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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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March 10, 2020

The Honorable Mary B. Neumayr
Chairman
Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Dear Chairman Neumayr:

I write to express my grave concerns with the legality of the Council on Environmental Quality's (CEQ's) proposed rule to extensively revise existing regulations implementing the National Environmental Policy Act of 1969 (NEPA).¹ These proposed revisions would degrade our climate, air and water quality, hinder the analysis of multiple environmental issues, and undermine important health and environmental protections. In addition to these gravely troubling implications, numerous provisions of the proposed regulation are legally questionable, either because they are substantively incompatible with NEPA's statutory requirements or contrary to the clear legislative intent of Congress when NEPA was being considered and enacted. These defects are so pervasive and, when taken as a whole, constitute such an egregious deviation from the law that the only responsible course of action is to withdraw the proposed regulation in its entirety.

What follows is a non-exhaustive analysis of some of the proposal's most significant legal flaws based on a review of legislative sources and accompanying materials, including: the Special Report to the Committee on Interior and Insular Affairs by Lynton K. Caldwell; the Joint House-Senate Colloquium to Discuss a National Policy for the Environment: Hearing Before the Senate Committee on Interior and Insular Affairs and the House Committee On Science and Astronautics; the hearing on S. 1075 before the Senate Committee on Interior and Insular Affairs in the 91st Congress; the Senate Report on NEPA accompanying S. 1075, the bill that became NEPA; the Conference Report accompanying S. 1075; the NEPA statute (42 U.S.C. 4321 et seq.); President Richard Nixon's signing statement concerning NEPA; and regulations for implementing the procedural provisions of NEPA (40 CFR Parts 1500-1508).

When President Nixon signed NEPA into law on January 1, 1970, he ratified a broad policy and legal framework for the federal government, stating that "the 1970's absolutely must be the years when America pays its debt to the past by reclaiming the purity of its air, its waters, and our

¹ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (Docket number CEQ-2019-0003).

living environment. It is literally now or never.”² The Act itself states that its purpose is, “to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man”.³ This national environmental policy was, according to the Senate’s Special Report to the Committee on Interior and Insular Affairs by Lynton K. Caldwell, intended to confront “the rapid deterioration of the environmental base, natural and manmade, which is the foundation of American security, welfare, and prosperity.”⁴ The Act’s goals are to devise “means and procedures to preserve environmental values in the larger public interest, to coordinate Government activities that shape our future environment, and to provide guidance and incentives for State and local government and for private enterprise,” as well as to “create and maintain a balanced and healthful environment.”⁵

Yet, beginning with the first sentence of the revised regulations, CEQ proposed to change its characterization of NEPA from “our basic national charter for the protection of the environment,”⁶ to “a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision making process”.⁷ Moreover, CEQ recasts NEPA’s entire purpose and goals in narrower terms, while also deleting the existing regulations’ policy section, which among other goals, charges federal agencies to “use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.”⁸ CEQ’s proposed changes to the NEPA regulations ignore Congressional intent, the plain reading of the NEPA statute, President Nixon, and regulations that have been in effect for 50 years.

CEQ’s proposed revisions that are statutorily inadmissible or otherwise legally defective are far more numerous than those discussed in this letter. Those provisions cited herein represent only a portion of the most troublesome proposals. Given the very short timeframe that CEQ has allowed for comments, it is not feasible to exhaustively enumerate all the instances in which CEQ is proposing actions that contravene Congress’s intent or violate other provisions of law. Like the

² Richard Nixon, Statement About the National Environmental Policy Act of 1969 Online by Gerhard Peters and John T. Woolley, The American Presidency Project, available at: <https://www.presidency.ucsb.edu/node/239921>.

³ I note that the Act itself states that its purpose is, “to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” §2, 42 U.S.C. 4321 *et seq.* (1970). Without the Act that created it, CEQ would not exist to propose revisions to NEPA’s implementing regulations, so CEQ can surely stipulate that NEPA is more than a procedural statute.

⁴ National Environmental Policy: *Hearing on S. 1075, S. 237, and S. 1752 Before the S. Comm. On Interior and Insular Affairs*, 91st Cong. 31 (A Special Report to the Committee on Interior and Insular Affairs, U.S. Senate, by Lynton K. Caldwell, together with a statement by Senator Henry M. Jackson).

