulations it promulgated after those statutory amendments, and CEQ already had determined that the key statutory addition—the inclusion of a "reasonably foreseeable" qualifier, 42 U.S.C. § 4332(C)—is consistent with CEQ's "cumulative effects analysis. *See, e.g.*, 87 Fed. Reg. at 23467 ("[T]he final rule will retain language on reasonable foreseeability.").

Consideration of cumulative effects likewise is perfectly consistent with *Seven County*. When agencies are called on to consider the "effects on the environment that result from the incremental effects of the action," 40 C.F.R. § 1508.1(i)(3), that complies with "the textually mandated focus of NEPA" being "the project at hand," *Seven County*, 145 S. Ct. at 1515. What the concept of cumulative effects adds is that the effects of the project at hand must be considered in the relevant context—that is, when the effects of the project at hand are "added to effects of other . . . actions" the Agency reasonably knows have taken place or reasonably foresees will take place in the future. 40 C.F.R. § 1508.1(i)(3). The Agency is not being called on to account for the environmental effects of a separate project that is "initiated (or expanded) as a result of . . . the current project." *Seven County*, 145 S. Ct. at 1512–13. But rather, a consideration of cumulative effects reflects that the acknowledged effects of the project at hand must be assessed against the environmental backdrop in which the project at hand arises. In this

[4] Even under the 2020 regulations, CEQ distanced itself from the suggestion that cumulative effects would be omitted from NEPA reviews. Instead, environmental trends (like climate change) "would be characterized in the baseline analysis of the affected environment rather than as an effect of the action." 85 Fed. Reg. at 43331.

way, consideration of cumulative effects informs the consideration of the effects of the project itself. Or, to put it in terms of the effects "NEPA dictated that" the agency in *Seven County* must consider—the ways the new railroad line "could disrupt the habitat of protected species, or the new rail embankments could cause soil erosion into local bodies of water, or trains on the new line could pollute the air," 145 S. Ct. at 1516—a consideration of cumulative effects would at least require looking at the ways those effects might combine with other actions to disrupt the species, cause soil erosion, or pollute the air.[5]

B. The Agency omits any express obligation to consider effects relating to climate.

As the United States government has recognized, climate change is the overarching environmental issue of our time. *Fifth National Climate Assessment*, U.S. Global Change Research Program, (Nov. 2023); *Long-Term Strategy of the United States: Pathways to Net-Zero Greenhouse Gas Emissions by 2050*, U.S. Dept. of State and the Executive Office of the President (Nov. 2021); *Endangerment and Cause or Contribute Findings for Greenhouse Gasses Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66496, 66523 (Dec. 15, 2009) (finding that elevated concentrations of greenhouse gasses were likely to "endanger the public health and welfare of current and future generations"); *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) ("The harms associated with climate change are serious and well recognized."). It has been clear for many years that federal agencies have an obligation to assess climate impacts under NEPA, an obligation consistently affirmed by the courts. *See, e.g.*, *Vecinos para el Bienestar v. FERC*, 1321 6 F.4th, 1329–30 (D.C. Cir. 2021); *350 Mont. v. Haaland*, 50 F.4th 1254, 1266–70 (9th Cir. 2022); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017); *Wild Earth Guardians v. Bureau of Land Mgmt*., 870 F.3d 1222 (10th Cir. 2017); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172 (9th Cir. 2008); *Mid-States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003); *City of Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478 (D.C. Cir. 1990). Given NEPA's textual directive to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations," 42 U.S.C. § 4331(b)(1), no other conclusion is possible. Consideration of climate impacts of federal agency actions is also compelled by NEPA's command to "utilize a systematic, interdisciplinary approach" that ensures the use of "natural and social science," and to "ensure the professional and scientific integrity" of NEPA documents. 42 U.S.C. § 4332(A), (D). Despite this administration's efforts to downplay the urgency of the climate crisis, the scientific consensus supporting it remains unimpeachable.

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[5] Indeed, the Court expressly recognized that one form of well-recognized cumulative analysis is called for, explaining that it often will be necessary to consider "other projects" where they are "so interrelated" as to inform the analysis of the project as issue. *Seven County*, 145 S. Ct. at 1517. So, there is every indication that the Court would expect that other forms of cumulative analysis would continue, too.

The 2024 CEQ regulations codified this requirement into regulation, clarifying that there is a linkage between the NEPA process and the statute's purpose. 89 Fed. Reg. at 35506–09; *see also* 88 Fed. Reg. at 49949, 49957. For example, § 1502.14(f) explained that the environmentally preferable alternative or alternatives are those that would best promote NEPA's policies by, for example, addressing climate change. 40 C.F.R. § 1502.14(f). Similarly, § 1502.15 identified the requirement to include anticipated climate-related changes to the environment and steps to take when that information is not readily available. 40 C.F.R. § 1502.15(b). Section 1502.16(a)(6)'s charge to agencies to analyze reasonably foreseeable climate change-related effects of both the proposed action and alternatives and on the proposed action and alternatives reflects long-standing law.

These changes to CEQ's rules were the subject of extensive public and expert input, and triggered considerable discussion from CEQ in its final rule. They also withstood legal challenges from a court that struck down other provisions of the rules. *Iowa v. Council on Env't Quality*, 765 F. Supp. 3d 859, 886 (D.N.D. 2025) (requirements to consider climate change are within CEQ's "zone of authority"). The rules were accompanied by detailed CEQ guidance that assisted agencies in assessing both a proposed action's contribution to the problem, as well as the potential impacts of a changing climate on federal projects. *See, e.g.*, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023). As the guidance recognized, "[c]limate change analysis is a critical component of environmental reviews and integral to Federal agencies managing and addressing climate change." *Id*. at 1198. Individual federal agencies have also taken extensive steps to plan for climate change in their individual planning and NEPA implementation. *See, e.g.*, *Report on Effects of a Changing Climate to the Department of Defense*, Office of the Under Secretary of Defense for Acquisition and Sustainment (Jan. 2019); *2023 Climate Action Plan Progress Report*, Department of Defense; *Climate Adaptation Plan 2024–2027,* U.S. Dept of Agriculture (May 2024); *Climate Adaptation and Resilience Plan*, Office of the Chief Scientist, U.S. Dept. of Agriculture (2024); *Climate Energy Adaptation Plan 2024–2027*, U.S. Dept. of Energy (May 2024); *2021 Climate Action Plan for Adaptation and Resilience*, U.S. Dept. of Commerce (Aug. 2021); *Climate Action Plan,* U.S. Dept. of the Interior (2021). And there has been substantial outside scholarship providing detailed recommendations on how to integrate climate issues into NEPA reviews, scholarship that CEQ and agencies previously took seriously. *See, e.g.*, Romany M. Webb et al., *Evaluating Climate Risk in NEPA Reviews: Current Practices and Recommendations for Reform* (2022); Michael Burger & Jessica Wentz, *Evaluating the Effects of Fossil Fuel Supply Projects on Greenhouse Gas Emissions and Climate Change Under NEPA*, 44 Wm. & Mary Env't L. & Pol'y Rev. 423 (2020); Institute for Policy Integrity, *Toward Rationality in Oil and Gas Leasing: Building the Toolkit for Programmatic Reforms* (2021).

