

COMMENTS OF ATTORNEYS GENERAL OF WASHINGTON, CALIFORNIA, NEW YORK, COLORADO, DISTRICT OF COLUMBIA, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, NEW JERSEY, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WISCONSIN, AND THE HARRIS COUNTY ATTORNEY'S OFFICE, AND THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

September 29, 2023

VIA REGULATIONS.GOV

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

Re: National Environmental Policy Act Implementing Regulations Revisions Phase 2
88 Fed. Reg. 49924 (July 31, 2023)
Docket No. CEQ-2023-0003

Deputy General Counsel Coyle:

The Attorneys General of the States of Washington, California, New York, Colorado, District Of Columbia, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin, and the Harris County Attorney's Office, and The New York State Department Of Environmental Conservation (collectively, the States) respectfully submit these comments on the Council on Environmental Quality's (CEQ) notice of proposed rulemaking (Proposed Phase 2 Rule) revising the regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347.¹

I. INTRODUCTION

The States support CEQ's proposed changes to NEPA's implementing regulations that align with NEPA's text and goals, including those changes that advance informed decision-making through public participation, transparency, and thorough review of environmental impacts. As CEQ knows, in enacting NEPA, Congress advanced a national policy of environmental protection by requiring federal agencies to conduct thorough and careful review of their actions' environmental impacts.² As the Supreme Court explained, Congress intended

¹ National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924 (July 31, 2023) Docket No. CEQ-2023-0003.

² 42 U.S.C. §§ 4331, 4332.

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NEPA’s “action-forcing procedures” to help “[e]nsure that the policies [of NEPA] are implemented.”³

NEPA’s implementing regulations, originally promulgated by CEQ in 1978 (the 1978 Regulations)⁴, have long served the important function of guiding federal agencies through a thorough environmental review process to ensure transparent and informed agency decision-making. However, in 2020 CEQ promulgated unlawful regulations improperly narrowing NEPA, threatening meaningful public participation, and unlawfully seeking to restrict judicial review of agency actions (the 2020 Rule).⁵ CEQ has since issued two rulemakings that partially address the revisions in the 2020 Rule which did not support the statutory purposes of NEPA.⁶

With this Proposed Phase 2 Rule, CEQ issues a broad rule to harmonize the NEPA implementing regulations with the statutory text and purposes of NEPA. Many of CEQ’s proposed changes implement NEPA’s goal of informed decision-making through better data collection and analysis, including collection of climate change data and data of disparate impacts of agency actions on communities with environmental justice concerns. CEQ’s changes clarifying the important role that States play in the NEPA process and incorporating Tribal governments and indigenous knowledge in the NEPA process strengthen environmental review.⁷ The States support these changes which improve federal agency implementation of NEPA. Finally, facing significant threats from climate change and corresponding state and local mandates to respond, the States strongly support CEQ’s integration of climate change considerations throughout the Proposed Phase 2 Rule. We further support quantification and analysis of reasonably foreseeable greenhouse gas (GHG) emissions as part of the environmental assessment and environmental impact statement processes.

However, this Phase 2 Rulemaking does not resolve all of the harms introduced by the 2020 Rule. Where CEQ can go further to undo the unlawful elements of the 2020 Rule, the States urge CEQ to do so. Specifically, the States urge CEQ to bring the use of categorical exclusions in line with NEPA’s statutory text, return to language requiring “substantial treatment” of alternatives in the alternatives analysis, and ensure draft Environmental Impact Statement (EIS) documents comply with NEPA to the “fullest extent possible.” Additionally, the States urge CEQ to codify some of CEQ’s existing guidance on the consideration of GHGs into

³ *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979) (quoting S. Rep. No. 91-296, at 19 (1969)); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (“Simply by focusing the agency’s attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.”).

⁴ Implementation of Procedural Provisions, 43 Fed. Reg. 55,978 (November 29, 1978).

⁵ *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020).

⁶ *See* Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021) [hereinafter Interim Final Rule]; National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757-01 (October 7, 2021) [hereinafter Phase 1 Rule].

⁷ *See* 88 Fed. Reg. at 49,939, 49,970 (proposed § 1501.5(c)(3)) (clarifying that “agencies” includes state, Tribal and local governments); 88 Fed. Reg. at 49,940, 49,971 (proposed § 1501.7) (clarifying the role of States as joint lead agencies).

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the NEPA regulations to ensure agencies properly consider the potential impacts from GHG emissions associated with federal agency actions.

II. SUMMARY OF COMMENTS

Below is a summary of the States' comments supporting provisions in CEQ's Proposed Phase 2 Rule and recommendations for strengthening the final rule:

- The States support CEQ's proposed changes which would re-center NEPA's statutory purposes in the regulations and reinforce NEPA's informed decision-making mandate.
- The States support CEQ's proposed changes to increase public participation and increase transparency in agency decision-making. By increasing accessibility and transparency and reducing the undue burden on commenters, CEQ's proposed changes support more meaningful input from the public.
- The States appreciate CEQ's proposal for flexibility to use innovative approaches when addressing extreme environmental challenges. But, the States urge CEQ to provide further clarity and include public participation in this process.
- The States support CEQ's proposed changes to promote rigorous environmental review by reducing inappropriate segmentation, reinstating meaningful significance and alternatives analyses, and appropriately limiting the use of categorical exclusions. The States urge CEQ to further incorporate analysis of climate change into the significance analysis, clarify the role of beneficial effects in a significance analysis, and limit inappropriate categorical exclusions in the final rule.
- The States support CEQ's proposed revisions strengthening environmental review documents, including those regarding the approval process for exemptions from strict time and page limits and increasing public participation. The States urge CEQ to provide clarity regarding time and page limits by defining "extraordinary circumstances" under which such limits do not apply. The States also urge CEQ to reduce bias in the preparation of environmental review documents by providing agency oversight during the process.
- The States support CEQ's proposed definitional revisions promoting a more robust consideration of environmental justice concerns and climate change concerns in the review of federal agency actions. The States further support CEQ's proposed revisions to the definitions of major federal action and extraordinary circumstances, with some additional clarifications.

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- Finally, the States recommend incorporating some of CEQ’s GHG Guidance into the regulations. However, the States recognize that some of the guidance requires greater flexibility for revision in the future, such as guidance based on changing data sets, and should remain as guidance to allow for future changes consistent with advancing scientific understanding.

Combined, CEQ’s proposed changes take critical steps toward modernizing NEPA, improving the quality of agency analysis, and undoing harms caused by the 2020 Rule. However, CEQ should go further and introduce regulatory changes to address all the harms of the 2020 Rule and clarify regulations where necessary.

III. THE STATES HAVE AN ENDURING INTEREST IN NEPA

As described in each of the comment letters noted here⁸ and in the States’ complaint challenging the 2020 Rule⁹, the States and territories have an enduring and unique role in implementing NEPA within their States and in participating in NEPA processes for actions with effects within their borders. Environmental review of federal agency action through the NEPA process is an important tool for States to understand these actions and to protect their interests by ensuring federal agencies make informed and transparent decisions. Accordingly, the States have actively participated in CEQ’s rulemakings on the NEPA regulations since 2018.¹⁰ The States fully incorporate here each of the prior comment letters.¹¹

Based on significant concerns with the legality of CEQ’s 2020 Rule, a coalition of States and territories challenged it in court.¹² As detailed in the lawsuit, the 2020 Rule is arbitrary, capricious, and contrary to law, exceeds CEQ’s statutory authority, and was promulgated without observance of procedure required by law.¹³ The States support CEQ’s efforts to reverse the unlawful 2020 Rule, including CEQ’s Phase 1 Rule that addresses some of the most problematic revisions of the 2020 Rule and this more comprehensive proposed Phase 2 Rule.

The States have a particularly strong interest in NEPA because it is a critical tool for understanding and mitigating the climate and environmental justice impacts of federal actions. NEPA requires agencies to consider climate change effects and the States have a strong interest

⁸ See Comments of Attorneys General of California, et al., on Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 28,591 (August 20, 2018) (attached as Exhibit 1); Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking, 85 Fed. Reg. 1684 (March 10, 2020) (attached as Exhibit 2) [hereinafter 2020 Comments]; Comments of Attorneys General of Washington, et al., on the Interim Final Rule, 86 Fed. Reg. 34154 (July 29, 2021) (attached as Exhibit 3); Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking 86 Fed. Reg. 55757 (Nov. 22, 2021) (attached as Exhibit 4).

⁹ First Amended Compl. for Declaratory & Injunctive Relief, *State of California, et al. v. Council on Env’tl. Quality, et al.*, Case No. 3:20-cv-06057-RS, Doc. 75 (filed Nov. 23, 2020) [hereinafter Complaint] (attached as Exhibit 5).

¹⁰ Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 28,591; Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” 85 Fed. Reg. 1684 (Jan. 10, 2020), Docket ID No. CEQ-2019-0003; Interim Final Rule, 86 Fed. Reg. 34,154; Notice of Proposed Rulemaking 86 Fed. Reg. 55,757-01.

¹¹ See note 8, *supra*.

¹² See Complaint, *supra* note 9.

