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

March 27, 2025

VIA REGULATIONS.GOV
Jomar Maldonado Vazquez
Director for NEPA
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (February 25, 2025)
Docket ID No. CEQ-2025-0002

Dear Director Maldonado Vazquez:

The Attorneys General of the States of Washington, California, New York, Arizona, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Vermont, and Wisconsin; the District of Columbia; Harris County, Texas; and the Commonwealth of Massachusetts (collectively, States) respectfully submit these comments on the Council on Environmental Quality's (CEQ) Interim Final Rule (Repeal Rule) repealing CEQ's regulations implementing the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347.[1]

The National Environmental Policy Act (NEPA) and CEQ's NEPA implementing regulations have 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

[1] The interim final rule is titled "Removal of National Environmental Policy Act Implementing Regulations," 90 Fed. Reg. 10,610 (Feb. 25, 2025), Docket ID No. CEQ-2025-0002.

[2] U.S. Gov't Accountability Off., GAO-14-369, National Environmental Policy Act: Little Information Exists On Nepa Analyses, 16 (2014), https://www.gao.gov/products/gao-14-370 (last visited Mar. 20, 2025) ("[a]ccording to studies and agency officials, some of the qualitative benefits of NEPA include its role as a tool for encouraging transparency and public participation and in discovering and addressing the potential effects of a proposal in the early design stages to avoid problems that could end up taking more time and being more costly in the long run."); Implementation of Procedural Provisions: Final Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978) (hereinafter the 1978 Final Rule).

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] CEQ promulgated regulations in 1978 to advance this purpose.[5] CEQ's Repeal Rule will destabilize decades of NEPA practice and undermine the implementation of NEPA policies directed by Congress.

States have a strong interest in robust NEPA compliance and significant opportunities for public participation required under CEQ's NEPA regulations in order to protect their residents, property, and natural resources. The States are injured when our residents suffer from 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]

CEQ's Repeal Rule will undo this guiding framework for federal agencies' environmental review to the detriment of the States. These comments demonstrate how the Repeal Rule (1) harms the States; (2) is arbitrary and capricious (3) fails to conform to the requirements for APA notice and comment rulemaking; (4) is contrary to law; (5) fails to comply with NEPA; and (6) fails to comply with the Endangered Species Act. In sum, the Repeal Rule is unlawful. For the reasons stated below, the States strongly oppose the Repeal Rule and request that it be withdrawn in its entirety.[9]

I. BACKGROUND

For half a century, NEPA has supported informed, transparent, and coordinated agency decision-making and meaningful public participation in understanding and evaluating the environmental and public health impacts of proposed federal actions through the application of CEQ's NEPA implementing regulations.[10] By requiring thorough environmental review before

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[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.").

[5] *See* the 1978 Final Rule.

[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. EPA*, 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, Minnessota, New Jersey, Oregon, Rhode Island, Wisconsin, Harris Couty, Texas, the Commonwealth of Massachusetts and the District of Columbia, filed a letter requesting that CEQ extend the comment period for the Repeal Rule. Comment ID CEQ-2025-0002-17196.

[10] U.S. Gov't Accountability Off., GAO-14-369, National Environmental Policy Act: Little Information Exists on NEPA Analyses, at 15 (2014) [hereinafter GAO Report], https://www.gao.gov/products/gao-14-369.pdf,("[a]ccording to studies and agency officials, some of the qualitative benefits of NEPA include its role as

committing significant resources to such actions, NEPA and CEQ's regulations have helped federal agencies for decades develop projects that protect and enhance the environment across the country.[11]

A. Background on CEQ's Regulations Implementing NEPA

For nearly five decades, CEQ's regulations implementing NEPA have guided largely uniform and effective environmental review processes by agencies across the federal government. The existence of a single set of overarching regulations has ensured transparent and informed agency decision-making, with consistency across federal agencies and actions. Such uniform standards are particularly important when multiple agencies are involved in a single action or group of related actions. [12]

CEQ began providing a framework for consistent application of NEPA across agencies soon after the statute was enacted, issuing interim guidelines to agencies in May 1970 pursuant to "the mandate of both the Act and Executive Order 11514,"[13] President Nixon's Executive Order directing CEQ to issue such guidelines.[14] CEQ finalized the guidelines in 1971[15] and revised them in 1973.[16]

After seven years of experience attempting to implement NEPA across agencies with only guidelines, however, CEQ encountered "inconsistent agency practices and interpretation of the law" which "impeded Federal coordination and made it more difficult for those outside government to understand and participate in" the NEPA process.[17] In light of those difficulties, President Carter in May 1977 directed CEQ to "[i]ssue regulations to Federal agencies for the

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a tool for encouraging transparency and public participation and in discovering and addressing the potential effects of a proposal in the early design stages to avoid problems that could end up taking more time and being more costly in the long run.").

[11] *See, e.g.,* Comments of Attorneys General of California, Illinois, Maryland, Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington, and the Secretary of the Commonwealth of Pennsylvania Department of Environmental Protections on Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 28, 591 at 12–15 (Aug. 20, 2018), attached as Exhibit 1 to Exhibit A.

[12] *See*, *e.g.,* 40 C.F.R. § 1501.7 (specifying procedures for lead agencies and certain inter-agency coordination when more than one federal agency "(1) Proposes or is involved in the same action; or (2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.").

[13] *See* Statements on Proposed Federal Actions Affecting the Environment: Interim Guidelines, 35 Fed. Reg. 7,390, 7391 (May 12, 1970).

[9] Exec. Order 11,514, 35 Fed. Reg. 4,247, 4,248 (Mar. 7, 1970). Sec 3(i) of Executive Order 11514 also directed CEQ to "Issue such other instructions to agencies . . . as may be required to carry out the Council's responsibilities under the Act."

