SANTA FE FOREST COALITION
and WILD WATERSHED
P.O. Box 1943
Santa Fe, New Mexico 87504
sam@wildwatershed.org

March 10, 2020

Ms. Mary Neumayr
Chairperson, Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503
RE: CEQ-2019-0003

PROPOSED REVISIONS TO REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

Dear Chairman Neumayr:

The following are comments to the Council on Environmental Quality's (CEQ) proposed revisions to regulations implementing the National Environmental Policy Act ("NEPA" or the Act).[1] Please accept these comments on behalf of the Santa Fe Forest Coalition and Wild Watershed. The comment period ends March 10, 2020 making these comments timely.

The Santa Fe Forest Coalition is an all volunteer nonprofit that educates the public, the media and policy makers on critical issues concerning forest and wildlife preservation in New Mexico. Member groups include Wild Watershed, Once a Forest, Multiple Chemical Sensitivities Taskforce, La Cueva Guardians, Tree Huggers Santa Fe and others. Wild Watershed is an all volunteer organization focused on aquatic conservation and wilderness preservation. Many of our organizations and members will also be submitting individual comments.

These proposed revisions of CEQ's NEPA regulations are deeply flawed, violate the letter and intent of NEPA and will not satisfy the objectives of this revision as articulated in the preamble. They are therefore arbitrary and capricious and must be withdrawn.

[1] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act; Notice of proposed rulemaking ("NPRM"), 85 Fed. Reg. 1684 (Jan. 10, 2020).

1. Introduction

NEPA is the lodestar of our nation's environmental conscience and actions. In NEPA, Congress clearly articulated environmental policies and goals for the United States, while acknowledging the "worldwide and long-range character of environmental problems."[2] Fully implemented, NEPA could help American citizens meet today's dual challenges of climate disruption and loss of biological diversity. As Senator Henry Jackson, the primary Senate sponsor of the Act, explained, NEPA "serves a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values."[3]

NEPA regulations currently require "that environmental information is available to public officials and citizens before decisions are made and before actions are taken."[4] 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 logging, oil and gas leasing, and road construction, and to influence those decisions. Receiving public comment is only part of the purpose of the NEPA process. Those comments must be evaluated and considered by the agencies when they are making decisions. Through compliance with the current regulations, federal agencies have learned that they are expected to stop, look, and listen to the deed holders of public lands they are serving before committing resources. In short, while implementation has been far from perfect, American citizens have benefitted from the important information and public involvement achieved through NEPA's implementation.

The proposed revisions fundamentally mischaracterize and attempt to rewrite the purpose of NEPA. They seek to substantially reduce both the breadth and depth of NEPA analysis as well as eviscerate available remedies for inadequate compliance. They try to reduce or eliminate the applicability of NEPA to a wide range of actions. They dismiss conflict of interest concerns along with the public's interest in being able to enforce the law. Instead of the public's interest in sound decisionmaking being central to the NEPA process, they elevate the profit-driven objectives of private corporations.

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[2] 42 U.S.C. § 4332(F).

[3] Statement in *National Environmental Policy: Hearing before the Committee on Interior and Insular Affairs, United States Senate*, 91st Congress, 1st Session, April 16, 1969, Appendix 2, p. 206, quoted in Caldwell, Lynton Keith, *The National Environmental Policy Act: An Agenda for the Future*, p. xvi, Indiana University Press (1998).

[4] 40 C.F.R. § 1500.1(b).

Given the emphasis on efficiency, it is particularly startling to see that the proposal contains several stunning reversals of long-held CEQ positions and decades of practice and case law. For example, CEQ states in the preamble that NEPA does not contain the terms "direct, indirect, or cumulative effects."[5] It proposes to simplify the definition by eliminating those terms and eliminating the requirement to analyze cumulative effects altogether, referencing excessively lengthy documentation and irrelevant or inconsequential information.[6] But CEQ never explains the basis on which it reached these conclusions, let alone acknowledge the fundamental importance of cumulative effects in meeting NEPA's mandate.

The proposed revisions not only fail to satisfy the effectiveness objectives set forth by CEQ but also violate the Congressionally mandated purpose of NEPA of, among other goals, fulfilling the responsibilities of each generation as trustee of the environment for succeeding generations.[7]

Today, our nation and our world face some of the most significant challenges to life on earth that we have encountered in recorded history. The science is clear that human activity is inducing both major changes in climate and the extinction of flora and fauna. A plethora of authoritative studies and reports tell us that we have a rapidly closing window of time in which we can possibly prevent or slow continued warming that will harm humans' existence on earth for centuries as well as jeopardize the continued existence of about one million animal and plant species.[8] In short, now is precisely the wrong time to limit the way our nation considers climate impacts through the proposed evisceration of the NEPA process.

