

## **Public Comments on the Proposed Changes to the National Environmental Policy Act**

CEQ-2019-0003

Submitted by the Environmental History Action Collaborative (EHAC), a working group of the Environmental Data Governance Initiative (EDGI)

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### **Why a strong NEPA is needed.**

The National Environmental Policy Act (NEPA) is a cornerstone of the laws and regulations put into place in the 1970s to protect the environment and public health. When the Republican President Nixon signed NEPA into law on January 1, 1970, he hailed it as a model of bipartisanship. It passed unanimously in the Senate and with only fifteen nay votes in the House. Upon signing NEPA into law, Nixon spoke of his staff devoting “many hours” to “pressing problems” including “airport location [and] highway construction,” referring mainly to the damage such projects were imposing on neighborhoods and natural lands. As he noted, “once the damage is done, it is [much harder to turn it around.](#)”<sup>1</sup> President Nixon invoked threats to Americans’ quality of life. “I have become convinced,” he declared, “that the 1970’s absolutely must be the years when America pays its debt to the past by reclaiming the purity of its air, its waters, and our living environment. It is literally [now or never.](#)”<sup>2</sup>

A main purpose of NEPA is to ensure that potentially destructive impacts on both communities and ecosystems would figure into decision-making about federal projects and funding. A strong NEPA is needed to reaffirm and protect basic principles, which throughout NEPA’s history have allowed other agencies and the public to identify potentially superior alternatives and mitigation measures to actions proposed by narrow, siloed mission-driven agencies. The core of NEPA is (1) its mandate that all federal agencies, whatever their specific mission, strive to achieve a harmonious balance between human activities and natural processes; (2) its requirement to document the anticipated environmental impacts of all major federal actions (not just, as previously, simply the economic benefits and costs); (3) often forgotten but no less important, its requirement that agencies document alternatives to the proposed action that might minimize adverse environmental impacts (an entirely new requirement for many federal projects and other actions); and (4) its requirement that this documentation be shared in advance with all other relevant agencies and with the public.

The majority of the proposed rule changes are at cross-purposes with the original intent of NEPA. We urge rejection of the proposals that: (a) minimize the substantive elements of NEPA; (b) arbitrarily limit the scope and length of EIS review; (c) reduce public participation in the NEPA process; (d) expand categorical exclusions; (e) limit the consideration of indirect and cumulative effects, and (f) restrict judicial review. We do support proposed changes that make information about the NEPA process more available in electronic formats and that expand tribal involvement in environmental decision-making. A detailed discussion of these points follows.

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<sup>1</sup> Frank Gannon, “RN in ‘70 – Launching the Decade of the Environment,” News: The New Nixon, The Richard Nixon Foundation, January 1, 2010, [nixonfoundation.org](http://nixonfoundation.org).

<sup>2</sup> Legislative History, National Environmental Policy Act, [balltopedia.org](http://balltopedia.org)., citing *The American Presidency Project*, “Richard Nixon – Statement About the National Environmental Policy Act of 1969, January 1, 1970.

## **NEPA's procedural and substantive provisions should be strengthened, not weakened.**

Among the many priorities set out in NEPA is the wide-ranging principle of creating “enjoyable harmony.” If taken seriously, this concept furnishes a broad imperative for environmental protection. The Administration’s current proposals minimize, even more than previous administrations and court decisions, the expansiveness of NEPA’s statutory intent. The substantive elements of NEPA have been minimized, sometimes even forgotten, as compared with the procedural components.<sup>3</sup>

The courts have defined NEPA’s requirements as mostly procedural,<sup>4</sup> yet other judicial decisions as well as significant legal scholarship suggest that the NEPA also entails substantive requirements.<sup>5</sup> Some clauses in the proposed changes seek to define away already limited opportunities to redress environmental harms in the courts. Among these, particularly damaging are clauses in part 1500 insisting that the new rules “create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm,<sup>6</sup> and later, the stipulation that “CEQ’s regulations do not create a cause of action for violation of NEPA.” Clauses nearby and elsewhere chip away at additional grounds NEPA provides for legal remedies of environmental damage, stating, for example, that “harm from the failure to comply with NEPA can be remedied by compliance with NEPA’s procedural requirements.”<sup>7</sup>

The proposed rules undermine the basic purpose of NEPA by proposing that “site-specific analyses need not be conducted prior to an irretrievable commitment of resources.”<sup>8</sup> Similarly, allowing agencies to lean on projected mitigation efforts in order to pass a Finding of No Significant Impact (FONSI) is a dubious move. That maneuver is rendered all the more questionable by the allowance of a legal rather than a scientific basis for the mitigation.<sup>9</sup> Enabling a FONSI to be declared on only the expectation that sufficient resources for mitigation will somehow come available,<sup>10</sup> while also not requiring any specific mitigation measure,<sup>11</sup> opens the door for many a FONSI’d project to cause environmental damages that go unmitigated, and turn out to be all too significant. Finally, restricting agencies to analyzing impacts solely within their jurisdiction<sup>12</sup> undercuts NEPA’s mandate for interagency cooperation, which has been a hallmark of the legislation.

### **Environmental Impact Statements give NEPA “teeth.”**

At the time of NEPA’s signing, few anticipated how consequential it would be. Nor did they note the far-reaching significance of its most important provision: Section 102, added late, by Sen. Henry “Scoop” Jackson, to give the law some “teeth.” This section requires the government to produce an

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<sup>3</sup> James R. Skillen, *Federal Ecosystem Management: Its Rise, Fall, and Afterlife* (University of Kansas, 2015), 69-72.

<sup>4</sup> Richard Lazarus, “The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtain,” *Georgetown Law Journal* 100 (2012): 1507-86.