[15] Statements on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. 7,724 (Apr. 23, 1971).

[16] Preparation of Environmental Impact Statements: Proposed Guidelines, 38 Fed. Reg. 10,856 (May 2, 1973).

[17] 1978 Final Rule at 55,978.

implementation of the procedural provisions of the Act (42 U.S.C. § 4332(2))"[18] to further "the purpose and policy of the National Environmental Policy Act of 1969, as amended (42 U.S.C. §§ 4321 et seq.), the Environmental Quality Improvement Act of 1970 (42 §§ U.S.C. 4371 et seq.), and Section 309 of the Clean Air Act, as amended (42 U.S.C. § 1857h-7)."[19] CEQ's regulations were needed to create a "uniform, government-wide"[20] approach to NEPA review and "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 emphasize the need to focus on real environmental issues and alternatives."[21] The resulting regulations, which CEQ issued in 1978,[22] were remarkably durable and effective, with only a few minor revisions made over the following four decades.

However, in 2017, after nearly 40 years of stable implementation of NEPA, President Trump issued E.O. 13807 directing CEQ to revise its regulations.[23] CEQ issued an advance notice of proposed rulemaking on June 20, 2018,[24] and a notice of proposed rulemaking on January 10, 2020, proposing broad revisions to CEQ's NEPA regulations.[25] In July 2020, CEQ finalized unlawful regulations, improperly narrowing environmental review under NEPA, threatening meaningful public participation, and impermissibly restricting judicial review of agency actions (hereinafter the "2020 Rule").[26] By late August 2020, nearly half of the States in the country—including many of the signatories to this letter—and numerous public interest organizations had filed lawsuits challenging the unlawful 2020 Rule.[27]

On January 20, 2021, President Biden issued E.O. 13990, which revoked President Trump's E.O. 13807 and directed agencies to review regulations implementing it.[28] CEQ systematically reviewed the 2020 Rule and, following notice and comment, issued three rulemakings that largely addressed the revisions in the 2020 Rule that did not support the

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[18] Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977)

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

[20] 1978 Final Rule at 55,978.

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

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

[23] Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (August 24, 2017).

[24] *See* Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018).

[25] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (Jan. 10, 2020).

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

[27] *See*, *e.g.*, *California v. CEQ*, No. 3:20-cv-06057 (N.D. Cal. August 28, 2020).

[28] Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021).

statutory purposes of NEPA.[29] The second of these rulemakings, CEQ's "Phase 1" rule, restored key provisions of the 1978 regulations, requiring analysis of all reasonably foreseeable effects of a major federal action.[30] The third rulemaking, CEQ's "Phase 2" 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 2023 Fiscal Responsibility Act, Pub. L. No. 118-5, 137 Stat.10.[31]

Following promulgation of the Phase 2 rule, a group of States led by Iowa brought an action, *Iowa v. CEQ*, in federal district court challenging that rule and seeking vacatur of the Phase 2 Rule, as well as reinstatement of the 2020 Rule.[32] Before oral argument on the parties' cross-motions for summary judgment, a divided panel in an unrelated case in the D.C. Circuit issued an opinion stating in part that CEQ lacked authority to issue regulations binding on other federal agencies for implementation of NEPA.[33] The *Iowa v. CEQ* court vacated the Phase 2 Rule and held, among other things, that CEQ's NEPA Phase 2 Rule was *ultra vires* because CEQ lacked authority to issue binding implementing regulations.[34] This ruling effectively put the 2020 Rule, as modified by the Phase 1 Rule, back into effect. The court took no action on CEQ's Phase 1 rule or other rulemakings.

B. CEQ's Regulations Serve a Unifying Purpose

As stated in CEQ's initial rulemaking in 1978, CEQ promulgated regulations to create a "uniform, government-wide approach" to NEPA implementation in order to effectively carry out its statutory mandates. This approach was needed to address the "inconsistent agency practices and interpretations of the law" which had occurred under CEQ's then existing non-binding guidance.[35] CEQ's regulations have provided a "uniform, government-wide approach" over their 47 years of existence.

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[29] *See* Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34154 (June 29, 2021); National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55757 (October 7, 2021) (Proposed "Phase 1" Rule).

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

[31] *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924 (July 31, 2023) (proposed Phase 2 Rule); National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442 (May 1, 2024) (final Phase 2 Rule). *See also*, Comments of Attorneys General of Washington, *et al*. on the Proposed Phase 2 Rule, 88 Fed. Reg. 49924 (July 31, 2023), attached here as Exhibit A.

[32] Complaint, *Iowa v. CEQ*, No. 1:24-cv-00089-DMT-CRH (D.N.D. May 21, 2024), ECF No. 1, attached here as Exhibit B.

[33] *See Marin Audubon Soc'y v. Fed. Aviation Admin*., 121 F.4th 902, 908-915 (D.C. Cir. 2024).

[34] *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.

[35] National Environmental Policy Act–Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55,978.

Since the promulgation of the 1978 Regulations, all federal agencies have been bound to follow CEQ's regulations.[36] As CEQ recognizes, "[a]gencies have NEPA implementing procedures that largely conform to CEQ's regulations."[37] Beyond conforming their procedures to CEQ's regulations, federal agencies incorporated CEQ's NEPA regulations directly into their own NEPA procedures. For example, the regulations of the Army Corps of Engineers, the Environmental Protection Agency (EPA), the United States Forest Service and the Federal Highway Administration, refer to, rely on and, in some cases, explicitly incorporate CEQ's regulations.[38] In this way, CEQ's NEPA regulations unify environmental review at the federal level.

