COMMENTS OF ATTORNEYS GENERAL OF THE STATES OF WASHINGTON, CALIFORNIA, NEW YORK, ILLINOIS, THE COMMONWEALTH OF MASSACHUSETTS…[1]

July 30, 2025

VIA REGULATIONS.GOV

U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20250-0108

Re: Revision of National Environmental Policy Act Interim Final Rule 90 Fed. Reg. 29632 (Jul 3, 2025) USDA-2025-0008

To Whom It May Concern:

The Attorneys General of the States of Washington, California, New York, Arizona, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Mexico, Oregon, Vermont; Rhode Island; the District of Columbia; Harris County, Texas; and the Commonwealth of Massachusetts (collectively, States) respectfully submit these comments in opposition to the United States Department of Agriculture (Agency) Interim Final Rule (the Rule) revising the Agency's regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347.[2]

NEPA has long supported informed and transparent agency decision-making and allowed for meaningful public participation in developing and reviewing proposed federal actions.[3] Congress enacted NEPA to advance a national policy of environmental protection by requiring federal agencies to conduct thorough and careful review of their actions' environmental impacts.[4] As the Supreme Court has explained, Congress intended NEPA's "action-forcing procedures" to help

[1] This comment letter supplants the previous version filed by the States on July 30, 2025.

[2] The Agency's interim final rule is titled "National Environmental Policy Act," 90 Fed. Reg. 29,632 (Jul 3, 2025), Docket ID No. USDA–2025–0008.

[3] U.S. Gov't Accountability Off., GAO-14-370, *National Environmental Policy Act: Little Information Exists On NEPA Analyses*, at 16 (2014), https://www.gao.gov/assets/gao-14-370.pdf (last visited Mar. 20, 2025) ("[a]ccording to studies and agency officials, some of the qualitative benefits of NEPA include its role as a tool for encouraging transparency and public participation and in discovering and addressing the potential effects of a proposal in the early design stages to avoid problems that could end up taking more time and being more costly in the long run.") .

[4] 42 U.S.C. §§ 4331, 4332.

"[e]nsure that the policies [of NEPA] are implemented."[5] In order to implement NEPA within the work of the Agency, the Agency promulgated regulations. The Agency's abrupt action to drastically change its longstanding NEPA regulations will disrupt and undermine the implementation of NEPA across the country.

States have a strong interest in robust NEPA compliance and the significant opportunities for public participation required under CEQ's NEPA regulations in order to protect their residents, property, and natural resources from uninformed decision making at the federal levels. The States and our residents are injured by the effects of environmental degradation, including effects exacerbated by climate change, resulting from ill-informed agency actions.[6] The States also have a quasi-sovereign interest in preventing harm to the health of our natural resources and ecosystem[7] and are entitled to "special solicitude" in seeking redress for environmental harms within our borders.[8]

The Agency's Rule will undo this guiding framework for federal agencies' environmental review under NEPA to the detriment of the States. These comments describe how the Rule (1) harms the States; (2) is arbitrary and capricious; (3) fails to conform to the requirements for notice-and-comment rulemaking under the Administrative Procedure Act (APA); and (4) is contrary to law. In sum, the Rule is unlawful. For the reasons stated below, the States strongly oppose the Rule and request that it be withdrawn in its entirety.

I. BACKGROUND

Since 1969, NEPA has promoted informed, transparent, and coordinated agency decision-making and meaningful public participation in the development of major infrastructure projects. By requiring thorough environmental review ahead of significant federal actions, NEPA has helped regulatory agencies and the American people evaluate and understand how such projects impact the environment and public health.[9] NEPA's procedural safeguards have—among other

[5] *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.").

[6] *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737–38 (1981).

[7] *Massachusetts v. EPA*, 549 U.S. 497, 519–22 (2007).

[8] *Id*. at 520.

[9] *See* Comments of Attorneys General of California, Illinois, Maryland, the Commonwealth of Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington, and the Secretary of the Commonwealth of Pennsylvania Department of Environmental Protection on Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591, at 2–5 (Aug. 20, 2018) [hereinafter 2018 Multistate Comments], https://www.regulations.gov/comment/CEQ-2018-0001-11812; Comments of Attorneys General of Washington, California, New York, the District of Columbia, Connecticut, Delaware, Guam, Illinois, Maine, Maryland, the Commonwealth of Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, and Vermont on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684, at 8–12 (Mar. 10, 2020) [hereinafter 2020 Multistate Comments], https://www.regulations.gov/comment/CEQ-2019-0003-172704.

things—protected drinking water from radioactive contamination, protected the public from exposure to harmful air pollutants and pathogens, and alerted agencies to wildfire risk so that damage from those fires could be mitigated.[10] Across the country, Americans have benefited from increased safety, preservation of natural resources, and long-term reductions in costs as a result of NEPA's review process.

A. CEQ adopted regulations to address inconsistent agency practices and interpretations.

From 1978 to 2025, CEQ's regulations implementing NEPA guided environmental review for agencies across the federal government. This single set of overarching regulations ensured consistency across federal agencies' environment review of federal actions.[11]

CEQ began providing federal agencies with guidelines for consistent application of NEPA across agencies in 1970, soon after NEPA was enacted.[12] After seven years of attempting to implement NEPA across agencies with only guidelines, however, CEQ found that "inconsistent agency practices and interpretation of the law . . . impeded Federal coordination and made it more difficult for those outside government to understand and participate in the environmental review process."[13] To address those difficulties, President Carter issued Executive Order (E.O.) 11991 in May 1977, directing CEQ to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA] (42 U.S.C. § 4332(2))."[14] CEQ's regulations would serve to create a "uniform, government-wide" approach to NEPA review;[15] to "make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to . . . focus on real environmental issues."[16] CEQ issued final NEPA implementing regulations in 1978 (1978 Regulations).[17]

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[10] *See* Env't L. Inst., *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government* (2010), https://ceq.doe.gov/docs/get-involved/NEPA_Success_Stories.pdf; Elly Pepper, *Never Eliminate Public Advice: NEPA Success Stories*, NRDC (Feb. 1, 2015), https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories.

[11] Implementation of Procedural Provisions: Final Regulations, 43 Fed. Reg. 55978 (Nov. 29, 1978).

[12] CEQ issued interim guidelines for implementing NEPA to agencies in May 1970, Statements on Proposed Federal Actions Affecting the Environment: Interim Guidelines, 35 Fed. Reg. 7390, 7391 (May 12, 1970), pursuant to President Nixon's Executive Order directing CEQ to issue such guidelines, Exec. Order 11514, 35 Fed. Reg. 4247, 4248 (Mar. 7, 1970). CEQ finalized the guidelines in 1971 and revised them in 1973. Statements on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. 7724 (Apr. 23, 1971); Preparation of Environmental Impact Statements: Proposed Guidelines, 38 Fed. Reg. 10856 (May 2, 1973).

[13] 43 Fed. Reg. at 55978.

[14] Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 25, 1977).

[15] 43 Fed. Reg. at 55,978.

[16] Exec. Order No. 11,991, 42 Fed. Reg. at 26,967.

[17] 43 Fed. Reg. 55,978.

The 1978 Regulations were binding on all federal agencies.[18] Agencies conformed their NEPA procedures accordingly: The regulations of the Army Corps of Engineers, the Environmental Protection Agency (EPA), the United States Forest Service, the Federal Highway Administration, and other agencies referred to and in some cases explicitly incorporated CEQ's regulations.[19] In 1979, the Agency incorporated and adopted CEQ's 1978 Regulations .[20] In addition to promoting uniformity across the federal government, CEQ's regulations aided development of state environmental regulations and facilitated public involvement in the environmental review process. And by providing a unified set of standards for environmental review across dozens of different agencies, CEQ's regulations helped the public to understand the NEPA process and made participation in the process more accessible.

B. CEQ rescinded its NEPA regulations in 2025.

CEQ's 1978 Regulations were remarkably durable, with only a few minor revisions made over the following four decades.[21] However, in 2017, after nearly 40 years of stable NEPA implementation, President Trump issued E.O. 13807 directing CEQ to revise its regulations.[22] In July 2020, CEQ finalized a rule that improperly narrowed environmental review under NEPA, threatened meaningful public participation, and impermissibly restricted judicial review of agency actions (2020 Rule).[23] The States and numerous public interest organizations filed lawsuits challenging the unlawful 2020 Rule.[24]

The lawsuits were dismissed[25] after CEQ, under the Biden Administration, issued revised NEPA regulations in 2022 and 2024 (2022 Rule and 2024 Rule, respectively) which reversed many provisions of the 2020 Rule and restored key provisions of the 1978 Regulations.[26] Among these, the 2022 Rule required analysis of all reasonably foreseeable effects of a major federal

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[18] *Id.*

[19] *See, e.g.,* 33 C.F.R. § 230.13(b) ("A supplement to the draft or final EIS should be prepared whenever required as discussed in 40 C.F.R. § 1502.09(c)."") (Army Corps); 40 C.F.R. § 6.100(b) (". . . adopts the CEQ Regulations (40 CFR Parts 1500 through 1508) implementing NEPA . . . Subparts A through C supplement, and are to be used in conjunction with, the CEQ Regulations") (EPA); 36 C.F.R. § 220.4(e)(2) ("Scoping shall be carried out in accordance with the requirements of 40 C.F.R. § 1501.7.") (Forest Service); 23 C.F.R. § 771.107 ("The definitions contained in the CEQ regulations . . . are applicable.") (Federal Highway Administration).

[20] 7 C.F.R. 1b.1(a)

[21] U.S. Dep't of Energy, History of CEQ NEPA Regulations and Guidance, https://www.energy.gov/nepa/history-ceq-nepa-regulations-and-guidance (last visited Jul. 11, 2025).

[22] Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 24, 2017).

[23] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020).

[24] *E.g.*, *California v. CEQ*, No. 3:20-cv-06057 (N.D. Cal. Aug. 28, 2020).

[25] *Iowa v. CEQ*, Case No. 1:24-cv-00089, (D.N.D. February 3, 2025), at ECF Nos. 145, 146.

[26] Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021); *see also* Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34154 (June 29, 2021).

action.[27] The 2024 Rule restored most of the remaining provisions of the 1978 Regulations, strengthened participation, strengthened analysis of climate change and human health impacts including environmental justice concerns, and implemented amendments to the NEPA statute enacted in the 2023 Fiscal Responsibility Act (FRA).[28]

In 2024, a group of states led by Iowa filed a lawsuit—*Iowa v. Council on Environmental Quality*—in federal district court, seeking to vacate the 2024 Rule and reinstate the 2020 Rule.[29] In February 2025, the *Iowa* court vacated the 2024 Rule, relying heavily on a recent opinion from the D.C. Circuit holding that CEQ lacked the authority to issue binding regulations.[30]

In January 2025, President Trump signed E.O. 14154, entitled "Unleashing American Energy".[31] E.O. 14154 revoked President Carter's E.O. 11991 directing CEQ to issue regulations and directed CEQ to "expedite and simplify the permitting process" for energy infrastructure projects by proposing to rescind CEQ's NEPA regulations and providing new guidance for NEPA implementation.[32] In addition to directing CEQ to reconsider its NEPA regulations, E.O. 14154 called for the coordinated "revision of agency-level implementing regulations," requiring any resulting agency regulations to "expedite permitting approvals and meet deadlines established in the [FRA]."[33] E.O. 14154 further directed that "[c]onsistent with applicable law, all agencies must prioritize efficiency and certainty over any other objectives, including those of activist groups, that do not align with the policy goals set forth in section 2 of this order or that could otherwise add delays and ambiguity to the permitting process."[34]

In February 2025, CEQ issued an interim final rule rescinding its NEPA implementing regulations (CEQ Repeal Rule).[35] In place of the regulations, CEQ issued a guidance memorandum to heads of federal agencies recommending that agencies "revise . . . their NEPA implementing procedures (or establish such procedures if they do not yet have any) to expedite

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[27] *See* National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23453 (Apr. 20, 2022) (2022 Rule).