<sup>5</sup> Jason J. Czarnezki, “Revisiting the Tense Relationship between the U.S Supreme Court, Administrative Procedure, and the National Environmental Policy Act,” *Stanford Environmental Law Journal* 25, no. 1 (2006): 3-28.

<sup>6</sup> Council on Environmental Quality (CEQ), “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” *Federal Register* 85, no. 7 (January 10, 2020): 1684-1730, 1694 (hereinafter cited as CEQ, “Update to NEPA Regulations”).

<sup>7</sup> CEQ, “Update to NEPA Regulations,” 1694, referencing §1500.3(d).

<sup>8</sup> CEQ, “Update to NEPA Regulations,” 1700.

<sup>9</sup> CEQ, “Update to NEPA Regulations,” 1698.

<sup>10</sup> CEQ, “Update to NEPA Regulations,” 1698.

<sup>11</sup> CEQ, “Update to NEPA Regulations,” 1709.

<sup>12</sup> CEQ, “Update to NEPA Regulations,” 1702.

environmental impact statement (EIS), assessing the environmental consequences of a proposed action and potential alternatives to proposed federal actions. While the aspirational principles at the beginning of the statute could be implemented flexibly, the EIS requirement could not.<sup>13</sup> As well as providing information, the mandate for an EIS process made NEPA the vehicle for a greater democratization of federal decisions, by opening a new avenue through which voices of the public and of other federal and state agencies affected by the action in question could be heard. Draft EISs are submitted for public comment and agencies are required to respond to public and expert criticism. Thereby, NEPA has been widely recognized by historians and other scholars as having [significantly enhanced the democracy of environmental governance](#).<sup>14</sup>

The Environmental Impact Statement (EIS) mandated by NEPA was intended to be an essential element for any federal action significantly affecting the environment. Reforms that make it serve this purpose more effectively are desirable. Unfortunately, many past proposed reforms, including expanding categorical exclusions, only work by narrowing NEPA's scope, corroding the law's purpose and effectiveness. By further limiting the size and scope of projects requiring NEPA review, the present proposed changes would further limit the law's effectiveness.<sup>15</sup>

The importance of the Threshold Applicability Analysis § 1501.1 has been evident in recent years.<sup>16</sup> The EIS that would establish oil and gas leasing on the Alaska coastal plain, including portions of the Alaska National Wildlife Refuge, did not provide a "no action" alternative, citing requirements laid out in the Tax Cuts and Jobs Act of 2017 (P.L. 115-97). This change should be rejected, as explicitly codifying this as a part of the regulatory guidance will open space for further laws that explicitly circumvent decades-long elements of NEPA practice. Likewise, deleting "all" before "reasonable" § 1502.14(a) will provide immense discretionary power to provide a narrow range of options for any project.<sup>17</sup> This change should be rejected as it would allow agencies to substantially undermine the capacity for real decisions and deliberations while providing a fiction of choice.

Several other language changes are troublesome and represent a failure to adhere to NEPA's goals. For example, [eliminating "Mandate" from the "Purposes, Policy, and Mandate"](#) section represents a step backward.<sup>18</sup> Changing ["shall" to "should" and "possible to reasonable"](#) in § 1501.2 would be a mistake, weakening the NEPA requirement to "Apply NEPA Early in the Process" as a "legally enforceable standard."<sup>19</sup>

Large infrastructure projects always entail costs and benefits. Until NEPA was passed, however, both government and private developers neglected their projects' environmental balance sheets. Thereby, communities in the path of dams or freeways, as well as endangered species and ecosystems, bore an inordinate share of the costs, often little noted until it was too late. NEPA has played a transformative

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<sup>13</sup> The key case, from 1971, is *Calvert Cliffs Coordinating Committee, Inc. et al. v. U.S. Atomic Energy Commission* (449 F.2d 1109 (D.C. Cir. 1971)), <https://law.justia.com/cases/federal/appellate-courts/F2/449/1109/240994/>.

<sup>14</sup> For just one example, see Wendy Nelson Espeland, "Bureaucratizing Democracy, Democratizing Bureaucracy," *Law and Social Inquiry* 25, no. 4 (Autumn, 2000): 1077-1109.

<sup>15</sup> Richard N. L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy*. 3rd ed. New Haven: Yale University Press, 2020, 213-21.

<sup>16</sup> CEQ, "Update to NEPA Regulations," 1695.

<sup>17</sup> CEQ, "Update to NEPA Regulations," 1721.

<sup>18</sup> CEQ, "Update to NEPA Regulations," 1693.

<sup>19</sup> CEQ, "Update to NEPA Regulations," 1695.

role in ensuring that this fuller array of costs and benefits are carefully assessed and allows affected communities to provide input before environmental harms are incurred, rather than having to seek remediation for damage done. NEPA has opened considerably greater opportunities for other agencies with missions that are affected, as well as the public, to comment on such projects and to suggest superior alternatives before a project is approved, rather than after the fact. Before NEPA, federal agencies were so siloed that even other federal and state agencies had little knowledge or input to projects affecting them, such as proposed dams that would affect water flow relied on by power plants downstream or national and state parks in the path of proposed highways.

NEPA ushered in an historic turning point in how decisions were made about public infrastructure projects and other major federal actions, as documented by many historians.<sup>20</sup> The era in which small but powerful and well-connected elites could decide where freeways were located, dams were built, or power plants permitted came to a close in the United States. Since then, NEPA has played a major role in sustaining the public's say in major federal actions, including management of national forest roadless areas and other public lands and the issuance of power plant permits. Assessing an array of effects has been crucial for responsible environmental decision-making, as the physical, chemical, and biological complexity of ecosystems cannot be understated, and literal and figurative watershed impacts can all too easily accumulate to overburden communities and environs.