States have also relied on CEQ's regulations and guidance in promulgating their own state environmental review processes. For instance, in Wisconsin, the Wisconsin Environmental Policy Act (WEPA) was developed based on the language in NEPA and CEQ's guidelines.[39] The regulations implementing WEPA directly reference CEQ's regulations.[40]

In addition to promoting uniformity across government, CEQ's NEPA regulations facilitate the public's involvement in environmental reviews by providing a unifying set of standards across all federal environmental reviews conducted by dozens of distinct federal agencies allowing the public reliable access to the NEPA process.

C. The Repeal Rule

CEQ's Repeal Rule abruptly discards decades of CEQ's coordination work by repealing all CEQ NEPA regulations in one sudden, poorly-conceived step. As justification for this sweeping move, CEQ variously points to President Trump's "Unleashing American Energy" Executive Order 14154 (E.O. 14154) and CEQ's own determination that it "may" lack rulemaking authority.[41]

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[36] National Environmental Policy Act–Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. at 55,978; 40 C.F.R. 1500.3(a).

[37] Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,614.

[38] *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).

[39] Wis. Stat. § 1.11 (2); s*ee also* Mednick Declaration, Exhibit B to State Intervenor Defendants' Additional Supplemental Briefing, attached here as Exhibit C.

[40] *See, e.g.* Wis. Admin. Code NR § 150.07 (1981); Mednick Declaration, *supra* note 39*,* at 4.

[41] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,613.

In the Repeal Rule, CEQ states it will "remove the existing implementing regulations for the National Environmental Policy Act of 1969."[42] With that action, CEQ repeals not only CEQ's Phase 1 Rule, but all of CEQ's NEPA implementing regulations implemented since 1978—leaving federal agencies with no comprehensive set of consistent rules for implementation of NEPA for the first time in nearly 47 years. There will no longer be a single guiding set of NEPA implementing regulations which each agency can tailor to the specific needs of its statutory mandate. The Repeal Rule will usher in a return to the balkanization of environmental review seen under CEQ's initial approach of promulgating guidance.[43] Each agency will develop a distinct set of NEPA procedures, and interpretations of the requirements of NEPA, forcing the public to learn multiple sets of procedures to participate in the NEPA process. This may also complicate joint NEPA reviews between multiple federal agencies where their NEPA procedures are inconsistent with each other.

The Repeal Rule also eliminates all the definitions in section 1508.1, which have long guided agencies in implementing critical NEPA mandates. For instance, CEQ's regulations provide a definition of "effects or impacts" to clarify what impacts the statute requires agencies to consider to effectuate NEPA's purposes.[44] The Repeal Rule will also jettison regulations guiding the public participation in the NEPA process, the use of categorical exclusions, the scoping process to determine the scope of issues for analysis, tiering environmental analysis, limitations on actions during the NEPA process, and cooperation with state, tribal, and local procedures.

The Repeal Rule utilizes an interim final rule procedure, rather than full notice and comment rulemaking under the federal Administrative Procedure Act. Through the Interim Final Rule process, CEQ has already stated that the Repeal Rule will take effect automatically on April 11, 2025, with only 15 days, including 10 business days, to respond to comments received.[45] That public comment opportunity is, in practical terms, meaningless as the Interim Final Rule automatically takes effect.[46] CEQ has updated its Repeal Rule notice twice, once to clarify the comment deadline and once to add in a citation to legal authority for pursuing the Repeal Rule rulemaking, further limiting the time the public has to comment on the Repeal Rule.[47] As many of the States previously requested, CEQ should abandon its current timeline, reopen comments

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[42] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,611.

[43] *See, e.g*. National Environmental Policy Act-Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. at 55,978.

[44] 40 C.F.R. § 1508.1(i).

[45] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10610.

[46] *Id*.

[47] 90 Fed. Reg. at 11,221; Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 12,690.

on the Repeal Rule for at least an additional 90 days, and push back the effective date of the Repeal Rule by at least another 30 days.[48]

CEQ also provides a variety of unlawful and unsubstantial justifications for the Repeal Rule's pre-determined and truncated process, claiming that it has "good cause" to do so, that its action is a "procedural and ministerial step," that the regulations are "rules of agency procedure and practice", and that the regulations are "interpretive rules" or "general statements of policy."[49] CEQ also wrongly asserts that it does not need to conduct a NEPA analysis of the Repeal Rule because it "has determined that the rule will not have a significant effect on the environment because it will not authorize any specific agency activity of commit resources to a project that may affect the environment."[50] Additionally, CEQ did not analyze whether the Repeal Rule would affect endangered or threatened species or consult with National Oceanic and Atmospheric Administration and U.S. Fish and Wildlife Services (the Services), as required under section 7 of the Endangered Species Act. Finally, CEQ did not follow the state consultation process mandated by E.O. 13132, Federalism, because it wrongly believes that the direct application of CEQ's regulations to federal agencies lacks federalism implications.[51]

CEQ's NEPA regulations provide the foundation for NEPA's implementation—establishing a durable and environmentally protective framework on which federal agencies, states, territories, local governments, and the public have relied for 40 years. But in this Repeal Rule, CEQ discards this long history of stability and public review, providing the public *only 30 days* to review and comment on CEQ's repeal of its regulations.

D. CEQ's Guidance

In place of the long-standing and binding regulations, CEQ issued a guidance memorandum on February 19, 2025 (the "Guidance") guiding agencies on how to implement NEPA and directing agencies to "revise or establish their NEPA implementing procedures (or establish such procedures if they do not yet have any)."[52] The Guidance further directed agencies to use the 2020 Rule—which the agency had repealed and replaced in prior rulemakings and which in some instances no longer reflects the provisions of NEPA as amended by the Fiscal Responsibility Act of 2023—"as an initial framework for the development of revisions to their

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[48] *See* Comment ID CEQ-2025-0002-17196.