However, CEQ has revoked its regulations and guidance in their entirety. This vacuum leaves it up to individual agencies to fill the regulatory gap on a case-by-case basis. But the Agency has provided zero direction or assistance in this effort, failing to include even so much as

a mention of climate change. The Agency must explain why it chose to say nothing about such a critical issue with a long-standing record, and why leaving agencies without any direction or guidance as to how to comply with NEPA is better than the rules and guidance that the IFR replaces. *Fox,* 556 U.S. at 515.

In short, any NEPA analysis of a proposed action that fails to include information on climate, where such impacts are present, cannot be considered a "hard look" given our rapidly changing environment and improved scientific capacity. The absence of any direction from the Agency, coupled with the withdrawal of the CEQ regulations and guidance, does not make the obligation to consider climate disappear. Instead, it leaves agencies vulnerable to legal challenge should they fail to adequately address this critical issue. Moreover, both CEQ and this agency have worked for many years to integrate climate into NEPA reviews. The decision to abandon that is nowhere explained or justified. We urge you to integrate the climate provisions adopted in the 2024 CEQ rules, and its implementing guidance, into a final rule. Failure to do so guarantees more project gridlock and controversy.

C. The IFR omits any express obligation to consider effects relating to environmental justice.

Environmental justice has played a key role in NEPA reviews for decades. 89 Fed. Reg. at 35540 ("Agencies have decades of experience integrating consideration of environmental justice in their NEPA reviews"). The purposes of NEPA align closely with the goal of ensuring greater consideration of environmental justice concerns, as articulated in the definition of "environmental justice" in CEQ's 2024 regulations:

> Environmental justice means the just treatment and meaningful involvement of *all people* . . . in agency decision making and other Federal activities that affect human health and the environment so that people are fully protected from disproportionate and adverse environmental effects (including risks) and hazards . . . have equitable access to healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

Id. at 35575 (emphasis added); Council on Environmental Quality, "National Environmental Policy Act Implementing Regulations Revision; Phase 2 Final Rule Response to Comments" (Apr. 2024) at 58 ("references to environmental justice reflect and advance NEPA's statutory objectives, text, and policy statements").

The core principles of environmental justice are embedded in the statutory language and purpose of NEPA. The statute strives "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare" of people; establishes "the continuing policy of the Federal Government" to "assure for *all Americans* safe, healthful, productive, and esthetically and culturally pleasing surroundings" and to "preserve important historic, cultural, and natural aspects of our national heritage;" and "recognizes that *each person* should enjoy a healthful environment." 42 U.S.C. §§ 4321, 4331(a), (b)(2), (b)(4), (c) (emphasis

added). CEQ explicitly agreed. *See* Council on Environmental Quality, "National Environmental Policy Act Implementing Regulations Revision; Phase 2 Final Rule Response to Comments" (Apr. 2024) at 55 ("CEQ agrees that the environmental justice-related provisions of the rulemaking advance NEPA's statutory policies, which include avoiding environmental degradation; preserving historic, cultural, and natural resources; and attaining the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.").

Addressing environmental justice in NEPA reviews is consistent with longstanding CEQ policy and agency practice. CEQ issued guidance on how to integrate environmental justice concerns into NEPA reviews nearly 28 years ago. *See* Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act* (1997). The guidance reiterates that "attainment of environmental justice is wholly consistent with the purposes and policies of NEPA," and that "[e]nvironmental justice issues encompass a broad range of impacts covered by NEPA." *Id.* at 7–8. The Guidance directs agencies how to address and consider environmental justice considerations at every stage of the NEPA review process. *Id.* at 10–17.

Other federal agencies, such as EPA, have published guidance on incorporating environmental justice in NEPA reviews. U.S. Environmental Protection Agency, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (1998). Some agencies, such as the Department of Transportation and the Department of Interior, have strategies for addressing environmental justice in NEPA processes. *See, e.g.*, Secretary Pete Buttigieg, DOT Order 5310.2C, *U.S. Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (2021); Secretary Deb Haaland, Secretarial Order 3399, *Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process* (2021); Dep't of Defense, Strategy on Environmental Justice (1995). In addition to specific agency guidance and strategy, the NEPA Committee and Interagency Working Group released a 2016 report on Promising Practices for Environmental Justice Methodologies in NEPA Reviews to disseminate best practices across the federal government for engaging with and protecting communities facing environmental injustice during the NEPA process. That report was based on four years-worth of researching and analyzing the interaction of environmental justice and NEPA, compiling methodologies gleaned from agency practices. The Working Group also released the 2019 Community Guide to Environmental Justice and NEPA Methods to aid communities in participating in the NEPA process. The Guide states:

> Many minority and low-income communities have been subject to multiple environmental and social impacts. Because these impacts in combination with potential new impacts can produce adverse and disproportionate effects on minority populations and low-income populations, NEPA review of a proposed action should address the history or circumstances of a particular community or population, the

> particular type of environmental or human health impact, and the nature of the proposed action.

Federal Interagency Working Group on Environmental Justice & NEPA Committee, *Community Guide to Environmental Justice and NEPA Methods* 3–4 (2019).

Courts have repeatedly recognized that agencies must consider environmental justice impacts. *Mid States Coal.*, 345 F.3d at 541; *see also Sierra Club*, 867 F.3d at 1368 (acknowledging that federal agencies are required to include environmental justice analysis in NEPA reviews); *Coliseum Square Ass'n, Inc. v. Jackson,* 465 F.3d 215, 232 (5th Cir. 2006) (same); *Trenton Threatened Skies, Inc., v. F.A.A.*, 90 F.4th 122, 138 (3rd Cir. 2024) (stating agencies "must consider designs or alternatives that will avoid or minimize disproportionately high and adverse impacts on low-income communities or communities of color"). Courts have not hesitated to find NEPA reviews deficient where agencies did not properly assess the environmental justice implications of their actions. *See, e.g.*, *City of Port Isabel v. FERC*, 111 F.4th 1198, 1207–10 (D.C. Cir. 2024) (holding the agency should have issued a supplemental EIS to address its new environmental justice analysis and conclusions); *Vecinos*, 6 F.4th at 1330–32 (remanding environmental impact statement because the agency's environmental justice analysis was deficient); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017) (remanding an environmental assessment for providing inadequate analysis of environmental justice implications of crude oil pipeline).

