



Animal Welfare Institute

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March 10, 2020

Via Federal eRulemaking Portal

Ms. Mary Neumayr, Chair
Edward A. Boling, Associate Director for NEPA
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Comments on Proposed Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Docket Number CEQ–2019–0003

Dear Chair Neumayr and Associate Director Boling:

On behalf of the Animal Welfare Institute (“AWI”), we submit the following comments on the Council on Environmental Quality’s (“CEQ”) Proposed Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* See 85 Fed. Reg. 1,684 (Jan. 10, 2020).

AWI, established in 1951, is a non-profit charitable organization headquartered in Washington, DC. The organization is dedicated to reducing animal suffering caused by people by seeking better treatment of animals in the wild, in the laboratory, on the farm, at home, and in commerce. This is accomplished through public education, research, collaborations with like-minded organizations, media relations, outreach to agencies, engaging its members and supporters, advocating for stronger laws both domestically and internationally, and through litigation.

AWI specifically endorses and incorporates by reference the comments filed by Earthjustice, the Southern Environmental Law Center, the National Wildlife Federation, and Oceana on behalf of themselves and numerous other public interest organizations, including AWI, on CEQ’s Proposed Update to the Regulations for Implementing the Procedural Provisions of NEPA. AWI further incorporates by reference the testimony provided by AWI staff at the two public hearings held on this proposal in Denver, Colorado, on February 11, 2020, and in Washington, D.C., on February 25, 2020. AWI offers the following supplemental comments.

I. Introduction

As the Supreme Court has held, the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, is the “basic charter for protection of the environment.” 40 C.F.R. § 1500.1(a). *Dept. of Transp. v. Pub Citizen*, 541 U.S. 752, 756 (2004). In enacting NEPA, Congress declared a national policy of “creat[ing] and maintain[ing] conditions under which man and nature can exist in productive harmony.” *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1120 (9th Cir. 2008) (quoting 42 U.S.C. § 4331(a)). NEPA was adopted to “promote efforts which will prevent or eliminate damage to the environment and biosphere” in order to “fulfill the responsibility of each generation as trustee of the environment for succeeding generations.” 42 U.S.C. §§ 4321, 4331(b)(1). NEPA is intended to “ensure that [federal agencies] . . . will have detailed information concerning significant environmental impacts” and “guarantee[] that the relevant information will be made available to the larger [public] audience.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

Under NEPA, before a federal agency takes a major federal action that significantly affects the quality of the environment, the agency must prepare an Environmental Impact Statement (“EIS”). *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1067 (9th Cir. 2002) (quoting 43 U.S.C. § 4332(2)(C)); 40 C.F.R. § 1502.9. “An EIS is a thorough analysis of the potential environmental impact that ‘provide[s] full and fair discussion of significant environmental impacts and . . . inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.’” *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (citing 40 C.F.R. § 1502.1). An EIS is NEPA’s “chief tool” and is “designed as an ‘action-forcing device to [e]nsure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.’” *Or. Natural Desert Ass’n*, 531 F.3d at 1121 (quoting 40 C.F.R. § 1502.1).

CEQ has proposed revisions to NEPA’s implementing regulations that are unprecedented in their significance and scope. AWI is concerned that the majority of the proposed changes would severely undermine informed agency decision making, reduce transparency, and limit public involvement in the NEPA process. The proposed rule would introduce changes that are inconsistent with both the letter and spirit of NEPA. Far from achieving the stated purpose of “streamlining” NEPA, the proposed changes would sow greater uncertainty, upending established case law, policies and procedure and creating confusion for the regulated community and the public that would take years if not decades to resolve.

Furthermore, CEQ’s public process for the rulemaking has been woefully inadequate to facilitate meaningful public participation and engagement. The public was provided with only two hearings and a mere 60 days to comment on regulations that would drastically alter the implementation of one of our country’s most essential environmental laws. AWI submitted a request for an extension of the comment period in a letter to Mr. Edward Boling and Ms. Viktoria Seale dated January 15, 2020. AWI also requested an extension of time during testimony provided during the hearing in Washington, D.C., on February 25, 2020. CEQ has failed to provide any response to these requests. The remainder of these comments address the proposed revisions relating to the alternatives analysis and cumulative effects analysis, including consideration of climate change impacts and impacts to threatened and endangered species.

