COLUMBIA LAW SCHOOL

SABIN CENTER FOR CLIMATE CHANGE LAW

EDF ENVIRONMENTAL DEFENSE FUND®
Finding the ways that work

March 10, 2020

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

Re: Proposed Amendments to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (Docket ID: CEQ-2019-0003-0001)

To Whom It May Concern:

The Sabin Center for Climate Change Law and Environmental Defense Fund submit these comments in response to the Council on Environmental Quality (CEQ)'s proposal to amend the implementing regulations of the National Environmental Policy Act (NEPA). This proposal represents a significant departure from CEQ's prior interpretation of NEPA as well as decades of agency practice, case law, and guidance consistent with that interpretation. It would undermine the core policy goals of NEPA by restricting the scope of environmental reviews and rescinding regulatory requirements aimed at ensuring that agencies take a "hard look" at the environmental effects of federal proposals. Furthermore, although climate change is not explicitly mentioned in the proposal, it appears that many of the provisions may be used to limit or even eliminate analysis of climate change-related considerations in NEPA reviews. This would be an absurd result a time when such considerations should be integral to agency decision-making across a broad array of projects and sectors.

1. NEPA's Core Policy Goals and the Requirement to Take a "Hard Look" at Environmental Impacts

NEPA establishes a national policy 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."[1] To carry out this policy, the statute declares that "it is the continuing responsibility of the Federal government to use all practicable means" to "improve and coordinate" federal activities so as to "fulfill the responsibility of each generation as a trustee of the environment for succeeding generations."[2]

[1] 42 U.S.C. § 4331(a).
[2] 42 U.S.C. § 4331(b).

As the Supreme Court has noted, the "sweeping policy goals" of NEPA are realized through a set of "action-forcing" environmental procedures, which require agencies to take a "hard look" at the environmental consequences of federal proposals.[3] This review process has twin aims: placing an obligation on agencies to consider every significant aspect of the environmental impact of a proposed action, and ensuring that the agency informs the public of how it has accounted for environmental impacts in its decision-making process.[4]

The "hard look" doctrine requires that agencies carefully consider relevant information about the environmental consequences of a proposed action, reasonable alternatives, and mitigation measures in order to make a reasoned decision about whether and how to proceed with the proposal.[5] The existing CEQ regulations provide a framework for complying with this obligation. For example:

- The regulations clarify that agencies must consider direct, indirect, and cumulative effects in environmental reviews, and define each of these terms.
- The regulations clarify the scope of actions that an agency should or may evaluate in the same NEPA process, including connected, cumulative, and similar actions.
- The regulations provide guidance and criteria for determining what constitutes a "significant" environmental effect which triggers the obligation to prepare a full environmental impact statement (EIS) for a proposal.

The proposed amendments would modify or rescind many of these provisions, replacing them with language aimed at limiting the scope of NEPA review. Some of these amendments are new standards which reflect an unreasonably narrow interpretation of the NEPA statute; others are vague restatements of existing law that lack the clarity and precision of the existing regulations.

2. Restricting the Scope of Effects That Must Be Reviewed Under NEPA

The proposal seeks to limit the scope of NEPA review by modifying the definition of "effects" that must be considered in NEPA reviews. As noted above, the current regulations require agencies to consider direct, indirect, and cumulative effects. The proposed amendments would replace this framework with the following definition:

> "Effects or impacts means effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. Effects include reasonably foreseeable effects that occur at the

[3] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).
[4] Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97 (1983).
[5] Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 378 (1989).

same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance."[6]

In addition, the proposed amendments would specify that:

> "A ''but for'' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. *Analysis of cumulative effects is not required.*"[7]

The proposal would thus curtail the scope of the impact analysis by: (i) rescinding the requirement to evaluate cumulative effects, and (ii) introducing new language aimed at limiting the instances in which agencies would be required to evaluate indirect effects. These amendments reflect an unreasonably narrow interpretation of what NEPA requires.

i. Cumulative Effects

The provision stating that "analysis of cumulative effects is not required" is an impermissible interpretation of NEPA. The statute explicitly calls for consideration of "*any* adverse environmental effects which cannot be avoided should the proposal be implemented."[8] This is expansive language which should be given full effect in light of the ambitious policy goals set forth in NEPA.