While we welcome the long-overdue recognition of tribal nations throughout the regulations, the extreme reversals of long-held CEQ positions would serve neither tribes nor the public well but instead would have a significantly detrimental and adverse impact on decisionmaking.

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[5] 85 Fed. Reg. at 1707. The statement about the lack of the precise terms "direct effect, indirect effect and cumulative effects" being in NEPA is reminiscent of the failed reliance of the Department of Labor on the lack of the term "service advisor" as a reason for reversing a long-standing position under the Fair Labor Standards Act. *Encino Motorcars, LLC v. Navarro,* 136 S.Ct. 127, 2127 (2016).

[6] 85 Fed. Reg. at 1707-08.

[7] 42 U.S.C. § 4331(b)(1).

[8] "Global Assessment Report on Biodiversity and Ecosystem Services", Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, 2019; "Global Warming of 1.5°C, Intergovernmental Panel on Climate Change, 2018, available at https://www.ipcc.ch/sr15/.

2. CEQ Has Violated Its Own Regulations for this Proposed Revision and Must Prepare an Environmental Impact Statement (EIS).

These revisions will change the environmental impact assessment process for the entire executive branch of government, covering millions of federal actions. The proposed regulations, clearly under the sole control and fully the responsibility of CEQ, will have a very significant effect on the quality of the human environment.

As CEQ noted in its preamble, it is disregarding its own past practices by failing to prepare NEPA analysis on these proposed revisions.[9] The proposed massive revisions, which would significantly alter how NEPA is implemented, clearly fall within the current definition of a major federal action.[10] Thus at a minimum, CEQ should have issued a draft environmental impact statement ("EIS") on January 10, 2020, when it published this proposal.

3. CEQ's Proposed Revision Triggers the Need for Consultation Under Section 7 of the Endangered Species Act.

Section 7 of the Endangered Species Act requires each agency to engage in consultation with the U.S. Fish and Wildlife Service ("FWS") and/or the National Marine Fisheries Service ("NMFS") (collectively the "Services") to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species ..."[11] The proposed action may adversely affect listed species and critical habitats in myriad ways.

The clearest demonstration as to how the regulations may affect listed species is the proposed change that allows agencies to ignore cumulative impacts. By allowing all federal agencies to ignore cumulative impacts entirely, cumulative impacts on listed species and critical habitats that occur downstream, downwind or otherwise outside the immediate areas of an agency's proposed action will never be evaluated. Agencies would have the green light to ignore entirely how a proposed action may, in conjunction with

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[9] Council on Environmental Quality, National Environmental Policy Act, Incomplete or Unavailable Information, Final Rule, 51 *Fed. Reg.* 15618, 15619 (April 25, 1986); Council on Environmental Quality, National Environmental Policy Act, Implementation of Procedural Provisions; Final Regulations, Vol. 43 55978, 55989, (November 29, 1978).

[10] 40 C.F.R. § 1508.18(a), (b)(1).

[11] 16 U.S.C. § 1536(a)(2).

other actions affecting a species, have potentially devastating effects on a species and/or its habitat.

Additionally, the proposed regulatory changes would gut the sole program that CEQ oversees to protect species listed under the ESA, replacing that program with an insignificant measure, in violation of ESA section 7(a)(1). "[S]ection 7(a)(1) imposes a specific obligation upon all federal agencies to carry out programs to conserve each endangered and threatened species."[12] "Conservation" means to use all necessary methods and procedures to bring any listed species to the point at which ESA protections are no longer necessary.[13]

CEQ's current NEPA regulations provide benefits that promote the conservation of listed species by requiring an assessment of cumulative impacts that includes consideration of the cumulative impacts of future federal actions, unlike the regulations implementing the ESA itself, which limit the analysis to "those effects of future State or private activities, not involving Federal activities[.]"[14]

The CEQ's proposed regulatory changes would strip away those benefits by barring the assessment of cumulative impacts entirely and otherwise weakening the analysis of impacts that do not amount to violations of other federal laws, making the remaining consideration of impacts merely an "insignificant measure" that cannot satisfy the section 7(a)(1) duty to conserve. In sum, the proposed NEPA regulation revisions take away the additive value that NEPA analysis provides to informing decisions above and beyond the analysis that would occur in the course of an ESA section 7(a)(2) consultation, and do not provide any substitute for those stripped benefits.