[28] *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442 (May 1, 2024) (2024 Rule); Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10 (2023).

[29] Complaint, *Iowa v. CEQ*, No. 1:24-cv-00089 (D.N.D. May 21, 2024), ECF No. 1.

[30] *See* Order Regarding All Mots. for Summ. J. & Partial Summ. J. at 23, *Iowa v. CEQ*, No. 1:24-cv-00089 (D.N.D. Feb. 3, 2025), ECF No. 145. The *Iowa* court also reviewed plaintiffs' claims that the Phase 2 Rule was arbitrary and capricious, granting some and rejecting others. *Id.* at 32–36.

[31] Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 20, 2025).

[32] *Id.* at 8355.

[33] Exec. Order No. 14154, 90 Fed. Reg. at 8355.

[34] *Id.*

[35] Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 10610 (Feb. 25, 2025), *as corrected by* Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 11221 (Mar. 5, 2025).

permitting approvals" (CEQ Guidance).[36] The CEQ Guidance further directed agencies to "prioritize efficiency and certainty over any other policy objectives,"[37] which is in conflict with NEPA's focus on environmental protection.[38] The CEQ Guidance "encourage[d]" agencies to use the unlawful 2020 Rule "as an initial framework for the development of revisions to their NEPA implementing procedures."[39] Like the 2020 Rule, the CEQ Guidance improperly limited environmental review. Among other things, it directed agencies to omit environmental justice analysis from NEPA documents[40] and to avoid providing the opportunity for public comment on proposed NEPA regulations[41] unless either is required by law. The Guidance also suggested that the scope of effects that agencies are required to analyze should be narrowed.[42]

In early July 2025, several agencies, including the Agency, the Department of Energy, Department of the Interior, Department of Defense, and Department of Transportation, issued interim final rules modifying and/or rescinding their NEPA implementing regulations.[43] The Agency issued its Rule on July 3, 2025. To support these changes, the Agency's Rule cited E.O. 14154, the CEQ Repeal Rule and Guidance, and other developments such as the Supreme Court's decision in *Seven County Infrastructure Coalition v. Eagle County* (*Seven County*),[44] which claimed that the NEPA regulations had caused delay and uncertainty in permitting.[45]

[36] Council on Env't Quality, Memorandum for Heads of Federal Departments and Agencies (Feb. 19, 2025) [hereinafter CEQ Guidance], https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf.

[37] *Id.* at 1.

[38] 42 U.S.C. § 4321(a).

[39] CEQ Guidance at 1.

[40] *Id.* at 5.

[41] *Id.* at 7.

[42] *Id.* at 5.

[43] Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29676 (Jul 3, 2025) (DOE); National Environmental Policy Act, 90 Fed. Reg. 29632 (Jul. 3, 2025) (USDA); National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 29498 (Jul. 3, 2025) (DOI); Procedures for Implementing NEPA; Removal, 90 Fed. Reg. 29461 (Jul. 3, 2025) (Army Corps); Procedures for Implementing NEPA; Processing of Department of the Army Permits, 90 Fed. Reg. 29465 (Jul. 3, 2025) (also Army Corps).

[44] *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497 (2025).

[45] Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. at 29679–80; National Environmental Policy Act, 90 Fed. Reg. at 29632, 29634; National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 29498–501; Procedures for Implementing NEPA; Processing of Department of the Army Permits, 90 Fed. Reg. at 29465–66.

As a result of the CEQ Repeal Rule, CEQ's uniform and binding NEPA regulations were eliminated.[46] With CEQ's regulations now gone, individual agencies face increased pressure to develop individual agency regulations to provide stability, transparency, and guide consistent environmental review in compliance with NEPA. Otherwise, environmental review under NEPA will return to the era of "inconsistent agency practices and interpretation" that the Carter Administration had sought to correct.[47] Although the Agency has revised its NEPA regulations, the Rule is problematic and unlawful in several ways.

C. The Agency's Rule revises its existing NEPA implementing regulations.

The Agency's Rule substantially revises its existing NEPA implementing regulations found at 7 C.F.R. § 1b.1-1b.4 and in addition promulgates new regulations codified at 7 C.F.R. § 1b.5-1b.12. These new regulations provide guidance on the implementation of NEPA and apply to the various subcomponents within the Agency, including the U.S. Forest Service. The Agency's Rule rescinds in full the existing NEPA regulations of its subcomponents, including the Agricultural Research Service; Animal and Plant Health Inspection Service; Farm Service Agency; National Institute of Food and Agriculture; Natural Resources Conservation Service; Rural Development; and U.S. Forest Service.[48] The Agency notes that its subcomponents may establish guidance to direct NEPA implementation in the future.[49]

The Agency's regulatory revisions in the Rule include harmful deletions of language previously included in the Agency's NEPA regulations and exclude important language previously codified in CEQ's NEPA implementing regulations. First, these revisions remove important policy language requiring the Agency to "assure responsible stewardship of the environment for present and future generations."[50] This requirement was consistent with the text of NEPA which requires federal agencies to fulfill the environmental policies embodied in NEPA.[51] The Agency has removed this requirement from its regulations and replaced it with a statement that "NEPA is a purely procedural statute that imposes no substantive environmental obligations or restrictions."[52]

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[46] *See,* Comments of Attorneys General of Washington, California, New York, Arizona, Colorado, Connecticut, District of Columbia, Delaware, Harris County, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Vermont, and Wisconsin on Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 10610, at 18–46 (Mar. 27, 2025) [hereinafter 2025 Multistate Comments], https://www.regulations.gov/comment/CEQ-2025-0002-88344; National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 29503 ("Following the rescission of CEQ's regulations, DOI's current rules are left hanging in air, supplementing a NEPA regime that no longer exists.").

[47] 2025 Multistate Comments

[48] 90 Fed. Reg. at 29635.

[49] *Id*.

[50] *Compare* 7 C.F.R. § 1b.2(a) (2025) with 7 C.F.R. 1b.2(a) (1995).

[51] 42 U.S.C. 4331(b)

[52] 7 C.F.R. 1b.2(a), 90 Fed. Reg. 29646.

Second, the Agency's revised NEPA regulations fail to direct the Agency and its subcomponents, consistent with the text of NEPA, to evaluate the indirect and cumulative effects of a major federal action. CEQ's NEPA regulations had included in the definition of effects a requirement that agencies analyze the direct, indirect, and cumulative impacts of a major federal action.[53] Now, the Agency's Rule instructs the Agency's subcomponents that they are not required by NEPA to "analyze environmental effects from other actions separate in time, or separate in place, or that fall outside of the Agency subcomponent's regulatory authority, or that would have to be initiated by a third party."[54] The Rule additionally directs the Agency's subcomponents that effects "should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain" or that "would need to be initiated by a third party."[55]

Third, the Agency's Rule limits public participation. The Agency's Rule allows for, but does not require, a scoping process; and does not require public participation if there is a scoping process.[56] Previously, the Agency had followed CEQ's regulations which had required a robust scoping process, including public participation.[57] Additionally, the Agency's Rule does not require public comment during the process of preparing an EIS.[58] Previously, CEQ's regulations, incorporated into the Agency's NEPA regulations, required the Agency to issue a draft EIS and to seek public comment on the draft EIS.[59] Finally, the Agency's Rule does not require subcomponents to address in writing comments that raise substantive issues and/or recommendations.[60] This contrasts with CEQ's regulations which had required federal agencies to do so.[61]

II. THE RULE WILL ADVERSELY IMPACT THE UNIQUE INTERESTS OF STATES, TERRITORIES, TRIBAL AND LOCAL GOVERNMENTS IN ROBUST NEPA REGULATIONS

NEPA is an example of cooperative federalism, envisioning a strong role for states, territories, tribal and local governments in environmental reviews. Indeed, when enacting NEPA, Congress declared that the federal government must act, "in cooperation with States and local governments" to evaluate potential environmental impacts in fulfillment of NEPA's purposes.[62]

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[53] 40 C.F.R. § 1508.1(i).

[54] 7 C.F.R. § 1b.5(b)(3), 7 CFR § 1b.7(g)(3).

[55] 7 C.F.R. § 1b.11(12)(ii).

[56] 7 C.F.R. § 1b.7(c).

[57] 40 C.F.R. §§ 1502.4, 1503.1 (2021).

[58] 7 C.F.R. § 1b.7(d)(2).

[59] 40 C.F.R. § 1502.9 (2021)

[60] 7 C.F.R. § 1b.7(f)(1).

[61] 40 C.F.R. § 1503.4(a) (2021).

[62] 42 U.S.C. §§ 4331(a).

Indeed, NEPA's success has led to the enactment of similar statutes in many states. The Agency's revision of its NEPA regulations threatens the interests of the States in protecting our residents and environmental resources through public participation and robust, informed decision-making processes for major federal actions.

A. The Rule Will Harm State Sovereign and Proprietary Interests.

NEPA regulations protect state sovereign and proprietary interests in at least two fundamental ways: (1) by enabling States to participate meaningfully to assess the impacts of agency actions on state natural resources and public health; and (2) by lessening the strain on state resources of shouldering the regulatory burden of those reviews. The Rule will adversely impact both of those types of interests.

1. States have an Important Role in the NEPA Process

NEPA contains provisions directly incorporating states, territories, and local governments into federal decision making.[63] The States rely on participation in the NEPA process to protect their proprietary, sovereign and quasi-sovereign interests in their natural resources and residents by, *inter alia*, identifying harms from federal actions to their resources, including to air, water, public lands, cultural resources, wildlife, and the public health and welfare of their residents that agencies might otherwise ignore. Participation also allows the States to thoroughly weigh in on the environmental impacts of an action, such as the long-term effects of climate change and the reduction of scarce water resources. And for certain federal projects where state environmental review may be limited or even preempted, a robust NEPA process is critical to protecting state interests, resources and residents from harmful environmental effects, which may otherwise evade review. State agencies thus regularly engage in the federal NEPA process as cooperating and commenting agencies or as agencies with special expertise highlighting potential effects to each State's natural resources and public health.

The Rule's revisions to the established Agency NEPA regulations would undermine the ability of States to protect these interests, injecting uncertainty into this area of longstanding state-federal cooperation. Environmental review of federal agency actions through the NEPA process is an important tool for the States to understand these actions and to protect their interests by ensuring federal agencies make informed and transparent decisions. Accordingly, many of the States have participated in CEQ's NEPA rulemakings since 2018, including by commenting on

[63] 42 U.S.C. §§ 4331(a), 4332(G).

the various proposed rulemakings since that time,[64] challenging the unlawful 2020 Rule,[65] and defending the 2024 Phase 2 Rule in the *Iowa* litigation.[66]

2. The Rule Would Place an Increased Burden on States to Evaluate the Impacts of Federal Actions

Many States have their own state environmental policy statutes and regulations modeled on NEPA—the so-called "little NEPAs." These include the California Environmental Quality Act,[67] Washington's State Environmental Policy Act,[68] New York's State Environmental Quality Review Act, [69] Connecticut's Environmental Policy Act,[70] the Massachusetts Environmental Policy Act,[71] and the District of Columbia's Environmental Policy Act.[72] Where an action subject to state environmental review also requires NEPA review, state and local agencies can often comply with their own environmental review requirements by adopting or incorporating by reference certain environmental documents prepared under NEPA, but only if those NEPA documents exist and meet state statutory requirements.[73] This collaboration allows state, local, and federal agencies to share documents, reduce paperwork, and efficiently allocate limited time and resources.