The 2024 CEQ regulations cemented the requirement to consider environmental justice impacts in NEPA reviews, giving agencies a definition and direction on how to weigh environmental justice considerations during the NEPA process where they arise. 40 C.F.R. §§ 1502.16, 1502.14(f), 1508.1(o). The inclusion of environmental justice in CEQ's regulations was supported by a chorus of public comments.[6] The explicit inclusion of environmental justice consideration in the regulations stood up when challenged in court. *Iowa v. Council on Env't Quality*, 765 F. Supp. 3d at 886 (including environmental justice considerations is within CEQ's "zone of authority").

However, in February, CEQ rescinded its NEPA regulations. In its wake, CEQ released a memorandum to the heads of federal agencies providing guidance on compliance with NEPA. In addressing President Trump's revocation of Executive Orders 14096 and 12898 (the Executive

[6] CEQ received many comments during the public comment period expressing support for more specific provisions to address environmental justice concerns. Inclusion of specific provisions on how to consider the issue was "long overdue, given the centuries of environmental dangers, toxins, public health implications, quality of life impacts, and unjust practices that perpetuate environmental violence on communities across the country." Letter from GreenLatinos and WE ACT for Environmental Justice, to Council on Env't Quality (Sept. 29, 2023); Letter from Abre' Conner, NAACP to Council on Env't Quality (Sept. 29, 2023) ("Black communities are often sacrifice zones for decisions that undergo a NEPA process").

Orders directing agencies to address environmental justice), the memorandum stated, "NEPA documents should not include an environmental justice analysis, to the extent this approach is consistent with other applicable law." CEQ, Memorandum Implementation of the National Environmental Policy Act, at 5. As explained above, declining to address environmental justice is not consistent with applicable law. Such guidance not only undermines the core purposes of NEPA, but it also contradicts decades worth of agency practices and established case law. This Agency fails to provide any guidance on how to address NEPA's purpose of assuring "for *all Americans* safe, healthful, productive, and esthetically and culturally pleasing surroundings," by considering environmental justice. 42 U.S.C. § 4331(b)(2) (emphasis added). The Agency must provide an explanation for why it chose not to mention environmental justice, an aspect of NEPA processes for decades.

Failure to consider environmental justice in NEPA reviews frustrates the core purpose of NEPA, is arbitrary and unexplained, and goes against longstanding agency practice and case law. By not mentioning environmental justice or even cumulative impacts in the IFR, the Agency is left without a clear direction on how or whether to address environmental justice impacts from agency action. This inevitably will leave Agency decisions vulnerable to legal challenges if they do not address environmental justice in its NEPA reviews. We strongly urge you to adopt the language in CEQ's 2024 NEPA regulations as it relates to environmental justice to avoid future litigation and delays.

D. The Agency has adopted limits on the scope of effects the Agency must consider that are not consistent with the statute.

In addition to omitting the features of the effects analysis just discussed, the Agency has included a number of other provisions that purport to narrow the effects that must be considered. These provisions largely restore language from the 2020 CEQ regulations—language that CEQ promptly discarded as inappropriate or confusing. The Agency has not explained why restoring these provisions makes sense nor has it engaged with CEQ's explanation for why these limitations are inappropriate.

Limiting consideration to the action or project at hand. To start, in multiple places, the Agency has suggested that it will limit its consideration to the "proposed action or project at hand." 90 Fed. Reg. at 29647 (7 C.F.R. § 1b.2(e)); 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2(f)); *see also* 90 Fed. Reg. at 29660 (7 C.F.R. § 1b.5(b)); 90 Fed. Reg. at 29663 (7 C.F.R. § 1b.7(g)). To the extent this means to eliminate consideration of indirect effects or cumulative effects, this is unsound for the reasons discussed above. If this is meant to confirm only that the focal point for environmental review is the action or project at hand, then that is unobjectionable. But, as with other additions made in the 2020 regulations, this addition is confusing and unnecessary. And it may also be incomplete. As the Supreme Court just made clear, it is not always sufficient to focus on the "project at hand." To take just one example, "in certain circumstances, other projects may be interrelated . . . to the project at hand" and thus must be considered. *Seven*

County, 145 S. Ct. at 1517. In those circumstances, limiting the analysis to the project at hand would render the environmental review deficient. More fundamentally, such a categorical approach to environmental review never could be appropriate. Agencies always must consider at least "those effects" that "are relevant to the agency's decisionmaking process." *Id.* at 1516; *see also id.* at 1513, 1514 n.4. If effects other than those from the "project at hand" are relevant to that determination, then of course the Agency must consider them. The absence of any regulatory direction on this point will breed confusion and contention.

Limiting effects to generally exclude those that are "remote in time, geographically remote, or the product of a lengthy causal chain." The Agency proposes restoring language from the 2020 CEQ regulations that "generally" excludes effects that "are remote in time, geographically remote, or the product of a lengthy causal chain." 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(a)(12)(ii)). Here again, CEQ quickly removed this language because it "may unduly limit agency discretion" and "stating them as categorical rules that limit effects" is in tension with the statute. 87 Fed. Reg. at 23466. Indeed, CEQ's view was well-founded, as the Supreme Court recently declined to adopt this kind of categorical rule: The Court explained that environmental effects "may fall within NEPA even if those effects might extend outside the geographical territory of the project or might materialize later in time." *Seven County*, 145 S. Ct. at 1515. The other touchstones the Court emphasized for NEPA review—relevance to the agency's decisionmaking and consideration of its regulatory authority, *see* 145 S. Ct. at 1513, 1514 n.4, 1516—likewise do not gel with this categorical rule. If an effect is remote in time, geographically remote, or the product of a lengthy causal chain but sits comfortably within the agency's regulatory authority and would be relevant to its decisionmaking, then it must still be considered, even after *Seven County*.

Limiting effects to exclude "those effects that the agency has no ability to prevent due to the limits of its regulatory authority, or that would occur regardless of the proposed action." The Agency also proposed to restore language from the 2020 CEQ regulations that excludes consideration of "effects that the [Agency] has no ability to prevent due to the limits of its regulatory authority or that would occur regardless of the proposed action." 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(a)(12)(ii)). This addition should be removed for the same reason the prior addition should be: The 2022 CEQ regulations removed this language as "unduly limit[ing] agency discretion" and because this kind of "categorical rule[]" is in tension with NEPA's statutory requirements. 87 Fed. Reg. at 23466. For all the same reasons just discussed, *Seven County* does not dictate the inclusion of this language. It merely repeated the discussion from *Public Citizen*—a feature CEQ already accounted for in its previous iteration of the rules—and did not purport to adopt a categorical rule. Moreover, the categorical rule the Agency adopts here does not match up with the Court's analysis, which appears to have been limited to those circumstances where the agency had "no regulatory authority over . . . separate projects" and it was clear "[o]ther agencies possess authority to regulate those separate projects." *Seven County*, 145 S. Ct. at 1516. In those circumstances, the agency's regulatory authority may be a relevant

limit, but that decision does not support the categorical rule that agencies are permitted to limit their review even where no other agencies would regulate a separate project. And again, what matters is not any narrow sense of regulatory authority, but rather the set of considerations that might inform the agency's decisionmaking.