4. The Proposed Revisions are Fundamentally Inconsistent with the Purpose of NEPA and Congressional Intent

CEQ's proposed revisions wrongfully mischaracterize NEPA and its implementing regulations as a procedural statue, turning today's substantively robust process with a clear purpose and linkage to NEPA's policies into a paperwork "check the box" exercise. Obscured is the law's overriding focus, namely utilizing a common sense and public-friendly process as an action-forcing mechanism for achieving the goals of NEPA.[15]

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[12] *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1146 (11th Cir. 2008) (citing *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir.1998)).

[13] 16 U.S.C. § 1532.

[14] 50 C.F.R. § 402.02.

[15] 40 C.F.R. § 1500.1(a).

For example, CEQ proposes to eliminate 40 C.F.R. § 1500.2 from the regulations entirely. The strong regulatory policy contained therein directs agencies to comply with various requirements of NEPA "to the fullest extent possible", including "[E]ncourage and facilitate public involvement in decisions which affect the quality of the human environment."[16] This mandate comes directly from Section 102(2) of NEPA.[17]

In their deliberations on this provision of NEPA, Congress made it clear that:

> ... It is the intent of the conferees that the provision "the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in Section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.[18]

CEQ's proposal to drop this section reinforces its inexplicable intention to define NEPA much more narrowly than the plain statutory language and Congressional mandate require. Nothing in the preamble addresses the reason for doing this other than simplifying and eliminating redundancy and repetition, but the preamble never explains how dropping part of the law is justifiable simplification nor does it point to a rational that make the current provision redundant or repetitious.[19]

5. The Proposed Revisions Would Illegally Eliminate Cumulative Effects Analysis

NEPA's legislative history is replete with references to the complexity of environmental impacts, the consequences of "letting them accumulate in slow attrition of the environment" and the "ultimate consequences of quiet, creeping environmental decline" all of which pointed to the need for an analysis of proposed impacts beyond the

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[16] 40 C.F.R. § 1500.2(d).

[17] 42 U.S.C. § 4332.

[18] House of Representatives, Conference Report to accompany S. 1075, National Environmental Policy Act of 1969, Dec. 17, 1969, Report No. 91-765, at 9-10, *available at,* https://ceq.doe.gov/docs/laws-regulations/Senate-Report-on-NEPA.pdf.

[19] 85 Fed. Reg. at 1693.

immediate, direct effects of an action.[20] Noted ecologist William Odum succinctly described the resulting environmental degradation from the much discussed cumulative effects as "the tyranny of small decisions."[21]

Within a few months of its establishment, CEQ explained that, "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impacts of the action proposed (and of further actions contemplated)."[22] It also explained that the requirement in Section 102(2)(C) of NEPA to identify "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" in the detailed statement (now known as an EIS) required the agency "to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations."[23] CEQ has consistently interpreted NEPA ever since then as requiring analysis and consideration of cumulative effects; indeed, it has been the predominate focus of CEQ's work for decades.

It is especially tragic that CEQ would attempt to abandon the requirement to analyze cumulative effects even as our country and our world are increasingly experiencing the impacts of cumulative change, for as one court stated, "the impact of greenhouse gas emission on climate change is precisely the kind of cumulative impacts analyses that NEPA requires agencies to conduct."[24] The preamble explanation is strikingly brief to justify the removal of the most important requirements in the NEPA regulations. The preamble alludes primarily to wanting agencies to focus their time and resources on the most significant effects rather than producing "encyclopedic documents" that include irrelevant or inconsequential information.[25] But the direction to avoid producing

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[20] 115 Cong. Rec. 29070 (October 8, 1969); *see also*, report accompanying S. 1075, National Environmental Policy Act of 1969, Senate Committee on Interior and Insular Affairs, July 9, 1969.

[21] Odum W.E. 1982. Environmental degradation and the tyranny of small decisions. *Bioscience 33:728-729.*

[22] Council on Environmental Quality: Statements on Proposed Federal Actions Affecting the Environment; Interim Guidelines, April 30, 1970, Section 5(b) (filed with Fed. Reg. May 11, 1970), available in *Environmental Quality, The First Annual Report of the Council on Environmental Quality*, 288 (1970) *available at* https://www.slideshare.net/whitehouse/august- 1970-environmental-quality-the-first-annual-report-of. The Interim Guidelines were published in final form with similar text. 36 *Fed. Reg.* 7,724 (April 23, 1971).