[49] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10,614-10,615.

[50] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,615-16.

[51] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,616.

[52] Memorandum from Council on Environmental Quality on Implementation of the National Environmental Policy Act to Heads of Federal Departments and Agencies 1 (Feb. 19, 2025) [hereinafter the Guidance], *available at* https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf

NEPA implementing procedures."[53] Among other things, the Guidance directs agencies to "prioritize efficiency and certainty over any other policy objectives,"[54] including apparently over the environmental policies stated in the text of NEPA.[55] The Guidance also directs agencies to omit environmental justice analysis from NEPA documents[56] and avoid providing the opportunity for public comment on proposed NEPA regulations,[57] unless either is required by law. CEQ also draws attention to the Repeal Rule's removal of language defining effects to include "cumulative effects" and directs agencies to rely on the NEPA statutory text in considering the reasonably foreseeable effects of a proposed action, "regardless of whether or not those effects might be characterized as 'cumulative.'"[58]

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

NEPA is an example of cooperative federalism, envisioning a strong role for states, territories, 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.[59] CEQ's NEPA regulations likewise direct federal agencies to the fullest extent practicable to cooperate with State and local agencies to reduce duplication between NEPA and comparable State and local requirements.[60] Indeed, NEPA's success has led to the enactment of similar statutes in many states. The wholesale repeal of CEQ's 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 Repeal Rule will Harm State Sovereign and Proprietary Interests

Comprehensive federal 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 federal 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 Repeal Rule will adversely impact both of those types of interests.

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[53] Guidance at 1-2.

[54] Guidance at 1.

[55] 42 U.S.C. § 4321(a)

[56] Guidance at 5.

[57] Guidance at 7.

[58] *Id*. at 5.

[59] 42 U.S.C. § 4331(a).

[60] 40 C.F.R. § 1506.2.

1. The Repeal Rule Will Impair the Ability of States to Meaningfully Participate in the NEPA Process to Safeguard Public Health and the Environment within their Borders

NEPA contains provisions directly incorporating states, territories, and local governments into federal decision making.[61] 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. State and territorial agencies and local governments have long relied on the NEPA process memorialized in CEQ's regulations to identify 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.

The States have obligations to conserve their natural resources, including wildlife, which are protected by robust NEPA review.[62] The States are also responsible for millions of acres of range, agricultural, aquatic, and commercial lands. These natural resources also generate revenue for many of the States. For instance, in Washington, natural resources generate more than $200 million in annual financial benefits to state public schools, institutions, and county services. States with coastline, such as Washington, California, New Jersey, Maine, Maryland, and Massachusetts, rely on NEPA to participate in federal agency decisions to operate, license, or permit activities in waterways and off coastlines impacting fisheries and maritime uses, which are critical to the health and economic vitality of the States. For instance, Maryland has a strong interest in the vitality of the Chesapeake Bay, one of the nation's most productive estuaries with a watershed that spans 64,000 square miles across six states and the District of Columbia. The Bay's health is affected by federal projects that occur within its watershed but also outside of Maryland, and meaningful NEPA review is integral to assessing the downstream impacts of such projects. As natural resources are increasingly vulnerable to sea level rise, coastal and inland flooding, erosion, and property damage from severe and frequent extreme weather events and other climate effects, which often disproportionately burden communities with environmental justice concerns, the NEPA process is increasingly important for the States to consider these impacts and protect their community interests.

Additionally, many of the States have significant federal acreage within their borders, and federal actions taken on those lands often affect the States' residents, natural resources, recreation, and tourism. For example, federal lands comprise more than half of Oregon, almost half of California, nearly one-third of New Mexico, and nearly a quarter of the District of Columbia.[63] The States host a multitude of federally-operated facilities such as national parks,

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[61] 42 U.S.C. §§ 4331(a), 4332(G).

[62] *See, e.g.* Wash. Rev. Code. §§ 77.04.012, 77.110.030, 90.03.010, 90.58.020; Wash. Const. art. XVI-XVII, § 1; Mass. Const. Amend. art. 97; Mass. Gen. Laws, ch. 12, §§ 3, 11D; N.M. Const. art. XX § 21; N.M. Stat. Ann. § 74-1-2; N.Y. Envtl. Conserv. Law § 11-0105; Or. Rev. Stat. § 498.002.

[63] *See* Cong. Research Serv., R42346, Federal Land Ownership: Overview And Data (Feb. 21, 2020), https://sgp.fas.org/crs/misc/R42346.pdf.

national forests, wildlife refuges, national monuments, military facilities, dams, and interstate highways that are subject to NEPA review. These range from Acadia National Park in Maine and the Grand Coulee Dam in Washington to the Cape Cod National Sea Shore in Massachusetts, the Gateway National Recreation Area in New Jersey and the Gila Wilderness in New Mexico. Federally owned lands are especially relevant in the District of Columbia where the federal government owns one-third of land, and owns or manages the District's two major rivers, the Potomac and Anacostia. In certain actions on federal lands, NEPA is the sole means for state agencies to advocate for protection of resources, including protection of state (but not federally) listed endangered species, and to identify unintended consequences of a proposed action.

Where an action has both federal and non-federal components, CEQ's NEPA regulations currently direct federal agencies to cooperate with State and local agencies to the fullest extent practicable to reduce duplication between NEPA and State and local requirements.[64] Accordingly, CEQ and several states have worked together to harmonize the environmental review processes under NEPA and little NEPAs through state-specific memoranda.[65] However, the Repeal Rule would disrupt this collaboration to the extent the repeal of CEQ's regulations, in conjunction with CEQ's Guidance, would prohibit agencies from considering cumulative impacts and environmental justice impacts. This change would impair federal agencies' coordination with states, creating greater complexity and uncertainty for applicants, and additional delays and paperwork.