¹³ *Id.*

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in robust analysis of these issues. The Proposed Phase 2 Rule correctly recognizes federal agencies' obligation to identify, analyze and consider alternatives and mitigation measures for the reasonably foreseeable direct, indirect, and cumulative effects, including "climate change-related effects," of all major federal actions.¹⁴ Consideration of climate change is critical in analyzing an action's relationship between short-term uses and long-term productivity, and any irreversible and irretrievable commitment of resources.¹⁵

Agency NEPA analysis also must prioritize affected communities and thoroughly analyze and disclose the environmental justice concerns presented by an action's GHG emissions and climate impacts.¹⁶ NEPA further directs agencies to "identify and develop methods and procedures" to ensure appropriate consideration of "presently unquantified environmental amenities."¹⁷ As the Proposed Phase 2 Rule recognizes, NEPA requires federal agencies to consider climate change impacts both from and to a proposed action¹⁸ as well as the "potential for disproportionate and adverse human health and environmental effects on communities with environmental justice concerns."¹⁹ Agencies' consideration should include assessing reasonably foreseeable GHG emissions and climate change impacts, whether quantifiable or not.²⁰

State and local governments also have strong interests in robust coordination and cooperation between federal agencies and state and local governments, particularly related to climate change and environmental justice. NEPA requires federal agencies to act, "in cooperation with States and local governments," to evaluate potential environmental impacts in fulfillment of NEPA's purposes.²¹ The Proposed Phase 2 Rule continues to promote coordination and cooperation between federal, state, Tribal and local agencies²² and to ensure that agencies consider inconsistency or "possible conflicts" "with any approved State, Tribal, or local plan or law," including those laws, plans, and controls addressing climate change.²³

The States are critical stakeholders in NEPA reviews, particularly for proposed federal actions that may increase the emissions of GHGs and impacts of climate change in our

¹⁴ 88 Fed. Reg. at 49,986 (proposed 40 C.F.R. § 1508.1(g)); *id.* at 49,977 (proposed 40 C.F.R. §§ 1502.16(a)(1)-(2), (7)-(12)).

¹⁵ 42 U.S.C. §§ 4331(a), 4321; and 4332(2)(I) (NEPA intended to "recognize the worldwide and long-range character of environmental problems.").

¹⁶ *See* 42 U.S.C. § 4331(a); 42 U.S.C. § 4332(2).

¹⁷ 42 U.S.C. § 4332(2)(B).

¹⁸ 88 Fed. Reg. 49,977 (proposed 40 C.F.R. §§ 1502.16(a)(7), (10)).

¹⁹ 88 Fed. Reg. 49,978 (proposed 40 C.F.R. § 1502.16(a)(14)).

²⁰ *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) ("[t]he impact of [GHG] emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."); *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 concurrently before an agency, their environmental consequences must be considered together.").

²¹ 42 U.S.C. § 4331(a).

²² 88 Fed. Reg. at 49,982 (proposed 40 C.F.R. § 1506.2(a)-(c)).

²³ 88 Fed. Reg. at 49,977 (proposed 40 C.F.R. § 1502.16); 88 Fed. Reg. at 49,982 (proposed 40 C.F.R. § 1506.2(d));

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jurisdictions. Federal lands comprise a significant portion of many jurisdictions, and federal actions taken on those lands often affect the States' residents, natural resources, recreation and tourism.²⁴ Furthermore, the States are on the front lines of climate change and face numerous and unique threats to people and natural resources, including disproportionate impacts to communities with environmental justice concerns.²⁵ Cooperation with State, Tribal, and local governments and the public is thus an essential component of NEPA's informed decision-making process.

IV. THE PROPOSED PHASE 2 RULE MAKES MEANINGFUL PROGRESS TO ADVANCE NEPA'S PROTECTIONS AND SHOULD GO FURTHER

CEQ's Phase 2 Rule, if finalized, does significant work to modernize the practice of NEPA and ensure informed decision-making by harmonizing NEPA's implementing regulations with the text and purposes of NEPA. The States strongly support CEQ's proposed changes where they clarify and emphasize informed and transparent decision-making. The States urge CEQ to take further action where the revised regulations text does not fully implement the text and purpose of NEPA.

A. The States Support the Proposed Phase 2 Rule's Revisions Emphasizing the Importance of NEPA

The States support CEQ's proposed regulatory revisions which incorporate NEPA's statutory purposes into the NEPA regulations. These regulatory changes more directly tie the Purpose and Policy sections with the text of NEPA, emphasize the obligation of federal agencies to fully implement NEPA, and remove unnecessary thresholds to NEPA analysis.²⁶ In contrast to the unlawful 2020 Rule, these revisions appropriately frame the environmental review process to enact the statutory policy to "use all practicable means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony."²⁷

1. CEQ's proposed revisions to the Purpose and Policy sections restore important framing language

CEQ's proposed revisions to the Purpose and Policy sections in §§ 1500.1 and 1500.2 serve a unique framing function as the very beginning of the regulations by placing the

²⁴ For example, federal lands comprise 80.1% of Nevada, more than half of Oregon, almost half of California, nearly one-third of New Mexico, nearly a quarter of the District of Columbia. See Congressional Research Service, "Federal Land Ownership: Overview and Data," Feb. 21, 2020, <https://sgp.fas.org/crs/misc/R42346.pdf>.

²⁵ See Comments of the Attorneys General of New York, *et al.* on Council on Environmental Quality's Interim "National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change" at 4-5 (Apr. 10, 2023), [hereinafter GHG Comment Letter] (attached as Exhibit 6).

²⁶ 88 Fed. Reg. at 49,966 (proposed 40 C.F.R. § 1500.1(a)); *Id.* at 49,946-67 (proposed 40 C.F.R. § 1500.1(a), (a)(2)); *Id.* at 49,967 (proposed 1500.1(b))(emphasis added). See also *id.* at 49,968 (proposed 40 C.F.R. § 1501.1(a) "Integrating the NEPA process into agency planning at an early stage.").

²⁷ 42 U.S.C. § 4331(a).

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regulations into the broader context of NEPA’s mandate that agencies practice informed decision-making.²⁸

CEQ’s revisions restore key language stating that NEPA is the “basic national charter for protection of the environment” and an “action-forcing” statute which is not merely procedural.²⁹ These changes are consistent with not only NEPA, but also with Supreme Court precedent emphasizing that environmental review is “one of the ‘action-forcing’ provisions intended as a directive to ‘all agencies to assure consideration of the environmental impact of their actions in decisionmaking.’”³⁰

CEQ’s proposed changes to § 1500.1(b) also correctly emphasize the need to “identify, consider, and disclose to the public” environmental impacts “*before* decisions are made and *before* actions are taken” which re-establishes the heart of NEPA’s “look before you leap” ethos.³¹ These changes support the collection of high quality information and the use of that information early in the agency decision-making process.

The States also fully support CEQ’s proposed revision in § 1500.2 to restore statutory language that NEPA be applied “to the fullest extent possible” and to emphasize broad community outreach as part of that process.³² For instance, CEQ’s proposal to explicitly include language that directs agencies to “to the fullest extent possible: [e]ncourage and facilitate ... engagement with communities with environmental justice concerns, which often include communities of color, low-income communities, indigenous communities, and Tribal communities” will strengthen the NEPA process and advance informed decision-making by ensuring meaningful community engagement and rigorous analysis of community impacts.³³ This update to NEPA’s regulatory language further aligns with NEPA’s statutory purpose to include public participation and transparency in the decision-making process³⁴ and addresses the reality that communities with environmental justice concerns have been disproportionately and adversely affected by certain Federal actions.³⁵

CEQ proposes in § 1500.2(f) to reinstate the provision that agencies should use “all practicable means ... to restore and enhance the quality of the human environment” consistent with NEPA’s purpose.³⁶ The States support the reinstatement of the 1978 Regulations’ language to return the regulations to their historic grounding in the fundamental principles of NEPA. The

²⁸ 88 Fed. Reg. at 49,930 (proposed 40 C.F.R. §§ 1500.1 and 1500.2).

²⁹ *Id.* at 49,966-67 (proposed 40 C.F.R. § 1500.1(a), (a)(2)).

³⁰ *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (quoting Conference Report on NEPA, 115 Cong. Rec. 40416 (1969)).

³¹ *Id.* at 49,924, 49,967 (proposed 40 C.F.R. §1500.1(b))(emphasis added). *See also id.* at 49,968 (proposed 40 C.F.R. § 1501.1(a) “Integrating the NEPA process into agency planning at an early stage.”).

³² 88 Fed. Reg. at 49,930, 49,967 (proposed 40 C.F.R. § 1500.2); 42 U.S.C. § 4332.

³³ 88 Fed. Reg. at 49,930, 49,967 (proposed 40 C.F.R. § 1500.2(d)).

³⁴ 42 U.S.C. § 4331(a).

³⁵ 88 Fed. Reg. at 49,930.

³⁶ *Id.* at 49,931, 49,967 (proposed 40 C.F.R. § 1500.2(f)).

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States agree that including policy objectives such as “to avoid environmental degradation, preserve historic, cultural, and natural resources,” and “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences” aligns with NEPA goals.³⁷

2. The States support CEQ’s proposed revisions reinforcing the obligation to implement NEPA

The States further support CEQ’s proposal to restore language emphasizing each federal agency’s independent obligation and ability to implement NEPA. CEQ’s proposal to remove language implemented by the 2020 Rule in § 1500.6 makes it clear that agencies have an obligation to comply with NEPA by following CEQ’s regulations and also reviewing and revising, as necessary, their own agency policies, procedures, and activities.³⁸ This independent obligation to comply with NEPA, combined with CEQ’s previous revisions to § 1507.3 in the Phase 1 Rule,³⁹ provides federal agencies with flexibility to craft regulations tailored to their agency’s work, even if they go beyond the requirements of CEQ’s NEPA regulations.

3. CEQ’s proposed changes determine the appropriate level of NEPA review

The States support CEQ’s proposal to revise the threshold analysis introduced by the 2020 Rule to align it with NEPA’s text and to better situate these threshold questions within the context of determining the appropriate level of NEPA review.⁴⁰ The States further support the Phase 2 Rule’s revisions removing certain “thresholds” that improperly provided agencies a basis to avoid any environmental review of certain proposed projects.⁴¹

Specifically, the States support CEQ’s edits to §§ 1501.1, 1506.9, and 1507.3 to limit federal agencies’ reliance on another agency’s procedures or another statutory process as a functional equivalent for their obligations under NEPA. For instance, CEQ’s proposed deletion of language from § 1501.1(a)(6) exempting an agency from NEPA where “the proposed action is an action for which another statute’s requirements serve the function of agency compliance with the Act,” eliminates an exemption that is inconsistent with NEPA’s text, purpose, and interpreting case law.⁴² Although federal courts recognize functional equivalency, they tend to apply the concept narrowly in contrast to the broad exemption in the current regulations.⁴³ CEQ

³⁷ *Id.*

³⁸ *See id.* at 49,968 (proposed 40 C.F.R. § 1500.6).

