COMMENTS OF ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA, WASHINGTON, NEW YORK, THE COMMONWEALTH OF MASSACHUSETTS, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, THE DISTRICT OF COLUMBIA AND HARRIS COUNTY, TEXAS

VIA REGULATIONS.GOV
Department of Energy
Office of NEPA Policy and Compliance
1000 Impendence Avenue SW
Washington, DC 20585

Re: Rescission of Department of Energy's NEPA Implementing Regulations, RIN 1990-AA52, DOE-HQ-2025-0026

To Whom It May Concern:

The Attorneys General of the States of Washington, California, New York, the Commonwealth of Massachusetts, Arizona, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, the District of Columbia and Harris County, Texas (collectively, States) respectfully submit these comments in opposition to the Department of Energy's (Agency) Interim Final Rule (the Rule) rescinding the Agency's regulations implementing the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347.[1]

NEPA has long supported informed and transparent agency decision-making and allowed for meaningful public participation in developing and reviewing proposed federal actions.[2] 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.[3] As the Supreme Court has explained, Congress intended NEPA's "action-forcing procedures" to help "[e]nsure that the policies [of NEPA] are implemented."[4] In order to

[1] The interim final rule is titled "Revision of Department of Energy's NEPA Implementing Regulations, 90 Fed. Reg. 29676 (July 3, 2025); DOE-HQ-2025-0026.

[2] U.S. Gov't Accountability Off., GAO14-369, National Environmental Policy Act: Little Information Exists On NEPA Analyses, 16 (2014), https://www.gao.gov/products/gao-14-370 (last visited July 20, 2025) ("[a]ccording to studies and agency officials, some of the qualitative benefits of NEPA include its role in encouraging public participation and in discovering and addressing project design problems that could be more costly in the long run."); Implementation of Procedural Provisions: Final Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978) (hereinafter the 1978 Final Rule).

[3] 42 U.S.C. §§ 4331, 4332.

[4] *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.").

implement NEPA within the work of the Agency, the Agency promulgated regulations.[5] The Agency's abrupt action to repeal 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 provided by the NEPA process allows States to protect their residents, property, and natural resources. The States and our residents are injured by the effects of environmental degradation, including effects exacerbated by climate change.[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] States also have a strong interest in the Agencies' consultation process with state agencies that have jurisdiction or special expertise related to the federal permitting process. The CEQ regulations, by comparison, emphasized early participation, and participation throughout all stages of the process.

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.[9]

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 prior to taking significant federal actions, NEPA has helped regulatory agencies and the American people evaluate and understand how such projects impact the environment and public health.[10] NEPA's procedural safeguards have—

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[5] In 1979, the Agency adopted CEQ's NEPA implementing regulations at 10 CFR § 1021 (44 Fed. Reg. 45918); in 1992, the Agency expanded its NEPA regulations (57 Fed. Reg. 15122); the Agency refined its NEPA regulations in minor ways in 1996, 2011, 2020 and 2024.

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

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

[8] *Id*. at 520.

[9] By separate correspondence through Regulations.gov, on March 14, 2025, California, Washington, New York, Colorado, Delaware, Illinois, Maine, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Wisconsin, the Commonwealth of Massachusetts, the District of Columbia, and Harris County, Texas, filed a letter requesting that CEQ extend the comment period for the Rescission Rule. Comment ID CEQ-2025-0002-17196.

[10] *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 Protections 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.

among other 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.[11] 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' environmental review of federal actions.[12]

CEQ began providing federal agencies with guidelines for consistent application of NEPA across agencies in 1970, soon after NEPA was enacted.[13] 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."[14] To address those difficulties, President Carter issued Exec. Order No. 11991, 3 C.F.R. 123 (1977) (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))."[15] CEQ's regulations would serve to create a "uniform, government-wide" approach to NEPA review;[16] 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."[17] CEQ issued final NEPA implementing regulations in 1978 (1978 Regulations).[18]

The 1978 Regulations were binding on all federal agencies.[19] Agencies conformed their NEPA procedures accordingly: The regulations of the Department of Energy, 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

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[11] *See* Env't L. Inst., *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government* (August 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.

[12] Implementation of Procedural Provisions: Final Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978).

[13] 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. 7,390, 7,391 (May 12, 1970), pursuant to President Nixon's Executive Order directing CEQ to issue such guidelines, Exec. Order No. 11,514, 35 Fed. Reg. 4,247, 4,248 (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. 7,724 (Apr. 23, 1971); Preparation of Environmental Impact Statements: Proposed Guidelines, 38 Fed. Reg. 10,856 (May 2, 1973).

[14] 43 Fed. Reg. at 55,978.

[15] Exec. Order No. 11991, 42 Fed. Reg. 26,967 (May 24, 1977).

[16] 43 Fed. Reg. 55,978.

[17] Exec. Order No. 11991, 42 Fed. Reg. at 26,967.

[18] 43 Fed. Reg. 55,978 (Nov. 29, 1978).

[19] 43 Fed. Reg. at 55, 978.

incorporated CEQ's 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 Executive Order (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 ("the 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 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 ("the FRA").[28]

In 2024, a group of states led by Iowa filed a lawsuit—*Iowa v. Council on Environmental*

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[20] *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); 10 C.F.R. § 1021.301 (Agency review and public participation); § 1021.313 (public review of EIS), 40 C.F.R. §§ 1502.4, 1503.1 (2021)(DOE).

[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. 40,463 (August 24, 2017).

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

[24] *E.g.*, *California v. Council on Env't Quality*, No. 3:20-cv-06057 (N.D. Cal. Aug. 28, 2020).

[25] *State of Iowa v. CEQ*, D.N.D. Case No. 1:24-cv-00089-DMT-CRH, at Dkt. 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. 34,154 (June 29, 2021).

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

[28] *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442 (May 1, 2024) (2024 Rule); Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat.10 (2023).

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.[30] However, the Eighth Circuit subsequently vacated the *Iowa* court's decision on July 29, 2025.[31]

In January 2025, President Trump signed E.O. 14154, the "Unleashing American Energy" order.[32] E.O. 14154 revoked President Carter's original 1977 order directing CEQ to issue regulations and directed CEQ to "expedite and simplify the permitting process" for energy infrastructure projects by providing new guidance for NEPA implementation and proposing to rescind CEQ's NEPA regulations.[33] 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 regulations to "expedite permitting approvals and meet deadlines established in the Fiscal Responsibility Act of 2023 (Public Law 118-5)."[34] 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."[35]

In February 2025, CEQ issued an interim final rule rescinding its NEPA implementing regulations (CEQ Repeal Rule).[36] 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 permitting approvals" (CEQ Guidance).[37] The CEQ Guidance further directed agencies to "prioritize efficiency and certainty over any other policy objectives,"[38] which is in conflict with NEPA's focus on environmental protection.[39] 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."[40] 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[41] and to avoid providing the opportunity for public comment on

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[29] Complaint, *Iowa v. Council on Env't Quality*, No. 1:24-cv-00089-DMT-CRH (D.N.D. May 21, 2024), ECF No. 1.

[30] *See* Order Regarding All Mots. for Summ. J. & Partial Summ. J. 23, *Iowa v. CEQ*, No. 1:24-cv-00089-DMT-CRH (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] *Iowa v. Council on Env't Quality*, Case No. 25-1641, Entry ID 5542514 (July 29, 2025).

[32] Exec. Order No. 14,154, 90 Fed. Reg. 8353 (Jan. 20, 2025).