### **Public participation is crucial in project planning.**

The great virtues of NEPA remain widely appreciated in recent times: ensuring that not just builders or government officials but affected communities and environments should receive some say in project planning. These continuing strengths of NEPA have been repeatedly documented in reports by government agencies and non-profit organizations.

- In 2010, the Department of Energy highlighted thirteen “[quiet success stories](#)” of NEPA, arguing that, in each case, NEPA was responsible for “public involvement and careful consideration of alternatives [that] has produced better outcomes.”<sup>21</sup>
- The Center for the American Progress underscores the value of NEPA in the context of a Charlotte, North Carolina-area transportation project. It argues that the current environmental review process “improves governance, increases transparency, and makes infrastructure projects better [by reducing environmental and community impacts through public participation and mitigations](#).”<sup>22</sup>
- The Natural Resources Defense Council also highlights NEPA successes in a special [report](#). NEPA “gives citizens their only opportunity to voice concerns about a project’s impact on their community.” Because it “ensure[s] that the project’s impacts – environmental and otherwise – are considered and disclosed to the public,” and “because informed public engagement often

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<sup>20</sup> Several books by historians offer analysis of NEPA’s significance to public involvement in federal policy: James Skillen, *The Nation’s Largest Landlord: The Bureau of Land Management in the American West* (2009); James Morton Turner, *The Promise of Wilderness: American Environmental Politics since 1964* (2012); Cody Ferguson, *This is Our Land: Grassroots Environmentalism in the Late-Twentieth Century* (2015).

<sup>21</sup> Office of NEPA Policy and Compliance, “‘Quiet’ Success Stories Illustrate NEPA’s Value,” *energy.gov*, accessed February 15, 2020.

<sup>22</sup> Kevin DeGood, “A Case Study of the CATS Blue Line Light Rail System,” Center for American Progress, August 16, 2018.

produces ideas, information, and even solutions that the government might otherwise overlook, [NEPA leads to better decisions – and better outcomes – for everyone.](#)<sup>23</sup>

We support the proposed update §1507.4 to include publishing information on agency websites regarding NEPA reviews and maintaining public access to agency records of NEPA reviews.<sup>24</sup> This is an important step forward in the provision of public information in the digital age. Agency websites are recognized as the primary means by which the public receives information from agencies<sup>25</sup> and are critical interfaces for the public to build environmental literacy and exercise civic engagement. Agencies should utilize their websites to provide sufficient context and information to facilitate authentic, relevant, informed public comment in the spirit of NEPA’s mission.

However, the proposed rule updates will likely restrict public participation in a variety of ways. The change proposed to §1502 to reduce agency requirements from circulation to simply publishing EIS reports and other documents could deprive interested parties of adequate notice of proposed actions. Limiting consideration of public comment by allowing the agencies discretion over the significance and specificity of comments “before any lack of agency response or consideration becomes a concern” may likewise restrict timely public involvement.<sup>26</sup> The proposed rule changes also assert that agencies need not include detailed analyses of alternatives nor delineation of alternatives excluded from analysis in Environmental Assessments (EAs),<sup>27</sup> cloistering substantial information within agencies and away from public view. Further paving the way for agencies to abdicate their responsibilities to the public in the NEPA process, the proposed updates invite considerable input from applicants themselves with merely a vague reference to agency “supervision”<sup>28</sup> to impede a “capture” of its decision-making by those it is supposed to regulate.

The imposition of arbitrary page limits and time limits for environmental documents also limits public participation and undercuts the original goals of NEPA. While we agree that “every EIS must be bounded by the practical limits of the decision-maker’s ability to consider detailed information,”<sup>29</sup> the appropriate response is not to limit the length or detail of the EIS itself, but to require summaries and synthesized information that encapsulate messages and point to the full document for details. Arbitrary page limits do not allow complex issues to be fully examined. Contrary to recommendations in the proposed rule,<sup>30</sup> public comment and protest time limits should be lengthened not shortened. Plain language summaries of environmental documents should be provided to invite the submission of thoughtful and thorough comments.

The inability to raise issues not previously raised in the public comment period already means that changing circumstances, new research findings, etc. are excluded from project review.<sup>31</sup> Limitations on judicial review, described below, likewise limit public involvement.

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<sup>23</sup> Elly Pepper, “Never Eliminate Public Advice: NEPA Success Stories,” Natural Resources Defense Council, February 1, 2015, [nrdc.org](http://nrdc.org).

<sup>24</sup> CEQ, “Update to NEPA Regulations,” 1707.

<sup>25</sup> Office of Management and Budget, M-17-06 “Policies for Federal Agency Public Websites and Digital Services,” November 8, 2016.

<sup>26</sup> CEQ, “Update to NEPA Regulations,” 1703.

<sup>27</sup> CEQ, “Update to NEPA Regulations,” 1697.

<sup>28</sup> CEQ, “Update to NEPA Regulations,” 1705.

<sup>29</sup> CEQ, “Update to NEPA Regulations,” 1700.

<sup>30</sup> CEQ, “Update to NEPA Regulations,” 1693.

<sup>31</sup> CEQ, “Update to NEPA Regulations,” 1693.