The cumulative effects analysis is an essential component of environmental impact assessment (EIA), as it allows agencies to understand how the incremental impacts of a project contribute to cumulative environmental problems such as climate change, air pollution, water pollution, and biodiversity loss, among other things. CEQ has noted that such analysis is "critical" for the purposes of evaluating project alternatives and developing appropriate mitigation strategies.[9] Reinforcing CEQ's prior position is the fact that the cumulative effects requirement has been integrated into EIA frameworks around the world, and many jurisdictions have adopted supplemental requirements for strategic environmental assessment (SEA) in order to improve assessment of cumulative effects of government decision-making at the programmatic level.[10]

[6] 85 Fed. Reg. 1684, 1728-29 (Jan. 10, 2020).
[7] 85 Fed. Reg. at 1729.
[8] 42 U.S.C. § 4332(C)(ii).
[9] CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* (1997).
[10] UN ENVIRONMENT, ASSESSING ENVIRONMENTAL IMPACTS - A GLOBAL REVIEW OF LEGISLATION (2018).

There are decades of agency practice, case law, and guidance affirming CEQ's prior interpretation that NEPA requires analysis of cumulative effects.[11] In some cases, courts have directly tied the obligation to evaluate cumulative effects to the statutory provisions rather than regulations. For example, in *Kleppe v. Sierra Club* (1974), the Supreme Court stated that consideration of cumulative effects at a programmatic level is necessary to comply with NEPA's mandate that agencies use "all practicable means" to achieve the policy of environmental protection set forth in NEPA and to comply with NEPA's procedural requirements.[12]

CEQ's proffered justification for removing the requirement to evaluate cumulative effects is that this will "focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action."[13] But in making this claim, CEQ overlooks the fact that NEPA reviews are already bounded by the "rule of reason" and agencies need only consider cumulative effects that are reasonably foreseeable, potentially significant, and caused by the action under review.[14]

ii. Indirect Effects

The proposed definition states that effects which must be considered under NEPA "*may* include reasonably foreseeable effects that are later in time or farther removed in distance" (i.e., indirect effects).[15] This is in contrast to the existing regulations, which specify that agencies *shall* evaluate such effects.[16] The addition of permissive language here appears aimed at giving agencies discretion about whether and how to evaluate indirect effects. Again, we do not think that this is a valid interpretation of NEPA due to the statutory language requiring agencies evaluate *any* adverse environmental effects and the decades of agency and judicial practice affirming that this includes indirect effects.

In addition, we are concerned about the new provisions which state that there must be a "reasonably close causal relationship" between the effect and the action, and that a "but for" causal relationship is insufficient for NEPA purposes. These provisions seek to further limit the scope of the impact analysis without clear standards or adequate justification. In particular, the language requiring a "reasonably close causal relationship" is not only extremely vague (the proposed regulations do not define this term) but also unnecessary given that the NEPA analysis

[11] See, e.g., CEQ (1997); U.S. EPA, *Consideration of Cumulative Impacts in EPA Review of NEPA Documents,* EPA 315-R-00-002 (1999) ("Because federal projects cause or are affected by cumulative impacts, this type of impact must be assessed in documents prepared under NEPA.").
[12] Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976).
[13] 85 Fed. Reg. at 1707.
[14] *See* 40 C.F.R. § 1508.7 (existing definition of "cumulative effects"). Although the regulatory definition doesn't explicitly limit the cumulative impacts analysis to "reasonably foreseeable" impacts, courts have made it clear that NEPA only requires "reasonable forecasting" and not a "crystal ball" inquiry. *See, e.g.,* Scientists' Inst. for Pub. Info., Inc. v. U.S. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C. Cir. 1973).
[15] 85 Fed. Reg. at 1729.
[16] 40 C.F.R. § 1508.25(c).

is already bound by the rule of reason and limited to those impacts which are reasonably foreseeable, potentially significant, and caused by the action under review. This language appears aimed at allowing agencies to ignore impacts which are in fact foreseeable and caused by the action on the grounds that the causal connection is too attenuated. As a result, it could be used as a justification for ignoring important impacts such as contributions to climate change.[17]

CEQ claims that this new language will help provide clarity on the bounds of effects consistent with the Supreme Court's holding in *Department of Transportation v. Public Citizen*. But the proposed amendments do not reflect the holding in that case. In *Public Citizen*, the Court held that an agency need not consider environmental effects in its NEPA review when it has "no ability" to adopt a course of action that could prevent or otherwise influence those effects.[18] The Court noted that the agency's lack of such discretion was a "critical feature" of the case. It explained that there was no reason to collect and analyze information about a particular set of impacts when the agency "simply lacks the power to act on" that information.[19] Thus, the fundamental issue in *Public Citizen* was whether the agency had the discretion to act on information about indirect effects. If CEQ intends to incorporate this standard into the NEPA regulations, then it should do so with greater precision and clarity.