[33] *Id.* at 8,355.

[34] *Id*.

[35] *Id.*

[36] Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 10,610 (Feb. 25, 2025), *as corrected by* Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 11,221 (Mar. 5, 2025).

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

[38] CEQ Guidance at 1.

[39] 42 U.S.C. § 4321(a).

[40] CEQ Guidance at 1.

[41] *Id.* at 5.

proposed NEPA regulations[42] unless either is required by law. The Guidance also suggested that the scope of effects that agencies are required to analyze should be narrowed.[43]

In early July 2025, several agencies, including the Agency, Department of the Interior, Department of Defense, and Department of Transportation, issued interim final rules modifying and/or rescinding their NEPA implementing regulations.[44] 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*),[45] claiming that the NEPA regulations had caused delay and uncertainty in permitting.[46]

C. The Agency's Rule and Non-Binding NEPA Procedures

As a result of the CEQ Repeal Rule, uniform and binding NEPA regulations were eliminated.[47] Without CEQ's regulations, agencies are under greater pressure to adopt agency-specific regulations that provide stability, transparency, and consistency incompliance with NEPA. Otherwise, NEPA review will return to the era of "inconsistent agency practices and interpretation" that the Carter Administration had sought to correct.[48]

In responding to this challenge, the Agency's Rule chooses to eliminate almost the entirety of the Agency's NEPA implementing regulations from the Code of Federal Regulations, leaving only the Agency's categorical exclusions, in a revised form, along with a provision for emergency circumstances in the Code.[49] Concomitant with this Rule, the Agency also issued limited guidance, entitled "[NEPA] Implementing Procedures" (NEPA Procedures), which are meant to substitute for the Agency's repealed implementing regulations. The NEPA Procedures

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[42] *Id.* at 7.

[43] *Id.* at 5.

[44] Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29,676 (Jul 3, 2025) (DOE); National Environmental Policy Act, 90 Fed. Reg. 29,632 (Jul. 3, 2025) (USDA); National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 29,498 (Jul. 3, 2025) (DOI); Procedures for Implementing NEPA; Removal, 90 Fed. Reg. 29,461 (Jul. 3, 2025) (Army Corps); Procedures for Implementing NEPA; Processing of Department of the Army Permits, 90 Fed. Reg. 29,465 (Jul. 3, 2025) (also Army Corps).

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

[46] Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. at 29,679–80; National Environmental Policy Act, 90 Fed. Reg. at 29,632, 29,634; National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 29,498–501; Procedures for Implementing NEPA; Processing of Department of the Army Permits, 90 Fed. Reg. at 29,465–66.

[47] *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. 10,610, at 18–46 (Mar. 27, 2025) [hereinafter 2025 Multistate Comments], https://www.regulations.gov/comment/CEQ-2025-0002-88344.

[48] *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, Regulations, 90 Fed Reg. 10,610, 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 29,503 ("Following the rescission of CEQ's regulations, DOI's current rules are left hanging in air, supplementing a NEPA regime that no longer exists.").

[49] 90 Fed. Reg. 29676 (July 3, 2025), noting proposal to eliminate 10 C.F.R. § 1021 *et seq*. and 10 C.F.R. § 205 (W).

state they do not "nor are they intended to, confer legal rights, impose legally binding requirements, or impose legal obligations upon DOE…"[50] Notably, the Agency did not undertake an APA notice-and-comment process for the NEPA Procedures; nor will they be codified in the Code of Federal Regulations.[51] As described below, the Rule and the NEPA Procedures have the potential to sanction non-compliance with NEPA by allowing the Agency to evade NEPA review even when undertaking activities that may harm the environment.

First, the NEPA Procedures fail to direct the Agency, consistent with the text of NEPA, to analyze all of the indirect and cumulative effects of a major federal action, although the requirement to consider these impacts is supported by NEPA case law. This is a significant change from the Agency's prior NEPA regulations, which incorporated CEQ's NEPA regulations requiring analysis of the direct, indirect, and cumulative impacts of a major federal action.[52] Conversely, the Agency's NEPA Procedures provide that the Agency must only consider "the action or project at hand."[53] And, they also state that the Agency must only evaluate "reasonably foreseeable environmental effects that have a reasonably close causal relationship to the proposed agency action and alternatives" and caution that the Agency must not consider "effects of projects over which it does not exercise regulatory authority."[54]

Second, although the Agency retains some of its categorical exclusions in Appendix B (categorical exclusions), it demotes 15 other actions from categorical exclusions to "administrative and routine actions that do not require NEPA review."[55] Before this change, the Agency was compelled to make an initial determination whether a proposed action was categorically excluded (a process which entailed some consideration of the proposed action's environmental effect) prior to relying on a categorical exclusion.[56] And, the Agency was permitted to utilize a categorical exclusion for these 15 activities only absent extraordinary circumstances.[57] The existence of such circumstances, including "scientific controversy"… "uncertain effects or effects involving unique or unknown risks"…and "unresolved conflicts concerning alternative uses of available resources" prevented use of a categorical exclusion.[58] Now, the Agency affirmatively determines that the listed activities are presumptively not considered "major" and not subject to any NEPA review.[59] Through this action, the Agency artificially narrows the scope of its NEPA review.

Third, the Agency also eliminated its requirement to complete a mitigation action plan.[60] A mitigation action plan previously followed the Agency's completion of an EIS and explained how the Agency would meet any mitigation commitments that were essential to render the impacts of a proposed action insignificant. While NEPA itself is procedural, previously the Agency's endorsed a commitment to eliminate impacts where possible, which it now eliminates.

Finally, the Agency's NEPA Procedures overtly limit public participation. The NEPA

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[50] *See* U.S. Department of Energy National Environmental Policy Act (NEPA) Implementing Procedures, June 30, 2025, at §1.0.
[51] *Id*.
[52] 10 C.F.R. § 1021.103
[53] *See* NEPA Procedures, § 2.1(b).
[54] NEPA Procedures § 3.1.
[55] NEPA Procedures at Appendix A; 90 Fed. Reg. 29,676.
[56] 10 C.F.R. § 1021.300(a).
[57] 10 C.F.R. § 1021.410(b)(2).
[58] *Id*.
[59] 90 Fed. Reg. 29,678.
[60] 10 C.F.R. § 1021.331.

Procedures anticipate soliciting public comment only during scoping,[61] but make clear the Agency will only solicit comments from federal agencies (and not the public) on an EIS, and will only seek comments from State, Tribal and local agencies as "appropriate."[62] Public comments are explicitly not required and the Agency will only seek public comments voluntarily if it "believes such comments will aid in discharging its duties under NEPA."[63] The NEPA Procedures also limit opportunities for state agencies to act as cooperating agencies, both by narrowing the scope of agencies to be consulted, and by weakening the process for participation. Finally, the NEPA Procedures do not require the Agency respond to comments from the public. By contrast, the Agency's prior NEPA regulations incorporated CEQ's NEPA regulations, emphasized early participation, through a robust scoping process, and included public participation throughout all stages of the process and responses to public comments.[64]

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

NEPA is an example of cooperative federalism, envisioning a strong role for states, territories, and 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.[65] NEPA's success has led to the enactment of similar statutes in many states. The Agency's rescission 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. The Rule Will Impair the Ability of States to Meaningfully Participate in the NEPA Process

NEPA contains provisions directly incorporating participation by States, territories and local governments into federal decision making.[66] 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

[61] NEPA Procedures § 7.1(c).
[62] *Id*. at §7.5.
[63] *Id.*
[64] 10 C.F.R. § 1021.301 (Agency review and public participation); § 1021.313 (public review of EIS), 40 C.F.R. §§ 1502.4, 1503.1 (2021).
[65] 42 U.S.C. § 4331(a).
[66] 42 U.S.C. §§ 4331(a), 4332(G).