## **Categorical exclusions should not be expanded.**

While the scope of NEPA reviews is wide ranging, many activities have been exempted as “categorical exclusions,”<sup>32</sup> a tactic that federal agencies have aggressively sought to expand. For example, the [Department of the Interior has expanded categorical exclusions to](#) include surveys, seasonal field camps, prescribed burns less than 2,000 acres in size, and routine fish stocking.<sup>33</sup> More recent efforts to expand the scope of categorical exclusions (CEs) by the Trump administration include [activities from logging to building infrastructure](#).<sup>34</sup>

In a further example, residents of Burien, Washington, under a flight path the airport has moved to expand, have twice sued FAA for not adequately taking into account the [environmental impacts of the new flyway](#).<sup>35</sup> In the last such suit, a federal court decided in November 2019, that the FAA had failed to defend its argument that the revised flight path deserved a “categorical exclusion” from NEPA’s requirements. The 2-1 federal decision ruled that exempting the flight path through categorical exclusion [constituted an “arbitrary and capricious” exercise of federal power](#).<sup>36</sup>

The proposal to expand categorical exclusions appears to be misplaced. The dismissal of “extraordinary circumstances”<sup>37</sup> as a reason to develop an EIS is directly at odds with the purpose of an EIS and the nature of a CE.

## **NEPA is a bulwark against foreseeable “indirect” and “cumulative” results from climate change.**

The reforms now proposed would exclude foreseeable conditions such as climate change from environmental analyses of proposed infrastructure projects. That move, solely focused on the benefits of building projects, with no mention of any environmental costs, augur a wholesale abrogation of NEPA’s original aims. Especially for long-lived public investments in infrastructure, almost certainly be affected by changes already foreseeable, this new NEPA regimen also promises shorter-lived roads, bridges, tunnels, etc., and a growing waste of taxpayer funds.

The dismissal of climate change as an urgent issue and the prioritizing of fossil fuel-driven economic growth threaten public health. Indeed, the proposed changes to NEPA would omit the larger and longer-term consequences on climate from all required reviews of environmental impact.

Climate change mitigation and adaptation is the clear intended target of proposed revisions to [limit consideration of “indirect” and “cumulative” effects, though the impacts of this provision would extend](#)

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<sup>32</sup> CEQ, “Update to NEPA Regulations,” 1695ff., §1500.4 (a).

<sup>33</sup> U.S. Department of the Interior, “Existing Categorical Exclusions,” [https://www.doi.gov/sites/doi.gov/files/uploads/doi\\_and\\_bureau\\_categorical\\_exclusions.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/doi_and_bureau_categorical_exclusions.pdf), accessed February 15, 2020. For more information on the history of categorical exclusions, see Kevin H. Moriarty, “Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion Note,” *New York University Law Review* 79, no. 6 (2004): 2312–40.

<sup>34</sup> Nick Bowlin, “Forest Service might limit public comments,” *High Country News*, June 27, 2019.

<sup>35</sup> Katherine Khashimova Long, “Burien has been plagued by noise from Sea-Tac Airport. So residents sued the government — and won,” *seattletimes.com*, December 9, 2019.

<sup>36</sup> “CATEX Controversy: The Ninth Circuit Strikes Down FAA Decision to Exempt a Sea-Tac Operational Change from Environmental Review,” *JDSupra*, December 9, 2019.

<sup>37</sup> CEQ, “Update to NEPA Regulations,” 1696.

[beyond effects of the climate crisis](#).<sup>38</sup> The rules propose that “[effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy causal chain](#).”<sup>39</sup> Under the proposal, effects should be taken into account only if they “[are reasonably foreseeable and have a reasonably close causal relationship to the proposed action](#).”<sup>40</sup> The proposed revision specifically states that “[Analysis of cumulative effects is not required](#).”<sup>41</sup> In addition to failing to address climate change effects, these proposed revisions fly in the face of basic atmospheric and hydrologic dynamics. There are well-known global pollutants, such as mercury, that can accumulate thousands of miles from where they are emitted.<sup>42</sup> Moreover, there are numerous toxic substances whose health effects do not appear for years or even decades, such as silicosis<sup>43</sup> and lead poisoning.<sup>44</sup> By dismissing the concept of cumulative effects, the proposed rules ignore leading federal research and would maintain and increase disproportionate impacts on already overburdened communities. Vague language circumscribing the impacts to be analyzed to those that are direct and immediate ignores decades of research on contaminant transport and on longitudinal health effects, and are wholly inappropriate shackles on NEPA analyses.

[Obama-era policies](#) required the [consideration of climate change in environmental reviews](#).<sup>45</sup> The proposal to eliminate consideration of indirect or cumulative effects of large infrastructure projects will undoubtedly subvert environmental protections not only in NEPA but in other environmental laws. The CEQ seeks a redefinition of “effects” in environmental impact statements (EISs), including “[whether CEQ should affirmatively state that consideration of indirect effects is not required](#).”<sup>46</sup> These clauses should be stricken from the proposed changes.

NEPA’s requirements for an EIS provide one—sometimes the only—vehicle for assessing the direct, indirect, and cumulative effects of major infrastructure projects on climate. The Supreme Court ruled in [Massachusetts v. EPA \(127 S.Ct. 1438 \(2007\)\)](#) that the “harms associated with climate change are serious and well recognized” [at 1442]. Regulations promulgated in the Obama era followed through on the Supreme Court ruling, also interpreted through the EPA’s subsequent “endangerment” finding, to require assessment of direct, indirect, and cumulative effects of climate change. By seeking to eliminate consideration of indirect and cumulative chains of causation, whether caused by or affecting federal projects and actions, the proposed changes to NEPA will undermine efforts both to ameliorate and to adapt to impending changes in our climate.

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<sup>38</sup> Lisa Friedman, “Trump Rule Would Exclude Climate Change in Infrastructure Planning,” *The New York Times*, January 3, 2020.

<sup>39</sup> CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, *Federal Register* 85, no. 7 (January 10, 2020): 1684-1730, 1729, §1508.1 (g) (2).