³⁹ *See id.* at 49,933; 86 Fed. Reg. at 55,761.

⁴⁰ *See* 88 Fed. Reg. at 49,934, 49,969 (proposed 40 C.F.R. § 1501.3).

⁴¹ *See* 2020 Comment letter, *supra* note 8, at 23-29.

⁴² *Compare* 40 C.F.R. § 1501.1(a)(6) with proposed 40 C.F.R. § 1501.1.

⁴³ *See, e.g., Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 384-85, 387 (D.C. Cir. 1973) (concluding that “section 111 of the Clean Air Act, properly construed, requires the functional equivalent of a NEPA impact statement,” and allowing a narrow exemption from NEPA); *Fund For Animals v. Hall*, 448 F. Supp. 2d 127, 134 (D.D.C. 2006) (rejecting Fish and Wildlife Service’s argument that the Migratory Bird Hunting Frameworks or the Endangered Species Act’s section 7 consultation process are the functional equivalent of NEPA’s environmental review process). *See also* 2020 Comment Letter, *supra* note 8, at 26-27.

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proposes to eliminate similar language in §§ 1506.9 and 1507.3(c)(5).⁴⁴ These changes emphasize the unique role NEPA plays in agency decision-making and ensure NEPA is implemented in accordance with the statutory mandate that agencies apply NEPA to “the fullest extent possible.”⁴⁵

B. The States Support CEQ’s Proposals to Improve Public Participation and Transparency in the NEPA Decision-making Process

Public participation is critical for informed decision-making under NEPA. Among other things, the public can be an important partner in identifying alternatives that improve a proposed action or reduce its environmental impacts, identifying shortfalls in the agency’s analyses, spotting missing issues, and providing additional information that the agency may have overlooked.⁴⁶ Public participation in the NEPA process can also advance environmental justice by ensuring that communities on the frontlines of environmental impacts have a voice in the process. The States support several revisions to the NEPA implementing regulations that ensure meaningful public participation.

1. The States support revisions enhancing accessibility and transparency

The States support CEQ’s revisions to increase public participation, accessibility, and transparency, including revisions to §§ 1501.5(c)(4), 1502.4(e)(9), § 1501.9, and § 1501.12.

First, the States support the revisions requiring a unique identification number that can be used for tracking environmental reviews for EAs in § 1501.5(c)(4) and EISs in § 1502.4(e)(9). NEPA review is often a multistep process with many procedures, multiple timelines, and voluminous records. A consistent reference point throughout the process can help the public and decision makers easily monitor the progress of the environmental review. The proposal thus increases transparency and accessibility of environmental reviews.

The States also support the changes in § 1501.9 that emphasize the importance of public engagement in the NEPA process at all levels of NEPA review.⁴⁷ As CEQ knows, the vast majority of NEPA reviews do not result in an EIS, so this change protects public participation in EAs and other NEPA processes.⁴⁸

⁴⁴ 88 Fed. Reg. at 49,956, 49,983 (proposed 40 C.F.R. § 1506.9); 88 Fed. Reg. at 49,958, 49,985 (proposed 40 C.F.R. § 1507.3(c)(5)).

⁴⁵ 42 USC § 4332.

⁴⁶ See 2020 Comment Letter, *supra* note 8, at 10.

⁴⁷ 88 Fed. Reg. at 49,945.

⁴⁸ See GAO, Nat’l Env’tl. Policy Act, Little Information Exists on NEPA Analyses, GAO-14-370, at 1 (Apr. 2014) (discussing CEQ estimates that “95 percent of NEPA analyses are CEs, less than 5 percent are EAs, and less than 1 percent are EISs”). In a 2016 report, CEQ found that federal agencies started from 137 to 261 EISs each year between 2012 and 2015, while preparing from 11,308 to 13,205 EAs per year during the same time period, *see* CEQ, Fourth Report on Cooperating Agencies in Implementing the Procedural Requirements of the Nat’l Env’tl. Policy Act 1 (Oct. 2016), https://ceq.doe.gov/docs/ceq-reports/Attachment-A-Fourth-Cooperating-Agency-Report_Oct2016.pdf. The 2020 Rule estimated that federal agencies annually complete 176 EISs and 10,000 EAs and apply approximately 100,000 CEs. 88 Fed. Reg. at 43,305 n.5.

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The States agree the revisions to § 1501.12 requiring agencies to explain briefly the relevance of material incorporated into environmental review documents are important steps in increasing agency transparency and accessibility in the NEPA process. Clarifying that this requirement applies to agencies will help better inform the public and agency decision makers.⁴⁹

The States further support CEQ's proposal to add references to "publicly accessible website[s]" and hyperlinks in § 1501.12 as an example of a way an agency can provide material incorporated by reference to the public in a more accessible way.⁵⁰ Modernizing the NEPA regulations to include these digital methods further increases transparency and facilitates public access to NEPA documents.

2. The States support removing an undue burden on commenters

The States support CEQ's proposed edits to § 1503.3 clarifying the expected level of detail in public comments and removing or modifying provisions of the 2020 Rule that inappropriately restrict public comments and place an unnecessary burden on public commenters.⁵¹

The States support the removal of language in § 1503.3(a) that creates unnecessary barriers to public participation in the NEPA process such as requiring comments "[to be as detailed] as necessary to meaningfully participate and fully inform the agency of the commenter's position" and to describe any "economic and employment impacts."⁵² Requiring such specificity can be a major hurdle to public commenters who are unfamiliar with the NEPA process and may preclude inclusion of important perspectives, such as the perspectives of community members experiencing disproportionate environmental justice impacts.

The States also support CEQ's decision to modify language in § 1503.3 (a) to clarify that the public should include citations or proposed changes to the EIS or describe the data, sources, or methodologies that support the proposed changes in the comments "only where possible."⁵³ This important change removes an unnecessary barrier to public comment.

Finally, the States support CEQ's proposal to remove language in § 1503.3(b) that places an undue burden on public participation through an onerous and unlawful exhaustion process that purportedly limited judicial review and remedies and a restrictive bonding requirement.⁵⁴ CEQ's proposed removal of the bond requirement and prescribed judicial remedies in § 1500.3(c) would address the inequity of bond requirements on under-resourced communities. These proposed amendments also recognize the role of courts in determining judicial remedies rather than attempting to proscribe them in regulations.⁵⁵ Similarly, the States support CEQ's

⁴⁹ 88 Fed. Reg. at 49,974 (proposed 40 C.F.R. § 1501.12).

⁵⁰ *Id.*

⁵¹ *Id.* at 49,951.

⁵² *Id.* at 49,951-52 (proposed 40 C.F.R. § 1503.3(a)).

⁵³ *Id.* (proposed 40 C.F.R. § 1503.3(a)).

⁵⁴ *Id.* (proposed 40 C.F.R. § 1503.3(b)).

⁵⁵ 2020 Comment Letter, *supra* note 9, at 65-66.

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proposed revision to remove a presumption of adequate consideration of public comments in § 1505.2(b).⁵⁶ CEQ’s proposed revision understands the role of courts in making this determination, rather than unlawfully suggesting that agencies could pre-determine exhaustion and limit the ability of affected communities to challenge a deficient environmental review process.

3. The States support flexibility in the NEPA process but urge further clarity

CEQ proposes a new section in § 1506.12 to provide agencies flexibility by adopting “innovative approaches” to address extreme environmental challenges.⁵⁷ While the States support creative solutions to address climate change and advance environmental justice in the face of extreme environmental challenges, the States have questions about how CEQ would ensure that this provision is applied consistent with NEPA’s text and purpose, what types of actions this approach would apply to, how often or broadly it would be used, and how it would complement CEQ’s other Proposed Phase 2 Rule changes to address climate change and environmental justice and ensure transparency and public participation in the NEPA process.

The States agree that proposed § 1506.12 is not a waiver of the requirement of NEPA analysis and that its application must be “consistent with section 101 of NEPA.”⁵⁸ To ensure that the use of “innovative approaches” is consistent with these limitations, CEQ should clarify the proposed regulatory language to explain how it will apply this new alternative process and what factors it will assess to ensure that the “innovative approaches” remain consistent with NEPA. CEQ should also further clarify how the “innovative approaches” provision interacts with its other proposed regulatory revisions, particularly those designed to address climate change, ensure robust review of reasonably foreseeable effects, and advance environmental justice.⁵⁹

If CEQ maintains § 1506.12 in its final rulemaking, the States urge CEQ to define “extreme environmental challenges”⁶⁰ and to clarify the role of public participation and transparency in the innovative approaches process to ensure that agencies incorporate meaningful public participation throughout the process. First, the States believe that defining “extreme environmental challenges” in addition to the list of examples provided will clarify the scope of this alternative process and help ensure that the provision is not used so broadly as to undermine NEPA’s text and purpose.⁶¹ Second, CEQ should clarify the public disclosure and participation process for an agency’s innovative approaches request and CEQ’s review of that request. As currently drafted, the proposed regulations do not provide an explicit step that allows for public involvement in the request process. Since frontline communities will be some of the most impacted by extreme environmental challenges, it is important to get their perspective early and often in the NEPA process especially where the standard NEPA process may be modified.

⁵⁶ 88 Fed. Reg. at 49,953, 49,981 (*compare* 40 C.F.R. § 1505.2(b) (2020) with proposed 40 C.F.R. § 1505.2).

⁵⁷ *See* 88 Fed. Reg. at 49,957, 49,984 (proposed 40 C.F.R. § 1506.12).