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.[67, 68]

The Agency's Rule unlawfully evades notice and public comment under the APA. Indeed, the Agency not only rescinded its regulations without a full notice-and-comment process, but also issued new NEPA Procedures without public input. In doing so, the Agency loses out on valuable public input into the Agency's NEPA Procedures, including information about the interaction between the State environmental review and the Agency's NEPA review process. By rescinding its NEPA regulations and instead issuing internal procedures to be applied in environmental reviews, the Agency is attempting to circumvent the APA notice and comment process for its NEPA implementing procedures, contrary to the transparency and public participation in the APA and built into the text of NEPA itself.[69]

Furthermore, the Rule itself both impairs meaningful participation in the NEPA process and precludes the benefits of public participation in subsequent NEPA processes. The Agency's NEPA regulations served a critical function in guiding the Agency's action and in providing certainty regarding the standards and analysis required during the NEPA process. As discussed above, previously, the Agency adhered to a robust public comment process, which provided needed certainty to States, local governments, Tribes, the regulated community, and the public because the regulations could not be changed without notice and comment. In contrast, as noted above, the Agency now eviscerates public comment by providing it at the Agency's discretion for EISs.

Moreover, the Agency's actions rescinding regulations that were promulgated via an APA rulemaking,[70] and replacing them with "non-binding" guidance, opens the door to more frequent and less public revisions to these NEPA procedures. By not following an APA rulemaking process for the adoption of its NEPA Procedures, the Agency will avoid the rigors and scrutiny of the APA's requirements for public notice and comment. This could encourage frequent flip-flopping in the Agency's NEPA Procedures and create inconsistency regarding the public participation provided during environmental review. And, because the Agency's new procedures are non-binding, the Agency may not even follow the public participation provisions in the procedures. This approach leaves the States with less certainty as to the NEPA process that will apply to any one project. This could lead to time consuming and costly revisions to State specific environmental review procedures to account for current federal guidelines, which can be altered more frequently and without notice and comment.

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[67] For example, many of the States have commented on CEQ's NEPA rulemakings since 2018. *See* Comments of Attorneys General of Washington, *et al* on the Proposed Phase 2 Rule, 88 Fed. Reg. 49924 (July 31, 2023); Comments of Attorneys General of Washington, et al., on the Interim Final Rule, 86 Fed. Reg. 34154 (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 (Mar. 10, 2020); Comments of Attorneys General of California, et al., on Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 28,591 (Aug. 20, 2018).

[68] Many of the States also challenged the unlawful 2020 Rule and defended the 2024 Rule in the *Iowa* litigation. First Amended Complaint, *California v. CEQ*; Proposed Intervenor-Defendant States' Cross Mot. for Partial Sum. J., *Iowa v. CEQ*, No 1:24-cv-00089-DMT-CRH (D.N.D. Aug. 30, 2024), ECF No. 83.

[69] 42 U.S.C. § 4332(C)(v), (J).

[70] 44 Fed. Reg. 45,918;57 Fed. Reg. 15,122.

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,[71] Washington's State Environmental Policy Act,[72] New York's State Environmental Quality Review Act, [73] Connecticut's Environmental Policy Act,[74] New Jersey's Executive Order 215,[75] the Massachusetts Environmental Policy Act,[76] and the District of Columbia's Environmental Policy Act.[77] 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.[78] 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 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.

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[71] Cal. Pub. Res. Code §§ 21000–21189.57 (West 2023).

[72] Wash. Rev. Code § 43.21C (2012).

[73] N.Y. Envtl. Conserv. Law art. 8 (McKinney 2024); N.Y. Comp. Codes R. & Regs. tit. 6, § 617 (2025).

[74] Conn. Gen. Stat. § 22a-1 *(2024).*

[75] N.J. Exec. Order No. 215 (Sept. 11, 1989).

[76] Mass. Gen. Laws ch. 30, §§ 61-62I (2023).

[77] D.C. Code §§ 8-109.01–109.12 (2025); D.C. Mun. Regs. tit. 20, §§ 7200–7299 (2025).

[78] *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 6, § 617.15 (2024); Mass. Gen. Laws ch. 30, § 62G (2023).

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 and the Public

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,[79] housing[80] and job instability,[81] and the cost of health care and lives lost from environmental pollutants,[82] extreme storms, heatwaves, and wildfires.[83] 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.[84] Such climate-related impacts disproportionately affect vulnerable

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[79] 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/.

[80] Mariya Bezgrebelna et al., *Climate Change, Weather, Housing Precarity, and Homelessness: A Systematic Review of Reviews*, 18 Int J Environ Res Public Health 5812 (May 28, 2021); Taylor Gauthier & 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/.

[81] A. R. Crimmins et al., Fifth National Climate Assessment, at Ch. 19 (2023), 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).

[82] 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.

[83] 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 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/.

[84] Alique Berberian et al., Racial Disparities in Climate Change-Related Health Effects in the United States, 9 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://nca2023.globalchange.gov/chapter/15/.

populations facing existing environmental burdens,[85] exacerbating both environmental risk[86] and economic inequality.[87]

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 its new NEPA procedures do not compel it to consider potential climate change impacts from an agency action. In fact, the Agency's NEPA Procedures do not mention consideration of climate change impacts at all. 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 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,[88] such out-of-state emissions contribute to statewide greenhouse gas emissions. If the Rule and the Agency's NEPA Procedures are 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 Makes 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 direct, indirect, and cumulative 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 EO 14173, which rescinds President Clinton's Executive

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

[86] H. Orru et al., *The Interplay of Climate Change and Air Pollution on Health*, 4 Current Envtl. Health Report 504, 504 (2017).

[87] 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/.

[88] Chapter 106 of the Laws of 2019; N.Y. Env't Conserv. Law § 75-0107(1) (McKinney 2025).

Order on environmental justice,[89] and the Agency's new procedures, which lacks any discussion of, or requirement 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, 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.[90] 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 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 rescind its NEPA regulations and rely on non-binding procedures 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 thereby impairing 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."[91] 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 repeal; and (4) ignores serious reliance interests engendered by the regulations. Additionally, the Agency promulgated the Rule without observance of procedures 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.

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[89] Exec. Order No. 12,898, 59 Fed. Reg. 7795 (Feb. 11, 1994) (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations).

[90] *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. 92,125 (Nov. 21, 2024).

[91] 5 U.S.C. § 706(2)(A), (D).

A. The Replacement of NEPA Regulations with NEPA Procedures Is Problematic

As a preliminary matter, the Agency's switch to guidance rather than formal regulations is unlawful and violates the APA. As explained below, the Agency should have undertaken the notice-and-comment process under the APA when promulgating its new NEPA Procedures, because these procedures do not fall under the exception for "interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice."[92] But to the extent that the Agency views its NEPA Procedures as subject to this exception, the use of procedures rather than regulations will inevitably increase the rate of change and create uncertainty. Internal procedures, such as interpretive rules or general statements of policy, do not require the notice-and-comment process under the APA, allowing agencies to amend or revoke them more quickly. Courts have noted that interpretive rules can be altered without notice-and-comment rulemaking, provided they do not amend the underlying regulations.[93] By doing away with the need for notice-and-comment rulemaking, it stands to reason that more rapid changes will ensue, thereby introducing uncertainty for regulated parties which may face frequent and unpredictable changes in agency practices.