The Rule would increase the burden on the States to rely more heavily on and prepare more documents under the States' little NEPAs. The States' laws are often administered in conjunction with the NEPA regulations, either through coordinated state and federal review or by relying on NEPA review to satisfy state environmental review requirements. For instance, in situations where a federal agency's limited analysis of indirect and cumulative impacts would be less stringent than a state's little NEPA standards, a state agency would be unable to rely on the federal Environmental Impact Statement (EIS) to make its own environmental findings. Thus, the burden would fall on the States to conduct additional analysis, such as preparing a separate state EIS. The Agency's Rule curtails the scope of impacts analysis required under NEPA, shifting the burdens of environmental review to state and local jurisdictions. As a result, the

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[64] *See* Comments of Attorneys General of Washington, *et al* on the Proposed Phase 2 Rule, 88 Fed. Reg. 49,924 (July 31, 2023); Comments of Attorneys General of Washington, et al., on the Interim Final Rule, 86 Fed. Reg. 34,154 (July 29, 2021); Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking 86 Fed. Reg. 55,757 (Nov. 22, 2021); Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking, 85 Fed. Reg. 1684 (March 10, 2020); Comments of Attorneys General of California, et al., on Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 28,591 (August 20, 2018).

[65] First Amended Complaint, *California v. CEQ*.

[66] *See* Proposed Intervenor-Defendant States' Cross Mot. for Partial Sum. J., *Iowa v. CEQ*, No 1:24-cv-00089 (D.N.D. Aug. 30, 2024), ECF No. 83.

[67] Cal. Pub. Res. Code § 21000–21189.57.

[68] Wash. Rev. Code. ch. 43.21C.

[69] N.Y. Env't. Conserv. Law art. 8; N.Y. Comp. Codes R. & Regs. tit. 6, pt. 617 .

[70] Conn. Gen. Stat. § 22a-1 *et seq.*

[71] Mass. Gen. Laws, ch. 30, §§ 61-62I.

[72] D.C. Code § 8-109.01–109.12; D.C. Mun. Regs. tit. 20, § 7200–7299 .

[73] *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 6, § 617.15; Mass. Gen. Laws, ch. 30, § 62G.

States will need to expend additional time and resources on environmental review of proposed federal actions. The Agency's finding that the Rule would have no federalism implications under Executive Order 13132 is therefore wrong and unsupported. The Agency should have engaged in the state consultation process and other procedures mandated by that executive order prior to issuing the Rule.

Moreover, where analysis of indirect or cumulative effects is not required under a State's little NEPA, the Rule would diminish the amount of information available to state and local agencies and the public with regard to environmental impacts of proposed projects. In such a case, neither the federal nor the State agency responsible for a project would be required to analyze or disclose the same level of information that would have been required under the Agency's previous regulations. This deprives the States and the public of the ability to participate in the NEPA process and ensure that the Agency's environmental decision-making is well-informed.

B. The Rule Will Undermine the Full Evaluation of Major Federal Actions at a Time When Climate Change Threats Make Comprehensive Analysis Even More Critical to the States.

A robust NEPA process—resulting in full evaluation of reasonably foreseeable environmental impacts of major federal actions—has become even more critical in the face of the increasing severity and frequency of compounding climate change impacts on States' sovereign lands and coastal areas, natural resources, infrastructure, and the health and safety of residents.

Climate change is causing significant environmental and economic losses for States and our residents, including, but not limited to, damage to infrastructure and natural resources,[74] housing[75] and job instability,[76] and the cost of health care and lives lost from environmental

[74] JEC Democratic Majority, *Climate-Exacerbated Wildfires Cost the U.S. Between $394 to $893 Billion Each Year in Economic Costs and Damages* 1 (Oct. 2023), https://www.jec.senate.gov/public/_cache/files/9220abde-7b60-4d05-ba0a-8cc20df44c7d/jec-report-on-total-costs-of-wildfires.pdf; NOAA National Centers for Environmental Information (NCEI), *Billion-Dollar Weather and Climate Disasters* (2025), https://www.ncei.noaa.gov/access/billions/ (last accessed July 30, 2025).

[75] Mariya Bezgrebelna et al., *Climate Change, Weather, Housing Precarity, and Homelessness: A Systematic Review of Reviews*, 18 Int J Environ Res Public Health 5812 (2021); Financial Security Program, *The Devastating Effects of Climate Change on US Housing Security*, The Aspen Institute (April 21, 2021), https://www.aspeninstitute.org/blog-posts/the-devastating-effects-of-climate-change-on-us-housing-security/.

[76] A. R. Crimmins et al., Fifth National Climate Assessment, at Ch. 19 (2023), https://web.archive.org/web/20250000000000*/https://nca2023.globalchange.gov/chapter/19/ (Climate change is anticipated to "impact employment by changing demand for workers, reducing worker safety, altering the location of available jobs, and changing workplace conditions in heat-exposed jobs.") (citations omitted).

pollutants,[77] extreme storms, heatwaves, and wildfires.[78] For instance, New Mexico already faces serious environmental challenges, with the entire state currently suffering from drought conditions and average temperatures increasing fifty percent faster than the global average over the past century. The escalating heatwaves, flooding, sea-level rise, extreme storms, and infectious diseases brought on by climate change have greater impacts on "[r]acially and socioeconomically marginalized communities," including communities of color, low-income communities, and Indigenous Peoples and Tribal Nations, as well as people with disabilities and unhoused people.[79] Such climate-related impacts disproportionately affect vulnerable populations facing existing environmental burdens,[80] exacerbating both environmental risk[81] and economic inequality.[82]

The States are already committing significant resources to meet policy goals and comply with statutory mandates to reduce in-state greenhouse gas emissions, as well as co-pollutants, while also investing in infrastructure to protect communities and state resources from the effects of climate change. A fully informed decision-making process requires that federal agencies work closely with states, territories, and tribal and local governments, as well as the public, to ensure that decisions account for the climate change impacts on communities already overburdened with pollution and associated public health harms.

The Rule undermines efforts by the States to study and abate climate-driven harms associated with major federal actions. As described above, the Agency may take the position that the Rule does not compel it or its subcomponents to consider potential climate change impacts from an agency action.[83] This position will make it more challenging for the States to assess greenhouse gas emissions and co-pollutants from projects subject to NEPA review, particularly where some of the emissions generated by the project will occur in a different state. For example, there could be projects sited outside of New York that have emissions associated with electricity generation

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[77] American Lung Association, *Asthma Trends and Burden* (last updated July 15, 2024), https://www.lung.org/research/trends-in-lung-disease/asthma-trends-brief/trends-and-burden.

[78] Kim Knowlton et al., *Six Climate Change-Related Events in the United States Accounted for About $14 Billion in Lost Lives and Health Costs*, 30: 11 Health Affairs 2167, 2170 (Nov. 2011); Vijay S. Limaye et al., *Estimating the Health-Related Costs of 10 Climate-Sensitive U.S. Events During 2012*, 3 GeoHealth 245, 245 (Sep. 2019), https://doi.org/10.1029/2019GH000202; Steven Woolf et al., *The Health Care Costs of Extreme Heat*, Center for American Progress (Jun. 27, 2023), https://www.americanprogress.org/article/the-health-care-costs-of-extreme-heat/.

[79] Alique Berberian et al., Racial Disparities in Climate Change-Related Health Effects in the United States, 9(3) Current Environmental Health Rep. 451, 454 (May 28, 2022); *see also* A. R. Crimmins et al., Fifth National Climate Assessment, at ch. 15 (2023), https://web.archive.org/web/20231114203700/https:/nca2023.globalchange.gov/chapter/15/.

[80] Alique Berberian et al., *supra* at 451-52 (May 28, 2022), https://doi.org/10.1007/s40572-022-00360-w.

[81] H. Orru et al., *The Interplay of Climate Change and Air Pollution on Health*, 4 Current Env't. Health Report 504, 504 (2017).

[82] Avery Ellfeldt & E&E News, *Climate Disasters Threaten to Widen U.S. Wealth Gap,* Scientific American (Oct. 2, 2023), https://www.scientificamerican.com/article/climate-disasters-threaten-to-widen-u-s-wealth-gap/.

[83] See section IIB for support.

or fossil fuel transportation in New York. Under New York's Climate Leadership and Community Protection Act, which requires significant statewide emission reductions by set dates,[84] such out-of-state emissions contribute to statewide greenhouse gas emissions. If the Rule is not withdrawn, New York may need to implement additional and potentially costly regulatory, policy, or other actions to ensure the achievement of the requirements of its state climate law. The Rule thus threatens the States' significant interests in evaluating and addressing the effects of climate change.

C. The Rule will Make it More Difficult for States to Protect Overburdened Communities.

The States have significant interests in robust and consistent evaluation of the full range of direct, indirect, and cumulative effects of the Agency's actions to prevent public health disparities flowing from uninformed federal decisions that adversely impact vulnerable communities. The Rule threatens these important interests.

The Rule threatens the ability of the States to understand the full range of effects from the Agency's actions. Without a full understanding of the effects, States will be limited in their ability to protect already overburdened communities. The Rule threatens to eliminate consideration of cumulative effects of a federal project on communities that face a historic and disproportionate pattern of exposure to environmental hazards. These communities are more likely to suffer future health disparities if cumulative impact review is eliminated from the NEPA process. President Trump's E. O. 14173, which rescinds President Clinton's Executive Order on environmental justice,[85] and the Agency's Rule, which lacks any explicit direction to consider, environmental justice will exacerbate that risk. Increased public health and community harms from weakened NEPA reviews will require greater expenditures of state, territorial and tribal and local funds to evaluate and remedy increased public health disparities flowing from uninformed federal agency action.

Studying cumulative impacts is essential to preventing further harm to disadvantaged communities and vulnerable populations, including communities of color, low-income communities, and Indigenous Peoples and Tribal Nations, already burdened with the effects of disproportionately high levels of pollution. Consideration of cumulative effects is also vital in understanding population vulnerability and assisting decision-makers to mitigate and prevent disproportionate environmental and climate harms.[86] Agencies simply cannot know the full impact of a project on a community without considering its existing levels of pollution and the cumulative impacts of adding another pollution source. Similarly, without considering existing

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[84] Chapter 106 of the Laws of 2019 (New York State Climate Leadership and Community Protection Act); N.Y. Env't. Conserv. L. § 75-0107(1).

[85] Exec. Order 12898, 59 Fed. Reg. 7629 (Feb.11, 1994) (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations).

[86] *See* Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking, 85 Fed. Reg. 1684 (Mar. 10, 2020); Comments of the Attorneys General of Massachusetts et al. on the U.S. Environmental Protection Agency Interim Framework for Advancing Consideration of Cumulative Impacts, 89 Fed. Reg. 92125 (Nov. 21, 2024).

burdens, agencies cannot identify meaningful alternatives or mitigation measures to reduce or avoid harms to impacted communities.

* * *

In summary, the Agency's longstanding regulations implementing NEPA are an important tool for the States to protect their interests in informed federal decision-making and avoiding numerous types of potential harms to their resources and the public health of their residents. The States have strong interests in the continued implementation of NEPA regulations that provide for a robust, deliberative, and complete federal environmental review process that the States have relied on for decades. The Agency's move to revise its NEPA regulations contributes to the fragmentation of NEPA review into individual, potentially inconsistent or conflicting procedures across dozens of federal agencies, and threatens to undermine the quality and efficiency of NEPA reviews and impair the States' interests.