⁵⁸ *Id.* at 49,957, 49,958 (proposed 40 C.F.R. § 1506.12(a)).

⁵⁹ *See* Proposed Rule 40 C.F.R. §§ 1500.2 (e), 1502.14(f) 1502.16 (a)(2), 1502.16 (a)(7), 1502.16 (a)(14), 1502.23 (c), 88 Fed. Reg. at 49931, 49961 (proposed §§ 1500.1(c), 1508.1(m)). *See also* Final Interim Rule; Phase 1 Rule.

⁶⁰ *See* 88 Fed. Reg. at 49,957, 49,984 (proposed 40 C.F.R. § 1506.12).

⁶¹ *See* 88 Fed. Reg. at 49,957-49,958 (proposed § 1506.12).

C. The States Support CEQ’s Proposed Revisions Supporting Rigorous Environmental Review

1. The States support CEQ’s proposal to restore language prohibiting improper segmentation of environmental reviews

CEQ proposes to reinstate language in § 1501.3(b) that agencies should not unlawfully segment their actions and extend these principles to EISs, EAs, and Categorical Exclusions (CEs).⁶² The States support reinstatement and expansion of this longstanding principle that requires federal agencies to consider whether there are connected actions that should be considered in the same NEPA review.⁶³ As the Ninth Circuit made clear in *Kern v. United States Bureau of Land Management*, NEPA requires federal agencies to analyze the combined environmental impacts of the proposed project and other projects, even if a project “individually has a significant environmental impact.”⁶⁴ Ensuring agencies do not improperly segment their environmental reviews, regardless of the type of review, is especially beneficial to communities with environmental justice concerns facing localized negative environmental impacts because it can help to ensure agencies take a holistic view of the impacts of their connected actions.⁶⁵ Avoiding improper segmentation further ensures that agencies fully consider and inform the public of the environmental impacts of connected actions on those communities.⁶⁶

2. The States support CEQ’s proposed reinstatement of a meaningful significance analysis

The States strongly support CEQ’s revisions in § 1501.3(d)(2)(iii) to reinstate a meaningful analysis for determining the significance of an agency action’s effects.⁶⁷ Restoring the “context” and “intensity” framework from the 1978 Regulations reduces confusion and adds clarity while ensuring agencies focus their analysis on meaningful factors to determine an action’s significance.

The States applaud CEQ’s decision to modernize this provision by adding several critical factors to both the context and intensity analyses to ensure that agencies engage in informed decision-making based on the reasonably foreseeable effects of proposed actions and do not ignore important aspects of the actions’ potential impacts. Among other revisions, the States strongly support CEQ’s decision to add consideration in the intensity analysis of State, Tribal, and local environmental protection laws, policies and efforts including those designed to address

⁶² 88 Fed. Reg. at 49,935 (proposed 40 C.F.R. § 1501.3(b)).

⁶³ See *Kern v. Bureau of Land Mgmt.*, 284 Fed 1062, 1078 (9th Cir. 2002).

⁶⁴ 284 F.3d 1062, 1078 (9th Cir. 2002).

⁶⁵ 88 Fed. Reg. at 49,935.

⁶⁶ See 88 Fed. Reg. at 49,969 (proposed § 1501.3)

⁶⁷ 88 Fed. Reg. at 49,935 (proposed 40 C.F.R. § 1501.3(d)(2)(iii)).

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climate change, ensure clean air and water, advance environmental justice, and promote species health and biodiversity.⁶⁸

The States recommend that CEQ strengthen § 1501.3(d) by identifying examples of relevant laws and policies that protect the environment. These examples could include state laws or policies to reduce State emissions by a date certain, to address air or water pollution, to mitigate the effects of climate harms, to improve resiliency in the face of climate change, to advance environmental justice, or to protect public health. Such examples would ensure that federal agencies do not overlook or ignore the critical actions of the undersigned States to respond to the climate crisis and to advance environmental justice. These revisions would align with the new intensity factor focused on assessing the degree of adverse impacts on communities with environmental justice concerns, the intensity factor focused on assessing impacts to public health and safety, and the general focus of these revisions to better address GHG emissions and climate impacts in the NEPA analysis.

The States further support CEQ's emphasis on the importance of assessing an agency action's full context at the local, regional, national, and global levels in § 1501.3(d)(1). Avoiding a myopic review ensures federal agencies will not overlook reasonably foreseeable impacts, such as an oil or gas project's local air quality impacts as well as its regional, national, and global impacts on climate change. Similarly, the States support CEQ's expansion of the intensity factor regarding endangered or threatened species to also include impacts to species habitat regardless of whether it has been designated as critical.⁶⁹

The States also support CEQ's revisions in § 1501.3(d)(2) to ensure agencies assess the potential impacts of an action on Tribal Nations and vulnerable communities by refocusing the analysis on how a project will, both in context and intensity, impact vulnerable communities, address or exacerbate environmental justice, impact unique, sensitive, or cultural resources, including Tribal sacred sites, and adding an intensity factor specifically focused on adverse impacts to reserved rights of Tribal Nations.⁷⁰

Further, the States support the stand-alone definition of significant effects in § 1508.1.⁷¹ But, the States are concerned that defining "significant effects" to include only "adverse effects" could create confusion over how agencies assess which effects are truly beneficial and from whose/which perspective.⁷² Different government entities, communities, and individuals may have divergent views as to the benefits or burdens of a particular effect. To avoid this confusion, CEQ should, at a minimum, provide agencies further direction on how they should apply the significance analysis to determine when a project "would result only in significant beneficial effects" and thus not require an EIS, including by directing that the benefits should be benefits to "the human environment" consistent with the definition of "effects" and providing further clarity

⁶⁸ 88 Fed. Reg. at 49,934, 49,969 (proposed 40 C.F.R. § 1501.3(d)(2)(iv)).

⁶⁹ *Id.* at 49,934, 49,969 (proposed 40 C.F.R. § 1501.3(d)(2)(viii)).

⁷⁰ *See id.* at 49,935-36 (proposed 40 C.F.R. § 1501.3(d)(2)).

⁷¹ *See id.* at 49,964 (proposed 40 C.F.R. § 1508.1(kk)).

⁷² *See id.*

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on how agencies should ensure that their review of these effects properly evaluates impacts on environmental justice.⁷³

Finally, the States recommend strengthening analysis of climate change effects at the determination of significance stage and in conducting NEPA reviews that do not involve an EIS. Most NEPA reviews do not result in an EIS, but instead are completed using a CE or EA.⁷⁴ If GHG emissions are primarily examined in EISs, actions not resulting in an EIS may escape consideration of their emissions potential and ways that to reduce those emissions. Collectively, that universe of actions could be significant in terms of emissions and effects and CEQ should require agencies to fully evaluate and consider mitigation for the potential GHG emissions of projects requiring EAs as well as EISs. To this end, we recommend CEQ incorporate concepts from the 2023 CEQ guidance document on consideration of GHG emissions and climate change (2023 GHG Guidance)⁷⁵ into other provisions of the regulations to ensure agencies properly assess GHG and climate effects are properly assessed in determining significance and reviewing actions not covered by Part 1502. Specifically, in § 1501.3, we recommend adding provisions recognizing that, although there is no particular quantity of GHG emissions that triggers the requirement for an EIS, Federal agencies should quantify, where relevant, the reasonably foreseeable direct and indirect GHG emissions of their proposed actions and reasonable alternatives (as well as the no-action alternative) and the effects associated with those projected emissions in the determination of significance. Similarly, for actions where an agency prepares an EA, § 1501.5(i), which directs application of § 1502.23 methodology to EAs, could specify that such methodology should include evaluation of reasonably foreseeable climate change-related effects where appropriate as stated in § 1502.23(c).

3. The States support CEQ’s proposed changes to ensure agencies conduct a meaningful alternatives analysis

The States support CEQ’s proposal to restore language to § 1502.4 stating that the alternatives analysis “is the heart of the environmental impact statement”; that the alternatives analysis “should sharply define issues for the decision maker and the public and provide a clear basis for choice in the options”; and that the EIS should “[r]igorously explore and objectively” evaluate alternatives.⁷⁶ Robust analysis of the relative environmental effects of a range of reasonable alternatives is necessary to ensure that the EIS serves the regulations’ purpose of providing for meaningful public input and informed federal agency decision-making.⁷⁷

⁷³ *Id.*

⁷⁴ *See* note 48, *supra*.

⁷⁵ 88 Fed. Reg. 1196-01 (Jan. 9, 2023).

⁷⁶ 88 Fed. Reg. 49,924-01, 49,948 (July 31, 2023).

⁷⁷ *See New Mexico ex rel. Richardson v. Bureau of Land Mngt.*, 565 F.3d 683, 708 (10th Cir. 2009) (“Without substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded.”); CEQ, Exec. Office of the President, *A Citizen’s Guide to the NEPA: Having Your Voice Heard*, at 2 (Dec. 2007), *available at* https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf (“Two major purposes of the environmental review process are better informed decisions and citizen involvement, both of which should lead to implementation of NEPA’s policies.”).