II. Alternatives Analysis

We oppose the proposed changes to the alternatives analysis, and we request that this proposal be withdrawn. The alternatives analysis has been the subject of significant litigation, and a large body of caselaw has developed on this subject. The notice of proposed rulemaking entirely ignores 50 years of judicial precedent on this subject. This renders the proposed rulemaking arbitrary and capricious, and therefore unlawful.

An agency's duty to consider alternatives to the proposed action has been described as the "heart" of the NEPA process. 40 C.F.R. § 1502.14. Agencies are required to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E); *see also* 42 U.S.C. § 4332(C)(iii). An EIS must "provide full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (citing 40 C.F.R. § 1502.1). It is essential that an EIS contain "detailed and careful" analysis of the relative merits and demerits of the proposed action and proposed alternatives, a requirement which courts have characterized as the "linchpin" of an EIS. *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) (quoting *Monroe Cnty Conservation Soc'y, Inc. v. Volpe*, 472 F.2d 693, 697-98 (2d Cir. 1972)).

"The purpose of NEPA's alternatives requirement is to ensure agencies do not undertake projects "without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means." *Env'tl. Defense Fund, Inc. v. U.S. Army Corps of Engrs.*, 492 F.2d 1123, 1135 (5th Cir. 1974). That analysis must identify multiple viable alternatives, so that an agency can make "a real, informed choice" from the spectrum of reasonable options. *Friends of Yosemite Valley v. Kemptorne*, 520 F.3d 1024, 1039 (9th Cir. 2008).

Federal courts have consistently held that an agency's failure to consider a reasonable alternative is fatal to an agency's NEPA analysis. *See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) ("A 'viable but unexamined alternative renders [the] environmental impact statement inadequate.'") (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)); *Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1519-20 (9th Cir. 1992) ("The existence of a viable, but unexamined alternative renders an environmental impact statement inadequate."). If the action agency rejects an alternative from consideration, it must explain why a particular option is not feasible and was therefore eliminated from further consideration. 40 C.F.R. § 1502.14(a). The courts will scrutinize this explanation to ensure that the reasons given are adequately supported by the record. *See Muckleshoot Indian Tribe*, 177 F.3d at 813-15; *Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1522 (9th Cir. 1992) (while agencies can use criteria to determine which options to fully evaluate, those criteria are subject to judicial review), *Citizens for a Better Henderson*, 768 F.2d at 1057.

CEQ has specifically invited comment on whether to establish a presumptive number of alternatives. We oppose the establishment of a presumptive number. Such an arbitrary

limitation is unprecedented, unwarranted, and has the potential to unduly restrict agency decision making on complex matters of critical importance to communities. The courts have required agencies to identify multiple viable alternatives, so that they can make “a real, informed choice” amongst the spectrum of reasonable options. As discussed above, the courts have consistently held that an agency’s failure to consider a reasonable alternative is fatal to the NEPA analysis, and courts will assess the reasons that alternatives were rejected. Arbitrarily limiting the number of alternatives undercuts the ability of the judicial branch to review agency decision making. It may also induce more litigation because limiting the number of alternatives increases the likelihood that an agency will fail to examine a reasonable alternative, which makes a successful legal challenge more likely. If the court finds the final agency action to be inadequate, then it would likely be remanded to the agency for further review. This would increase the time and resources that the agency would need to expend on its review, which would reduce efficiency and timeliness of agency decision making. This is counterproductive to the rationale CEQ has given for the proposed regulatory changes. Notably, increasing agency staff to adequate levels, providing additional training, and enhancing efforts to reduce staff attrition would be a more effective method of ensuring the efficiency of the NEPA process, and would not require undermining the very purpose of the law.