<sup>40</sup> CEQ, “Update to NEPA Regulations,” 1728-1729, §1508.1 (g).

<sup>41</sup> CEQ, “Update to NEPA Regulations,” 1729 §1508.1 (g) (2).

<sup>42</sup> Nicola Pirrone and Rob Mason, *Mercury Fate and Transport in the Global Atmosphere* (Boston, Mass: Springer, 2009).

<sup>43</sup> MJ Reilly, SJ Timmer, KD Rosenman, “The Burden of Silicosis in Michigan,” *Annals of the American Thoracic Society* 15 (2018): 1404-1410.

<sup>44</sup> Agency for Toxic Substances & Disease Registry, “Toxicological Profile for Lead,” 2019.

<sup>45</sup> The White House, “Fact Sheet: White House Council on Environmental Quality Releases Final Guidance on Considering Climate Change in Environmental Reviews,” August 2, 2016; Chris Mooney, “From Now On, Every Government Agency Will Have to Consider Climate Change,” *The Washington Post*, August 2, 2016.

<sup>46</sup> CEQ, “Update to NEPA Regulations,” 1708.

The CEQ also [claims that the proposed NEPA rule changes do not raise federalism concerns](#)<sup>47</sup> that will impact the states. While the proposed rule changes would apply to federal agencies, failure of those agencies to consider direct, indirect, and cumulative effects will impose burdens on the states, leaving the human and fiscal costs of climate change mitigation to the states, precisely the issue that brought states to sue successfully in *Massachusetts v. EPA*. State agencies need to know the full impacts of proposed actions and have an opportunity to propose better alternatives.

Rather than weakening NEPA's provisions for environmental protection, any reforms should seek to *extend* protections. NEPA's environmental analysis requirements should continue for all federal actions significantly affecting the environment. They should include all significant impacts anticipated, all significant environmental trends affecting them, and all meaningful alternatives available either to the initiating agency or to other federal and state agencies reviewing the document. And the opportunity to review the analysis and to suggest better alternatives should remain open both to all other agencies with relevant jurisdiction or special expertise and to the public. The resulting analysis should produce a concise and environmentally sound basis for making a reasonable, rather than an arbitrary or capricious, choice among the alternatives considered.<sup>48</sup>

### **Judicial review should not be further limited.**

Various measures in the proposed rules attempt to insulate the agencies from litigation aimed to compel them to perform their duties under NEPA. Contradictorily, the proposed changes advocate that NEPA violations be raised as soon as practicable, even as the rules foreclose the legal avenues for doing so.<sup>49</sup> The proposed updates declare that neither procedural nor substantive violations of NEPA are grounds for legal action,<sup>50</sup> not only rendering NEPA conceptually null and void but also running contrary to the express purpose of judicial review and the Administrative Procedure Act (APA) specification that any person "adversely affected or aggrieved by agency action" has a cause for legal action.<sup>51</sup> Perhaps more insidiously, these proposed updates are at odds with the explicit purpose of NEPA itself. Section §1500.1(c) reads "Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action." By limiting legal recourse, the proposed rule changes undermine the Act itself.

The proposed rules also would expand the authority of agencies, such as declaring the agency the determinant of what is "harmless" and what are "non-substantive errors."<sup>52</sup> The public should have the right to assert harms and seek judicial review for remediation. The proposed rule updates further impede the public's ability to pursue legal action by proposing to "impose bond and security requirements or other conditions" for parties seeking a stay through judicial review.<sup>53</sup> The dollar amount of a bond likely to be relevant for a federal action, such as widening a highway or building a bridge, would be prohibitively expensive for many private citizens, community groups, or non-profit

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<sup>47</sup> Mark Hand, "Democrats Go Easy on Trump's Nominee for top White House Environmental Office," *Think Progress*, July 19, 2018; CEQ, "Update to NEPA Regulations," 1711.

<sup>48</sup> See Andrews, *Managing the Environment*, 213-21.

<sup>49</sup> CEQ, "Update to NEPA Regulations," 1694.

<sup>50</sup> CEQ, "Update to NEPA Regulations," 1694.

<sup>51</sup> 5 U.S. Code §702 "Right of review."

<sup>52</sup> CEQ, "Update to NEPA Regulations," 1694, 1713.

<sup>53</sup> CEQ, "Update to NEPA Regulations," 1694.

organizations, and would in effect shut down public litigation. This measure, again, strikes at the heart of NEPA and its purposeful inclusion of affected communities in decision-making.

These rule updates also would arbitrarily limit judicial review to the point at which the agency publishes a Record of Decision (ROD), rather than at the completion of the EIS, as has been practice for more than 40 years.<sup>54</sup> They would codify the discriminatory practice of excluding relevant insights or developments that were not included in public comments on draft environmental documents, while simultaneously shortening public comment and protest periods.<sup>55</sup>

Altogether, the proposed rule's restrictions, especially those related to judicial review, are contrary to NEPA's purpose and may well fall outside executive branch authority to limit judicial review. The fact that proposed new §1500.3 (e), would make severable the revisions anticipates litigation over these rule changes.<sup>56</sup> Further, while the CEQ emphasizes economic feasibility as a goal of the proposed changes, this severability clause would likely run up extraordinary legal fees.

### **Concerns regarding delays are overstated.**

Critics of NEPA often greatly exaggerate the length of time required for environmental reviews as well as the degree to which reviews are responsible for project delays. Records maintained by the U.S. Department of Transportation note that in 2018, the average time to completion was 3.9 years for a highway project. For more information, see the [U.S. Department of Transportation website](#).<sup>57</sup>

In fact, the law was designed to halt or require revision and reformulation of any project that fails to adequately take into account and minimize environmental impacts. As Chief Justice Warren Burger wrote in the opinion in *TVA v. Hill* (1978), "It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result." Environmental legislation demands an assessment of priorities and values, which, at times, means that something will not be built or will be delayed, including infrastructure that seems immensely valuable to some individuals or groups.