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The States also support CEQ’s proposal to restore the policy statement in § 1500.2(e) directing agencies to identify and analyze alternatives that would “avoid or minimize adverse effects” on the environment.⁷⁸ The States disagree with the 2020 Rule’s rationale for deleting § 1500.2, which argued that the section unnecessarily repeated requirements stated elsewhere in the NEPA regulations.⁷⁹ As CEQ notes in the Proposed Phase 2 Rule, an introductory policy statement provides important context for the provisions that follow and improves readability.⁸⁰ The alternatives analysis, like NEPA as a whole, is not merely a procedural exercise. Rather, it forces agencies to take a “hard look” at the environmental consequences of proposed actions, for the purpose of “protecting and promoting environmental quality.”⁸¹ This necessarily entails contemplation of alternatives that would lessen harm to the environment. The States also support CEQ’s proposal to revise subsection (e) to expressly include environmental justice and climate change as examples of environmental effects that agencies may consider in identifying less harmful alternatives.⁸²

The States further support CEQ’s proposal to add language to § 1502.14 providing that reasonable alternatives may include alternatives outside the lead agency’s jurisdiction.⁸³ The States believe analysis of reasonable alternatives outside of the lead-agency jurisdiction represents a reasonable interpretation of NEPA’s requirement to analyze such alternatives. As the States stated in their comment opposing the 2020 Rule, ignoring such alternatives may present the public and decision makers with a false and unlawfully narrowed picture of the choices available to accomplish an action’s purpose, leading to selection of an inferior alternative.⁸⁴ By contrast, if the lead agency alerts the public and decision makers to superior alternatives within the authority of another agency, the public or agency officials could then advocate for the other agency to carry out those alternatives. Furthermore, other agencies at the federal, state, or local level with authority to carry out such alternatives could rely on the lead agency’s NEPA review to meet their own environmental review obligations. Early interagency coordination and communication regarding potential alternatives would be important to ensure that analysis of these types of alternatives is robust and meaningful.⁸⁵

The States also support CEQ’s proposed revision to § 1506.1(b) clarifying that agencies may not take actions prior to making a final decision that limits alternatives. In particular, the States support the proposed language stating that any agency authorization of purchases by an applicant for federal funding prior to completion of NEPA review must not limit the agency’s selection of alternatives.⁸⁶ The text of NEPA requires “that agencies complete environmental

⁷⁸ 88 Fed. Reg. at 49,931.

⁷⁹ 85 Fed. Reg. 43,304-01, 43,317.

⁸⁰ 88 Fed. Reg. at 49,930.

⁸¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-50 (1989).

⁸² 88 Fed. Reg. at 49,931.

⁸³ *Id.* at 49,948.

⁸⁴ 2020 Comment Letter, *supra* note 8, at 38-42.

⁸⁵ *Id.* at 40.

⁸⁶ 88 Fed. Reg. at 49,954.

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review before any irreversible and irretrievable commitment of resources.”⁸⁷ Whether such a commitment has been made “is necessarily contextual . . . requir[ing] a fact-specific inquiry.”⁸⁸ CEQ’s proposed revision to § 1506.1(b) would clarify that NEPA’s requirement of informed decision-making limits actions that can be taken before a decision is made.

Finally, the States urge CEQ to restore language in § 1502.14 to ensure agencies “devote substantial treatment to each alternative considered in detail.”⁸⁹ The 2020 Rule removed the “substantial treatment” language from § 1502.14 and replaced it with the mere requirement to “discuss” each alternative.⁹⁰ As described in the States’ 2020 Comment letter, this change could potentially undermine the adequacy of the alternatives analysis.⁹¹ CEQ should restore the “devote substantial treatment” which, along with the “[r]igorously explore and objectively” evaluate language, would ensure agencies take a “hard look” at their proposed action.⁹²

4. The States recommend CEQ strengthen its proposed revisions to ensure agencies consider reasonably foreseeable projected GHG emissions in the alternatives analysis

The Proposed Phase 2 Rule also laudably recognizes in proposed § 1502.14(f) that identification of the environmentally preferable alternative or alternatives should consider which alternatives best address climate change-related effects.⁹³ We recommend strengthening this section to require specific consideration of reasonably foreseeable GHG emissions, in comparison of alternatives. This analysis will enable agencies and the public to see clearly the comparison among the projected emissions from a proposed action and its alternatives. In the context of proposed energy actions that are greenhouse gas-intensive, this analysis will assist agencies in identifying clean energy alternatives to proposed fossil fuel energy projects.

5. CEQ must ensure categorical exclusions are consistent with NEPA

The States recognize that CEs are a useful tool for streamlining the NEPA process. As CEQ has previously explained, however, “[i]f used inappropriately, categorical exclusions can thwart NEPA’s environmental stewardship goals, by compromising the quality and transparency of agency environmental review and decision-making, as well as compromising the opportunity for meaningful public participation and review.”⁹⁴ The States applaud CEQ’s revisions to the CE provision at § 1501.4 to add the clause “individually or in the aggregate,” which clarifies that agencies must consider both the individual application of a CE and also the aggregate impact of

⁸⁷ 2020 Comment Letter, *supra* note 8, at 37-38 (citing *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988); 42 U.S.C. § 4332(C)(v)).

⁸⁸ *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009).

⁸⁹ See 40 C.F.R. 1502.14 (1978)

⁹⁰ Compare 40 C.F.R. § 1502.14 (2020) with 40 C.F.R. § 1502.14 (1978).

⁹¹ See 2020 Comment Letter, *supra* note 8, at 40-41.

⁹² 88 Fed. Reg. 49,924-01, 49,948 (July 31, 2023).

⁹³ 88 Fed. Reg. at 49,977 (proposed 40 C.F.R. § 1502.14(f)).

⁹⁵ 88 Fed. Reg. at 49,937.

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its repeated application over time in determining whether it has significant effects.⁹⁵ Combined with the Phase 1 rulemaking's reinstated cumulative effects language,⁹⁶ this proposed change will ensure agencies consider the actual anticipated impacts of applying a CE. Similarly, CEQ's proposed revision requiring agencies to consider "extraordinary circumstances" in promulgating CEs would ensure agencies consider the full range of possibilities when enacting CEs. The States further support CEQ's revisions for transparency in the use of CEs, including by requiring agencies to maintain a website with a list of all CEs regardless of the method of adoption.⁹⁷

To further ensure the use of categorical exclusions aligns with NEPA's text and goals, the States recommend that CEQ's final rule include several additional revisions to the proposed CE provisions. First, CEQ should explain how § 1507.3(a), which presumes that CEs that exist as of the date of the final rule are consistent with the subchapter, ensures agency compliance with NEPA and CEQ's Proposed Phase 2 Rule.⁹⁸ CEQ initially adopted this provision in the final 2020 Rule,⁹⁹ and the States challenged it in their lawsuit over that Rule.¹⁰⁰ The States remain concerned about the legality of and justification for this provision and, at a minimum, seek clarity on how this presumption interacts with the requirements of § 1507.3(c)(8) and (9), CEQ's proposed changes to the significance analysis in § 1501.3(d)(2)(iii), and NEPA itself, including whether agencies are required to review those categorical exclusions for which CEQ presumes compliance within twelve months of CEQ's final Phase 2 Rule.

Second, CEQ should adopt measures to ensure transparency in the use of CEs by (a) requiring agencies to publish documentation for instances where agencies apply a CE notwithstanding extraordinary circumstances, (b) requiring (not just recommending) agencies to maintain a single list of CEs regardless of how they are established, and (c) directing agencies to ensure opportunities for public participation when agencies apply the CEs of other agencies or when they establish CEs through programmatic and planning decisions.¹⁰¹

Third, the States recommend that CEQ require agencies to review their CEs every seven years, consistent with CEQ's guidance on CEs, rather than the ten years proposed in the draft rule.¹⁰² As CEQ previously observed, a seven-year cycle of review ensures agencies do not rely on CEs "that are outdated and no longer appropriate."¹⁰³ CEQ should also further clarify that the

⁹⁵ 88 Fed. Reg. at 49,937.

⁹⁶ 86 Fed. Reg. at 55,762-01.

⁹⁷ 88 Fed. Reg. at 49,937.

⁹⁸ *Id.* at 49,985 (proposed 40 C.F.R. § 1507.3(a)).

⁹⁹ *See* 85 Fed. Reg. at 43,340, 43,373 (§ 1507.3(a)).

¹⁰⁰ *See* Complaint, *supra* note 9, ¶ 178(e).

¹⁰¹ 88 Fed. Reg. at 49,938.

¹⁰² *Compare* CEQ, MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES: ESTABLISHING, APPLYING, AND REVISING CATEGORICAL EXCLUSIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, at 16 (Nov. 23, 2010) (recommending that agencies review CEs at least every 7 years), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf [hereinafter *Categorical Exclusions Guidance*], with 88 Fed. Reg. 49938 (§ 1507(c)(9)) (adopting a 10-year time frame for reviewing CEs).

¹⁰³ *Categorical Exclusions Guidance* at 16 (recommending that agencies review CEs at least every 7 years).

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requirement to more regularly review CEs applies to CEs adopted by any method, including the newly proposed provisions that would allow agencies to adopt CEs through a land use plan or “other equivalent planning or programmatic decisions.”¹⁰⁴

Fourth, the States remain concerned about the use of mitigated CEs where extraordinary circumstances exist for many of the same reasons stated in our comments on the 2020 regulatory changes.¹⁰⁵ The Proposed Phase 2 Rule states that agencies may still apply a CE where extraordinary circumstances exist “if the agency conducts an analysis and determines that the proposed action does not in fact have the potential to result in significant effects notwithstanding the extraordinary circumstance or the agency modifies the action to address the extraordinary circumstance.”¹⁰⁶ The States are concerned that such mitigated CEs in the face of extraordinary circumstances could convert the utility of CEs into a tool to unlawfully thwart NEPA’s mandates and goals of informed and transparent decision-making and urge CEQ in the final rule to either remove the use of mitigated CEs where extraordinary circumstances exist or adopt other protective measures.

D. The States Support CEQ’s Proposed Changes Strengthening Environmental Review Documents

The States support CEQ’s proposed revisions to provisions regarding the process to develop environmental review documents where they support informed and transparent decision-making. However, there are several additional changes CEQ can make to strengthen this process in line with the purposes of NEPA.