III. THE RULE VIOLATES THE APA

The Rule violates the procedures and standards established by the APA and fails to comply with NEPA's text and purpose. Under the APA, an agency action is unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "without observance of procedure required by law."[87] The Rule is arbitrary and capricious because the agency (1) fails to provide a reasoned explanation for its position; (2) fails to provide a rational connection between the facts found and the choice made; (3) entirely fails to consider the unifying purpose of the regulations and the confusion that will occur following their promulgation; and (4) ignores serious reliance interests engendered by the regulations. Additionally, the Agency promulgated the Rule without observance of procedure required under the APA by (1) asserting "good cause" exists to circumvent the APA rulemaking process when none exists; (2) denying that the regulations are legislative rules; (3) improperly asserting that the Rule is a rule of agency organization, an interpretive rule, or a general statement of policy; and (4) curtailing public participation in the rulemaking process.

A. The Rule is Arbitrary and Capricious.

Under the APA, a "reviewing court shall … hold unlawful and set aside" federal agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[88] The agency must make a "rational connection between the facts found and the choice made."[89] An agency action is "arbitrary and capricious" under the APA where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in

[87] 5 U.S.C. § 706(2)(A), (D).

[88] 5 U.S.C. § 706(2).

[89] *Burlington Truck Lines, Inc. v. United States,* 371 U. S. 156, 168 (1962).

view or the product of agency expertise."[90] "Agencies are free to change their existing policies," but they must "provide a reasoned explanation for the change."[91] In this rulemaking, the Agency fails to provide any reasoned explanation for the Rule in violation of the APA, fails to assert a rational connection between the facts found and the choice it has made, makes a decision that runs counter to the evidence before the agency, and fails to consider important aspects of the problem.

1. The Agency Failed to Provide a Reasoned Explanation for its Abrupt Change in Position

As the basis for its Rule, the Agency makes several arguments for revising its regulations and rescinding its subcomponents' NEPA regulations.[92]

a. Because it was unlawful, the repeal of CEQ's implementing regulations provides no justification for revising the Agency's NEPA regulations

First, the Agency explains that it previously relied on CEQ's NEPA implementing regulations, but that CEQ repealed its regulations.[93] The Agency argues that, even where it had additional regulations supplementing the CEQ regulations, those regulations are too dependent on the now-repealed CEQ regulations to survive.[94] The Agency argues that leaving its prior NEPA regulations and its subcomponents' regulations in the Code of Federal Regulations would create uncertainty and confusion, and conflict with a directive from E.O. 14154 that agencies revise procedures to prioritize efficiency and certainty, because the existing regulations would supplement non-existent CEQ regulations. [95]

This argument fails because it makes CEQ Repeal Rule the predicate for the Agency's Rule. As several of our States explained in a comment letter in opposition to the CEQ Repeal Rule, that rule was unlawful for multiple reasons, including that CEQ did not adequately explain its complete reversal in its position as to whether it had authority to adopt regulations.[96]

The Agency's argument also misrepresents the degree to which the Agency's revision of its regulations is demanded by E. O. 14154. E. O. 14154 *did not* direct agencies to rescind their own regulations. Instead, the order refers to agency level implementing regulations multiple times. It states that CEQ shall convene a working group to "coordinate the revision of agency-level *implementing regulations* for consistency." It further notes that "resulting *implementing*

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[90] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[91] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

[92] 90 Fed. Reg. at 29647.

[93] 90 Fed. Reg. 29632.

[94] *Id*.

[95] 90 Fed. Reg. 29635.

[96] The comment letter is attached and incorporated by reference.

regulations" must meet certain additional requirements, like meeting deadlines established in the Fiscal Responsibility Act of 2023.

Moreover, the reasoning that CEQ utilized to rescind its NEPA implementing regulations does not apply to the Agency's NEPA regulations. CEQ argued that it may not have authority to administer its own regulations following the revocation of E.O. 11991 and with passing references to the *Marin Audubon* and *Iowa v. CEQ* decisions.[97] E.O. 11991 addressed regulations by CEQ, not other agencies, so its revocation is irrelevant. And though *Marin Audubon* and *Iowa v. CEQ* called into question CEQ's ability to issue binding regulations, the courts *never* questioned the ability or propriety of other agencies promulgating regulations to implement NEPA. For example, in a part of *Marin Audubon Society v. Federal Aviation Administration*, 121 F.4th 902, 914 (D.C. Cir. 2024) not joined by the full panel, the court reserved the question of whether other agencies (i.e., not CEQ) have the authority to adopt CEQ's regulations or incorporate them by reference into their own NEPA regulations.[98]

The Agency's explanation related to the CEQ Repeal Rule is also arbitrary and capricious because the Agency failed to consider the obvious alternative[99] of adopting CEQ's NEPA implementing regulations that the Agency and its subcomponents previously incorporated by reference. The Agency is wrong that the existing executive orders required the Agency to eliminate its NEPA regulations. The Agency could have simply initiated a rulemaking to move the language previously codified at 40 C.F.R. parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508 to 7 C.F.R. § 1b.1(a) where CEQ's regulations were incorporated by reference, rather than chose to eliminate or revise the regulations, without providing a reasoned explanation.

Even short of recodifying CEQ's NEPA regulations as its own, the Agency had many additional and obvious alternatives to rushed interim final rule process. The Agency could have and should have initiated a more traditional and deliberative notice-and-comment rulemaking process, involving input from stakeholders on which, if any, regulations to rescind or modify. This process could have evaluated a number of alternatives.

b. NEPA is a stable area of law and does not require fast-evolving regulations that evade APA notice and comment.

Second, NEPA has been a remarkably stable area of law. For example, the Agency pointed to the *Seven County* case[100] as a basis for its argument that it needed flexibility.[101] In *Seven County*, the

[97] 90 Fed. Reg. 10,610, 10,614 (Feb. 25, 2025).

[98] This analysis appeared in a separate section of the opinion unnecessary to the panel's ultimate decision, and there were serious party presentation concerns called out by CEQ itself as well as by the dissent in *Marin Audubon*.

[99] *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 & n.36 (D.C. Cir. 1986) (the "failure of an agency to consider obvious alternatives has led uniformly to reversal") (collecting cases); *see, e.g., State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 48 (failure to "even consider the possibility" of "alternative way of achieving the objectives of the Act" was arbitrary and capricious).

[100] *Seven Cnty.,* 145 S. Ct. 1497.

[101] National Environmental Policy Act , 90 Fed. Reg. 29632 (July 3, 2025).

Supreme Court discussed the deference afforded to agencies in determining whether an environmental impact statement complies with NEPA with citations to NEPA cases decided in 1978 and 1980—*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227–28 (1980). Other foundational NEPA cases are primarily from the 1970s and 1980s,[102] and there have been relatively few Supreme Court cases interpreting NEPA and requiring major changes to agencies' environmental reviews, over the past 45 years.

CEQ's 1978 Regulations were durable and effective, with only a few minor revisions made over the following four decades until President Trump called for their revision in 2017 prior to issuing the 2020 Rule. The changes made in the 2020 Rule were not the result of caselaw developments, but designed to unlawfully narrow environmental review under NEPA, threaten meaningful public participation, and restrict judicial review of agency actions.[103] The amendments to the CEQ regulations during the Biden Administration (the 2022 Rule and 2024 Rule) were similarly not made in response to caselaw developments. Instead, the rulemakings largely addressed the revisions in the 2020 Rule that did not support the statutory purposes of NEPA.[104] The 2022 Rule restored certain provisions of the 1978 regulations, requiring analysis of all reasonably foreseeable effects of a major federal action.[105] The 2024 Rule restored most of the remaining provisions of the 1978 Regulations, strengthened analysis of climate change and human health

[102] *See Andrus v. Sierra Club*, 442 U.S. 347, 357–58 (1979) (upholding CEQ's construction of NEPA through its regulations and stating "CEQ's interpretation of NEPA is entitled to substantial deference"); *Robertson v. Methow Valley Council*, 490 U.S. 332, 351 (1989) (recognizing that the "requirement" to include a discussion of mitigation measures flows in part from CEQ's implementing regulations, and finding a revision to CEQ's regulations was "entitled to substantial deference"); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360 (1989); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87 (1983); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004). Nearly every Federal Circuit Court of Appeals followed the Supreme Court and endorsed NEPA regulations. *See, e.g., See Found. on Econ. Trends v. Lyng*, 817 F.2d 882, 884 n.6 (D.C. Cir. 1987); *Mass. v. Watt*, 716 F.2d 946, 948 (1st Cir. 1983), *abrogated on other grounds by Marsh v. Or. Nat. Res. Council*, 490 U.S. 360 (1989); *Brodsky v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 113, 120 n.3 (2d Cir. 2013); *N.J., Dep't of Env't Prot. & Energy v. Long Island Power Auth*., 30 F.3d 403, 409 n.9 (3d Cir. 1994); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 512 n.3 (4th Cir. 1992); *Sierra Club v. Sigler*, 695 F.2d 957, 964 (5th Cir. 1983); *Kentucky Riverkeeper Inc. v. Rowlette*, 714 F. 3d 402, 407 (6th Cit. 2013); *Rhodes v. Johnson*, 153 F.3d 785, 787 (7th Cir. 1998); *Goos v. Interstate Com. Comm'n*, 911 F.2d 1283, 1286 n.2 (8th Cir. 1990); *In re Operation of Mo. River Sys. Litig.*, 516 F.3d 688, 693 (8th Cir. 2008); *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125-27 (8th Cir. 1999). *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986); *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988), *overruled on other grounds by Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992); *Defs. of Wildlife, Earth Island Inst. v. Hogarth*, 330 F.3d 1358, 1369 (Fed. Cir. 2003).

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

[104] *See* Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021); National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757 (Oct. 7, 2021) (Proposed "Phase 1" Rule).

[105] National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022).

impacts, including environmental justice concerns, strengthened public participation, and implemented amendments to the NEPA statute enacted in the FRA.[106]

c. The Agency has not provided a reasoned explanation for forgoing notice and comment on its NEPA implementing procedures.

Third, the Agency has not provided a reasoned explanation for reversing its position that its NEPA implementing regulations should be subject to full notice and comment rulemaking. In promulgating its 1979 NEPA regulations, the Agency provided notice and accepted written comments pursuant to the APA.[107] Any "unexplained inconsistency" between a rule and its repeal is "a reason for holding an interpretation to be an arbitrary and capricious change."[108]

d. The *Seven County* decision does not justify the Agency's revision of its NEPA implementing regulations.

Fourth and finally, the Agency notes that the changes in its NEPA regulations reflect the Supreme Court's decision in *Seven County*.[109] In removing and/or revising key parts of its NEPA implementing regulations, the Agency invoked the Supreme Court's recent decision in *Seven County*, pointing out that NEPA review is a "purely procedural" requirement that "does not itself require any substantive outcome."[110] Yet, the fact that a statute poses only procedural requirements provides no justification for an agency to *revoke* codified regulations. *Seven County* held that courts should "substantially" defer to agencies regarding the "scope and contents" of environmental review—specifically, their identification of particular impacts and alternatives in environmental impact statements and that NEPA did not require the agency in that case to consider certain indirect impacts.[111] It did not address the propriety of NEPA's procedural requirements. Furthermore, the Court's decision acknowledged that agency choices about the scope of environmental review should still "fall within a broad zone of reasonableness."[112] The *Seven County* decision does not justify the Agency's changed position regarding its NEPA implementing regulations.

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[106] *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49,924 (July 31, 2023) (proposed Phase 2 Rule); National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442 (May 1, 2024) (final Phase 2 Rule).