In most cases, review requirements are not the cause for delay. In fact, the Council on Environmental Quality (CEQ) reports, in 99.6 percent of cases, full environmental impact statements are [actually](#)

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<sup>54</sup> CEQ, "Update to NEPA Regulations," 1693.

<sup>55</sup> CEQ, "Update to NEPA Regulations," 1693.

<sup>56</sup> CEQ, "Update to NEPA Regulations," 1694.

<sup>57</sup> Post SAFETEA-LU projects completed by Fiscal Year 2012-1018, "Estimated Time Required to Complete the NEPA Process," NEPA and Project Development, Environmental Review Toolkit, [https://www.environment.fhwa.dot.gov/nepa/timeliness\\_of\\_nepa.aspx](https://www.environment.fhwa.dot.gov/nepa/timeliness_of_nepa.aspx), accessed February 12, 2020.

[deemed unnecessary](#).<sup>58</sup> According to this same study, when EISs are drafted, 58.9% are completed in less than three years. Fewer than five percent required more than a decade to complete.<sup>59</sup>

Additional delays may also result from litigation, which is distinct from the review process. The proposed reforms will likely result in more litigation, as stakeholders challenge a set of regulations that diminishes their opportunities for public comment. Hence, we anticipate these regulations will increase, not decrease, the length of the environmental review process.

Example 1: The 25 years it took to begin construction of the Basnight Bridge owed very little to NEPA itself. As the Southern Environmental Law Center noted in comments on NEPA revision last fall, delays in the project were “[due entirely to an incomplete proposal, politics, and funding](#).”<sup>60</sup>

A new bridge was first proposed in the early 1990s to replace the Bonner Bridge, which was built in 1963 between islands in North Carolina’s shifting Outer Banks. The replacement structure was needed, argued the highway department, precisely because this earlier construction had been undertaken with such a poor understanding of its environment (it was built prior to NEPA). Among other issues, the inlet it crossed kept migrating rapidly to the south. Among the challenges then faced in coming up with a more resilient and sustainable design, as [recounted by highway technical officials in 2015](#), the new bridge was slated to cross landscapes in the Pea Island Wildlife Refuge and Cape Hatteras National Seashore, threatening rare birds and other species. They also confronted “a constantly changing coastal environment that is vulnerable to frequent and extreme storm events,” even as they sought to plan “something that’s going to last 50 years.”<sup>61</sup>

While there was a sixteen-year delay between the draft and final environmental impact statements for the project, approved by the Federal Highway Administration in 2010, [the Southern Environmental Law Center has documented](#) the poor foresight and political squabbles behind the delay — not NEPA’s procedural requirements.

As discussed below, the proposed NEPA rules now seek to exclude most considerations of climate change from the planning and decision-making in such projects. The history of the Bonner and Basnight bridge projects in a place like the Outer Banks, notoriously unstable and now anticipating even more severe storms, raises serious questions about just how resilient or reliable the resulting infrastructure will be.

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<sup>58</sup> Table 3-1, “Estimated Time Required,” [https://www.environment.fhwa.dot.gov/nepa/timeliness\\_of\\_nepa.aspx](https://www.environment.fhwa.dot.gov/nepa/timeliness_of_nepa.aspx), accessed February 15, 2020.

<sup>59</sup> Table 2-5, “Estimated Time Required,” [https://www.environment.fhwa.dot.gov/nepa/timeliness\\_of\\_nepa.aspx](https://www.environment.fhwa.dot.gov/nepa/timeliness_of_nepa.aspx), accessed February 15, 2020.

<sup>60</sup> Lynn Bonner, “Trump Uses North Carolina’s Basnight Bridge to Justify Change in Environmental Rules,” *The [Raleigh, NC] News and Observer*, January 9, 2020.

<sup>61</sup> “Bonner Bridge: Ensuring Connectivity and Resilience on North Carolina’s Coastal Barrier Islands,” Climate Change Briefing, AASHTO, Resilient and Sustainable Transportation Systems Technical Excellence Center, October 25, 2015, dewberry.com.

Example 2: A portion of the Sterling Highway, which runs from Juneau through the Kenai River Valley, traverses federal reserves including the Chugach National Forest and the Kenai National Wildlife Refuge. NEPA itself is not really responsible for the [disagreements over routing that have caused delays](#).<sup>62</sup>

More influential is the fact that in a region where much of the land is public, federal law sets many rules for its development, especially if reserved for wildlife and recreation. A federal law from 1966 prohibits a road corridor “unless [there is] no feasible and prudent alternative.” Designated wilderness areas—touched on by one of the route proposals—set an even higher standard, requiring presidential review (following an executive order by George W. Bush) and Congressional approval. This highway is dangerous for related reasons. Motorists are apt to collide with its abundant herds of elk and moose, whose protection [Fish and Wildlife officials have sought](#).<sup>63</sup>

Example 3: As with the two previous examples, the controversies that [dogged](#)<sup>64</sup> and [slowed](#)<sup>65</sup> efforts to expand the Seattle-Tacoma airport hinged less upon NEPA itself than the project’s potentially far-reaching impacts, and the many parties deeply affected by these impacts. A “streamlined” NEPA will not stop many of the lawsuits of the aggrieved that slowed this project and may even multiply litigation.