The shift from regulations to internal procedures also reduces opportunities for public participation. The APA's notice-and-comment requirements are designed to ensure public involvement in the rulemaking process, allowing stakeholders to provide input and agencies to educate themselves on the potential impacts of their rules. The purpose of notice-and-comment rulemaking is to reintroduce public participation and fairness to affected parties.[94] However, when agencies rely on internal procedures, such as interpretive rules or policy statements, they are exempt from notice-and-comment requirements under 5 U.S.C. § 553(b)(A). This exemption limits the ability of the public to influence agency decisions and deprives the public of a meaningful opportunity to comment on interrelated procedural changes.

The Agency's rescission of NEPA regulations and reliance on non-binding internal procedures also will make it harder to determine the level of analysis or standards that apply to specific projects. Legislative rules, which are subject to notice-and-comment rulemaking, create legally binding requirements and provide clarity for regulated parties. In contrast, interpretive rules and policy statements are non-binding and may lack the specificity needed to guide compliance. For instance, courts have distinguished between legislative rules, which have the force of law, and procedural rules, which do not alter the rights or interests of parties: "the APA does not require notice and comment for interpretive rules, general statements of policy, and rules of organization, procedure, or practice." [95]

The Agency's lack of binding authority on NEPA implementation will lead to confusion and litigation about the applicable standards, as the Agency will not have binding interpretations of NEPA's requirements in place, and the Agency may apply its procedures inconsistently.

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[92] 5 U.S.C. § 553(b)(A).

[93] *See Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 713 (D.C. Cir. 2015).

[94] *See Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) ("The essential purpose of according s 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies").

[95] *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014).

B. The Rule is Arbitrary and Capricious and Violates the APA

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."[96] The agency must make a "rational connection between the facts found and the choice made."[97] 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 view or the product of agency expertise."[98] "Agencies are free to change their existing policies," but they must "provide a reasoned explanation for the change."[99] 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 adopting its NEPA Procedures and rescinding its' NEPA regulations.

a. The Repeal of CEQ's Implementing Regulations Does Not Justify the Agency's Action Rescinding its NEPA Regulations

First, the Agency explains that it previously relied on CEQ's NEPA implementing regulations, but that CEQ repealed its regulations. 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 "that no longer exist and that could not exist again under existing Executive Orders" to survive.[100] The Agency argues that leaving its prior NEPA 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.[101]

This argument fails because it makes CEQ's 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.[102]

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[96] 5 U.S.C. § 706(2).

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

[98] *Motor Vehicle Manufacturers. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*).

[99] *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).

[100] 90 Fed. Reg. 29,676, 29,679.

[101] 90 Fed. Reg. 29,681.

[102] The comment letter is incorporated by reference.

The Agency's argument also misrepresents the degree to which the Agency's rescission of its regulations is demanded by E.O. 14154. Executive Order 14154 *did not* direct agencies to rescind their own regulations in favor of non-binding procedures that were not subject to public notice and comment. Instead, the Executive 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." [103] It further notes that "resulting *implementing regulations*" must meet certain additional requirements, like meeting deadlines established in the Fiscal Responsibility Act of 2023.[104]

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 (now vacated*) Iowa v. CEQ* decisions.[105] Executive Order 11991 addressed regulations by CEQ, not other agencies, so its revocation is irrelevant. As noted above, the *Iowa v. CEQ* decision has been vacated.[106] And though *Marin Audubon* called into question CEQ's ability to issue binding regulations into question, the courts *never* questioned the ability or propriety of other agencies promulgating regulations to implement NEPA. For example, in a part of *Marin Audubon Soc'y v. Fed. Aviation Admin*., 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.[107]

The Agency's explanation related to the CEQ Repeal Rule is also arbitrary and capricious because the Agency failed to consider the obvious alternative[108] of adopting CEQ's NEPA implementing regulations that the Agency 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 the regulations entirely, without providing a reasoned explanation, as the Agency has done.

Even short of recodifying CEQ's NEPA regulations as its own, the Agency had many additional and obvious alternatives to the Rule. 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. For example, CEQ recently encouraged agencies to use the final 2020 Rule as an initial framework for the development of revisions to their NEPA

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[103] Executive Order 14,154, 90 Fed. Reg. 8353 (Jan. 29, 2025).

[104] *Id.*

[105] 90 Fed. Reg. 10,610, 10,614 (Feb. 25, 2025).

[106] *Iowa v. Council on Env't Quality*, Case No. 25-1641, Entry ID 5542514 (July 29, 2025).

[107] 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*.

[108] *Yakima Valley Cablevision, Inc. v. F.C.C.*, 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).

processes.[109] CEQ further directed agencies to "apply their current NEPA implementing procedures with any adjustments needed to be consistent with the NEPA statute as revised by the FRA." Where agencies have historically utilized regulations to implement NEPA, the obvious approach, consistent with the public transparency standards the agency has adhered to in the past, was to update their regulations rather than delete the regulations in favor of non-binding internal procedures.

Finally, the Agency's argument that the Rescission Rule was necessary to promote certainty is wrong. Regulations that are binding promote certainty. But internal procedures that the Agency insists are "non-binding" and that it can change without public input do not promote certainty.

b. NEPA Is a Stable Area of Law and Does Not Require Fast-Evolving Procedures that Evade APA Notice and Comment

Second, the Agency argues that the flexibility afforded by using non-binding internal procedures to respond to new developments in a fast-evolving area of law outweighs the appeal of codifying regulations. This argument fails because the law is not "fast evolving," regulations can easily be updated to respond to new developments as they occur, and the Agency has not accounted for the disadvantages of non-binding internal procedures.

NEPA has been a remarkably stable area of law. For example, the Agency references the *Seven County* case[110] as a basis for the argument that it needed flexibility.[111] In *Seven County*, the 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. Nat. Res. Def. 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,[112] and there have been

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[109] CEQ, Memorandum for Heads of Federal Departments and Agencies: Implementation of the National Environmental Policy Act 4 (Feb. 19, 2025), *available at* https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf

[110] 145 S. Ct. 1497.

[111] 90 Fed. Reg. 29,679.

[112] *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*, 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. Oregon 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. Pub. 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); *Massachusetts v. Watt*, 716 F.2d 946, 948 (1st Cir. 1983), *abrogated on other grounds by Marsh*, 490 U.S. 360; *Brodsky v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 113, 120 n.3 (2d Cir. 2013); State of *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 Cir. 2013); *Rhodes v. Johnson*, 153 F.3d 785, 787 (7th Cir. 1998); *Goos v. I.C.C.*, 911 F.2d 1283 n.2 (8th Cir. 1990); *In re Operation of Missouri. 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). *Trs. for Ala. v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986); *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th

relatively few Supreme Court cases interpreting NEPA or requiring major changes to agencies' environmental reviews over the past 45 years.