[107] Department of Agriculture National Environmental Policy Act Final Policies and Procedures, 44 Fed. Reg. 44,802 (July 30, 1979).

[108] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005).

[109] *Seven Cnty.,* 145 S. Ct. 1497.

[110] "USDA is revising its prior procedures and practices for implementing NEPA, a 'purely procedural statute' which 'simply prescribes the necessary process for an agency's environmental review of a project'—a review that is, even in its most rigorous form, 'only one input into an agency's decision and does not itself require any particular substantive outcome.'" National Environmental Policy Act, 90 Fed. Reg. at 29,644 (quoting *Seven Cnty.*, 145 S. Ct. at 1510–11).

[111] *Seven Cnty.*, 145 S. Ct. at 1508.

[112] *Seven Cnty.*, 145 S. Ct. at 1513.

To support its Rule, the Agency improperly invokes the Court's observation that NEPA review causes undue delays. The Agency states that it is "conscious of the Supreme Court's admonition [in *Seven County*] that NEPA review has grown out of all proportion to its origins of a 'modest procedural requirement,' creating, 'under the guise of just a little more process,' '[d]elay upon delay, so much so that the process seems to borde[r] on the Kafkaesque.'"[113] However, judicial expressions of policy views are non-binding. Such policy views were also not grounded in any factual analysis. The Department of the Interior, for example, acknowledges that actions requiring an EIS are "a small proportion of all actions" and that the time to complete an EIS has decreased from 4.4 years to 2.2 years over the last twelve years.[114] The Agency adopted the CEQ regulations in 1979[115] and promulgated its current NEPA implementing regulations in 1995, three decades ago.[116] Even if the Agency takes the position that environmental review has become burdensome, the Agency must still comply with the requirements of NEPA. The *Seven County* decision was intended as a "course correction" for *courts*, to bring "*judicial* review . . . back in line" by limiting judges' ability to require agencies to consider specific environmental effects.[117] It does not justify the Agency's action rescinding or revising its NEPA implementing regulations.

2. The Agency Failed to Provide a Reasoned Explanation for Excluding Fundamental NEPA Requirements

In addition to failing to provide a reasoned explanation for revising its NEPA implementing regulations, the Agency does not provide an explanation or basis for the exclusion of certain requirements that were included in CEQ's NEPA implementing regulations and that had guided the Agency for decades. Previously, the Agency incorporated and adopted all of CEQ's NEPA regulations into its own NEPA regulations.[118] Now, the Agency does not even provide any list of the requirements from its prior NEPA regulations, its subcomponents' regulations, and CEQ's regulations that the Agency now does not incorporate. One of the core tenets set forth in *State Farm* is that "an agency changing its course…is obligated to supply a reasoned analysis for the change."[119] "Reasoned decision making…necessarily requires the agency to acknowledge and

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[113] National Environmental Policy Act, 90 Fed. Reg. 29632, 29634 (quoting *Seven Cnty.*, 145 S. Ct. at 1513–14).

[114] Department of the Interior, Regulatory Impact Analysis for the Interim Final Rule National Environmental Policy Act Implementing Regulations, RIN: 1090-AB18 (June 30, 2025), available at: https://docs.publicnow.com/viewDoc?filename=139931%5CEXT%5CE7AEDE332336C975D7E281185B5B7404B34C81D9_63F944875636216EC580363B788BA3A4DCF1D4B4.PDF

[115] National Environmental Policy Act Final Policies and Procedures,44 Fed. Reg. 44,802 (Jul. 30, 1979); see also National Environmental Policy Act, 90 Fed. Reg. 29632, 29633 (July 3, 2025).

[116] Departmental Proceedings, Judicial Proceedings, and NEPA Policy,60 Fed. Reg. 66,481 (Dec. 22, 1995); see also National Environmental Policy Act, 90 Fed. Reg. 29632, 29633 (July 3, 2025).

[117] *Seven Cnty.*, 145 S. Ct. at 1514 (emphasis added).

[118] 7 C.F.R. § 1b.a(a).

[119] *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm*, 463 U.S. 29, 42 (1983) (finding agency acted arbitrarily and capriciously in revoking the requirement that new motor vehicles include passive restraints).

provide an adequate explanation for its departure from established precedent."[120] The Agency has not provided a reasoned explanation for excluding fundamental NEPA requirements, which the Agency had followed for decades as part of the CEQ regulations incorporated by reference at 7 C.F.R. § 1b.1(a).

The Agency provided no reasoned explanation for certain changes to its NEPA requirements, including the following: redefining effects, removing express direction to analyze cumulative and indirect effects, removing express direction to assess disproportionate effects on communities with environmental justice concerns, omitting express direction to consider climate change impacts, and removing public comment standards.

a. The Agency Fails to Provide a Reasoned Explanation for Removing and Excluding the Consideration of Cumulative and Indirect Effects

The Agency failed to provide a reasoned explanation for excluding core NEPA requirements through a redefinition of the term "effects" and removing cumulative effects analysis for the United States Forest Service (USFS). The prior CEQ regulations included in the definition of effects "direct, indirect, and cumulative effects,"[121] and clarified that "[e]ffects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, such as disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative. Effects also include effects on Tribal resources and climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives."[122] Additionally, the USFS NEPA implementing regulations included a directive that the USFS look at cumulative effects.[123] The Agency provides no explanation, much less a reasoned or rational one, for excluding "indirect" and "cumulative" from the "effects" definition it now imposes. The inclusion of "indirect" and "cumulative" impacts in the effects definition originated in CEQ's 1978 Regulations, which the Agency

[120] *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citing *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009).

[121] 40 C.F.R. § 1508.1(g), as amended in 2022 by 87 Fed. Reg. 23453, 23469-70.

[122] 40 C.F.R. § 1508.1(i)(4), as amended in 2024 by 89 Fed. Reg. 35442, 35575.

[123] 36 CFR 220.4(f).

incorporated into its NEPA regulations[124] , as well as in the USFS NEPA regulations.[125] The Agency's Rule now states: "Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to the limits of its regulatory authority, or that would occur regardless of the proposed action or selected alternative, or that would need to be initiated by a third party."[126] This definition of "effects" fails to expressly include cumulative and indirect effects, in violation of NEPA's plain language, which requires federal agencies to consider all "reasonably foreseeable" effects,[127] and to address impacts to future as well as present generations.[128] Notwithstanding the Court's determination in Seven County Infrastructure that indirect effects must not be improperly attenuated from the proposed action, this statutory mandate cannot be met without analyzing cumulative and indirect effects. Moreover, since prior to CEQ's promulgation of its 1978 Regulations, courts have consistently affirmed agencies' legal obligation to consider these effects.[129] Therefore, the Agency must, at a minimum, explain why it is excluding the indirect and cumulative impact definitions.

NEPA's statutory mandate also requires federal agencies to consider "disproportionate and adverse effects on communities with environmental justice concerns" and "climate-change related effects," as set forth in the 2024 Rule.[130] Yet the Agency has not provided any explanation, much less a reasoned or rational one, for removing references to environmental justice and climate change in its own NEPA implementing regulations. Consistent with section 102(2)(C) of NEPA, consideration of environmental justice and climate change-related effects has long been part of NEPA analysis. "The impact of GHG emissions on climate change is

[124] CEQ has long recognized the need to consider indirect and cumulative effects under NEPA. CEQ recognized in NEPA guidance issued in 1973—less than four years after NEPA was enacted—that indirect or "secondary" effects "may often be even more substantial than the primary effects of the original action itself." Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550, 20553 (Aug. 1, 1973). And even before that, CEQ recognized that the effects of many decisions can be "individually limited but cumulatively considerable." Council on Environmental Quality, Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724–29 (Apr. 23, 1971) (The 1971 Guidelines were later revised in 1973 (38 Fed. Reg. 20550–62 (Aug. 1, 1973)) (codified at 40 C.F.R. § 1502)). More recently, CEQ reaffirmed that "cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment." CEQ, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Jan. 1997) [hereinafter Considering Cumulative Effects], https://ceq.doe.gov/publications/cumulative_effects.html.

[125] 36 CFR 220.4(f).

[126] Department of Agriculture National Environmental Policy Act, 90 Fed. Reg. 29632, 29672 (July 3, 2025).

[127] 42 U.S.C. § 4332(C)(i)-(ii).

[128] 42 U.S.C. §§ 4321, 4331.

[129] *See, e.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (interpreting NEPA to require consideration of "cumulative or synergistic environmental impact."); *Nat. Res. Def. Couns. v. Hodel*, 865 F.2d 288, 297–98 (D.C. Cir. 1988) (stating "NEPA, as interpreted by the courts, and CEQ regulations both require agencies to consider the cumulative impacts of proposed actions," and holding that NEPA required the Secretary of the Interior to consider the cumulative impacts of offshore development in different areas of the Outer Continental Shelf).

[130] 40 CFR § 1508.1(i)(4), as amended in 2024 by National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35575 (May 1, 2024).

precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."[131] With respect to environmental justice, NEPA makes it the federal government's responsibility to "assure for *all* Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,"[132] and states "that *each person* should enjoy a healthful environment."[133] Consideration of how a proposed federal action might disproportionately affect *some* Americans more than others is thus a highly relevant consideration under the statute. NEPA's focus on "the quality of the *human* environment,"[134] is also a concern advanced by analyzing the distribution of environmental burdens in the human environment. Courts have also reviewed NEPA analyses to determine if they appropriately considered environmental justice impacts.[135]

Lastly, the Agency's narrow redefinition of what effects should be considered does not follow the *Seven County* decision. In fact, the Supreme Court explicitly recognized that "environmental *effects* of the project at issue may fall within NEPA even if those *effects* might extend outside the geographical territory of the project or might materialize later in time—for example, run-off into a river that flows many miles from the project and affects fish populations elsewhere, or emissions that travel downwind and predictably pollute other areas."[136] The Supreme Court also noted that other projects may still be "interrelated and close in time and place to the project at hand" and require analysis under NEPA.[137] Thus, by stating that the term "effects" should not generally consider any environmental effects that are "remote in time, geographically remote, or the product of a lengthy causal chain," the agency precludes consideration of effects that the Supreme Court has specifically stated may fall within NEPA's statutory requirements.[138]

b. The Agency Fails to Provide a Reasoned Explanation for Curtailing Public Comment During the NEPA Process

Public involvement by States and our residents is critical to identifying and evaluating public health and environmental issues of local or statewide concern that may result from federal actions. Public participation further provides a critical tool for 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

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[131] *Ctr. for Biological Diversity v. Nat'l Highway Transportation Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008); *see also* 89 Fed. Reg. at 35452 n.58; *WildEarth Guardians v. U.S. Bureau of Land Mgmt*., 870 F.3d 1222 (10th Circ. 2017) (invalidating an EIS and Record of Decision for coal leases for failing to consider climate change).

[132] 42 U.S.C. § 4331(b)(2) (emphasis added).

[133] *Id*. § 4331(c) (emphasis added).

[134] *Id*. § 4332(c) (emphasis added).

[135] *See, e.g.*, *Mid States Coal. for Progress v. Surface Transp. Bd*., 345 F.3d. 520, 541 (8th Cir. 2003); *Sierra Club v. Fed. Energy Regul. Comm'n.,* 867 F.3d 1357, 1370 (D.C. Cir. 2017).

[136] *Seven Cnty.* 145 S. Ct. at 1515 (emphasis in original).

[137] *Id.* at 1517.