In its request for input on establishing a presumptive number of alternatives, CEQ provided the following example: “(e.g., a maximum of three alternatives including the no action alternative).” 85 Fed. Reg. 1,684, 1,702. Although we acknowledge that this is an example, it is telling as to what CEQ’s preference would be in the event that a presumptive maximum number of alternatives was adopted. If there were only three alternatives, including the no action alternative, that would require only the preferred alternative and one other alternative. In many circumstances, this would entirely fail to address the “full spectrum of alternatives,”¹ particularly for projects that are complex or involve sensitive resources.

Below is a list of questions that are vital to a better understanding of the rationale and the implications of the proposed revisions to the alternatives analysis:

1. How did CEQ take into consideration the extensive caselaw on alternatives analysis as it developed the proposed regulations?
2. If CEQ did not consider this caselaw, why did the agency choose not to do so?
3. Why is CEQ proposing regulations that are not in accordance with over 50 years of caselaw on alternatives analysis?
4. How do the proposed changes make the regulatory atmosphere more predictable?
5. How would the proposed change reduce litigation on alternatives analysis?

¹ CEQ has advised that “[w]hen there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS.” Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, Question 1b, 46 Fed. Reg. 18,026 (March 23, 1981) (as amended 1986). Available at: <https://www.energy.gov/sites/prod/files/2018/06/f53/G-CEQ-40Questions.pdf>.

6. What benefit would a presumptive limitation on alternatives provide?
7. What negative impacts would a presumptive limitation on alternatives impose?
8. Could a presumptive limitation on alternatives negatively impact agency flexibility, and if so, why does CEQ think that such a negative impact is acceptable?
9. How would a presumptive limitation accommodate a particularly complex project or a project involving particularly sensitive resources, for which a limited number of alternatives would not be appropriate or legally acceptable?
10. If a presumptive limitation were adopted, would a variance from the presumptive number be permitted, and if so, how would the regulations provide for this?
11. How does CEQ define a “reasonable number of examples”?²

III. Cumulative Impacts Analysis and Consideration of Climate Change

We are strongly opposed to the proposal to remove the Cumulative Effects Analysis (“CEA”) from consideration of the impact of a federal project,³ and we request that this proposal be withdrawn. This proposal would overturn a rational, common sense CEQ regulation that has been in place for 42 years and would circumvent established caselaw on this issue. CEA is a required aspect of environmental impact analysis under NEPA.⁴ The regulation, 40 C.F.R. § 1508.25(c), which was first issued by CEQ in 1978, directs agencies to consider in their environmental impact analyses three types of impacts: direct, indirect, and cumulative. Cumulative impact is defined as “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

As one in-depth analysis of NEPA legislative history and caselaw explains: “CEA is a critical aspect of NEPA analysis in that it requires federal agencies to look beyond the incremental impacts of a single decision, which may be individually insignificant but may cumulatively contribute to significant environmental change. The legislative history of NEPA’s passage indicates that cumulative impacts were always intended to be one of the central aspects of NEPA analysis.”⁵ “[T]he legislative history of NEPA indicates Congress’s desire to improve upon the mistakes of the past by looking beyond incremental decision-making by independent government agencies to consider long-term and cumulative effects. Part of the intent of NEPA . . . was to force federal agencies to look beyond the immediate effects of their projects and their

² *See id.*

³ 85 Fed. Reg. 1,684, 1,729 (Jan. 10, 2020) (stating that analysis of cumulative effects is not required).

⁴ Courtney A. Schultz, History of the Cumulative Effects Analysis Requirement Under NEPA and Its Interpretation in U.S. Forest Service Case Law, 27 J. Env’tl. Law and Litigation 125, 126 n7 (2012). Available at: <https://mylaw.uoregon.edu/org/jell/docs/271/Schultz.pdf>.