1. The States support the removal of the requirements for senior agency official approvals

The States support CEQ’s proposal providing for additional flexibility in preparing environmental review documents. For example, CEQ proposes to dispense with the requirement in current § 1501.5(g) that a senior agency official must approve in writing the exceedance of an EA’s 75-page limit, and the requirement in current § 1502.7 for a senior agency official to approve the exceedance of an EIS’s 150-page limit.¹⁰⁷ Similarly, the States support CEQ’s proposal to allow the agency to extend the deadlines to complete an EA or EIS, without the need for approval by a senior agency official. CEQ’s proposal gives agency staff, rather than a senior agency official, the ability to respond to factors beyond agency control affecting the review timeline such as “the potential for environmental harm; the size of the proposed action; other time limits imposed on the action by other statutes, regulations, or Executive Orders; the degree of public need for the proposed action and the consequences of delay; and the need for a

¹⁰⁴ 88 Fed. Reg. at 49,938, 49,970 (proposed 40 C.F.R. § 1501.4(c)).

¹⁰⁵ See *id.* at 49,937-38, 49,970 (proposed 40 C.F.R. § 1501.4(b)(1)); 2020 Comment Letter, *supra* note 8, at 35-36.

¹⁰⁶ 88 Fed. Reg. at 49,970 (proposed 40 C.F.R. § 1501.4(b)(1)).

¹⁰⁷ See *id.* at 49,972-73 (proposed 40 C.F.R. § 1501.10(b)(1) and (2)),

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reasonable opportunity for public review.”¹⁰⁸ These changes will provide agency officials flexibility to ensure they have time to meet the rigorous analysis requirements of NEPA.

2. The States support CEQ’s proposed revisions to encourage public disclosures and participation in the environmental assessment process

The States support CEQ’s proposed revision of § 1501.5 to clarify public participation opportunities with respect to EAs, including the addition of a new paragraph requiring that lead agencies must invite public comments on a draft EA and must consider those comments when preparing a final EA.¹⁰⁹ This clarification is a recognition of one of NEPA’s fundamental purposes—to facilitate meaningful public participation and informed decision-making.

The States support CEQ’s proposal that agencies “should apply,” rather than “may apply” existing regulatory provisions providing for the collection of all essential information and requiring scientific integrity in the EA process.¹¹⁰ Section 1502.21 requires lead agencies to disclose incomplete or unavailable information and § 1502.23 requires lead agencies to identify and disclose any methodologies used, including scientific models and data sources. Collection of relevant information and scientific integrity are important to support informed agency decision-making. Because of this, the States encourage CEQ to go further by revising the regulations to state that “shall apply the provisions of §§ 1502.21 and 1502.23 to environmental assessments” to make this a mandate rather than a recommendation.

3. The States support CEQ’s proposed revisions regarding environmental review documents

The revision to § 1506.5(a) requiring agencies to use “reliable data and resources”¹¹¹ also encourages agencies to collect the information that will allow them to make informed decisions. However, the States urge CEQ to define the term “reliable” to ensure that agencies rely on the best available science and data in their environmental review processes.

Finally, the States support adding provisions to § 1505.3 to encourage lead agencies to incorporate mitigation measures addressing a proposed action’s significant adverse human health and environmental effects that disproportionately and adversely affect communities with environmental justice concerns. This addition would emphasize that agencies should be considering environmental justice issues related to their actions, and addressing their disproportionate effects through the NEPA process—potentially through mitigation measures.

4. The States support CEQ’s proposed revisions to provisions governing environmental impact statements

The States support CEQ’s proposal to restore action-forcing language in § 1502.1(a) (purpose) deleted by the 2020 Rule regarding the purpose of EISs as they relate to NEPA.

¹⁰⁸ CEQ, MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES ON IMPROVING THE PROCESS FOR PREPARING EFFICIENT AND TIMELY ENVIRONMENTAL REVIEWS UNDER NEPA at 14 (Mar. 6, 2012).

¹⁰⁹ 88 Fed. Reg. at 49,970 (proposed 40 C.F.R. § 1501.5).

¹¹⁰ Compare 40 C.F.R. § 1501.5(g) (2020) with 88 Fed. Reg. at 49970 (proposed 40 C.F.R. § 1501.5(i)).

¹¹¹ 88 Fed. Reg. at 49,982 (proposed 40 C.F.R. § 1506.5(a)).

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Specifically, the 2020 Rule removed language from § 1502. stating that the “primary purpose of an environmental impact statement is to serve as an action-forcing device to ensure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.”¹¹² The restoration of this language reinforces NEPA’s purpose as an action-forcing statute and emphasizes that NEPA is not just a procedural statute. Clarifying this purpose in the context of the EIS process further encourages lead agencies to prepare a thorough review of the significant environmental impacts of major federal actions consistent with NEPA.¹¹³ The States also support CEQ’s revision to § 1502.1(b) to restore the language clarifying the importance for lead agencies to make informed decisions and emphasizing that an EIS is more than just a disclosure document.¹¹⁴

The States support revisions to the language of § 1502.2 (implementation) to ensure that lead agencies explain in an EIS how alternatives and agency decisions will or will not achieve the requirements of NEPA, CEQ’s implementing regulations, and other environmental policies.¹¹⁵ Such revisions are necessary to facilitate NEPA’s goals of transparency and public participation.

The States support CEQ’s proposed revisions and reorganizations in § 1502.15 (affected environment) emphasizing the importance of high quality information, including the best available science and data, and clarifying considerations of reasonably foreseeable environmental trends such as climate change to establish an appropriate baseline that accounts for forward-looking climate projections.¹¹⁶ These revisions would encourage agencies to use high quality information in recognition that such information should be the basis for informed agency decision-making and incorporated in the EIS.

Similarly, the States support revisions to § 1502.16 (environmental consequences) that require agencies to integrate climate change and environmental justice into the environmental consequences analysis, including by discussing risk reduction, saliency, or adaptation measures to reduce the climate impacts of the proposed action and alternatives.¹¹⁷ In particular, the States applaud CEQ’s decision to add a paragraph in this section providing that agencies must discuss the potential for disproportionate and adverse health and environmental effects on environmental justice communities.¹¹⁸ The addition of this paragraph emphasizes the need for EISs to include environmental justice analyses to ensure that agency actions do not impose disproportionate adverse effects on these communities. CEQ’s requirement that lead agencies discuss both climate

¹¹² Compare 40 C.F.R. § 1502.1 (1978), and 40 C.F.R. § 1502.1(a) (2020).

¹¹³ 42 U.S.C. § 4332(C).

¹¹⁴ 88 Fed. Reg. at 49,945, 49974 (proposed 40 C.F.R. § 1502.1(b)).

¹¹⁵ *Id.* at 49974 (proposed 40 C.F.R. § 1502.2).

¹¹⁶ *Id.* at 49,949, 77 (proposed 40 C.F.R. § 1502.15).

¹¹⁷ *Id.* at 49,949-50, 77 (proposed 40 C.F.R. § 1502.16).

¹¹⁸ *Id.* at 49,950, 78 (proposed 40 C.F.R. § 1502.16(14)).

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change and environmental justice impacts are consistent with NEPA because, as recognized by the courts, such effects are “reasonably foreseeable.”¹¹⁹

The States support CEQ’s proposed revision to remove “but available” from § 1502.21(b) (incomplete or unavailable information).¹²⁰ Striking “but available” from this provision would ensure agencies obtain necessary additional relevant information in cases where information is incomplete regarding reasonably foreseeable significant adverse effects that is essential to a reasoned choice among alternatives —especially in the climate and environmental justice contexts, rather than dismiss the information as unavailable and thereby refuse to take necessary actions to obtain more information that could fill in the gaps.¹²¹

The States further support CEQ’s revisions to § 1502.23 (methodology and scientific accuracy), which would emphasize the importance of high-quality information, require agencies to offer explanations of assumptions in their analyses, and require them to incorporate projections, such as in the climate change context.¹²² The States also support CEQ’s proposed revisions adding language to this section explicitly including Indigenous Knowledge.¹²³

The States also support proposed changes that integrate climate change considerations into the EIS process. Specifically, the States support the proposed change to § 1502.16(a)(7), which requires an EIS to include the effects of climate change from and to an action among the “environmental consequences” of an action, and proposed § 1502.16(a)(10), which requires consideration of relevant “risk reduction, resiliency, or adaptation measures.”¹²⁴ Finally the States further support proposed § 1502.16(a)(6), which requires an EIS to discuss inconsistency of a proposed action with state, Tribal or local plans, policies and control, including those addressing climate change.¹²⁵ The States similarly urge CEQ to return to the requirement in the 1978 regulations that agencies must comply with NEPA to “fullest extent possible” for draft EISs, rather than the current language of “fullest extent practicable” in § 1502.9(b) (Draft, final, and supplemental statements).¹²⁶ The “fullest extent possible” language for draft EISs aligns

¹¹⁹ See, e.g., *Eagle County, Co. v. Surface Transp. Bd.*, No. 22-1019, Slip Op. at 32-35, 2023 WL 5313815, at *14, 22, ___ F.4th ___ (D.C. Cir. Aug. 18, 2023) (finding climate effects and environmental justice impacts are reasonably foreseeable); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 67-68 (D.C. Cir. 2019) (finding climate change effects of GHG emission are reasonably foreseeable).

¹²⁰ Compare 88 Fed. Reg. at 49,978 (proposed § 1502.21(b)), with 40 C.F.R. § 1502.21(b).

¹²¹ 88 Fed. Reg. at 49,950, 49,978 (proposed 40 C.F.R. § 1502.21(b)).

¹²² *Id.* at 49,951, 78 (proposed 40 C.F.R. § 1502.23).

¹²³ The States understand “Indigenous Knowledge” to be defined by CEQ as: “a body of observations, oral and written knowledge, innovations, practices, and beliefs developed by Tribes and Indigenous Peoples through interaction and experience with the environment.” OFFICE OF SCIENCE AND TECHNOLOGY POLICY AND CEQ, GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON INDIGENOUS KNOWLEDGE (Nov. 30, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf>.

¹²⁴ *Id.* at 49,977 (proposed 40 C.F.R. § 1502.16(a)(7), (10)).

¹²⁵ *Id.* at 49,977 (proposed 40 C.F.R. § 1502.16(a)(6)).