As part of the administration’s “streamlining,” the proposed rule changes also seek to eliminate consideration of “cumulative” environmental impacts. Thereby, those poorer and minority communities whose surroundings are faced with many environmental harms [are likely to bear an even greater burden](#).<sup>66</sup> Already, in spite of the lengthy NEPA process over the Seattle airport’s expansion, nearby residents who continue to bear its brunt have wound up feeling their concerns about heightened noise and air pollution have been sidelined. The Seattle experience makes a strong case for fair-minded consideration and comparison of alternatives. [As one resident put it at a hearing in 2018](#), “the communities that are taking the impacts are poor. Our area is going to lose because we don’t have the voice, power and money other neighborhoods have.”<sup>67</sup>

### **Administration actions have slowed the EIS process.**

The present administration has slowed the EIS process both by significantly shrinking relevant agencies and by abruptly relocating the office responsible for implementing NEPA, the Council on Environmental Quality, as reported in the [Washington Post](#)<sup>68</sup> and [Greenwire](#).<sup>69</sup>

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<sup>62</sup> Julie Stricker, “Wrangling Roads,” *Alaska Business*, June 7, 2018, akbizmag.com.

<sup>63</sup> Interagency Working Group, “Wildlife Mitigation and Human Safety for Sterling Highway MP58-79 Project,” Progress Report (Phase I), State Project No. 54990, Federal Project No. IM-OA-3(14), February 2009, fws.gov.

<sup>64</sup> Walt Crowley (with research by Daryl McClary and Paula Becker), “Sea-Tac International Airport: Third Runway Project,” *historylink.org*, June 21, 2003.

<sup>65</sup> Sara Jean Green, “Sea-Tac’s Third Runway Set to Open after Years of Delay,” *seattletimes.com*, September 26, 2008.

<sup>66</sup> Rebecca Beitsch, “Critics Warn Trump’s Latest Environmental Rollback Could Hit Minorities, Poor Hardest,” *thehill.com*, January 12, 2000.

<sup>67</sup> Gwen Davis, “Neighbors of Sea-Tac Airport Feel Powerless over Airport’s Sweeping Expansion Plans,” *westsideseattle.com*, June 1, 2018.

<sup>68</sup> Brady Dennis, “EPA Under Trump Shrinks to Near Reagan-Era Staffing Levels,” *The Washington Post*, September 6, 2017.

<sup>69</sup> Robin Bravender, “CEQ Staff Instructed to Pack Up Main Building,” *Greenwire*, February 23, 2017.

Administration officials have also hindered efforts to streamline and otherwise improve the NEPA review process initiated by previous administrations. In 2010, in celebration of the Act's 40th anniversary, the Obama administration [refined its implementation](#).<sup>70</sup> Among the Obama revisions were measures clarifying when findings of no significant impact are appropriate and when categorical exclusions could be used to exempt routine activities from NEPA review.

### **Addressing environmental concerns up front is less costly.**

While legal fees can amass quickly, they pale in comparison to remediation costs. NEPA provides an opportunity to halt likely environmental harms before they happen, and before taxpayers need to pay to clean up the contamination. Recognizing the costs of contaminated site remediation, in 1980 Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) including a Superfund to pay for remediation of toxic sites. The money, largely derived from taxes on industry, has been insufficient to cover the costs of remediation, leaving sites languishing on the National Priorities List (NPL), their remediation unfunded.<sup>71</sup> Habitat restoration is also costly, not to mention the cost of health care associated with chronic or acute exposure to environmental toxicants. Halting these harms before they occur is the fiscally responsible approach.

### **Protecting workers *and* the environment should be a priority.**

In advocating for the proposed changes, the Trump administration aims to draw upon the support of unions like those in the building trades that have long supported fossil fuel infrastructure projects and have been publicly critical of actions on climate change and environmental protection. These unions have argued that they are protecting their members' relatively high-paying jobs and worry that talk of a "just transition" means deindustrialization and loss of some of the best jobs available for working class people in some parts of the U.S.<sup>72</sup>

However, many unions, including building trades unions, have supported environmental protection historically and more recently. Labor unions championed core environmental laws, such as the Clean Air Act, Clean Water Act, and the National Environmental Policy Act itself, in the 1960s and 1970s.<sup>73</sup> More recently, labor groups including some from the construction industry, participated in planning and development as well as lobbying for the recently passed Climate and Community Protection Act in New York, setting the nation's most aggressive targets yet for greenhouse gas emissions.<sup>74</sup>

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<sup>70</sup> Executive Office of the President, Council on Environmental Quality, "White House Council on Environmental Quality Announces Steps to Modernize and Reinvigorate the National Environmental Policy Act," February 18, 2010, [obamawhitehouse.archives.gov](http://obamawhitehouse.archives.gov).

<sup>71</sup> Nicole Franklin, "The Superfund Program Past and Present Funding Implications," Virginia Commonwealth University Masters Thesis, 2011.

<sup>72</sup> For a discussion of this see Rebecca Stoner, "Why Are Unions Joining Conservative Groups to Protect Pipelines?" *Pacific Standard*, <https://psmag.com/environment/why-are-unions-joining-conservative-groups-to-protect-pipelines>, May 31, 2019. See also Mindy Isser, "Climate Activists Can't Afford to Ignore Labor. A Shuttered Refinery in Philly Shows Why," *In These Times*, <http://inthesetimes.com/working/entry/22243/climate-workers-just-transition-philadelphia-energy-solutions-workers-labor>, January 10, 2020.

<sup>73</sup> Chad Montrie, *The Myth of Silent Spring: Rethinking the Origins of American Environmentalism* (Berkeley: University of California Press, 2018).

<sup>74</sup> See "New York Aims to Fight Climate Change by Creating Green Union Jobs," *The Guardian*, <https://www.theguardian.com/us-news/2019/may/16/new-york-climate-jobs-plan-union-work>, May 16, 2019.