⁵ *Id.* at 127.

own jurisdictional boundaries and provide a larger-scale analysis of their contribution to the state of the environment.”⁶

Moreover, “[t]he notion of CEA also follows from other language in the Act itself. Under Section 102 of NEPA, agencies must report on ‘the environmental impact of the proposed action’ and ‘any adverse environmental effects which cannot be avoided should the proposal be implemented.’”⁷ Indeed, “[t]he Act also specifies that the EIS should discuss ‘the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity.’ It is implied that the scope of an EIS is meant not only to consider the immediate effects of a project but also how it might impact the environment in the long-term through indirect or cumulative effects with other projects.”⁸

“The precise terminology of “cumulative impacts” is not found in the legislative hearings that preceded NEPA’s passage. However, the cumulative effects requirement represents some of the core goals of NEPA: to consider long-term environmental effects, to look beyond incremental decision-making, and to consider the effects of the actions of multiple actors. When seen in concert with the sweeping environmental goals articulated in the statement of purpose and Section 101 of NEPA, the language in Section 102, and the legislative history of NEPA, CEA is a logical interpretation of the Act itself. Furthermore, the CEA requirement was a codification of NEPA common law that had been established during the 1970s[.] CEQ guidelines also emphasized the importance of cumulative impacts as early as 1973. Therefore, when the CEA requirement was included in the 1978 regulations, it was nothing new or novel.”⁹

This legislative history provides a clear foundation for the CEA in CEQ’s 1978 NEPA regulations. CEQ’s proposed removal of this requirement would overturn a regulation that has been in place for 42 years. CEQ proposes this drastic change without adequate explanation. It is a well-settled principle of administrative law that a federal agency may not adopt a position that abruptly changes direction from prior agency regulations without providing a reasoned explanation for the change. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *see also Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (“adjudication is subject to the requirement of reasoned decisionmaking”), *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (an agency has a duty to “explain its departure from prior norms”). Courts reviewing abrupt agency changes of direction apply this principle when an agency formally rescinds or revises an existing regulation, *id.* at 42, 46, 57, and when it alters a prior interpretation of its own rules or governing statute. *See, e.g., N.Y. Pub. Interest Research Group v. Johnson*, 427 F.3d 172, 182–83 (2d Cir. 2005); *Lal v. INS*, 255 F.3d 998, 1008–09 (9th Cir. 2001) (invalidating an agency interpretation of a regulation because the agency changed course from its settled policies).

⁶ *Id.* at 132. *See also* S. REP. NO. 91-296 (1969).

⁷ *Id.* at 133 (citing 42 U.S.C. § 4332(C)(i)–(ii) (2006)).

⁸ *Id.*

⁹ *Id.* (citing Terence L. Thatcher, Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act, 20 ENVTL. L. 611 (1990) and 38 Fed. Reg. 20,550 (Aug. 1, 1973)).

In administrative rulemaking, the rationality requirement extends from the principle that changes to regulatory law should be founded on reasoned analysis based on agency experience and expertise. Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 820 (1994). According to a recent Supreme Court decision, when changing a policy, “the agency must at least ‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’” *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citing *FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009)). “In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Id.* (citation omitted). “In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox Television Stations*, 556 U.S. at 515–16. “It follows that an ‘[u]nexplained inconsistency’ in agency policy is ‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.’” *Encino Motorcars*, 136 S. Ct. at 2126 (citing *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

CEQ’s sudden reversal of this long-standing position, which has been upheld by numerous court decisions, is arbitrary and capricious, and must be withdrawn.

A. Climate Change Impacts

The proposed changes to the CEA are clearly designed to restrict agencies’ ability to consider a project’s climate impacts. Yet courts have held that “[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). “[T]he fact that climate change is largely a global phenomenon that includes actions that are outside of [the agency’s] control . . . does not release the agency from the duty of assessing the effects of its actions on global warming within the context of other actions that also affect global warming.” *Id.* (quotations and citations omitted); *see also Border Power Plant Working Grp. v. U.S. Dep’t of Energy*, 260 F. Supp. 2d 997, 1028–29 (S.D. Cal. 2003) (finding agency failure to disclose project’s indirect carbon dioxide emissions violates NEPA).