[23] *Id.* at Section 7(a)(iv); *see also*. 42 U.S.C. § 4331(b)(1).

[24] *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508 (9th Cir. 2007), amended at 538 F.3d 1172 (9th Cir. 2008).

[25] 85 Fed. Reg. at 1708.

encyclopedic documents and to focus on the most significant effects simply mirrors CEQ's current regulations.[26]

CEQ's decision to bar consideration of cumulative effects will have real world environmental consequences by thwarting the development of information that has in the past altered agency decision-making. CEQ must withdraw this arbitrary proposal. If the agencies need further guidance on how to analyze cumulative effects, CEQ can provide that guidance. But it cannot obliterate a fifty-year-old legal requirement that is based on consistent interpretation of the law.

Additionally, CEQ asks whether it should codify any aspects of its proposed Greenhouse Gas (GHG) guidance in the regulation, and if so, how CEQ should address them in the regulations. We do not think CEQ should include its proposed GHG guidance in the regulations in any form. The courts have made it clear for many years that climate disruption is among the impacts to be assessed.[27] CEQ's draft guidance fell woefully short of the mark in many respects. Among other problems, it significantly failed to reflect relevant judicial decisions regarding issues such as quantification of GHG emissions and analysis of the actual effects resulting from them, the scope of that analysis, upstream and downstream effects, alternatives, cumulative effects analysis, the effects of climate disruption on vulnerable populations and on the proposed action itself.

6. The Proposed Revisions would Illegally Eliminate Indirect Effects Analysis

CEQ's proposed deletion of the definition and references to indirect effects 40 C.F.R. § 1508.1(g) is unlawful and will lead to confusion and litigation. Like cumulative effects, indirect effects have long been the subject of CEQ direction and guidance and the need for agencies to analyze indirect or secondary effects has also been the subject of numerous federal court decisions. Analysis of indirect effects is required whether CEQ's regulations specify them or not.

Along with the above-noted statements about cumulative effects, CEQ first addressed the need to analyze indirect or secondary effects in the 1970 Interim Guidelines.[28] Those guidelines explained that, "Both primary and secondary significant consequences for the environment should be included in the analysis". The example given of secondary effects

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[26] 40 C.F.R. §1500.1.

[27] *Mid States Coal. for Progress v. Surface Transp. Bd.,* 345 F.3d 520 (8th Cir. 2003); *Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003).

[28] 35 Fed. Reg. 7390, 7391 (May 12, 1970).

—the implications of a proposed action for population distribution or concentration and the effects of such a population change on resources such as water and public services in the area—was included in the updated 1971 Guidelines.[29]

The justification for striking the terms "direct" and "indirect" and deleting the definition of "indirect effects" from the regulations is as inadequate as the justification for deleting the requirement to analyze cumulative effects. The rationale is simply that it is too hard. In fact, we seriously disagree with that proposition.

To the extent agencies are truly having difficulty with how to go about assessing effects, CEQ should be working on further guidance for transmitting information on how to best and most efficiently meet the goals and requirements of the law. To the extent the difficulties are either self-imposed (for example, by agencies feeling pressured to omit references to climate disruption) or because they lack the capacity to prepare or oversee adequate NEPA analyses, CEQ should also address those problems. We remind CEQ that lack of agency resources is not a valid excuse for failing to comply with the law.[30] But CEQ cannot arbitrarily delete requirements that would strip NEPA analyses down to solely direct effects, thereby re-creating one of the fundamental problems that NEPA was designed to address.

For all of the reasons stated above, we strongly oppose both the deletion of the definition of indirect effects in CEQ's regulation and any possible attempt in the final regulation or future rulemaking to affirmatively state that agencies are not required to analyze indirect effects. In fact, agencies are required to analyze the full array of reasonably foreseeable impacts, including indirect effects, along with direct impacts and cumulative impacts. The current regulatory provisions should stand.

7. The Proposed Revisions Would Elevate the Role of the Private Sector While Diminishing the Role of the Public

40 C.F.R. § 1505.5(c) would reverse CEQ's prohibition against private sector applicants preparing EISs for their own projects. It would also delete the current conflict of interest provisions prohibiting consultants who have a financial interest or other interest in the outcome of the proposed action to prepare EISs for their own projects.

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[29] 36 Fed. Reg. 7724, 7725 (Apr. 23, 1973). ("Significant adverse effects on the quality of the human environment include both those that directly affect human beings and those that indirectly affect human beings through adverse effects on the environment.").