⁵ S. Rep. No. 91-296, at 5 (1969).

⁶ § 2, 42 U.S.C. 4321 *et seq.* (1970). *See also* Footnote 3 above.

⁷ 40 C.F.R. § 1500.2 (f)

⁸ *Id.*

time restrictions that CEQ proposes to place on the public's participation in the NEPA process, the fact that CEQ has provided only 60 days to comment on this proposed regulation is severely irresponsible given the magnitude of its implications.

The numerous defects in the proposed regulation and the restricted processes that CEQ has instituted for the public to review and comment on its proposal amounts to a fundamentally flawed proposal that cannot be legally sustained. I encourage you to abandon this effort.

Sincerely,



Thomas R. Carper
Ranking Member

ENCLOSURE: Appendix

Appendix

I. CEQ has contravened Congress's clear legislative intent to require federal agencies to consider indirect effects and cumulative impacts when assessing the environmental impacts of federal actions

The inclusion of cumulative environmental impacts in NEPA analysis allows for a holistic understanding of how a project's effects will interact with or add to the collective impacts of other projects. While the environmental impact of one project may seem minor on its own, several projects may cause significant harm to communities and the environment when viewed altogether. An analysis of congressional intent, as documented in the Special Report to the Committee on Interior and Insular Affairs by Lynton K. Caldwell, the Senate Committee on Interior and Insular Affairs Report accompanying S. 1075, the Council on Environmental Quality's (CEQ's) own guidelines implementing congressional direction a mere four months after the enactment of the NEPA statute, and Supreme Court jurisprudence, including *Kleppe v. Sierra Club* (1976), shows that CEQ's removal of cumulative impacts and indirect effects is in direct contravention of the law.⁹

In its proposed regulations, CEQ has amended the definition of "effects" and deleted references to *cumulative impacts*, in order to reduce the caliber and scope of analysis that agencies are required to perform when preparing environmental impact statements on major federal actions. Agencies are currently required to consider both "direct effects" and "indirect effects," which the existing regulations define as:

*"caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."*¹⁰

Under the proposed regulations agencies would be required only to consider effects:

*"that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives."*¹¹

Further, CEQ has proposed to remove the existing requirement that agencies consider *cumulative impacts* in assessing federal actions. Under the existing regulations, cumulative impacts are defined as:

*"result[ing] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."*¹²

⁹ See 427 U.S. 390 (1976). ("[W]hen several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action... Cumulative environmental impacts are, indeed, what require a comprehensive impact statement.")

¹⁰ See 40 C.F.R. § 1508.8

¹¹ See 40 C.F.R. § 1508.8 (g)(a), (b)

¹² See 40 C.F.R. § 1508.7

In place of a required *cumulative impacts* analysis, CEQ's proposed revisions states:

"A 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy casual chain...Analysis of cumulative effects is not required."¹³

The legislative record that demonstrates that Congress intended to ensure that NEPA analyses include a consideration of cumulative impacts and indirect effects is unambiguous, as described below.

July 1968 Joint House-Senate Colloquium to Discuss a National Policy for the Environment¹⁴

The view that cumulative damage to the environment must be addressed as part of a national environmental policy was informed by several witnesses who testified before a joint House-Senate colloquium in July 1968, including U.S. Secretary of Health, Education and Welfare Wilbur J. Cohen. In his testimony, Secretary Cohen stated:

Environmental changes of the kind occasioned by air and water pollution, unwise use of pesticides, declining water supplies, and urban sprawl may develop unobtrusively but can be devastating in their end result. These changes are insidious. They occur gradually and thus fail to arouse public awareness. They have irreversible harmful effects on man and the environment before they are detected and understood. Environmental quality continues to decline, while Government, lacking or perhaps failing to recognize a popular consensus for comprehensive control, is unable to stem the tide....

Our economy grows, our urbanization increases, and our population continues to expand. Yet our actions are not adequate to enable people to live in this changing Nation in full enjoyment of physical and mental health, well-being, and comfort. Let me cite a few specific examples of the problem:

Despite widespread efforts to control the use of pesticides, amount of these poisonous chemicals accumulating in the environment is steadily increasing. We still do not know all we should about the possible human and other effects of exposure to small amounts of pesticides over a long period of time....