The need to evaluate such impacts is bolstered by the fact that “[t]he harms associated with climate change are serious and well recognized,” and environmental changes caused by climate change “have already inflicted significant harms” to many resources around the globe. *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007); *see also id.* at 525 (recognizing “the enormity of the potential consequences associated with manmade climate change.”). For a non-exhaustive list of cases in which courts have held that climate change impacts must be considered as part of the NEPA analysis, *see Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), *High Country Conservation Advocates v. United States Forest Serv.*, 52 F. Supp. 3d 1174 (D. Colo. 2014), *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transp.*, 713 F. Supp. 2d 491 (M.D.N.C. 2010), *San Juan Citizens Alliance v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227 (D.N.M. 2018), *Mont. Env’tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017).

CEQ has recognized the importance of analyzing climate change impacts, as demonstrated by its release of Revised Draft Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews in December 2014 (hereinafter “Climate Change Guidance”).¹⁰ As the Climate Change Guidance explains, although “[c]limate change is a particularly complex challenge given its global nature and inherent interrelationships among its sources, causation, mechanisms of action, and impacts,” it is a “fundamental environmental issue, and the relation of Federal actions to it falls squarely within NEPA’s focus.”¹¹ The Guidance states that “analyzing the proposed action’s climate impacts and the effects of climate change relevant to the proposed action’s environmental outcomes can provide useful information to decision-makers and the public and should be very similar to considering the impacts of other environmental stressors under NEPA.”¹² This is consistent with CEQ’s Guidance on Considering Cumulative Effects under NEPA (“Cumulative Impacts Guidance”), which directs agencies to consider impacts on the “global atmosphere.”¹³

The CEQ Climate Change Guidance outlines a framework of analysis for these issues. Regarding the potential of the proposed action and action alternatives to impact the climate, the Climate Change Guidance provides that agencies should “account for greenhouse gas emissions from the proposed action and any connected actions,” and that the emissions considered should include all those that have “a reasonably close causal relationship to the Federal action, such as those that may occur as a predicate for the agency action (often referred to as upstream emissions) and as a consequence of the agency action (often referred to as downstream emissions)[.]”¹⁴ The Climate Change Guidance directs agencies to consider two specific impact areas relating to climate change: “(1) the potential effects of a proposed action on climate change as indicated by its GHG Emissions; and (2) the implications of climate change for the environmental effects of a proposed action.” The Climate Change Guidance also takes into account the difficulties in attributing specific climate impacts to individual projects. To address this, CEQ recommends that agencies use the projected GHG emissions and also, when appropriate, potential changes in carbon sequestration and storage, as a proxy for assessing a proposed action’s potential climate change impacts.¹⁵

¹⁰ CEQ finalized this Climate Change Guidance in August 2016. See Council on Environmental Quality, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (Aug. 2016). Available at: https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf. The Guidance was subsequently withdrawn in April 2017. In June 2019, a new Draft NEPA Guidance on Consideration of Greenhouse Gas Emission was released. 85 Fed. Reg. 30,097 (June 26, 2019). A final version has not been published.

¹¹ CEQ Revised Draft Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews at 2 (Dec. 2014).

¹² *Id.*

¹³ Cumulative Impacts Guidance at 15; see also *id.* at 13 (describing “release of greenhouse gases” as a cumulative effect to be considered in NEPA analyses).

¹⁴ CEQ Revised Draft Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews at 11 (Dec. 2014).

¹⁵ *Id.* at 8.

Removing the CEA from CEQ regulations and prohibiting consideration of a project's impacts on climate change is a reversal of prior agency policy that must be adequately explained, as discussed above. CEQ has failed to adequately explain the reasons for this reversal, which renders this aspect of the proposed rulemaking arbitrary and capricious.

B. Impacts on Threatened and Endangered Species

The elimination of the CEA will also adversely affect threatened and endangered species listed under the Endangered Species Act ("ESA"). The CEA benefits listed species by requiring the action agency to consider the impacts of current and future federal actions on listed species and their habitat. This is vital to assessing the impact of multiple projects on a broader scale. This is important because although one project may not adversely affect a species and its habitat, multiple projects may have an adverse impact, which agencies would entirely fail to evaluate under the proposed regulations. Consideration of the effects of multiple projects on habitat fragmentation, air and water quality, noise, foraging, breeding, and denning habitat, and food sources, for example, must be evaluated to understand how federal actions may affect listed species and their habitat.