## Promoting environmental justice is essential.

Rolling back NEPA protections would subvert efforts to promote environmental justice. The goals of NEPA have evolved since 1970. One of the most important changes in how NEPA has been implemented was the result of [Executive Order 12898](#), issued by President Clinton in 1994. It requires that the federal government give attention to environmental justice in assessing the consequences of proposed actions and in undertaking outreach to ensure that all affected communities are engaged in the public review process.<sup>75</sup>

However, while Clinton's Executive Order has been significant, it has not translated into the effective actions for which many environmental justice groups had hoped. [Reflections by the NRDC](#) on EO 12898 after 20 years were mixed.<sup>76</sup> Hardworking Americans often live in communities that have been made to shoulder many of our society's environmental burdens, from peeling lead paint to tiny asthma-inducing particulates to hazardous wastes dumps. For instance, poor and minority communities continue to be exposed at a disproportionate rate to the hazards of particulate matter pollution. A 2018 study revealed that the poor are exposed to 1.35 times more PM2.5 pollution, non-whites to 1.28 times more PM2.5 pollution, and Blacks 1.54 times more PM2.5 pollution compared to the average American.<sup>77</sup> But the excision of "cumulative" considerations from the new NEPA rules appears to place [these communities, and the cause of environmental justice itself](#), on the Council of Environmental Quality's chopping block.<sup>78</sup>

The history of NEPA enforcement since the 1970s is complex. The CEQ's proposed update emphasizes Supreme Court decisions like *Robertson v. Methow Valley Citizens Council* (490 U.S. 332, 1989), which interpreted NEPA as primarily establishing procedural requirements. Such case law also allowed for agencies to make decisions based on other values not articulated by NEPA itself (i.e. economic benefit) so long as they adequately detailed environmental impacts. As critics pointed out at the time, this decision and other adverse Supreme Court decisions departed from the explicitly stated intentions of the Congresspeople who crafted NEPA. They envisioned a law that would substantially change agency decision-making, not merely require them to tally up environmental harms before proceeding.<sup>79</sup>

## Some of the reforms now proposed are quite positive.

The recommendation to add "Tribal" throughout the regulatory process pursuant to E.O. 13175, titled "Consultation and Coordination with Indian Tribal Governments" in §§ 1501.8(a), 1502.16(a)(5),

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<sup>75</sup> Executive Order 12898 of February 11, 1994, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations," *Federal Register* 59, no. 32, February 16, 1994, <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>

<sup>76</sup> See NRDC, "The 20th Anniversary of President Clinton's Executive Order 12898 on Environmental Justice," <https://www.nrdc.org/experts/albert-huang/20th-anniversary-president-clintons-executive-order-12898-environmental-justice>, February 10, 2014.

<sup>77</sup> Ihab Mikati et al., "Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status," *American Journal of Public Health*, (2018): e1–e6.

<sup>78</sup> Rebecca Beitsch, "Critics Warn Trump's Latest Environmental Rollback Could Hit Minorities, Poor Hardest," *thehill.com*, January 12, 2000.

<sup>79</sup> See David B. Lawrenz, "Judicial Review under the National Environmental Policy Act: What Remains after *Robertson v. Methow Valley Citizens Council*," *University of Colorado Law Review* 62, no. 4 (1991): 899-932.

1503.1(a)(2)(ii), and 1506.6(b)(3)(ii), represents an important improvement.<sup>80</sup> Other reforms are indeed modernizing, including adaptations to current publication and communication technology. The proposed rules clarify, for instance, that agencies can publish materials in electronic formats.<sup>81</sup> However, while proposed rule changes that expand electronic access to information and public meetings and hearings are welcome, the proposed rule change to §1506.6 (c) Public Involvement, suggesting that “Agencies *may* conduct public hearings and public meetings by means of electronic communication *except where another format is required by law*,”<sup>82</sup> open significant exceptions that may be used to unfairly limit public participation, especially by marginalized populations lacking digital access.

### **A strong NEPA should be maintained as evidence of U.S. environmental leadership.**

Historically, the United States was the “envy of the world” for its leadership on environmental regulatory issues. Domestic environmental regulations—and NEPA in particular—served as templates for the international community’s approach to environmental protection. As James Turner and Andrew Isenberg explain in *The Republican Reversal*, “The United States had a long history of international environmental leadership. In 1911, it joined with other nations to create the North Pacific Fur Seal Convention to regulate the hunting of fur seals; in 1916, the United States agreed to the Migratory Bird Treaty with Canada; in 1946, U.S. diplomats played an important role in the International Convention for the Regulation of Whaling; and in the early 1970s, the United States led the negotiations that resulted in the Convention on International Trade in Endangered Species. Through the late 1980s, both Democrats and Republicans could take pride in the record of the United States in international environmental leadership.”<sup>83</sup>

NEPA is among the most effective of U.S. environmental laws, enacted by overwhelming bipartisan majorities, signed and implemented by a Republican president, and adopted as an international model by countless other countries’ governments and international lending institutions as well as more than half the U.S. state governments. If the U.S. is to claim status as a world leader when it comes to the environment, then the majority of the proposed changes to NEPA should be rejected.

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<sup>80</sup> CEQ, “Update to NEPA Regulations,” 1692.

<sup>81</sup> CEQ, “Update to NEPA Regulations,” 1692.

<sup>82</sup> CEQ, “Update to NEPA Regulations,” 1725, emphasis added.

<sup>83</sup> James Morton Turner and Andrew C. Isenberg, *The Republican Reversal: Conservatives and the Environment from Nixon to Trump* (Cambridge, Mass.: Harvard University Press, 2018), 148.