There is serious concern about the health hazards of air pollution, and yet this problem is steadily growing worse. Unless we accelerate our effort to bring it under control, pollution will inevitably reach critical proportions in many large urban areas within the next several years.

Unfortunately, these separate insults to the system do not impinge on one individual one at a time; they occur all at once. While the individual may be able to adapt to slightly polluted water, or air, or food, he probably cannot adapt to the

¹³ See proposed regulation at 40 C.F.R. § 1508.1 (g)(2)

¹⁴ Hearing before the Committee on Interior and Insular Affairs, United States Senate, and the Committee on Science and Astronautics, U.S. House of Representatives, Ninetieth Congress, second session, July 17, 1968.

collective onset of all of them. And, if he is subjected at the same time to slum housing, crowding, noise and other urban environment stresses, he will find life altogether unbearable.

In addition to the collective effects, we have to understand the cumulative effects of environmental hazards. Threats to health can follow from prolonged, repeated exposure to concentrations of environmental pollutants so small that they do not make an individual sick enough to send him to the doctor.

In sum, we are concerned with problems that stem from all the activities of our society, but concentrate in one spot: the well-being of the individual.^{15,16}

April 16, 1969 Senate Committee on Interior and Insular Affairs, Hearing on S. 1075

The clear intent that NEPA requires the consideration of cumulative and indirect environmental effects is echoed in the hearing record of April 16, 1969, when the Committee on Interior and Insular Affairs met to consider S. 1075, the bill that eventually was enacted as NEPA. With respect to *cumulative impacts*, it was at this hearing that Senator Henry Jackson (D-WA), Committee Chairman and the bill's lead sponsor, entered into the record a special report from an arrangement by Senator Jackson with outside consultant Lynton Caldwell, to the Committee "On the Need for a National Policy for the Environment: An Explanation of its Purpose and Content; An Explanation of Means to Make It Effective; And a Listing of Questions Implicit in Its Establishment," ("Special Report"), along with a detailed statement by Senator Jackson endorsing the Special Report and its explanation of the bill's purpose and goals.¹⁷ Of particular interest is a passage in the Special Report that discusses how S. 1075 addresses a need for a national environmental policy that accurately recognizes the costs of environmental damage, particularly damage that accumulates from disparate sources over the long term. It reads:

¹⁵ Joint House-Senate Colloquium to Discuss a National Policy for the Environment: Hearing Before the S. Comm. on Interior and Insular Affairs and the H. Comm. On Science and Astronautics, 90th Cong. 34-36 (1968) (Statement of Wilbur J. Cohen, Secretary of Health, Education and Welfare).

¹⁶ Joint House-Senate Colloquium to Discuss a National Policy for the Environment: Hearing Before the S. Comm. on Interior and Insular Affairs and the H. Comm. On Science and Astronautics at 140 (1968). At the same joint House-Senate colloquium where Secretary Cohen testified, Congressman Emilio Daddario entered into the record a letter from Blair T. Bower, Acting Director, Quality of the Environment Program, Resources for the Future, Inc. In his letter, Mr. Bower advises Congress to consider the "assimilative capacity of the environment" to accommodate cumulative impacts that he refers to as "residual discharges". Mr. Bower specifically notes one cumulative impact that has grown to become the most intractable problem that our world now faces, 50 years later:

Assimilative capacity of the environment

There is a finite capacity of air, water, and land to absorb the residuals discharged into them without significant impacts on quality. When this capacity is exceeded, quality deteriorates.

It is important to note that there are both short-run and long run aspects of assimilative capacity... The long-run aspects assimilative capacity are much less well known. Discharge of carbon dioxide into the atmosphere can be considered harmless in the short-run, because natural vegetation and oceans provide major "sinks" for its assimilation. Yet there is some evidence that a net accumulation of CO₂ is occurring in the atmosphere. If this accumulation were to continue, some experts have suggested that it may give rise to significant and probably adverse weather changes by the end of this, or early in the next, century.