NEPA also serves an important role in coordinating energy projects in the States. For instance, New Jersey is home to numerous proposed energy infrastructure and transmission projects, many of which involve federal action. These include wind energy projects, natural gas pipelines, and the Great Falls Hydroplant. In New Mexico, the Bureau of Land Management (BLM) has approved over 7,800 oil and gas leases as well as 21 federal coal leases.

The States rely on participation in the NEPA process to protect their proprietary and sovereign interests in their natural resources. It allows the States to thoroughly weigh in on the short-term benefits of resource extraction against the long-term effects of climate change and consider conservation of scarce water resources. And for certain federal projects where state environmental review may be limited or even preempted, a robust NEPA process is critical to protecting state interests, resources and residents from harmful environmental effects, which may otherwise evade review. Environmental review of federal agency action through the NEPA process is an important tool for the States to understand these actions and to protect their interests by ensuring federal agencies make informed and transparent decisions. The Repeal Rule's rescission of the coordinating provisions of CEQ's NEPA regulations would undermine the ability of States to protect these interests, injecting uncertainty into this area of longstanding state-federal cooperation.

The Repeal Rule would also make it more difficult to consider indirect effects of federal actions, which can significantly impact state resources. For instance, the construction of the Alaskan Way tunnel in Seattle, Washington is an example of why analyzing an indirect effect, such as vibration, is critical. The study of potential vibration impacts from tunneling led to the realization that the historic buildings in Pioneer Square required LIDAR documentation and monitoring to record potential movement and structural changes. The analysis led the Federal Highway Administration (FHWA) and Washington State Department of Transportation (WSDOT) to develop monitoring measures to detect when the tunneling vibrations were having adverse effects to the materials, workmanship, and structural integrity of the historic buildings above. The loss of this type of analysis, in which an indirect effect could result in a direct consequence, will lead to the damage and destruction of cultural resources. Without an analysis of indirect and cumulative effects, state agencies would also lack the information necessary to coordinate other state programs and resources impacted by these actions.

Environmental review of federal agency actions through the NEPA process is an important tool for the States to understand these actions and to protect their interests by ensuring federal agencies make informed and transparent decisions. Accordingly, many of the States have participated in CEQ's NEPA rulemakings since 2018, including by commenting on the various proposed rulemakings since that time,[66] challenging the unlawful 2020 Rule,[67] and defending the 2024 Phase 2 Rule in the *Iowa* litigation.[68]

2. The Repeal Rule and the Guidance 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,[69] Washington's State Environmental Policy Act,[70] New York's State Environmental Quality

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[66] *See* Comments of Attorneys General of Washington, *et al* on the Proposed Phase 2 Rule, 88 Fed. Reg. 49924 (July 31, 2023), attached here as Exhibit A; Comments of Attorneys General of Washington, et al., on the Interim Final Rule, 86 Fed. Reg. 34154 (July 29, 2021) included here as Exhibit 3 to attached Exhibit A; Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking 86 Fed. Reg. 55757 (Nov. 22, 2021) included here as Exhibit 4 to attached Exhibit A; Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking, 85 Fed. Reg. 1684 (March 10, 2020) included here as Exhibit 2 to attached Exhibit A; Comments of Attorneys General of California, et al., on Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 28,591 (August 20, 2018) attached here as Exhibit 1 to Exhibit A.

[67] First Amended Complaint, *California v. CEQ,*included here as Exhibit 1 to Exhibit 3 of attached Exhibit A.

[68] *See* 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] Cal. Pub. Res. Code § 21000–21189.57.

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

Review Act,[71] Connecticut's Environmental Policy Act,[72] New Jersey's Executive Order 215,[73] the Massachusetts Environmental Policy Act,[74] and the District of Columbia's Environmental Policy Act.[75] 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.[76] This collaboration allows state, local, and federal agencies to share documents, reduce paperwork, and efficiently allocate limited time and resources.

The Repeal Rule would increase the burden on the States to rely more heavily on and prepare more documents under our own environmental laws due to the loss of guiding language in CEQ's regulations, such as the language directing agencies to consider indirect and cumulative impacts. 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. By curtailing the scope of impacts analysis required under NEPA, the Repeal Rule shifts the burdens of environmental review to state and local jurisdictions. This additional analysis requires the States to expend additional time and resources on environmental review of a proposed federal action. CEQ's finding that the Proposed Rule would have no federalism implications under Executive Order 13132 is therefore wrong and unsupported. CEQ should have engaged in the state consultation process and other procedures mandated by that Executive Order.

Additionally, where state agencies currently rely on agency NEPA regulations which incorporate CEQ's regulations, the Repeal Rule introduces uncertainty. For instance, the Washington State Department of Transportation (WSDOT) primarily complies with NEPA pursuant to the United States Department of Transportation (USDOT) NEPA rules in 23 C.F.R. § 771 that establish NEPA procedures for the Federal Highway Administration, Federal Transit Administration, and Federal Railroad Administration, and in 33 C.F.R. § 230 for the U.S. Army Corps of Engineers. These federal agencies constitute the NEPA lead agencies for the majority of WSDOT transportation projects having a federal nexus. Both sets of NEPA rules include adoption of CEQ's NEPA regulations in 40 C.F.R. parts 1500 through 1508 by reference and are

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[71] N.Y. Envtl. Conserv. Law art. 8; N.Y. Comp. Codes R. & Regs. tit. 6, pt. 617.