[138] "[S]o-called indirect effects can sometimes fall within NEPA . . . ." *Id.*

may not have known existed. For these reasons, NEPA prioritizes democratic values by providing a central role for public participation in the environmental review process.[139]

Consistent with the above principles, the Agency's former NEPA regulations required federal agencies to request comments on draft environmental impact statements from federal and state agencies, Tribes, and the public.[140] In contrast, the Rule only requires the Agency to solicit public comments at the notice of intent stage and do not require publication of a Draft EIS at all. [141] This elimination of public participation opportunities vitiates one of the core purposes of an EIS under NEPA, which is to "make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."[142] If the public is not allowed to review and comment on the draft EIS—the Agency's assessment of environmental effects and rationale for its findings—before it is finalized, then the public's ability to engage in the development of information will be so limited as to be essentially non-existent.. The Agency provides no reasoned or rational explanation for virtually eliminating the public's ability to engage in the NEPA decision-making process in this manner.

To the extent the Agency seeks to justify this change by citing the need for efficiency in environmental reviews under NEPA,[143] the Agency has provided no reasoned or rational explanation for how it has chosen to balance the aims of efficiency and public participation. It does not assess how much time this step added in the past or how much time it anticipates will be saved by removing it. Public participation serves a valuable role and often impacts the contours of the final project through inclusion of additional mitigation measures.[144] Therefore, to comply with the APA, the Agency must explain why it is no longer requiring the solicitation of public comment during the preparation of EISs, and how this decision is consistent with the underlying goals and principles of NEPA.

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[139] *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (quoting Conference Report on NEPA, 115 Cong. Rec. 40416 (1969) (internal quotations omitted).

[140] 40 C.F.R. § 1503.1(a), as amended in 2024 by National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35575 (May 1, 2024).

[141] *See, e.g.,* 7 C.F.R. § 1b.7(b)(1)(viii); 7 C.F.R. § 1b.7(d)(2) (providing that a subcomponent "may" solicit public comment on an EIS, but not requiring it).

[142] *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1287 (9th Cir. 1974).

[143] National Environmental Policy Act, 90 Fed. Reg. 29632, 29637 (July 3, 2025).

[144] *See, e.g.,* Ashley Stava, et al "Quantifying the substantive influence of public comment on

United States federal environmental decisions under NEPA" Environ. Res. Lett. 20074028 June 10, 2025, https://iopscience.iop.org/article/10.1088/1748-9326/addee5.

c. The Agency Failed to Provide a Reasoned Explanation for the Presumption that an EA Rather than an EIS Is Required

The Agency has not provided a reasoned explanation for the Rule's changes to the standards for when and whether an EA or EIS is prepared.

NEPA requires preparation of an EIS for all major federal actions "significantly affecting the quality of the human environment."[145]. The EIS lies at the heart of NEPA's purpose, directing agencies to consider reasonable alternatives and mitigation that would avoid adverse environmental effects of the proposed action. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004). NEPA prescribes a process for determining whether an EIS is required: an agency must prepare an EIS "with respect to a proposed agency action . . . that has a reasonably foreseeable significant effect on the quality of the human environment"; an agency must prepare an EA "if the significance of such effect is unknown." 42 U.S.C. § 4336(b). Simply put, an EA is required, absent a categorical exclusion, for the purpose of determining whether a proposed action may have significant effects and require an EIS to analyze alternatives and mitigation.

The CEQ regulations reflected this prescribed process, stating that an agency "shall prepare an [EA] for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown" unless a categorical exclusion applies.[146] The CEQ regulations also required that an agency, "[b]ased on [an] [EA] make its determination whether to prepare an [EIS]." 40 C.F.R. § 1501.4(c) (1978); ("Based on the [EA] [the agency shall] make its determination whether to prepare an [EIS].") 40 C.F.R. § 1501.5(c)(1) (2020) (an EA "shall provide sufficient evidence and analysis for determining whether to prepare an [EIS]"); 40 C.F.R. § 1501.5 (c)(1) (2024) (same as 2020 Rule)). Further, courts have held that preparation of an EA is not a cursory exercise, applying "hard look" review to an agency's decision not to prepare an EIS based on an EA's finding of no significant impact, requiring the agency to provide a "convincing statement of reasons why a project's impacts are insignificant." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001), *abrogated on other grounds recognized by Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139 (2010); *see also Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006).

The Agency also has not provided a reasoned explanation for its alteration of the definition of significance for determining whether to prepare an EIS and, if so, which factors to analyze. Although the NEPA statute does not define significant effects, the CEQ regulations required consideration of several factors. (*See* 40 C.F.R. 1501.3(b) (2020) (requiring consideration, in determining significance, of the "potentially affected environment," such as impacts on endangered species and critical habitat under the ESA; and the "degree of effects); 40 C.F.R. §

[145] 42 U.S.C. § 4332.

[146] 40 C.F.R. § 1501.5(a).

1501.3(d) (2024) (restoring context and intensity factors from 1978 Rule).)[147] The Agency's alteration of the definition of significance is therefore arbitrary and capricious.

3. The Agency Failed to Consider Important Aspects of the Problem

Moreover, the Agency fails to consider multiple important issues in the Rule. An agency action is "arbitrary and capricious" under the APA where "the agency has…entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency."[148] Thus, when an agency amends its regulations, it must demonstrate by reasoned explanation that it has considered the context and intent behind the original regulation.[149] In promulgating the Rule, the Agency entirely fails to consider the impact of revising its NEPA regulations in conjunction with the repeal of the CEQ regulations on the NEPA regulatory landscape, and the value of a consistent and unifying approach to NEPA implementation which no longer exists. The Agency also fails to consider the confusion that will be caused by the Agency's subcomponents and other federal agencies promulgating new and disparate NEPA internal procedures and guidance. The Agency therefore is making a decision that runs counter to the evidence before the agency, which include CEQ's 1978 findings that inconsistent agency regulations make it difficult for the public to participate in the environmental review process, and cause unnecessary duplication, delay, and paperwork.[150]

a. The Agency Failed to Consider the Unifying Function of Regulations in Promulgating the Rule

The Agency acted arbitrarily and capriciously by ignoring the importance of its reliance on time-tested and unifying regulations to guide its decisions under NEPA, and the impact of the revision of its NEPA regulations and rescission of its subcomponents' regulations together with the repeal of the CEQ regulations on this situation. The Agency does not consider that the revision of its regulations, the rescission of its subcomponents' regulations, and CEQ's repeal of the NEPA regulations left a chasm in the NEPA regulatory landscape. Where the CEQ regulations previously bridged the gap between NEPA and unique agency regulations such as the Agency's specific categorical exclusions, federal agencies are now left with a dissonant set of individual regulations and non-binding guidance documents, and the Agency defers the creation of further guidance to its subagencies to develop in the future. Nothing prevents the Agency from adopting CEQ's unifying regulations as its own and restoring the order that these regulations previously

[147] Note that several agencies seem to adopt the 2020 Rule definition. *See* Dep't of Energy, NEPA Implementing Procedures, § 3.2; Dep't of Agric., 7 C.F.R. § 1b.11(50), 90 Fed. Reg. 29632, 29673-29674 (July 3, 2025); U.S. Army Corps Procedures, 30 C.F.R. § 333.12 ("Most permits or permissions under the authorities identified in § 333.1(b) normally require environmental assessments, but likely do not require an environmental impact statement."), 90 Fed. Reg. 29465, 29473-19474 (July 3, 2025).

[148] *State Farm*, 463 U.S. at 43.

[149] *See NAACP, Jefferson County Branch v. Donovan*, 765 F.2d 1178, 1185 (D.C. Cir. 1985).

[150] 1978 Final Rule at 55978.

provided. The Agency's failure to even consider doing so ignores an important aspect of the problem.

As described in Section II(A) above, in 1978, in accordance with E.O. 11991, CEQ promulgated regulations to address concerns of "inconsistent agency practices and interpretations of the law" under CEQ's non-binding guidance, which impeded both Federal coordination and public participation in the environmental review process.[151] CEQ's prior NEPA regulations fulfilled their intended purpose of guiding federal agencies in a "uniform, government-wide approach" to NEPA implementation.[152] The Agency fails entirely to address the lack of a uniform regulatory approach to implementing NEPA in the Rule. It provides no recognition of the initial rationales for CEQ's NEPA implementing regulations or Agency's and its subcomponents' NEPA regulations and no explanation why inconsistencies between the Agency's revised NEPA regulations and other federal agencies' regulations and non-binding internal procedures, will not implicate the same concerns.

In addition, the varied and inconsistent non-binding NEPA internal procedures issued by other federal agencies also create confusion. There is now a patchwork of regulations, partial regulations, and non-binding guidance across different federal agencies. Now, when planning projects that require NEPA approvals from multiple federal agencies, states, territories, and tribal and local governments, and project proponents will be subject to uncertainty as to how to apply multiple agencies' divergent and possibly conflicting internal procedures.

For example:

- The Department of Energy (DOE)'s new NEPA procedures list the actions that a project applicant must take, including initiating any request to DOE to prepare the NEPA review with the application or during the early scoping period, providing environmental information used to prepare or evaluate the environmental document, replacing the applicant-directed contractor at DOE's request, and developing a consolidated administrative record within two weeks of DOE's request.[153] In contrast, the Department of Defense's (DoD) NEPA procedures do not set forth these expectations for project applicants.[154]
- The DOE procedures state that "the environmental document needs a description of the affected environment that is sufficient to support a reasoned explanation of DoE's conclusion regarding the significance of effects,"[155] whereas the DoD's NEPA procedures call for the DoD to "consider the potentially affected environment and degree

[151] 43 Fed. Reg. at 55978.

[152] *Id*.

[153] DOE, *National Environmental Policy Act (NEPA) Implementing Procedures* (DOE Procedures) at pp. 10-11. (June 30, 2025), https://www.energy.gov/sites/default/files/2025-06/2025-06-30-DOE-NEPA-Procedures.pdf.

[154] Department of Defense National Environmental Policy Act Implementing Procedures (DoD Procedures) at p. 23 (June 30, 2025), https://www.denix.osd.mil/nepa/denix-files/sites/55/2025/06/DoD-NEPA-Procedures-FINAL.pdf.

[155] DOE Procedures at p. 14.

of the effects of the action" without expressly requiring a description of the affected environment.[156]

- The Department of Transportation (DOT)'s revised NEPA procedures outline a notification and consultation process and guidelines for preparing environmental documentation during emergencies.[157] DoD's and DOE's NEPA procedures do not provide as much detail regarding emergencies that may interfere with the preparation of environmental documents.[158]

As a result, state agencies that are delegated authority to comply with NEPA, must develop different procedures to meet various federal agency regulations and guidelines. Additionally, for projects involving more than one federal agency, the Agency's Rule will increase uncertainty about which of the federal agencies' inconsistent NEPA processes apply.

In promulgating new and disparate regulations without consideration of the important unifying role served by the Agency's and its' subcomponents' prior regulations and CEQ's regulations, and the gaping chasm created by the revision of those regulations, the Agency has "entirely failed to consider an important aspect of the problem" in violation of the APA.[159]

b. The Agency Failed to Evaluate the Uncertainty the Rule Will Cause

While the Agency claims that the Rule will reduce uncertainty in accordance with E.O. 14154, it will do the opposite. The Agency's rationale ignores and minimizes the uncertainty the revision of its NEPA regulations will cause.

Moreover, the Agency's former NEPA regulations, incorporating CEQ's regulations, were far more detailed than the Agency's revised regulations. The CEQ regulations provided, inter alia, requirements for how each reasonable alternative is developed and analyzed, data source and quality standards for information used, specific environmental consequences that must be addressed, and criteria for cost-benefit analyses.[160] In comparison, , the Agency's rescinded its regulations that provided detailed requirements for conducting NEPA reviews. The Rule will engender inconsistent decision-making and lead to uncertainty in environmental reviews and project approvals. This will be detrimental to the stated goals of efficiency and certainty.