¹⁷ National Environmental Policy: Hearing on S. 1075, S. 237, and S. 1752 Before the S. Comm. On Interior and Insular Affairs, 91st Cong. (A Special Report to the Committee on Interior and Insular Affairs, U.S. Senate, by Lynton K. Caldwell, together with a statement by Senator Henry M. Jackson).

The nation long ago would probably have adopted a coherent policy for the management of its environment, had its people recognized that the costs of overstressing or misusing the environment were unavoidable. This recognition was arrived at belatedly for several reasons: *First*, environmental deterioration in the past tended to be gradual and accumulative, so that it was not apparent that any cost or penalty was being exacted; *second* it seemed possible to defer or to evade payment either in money or in obvious loss of environmental assets; *third*, the right to pollute or degrade the environment (unless specific illegal damage could be proved) was widely accepted. Exaggerated doctrines of private ownership and an uncritical popular tolerance of the side effects of economic production encouraged the belief that costs projected onto the environment were costs that no one had to pay.

This optimistic philosophy proved false as many regions of the Nation began to run out of unpolluted air and water, as the devastation of strip mining impoverished mining communities, as the refuse of the machine age piled up in man-made mountains of junk, as the demand for electricity and telecommunications arose to festoon the nation with skeins of cables strung from forests of poles, and as the tools of technology increasingly produced results incompatible with human well-being. Under the traditional "ground rules" of production, neither enterprise nor citizen was called upon to find alternatives or to pay for measures that would have prevented or lessened ensuing loss of environmental quality. Payment continued to be exacted in the loss of amenities the public once enjoyed, and in the costs required to restore resources to usefulness and to support the public administration that environmental deterioration entailed. When the public began to demand legislation to control pollution and to prevent environmental decay, the reaction of those involved in environmental degrading activities was often one of counter-indignation. Businessmen, municipalities, corporations and property owners were confronted with costs in the form of taxes or the abatement of nuisances that they had never before been called upon to pay. They were now about to be penalized for behavior which America had long accepted as normal.

What is now becoming evident is that there is no way in the long run of avoiding the costs of using the environment. The policy question is not whether payment shall be made; it is when payment shall be made, in what form, and how the costs are to be distributed. Hard necessity had made evident the need for payment to obtain air and water of quality adequate to meet at least minimum standards of health and comfort....

It is not only industrial managers and public officials who need to recognize the unavoidable costs of using the environment. It is, above all, the individual citizen because he must ultimately pay in money or in amenities for the way in which the environment is used. If, for example, he likes to eat lobster, shrimp or shellfish, the citizen must reconcile himself to either paying dearly for these products or indeed finding them unobtainable at any price, unless we find ways to preserve America's coastline and coastal waters. The individual citizen may also have to

pay in the cost of illness and in general physical and psychological discomfort. And these costs, of course, are not incurred voluntarily.

It is in the interest of his welfare and his effectiveness as a citizen American needs to understand that environmental quality can no longer be had “for free.” Recognition of the inevitability of costs for using the environment and of the forms which these costs may take is essential to knowledgeable and responsible citizenship on environmental policy issues.

In summary, the American people have reached a point in history where they can no longer pass on to nature the costs of using the environment. The deferral of charges by letting them accumulate in slow attrition of the environment, or by debiting them as loss of amenities will soon be no longer possible. It is no longer feasible for the American people to permit it. The environmental impact of our powerful, new, and imperfectly understood technology has often been unbelievably swift and pervasive. Specific effects may prove to be irreversible. To enjoy the benefits of technological advance, the price preventing accidents and errors must be paid on time. From now on “pay-as-you-go” will increasingly be required for insuring against the risks of manipulating nature. This means merely that provision must be made for the protection, restoration, replacement, or rehabilitation of elements in the environment before, or at the time, these resources are used. Later may be too late.¹⁸

It is especially noteworthy that this section of the Special Report cites at its very front the past prevailing conditions of “gradual and accumulative” environmental deterioration as a reason to establish a coherent policy for the nation’s environment. The Special Report also discusses “[r]ecognition of the inevitability of costs for using the environment and of the forms which these costs may take,” and how the obsolete practice of “letting [charges] accumulate in slow attrition of the environment, or by debiting them as loss of amenities will soon be no longer possible.” Beyond using phrases such as “gradual and accumulative”, “inevitability of costs” and “accumulate in slow attrition of the environment”, the Special Report makes clear that by 1969, the advance of technology had accelerated the costs of environmental damage, that the national environmental policy envisioned by the bill recognized that those costs could not be avoided, and policy models “debiting [costs] as loss of amenities” were no longer tenable. To remedy this long term environmental decay, which accumulates over time, the Special Report argued that policy must mandate that government address environment protection needs “before, or at the time” major actions were taken.