The Agency has also appended an exclusion of effects relevant to projects "initiated by a third party." 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(a)(12)(ii)). To the extent that is meant to exclude categorically an analysis of all induced effects, that marks a dramatic change from how agencies have analyzed effects since NEPA's passage, and is sharply in tension with the statute itself, for the reasons explained above. The Agency cannot completely transform the scope of NEPA, let alone do so without any explanation. And certainly the Supreme Court's recent decision is not a basis for such a radical turnaround. Even if *Seven County* gestured at declining to consider such effects where the record left doubt about whether they would occur, 145 S. Ct. at 1515–16 ("the project at issue *might* lead to construction or increased use of a separate project" (emphasis added)), an Agency still might need to consider such effects where those effects are so certain that the "separate project" cannot be said to "break[] the chain of proximate causation," *id.* After all, in traditional proximate causation analysis, the causal chain does not break where the later actions down the causal chain are sufficiently predictable at the time the action being considered took place. W. Page Keeton et al., *Prosser and Keeton on Law of Torts* 273, 276–77 (5th ed. 1984); Restatement (Third) of Torts § 34; Restatement (Second) of Torts §§ 440–443. And in any event, this categorical approach would have to give way where the Agency was called upon to account for the actions third parties might take in response.

Scope of Analysis provision. The Agency ultimately provides that "[t]o the extent it assists in reasoned decision making," the Agency "may, but is not required to by NEPA, analyze environmental effects" that fall outside the limits just discussed. 90 Fed. Reg. at 29660 (7 C.F.R. § 1b.5(b)(3); 90 Fed. Reg. at 29664 (7 C.F.R. § 1b.7(g)(3)). Perhaps it is encouraging that the Agency leaves the door open to doing more than what it views as the bare minimum. Even so, the provision surfaces the fundamental incoherence of the Agency's approach. If the analysis of such effects "assist[s]" in "reasoned decision making," then by definition the Agency must do that analysis. 90 Fed. Reg. at 29660 (7 C.F.R. § 1b.5(b)(3); 90 Fed. Reg. at 29664 (7 C.F.R. § 1b.7(g)(3)). And if these categorical rules are allowing the Agency to avoid considering effects that might be useful to it, they can have no place in an appropriate implementation of NEPA. *See Marsh*, 490 U.S. at 371; *accord Seven County*, 145 S. Ct. at 1513.

X. The Agency Omits Important Features Of The Prior Regulations That Guided The Alternatives Analysis.

The "alternatives" analysis has long constituted "the heart" of NEPA review. 40 C.F.R. § 1502.14; C*ity of Los Angeles v. F.A.A.*, 63 F.4th 835, 843 (9th Cir. 2023) ("Consideration of alternatives 'is the heart of the [EIS]' and agencies should '[r]igorously explore and objectively evaluate all reasonable alternatives.'"). Without a robust analysis of alternatives, the NEPA

process becomes a process documenting the effects of a "done deal" rather than contributing to a decisionmaking process. 89 Fed. Reg. at 35502.

The Agency has omitted key aspects of CEQ's regulations that made that promise real, without offering any explanation about why it made sense for the Agency to deviate from long-standing and well-settled standards

To start, the Agency has omitted the acknowledgment that this analysis is at the "heart" of NEPA review. 40 C.F.R § 1502.14. That language appeared in the original CEQ regulations, and as CEQ recently explained in the 2024 regulations when it restored that language, doing so "emphasizes the importance of the alternatives analysis" and reflects that a number of courts have "quoted that language . . . in stressing the importance of the alternatives analysis." 89 Fed. Reg. at 35502. Indeed, as the Supreme Court just confirmed, whether the agency properly "has addressed . . . feasible alternatives" is among the issues that is so critical that courts must play a role in ensuring compliance. *See Seven County*, 145 S. Ct. at 1511. The Agency should include the language here or explain why it chooses not to.

Second, the Agency also has omitted the requirement that the agency "[r]igorously explore and objectively evaluate alternatives." 40 C.F.R. § 1502.14(a). Including that standard is important because it helps "ensure agencies conduct a robust analysis of alternatives and their effects, rather than a cursory, box-checking analysis." 89 Fed. Reg. at 35503. It also aligns with "a standard that agencies have decades of experience applying in the analysis of alternatives." *Id*. at 35503. Indeed, CEQ has directed agencies to apply this standard since at least April 1970. Interim Guidelines § 7(a)(iii). The Agency should make clear that this familiar standard continues to apply to alternatives analysis, instead of leaving it ambiguous.

Third, the Agency has omitted authorization to include in the analysis "reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(a). CEQ had recognized that there are certain circumstances where those kind of alternatives would be relevant and wanted to make clear to agencies that they had the discretion to consider them. Cases support this analysis, *see, e.g.*, *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 835–36 (D.C. Cir. 1972), and it can be particularly important to do so when "agencies are considering program-level decisions or anticipate funding for a project not yet authorized by Congress," 89 Fed. Reg. at 35503.

While most of the time, we are focused on reasonable alternatives that are within the lead agency's jurisdiction, there are situations in which it is reasonable to evaluate alternatives outside the agency's jurisdiction, not just those discussed by CEQ, but also others. The Agency should not omit this requirement.

Finally, the Agency also has omitted the requirement that the Agency identify the "environmentally preferrable alternative." 40 C.F.R. § 1502.14(f). This information is "helpful for decision makers and the public" because it can allow "public comment on th[e]

determination" and facilitate a determination of whether the agency has "adequately explained its conclusion." 89 Fed. Reg. at 35504. This improves the "transparency of the agency's decision-making process" and ensures that "agencies make informed decisions regarding actions that impact the environment." *Id*. CEQ also has confirmed that such a requirement does not "result in unnecessarily broad and time-consuming environmental reviews." *Id*. That's because CEQ's "regulations have always required agencies to identify the environmentally preferrable alternative" and thus agencies have "decades of experience" applying that standard. *Id*. And identification of the environmentally preferable alternative does not mean that the Agency must adopt this alternative. But it does mean that the public will understand where a different choice is made and the Agency will have an opportunity to explain why. This is yet another example where the Agency has not contended with CEQ's explanation.