CEQ's 1978 Regulations[113] 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.[114] The amendments to the CEQ regulations during the Biden Administration (the 2022 Rule and the 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.[115] The 2022 Rule, restored key provisions of the 1978 regulations, requiring analysis of all reasonably foreseeable effects of a major federal action.[116] The 2024 Rule restored most of the remaining provisions of the 1978 regulations, strengthened analysis of climate change and human health impacts, including environmental justice concerns, strengthened public participation, and implemented amendments to the NEPA statute enacted in the FRA.[117]

In support of its argument that the NEPA Procedures are required to respond to developments in a "fast evolving" area of law, the Agency again points to E.O. 14301. However, that executive order says only that "The Secretary shall, in consultation with the Chair of the Council on Environmental Quality, take action to reform the Department's rules governing compliance with the National Environmental Policy Act (NEPA) no later than June 30, 2025, consistent with the policies articulated in [executive order 14154] and with applicable law."[118] As discussed above, E.O. 14154 nowhere commanded federal agencies to implement NEPA through non-binding internal procedures. The direction to reform rules is more consistent with revising regulations than converting to non-binding guidance.

c. The Agency Has Not Provided a Reasoned Explanation for Forgoing Notice and Comment on Its NEPA Implementing Procedures.

Third, the Agency argues that when its regulations were developed the internet was in its infancy so codification ensured the regulations were more accessible to the public; however, now that the internet is more developed, procedures may be uploaded for easy viewing and the upside

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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).

[113] National Environmental Policy Act-Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55,978 (Nov. 29, 1978).

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

[115] *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).

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

[117] *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).

[118] 90 Fed. Reg. 29,677-78.

of codification is removed.[119] This argument defies common sense and the law. The Agency made clear in prior rulemakings that codification was not just about making regulations easy for the public to find. Public accessibility encompasses more than ability to view regulations, it also involves engagement. Indeed, in its latest rule revising its NEPA regulations, the Agency accepted written comments and held a public hearing.[120] The Agency "considered and evaluated the comments received during the public comment period" and "[m]any revisions suggested" through comments were incorporated into the final rule.[121] The Agency has not provided a reasoned explanation for reversing its position that NEPA implementing procedures should be subject to notice and comment. Any "unexplained inconsistency" between a rule and its repeal is "a reason for holding an interpretation to be an arbitrary and capricious change."[122]

d. The Fiscal Responsibility Act Does Not Justify Rescinding the Agency's NEPA Implementing Regulations and Issuing Procedures Instead

Fourth, the Agency argues that its new NEPA implementing internal procedures are needed to implement the statute as amended in 2023. The Fiscal Responsibility Act of 2023 (FRA)[123] added certain requirements, including those related to: page limits and deadlines for environmental assessments (EA) and environmental impact statements (EIS); the definition of "major federal action" and relevant exclusions; the procedure for determining the appropriate level of review; directions for categorical exclusions; the procedures governing project-sponsor-prepared EAs and EISs; and notice and solicitation of comments when issuing a notice of intent to prepare an environmental impact statement. This argument fails because the amendments introduced in the FRA are not a reason to rescind the NEPA regulations and issue non-binding internal procedures. Agencies implementing NEPA have previously responded to new legislation that impacts such implementation by updating their regulations.[124] The FRA amendments were in fact quickly and fully addressed in the CEQ's 2024 NEPA regulations, which were supported by a regulatory impact analysis and subject to extensive public input. As noted above, the appropriate approach for the Agency was to update its regulations to incorporate the FRA updates in compliance with APA notice and comment.

The FRA's revisions to NEPA therefore do not justify the Agency's change in position from utilizing NEPA implementing regulations to utilizing non-binding guidance.

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[119] Department of Energy Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29,676, 29,679 (July 3, 2025).

[120] Department of Energy National Environmental Policy Act Implementing Procedures, 55 Fed. Reg. 46,444-01 (Nov. 2, 1990).

[121] Department of Energy National Environmental Policy Act Implementing Procedures, 57 Fed. Reg. 15,122-01 (Apr. 24, 1992).

[122] *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. 967, 981 (2005).

[123] Pub. L. No. 118-5, 137 Stat. 10 (2023).

[124] *See, e.g.*, Department of Transportation Environmental Impact and Related Procedures, 72 Fed. Reg. 44,038-01 (Aug. 7, 2007) (making revisions prompted by enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which prescribe[d] additional requirements for environmental review and project decisionmaking that [we]re not appropriately reflected in the existing joint NEPA procedures.")

e. The *Seven County* Decision Does Not Justify the Agency's Rescission of Its NEPA Implementing Regulations.

Finally, the Agency notes that the changes in its NEPA regulations reflect the Supreme Court's decision in *Seven County*.[125] In removing 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."[126] 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.[127] 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."[128] Rescinding core regulations and replacing them with non-binding guidance effectively guts environmental review. This flies in the face of NEPA's text and purpose and so is unreasonable. The *Seven County* decision does not justify the Agency's changed position regarding its NEPA implementing regulations.

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.'"[129] 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.[130] Moreover, any concern that NEPA requirements have "grown out of all proportion" is not properly addressed by repealing NEPA regulations altogether. The Agency adopted the CEQ NEPA regulations in 1979131 and codified its NEPA implementing guidelines as regulations in 1992, over three

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[125] 145 S. Ct. 1497.

[126] "DOE is repealing 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.' Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. at 29,680 (quoting Seven Cnty., 145 S. Ct. at 1511).

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

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

[129] Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. at 29,679 (quoting *Seven Cnty.*, 145 S. Ct. at 1513–14).

[130] 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

[131] Compliance With the National Environmental Policy Act, 44 Fed. Reg. 45,918 (Aug. 6, 1979); see also Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. at 29,678.

decades ago.[132] Even if the Agency takes the position that environmental review has become burdensome, the Agency must still comply with the requirements of NEPA. Rescinding all regulations—rather than a more tailored approach of revising regulations—is a hyperbolic response, a blunt force tool that topples the very framework that the agency relies on to meet NEPA's statutory requirements. 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.[133] It did not justify the Agency's action rescinding its NEPA implementing regulations.

The Agency asserts that rescinding its NEPA regulations is consistent with the "broad discretion"[134] granted to it under *Seven County.*[135] This argument also has no merit. *Seven County* held that courts "must defer to the agency's reasonable choices regarding the scope and contents of [an] EIS," or environmental impact statement,[136] and that "a reviewing court must be at its 'most deferential' when agencies make "speculative assessments or predictive or scientific judgments, and decide[] what qualifies as significant or feasible."[137] The *Seven County* opinion thus allowed agencies more discretion to determine what specific, factual components should be part a particular environmental review. It did not grant agencies blanket authority to repeal their own NEPA implementing procedures. Furthermore, no such repeal is necessary for agencies to retain discretion in conducting environmental reviews. Agencies' NEPA implementing regulations do not limit discretion; rather, they make exercise of that discretion consistent and transparent to the public. In repealing its regulations, the Agency is not limiting the factual scope of an environmental review, because without implementing regulations interpreting NEPA the scope of review is uncertain. In fact, the Agency's Rule states that "DOE will look for opportunities to forego a 30-day consultation process [when revising categorical exclusions from NEPA] when, consistent with its statutory authority and because of the substantial deference courts give DOE under the *Seven County* decision[,] doing so is deemed a well-reasoned decision."[138] This measure has little to do with determining the "scope and contents" of an environmental review and instead will stifle public participation. *Seven County* called for informed discretion, not arbitrary decisionmaking. By rescinding its NEPA implementing regulations, the Agency is not enhancing its discretion—it is simply making the discretion less visible and more susceptible to abuse.