The Agency's promulgation of the Rule also may significantly increase litigation. Currently, most NEPA analyses do not result in litigation.[161] According to CEQ data, "the number of NEPA lawsuits filed annually has consistently been just above or below 100, with the exception of a

[156] DoD Procedures at p. 3.

[157] Department of Transportation, DOT Order 5610.1D, *DOT's Procedures for Considering Environmental Impacts*, at pp. 25-26, https://www.transportation.gov/sites/dot.gov/files/2025-07/DOT_Order_5610.1D_OST-P-250627-001_508_Compliant.pdf.

[158] DoD Procedures at p. 21; DOE Procedures at p. 20.

[159] *State Farm*, 463 U.S. at 43.

[160] 40 C.F.R. § 1502.

[161] U.S. Gov't Accountability Off., GAO-14-369, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* [hereinafter "GAO Report"], at 19 (2014), https://www.gao.gov/assets/gao-14-369.pdf.

period in the early- and mid-2000s."[162] "Given that the number of federal actions potentially subject to NEPA is roughly 100,000 or so annually, litigation rates are exceedingly low."[163] Even for EISs, which represent a small fraction of NEPA review processes, "on average 20% are challenged and just 13% are actually litigated."[164] However, the Agency cannot rely on the rescinded CEQ regulations, which have been upheld time and again by the courts, and therefore, the Agency's environmental decision-making may be subject to an increasing number of legal challenges. Courts will need to determine whether the Agency's environmental review of federal projects is consistent with NEPA without the benefit of CEQ's regulations. Furthermore, if various agencies' rescission rules and non-binding NEPA internal procedures are challenged in court, confusion will likely arise as different courts may make conflicting decisions about the myriad agency rules and procedures, which do not rely on the unifying provisions set forth in the former CEQ regulations. The Agency's assertion that the Rule will reduce uncertainty thus "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[165] This position is thus arbitrary and capricious.

In sum, the varied and unpredictable application of standards and procedures leads to uncertainty in environmental review and introduces greater ambiguity in the event of legal challenges under NEPA.

4. The Agency Failed to Adequately Consider Reliance Interests

The Agency argues that the Rule does not implicate any reliance interests because: 1) NEPA is a "purely procedural statute"; 2) it is unclear how parties can assert reliance interests in prospective procedures; and 3) any reliance interests are outweighed by policy considerations related to, *inter alia*, project costs and the economy. The Agency's assertions are contrary to law and fact.

Under the APA, in changing course, an agency must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[166] When an agency's "prior policy has engendered serious reliance interests that must be taken into account," it must "provide a more detailed justification [for its change in policy] than what would suffice for a new policy created on a blank slate."[167] A "summary discussion" is insufficient where decades of reliance on an agency's previous position

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[162] *Id*.

[163] David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 Ariz. St. L.J. 4, 50 (2018).

[164] *Id*.; *see also* GAO Report at 19; Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1510 (2012), http://law.harvard.edu/faculty/rlazarus/docs/articles/Lazarus_APeekBehindtheCurtain_2012.pdf (as of 2012, the Supreme Court had decided only 17 NEPA cases).

[165] *State Farm*, 463 U.S. 29, 43.

[166] *Dep't of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1914-15 (2020).

[167] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

exists.[168] An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[169]

Over the nearly fifty-year lifespan of CEQ's NEPA regulations, significant reliance interests have developed across the nation. CEQ's regulations have been in place as legislative rules since 1978, and had been relied on by states, industry, and the public. At the state level, many States drafted their own little NEPAs in reliance on CEQ's NEPA implementing regulations providing clarity as to the content of federal environmental reviews. The States conduct environmental reviews at the state level in coordination with federal agencies' environmental reviews under NEPA. With the repeal of CEQ's NEPA implementing regulations, and the revision of the Agency's NEPA regulations, States will need to reassess not only their own state environmental law processes, but also the procedures applicable to and content of individual project environmental reviews to ensure they meet the statutory goals and requirements of state law. The repeal of CEQ's regulations and subsequent revision of the Agency's NEPA regulations will "necessitate systemic, significant changes" for all who interact with NEPA.[170]

Considering this reliance on longstanding CEQ's and the Agency's and its subcomponents' NEPA regulations, the Agency's cursory dismissal of reliance interests is wrong and renders its decision to repeal its NEPA regulations arbitrary and capricious. First, the Agency states that because NEPA is a "purely procedural statute" that "imposes no substantive environmental obligations or restrictions," there are no reliance interests. But this argument is misguided. Procedural obligations set forth by NEPA regulations form a central, and enduring (until now), part of an environmental review framework relied upon by the States, applicants and the public for federal projects across the country. In addition, the Agency's focus on the *type* of reliance interests is too narrow; the argument that NEPA is a procedural statute does not overcome the fact that the States and project applicants rely on the dependability of the Agency's and its subcomponents' NEPA regulations when planning potential projects, or series of projects under a program or programmatic environmental document, that may stretch over a period of years. The Agency cannot absolve itself of the responsibility to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns" by simply declaring that there are no reliance interests in the first place.[171]

Second, the Agency also appears to argue that there are no reliance interests in prospective NEPA procedures. This argument misses the mark, however, as the States have reliance interests not in prospective procedures, but in the longstanding agency NEPA regulations revised by the Agency through an interim final rule. As stated above, the States have a strong reliance interest

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[168] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (finding reliance by industry on an agency position in place since 1978 required more than a summary discussion of the reasoning for the change).

[169] *Encino Motorcars, LLC*, 579 U.S. at 222 (quoting *Nat'l Cable & Telecom. Assn v Brand X,* 125 S.Ct. 2688 (2005) .

[170] *Encino Motorcars, LLC,* 579 U.S. at 222.

[171] *Department of Homeland Security*, 140 S. Ct. at 1914-15 (2020).

in the stability of the rules that govern environmental review of decision-making; this stability was undermined by the Agency's Rule.

Third, the Agency claims that, to the extent any reliance interests exist, they are outweighed by other policy considerations. But this argument is unsupported by any assessment of what the reliance interests are, and only highlights the fact that the Agency both failed to determine whether the public's reliance interests in the relative stability provided by NEPA regulations is significant, and unlawfully declined to weigh these interests against competing policy concerns.

The States' and the public's reliance interests in stable and well-established NEPA regulations should not be waved off arbitrarily. The States rely on NEPA regulations to guide the uniform and adequate review of projects. Without sufficient NEPA review by federal agencies, the States are required to expend costs and resources to understand project impacts and, for some projects, to comply with state law.[172] Moreover, as explained above, the Agency's revisions of its NEPA regulations will lead to uncertainty as to which procedures to follow, and will disrupt environmental reviews across the country, where the States already have significant resources devoted to NEPA implementation. It will also require the States to invest more resources in environmental review processes because the staff assigned in each State must familiarize themselves with the regulations of the individual federal agencies involved in each project. The Agency's failure to consider these reliance interests renders the Rule arbitrary and capricious.

B. The Agency's Use of an Interim Rule Here is Procedurally Improper.

The APA requires agencies to follow the same procedural steps when amending or repealing a rule as they do when promulgating a rule, including providing notice and an opportunity for public comment unless a specific exception applies. The APA prohibits an agency from issuing an interim final rule to repeal a regulation promulgated through rulemaking.

Under the APA, the effort to repeal regulations is a rulemaking and held to the same standard as a rulemaking to promulgate new regulations and the Rule is not an interpretive rule.[173] The Agency cites to the text of NEPA and E.O. 14154 as the authority under which the Agency issues the Rule, but fails to acknowledge that the APA explicitly requires notice and comment for rulemaking. Specifically, agencies must publish a general notice of proposed rulemaking in the Federal Register and provide an opportunity for public participation through written comments before adopting, amending, or repealing a rule.[174] This requirement applies equally to the amendment of a previously promulgated final rule, as the APA defines "rulemaking" to include the process of "formulating, amending, or repealing a rule."[175] Courts have consistently

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[172] *See, e.g., Texas v. United States*, 40 F.4th 205, 227-28 (5th Cir. 2022) (finding the Department of Homeland Security did not adequately consider relevant costs to the plaintiff States or their reliance interests in the pre-existing enforcement policy).

[173] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action")).

[174] 5 U.S.C. § 553.

[175] 5 U.S.C. § 551(5).

held that the repeal of a rule constitutes substantive rulemaking and is therefore subject to these procedural requirements.[176] Notice and comment prior to amending a rule prevents agencies from undoing their prior rulemaking efforts without giving stakeholders an opportunity to comment on the proposed repeal. As the D.C. Circuit has recognized, notice and comment ensures agencies cannot arbitrarily reverse their prior decisions.[177]

The APA provides limited exceptions to the notice-and-comment requirement, such as when an agency finds "good cause" that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. But courts have narrowly construed these exceptions and they do not apply here.

1. The "Good Cause" Exception Does Not Apply

The Agency invokes the "good cause" exception as a basis for avoiding notice and comment, citing a supposed "need for speed and certainty" following CEQ's repeal of its NEPA regulations.

The APA only exempts rules from notice and comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest."[178] The APA makes clear that the exception "should be limited to emergency situations,"[179] or scenarios where notice and comment "could result in serious harm."[180] The good cause exception is "narrowly construed and only reluctantly countenanced."[181] The self-imposed goals of "speed and certainty" do not fit into these categories.

First, the CEQ Guidance issued with rescission of the CEQ regulations specifically instructs agencies to rely on prior regulations until they have adopted new ones, undercutting any argument that this scenario constitutes an emergency warranting evasion of notice-and-comment rulemaking. The CEQ Guidance provides: "While these revisions are ongoing, agencies should continue to follow their existing practices and procedures for implementing NEPA consistent with the text of NEPA, E.O. 14154, and this guidance."[182] It is simply illogical for the Agency to claim that there is an "emergency" need to remove all of its NEPA implementing regulations from the Code of Federal Regulations at the same time that CEQ has directed agencies to continue to rely on its own removed regulations.

Second, emergencies that are of the executive's own making do not qualify for the "good cause" exception. For example, in *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d

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[176] *See Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2018) ("These requirements apply with the same force when an agency seeks to delay or repeal a previously promulgated final rule").

[177] *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982).

[178] 5 U.S.C. § 553(b)(B).

[179] *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 448 (D.C. Cir. 1982).

[180] *Chamber of Com. of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006); *see also Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

[181] *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018).

[182] CEQ Guidance.

Cir. 2004), the court considered a Department of Energy rule that delayed the effective date of certain efficiency standards without notice and comment because the agency wanted more time to consider the standards, and the standards were set to become effective imminently. The court held "an emergency of DOE's own making" could not "constitute good cause."[183] Further, the court noted that no true emergency existed because the only thing "that was imminent was the impending operation of a statute intended to limit the agency's discretion (under DOE's interpretation), which cannot constitute a threat to the public interest."[184] Here, similarly, the mere existence of a rule repealing NEPA regulations by CEQ as directed by E.O 14154 does not constitute good cause. Furthermore, the Agency's unnecessary act of "rescinding the old procedures immediately" was the cause of the "emergency," and does not justify foregoing notice and comment.[185]

Third, the Agency fails to explain in the Rule how the purported need to resolve agency confusion is an emergency or situation where allowing time for the Agency's consideration of comments would result in serious harm to the public interest. To the contrary, receiving and responding to the public's and the States' input on a rule that rescinds major sections of the Agency's NEPA implementing regulations would reduce rather than exacerbate agency confusion. Moreover, the Agency nowhere explains how revising its NEPA implementing regulations and rescinding its subcomponents' NEPA regulations would serve the purported purpose of resolving agency confusion. For all these reasons, the "good cause" exception does not apply to the Rule.