¹²⁶ *Id.* at 49,947, 49,976 (proposed 40 C.F.R. § 1502.9(b)).

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NEPA’s plain language,¹²⁷ its purposes of informed decision making and public participation,¹²⁸ and with CEQ’s proposal to return to similar language in § 1500.2.¹²⁹

5. The States urge CEQ to include quantification of GHG emissions and future emissions scenarios to assess climate change effects in EISs

The States recommend that proposed § 1502.16(a)(7) (environmental consequences) align with the 2023 GHG Guidance in emphasizing quantification of GHG emissions in determining reasonably foreseeable climate change-related effects.¹³⁰ Where relevant, a full lifecycle analysis of GHG emissions should be performed that includes an analysis of upstream and downstream emissions from an action for the foreseeable lifetime of that action.¹³¹ This quantification may be particularly important for energy projects. Where information about these emissions is missing or otherwise unknown, we support incorporating into the regulations the 2023 GHG Guidance’s explanation that such omitted information is not a basis to ignore and fail to analyze these impacts, which are still reasonably foreseeable.¹³²

Similarly, in setting the context for a proposed action, proposed § 1502.15(b) requires an EIS to consider reasonably foreseeable climate-related changes to the environment,¹³³ a requirement echoed in § 1502.23(c).¹³⁴ These provisions should be strengthened by requiring consideration of projections based on varying emissions scenarios and related variations in climate change effects on the proposed action and alternatives. The 2023 GHG Guidance provides important information on quantifying and analyzing uncertainty in long-range projections of climate change, guiding agencies to use the most current reports on climate impacts such as national climate assessments,¹³⁵ and using the most current Social Cost of Greenhouse Gases (SC-GHG) estimates, where relevant. The States urge that CEQ strengthen the final rule by codifying the need to manage this uncertainty and analyze it; otherwise, agencies may unlawfully seek to minimize or avoid analysis of long-range projections of climate change altogether.

¹²⁷ 42 U.S.C. § 4332.

¹²⁸ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (describing NEPA’s purpose that agencies “will carefully consider, detailed information “ and provide “a springboard for public comment”)

¹²⁹ 88 Fed. Reg. at 49,930, 49,967 (proposed 40 C.F.R. § 1500.2).

¹³⁰ 88 Fed. Reg. at 1,200.

¹³¹ See 88 Fed. Reg. at 1,204; *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 735 (9th Cir. 2020); *Diné Citizens Against Ruining Our Env’t v. Haaland*, 59 F.4th 1016, 1043 (10th Cir. 2023).

¹³² 88 Fed. Reg. at 1,202.

¹³³ *Id.* at 49,977 (proposed 40 C.F.R. § 1502.15(b)).

¹³⁴ *Id.* at 49,979 (proposed 40 C.F.R. § 1502.23(c)).

¹³⁵ *Id.* at 1,208.

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6. The States encourage CEQ to adopt further clarifications on provisions codified by the Fiscal Responsibility Act concerning preparation of environmental review documents

The Fiscal Responsibility Act of 2023 codified various provisions of the 2020 Rule, including a 75-page limit for EAs¹³⁶ and a 150-page limit for EISs, unless the agency action is one of “extraordinary complexity”, in which case a 300-page limit applies for the EIS excluding citations and appendices from the page limitation.¹³⁷

The Fiscal Responsibility Act, however, does not define “extraordinary complexity.”¹³⁸ To ensure consistency and transparency in the NEPA the States recommend that CEQ’s final rule define “extraordinary complexity” or that CEQ otherwise issue guidelines on application of the term. What constitutes “extraordinary complexity” will likely vary among federal agencies. Therefore, the States propose that an action be classified as one of extraordinary complexity whenever agency staff determines that the 150-page limit is insufficient to disclose and analyze the potentially significant effects of a major federal agency action as required under NEPA. This additional clarification will help agencies align the page limit requirement with their obligation under NEPA to provide the public with a full environmental analysis.

The Fiscal Responsibility Act also requires lead agencies to prescribe procedures to allow project sponsors, rather than disinterested third parties, to prepare EAs and EISs under the supervision of the agency.¹³⁹ The Act also provides that the lead agency may provide a sponsor with guidance and assistance in preparation, and that the lead agency shall independently evaluate the environmental document and take responsibility for the contents.¹⁴⁰ The States encourage CEQ to guide lead agencies in preventing bias from project sponsors that undermines NEPA’s promotion of informed agency decision-making. The States support CEQ’s proposal to remove the ability of conflicted project proponents to prepare EIS’s as it will strengthen environmental review by reducing conflicts of interest¹⁴¹ and preventing the “self-serving assumptions” of a project proponent.¹⁴²

The States further propose that CEQ develop guidance for lead agencies to mitigate the risk of conflicts. This guidance could include: (1) requiring assignment of project sponsor drafted environmental documents to an agency staff member to routinely check on the progress of the preparation and the accuracy of the analyses; (2) requiring project sponsors drafted environmental documents to be subject to review for accuracy by another agency staff member not assigned to supervise the progress; (3) requiring at least one public meeting in which the project sponsor preparing the environmental document is available to answer the public’s

¹³⁶ 42 U.S.C. § 4336a(e)(2).

¹³⁷ 42 U.S.C. § 4336a(e)(1)(B).

¹³⁸ *Id.*

¹³⁹ 42 U.S.C. § 4336a(f).

¹⁴⁰ *Id.*

¹⁴¹ 88 Fed. Reg. at 49,956, 49,983 (proposed 40 C.F.R. § 1506.5(b)(4))

¹⁴² *See Greene Cnty. Planning Bd. v. Fed. Power Comm’n*, 455 F.2d 412, 420 (2nd Cir. 1972).

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questions, within one month after the draft document is released and before the public commenting deadline elapses; (4) requiring at least one public meeting in which the project sponsor preparing the environmental document is available to answer the public's questions within one month after the final document is published; and (5) any other procedures that CEQ deems appropriate to prescribe for lead agencies to reduce the risks of inadequately prepared environmental documents. Such procedures will support independent analysis and unbiased decision-making by the lead agencies and transparency and public participation in the process.

E. The States support CEQ's Proposed Definitions to Improve Environmental Review

The States support CEQ's efforts to add clarity to the NEPA process by adding new definitions to commonly used NEPA terms and updating or revising definitions of other important terms. In particular, the States support adding stand-alone definitions of environmental justice, extraordinary circumstances, and significant effects.

1. The States support updating the definition of effects to include environmental justice and climate-change related effects

The States support the changes to § 1508.1(g) that add "disproportionate and adverse effects to communities with environmental justice concerns and climate change-related effects" to the list of common types of effects that may arise during NEPA review.¹⁴³ The States also support clarifying that climate change effects can include both the contributions to climate change from a proposed action and its alternatives as well as the potential effects of climate change on the proposed action and its alternatives.¹⁴⁴ This updated definition of climate change-related effects will help agencies adapt to ever-evolving climate threats while using the best available science and information on any disparate health effects (including risks) to help with the NEPA analysis. The States agree with CEQ that this update to the effects definition is consistent with important long-term NEPA analysis, the best use of available science, and to meet NEPA requirements.¹⁴⁵

2. The States support additional definitions related to environmental justice

The States applaud CEQ's decision to add two definitions related to environmental justice. Specifically, the States support adding a new definition of "environmental justice" in the Proposed Phase 2 Rule at § 1508.1(k)¹⁴⁶ consistent with Executive Order 14096.¹⁴⁷ The States support the updated definition since it is now inclusive of Tribal affiliation and disability as protected categories. The States agree with CEQ that adding a stand-alone definition for environmental justice will help agencies fully analyze environmental justice and climate change-related effects consistent with their obligations to evaluate all reasonably foreseeable effects

¹⁴³ 88 Fed. Reg. at 49986 (proposed 40 C.F.R. § 1508.1(g)).

¹⁴⁴ *Id.* at 49,960.

¹⁴⁵ *Id.*

¹⁴⁶ 88 Fed. Reg. at 49,961.

¹⁴⁷ Exec. Order No. 14096, 88 Fed. Reg. 25,251 (April 21, 2023). Executive Order 14096 updated the definition of environmental justice from Executive Order 12898 signed in 1994 by President Clinton.

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under NEPA and consistent with CEQ’s existing guidance.¹⁴⁸ The States recommend CEQ further center consideration of environmental justice impacts by providing direction to agencies, either through the final rule or guidance, on how to evaluate cumulative disproportionate adverse effects on environmental justice communities. While the definition of environmental justice addresses “the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers...,”¹⁴⁹ CEQ should elaborate further on how agencies should incorporate and assess those cumulative impacts in various NEPA review contexts. In addition, in response to CEQ’s invitation for comment on whether and how communities with environmental justice concerns should be defined,¹⁵⁰ the States generally support the approach of defining “communities with environmental justice concerns” as communities that do not experience environmental justice as defined in § 1508.1(k).¹⁵¹

3. The States support some changes to the extraordinary circumstances definition and urge further clarity

With respect to the definition of extraordinary circumstances, the States support highlighting impacts to environmental justice, historic properties and cultural resources, and sensitive environmental resources and impacts associated with climate change as types of circumstances that may warrant more detailed environmental review through an EA or EIS.¹⁵² However, the States ask CEQ to clarify the meaning of “substantial effects” in this definition (which appears to be a new term used only in this definition) and to explain how it aligns with or differs from the definition of “effects” and “significant effects.”¹⁵³ It also is not clear why the “substantial effects” language applies to certain impacts (i.e. impacts on sensitive environmental resources and impacts associated with climate effects) but not to other impacts (i.e. impacts to communities with environmental justice concerns and impacts on historic properties or cultural resources), which appear to create extraordinary circumstances when effects are “adverse.”¹⁵⁴ In the final rule, CEQ should clarify these examples to ensure consistency and clarity and to avoid inappropriate use of CEs.