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

[73] Exec. Order No. 215 (September 11, 1989).

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

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

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

intended to be applied in conjunction with the CEQ rules. WSDOT is concerned that the repeal of CEQ's NEPA rules will disrupt or significantly delay numerous transportation projects critical for Washington State's economy, public safety, mobility, and highway preservation needs until such time that new NEPA procedures are clarified.[77] Furthermore, such delays may result in additional costs and other impacts associated with significant delays in critical transportation project delivery. Similarly, in California, the California High Speed Rail Authority (CHSRA) also works with USDOT regulations implementing NEPA in developing a high-speed rail network in California. The Repeal Rule's elimination of CEQ's NEPA regulations, which are relied upon by USDOT in its NEPA reviews, could potentially delay construction, defer economic benefits, and increase state and federal expenditures on the project.[78]

Moreover, where additional environmental review is not required under a little NEPA, the Repeal Rule and the Guidance would diminish the amount of information available to state and local agencies and the public with regard to environmental impacts of proposed projects.

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

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

Climate Change is causing significant environmental and economic losses for States and our residents, including, but not limited to, damage to infrastructure and natural resources,[79] housing[80] and job instability,[81] and the cost of health care and lives lost from environmental

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[77] *See* Nizam Declaration, Exhibit F to State Supplementary Brief, attached here as Exhibit C.

[78] *See* Galvez-Abadia declaration, Exhibit A to State Supplementary Brief, attached here as Exhibit C.

[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).

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 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 while also investing in infrastructure to protect communities and state resources from the effects of climate change. A fully informed decision-making process—like that required under CEQ's current NEPA regulations— requires that federal agencies work closely with state, local, and tribal governments, as well as the public, to ensure that decisions account for the impacts on communities already overburdened with pollution and associated public health harms.

An agency cannot evaluate a project's future climate impacts without addressing the cumulative impact of greenhouse gas emissions. Those impacts cannot be meaningfully assessed through a narrow analysis of direct effects from an individual proposed action. The emissions from a federal agency action in addition to existing and future emissions from other projects are precisely the sort of information a NEPA analysis should analyze robustly.

The Repeal Rule undermines efforts by the States to study and abate climate-driven harms associated with major federal actions. If agencies follow the 2020 Rule's constraints on

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[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/.

[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/.

the consideration of climate change, it will make it more challenging to assess greenhouse gas emissions from projects subject to NEPA review where some of the emissions the project generates 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 Repeal Rule is not withdrawn, New York may need to implement additional and potentially costly regulatory, policy, or other actions to ensure the achievement of the requirements of its state climate law. The Repeal Rule and Guidance thus threaten the States' significant interests in evaluating and addressing the effects of climate change.

In summary, CEQ's Repeal Rule harms the States' interests. The States have strong interests in the continued implementation of CEQ's NEPA regulations that provide for a robust, deliberative, and complete federal environmental review process that the States have relied on for decades.

C. The Repeal Rule will Make it More Difficult for States to Protect Overburdened Communities and Ensure that the Full Range of Cumulative and Indirect Effects of Federal Projects are Evaluated and Considered

The States have significant interests in robust and consistent evaluation of the full range of effects of federal action across federal agencies to prevent public health disparities flowing from uninformed federal decisions that adversely impact vulnerable communities. The Repeal Rule and Guidance threaten these important interests.

Like the 2020 Rule, the Repeal Rule coupled with the Guidance threaten to eliminate consideration of cumulative effects to 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 Executive Order 14173, which rescinds President Clinton's Executive Order on environmental justice,[89] and CEQ's direction to federal agencies that they "should not include an environmental justice analysis" in their NEPA documents [90] only exacerbate that risk. Increased public health and community harms from weakened NEPA reviews under the procedures applying standards from the 2020 Rule will require greater expenditures of state and territorial 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

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[88] Chapter 106 of the Laws of 2019; N.Y. Envtl. Conserv. L. § 75-0107(1).

[89] Exec. Order 12,898, 59 Fed. Reg. 7795 (February 11, 1994) (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations).

[90] Guidance at 5.

communities, and Indigenous Peoples and Tribal Nations, already burdened with the effects of disproportionately high levels of pollution. Consideration of indirect and cumulative effects is also vital in understanding population vulnerability and assisting decision-makers to mitigate and prevent disproportionate environmental and climate harms.[91] 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, CEQ'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. Fragmentation of NEPA review into individual, potentially inconsistent or conflicting procedures across dozens of federal agencies threatens to undermine the quality and efficiency of NEPA reviews, as described below, and impair the States' interests.

III. CEQ'S REPEAL RULE VIOLATES THE APA

CEQ's Repeal 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."[92] CEQ's Repeal Rule, both individually and in conjunction with the Guidance, is arbitrary and capricious because CEQ (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 CEQ's promulgation of NEPA regulations. CEQ's Repeal Rule, in conjunction with the Guidance, is also contrary to law in various respects, including by eliminating consideration of indirect and cumulative effects and short-circuiting public process, in violation of NEPA's core requirements. Additionally, CEQ promulgated the Repeal Rule without observance of procedure required under the APA by (1) asserting "good cause" exists to circumvent the APA rulemaking process when none exists; (2) denying that the NEPA regulations are legislative rules; (3) improperly asserting that the Repeal 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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[91] *See* Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking, 85 Fed. Reg. 1684 (March 10, 2020) included here as Exhibit 2 to attached Exhibit A; 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 FR 92125 (November 21, 2024) attached here as Exhibit D.

[92] 5 U.S.C. § 706(2)(A), (D).