2. The exception for "interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice" does not apply

For similar reasons, the Agency is simply incorrect in arguing that the Rule is an "interpretive rule" that "provides an interpretation of a statute, rather than make[s] discretionary policy choices, which establish enforceable rights or obligations for regulated parties."

An interpretive rule is one in which an agency announces its interpretation of a statute in a way that "only reminds affected parties of existing duties."[186] These rules allow "agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings. . . . '[R]egulations,' 'substantive rules,' or 'legislative rules' are those which create law, usually complementary to an existing law; whereas interpretive rules are statements as to what administrative officer thinks the statute or regulation means."[187] Interpretive rules do not

[183] 355 F.3d at 205.

[184] *Id.*

[185] 90 Fed. Reg. at 29645.

[186] *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc).

[187] *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

"effect[] a substantive change in the regulations."[188] If a "rule effectively amends a prior legislative rule," it is a "legislative, not an interpretive rule" that requires notice and comment.[189]

The Rule substantively changes the Agency's existing, longstanding NEPA regulations diverging from CEQ's longstanding provisions that impose requirements for how the agency must conduct environmental review to comply with NEPA. It therefore plainly exceeds the narrow exception for interpretive rules.

Further, as discussed above, "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked" and "may not alter [such a rule] without notice and comment."[190]

The Agency's prior NEPA-implementing regulations went through notice and comment and were binding. Repealing those binding regulations is therefore not an interpretive act; it requires full notice-and-comment rulemaking. The "interpretive rule" exception does not apply to the Rule.

Nor can the Agency succeed in arguing that the Rule is a "general statement of policy" that "provide[s] notice of an agency's intentions as to how it will conduct itself, . . . without creating enforceable rights or obligations." Rather, the Rule is a final and specific action revising the Agency's longstanding NEPA regulations and rescinding its subcomponents' NEPA regulations.

A general statement of policy is "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications."[191] Such statements are distinguished from substantive rules because they do not establish binding norms but instead "announce[] the agency's tentative intentions for the future."[192]

The Agency's Rule is not a tentative announcement that is non-binding or an expression of future intentions. Instead, the Rule is final and decisive. It substantially revises the Agency's NEPA implementing regulations and rescinds its subcomponents' NEPA regulations from the Code of Federal Regulations. The Rule is "final" and there is no suggestion that the Agency will undertake future rulemaking to resurrect regulations. The "general statement of policy" exception does not apply to the Rule.

In summary, since none of the APA Section 553(b) exceptions apply to the Rule, the Agency violated the APA by not complying with notice and comment requirements.

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[188] *Warder v. Shalala*, 149 F.3d 73, 80 (1st Cir. 1998).

[189] *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

[190] *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (quoting *Nat'l Family Planning & Reproductive Health Assoc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992)).

[191] *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

[192] *Id.* at 38.

3. The comment period for the Rule is insufficient

Even if the Agency intends to respond to comments before finalizing the Rule, 28 days for comment is insufficient. The Agency's Rule fundamentally changes how the Agency and its subcomponents must consider the environmental impacts of major federal actions. This short 28-day comment period is nowhere near enough time for the public to properly understand and meaningfully respond to the Rule.

The Agency has determined that this rule is significant and that E. O. 12866 applies. Therefore, the Agency is required to abide by the terms of that executive order, which states that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[193] The Agency does not even provide for a 30-day comment period.

"In cases involving the repeal of regulations, courts have considered the length of the comment period utilized in the prior rulemaking process as…well as the number of comments received during that time-period" in determining whether an agency has afforded sufficient time for comment. *California v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019) (citing *North Carolina Growers' Ass'n*, 702 F.3d at 770).

The Agency's previous rulemakings for revisions to NEPA regulations provided 45 or 60 days for comment and multiple public hearings. A minimum of 60 days should be provided for the public to comment on the significant legal and factual issues implicated in the Rule, as described above.

C. The Agency's Action is Contrary to Law

The Agency's promulgation of the Rule is contrary to law, and thus violates the APA,[194] because the Rule does not comply with the requirements of NEPA.

1. The Agency Unlawfully Limits Its Responsibility to Consider "Indirect" and "Cumulative" Effects

As noted above in Section 2, the Agency did not reasonably explain its exclusion of the terms "indirect" and "cumulative" from the "effects" definition in the Agency's Rule. For the same reasons that the redefinition of "effects" is unreasonable, it is also contrary to law. The analysis of cumulative and indirect effects is necessary to allow for the full consideration of significant impacts required by NEPA. The exclusion of that analysis thus violates one of NEPA's central mandates.

NEPA's "primary function is information forcing, … compelling federal agencies to take a hard and honest look at the environmental consequences of their decisions."[195] NEPA requires federal

[193] Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

[194] 5 U.S.C. § 706(2)(A).

[195] *Am. Rivers v. FERC*, 895 F.3d 32, 49 (D.C. Cir. 2018) (citations and internal quotation marks omitted).

agencies to prepare a "detailed statement" on the impacts of certain actions prior to making decisions.[196] Section 102 of NEPA requires that agencies disclose "any adverse environmental effects which cannot be avoided" if the agency action goes forward.[197] And NEPA requires agencies to consider the larger context, directing them to "recognize the worldwide and long-range character of environmental problems."[198] NEPA's legislative history, too, makes clear that, through NEPA, Congress sought to prevent agencies from making decisions without considering the larger context and incremental impact of projects on the environment. For instance, the Senate expressed concern that "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."[199]

Consistent with NEPA's plain text and purpose, for over 40 years the courts and CEQ have interpreted NEPA's "hard look" requirement to demand consideration of direct, indirect, and cumulative effects.[200] Identifying and analyzing only direct effects that are close in time and geography to the proposed federal action ignores the true nature of most environmental problems, which Congress recognized as "worldwide and long-range" in character.[201] A robust analysis of a project's environmental effects is critical for informing decision makers and the public, particularly where projects may contribute incrementally to larger environmental or climate harms. Or, as the Second Circuit noted in *Hanly v. Kleindienst*, "[o]ne more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel. Hence the absolute, as well as comparative, effects of a major federal action must be considered."[202] The *Seven County* decision does not change the principle that indirect effects should be considered in appropriate cases. As described above, the decision recognizes that indirect effects such as "run-off into a river that flows many miles from the project and affects fish populations elsewhere, or emissions that travel downwind and predictably pollute other areas" may fall under NEPA. [203]

The Agency's Rule, however, is excluding a clear requirement to consider the three categories of effects, replacing them with a vague redefinition directing agencies not to consider effects that are "remote in time, geographically remote, or the product of a lengthy causal chain."[204] NEPA

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[196] 42 U.S.C. § 4332(2)(C).

[197] *Id.* § 4332(2)(C)(ii).

[198] *Id*. § 4332(2)(I).

[199] S. Rep. No. 91-296, at 5.

[200] 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(c); *Kleppe*, 427 U.S. at 410; *Hanly v. Kleindienst*, 471 F.2d 823, 830–31 (2d Cir. 1972); *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 666 (9th Cir. 2009) ("NEPA requires the Forest Service to perform a cumulative impact analysis in approving projects.").

[201] 42 U.S.C. § 4332(2)(F); *see also* S. Rep. No. 91-296, at 5 (Senate report stating "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.").

[202] 471 F.2d at 831.

[203] *Seven Cnty.,* 145 S. Ct. at 1515.

[204] Department of Agriculture National Environmental Policy Act, 90 Fed. Reg. 29632, 29672.

requires that an agency assess *all* of the project's reasonably foreseeable significant impacts,[205] and the exclusion of impacts that are "remote in time" or "geographically remote," would unlawfully take such "long range" environmental impacts out of NEPA's purview and undermine NEPA's mandate and purpose to ensure that agencies are fully equipped to make decisions concerning all significant environmental impacts.[206]

The exclusion of the NEPA regulations in conjunction with the treatment of "remote" impacts also ignores the reality that some major federal actions will have adverse effects that are remote in time but also reasonably foreseeable if not certain. Examples include the proposed geologic repository for the disposal of high-level radioactive wastes at Yucca Mountain, Nevada, identified in the Nuclear Waste Policy Act, as well as other interim storage options currently under development by the Department of Energy. Radioactive releases from the repository to the environment are not likely to occur for hundreds and possibly thousands of years, but after that, significant releases are certain to occur and must be evaluated.[207]

For these reasons, the Agency's replacement of the traditional definition of effects with a definition that does not include indirect or cumulative impacts is unlawful and contrary to law. When conducting NEPA analyses, the agency is required to take the requisite "hard look" at all reasonably foreseeable impacts.

2. The Agency Unlawfully Curtails the Public Participation at the Heart of the NEPA Process

Public participation is one of the "twin aims" of NEPA.[208] The process is rooted in statutory obligations that a federal agency "consider every significant aspect of the environmental impact of a proposed action" *and* "inform the public that it has indeed considered environmental concerns in its decision-making process."[209] NEPA regulations have long "ensured that agencies identify, consider, and disclose to the public relevant environmental information early in the process before decisions are made and before actions are taken[,]"[210] just as courts even predating the 1978 regulations have recognized the public's role in making certain that federal

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[205] 42 U.S.C. § 4332. Moreover, CEQ itself previously stated that "[p]erhaps the most significant environmental impacts results from the combination of existing stresses on the environment with the individually minor, but cumulatively major, effects of multiple actions over time." CEQ, Exec. Office of the President, National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years at 29 (Jan. 1997), https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf.

[206] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); 42 U.S.C. §§ 4332(2)(F), 4332(2)(C)(ii).

[207] The certainty of releases to the environment thousands of years into the future led both the U.S. EPA and the U.S. Nuclear Regulatory Commission to require the Department of Energy to estimate releases for one-million years. 40 C.F.R. § 197.20; 10 C.F.R. § 63.311; 40 C.F.R. § 197.12 (defining "period of geologic stability" as one million years following disposal).

[208] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal citation omitted).

[209] *Id*.

[210] 40 C.F.R. § 1500.1(b).

decision-making is "premised on the fullest possible canvassing of environmental issues[.]"[211] Thus, NEPA requires that agencies prepare environmental impact statements to disclose and address potentially significant environmental effects of a project; and as stated above, one purpose of this document is to "make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."[212]

Here, the Agency's revised NEPA regulations eviscerate public participation, rendering public notice and comment from the public and other entities discretionary during the EIS process.[213] Also, the revised regulations do not expressly require the Agency to solicit comments on draft EISs, and instead state that the Agency may request and obtain comments "at any time that is determined reasonable by the responsible official in the process of preparing the [EIS]."[214] The effect of these provisions is to allow the Agency to analyze environmental effects and their significance without any public input. By doing so, the Agency strikes at the heart of NEPA's purpose and environmental review requirements, in violation of NEPA and, accordingly, the APA.

IV. CONCLUSION

In conclusion, the Agency should repeal its Rule and issue new NEPA regulations after undertaking notice and comment under the APA.

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[211] *Jones v. District of Columbia Redevelopment v. Land Agency*, 499 F.2d 502, 511 (D.C. Cir. 1974).

[212] *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1287 (9th Cir. 1974).

[213] 7 C.F.R. § 1b.7(d)(2) (2005); 90 Fed. Reg. at 29662-63 (stating that the Agency *may* request comments from "State, Tribal, or local governments that may be affected by the proposed action," agencies that have requested to "receive statements on actions of the kind proposed," and from the public during the EIS process).

[214] *Id*. at 7 C.F.R. § 1b.7(d)(3).

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