CEQ’s proposed revisions would return the United States to a pre-1969 regulatory scheme where gradual and accumulative environmental damage could occur with no clear recognition of the costs to the nation or individual citizens. This runs against what the legislative history tells us was Congress’s intent. The Special Report entered into the Senate hearing record makes clear the need for legislation arose because the ad-hoc method of accounting for environmental damage was no longer “adequate to meet... minimum standards of health and comfort.”¹⁹

¹⁸ Id. at p. 100.

¹⁹ Id. at 99.

July 9, 1969 Senate Committee on Interior and Insular Affairs Report on S. 1075

On July 9, 1969, the Senate Committee on Interior and Insular Affairs published its report (“Senate Report”) to accompany S. 1075, the bill that was reported out of the committee unanimously on June 18 and would later be adopted by the full Congress as Title I of NEPA. With respect to *indirect effects*, the Senate Report explains that Section 102, subsections (a)-(f) “authorize and direct... Federal agencies... to develop procedures to insure that presently unquantified environmental values and amenities are given appropriate consideration.”²⁰ These procedures to consider “presently unquantified environmental values and amenities” are plainly the *indirect effects* analysis that CEQ now seeks to delete from NEPA’s implementing regulations. It is also plain that Congress did not intend for agencies to focus on the most narrow possible consequences of their proposed actions that fall within the *close causal relationship* standard that CEQ proposes.

This view is affirmed in the Senate Report, which notes, “As the evidence of environmental decay and degradation mounts, it becomes clearer each day that the Nation cannot continue to pay the price of past abuse. The costs of air and water pollution, poor land-use policies and urban decay can no longer be deferred for payment by future generations. These problems must be faced while they are still on manageable proportions and while alternative solutions are still available.”²¹ Accordingly, the Senate Report explains that “S. 1075 is designed to deal with many of the basic causes of these increasingly troublesome and often critical problems of domestic policy... S. 1075 is also designed to deal with the *long-range implications* of many of the critical environmental problems which have caused great public concern in recent years (emphasis added).”²²

II. CEQ’s proposed delegation of responsibility for the preparation of environmental impact statements under NEPA to industry is fundamentally incompatible with the act’s statutory language.

NEPA requires the Federal Government to prepare environmental impact statements for major Federal actions in accordance with 42 USC § 4332 (2)(C), which states that:

(2) The agencies of the Federal Government shall... (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official.

The statute clearly assigns the Federal Government with the responsibility to assess the environmental impacts of major actions, with specific responsibility assigned to the “responsible official.” The language of the Senate Report further specifies that “each agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs, shall make a determination as to whether the proposal would have a significant effect upon the quality of the human environment.”²³

²⁰ Senate Committee on Interior and Insular Affairs Report on S. 1075 at p.2 (July 1969).

²¹ Id. at p. 5.

²² Id. at p. 8.

²³ Id. at p. 20.

The legislative history reveals that Congress assigned this responsibility to Federal agencies. The Senate Report states that:

[T]he continuing policy and responsibility of the Federal Government is declared to be that, consistent with other essential considerations of national policy, the activities and resources of the Federal Government shall be improved and coordinated to the end that the Nation may attain certain broad national goals in the management of the environment. The broad national goals are as follows:

(1) Fulfill the responsibilities of each generation as trustee of the environment for future generations. It is recognized in this statement that each generation has a responsibility to improve, enhance, and maintain the quality of the environment to the greatest extent possible for the continued benefit of the future generations.²⁴

Congress entrusted this responsibility to the Federal Government, because only the federal government has the authority, resources, and interest to successfully fulfill it. CEQ's proposed revision of Sec. 1506.5 of the implementing regulations allows the Government to abdicate the responsibilities that Congress assigned it.²⁵ By allowing a private applicant or a contractor infected by a conflict of interest to prepare an environmental impact statement, pursuant to NEPA section 102(2)(C), CEQ's proposal would unlawfully grant a central role in the enterprise of preserving the environment for the benefit of future generations to industry or other parties.