2. The Agency Failed to Provide a Reasoned Explanation for Eliminating Regulations Implementing Fundamental NEPA Requirements Required by the Statute

In addition to failing to provide a reasoned explanation for rescinding its NEPA implementing regulations in favor of procedures adopted without notice and comment, the Agency has failed to provide a reasoned explanation for its failure to include fundamental NEPA requirements in its new NEPA procedures. One of the core tenets set forth in *State Farm* is that

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[132] National Environmental Policy Act Implementing Procedures, 57 Fed. Reg. 15,122 (Apr. 24, 1992); see also Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. at 29,678.

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

[134] Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. at 29,694.

[135] *Id.*

[136] *Seven Cnty.*, 145 S. Ct. at 1514.

[137] *Id.* at 1512 (quoting *Baltimore Gas and Elec. Co.*, 462 U.S. 87, 103 (1983)).

[138] Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. at 29,699.

"an agency changing its course…is obligated to supply a reasoned analysis for the change."[139] "Reasoned decision making…necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent."[140] The Agency has not provided a reasoned explanation for omitting fundamental NEPA requirements, which had been included in the CEQ regulations and the Agency's NEPA implementing regulations, from its new procedures.

In outlining its basis for revising its NEPA implementing regulations, the Agency focuses entirely on its reasons for utilizing non-binding internal procedures instead of regulations, with no explanation or basis for the removal of certain requirements that no longer appear anywhere now that the regulations have been rescinded. The Agency does not even provide any list of the requirements that are being removed. Instead, it notes in passing that "where DOE has retained an aspect of its preexisting NEPA implementing procedures, it is because that aspect is compatible with these guiding principles; where DOE has revised or removed an aspect, it is because that aspect is not so compatible."[141]

In particular, the Agency failed to prove a reasoned explanation for the removal of certain prior provisions previously at 10 C.F.R. §§ 1021.100 to 1020.410, from its NEPA Procedures, including: 10 C.F.R. § 1021.101: The Agency's policy statement setting its intention that it is "DOE's policy to follow the letter and spirit of NEPA"; 10 C.F.R. § 1021.103: adopting CEQ's NEPA regulations; 10 C.F.R. § 1021.301(a)-(e): Agency review and public participation in the NEPA process; 10 C.F.R. § 1021.311 (a)-(f): notice of intent and scoping;10 C.F.R. § 1021.313: public review of environmental impact statements (at least 45 days for public comment and at least one public hearing); 10 C.F.R. § 1021.331: mitigation action plans; 10 C.F.R. § 1021.410: listing categorical exclusions and extraordinary circumstances which would prevent usage of categorical exclusions.

3. The Agency Fails to Provide a Reasoned Explanation for Eliminating its Requirement to Consider Certain Effects

The Agency failed to provide a reasoned explanation for eliminating core NEPA requirements through a redefinition of the term "effects." The prior CEQ regulations included in the definition of effects "direct, indirect, and cumulative effects,"[142] 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."[143] The Agency provides no explanation, much less a reasoned or rational one, for removing "indirect" and "cumulative" from the "effects" definition. The inclusion of "indirect" and "cumulative" impacts in the effects definition originated in

[139] 463 U.S. at 42 (finding agency acted arbitrarily and capriciously in revoking the requirement that new motor vehicles include passive restraints).

[140] *Dillmon v. Nat'l Transp. Safety Bd.,* 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citing *F.C.C. v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009)).

[141] 90 Fed. Reg. 29,676, 29,680.

[142] 40 C.F.R. § 1508.1(g), as amended in 2022 by 87 Fed. Reg. 23,453, 23, 469-70.

[143] 40 C.F.R. § 1508.1(g)(4), as amended in 2024 by 89 Fed. Reg. 35,442, 35,575.

CEQ's 1978 Regulations, which the [Agency] incorporated into its NEPA regulations.[144] The Agency's NEPA Procedures now state: "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 that would need to be initiated by a third party."[145] 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,[146] and to address impacts to future as well as present generations.[147] 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.[148] Therefore, the Agency must explain why it is abandoning 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.[149] Yet, the Agency has not provided any explanation, much less a reasoned or rational one, for removing references to environmental justice and climate change. Consistent with section 102(2)(C) of NEPA, consideration of environmental justice and climate change-related effects has long been part of NEPA analysis.[150] "The impact of GHG emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."[151] With respect to environmental justice, NEPA makes it the federal government's responsibility to "assure for *all* Americans safe,

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[144] 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. 20,550, 20,553 (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. 20549–62 (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.

[145] Department of Energy Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29676, 29703.

[146] 42 U.S.C. § 4332(C)(i)-(ii).

[147] §§ 4321, 4331.

[148] *See, e.g.*, *Kleppe*, 427 U.S. 390, 410 (1976) (interpreting NEPA to require consideration of "cumulative or synergistic environmental impact."); *Nat. Res. Def. Council, Inc. 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).

[149] 40 C.F.R. § 1508.1(g)(4), as amended in 2024 by 89 Fed. Reg. 35,442, 35,575.

[150] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1217 (9th Cir. 2008); *see also* 89 Fed. Reg. at 35452 n.58; *WildEarth Guardians v. United States 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).

[151] *Center for Biological Diversity*, 538 F.3d at 1217; *see also* 89 Fed. Reg. at 35,452 n.58; *WildEarth Guardians*, 870 F.3d 1222 (invalidating an EIS and Record of Decision for coal leases for failing to consider climate change).

healthful, productive, and esthetically and culturally pleasing surroundings,"[152] and states "that *each person* should enjoy a healthful environment."[153] 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,"[154] 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.[155]

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."[156] 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.[157]

4. 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 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.[158]

Consistent with the above principles, the Agency's prior NEPA regulations required federal agencies to request comments on draft environmental impact statements from federal and State agencies, Tribes, and the public.[159] In contrast, the Agency's new NEPA Procedures state: "DOE *may* publish a notice of intent to prepare an environmental assessment or other public notice to request scoping comments on the environmental assessment."[160] As part of scoping, the Agency is instructed to publish a concise notice of intent if an EIS is required and shall solicit public comment at that point in the environmental review process, but the NEPA Procedures do

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[152] 42 U.S.C. § 4331(b)(2) (emphasis added).

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

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

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

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

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

[158] *Kleppe*, 427 U.S. at 409 (quoting Conference Report on NEPA, 115 Cong. Rec. 40416 (1969) (internal quotations omitted).

[159] 40 C.F.R. § 1503.1(a), as amended in 2024 by 89 Fed. Reg. 35,442, 35,575.

[160] NEPA Procedures §6.1.

not require solicitation of public comments on draft EISs.[161] This elimination of public participation opportunities vitiates one of the core purposes of an environmental impact statement 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."[162] 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 hampered. The Agency provides no reasoned or rational explanation, or indeed, any explanation at all, for impairing 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, the Agency has provided no reasoned or rational explanation for how it has chosen to balance the aims of efficiency and public participation. Therefore, to comply with the APA, the Agency must explain why it is no longer requiring the solicitation of public comment on draft EISs.

5. 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."[163] 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. 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.[164] 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."[165] 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.[166] The CEQ regulations also required that an agency, "[b]ased on [an] [EA] make its determination whether to prepare an [EIS]."[167] 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

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[161] NEPA Procedures §7.1.

[162] *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).

[163] 42 U.S.C. § 4332.

[164] *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004).

[165] 42 U.S.C. § 4336(b).

[166] 40 C.F.R. § 1501.5(a).