Finally, we note that CEQ is also soliciting comment on whether it should affirmatively state that consideration of indirect effects is not required under NEPA. We strongly oppose such language for the reasons stated above: this would be an impermissible interpretation of NEPA and an unjustifiable departure from decades of agency practice, guidance, and case law.

3. Rescinding the Requirement to Prepare a Joint EIS for Cumulative Actions

The existing NEPA regulations require that agencies conduct a joint NEPA review of actions that "when viewed with other proposed actions have cumulative significant impacts."[20] CEQ is also proposing to strike this paragraph on "cumulative actions" for consistency with the proposed revisions to the definition of effects. CEQ does not proffer any other rationale for rescinding this aspect of the existing regulations.

We recognize that there is very little case law enforcing the cumulative actions requirement. However, this is largely due to the overlap between the cumulative impacts requirement and the cumulative effects requirement – when faced with situations where agencies have failed to analyze the cumulative effects of multiple projects, courts have sought to provide the narrowest possible remedy remanding with instructions to update the cumulative impacts analysis for one

[17] We discuss the implications of this and other amendments for climate change-related analysis below.
[18] U.S. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 770 (2004).
[19] Id. at 768.
[20] 40 C.F.R. § 1508.25(a)(2).

or more proposals, rather than requiring the preparation of a joint EIS.[21] Thus, the lack of case law should not be viewed as a reflection on the importance or validity of this requirement, but rather an expression of judicial restraint in NEPA enforcement.

The cumulative actions requirement serves two main purposes. The first is very similar to that of the cumulative effects requirement – it aims to ensure that agencies account for the synergistic or compounding effects of multiple actions on a particular resource, such as the global climate system or a regional water body. But the second purpose is supplemental to the cumulative effects requirement – it aims to promote efficiency in NEPA processes by specifying circumstances in which agencies should conduct a single NEPA review for multiple projects.

It is therefore ironic that CEQ would seek to rescind this requirement when the stated goals of the proposed amendments are to "facilitate more efficient, effective, and timely NEPA reviews." Indeed, one clear source of inefficiency in existing NEPA processes is that too often agencies do not use programmatic and joint reviews in a strategic fashion. CEQ explicitly elaborated upon the numerous opportunities whereby agencies could use programmatic analyses to provide for greater efficiency in their work as well as compliance with the twin aims of NEPA in 2014 guidance on this topic.[22]

The importance of evaluating cumulative actions together is further reinforced by another provision in the existing regulations which directs agencies to consider "whether the action is related to other actions with individually insignificant but cumulatively significant impacts" when evaluating significance, and which clarifies that "[s]ignificance cannot be avoided… by breaking [the action] down into small component parts."[23] As discussed below, we also oppose the amendment which would strike this language along with other guidance on how to conduct significance evaluations as it is inconsistent with the language and purpose of the statute. It is also arbitrary in that the effect of eliminating the provision runs counter to the stated purpose of the overall revision, namely increased efficiency in NEPA review.[24]

4. Revising the Criteria for Significance Determinations

[21] *See, e.g.,* Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989 (9th Cir. 2004).
[22] CEQ, Memorandum for Heads of Federal Departments and Agencies: Effective Use of Programmatic NEPA Reviews (Dec. 18, 2014).
[23] 40 C.F.R. § 1508.27(b)(7).
[24] An agency must "articulate satisfactory explanation for its action including rational connection between the facts found and the choice made" and an agency rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, *offered an explanation for its decision that runs counter to the evidence before the agency*, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43–44 (1983) (emphasis added, internal citations omitted).

The existing regulations define "significantly" as requiring consideration of both context and intensity.[25] They also outline ten criteria that should be considered in evaluating intensity which include the degree to which the possible effects are highly uncertain or involve unique or unknown risks, the degree to which the effects are likely to be highly controversial, and the degree to which the action may establish a precedent for future actions with significant effects.[26] Even under the existing regulations, agencies have a large amount of discretion in determining whether an impact is "significant."