While NEPA's existing implementing regulations do allow contractors to prepare environmental impact statements, they do so under very particular circumstances: they must be chosen solely by the lead federal agency or agencies, or where appropriate by a cooperating agency to avoid any conflict of interest.²⁶ Further, the existing regulations provide that "Contractors shall execute a disclosure agreement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project."²⁷ This existing regulatory provision is permissible under NEPA, because it is not a delegation of authority. The contractor is chosen by the government and works on behalf of the government, under the supervision of the responsible federal official. The contractor's sole responsibility and interest is to perform the work that the agency assigns it, under guidance and with the participation of the responsible federal official who selected the contractor. Under this scheme, the contractor is able to inhabit the same interests as government, free of any conflict. The responsible agency official can be confident in the accuracy and comprehensiveness of the information that the contractor presents and able to effectively evaluate the sufficiency of the environmental impact statement.

CEQ's proposed revision would create a radically changed regulatory landscape that is inimical to NEPA's goals and incompatible with Congress's intent. The proposed revision would allow a private applicant to prepare environmental impact statements. This is impermissible under NEPA, because there is no scenario under which a private applicant can effectively fulfill the responsibility that NEPA assigns to the government. A private applicant's special interests positions the private applicant in a distinct and irreconcilably different role from the government.

²⁴ Id. at p. 18.

²⁵ 40 C.F.R. § 1506.5

²⁶ 40 C.F.R. § 1506.5 (c)

²⁷ Id.

No amount of supervision from the responsible official can cure this defect. The government and the private applicant do not and cannot hold the same interests, therefore a private applicant cannot be entrusted to work effectively with the responsible official to “utilize to the fullest extent possible a systematic, interdisciplinary, team approach. Such planning and decisions should draw upon the broadest possible range of social and natural scientific knowledge and design arts,” as the statute requires.²⁸

Similarly, relying upon contractors who do not execute a disclosure agreement and certify that they are free of conflicts of interest to conduct environmental impact statements suffers from the same defective arrangement. Allowing applicants and conflicted contractors to prepare environmental impact statements would encourage the type of scenario that NEPA was drafted to correct. As the Senate Report explains, “Many of the environmental controversies of recent years have, in large measure, been caused by the failure to consider all relevant points of view in the planning and conduct of Federal activities. Using an interdisciplinary approach that brought together the skills of the landscape architect, the engineer, the ecologist, the economist, and other relevant disciplines would result in better planning and better projects. Too often planning is the exclusive province of the engineer and the cost analyst.”²⁹

When an environmental impact statement is required, clear congressional authority would be required to allow for a re-assignment of the Federal government responsibilities, and Congress has not provided such authority in NEPA.³⁰

III. The proposal unlawfully restricts the participation of the public in the implementation of NEPA, which subverts the act’s goals and purpose

NEPA’s Section 101 (c) states, “The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”

The Senate Report elaborates:

[Section 101 (c)] asserts congressional recognition of each person’s fundamental and inalienable right to a healthful environment. It is apparent that the guarantee of the continued enjoyment of any individual right is dependent upon individual health and safety. It is further apparent that deprivation of an individual’s right to a healthful environment will result in the degradation or elimination of all his rights.

The subsection also asserts congressional recognition of each individual’s responsibility to contribute to the preservation and enhancement of the environment. The enjoyment of individual rights requires respect and protection of the rights of others. The cumulative influence of each individual upon the

²⁸ Sec. 102 [42 USC § 4332] (2)(a)

²⁹ Senate Committee on Interior and Insular Affairs Report on S. 1075 at p.20 (July 1969).