[167] 40 C.F.R. § 1501.4(b) (1978); ("Based on the [EA] [the agency shall] make its determination whether to prepare an [EIS].") 40 C.F.R. § 1501.5(a) (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)).

of reasons why a project's impacts are insignificant.[168]

The Agency has not provided a reasoned explanation for the statement in the Agency's new NEPA Procedures that certain major federal actions not subject to a categorical exclusion are presumed to require an EA but not an EIS.[169] Such a presumption inverts the process dictated by the text and purpose of NEPA and the regulatory framework established by the Agency's NEPA regulations. The Agency is required under NEPA and regulations to study the potentially significant impacts of a proposed action, absent a categorical exclusion, and provide a defensible explanation for its decision not to prepare an EIS. There is no reasoned explanation for the Rule's change from the Agency's prior NEPA regulations incorporating the CEQ regulations, which contain no presumption in favor of an EA, to the Agency's statement that certain major federal actions not subject to a categorical exception are presumed to require an EA but not an EIS. The Agency's procedure is therefore arbitrary and capricious and contrary to NEPA.

Nor has the Agency 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. § 1501.3(d) (2024) (restoring context and intensity factors from 1978 Rule).)[170] The Agency's alteration of the definition of significance is therefore arbitrary and capricious.

6. 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."[171] 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.[172] In promulgating the Rule, the Agency entirely fails to consider the impact of rescinding 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 Agency 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 it, including CEQ's 1978 findings that inconsistent agency regulations make it

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[168] *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).

[169] *See* Dep't of Energy, NEPA Implementing Procedures, § 2.2(c)(2) ("If the proposed action is not likely to have a reasonably foreseeable significant effect on the quality of the human environment, or if the significance of the effects of the proposed action is unknown, DOE will prepare an environmental assessment.").

[170] 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. 29,632, 29,673-74 (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. 29,465, 29,473-74 (July 3, 2025).

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

[172] *See N.A.A.C.P., Jefferson Cnty. Branch v. Donovan*, 765 F.2d 1178, 1185 (D.C. Cir. 1985).

difficult for the public to participate in the environmental review process, and cause unnecessary duplication, delay, and paperwork.[173]

7. The Agency Failed to Consider the Impact of Rescinding the Agency's Regulations in Conjunction with the Repeal of the CEQ's Regulations

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 rescission of its NEPA regulations together with the repeal of the CEQ regulations. The Agency does not consider that the rescission of its 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 non-binding guidance documents. Nothing prevents the Agency from adopting CEQ's unifying regulations as its own and restoring the order that these regulations previously provided. The Agency's failure to even consider doing so exhibits a disregard for the history of the CEQ regulations.

As described 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.[174] CEQ's prior NEPA regulations fulfilled their intended purpose of guiding federal agencies in a "uniform, government-wide approach" to NEPA implementation.[175] 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 NEPA regulations and no explanation why rescinding the Agency's NEPA regulations and issuing 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 Agency's new NEPA Procedures list the actions that a project applicant must take, including initiating any request to the Agency 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 the Agency's request, and developing a consolidated administrative record within two weeks of the Agency's request.[176] In contrast, the Department of Defense's

[173] 43 Fed. Reg. 55,978.

[174] 1978 Final Rule at 55,978.

[175] *Id*.

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

(DOD) NEPA procedures do not set forth these expectations for project applicants.[177]

- The Agency 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,"[178] whereas the Department of Defense's NEPA procedures call for the DOD to "consider the potentially affected environment and degree of the effects of the action" without expressly requiring a description of the affected environment.[179]
- The Department of Transportation's (DOT) revised NEPA procedures outline a notification and consultation process and guidelines for preparing environmental documentation during emergencies.[180] The Agency's and the Department of Defense's NEPA procedures do not provide as much detail regarding emergencies that may interfere with the preparation of environmental documents.[181]

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

The Agency's new NEPA Procedures do not and cannot exist in the same unifying framework as existed under CEQ's NEPA regulations. Instead, the internal procedures may lead to inconsistent decisions by the agency. For example, the NEPA Procedures do not provide specific guidance as to when public comment is to be invited, and do not expressly provide for public comment on draft environmental impact statements or any requirement to respond to comments.

In rescinding its NEPA regulations and issuing new non-binding internal procedures without consideration of the important unifying role served by the Agency's regulations and CEQ's regulations, and the gaping chasm created by the rescission of those regulations, the Agency has "entirely failed to consider an important aspect of the problem" in violation of the APA.[182]

8. The Agency Failed to Evaluate the Uncertainty Rule Issuance of Non-Binding Procedures

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

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

[178] DOE Procedures at p. 14.

[179] DoD Procedures at p. 3.

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

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

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

As compared to regulations, non-binding NEPA Procedures are more uncertain because an agency may argue that it need not comply with these procedures and they can be changed at any time without notice and comment. The CEQ regulations had been in place for more than four decades and provided reliable guideposts for the evaluation of environmental effects under NEPA. The Agency previously referenced CEQ's regulations in its NEPA implementing regulations. When CEQ repealed its NEPA regulations, the Agency could have revised its regulations to incorporate the CEQ regulations as its own. Instead, the Agency is now engaged in experimentation—it adopted non-binding internal procedures that do not benefit even from the collective wisdom that could have been provided by public notice and comment. Moreover, the Agency may argue that its NEPA internal procedures can be ignored, revised, discarded and replaced, at any time. The Agency may be in a perpetual cycle of new internal procedures which States and project applicants cannot rely on. The non-binding nature of the Agency's internal procedures will likely raise concerns—similar to those regarding repeal of the CEQ regulations—that the rescission of Agency's NEPA regulations would lead to "tremendous uncertainty" which would "frustrate project backers that want clear, predictable and efficient procedures."[183]

Moreover, the Agency's prior NEPA regulations, incorporating CEQ's regulations, were far more detailed than the Agency's new NEPA Procedures. The 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.[184] In comparison, the Agency rescinded its regulations that provided detailed requirements for conducting NEPA reviews. Its NEPA Procedures now contain just a few paragraphs describing the contents of an EIS with the majority of the focus on brevity.[185] The Rule will lead to uncertainty in environmental reviews and project approvals. This will be detrimental to the stated goals of efficiency and certainty.

The Agency's issuance of non-binding NEPA procedures also may significantly increase litigation. Currently, most NEPA analyses do not result in litigation.[186] According to CEQ data, "the number of NEPA lawsuits filed annually has consistently been just above or below 100, with the exception of a period in the early- and mid-2000s."[187] "Given that the number of federal actions potentially subject to NEPA is roughly 100,000 or so annually, litigation rates are exceedingly low."[188] Even for EISs, which represent a small fraction of NEPA review processes, on average 20% are challenged and just 13% are actually litigated."[189] However, the Agency's new NEPA internal procedures 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

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[183] *See* Juan Carlos-Rodriguez, *Better Process Not Certain as White House Loses NEPA Regs*, Law 360 (Feb. 20, 2025).

[184] 40 C.F.R. § 1502.

[185] NEPA procedures at § 7.4.

[186] GAO-14-369, National Environmental Policy Act: Little Information Exists on NEPA Analyses [hereinafter "GAO Report"], at 19 (2014), https://www.gao.gov/products/gao-14-369.pdf.

[187] *Id*.

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

[189] *Id*.; *see also* GAO Report, *supra* note __, 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).

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 rescission of its NEPA regulations 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."[190] This position is thus arbitrary and capricious.