The elimination of the CEA is particularly harmful because the CEA required by the current CEQ regulations is broader than requirements under the ESA's implementing regulations. The ESA's implementing regulations define cumulative effects as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 CFR § 402.02. In comparison, as stated above, the current NEPA regulations define cumulative impact as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. NEPA's CEA is therefore more comprehensive than the analysis required under the ESA. *See, e.g., Fund for Animals v. Hall*, 448 F. Supp. 2d 127, 136 (D.D.C. 2006) ("[T]he ESA Section 7 consultation process differs from the cumulative impacts analysis required by NEPA in a number of important ways." ESA Section 7 regulations "only require agencies to consider the cumulative impacts of non-federal actions" while "NEPA requires agencies to consider the cumulative impacts of all actions"). Additionally, the current NEPA regulations require the assessment of impacts that do not necessarily result in jeopardy or destruction or adverse modification of critical habitat, but that nonetheless may be significant, in contrast to the ESA's requirements. It is clear that removing NEPA's current CEA requirement will negatively impact threatened and endangered species and their habitat by undermining the ability of federal agencies to take cumulative effects on species into consideration when making certain decisions.

The proposed regulations will also adversely affect imperiled species by eliminating a significance factor that explicitly requires consideration of an action's impact on threatened and endangered species and their habitat. NEPA requires that federal agencies prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (2012). The "significance" of the proposed action's "environmental effects depends on both its context and its intensity." 40 C.F.R. § 1508.27. Intensity refers to the severity of the activity as revealed through the consideration of ten factors. One such factor is

the “degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the [ESA][.]” 40 C.F.R. § 1508.27(b)(9). CEQ fails to provide a reasoned explanation for the removal of this longstanding significance factor. This removal will likely result in a failure to consider impacts on threatened and endangered species and their habitat, which will cause harm.

Below is a list of questions that are vital to a better understanding of the rationale and the implications of the proposed revisions to the CEA:

1. How is CEQ’s removal of CEA in accordance with the requirements of NEPA?
2. How did CEQ consider the extensive caselaw on CEA as it developed the proposed regulations?
3. If CEQ did not consider this caselaw, why did the agency choose not to do so?
4. How did CEQ consider the legislative history of NEPA as it developed the proposed regulations?
5. Why is CEQ proposing regulations that are not in accordance with over 40 years of caselaw on CEA?
6. How do the proposed changes make the regulatory atmosphere more predictable?
7. How would the proposed change reduce litigation on CEA?
8. How did CEQ consider the caselaw that has developed on consideration of a project’s climate impacts as it developed the proposed regulations?
9. If CEQ did not consider this caselaw, why did the agency choose not to do so?
10. How can action agencies adequately assess the environmental impacts of a project without considering climate impacts?
11. How can action agencies and the U.S. Fish and Wildlife Service adequately assess the impacts of federal actions on threatened and endangered species and their habitat without considering the cumulative impacts of multiple actions?
12. Did CEQ assess the impact that its proposed regulatory changes may have on threatened and endangered species and their habitat? If so, how did CEQ conduct this assessment? If not, why did CEQ not conduct such an evaluation?
13. Why did CEQ remove the impact on threatened and endangered species as a significance factor, and what impact will this removal have on listed species and their habitat?

14. How can CEQ ensure that the proposed regulations will not further imperil species listed as threatened and endangered under the ESA?

IV. Conclusion

CEQ's proposed regulations fail to achieve their stated goal while fundamentally undermining the purpose and intent of NEPA and denying the public the democratic process at the heart of the law. We renew our request that you withdraw the fatally flawed proposed regulations. Thank you for your consideration of these comments. We look forward to CEQ providing detailed responses to the questions posed herein. If you have any questions or there is any additional information we can provide, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Johanna Hamburger". The signature is written in a cursive style with a large initial "J".

Johanna Hamburger

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