A. CEQ's Repeal Rule is Arbitrary and Capricious

Under the APA, a "reviewing court shall … hold unlawful and set aside" federal agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[93] The agency must make a "rational connection between the facts found and the choice made."[94] 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."[95] "Agencies are free to change their existing policies," but they must "provide a reasoned explanation for the change."[96] In this rulemaking, CEQ fails to provide any reasoned explanation for the Repeal 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. CEQ Failed to Provide a Reasoned Explanation for its Abrupt Change in Position

As the basis for its Repeal Rule, CEQ relies in part on its assertion, for the first time in over 40 years of rulemakings, that it lacks authority to promulgate NEPA implementing regulations.[97] However, CEQ does not provide a reasoned explanation for this position, especially in light of the long history of CEQ's assertions to the contrary.

CEQ has previously asserted in each of its prior rulemakings dating back to 1978 that it has legal authority to promulgate NEPA implementing regulations.[98] CEQ stated that authority for CEQ to promulgate NEPA regulations came from "the President's Constitutional and statutory authority, including NEPA, the Environmental Quality Improvement Act, and section

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[93] 5 U.S.C. § 706(2).

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

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

[96] *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).

[97] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10613.

[98] *See* National Environmental Policy Act-Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55,978 (Nov. 29, 1978); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (Jan. 10, 2020); *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, 87 Fed. Reg. 23,453 (Apr. 20, 2022); National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442 (May 1, 2024).

309 of the Clean Air Act."[99] CEQ asserted it had regulatory authority as recently as four months ago, in November 2024.[100]

In the 45 years since CEQ first promulgated NEPA regulations, courts have repeatedly recognized CEQ's authority to issue judicially enforceable regulations. In 1979, the year after promulgation of CEQ's first regulations, the Supreme Court upheld CEQ's construction of NEPA through its regulations—specifically the meaning of "major federal actions" —and stated "CEQ's interpretation of NEPA is entitled to substantial deference" in a detailed discussion of CEQ's newly minted regulations.[101] The Supreme Court recognized CEQ's authority ten years later in *Robertson v. Methow Valley*, where it found the "requirement" that an EIS include a discussion of mitigation measures "flows both from the language of the Act and, more expressly, from CEQ's implementing regulations."[102] In *Methow*, the Court upheld a revision to CEQ's regulations, finding it was "entitled to substantial deference."[103] More recently, the Supreme Court stated clearly in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 757 (2004), that CEQ was "established by NEPA with authority to issue regulations interpreting [the EIS requirement]." Nearly every Federal Circuit Court of Appeals has followed the Supreme Court and endorsed CEQ's regulatory authority either explicitly or implicitly.[104]

Congress has ratified CEQ's NEPA regulations both overtly and implicitly.[105] It is "well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, 'Congressional failure to revise or repeal [the

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[99] National Environmental Policy Act-Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. at 55,978.

[100] *See* Federal Defendants' Revised Supplemental Brief, *Iowa v. CEQ*, attached here as Exhibit E.

[101] *Andrus v. Sierra Club*, 442 U.S. 347, 357–358 (1979).

[102] 490 U.S. 332, 351 (1989).

[103] *Id*. at 356.

[104] *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 v. Or. Nat. Res. Council*, 490 U.S. 360 (1989); *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 113, 120 n.3 (2d Cir. 2013); *N.J., Dep't of Env't Prot. & Energy v. Long Island Power Auth*., 30 F.3d 403, 409 n.9 (3d Cir. 1994); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 512 n.3 (4th Cir. 1992); *Sierra Club v. Sigler*, 695 F.2d 957, 964 (5th Cir. 1983); *Kentucky Riverkeeper Inc. v. Rowlette*, 714 F. 3d 402, 407 (6th Cit. 2013); *Rhodes v. Johnson*, 153 F.3d 785, 787 (7th Cir. 1998); *Goos v. Interstate Com. Comm'n*, 911 F.2d 1283 n.2 (8th Cir. 1990) (citing a law review article in turn citing to *Andrus v. Sierra Club*); *In re Operation of Mo. River Sys. Litig.*, 516 F.3d 688, 693 (8th Cir. 2008) (referring to CEQ's regulations on supplemental environmental impact statements to decide case); *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125-1127 (8th Cir. 1999) (finding standing for plaintiff following detailed discussion of pertinent CEQ's regulations). *Trustees for Ala. v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986); *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988), *overruled on other grounds by Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992); *Defs. of Wildlife, Earth Island Inst. v. Hogarth*, 330 F.3d 1358, 1369 (Fed. Cir. 2003).

[105] *See Futures Trading Commission v. Schor,* 478 US 833, 846 (1986).

interpretation] is persuasive evidence that the interpretation is intended by Congress.'"[106] Congress has gone a step further and explicitly affirmed CEQ's authority by incorporating numerous provisions from CEQ's NEPA regulations into subsequent legislation, confirming the validity of CEQ's regulations and its regulatory directive.[107] Congress recently used provisions from CEQ's regulations to amend the text of NEPA itself, effectively ratifying them. In 2023, Congress amended NEPA by enacting the Fiscal Responsibility Act (FRA).[108] Specifically, the FRA included concepts from CEQ's regulations, including environmental assessments (EAs), Findings of No Significant Impact (FONSIs), and Categorical Exclusions (CEs).[109] These terms and concepts did not appear in the original text of NEPA but were subsequently developed by CEQ in CEQ's 1978 NEPA regulations.[110] These and other Congressional actions over decades affirm the validity of CEQ's regulations.