XI. The Agency Has Adopted An Impermissible Approach To Significance.

Without any explanation, the Agency has abandoned the long-standing factors of context and intensity that have informed the question whether an "adverse effect of the proposed action is significant." 40 C.F.R. § 1501.3(d). The question of whether a proposed action has "significant impacts" is among the most consequential and controversial issues that arise in NEPA processes and litigation. Agencies and the public have become familiar with the long-standing criteria for significance and have used them systematically as a roadmap to evaluate a proposed action. In reaffirming the utility of these criteria just last year, CEQ explained that they did not "expand the scope of NEPA review," but rather "assist[ed] agencies in determining the appropriate level of NEPA review for their proposed actions by focusing their review on the critical factors in determining significance." 89 Fed. Reg. at 35464. The prior approach to assessing significance has been useful and should not be abandoned.

In addressing significance here, the Agency has adopted a version of what appeared in the 2020 regulations. *See* 85 Fed. Reg. at 43360. CEQ already has explained, in detail, why the 2020 approach to significance should be abandoned. *See* 89 Fed. Reg. at 35464–69. To the extent the Agency has followed the 2020 regulations, its approach reflects the same omissions, confusion, and other problems that the 2024 regulations addressed. The Agency should restore those omitted components from the 2024 regulations, or at least explain how it has resolved the problems with the 2020 regulations that CEQ later solved.

To take one example, the agency has omitted the consideration of "global" contexts. That departs from the recently revoked CEQ rules, which directed agencies to evaluate "the potential global, national, regional, and local contexts" of impacts to determine the appropriate level of NEPA review. 40 C.F.R. § 1501.3(d)(1). The use of the word "global" in this provision reflects the statute itself, which calls for agencies, to the "fullest extent possible," to:

> recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate

> support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.

42 U.S.C. § 4332(2)(I); *id.* § 4346b (authorizing "expenditures in support of international activities"); *see also* 44 Fed. Reg. 1957 (Jan. 9, 1979) (executive order instructing agencies to consider effects of action on "the global commons" and the "environment of a foreign nation"). While the focus of NEPA is "fulfill[ing] the social, economic, and other requirements of present and future generations of Americans," 42 U.S.C. 4331(a), NEPA recognizes the extraterritorial impacts of federal government actions—on climate, water, air pollution, and biodiversity among other things—ultimately impact Americans as well as everyone else. NEPA's application to federal actions that result in environmental impacts outside U.S. borders has long been settled. *See, e.g., Env't Def. Fund v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993). In including the word "global" in this provision, CEQ explained the rule's description of context was "consistent with the decades of experience agencies had implementing the 1978 regulations." 89 Fed. Reg. at 35465.

The Agency omits this reference to "global," and there is a repeated and consistent emphasis on the impacts of actions to "Americans," as if the impacts to the global commons are irrelevant or that the environment stops at the U.S. border. That approach does not square with the legal authorities just discussed, and it is foreclosed by the recent statutory amendments which make clear that an agency need not consider a decision only where its "effects" are "located *entirely* outside of the jurisdiction of the United States." 42 U.S.C. § 4336e(10)(b)(vi) (emphasis added). While the new standards appear to at least offer discretion to agencies to consider extraterritorial impacts, we urge you to provide greater clarity on this important issue so that key extraterritorial impacts are not omitted

That is not the only way in which the Agency's rule departs from the approach CEQ previously chose to assess significance. The Agency offered some explanation for its approach, *see* 90 Fed. Reg. at 29636, but it fails to contend with all the ways it has departed from the prior CEQ regulations. At a minimum, the agency should restore some of the overarching principles—for example, the notion that "agencies shall not offset an action's adverse effects with other beneficial effects to determine significance." 40 C.F.R. § 1501.3(d). Moreover, the agency fails to include consideration of criteria specifically identified in NEPA, itself, such as "important historic, cultural, and natural aspects of our national heritage," "renewable resources," impacts to "long-term productivity," and the "worldwide and long-range character of environmental problems." 42 U.S.C. § 4331(4), (6); *id.* § 4332(2)(C)(iv), (F).

In any event, the Agency's approach here also adds novel considerations that were not present in previous versions of the CEQ regulations. For example, the Agency directs the consideration of "[e]conomic effects" and the "[e]ffects on the quality of life of the American people." 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2(f)(3)). Given the many criteria the Agency has

omitted, these are particularly inexplicable additions. In the past, CEQ has made clear that "economic [and] social" effects stand alone as effects that "by themselves do not require preparation of an environmental impact statement." 40 C.F.R. § 1502.16(b). Indeed, these are the sort of effects that should not be given "a higher priority than other effects" in the analysis. 89 Fed. Reg. at 35510. As to focusing the Agency's attention on the "quality of life of the American people," that criterion is as unobjectionable as it is unhelpful. An overarching goal of NEPA is, of course, to improve the quality of life of Americans, and thus additional guidance has been helpful to channel the types of factors the Agency should assess in evaluating significance. To that end, many of the factors agencies previously would look at to determine significance—and which have been omitted here—no doubt inform the quality of life of the American people. To name just a few, the degree to which "the action may adversely affect unique characteristics of the geographic area" informs how an action will impact the American people. 40 C.F.R. § 1501.3(d)(2)(ii). As does the degree to which the "action may adversely affect communities with environmental justice concerns" informs how an action will impact the American people. 40 C.F.R § 1501.3(d)(2)(vii). So too with others. Accordingly, the Agency should restore the more granular guidance CEQ once provided or explain why it has not done so.

XII. The Agency Has Adopted An Impermissible Approach To Reviewing Connected Actions And Long-Term/Multi-Phase Actions.

A. The Agency's explanation for when a supplemental EIS is required is inappropriate.

CEQ has long required that an agency will prepare "supplements to either draft or final" EISs if a "major Federal action is incomplete and ongoing," and "the agency makes substantial changes to the proposed action that are relevant to environmental concerns" or there "are substantial new circumstances or information about the significance of adverse effects that bear on the analysis." 40 C.F.R. § 1502.9(d). The Agency should revert to CEQ's formulation.

First, the Agency swapped "incomplete and ongoing" with "remains to occur." 90 Fed. Reg. at 29670 (7 C.F.R. § 1b.9(r)). Just last year, CEQ rejected the use of "remains to occur"—and switched back to "incomplete and ongoing," precisely because "remains to occur" was "vague" and the latter phrase provided "more clarity." 89 Fed. Reg. at 35499. The Agency should not reintroduce that confusion.

Second, the Agency chose to describe the circumstances under which a supplemental document must prepared in new terms, explaining that it will supplement an environmental document if there "are new circumstances or information with relevance to the proposal and these have bearing on the proposed action (or selected alternative) or potential to change the anticipated degree of effect." 90 Fed. Reg. at 29670 (7 C.F.R. § 1b.9(r)). It is unclear whether this amounts to any substantive change from CEQ's formulation, but if it is, the Agency must explain why it has taken a different approach.