4. The State support proposed changes to the definition of major Federal actions

Finally, the States support CEQ’s changes to the definition of major Federal action to add clarity, eliminate language that could potentially limit agency review of agency actions under NEPA, and provide examples of major Federal actions where agencies have the requisite control

¹⁴⁸ See, e.g., CEQ, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Dec. 10, 1997) (“Environmental Justice Guidance”), <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf>.

¹⁴⁹ See 88 Fed. Reg. at 49986 (proposed 40 C.F.R. § 1508.1(k)(1)).

¹⁵⁰ 88 Fed. Reg. at 49,960.

¹⁵¹ *Id.*, *id.* at 49986 (proposed 40 C.F.R. § 1508.1(k)(1)).

¹⁵² 88 Fed. Reg. at 49,961, 49,987 (§ 1508.1(m)). We caution, however, that many climate change-related effects that now seem extraordinary may become a “new normal,” as climate change progresses.

¹⁵³ Compare 88 Fed. Reg. at 49,987 (proposed 40 C.F.R. § 1508.1(m)), with *id.* at 49,988 (§ 1508.1(g), (kk)).

¹⁵⁴ *Id.* at 49,987 (proposed 40 C.F.R. § 1508.1(m)).

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and responsibility to trigger NEPA review.¹⁵⁵ The States further support eliminating exclusions from the definition of major Federal action that were not recently codified at 42 U.S.C. § 4336(e)(10). As CEQ notes, whether an action is a major Federal action is a fact-specific inquiry.¹⁵⁶ Given the fact-specific nature of this inquiry, the States are concerned that CEQ's suggestion to potentially set a threshold for the amount or proportion of federal funding necessary for agency action to trigger NEPA¹⁵⁷ would undermine the statute's emphasis that it apply to "the fullest extent possible,"¹⁵⁸ and potentially lead to perverse incentives for projects to take fewer federal funds to avoid NEPA review. The States believe that Congress's recent statutory changes, as clarified by CEQ's draft regulations, are sufficient to provide clarity on the scope of NEPA's application and do not think that a threshold amount is necessary or useful.

V. THE PROPOSED PHASE 2 RULE INTEGRATES ANALYSIS OF CLIMATE CHANGE EFFECTS INTO THE REGULATIONS, BUT SHOULD BE STRENGTHENED FOR ENVIRONMENTAL IMPACT STATEMENTS AND OTHER NEPA REVIEWS

The Proposed Phase 2 Rule requests comment on whether to codify any or all of CEQ's 2023 GHG Guidance,¹⁵⁹ and if so, whether provisions of Part 1502 or other regulations should be amended.¹⁶⁰ The 2023 GHG Guidance recommends major areas for consideration of climate change effects in NEPA reviews, including that agencies: (1) quantify the projected lifetime emissions of GHGs from proposed actions and alternatives; (2) provide additional context for those emissions; (3) use best available information; (4) apply a "rule of reason" in determining how to consider effects; and (5) incorporate environmental justice considerations into analysis of climate-related effects.¹⁶¹ The States support incorporating into the final rule many of the principles, definitions and provisions from or suggested by the 2023 GHG Guidance, integrating climate change and associated resiliency considerations into all NEPA reviews where applicable.

However, the States also expect the nature of and responses to the climate crisis will continue to evolve. We do not recommend full codification of the 2023 GHG Guidance, particularly specific technical or analytic techniques,¹⁶² or concepts discussed in the guidance that need elaboration.¹⁶³ The Proposed Phase 2 Rule encourages innovation and use of the best

¹⁵⁵ See *id.* at 49,962 (discussing proposed 40 C.F.R. § 1508.1(u)); see also 42 U.S.C. § 4336(e)(10)(defining major Federal action).

¹⁵⁶ 88 Fed. Reg. 49,962.

¹⁵⁷ See *id.* at 49,987 (proposed 40 C.F.R. § 1508.1(u)(2)(i)(A)).

¹⁵⁸ 42 U.S.C. § 4332.

¹⁵⁹ 88 Fed. Reg. at 1,196.

¹⁶⁰ 88 Fed. Reg. at 49,945.

¹⁶¹ GHG Comment Letter, *supra* note 28, at 23.

¹⁶² For example, the 2023 GHG Guidance refers to a number of quantification and assessment tools available on CEQ's website, 88 Fed. Reg. at 1201 n.56. This and other similar provisions that will evolve and improve over time are better suited to a guidance document, not regulations.

¹⁶³ See GHG Comment Letter, *supra* note 28, at 153.

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and most current information for NEPA reviews.¹⁶⁴ The 2023 GHG Guidance should continue to evolve while the regulations remain more stable. For that reason, revisions of the guidance that need additional explanation and examples should not be codified into the regulations.

This comment letter already discusses above several areas where the States support consideration of climate change issues in the Proposed Phase 2 Rule. In the following section, we discuss additional provisions the States support in the Proposed Phase 2 Rule and areas to improve the consideration of climate change effects in EISs and other NEPA reviews.

A. The States Recommend Strengthening the Consideration of Climate Effects and Communication of Those Effects and Alternatives to Affected Stakeholders

The Proposed Phase 2 Rule states CEQ's intention to return to the long-standing policy of the NEPA regulations being not just a "check-the-box exercise," but also "action-forcing."¹⁶⁵ Therefore, Part 1502, which governs EISs, should be strengthened with principles and requirements from the 2023 GHG Guidance as discussed in greater detail below to encourage more environmentally protective decisions.

1. Strengthening accessibility of GHG emissions and climate change effects analyses

The States' 2023 GHG Comment Letter proposed several accessibility provisions to enhance public participation in review of proposed actions with a climate change-related component, and further recommended that CEQ consider their incorporation into the regulations.¹⁶⁶ The recommendations included holding early and frequent public meetings, translating key analyses into languages spoken in the affected community, and providing affected communities with information on technical issues in plain language. Proposed § 1500.4 emphasizes providing analytical and concise documents, including by use of plain language.¹⁶⁷ This section should be strengthened, however, by addition of specific requirements concerning technical or climate change-related analyses, encouraging plain language explanation of these analyses and by requiring translation into relevant languages. State and local governments may have resources to facilitate compliance with this type of requirement and other measures to promote full stakeholder and public participation.

2. Strengthening analysis of cumulative effects on communities with environmental justice concerns

Proposed § 1502.16(a)(14) requires that EIS review discuss the potential for disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.¹⁶⁸ The States strongly support this provision, which echoes recognition in the 2023 GHG Guidance that climate change will have disproportionate adverse

¹⁶⁴ 88 Fed. Reg. at 49,950, 51, and 57 (proposed 40 C.F.R. § § 1502.21, 23 and 1506.12).

¹⁶⁵ 88 Fed. Reg. at 49,945 (discussing proposed 40 C.F.R. § 1502.1).

¹⁶⁶ GHG Guidance Letter, *supra* note 28, at 33.

¹⁶⁷ 88 Fed. Reg. 49,967-68 (proposed 40 C.F.R. § 1500.4(c)).

¹⁶⁸ 88 Fed. Reg. at 49,978.

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impacts in communities of color, low-income communities, and Tribal Nations and Indigenous communities.¹⁶⁹ However, we recommend CEQ’s final rule expressly require that this environmental justice analysis include assessment of cumulative effects on communities, particularly in the context of climate change. NEPA requires agencies to consider the cumulative impacts of GHG emissions on climate change.¹⁷⁰ The 2023 GHG Guidance recognized that climate change “is inherently cumulative in nature,” and these cumulative climate impacts frequently cause disproportionate impact on overburdened communities.¹⁷¹ We therefore recommend that the discussion of environmental consequences include assessment of the ways affected communities are already overburdened with adverse environmental, socio-economic, and public health impacts, including the polluting effects of GHGs, such as air toxins and increased particulate matter. This analysis of cumulative impacts from co-pollutants should account for future projected climate conditions, including extreme heat and other changes such as sea level rise and flooding, and discuss how the increased levels of these emissions would affect overburdened communities in those contexts. To assess the full impact of a proposed action on a community, an agency must consider the existing levels of pollution and the cumulative impacts in the community of adding another pollution source.

Accordingly, CEQ should strengthen the final rule by instructing agencies to conduct analysis in a manner that ensures that federal NEPA reviews identify and disclose the full scope of potential impacts to communities, particularly already overburdened communities. The regulations could refer agencies to consideration of appropriate guidance and screening tools.¹⁷²

¹⁶⁹ 88 Fed. Reg. at 1,197.

¹⁷⁰ See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) (“The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”); see also *id.* (“The 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.”) (cleaned up); see also Exec. Order 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021) (directing federal agencies to “secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment”); Exec. Order 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021) (directing all federal agencies to “work to redress inequities in their policies and programs that serve as barriers to equal opportunity”); Exec. Order 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021) (directing all executive departments and agencies to address any actions that conflict with goal of prioritizing environmental justice, among other national objectives); Exec. Order 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) (directing agencies to select regulatory approaches that maximize net benefits including “distributive impacts[] and equity”); Exec. Order 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994) (directing each federal agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations”); Exec. Order 12,866, 51 Fed. Reg. 51,735 (Oct. 4, 1993) (ordering agencies to consider “distributive impacts[] and equity” in designing regulations).

¹⁷¹ 88 Fed. Reg. at 1,206.

¹⁷² See, e.g., U.S. EPA, EJSscreen: Environmental Justice Screening and Mapping Tool (last updated Sept. 9, 2023), available at <https://www.epa.gov/ejscreen>; Cal. Office of Environmental Health Hazard Assessment, CalEnviroScreen 4.0 (last updated May 1, 2023), available at <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40>.

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VI. CONCLUSION

As stated above, the undersigned States largely support CEQ's Proposed Phase 2 Rule and urge CEQ to include more protective language to ensure NEPA's implementing regulations fully implement NEPA's statutory mandate.

Sincerely,

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