9. 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."[191] 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."[192] A "summary discussion" is insufficient where decades of reliance on an agency's previous position exists.[193] An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[194]

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. The Agency's NEPA regulations had been in place since 1979, amended in 1992, and incorporated CEQ's regulations. At the State level, the 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 rescission 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 rescission of the Agency's NEPA regulations will "necessitate systemic, significant changes" for all who interact with NEPA.[195]

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[190] *See* 90 Fed. Reg. 29,679; *State Farm*, 463 U.S. 29, 43.

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

[192] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[193] *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).

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

[195] *Id.*

Considering this reliance on longstanding CEQ's and the Agency's 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.[196] 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 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.[197]

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 rescinded by the Agency through an interim final rule. As stated above, the States have a strong reliance interest in the stability of the rules that govern environmental review of decision-making; this stability was undermined by the Agency's rescission of its NEPA regulations and issuance of non-binding procedures.

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 have significant reliance interests in their use of resources, costs, and development of environmental review processes in planning projects under NEPA; these types of reliance interests are recognized under the APA.[198] As explained above, the Agency's rescission of its NEPA regulations and issuance of non-binding internal procedures 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.

C. The Agency's Rule 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

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[196] 90 Fed. Reg. 29,677.

[197] *Dep't of Homeland Security*, 140 S. Ct. at 1914-15 (2020).

[198] *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).

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.[199] 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, which includes the repeal of a rule. 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.[200] This requirement applies equally to the repeal of a previously promulgated final rule, as the APA defines "rulemaking" to include the process of "formulating, amending, or repealing a rule."[201] Courts have consistently held that the repeal of a rule constitutes substantive rulemaking and is therefore subject to these procedural requirements.[202] Notice and comment prior to repealing 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.[203]

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 this exception and it does not apply here. The Agency failed to comply with APA notice-and-comment requirements and does not satisfy the criteria for falling under an exception.

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 to meet the deadlines in E.O. 14154" and "to expeditiously resolve agency confusion." But neither of these purported justifications constitutes "good cause."

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."[204] The APA makes clear that the exception "should be limited to emergency situations,"[205] or scenarios where notice and comment "could result in serious harm."[206] The good cause exception is "narrowly construed and only reluctantly countenanced."[207] Neither self-

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[199] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (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")).

[200] 5 U.S.C. § 553.

[201] 5 U.S.C. § 551(5).

[202] *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").

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

[204] 5 U.S.C. § 553(b)(B).

[205] *Consumer Energy Council of America*, 673 F.2d at 448.

[206] *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).

[207] *Natural Resources Defense Council*, 894 F.3d at 114.

imposed deadlines in E.O. 14154 nor purported agency confusion fit into these categories.

First, the CEQ Guidance specifically instructs agencies to rely on prior regulations, 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."[208] 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, even if the Agency misinterpreted CEQ's Guidance as requiring it to issue a final rule to rescind the Agency's NEPA regulations within 30 days, emergencies that are of the executive's own making do not qualify for the "good cause" exception. For example, in *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179 (2d 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."[209] 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."[210] Here, similarly, the mere existence of arbitrary deadlines set out in E.O. 14154 does not constitute good cause.

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 contrary, receiving and responding to the public's and the States' input on a rule that repeals all NEPA implementing regulations would reduce rather than exacerbate agency confusion. Moreover, the Agency nowhere explains how repealing its NEPA implementing 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."[211] 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

[208] Memorandum from Katherine R. Scarlett, Council on Environmental Quality, for Heads of Federal Departments and Agencies (Feb. 19, 2025) (on file with author).

[209] 355 F.3d at 205.

[210] *Id.*

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

what administrative officer thinks the statute or regulation means."[212] Interpretive rules do not "effect[] a substantive change in the regulations."[213] If a "rule effectively amends a prior legislative rule," it is a "legislative, not an interpretive rule" that requires notice and comment.[214]

The Rule substantively changes the Agency's existing, longstanding NEPA regulations by repealing them and removing them from the Code of Federal Regulations altogether, eliminating 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."[215] The Agency's 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 repealing the Agency's longstanding regulations for NEPA.

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."[216] 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."[217]

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 removes all iterations of the Agency's NEPA implementing 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's exceptions apply to the Rule, the Agency violated the APA by not complying with notice and comment requirements.

3. Allowing Only Thirty Days for Comment on the Rule is Insufficient

Even if the Agency intends to respond to comments before finalizing the Rule, 30 days for comment is insufficient. The Agency's Rule fundamentally changes how the agency must consider the environmental impacts of major federal actions. Thirty days is nowhere near enough time for the public to properly understand and meaningfully respond to the Rule.

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

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

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

[215] *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (quoting *Nat'l Family Plan. & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992)).

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

[217] *Id.* at 38.

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."[218]

"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 by & through Becerra v. United States Dep't of the Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019) (citing *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012)).

The Agency's previous rulemakings for revisions to NEPA regulations have 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.

D. The Agency's Action is Contrary to Law and Violates NEPA Itself

The Agency's promulgation of its new NEPA Procedures is contrary to law, and thus violates the APA,[219] because the procedures do not comply with the requirements of NEPA.

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

The Agency did not reasonably explain the absence of the terms "indirect" and "cumulative" from the "effects" definition in the Agency's new NEPA procedures. 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 elimination 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."[220] NEPA requires federal agencies to prepare a "detailed statement" on the impacts of certain actions prior to making decisions.[221] Section 102 of NEPA requires that agencies disclose "any adverse environmental effects which cannot be avoided" if the agency action goes forward.[222] And NEPA requires agencies to consider the larger context, directing them to "recognize the

[218] Exec. Order. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[219] 5 U.S.C. § 706(2)(A).

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

[221] 42 U.S.C. § 4332(2)(C).

[222] *Id.* § 4332(2)(C)(ii).

worldwide and long-range character of environmental problems."[223] 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."[224]

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.[225] 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.[226] 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."[227] 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. [228]

The Agency, however, is eliminating 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."[229] NEPA requires that an agency assess *all* of the project's reasonably foreseeable significant impacts,[230] 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.[231]

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[223] *Id*. § 4332(2)(F).

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

[225] 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.").

[226] 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.").

[227] *Id.* at 831.

[228] 145 S. Ct. at 1515.

[229] Department of Energy Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29,676, 29,703.

[230] 42 U.S.C. § 4332. Moreover, CEQ itself previously stated that "[p]erhaps that 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 of over time." NEPA Effectiveness Study, *supra* note 38, at 29. CEQ provides no reasoned explanation for its change in position from previously recognizing cumulative impacts as often the "most significant."

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

The elimination 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.[232]

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.[233] 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."[234] 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[,]"[235] just as courts even predating the 1978 regulations have recognized the public's role in making certain that federal decision-making is "premised on the fullest possible canvassing of environmental issues[.]"[236] 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."[237]

As previously discussed, the Rule and the NEPA Procedures eviscerate public participation rendering public notice and comment basically discretionary at the scoping stage, contain no requirement for public involvement during development of an EIS, and only require involvement from States and others when the Agency deems it appropriate. The effect of this provision 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

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[232] 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).

[233] *Baltimore Gas and Elec. Co.*, 462 U.S. at 97 (internal citation omitted).

[234] *Id*.

[235] 40 C.F.R. § 1500.1(b).

[236] *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502 (D.C. Cir. 1974).

[237] *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).

environmental review requirements, in violation of NEPA and, accordingly, the APA.

E. Conclusion

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

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