The Agency also has omitted the catchall provision that permits the Agency to "prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so." 40 C.F.R. § 1502.9(d)(2). The Agency has not explained the basis for that omission, and it should retain this authority to develop a supplemental EIS when it would be appropriate.

B. The Agency has adopted an inappropriate approach to segmentation and connected actions.

Previous iterations of the CEQ regulations have long provided that the "agency shall, in a single review, proposals or parts off proposals that are related closely enough to be, in effect, a single course of action." 40 C.F.R. § 1501.3(b); *see also* 43 Fed. Reg. at 55992, 56005 (1978 regulations). CEQ also had established a natural corollary to that principle, which is that an "agency shall not avoid a determination of significance by . . . segmenting an action into smaller component parts." 40 C.F.R. § 1501.3(b). As CEQ explained, that also is a "longstanding principle" that is relevant to the preparation of all environmental documents. 89 Fed. Reg. at 35462; *see also id.* 35462–63 (collecting caselaw support for this anti-segmentation principle).

The Agency has omitted these critical, common-sense provisions, without explaining why. That omission, coupled with its emphasis on considering only the project or action at hand, risks the Agency declining to take the comprehensive approach to NEPA review that long has been required. That would be error for the reasons discussed above. *See also Seven County*, 145 S. Ct. at 1517. The Agency should restore these important provisions from the 2024 CEQ regulations or else explain why it has abandoned them.

Separate from the absence of these provisions, the Agency also has abandoned any discussion of the concept of a "connected action" for purposes of NEPA review. Under CEQ's most recent controlling regulation, the Agency must "consider whether there are connected actions, which are closely related Federal activities or decisions that should be considered in same NEPA review" and that

> (1) [a]utomatically trigger other actions that may require NEPA review;
> (2) [c]annot or will not proceed unless other actions are taken previously or simultaneously; or
> (3) [a]re interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1501.3(b).

Here, the Agency does not reference connected actions, without any explanation for abandoning this concept. The Agency should restore references to connected actions and this definition of connected action or else explain why it has abandoned them.

C. Agencies have not guaranteed comment when they rely on a previously-prepared environmental impact statement.

In providing for the adoption of previously prepared environmental documents in cases where the later action is not "substantially the same" as the earlier action, the 2024 CEQ regulations required additional "public engagement . . . consistent with the requirements for the document type." 89 Fed. Reg. at 35521; 40 C.F.R. § 1506.3. That meant that, before adopting an EIS, the Agency was required to provide notice and seek comment.

The Agency no longer requires the public engage here. 90 Fed. Reg. at 29668 (7 C.F.R. § 1b.9(e)(8)). For all the reasons discussed above, the Agency should require notice and comment on this type of environmental impact statement, too.

XIII. The Omission Of Standards For Mitigation Is Inappropriate And Unexplained.

Previous iterations of CEQ's NEPA implementing rules provided detailed direction as to how to properly consider the role of mitigation in the NEPA process. The issue is a critical one: properly employed, mitigation can reduce the extent of the environmental impacts to the point where effects are no longer significant enough to trigger an EIS. Alternatively, it can be utilized to reduce the severity of adverse impacts identified in an EA or EIS. Ensuring the integrity of such mitigation, holding agencies accountable to their promises to implement it, and analyzing it carefully is therefore critical to ensuring NEPA's admonition to fully imbue federal decision making with environmental awareness. 42 U.S.C. §§ 4321, 4331. While NEPA does not substantively require that adverse environmental impacts be mitigated, it does require consideration of mitigation. *Roberston*, 490 U.S. at 351 (1989) ("The requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from *the language of the Act* and, more expressly, from CEQ's implementing regulations." (emphasis added)).

Consideration and disclosure of measures to mitigate adverse impacts has always been a key part of the NEPA process. *See, e.g.*, 40 C.F.R. § 1502.14(f) (1978) (requirements for discussing alternatives); § 1502.16(e)–(h) (1978) (requirements for discussing environmental effects); § 1503.3(d) (1978) (requirements for comments); § 1504.3(c)(2)(vi) (1978) (criteria for referrals); § 1505.3 (1978) (implementation standards). It is also the subject of extensive agency guidance and practice going back decades. *See, e.g.*, *Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*, 76 Fed. Reg. 3843 (Jan. 21, 2011).

The latest version of CEQ's implementing regulations provided a detailed and helpful update to these provisions. For example, the 2024 CEQ regulations state that agencies "should, where relevant and appropriate" incorporate measures to address "significant human health and environmental effects" of their actions. 40 C.F.R. § 1505.3(b). Similarly, 40 C.F.R. § 1505.2(c) requires an agency to "state whether the agency has adopted all practical means to mitigate

environmental harm . . . and if not, why not." Another provision directed that mitigation "shall" be implemented (for example, through conditions in permits or funding) where mitigation is established in a NEPA document "and committed as part of the decision." *Id*. § 1505.3(a).[7] Of particular note, CEQ's provisions recognized that in the circumstances where further environmental review is avoided "based on implementation of mitigation," it makes sense to make sure that it occurs. *Id*. § 1505.2(c). And so, it may be important that agencies "provide for monitoring to assure that their decisions are carried out." *Id*. § 1505.3(a). As CEQ confirmed, these provisions "do[] not impose any binding requirements on agencies, but rather codif[y] a portion of CEQ's longstanding position that agencies should, as a policy matter, mitigate significant adverse effects where relevant and appropriate." 89 Fed. Reg. at 35517.

The adoption of these revised rules was particularly valuable due to the inconsistencies in the way agencies handled mitigation. For example, some agencies built mitigation into the project itself and then failed to ensure that it ever occurred—meaning that the effects of the action were more significant and more adverse than ever considered by the agency or disclosed to the public. For example, the Forest Service and BLM, routinely have relied on EA project design "criteria" or "features," or other formulations to escape the obligation to enforce such measures during project implementation. Although these measures are described as part of the project and therefore not mitigation, they can still serve to limit the extent or duration of adverse effects and thus to support a finding of no significant impact. However, the agencies frequently waive many of these measures in project implementation, undermining both the spirit and letter of NEPA. The previous regulations were intended to put a stop to such abuses.

Following this IFR, at least some of this scaffolding and direction is absent. While some features of the existing regulations continue to appear in at least some form, 90 Fed. Reg. at 29661 (7 C.F.R. § 1b.6(b)(3)); 90 Fed. Reg. at 29666 (7 C.F.R. § 1b.8(b)(6); 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(29)), there are also omissions. Without the existing scaffolding and direction, the Agency will be left yet again to figure things out on their own and the public will be in the dark about how effects are being mitigated and unsure about whether the mitigation will actually come to pass. Leaving such a vacuum in a critical component of NEPA implementation is inexplicable and the agency does not offer any justification for it in the IFR. It must either restore the 2024 mitigation provisions or explain why a different approach is warranted.