[30] *Pub. Emps. for Envtl. Responsibility v. U.S. Fish and Wildlife Serv.,* 177 F. Supp. 3d 146, 155 (D.D.C. 2016) ("The Court is aware of no case condoning an agency's failure to examine alternatives in an EA solely on the ground of unavailability of resources.").

These changes would negate the purpose of EISs by allowing a biased party to conduct the environmental analysis. CEQ clearly understands the risks of conflict of interest because it previously published guidance interpreting Section 1506.5(c) and the conflict of interest provision. That guidance addressed the importance of this provision:

> Some persons believe these restrictions are motivated by undue and unwarranted suspicion about the bias of contractors. The Council is aware that many contractors would conduct their studies in a professional and unbiased manner. However, the Council has the responsibility of overseeing the administration of the National Environmental Policy Act in a manner most consistent with the statute's directives and the public's expectations of sound government. The legal responsibilities for carrying out NEPA's objectives rest solely with federal agencies. Thus, if any delegation of work is to occur, it should be arranged to be performed in as objective a manner as possible. Preparation of environmental impact statements by parties who would suffer financial losses if, for example, a "no action" alternative were selected, could easily lead to a public perception of bias. It is important to maintain the public's faith in the integrity of the EIS process, and avoidance of conflicts in the preparation of environmental impact statements is an important means of achieving this goal.[31]

In that guidance, CEQ again stressed that there was no barrier to applicants communicating with agencies by providing them with information, nor were consulting firms barred from competing because they might have a future interest in the action. Thus, CEQ sought to walk a careful line between balancing the public interest and acknowledging the role of outside consultants to supplement the agency's capacity, or lack thereof to prepare EISs.

CEQ now proposes to erase that line entirely. It fails to address the complete elimination of the conflicts of interest provisions in the regulations other than a vague reference to commenters urging that CEQ allow "greater flexibility for the project sponsor to prepare NEPA documents." But CEQ never explains why it proposed to reverse its position on conflict of interest and why it thinks doing so is in the public interest.

It is true that federal agencies themselves are proponents of actions for which they prepare EISs. But there is an important difference. The responsibility of government agencies is to act in the public's interest. The responsibility of companies is to act in their

[31] 48 Fed. Reg. 34,263, 34,266 (July 28, 1983).

shareholders' interest. Both segments of society have legitimate—but quite different roles to play and NEPA law has recognized that difference.

In essence, CEQ is proposing to institutionally codify an inherent conflict of interest. This is counter to widely accepted ethical standards that restrict people with a conflict of interest from influencing important government decisions. That is why senior level federal government employees must file public financial disclosure statements and why conflicts of interests are broadly interpreted and regulated by the Office of Government Ethics. Indeed, a federal employee who fails to recuse him or herself from a particular matter if it would have a direct and predictable effect on that employee's own financial interests are subject to potential criminal prosecution.[32]

People generally understand that no matter how good one's intentions are, self-interest is a powerful motivation and therefore conflict of interest rules have an important public policy purpose. It is difficult to think of any context in which conflicts of interest provisions have been eliminated once imposed. CEQ should not aim at setting a precedent in this regard.

CEQ's proposal in this instance would undermine the integrity of the NEPA process. It should be withdrawn.

8. Conclusion

We urge CEQ to withdraw this entire regulatory proposal and work to enforce the sensible and lawful provisions of the current CEQ regulations. We remind CEQ that studies conducted to determine the cause of delay in federal actions coming under NEPA have consistently found that NEPA is *not* the primary driver of delay.[33] Further, we believe that the outcome of upending five decades of NEPA law and attempting to redesign the process will actually result in more, not less, time spent on NEPA analysis. But most urgently, the consequences of finalizing these proposed revisions will do lasting damage to the quality of our human environment and stifle the fundamental American virtue of engaged citizenship.

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[32] 18 U.S.C. § 208.

[33] USDA Forest Service, *Environmental Analysis and Decision Making: The Current Picture* (Phoenix, Az. Sept. 2017), Department of Treasury report by Toni Horst, et al.; *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*, (December, 2016) Congressional Research Service; *The Role of the Environmental* Review *Process in Federally Funded Highway Projects: Background and Issues for Congress*, R42479, (April 11, 2012).

Respectfully Submitted,

/Sam Hitt/

Sam Hitt
President, Santa Fe Forest Coalition
Founder, Wild Watershed
P.O. Box 1943
Santa Fe, New Mexico 87504
sam@wildwatershed.org