The proposed rule would eliminate the existing definition of "significantly" and replace it with this provision: "In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action."[27] This language does not provide a workable definition of the term, and it fails to offer meaningful guidance to agencies, who will be left to reinvent analytic approaches to and criteria for determining significance on a case-by-case basis. Nor does it provide a benchmark that courts could use to evaluate the reasonableness of significance determinations. This, again, will result in uncertainty and delay for agencies conducting environmental review under NEPA.

In addition, the proposal would specify that even reasonably foreseeable effects "should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy casual chain."[28] CEQ cites the Supreme Court's decision in *Public Citizen* as support for this new restriction on significance determinations. But this is a misinterpretation of that case, which, as noted above, held that an agency is not required to consider effects in its NEPA analysis when it has "no ability" to prevent or otherwise influence those effects. There have been a number of court decisions affirming that *Public Citizen* is inapposite where an agency *does* have control over indirect effects, and that agencies must consider such effects so long as they are caused by the action and reasonably foreseeable.[29]

Finally, the proposed regulations would add a new provision stating that: "in the case of a site-specific action, significance would usually depend on the effects in the locale rather than in the Nation as a whole."[30] This provision has no justification in the NEPA statute and simply does not make sense: if a proposal will have potentially significant effects on the entire nation, then these effects should not be discounted simply because it is a site-specific project. To the contrary, if a

[25] 40 C.F.R. § 1508.27.
[26] *Id.*
[27] 85 Fed. Reg. at 1714.
[28] 85 Fed. Reg. at 1729.
[29] For an in-depth discussion of how this argument has been handled in cases involving fossil fuel supply infrastructure, see Michael Burger & Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review,* 110 HARVARD ENVIRONMENTAL LAW REVIEW 41 (2017); Michael Burger & Jessica Wentz, *Evaluating the Effects of Fossil Fuel Supply Projects on Greenhouse Gas Emissions and Climate Change Under NEPA,* WILLIAM & MARY ENVIRONMENTAL LAW AND POLICY REVIEW (forthcoming, 2020) (both attached as exhibits).
[30] 85 Fed. Reg. at 1714.

site-specific project will have nationwide impacts then this would weigh in favor of a significance determination.

There is no language in the NEPA statute which supports CEQ's attempt to limit significance determinations in this manner. To the contrary, NEPA's mandate to broadly look at all environmental impacts, particularly when read in light of the statute's lofty environmental policy, supports a more expansive interpretation of the statute. What's more, NEPA requires agencies to "[u]tilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment."[31] The proposed revision plainly seeks to eliminate the use of "systematic, interdisciplinary" analysis, and to avoid having agencies take the requisite "hard look" at environmental impacts.

5. Implications for Climate Change Analysis

We are particularly concerned that the current administration intends to use this proposal as a vehicle for curtailing analysis of GHG emissions and climate change impacts in NEPA reviews. Although "climate change" is not mentioned in the proposal, many of the aforementioned amendments appear aimed at overriding case law requiring analysis and disclosure of climate change-related considerations, particularly for fossil fuel supply proposals where such analysis is absolutely integral to informed decision-making about whether and how to proceed with the proposals.

For example, in early cases involving agency obligations to disclose GHG emissions under NEPA, courts held that agencies must not only quantify GHG emissions but also discuss the on-the-ground effects of climate change as part of the cumulative impacts analysis.[32] More recently, the regulatory requirements for analysis of indirect and cumulative effects have played a major role in litigation involving federal agency obligations to account for climate change when reviewing the impact of fossil fuel extraction leases and approvals for infrastructure such as pipelines. There are many court decisions requiring agencies to evaluate downstream GHG emissions (e.g., from the combustion of fossil fuels) as indirect or cumulative effects of such approvals, as well as several decisions requiring consideration of upstream emissions (e.g., from fossil fuel production) in the context of transport projects such as coal railways. In some cases, the cumulative effects requirement has also been interpreted as requiring agencies to consider the effects of multiple fossil fuel leasing decisions under their control. These decisions have played an important role in prompting more thorough analysis of the potential effect of such projects on fossil fuel use and the corresponding impact on GHG emissions and global climate change.[33]

[31] 42 U.S.C. § 4332(2)(A).
[32] See, e.g., Center for Biological Diversity v. National Highway Transportation Safety Administration, 538 F.3d 1172 (9th Cir. 2008).
[33] See Burger & Wentz (2017); Burger & Wentz (2020).