[7] As CEQ explained, because NEPA requires agencies to identify the "reasonably foreseeable environmental effects" of an action, "to the extent that identification assumes the implementation of mitigation measures to avoid adverse effects, it follows, in turn, that implementation of mitigation must also be reasonably foreseeable." 89 Fed. Reg. at 35518. This provision was upheld against a legal challenge. *Iowa v. Council on Env't Quality*, 765 F. Supp.3d at 887 ("Monitoring agency-chosen mitigation is directly related to the detailed statement CEQ is directed to regulate.").

XIV. The Agency Failed To Comply With NEPA Even Though Promulgation Of The IFR Is A "Major Federal Action" With Potentially Significant Impacts.

The IFR is procedurally defective in another way, insofar as the Agency did not comply with NEPA in issuing this rule—which is a major federal action with environmental impacts that need to be disclosed and considered in a NEPA document. The Agency has broken with precedent and offered an inadequate and arbitrary explanation for its actions.

NEPA requires all agencies of the federal government to prepare a "detailed statement" analyzing the environmental effects of, and reasonable alternatives to, all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Historically, a "major federal action" upon which an EIS may be required included "new or revised agency rules [and] regulations." 40 C.F.R. 1502.4 (1978) ("Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations."); 40 C.F.R. § 1508.1(q)(2)(i) (2024) (major federal action includes "[a]doption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act"). As the leading treatise on NEPA states bluntly, "Federal agency rules and regulations are federal actions that require the preparation of an impact statement." § 8:31. *Rules and regulations*, NEPA Law and Litig. § 8:31 (2024). NEPA has been performed on the issuance of regulations since its inception. *See, e.g.*, *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971) (rules for licensing nuclear power plants); *Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, 397 F. Supp. 3d 430 (S.D.N.Y. 2019) (interpretive rule declaring that the Migratory Bird Treaty Act's take prohibition does not apply to incidental takes was a major federal action).

Indeed, when CEQ first promulgated the original version of its implementing regulations, it prepared a special environmental assessment considering the impacts of its action; it did the same when it issued the 2024 revisions. 89 Fed. Reg. at 35552 (discussing history of preparing "Special EAs" for promulgation of NEPA rules). Both documents are attached.

In issuing the IFR, the Agency did not prepare an EA, EIS, or any NEPA documentation at all. Instead, the IFR declares that the rules are "procedural in its entirety" and hence not subject to NEPA review. 90 Fed. Reg. at 29645. This justification makes no sense. NEPA itself is entirely procedural but nonetheless is intended to have, and does have, environmental impacts. These set of rules will have significant impacts on what kinds of actions are covered by NEPA reviews and what those reviews will cover. There is no exemption under NEPA for "procedural" rules and the agency must comply with NEPA prior to implementing the IFR.

Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947, 954–55 (7th Cir. 2000) is not to the contrary. In *Heartwood*, the Seventh Circuit concluded that adoption of categorical exclusions for timber harvest on Forest Service land was not a major federal action for NEPA review purposes. On that record and those facts, that may have been so. But the IFR—combined with the revocation of CEQ's implementing regulations—is entirely another matter.

The IFR's potential environmental impacts are self-evident. Combined with the revocation of the CEQ rules, the IFR eliminates all of the direction to agencies that guide their implementation of NEPA. The entire premise of this effort is to meet explicit goals of expediting development and resource extraction projects as directed by the President's executive orders. *See, e.g.*, Executive Order 14154. The IFR is explicitly directed towards the Administration's effort to streamline federal approvals for consequential, high-impact projects like pipelines and energy generation, production, and transmission projects. Assuming that the premise of the IFR is correct—that it will expedite the approval and construction of many such projects with potential significant environmental impacts—then it unavoidably follows that the IFR itself will have significant environmental impacts that the Agency must consider and disclose pursuant to NEPA.

The Agency's promulgation of the IFR without preparing an EA or EIS that: (a) examines a reasonable range of alternatives; (b) has a statement of purpose and need that corresponds to the agencies' proposed action; (c) identifies the correct no action alternative baseline for comparing and assessing direct, indirect, and cumulative environmental effects; (d) uses high quality scientific information; and (e) examines the overarching direct, indirect, and cumulative environmental effects of the IFR violates NEPA and the APA.

XV. The Agency Failed To Comply With The Requirements Of The Endangered Species Act In Issuing The IFR.

Section 7(a)(2) of the ESA requires that each federal agency, in consultation with the U.S. Fish and Wildlife Service ("FWS") and/or the National Marine Fisheries Service ("NMFS"), ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat of such species. 16 U.S.C. § 1536(a)(2). "Action is defined to include the promulgation of regulations; actions that may directly or indirectly cause modifications to the land, water, or air; and actions that are intended to conserve listed species or their habitat." 50 C.F.R. § 402.02.

If a federal agency determines that a proposed action—like issuance of a regulation—"may affect" listed species or critical habitat, the agency must engage in "formal consultation" with FWS and/or NMFS, depending on the species involved. 50 C.F.R. § 402.14. Courts have recognized that the "may affect" hurdle is extremely low, encompassing any possible effect, whether beneficial, benign, adverse, or of an undetermined character.

Formal consultation concludes with the preparation of a biological opinion by FWS and/or NFMS addressing whether the proposed action will jeopardize threatened or endangered species or result in the destruction or adverse modification of critical habitat and setting forth any necessary measures for avoiding, minimizing, and mitigating any adverse impacts. 16 U.S.C. § 1536(b). An action agency may avoid formal consultation by engaging in "informal

consultation" with FWS and/or NMFS and obtaining a written concurrence that the project is not likely to adversely affect threatened or endangered species or critical habitat. 50 C.F.R. § 402.13(a).

The Agency's issuance of the IFR required consultation under the ESA because when combined with CEQ's revocation of its implementing regulations, it substantially weakens the environmental review process in many ways that affect listed species and their habitat, including by allowing the agencies to: (1) disregard and/or inadequately analyze direct, indirect, and cumulative impacts of proposed projects; (2) establish arbitrary limits on the completion of EAs and EISs, truncating and reducing the quality of those reviews; (3) gather no new data when preparing completing environmental reviews; (4) undercut the importance of analyzing a range of reasonable alternatives; (5) significantly expand the use of categorical exclusions when in fact adverse environmental impacts are likely; and other flaws as discussed in these comments.

But as far as commenters can determine, the Agency did not consult on the impacts of the IFR to protected species. The IFR says nothing about the issue at all, providing no explanation of a key issue. Nor is there any record of consultation that we are aware of. This failure violates the ESA and is arbitrary.