³⁰ See e.g., 23 U.S.C. 327 (Surface transportation project delivery program). The key distinctions include express Congressional authorization for assignment to States, and assignment to public entities rather than private applicants.

environment is of such great significance that every effort must depend upon the strong support and participation of the public.³¹

In spite of Congress's clear admonition to support public participation in NEPA's regulatory process, CEQ has proposed revisions that would hinder the public's ability to weigh in on federal actions that may impact the quality of the human environment. These include proposed revisions that impose restrictions on submitting information and comments under the NEPA process.

Proposed Sec. 1500.3(b)(3) and proposed Sec. 1503.3 establish an inflexible restriction on submitting objections to the submitted alternatives, information, and analysis section (Sec. 1502.17) to within 30 days of the notice of availability of the final environmental impact statements. Proposed Sec. 1500.3 (b)(3) also provides a mechanism under which a comment not considered "as specific as possible" under the proposed revision to Sec. 1503.3 can be deemed unexhausted and forfeited. Put simply, if a comment is not raised within either 30 days or with sufficient specificity deemed necessary by CEQ, the public would lose its opportunity to comment.

While the existing implementing regulations do encourage agencies to set time limits on NEPA processes, the imposition of rigid time restrictions and technical hurdles on public participation within the implementing regulations is arbitrary, unhelpful, and restrictive in a manner that subverts Congress's intent. In many cases, the public evaluation of environmental impact statements, whether conducted by technical experts or regular citizens concerned by how a proposed federal action will affect their lives, is a time intensive, technically challenging undertaking. By proposing that agencies must restrict the time in which comments to final environmental impact statements can be accepted to 30 days, CEQ encourages a process that potentially prevents the consideration of the most relevant available scientific analysis and prevents individuals from meaningfully submitting their views on projects that could profoundly affect their lives.

Other restrictions to public participation in the proposed revisions include:

- The proposed deletion of Sec. 1504.3(e), which allows the public to submit their views as part of CEQ's interagency dispute resolution process;
- The proposed revision to Sec. 1506.6(c), which requires agencies to make draft environmental impact statements available to the public at least 15 days before any public hearing on the draft environmental impact statement; and
- A revision to Sec. 1506.6(f), which removes the requirement that agencies must make environmental impact statements, comments received, and underlying documents available to the public pursuant to provisions of the Freedom of Information Act "without regard to the exclusion for interagency memoranda."

Taken together these proposed revisions thwart "each individual's responsibility to contribute to the preservation and enhancement of the environment" as recognized by Congress under NEPA, and therefore violate "each person's fundamental and inalienable right to a healthful

³¹ Senate Report, p. 19 (In the Senate Report, this language references "Section 101(b)", which would later become NEPA's Section 101(c)).

environment,” since, as the Senate Report reminds us, “The enjoyment of individual rights requires respect and protection of the rights of others.”³²

IV. CEO’s proposal illegally invites Federal agencies to opt out of NEPA

Sections 1501.1(a)(4) and 1507.3(c)(5) of the proposed rule directs agencies to “determine...whether the proposed action for which compliance with NEPA would be inconsistent with Congressional intent due to the requirements of another statute” as a threshold test to determine whether a federal action is subject to NEPA.

There is no legal foundation for this proposed revision. Congress has not granted federal agencies with the authority to determine whether applying NEPA to major government actions is inconsistent with Congressional intent due to the requirements of another statute, and to use that determination as a basis for opting out of NEPA. If an individual believes that a contradiction exists within federal law due to perceived Congressional intent, they may ask Congress to rectify the perceived contradiction, or if injury has occurred they may petition the courts to review the law. There is no role for the Executive Branch in this process. NEPA applies to all major federal actions, except where explicitly provided by law. Any exceptions beyond those explicitly articulated in law constitutes a “repeal by implication,” which by its nature invokes a legislative function.

Secondly, proposed sections 1501.1(a)(5), 1507.3(b)(6) and 1506.9 (with respect to proposed regulations) directs agencies to “determine...whether the proposed action is an action for which the agency has determined that other analyses or processes under other statutes serve the function of agency compliance with NEPA,” an invitation that is also included in sections 1501.1(a)(5) and 1507.3(b)(6) (with respect to proposed actions). There is no legal foundation for this provision either. Congress has not granted agencies across the federal government the option to substitute other processes to fulfill the requirements of NEPA. Accordingly, such proposed revisions are unlawful.

³² Id.