The proposed amendments take aim at many of the regulatory requirements underpinning the case law on climate change and NEPA. In particular:

- **Elimination of cumulative effects requirement:** This may be cited as a basis for ignoring a variety of different climate-related impacts in NEPA reviews, including: (i) downstream and upstream emissions from fossil fuel supply projects; (ii) cumulative emissions across multiple projects; and (iii) on-the-ground climate change impacts arising from a proposal's emissions contributions.
- **Modified language on indirect effects requirement:** The requirement that there be a "reasonably close causal relationship" appears aimed at limiting analysis and disclosure of certain indirect impacts, such as: (i) upstream and downstream emissions from fossil fuel projects, and (ii) any on-the-ground effects of climate change. In addition, the permissive language specifying that the effects which must be analyzed *may* include effects that are later in time or farther removed in distance signals to agencies that evaluation of indirect effects is optional rather than mandatory. Both provisions may therefore be used to justify the omission of GHG emissions and climate-relate considerations from NEPA reviews for a broad range of projects.
- **Elimination of cumulative actions requirement:** This may be cited as a basis for segmenting reviews of proposals that will have cumulatively significant effects on climate, such approvals of federal coal, oil, and gas leases and pipeline infrastructure.
- **Changes to significance criteria:** The revocation of the significance criteria would make it easier for agencies to dismiss the significance of GHG emissions across all types of projects, including fossil fuel supply projects, as there would be no clear guidelines for what constitutes a "significant impact." In addition, the new language specifying that even reasonably foreseeable effects "should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy casual chain" could be cited to justify the exclusion of upstream and downstream emissions from significance determinations for fossil fuel supply projects. It could also be used to justify the wholesale exclusion of GHG emissions and climate change impacts from all federal reviews, since the impacts of climate change (e.g., sea level rise) are geographically and temporally attenuated from the emission of GHGs. Finally, the proposed language specifying that significance "would usually depend on the effects in the locale rather than in the nation as a whole" may be used as a justification to ignore the contribution of projects to global climate change and the corresponding effect on the nation.

To be clear: there is no valid legal justification for excluding potentially significant GHG emissions or climate change impacts from NEPA reviews. Climate change is the most urgent and pervasive environmental problem of our time, and ignoring the ways in which federal proposals

may contribute to and exacerbate this problem would plainly violate the requirement to take a "hard look" at environmental impacts.

6. Conclusion

Rather than promoting transparency, public engagement, and informed decision-making consistent with the policy set forth in NEPA, the proposed amendments aim to curtail environmental analyses and limit disclosures to the public. While the stated purpose of the revisions is to "clarify CEQ regulations to facilitate more efficient, effective, and timely NEPA reviews"[34] the revisions would have the opposite effect. For reasons discussed above, we believe that many of these amendments reflect an unreasonably narrow interpretation of NEPA, and even those that are not clearly unlawful are problematic insofar as they will introduce additional ambiguity in the NEPA process and uncertainty about how agencies should carry out their statutory mandates. Moreover, given the current administration's energy and environmental agenda, we are deeply concerned that these amendments are part of a broader effort to streamline approvals of projects with potentially significant impacts on GHG emissions and climate change – particularly fossil fuel supply projects – without a thorough assessment of their environmental impacts.

Most of the environmental challenges we face today are in fact cumulative and interconnected. Climate change is a prime example. To ignore this reality is not only irrational – it is also detrimental to the public interest and a flagrant violation of NEPA's language and policy. Any future changes to the NEPA regulations should be aimed at improving consideration of indirect and cumulative effects rather than curtailing it. The proposed revisions represent a major step in the wrong direction.

Sincerely,

/s/ Rosalie Winn

Jessica Wentz
Non-Resident Senior Fellow
Sabin Center for Climate Change Law
jaw2186@columbia.edu
(707) 545-2904 x. 19

Rosalie Winn
Attorney, U.S. Clean Air
Environmental Defense Fund
rwinn@edf.org
(303) 447-7212

Attachments (2):

[34] 85 Fed. Reg. at 1685.

1. Michael Burger and Jessica Wentz, *Evaluating the Effects of Fossil Fuel Supply Projects on Greenhouse Gas Emissions and Climate Change under NEPA*, Wm. & Mary Envtl. L. & Pol'y (forthcoming, 2020)

2. Michael Burger and Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review*, 41 Harvard Envtl. L. Rev. 109 (2017)