The Agency should suspend the effectiveness of the IFR until consultation is complete. This too is compelled by statute. Specifically, ESA Section 7(d) provides that after federal agencies initiate consultation on an action under Section 7(a)(2), but prior to completion of consultation, the agencies "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." 16 U.S. C. § 1536(d). The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. While the Agency goes through the consultation process, it should take measures to ensure that this provision is satisfied.

XVI. The IFR Impermissibly Broadens The Circumstances Where There Can Be Preparation Of NEPA Documents By Applicants Or Contractors.

The IFR provides that the applicant, or contractors hired by the applicant or by the Agency, may prepare environmental documents under the Agency's supervision. 90 Fed. Reg. at 29671–72 (7 C.F.R. § 1b.10).

The Agency impermissibly permits an "applicant or other third party" to prepare documentation relating to categorical exclusions. 90 Fed. Reg. at 29671 (7 C.F.R. § 1b.10(b)). The statute does not authorize the Agency to allow an applicant to prepare findings relating to a categorical exclusion or any other document beyond an EA or EIS, 42 U.S.C. § 4336a(f). The Agency thus should omit this provision and any other provision that would allow applicants or contractors to prepare documents other than EAs or EISs.

XVII. Certain Provisions Of The CEQ Regulations The Agency Has Retained Are Inconsistent With The Statute.

In several places, the Agency has retained provisions that appeared in the 2024 CEQ regulations and to which we previously have objected and/or continue to object as inconsistent with NEPA's requirements. Where the Agency has maintained versions of those provisions here, we incorporate our prior objections. *See, e.g.*, Letter from 328 organizations and tribal nations, to Council on Env't Quality (March 10, 2020); Letter from Environmental Organizations, to Council on Env't Quality (March 2, 2022); Letter from 88 organizations, to Council on Env't Quality (Sept. 29, 2023). We emphasize a few of the ways that the latest CEQ regulations are inconsistent with the statute and also describe objections to the way the Agency has reimplemented those requirements here.

A. The Agency cannot apply a categorical exclusion where it determines significant effects are avoided by mitigation or modification of the action.

CEQ's regulation provided that "[i]f extraordinary circumstances exist, the agency nevertheless may apply the categorical exclusion if . . . the agency modifies the action to avoid the potential to result in significant effects." 40 C.F.R. § 1501.4(b)(1). The Agency has retained a version of this regulation. 90 Fed. Reg. at 29650 (7 C.F.R. § 1b.3(f)(3)).

This approach is inconsistent with NEPA's statutory structure. Where an action cannot be "excluded pursuant to" a categorical exclusion, the Agency must do at least an EA. 42 U.S.C. § 4336(b)(2). In finding extraordinary circumstances, the agency has determined that the action is no longer within the "category of actions that a Federal agency has determined normally does not significantly affect the quality of the human environment," 42 U.S.C. § 4336e(1), and so the Agency must do an EA or EIS. *See* 42 U.S.C. § 4336(b)(2).

Indeed, normally, the place for an agency to determine that a particular action will not result in a significant impact as a result of modification or mitigation is after the completion of an EA. Such a determination—called a mitigated finding of no significant impact (FONSI)—thus is normally the end result of the EA review process, not a categorical exclusion determination. By bringing that forward into the categorical exclusion stage of environmental review, the Agency is engaging in an attempted end-run around the procedural requirements of the EA process. The statute envisions categorical exclusions and EAs to play separate roles, and the Agency's approach thus cannot be squared with the statute.

B. The statute does not permit reliance on previously prepared environmental documents.

CEQ also had permitted an agency to adopt EISs, environmental assessments, and categorical exclusion determinations where the proposed actions are "substantially the same" as the action covered by the original environmental document. 40 C.F.R. § 1506.3. The Agency repeats that authority here, *see* 90 Fed. Reg. at 29668 (7 C.F.R. § 1b.9(e)(8).

Whether there is any statutory support for this kind of adoption or reliance is questionable. The statute specifies the circumstances where no environmental review is required, 42 U.S.C. § 4336, and allows an agency to rely on a prior environmental document only in cases "[w]hen an agency prepares a programmatic environmental document," 42 U.S.C. § 4336b. But even if some forms of adoption could be squared with the statute—where the adopted document was subjected to any required public participation and other requirements in the context of applying it to the proposed action—the statute should not be read to bear using such a process to skip procedural steps altogether.

To that end, the Agency's attempt to use this process to expand the scope of available categorical exclusions that have never been formally adopted pursuant to 42 U.S.C. § 4336c is not permitted. NEPA expressly limits reliance on categorical exclusions to only "one of the agency's [own] categorical exclusions" [or] "another agency's categorical exclusions consistent with section 4336c of this title." 42 U.S.C. § 4336(a)(2); *see also id.* § 4336(b)(2). Further, even for situations where an agency has adopted a categorical exclusion, it can be applied only to the specific activities that fall within that "category of actions," *id.* § 4336e(1), not to any other action that the agency claims is "substantially the same."

C. The emergency circumstances provision is not authorized by statute.

The Agency has retained a version of CEQ's provision (40 C.F.R. § 1506.11) relating to NEPA compliance in the case of emergencies.

As an initial matter, the Agency has not located any statutory support within NEPA that justifies non-compliance. NEPA does not, by its terms, allow its requirements to be skipped in the case of emergency. Indeed, the statute and its promise of compliance "to the fullest extent possible," 42 U.S.C. § 4332, should be interpreted as "words of expansion rather than words of limitation," Richard Lazarus, *The National Environmental Policy Act in the United States Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 Geo. L.J. 1508, 1541 (2012) (collecting cases), and early courts applying the act rejected the argument that agencies had discretion not to implement the statute, *see, e.g.*, *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 699 (2d Cir. 1972) ("NEPA must be followed unless some existing law applicable to the agency ma[kes] compliance impossible."); *Ely v. Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971). Accordingly, there is no basis for the Agency omitting its obligation to satisfy NEPA by claiming the existence of an emergency.

Relatedly, the Agency has omitted the reminder—found in CEQ's prior version of the regulations—that "[a]lternative arrangements do not waive the requirement to comply with the statute, but establish an alternative means for NEPA compliance." 40 C.F.R. § 1506.11. That had been an important provision to "address confusion as to whether, during emergencies, agency actions are exempted from NEPA." 89 Fed. Reg. at 35529. The answer to that confusion was a resounding no. *Id*. The Agency should retain this express disclaimer.

Finally, to the extent the Agency suggests that it can take actions without consulting the CEQ, 90 Fed. Reg. at 29670 (7 C.F.R. § 1b.9(v)), that marks an unexplained change from CEQ's regulation.

XVIII. Conclusion.

For all these reasons, the Agency's IFR is inconsistent with NEPA and bedrock principles of administrative law. We urge the Agency to withdraw the IFR until the agency can issue draft rules subject to comment, with a reasonable timeline for comments.