In the Repeal Rule, however, CEQ takes a contradictory position that it "may" not have authority to issue binding regulations.[111] CEQ dismisses multiple Supreme Court precedents in only two sentences with no analysis.[112] CEQ fails entirely to address the plain language of NEPA, decisions at the Court of Appeals level, or the evidence of congressional ratification of CEQ's rulemaking authority described above. CEQ mentions the *Marin Audubon* and *Iowa v. CEQ* cases in a footnote to support its position about possible reliance interests, not as a basis for its decision to repeal the regulations.[113] Moreover, in discussing those cases, CEQ does not acknowledge that the discussion of CEQ's rulemaking authority in *Marin Audubon* appeared in a

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[106] *See Futures Trading Commission,* 478 US at 846.

[107] *See, e.g.*, Fixing America's Surface Transp. Act of 2015, Pub. L. No. 114-94, §§ 41001 (codified at 42 U.S.C. §§ 4370m(4), (8), (15)), 41001 (codified at 42 U.S.C. § 4370m-2(e)(1)), 41001 (codified at 42 U.S.C. § 4370m-4(d)(2)); Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 606 (codified at 16 U.S.C. § 6591e(b)(1)); Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005, Pub. L. No. 109-59 § 6002 (codified at 23 U.S.C. § 139(d)(5)); Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, § 1005 (codified at 33 U.S.C. § 2348).

[108] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5.

[109] 42 U.S.C. §§ 4336(b)(2); 4336e(1); 4336e(7).

[110] 40 C.F.R. §§ 1501.4, 1501.5, 1501.6.

[111] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,613. CEQ also states that it has "serious concerns about its statutory authority" to promulgate regulations, "at least in the absence of E.O. 11991." *Id*. However, CEQ is pursuing an APA rulemaking in promulgating the Repeal Rule. Under the APA, the effort to repeal regulations is a rulemaking and held to the same standard as a rulemaking to promulgate new regulations. *Perez*, 575 U.S. at 96 (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")). CEQ cites to the text of NEPA and an Executive Order as the authority under which CEQ issues the Repeal Rule. Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 12,690. This contradiction is never explained by CEQ in the Repeal Rule.

[112] *Id*.

[113] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,614 n.35.

separate section of the opinion unnecessary to the panel's ultimate decision, and that there were serious party presentation concerns called out by CEQ itself as well as by the dissent in *Marin Audubon*.[114] That separate section of the opinion prompted a vigorous dissent and was subsequently called into question by Chief Judge Srinivasan's concurrence in an *en banc* hearing denial.[115] As Chief Judge Srinivasan's concurrence points out, the issue was not presented by the parties, briefed before the D.C. Circuit Court of Appeals, or necessary to the court's ultimate holding.[116] CEQ's complete reversal in position as to its authority to adopt regulations "runs counter to the evidence before the agency" and CEQ fails to provide a reasoned explanation for the divergence from decades of previous consistent agency positions.

2. CEQ also Fails to Provide a Reasoned Explanation for Eliminating Regulations Implementing Fundamental NEPA Requirements, Like the Requirement to Consider Cumulative and Indirect Effects

Similarly, CEQ also has failed to provide a reasoned explanation for eliminating core requirements of the NEPA regulations, including the "effects" definitions in the Repeal Rule. For example, CEQ provides no explanation, much less a reasoned or rational one, for the elimination of the "effects" definition. And CEQ's Guidance only adds to the confusion, telling agencies that NEPA "requires consideration of reasonably foreseeable' effects, regardless of whether or not those effects might be characterized as 'cumulative.'"

CEQ has not explained how the deletion of this definition is consistent with its prior statement that a "cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment."[117] CEQ also does not explain why cumulative impacts—which are, by definition, impacts that "*result*[] *from the incremental impact of the action* when added to other past, present, and reasonably foreseeable future actions"[118]—are not impacts that "occur as a result of the agency's decision."[119]

In addition, CEQ did not explain its position that "Federal agencies should analyze the reasonably foreseeable effects of the proposed action consistent with section 102 of NEPA, which does not employ the term 'cumulative effects;' NEPA instead requires consideration of 'reasonably foreseeable' effects, regardless of whether or not NEPA's requirement that agencies

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[114] *See* Federal Defendants' Revised Supplemental Brief, *Iowa v. CEQ*, attached here as Exhibit E; *Marin Audubon Soc'y v. Fed. Aviation Admin*., 121 F.4th 902, 920-22 (D.C. Cir. 2024).

[115] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,614 n.25; *Marin Audubon Soc'y v. Fed. Aviation Admin*., No. 23-1067, 2025 WL 374897, at *1 (D.C. Cir. Jan. 31, 2025).

[116] *Id*.

[117] Considering Cumulative Effects, *infra* note 190, at 3. *See also* S. Rep. No. 91-296, at 5 (1969).

[118] 40 C.F.R. § 1508.7 (emphasis added).

[119] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 1708.

consider "*any* adverse environmental effects which cannot be avoided,"[120] including effects that "are caused by the [agency] action and are later in time or farther removed in distance, but are still reasonably foreseeable."[121] CEQ has not provided a reasoned explanation for eliminating the definitions of cumulative impacts or indirect impacts, and in the Guidance directing agencies to potentially exclude these impacts from NEPA review.

3. CEQ Fails to Provide a Reasoned Explanation For Why it was Necessary to Repeal its Regulations Wholesale and also Failed to Consider Reasonable Alternatives

CEQ also failed to provide reasoned explanation when it determined it would repeal all of its NEPA implementing regulations. A rule is overbroad where there is a mismatch between what the rule does and the problem the agency has set out to address.[122] CEQ's sudden statement of a lack of rulemaking authority does not require CEQ to follow a hasty predetermined process to repeal the regulations. CEQ could have and should have initiated a more traditional and deliberative notice and comment rulemaking process, involving input from stakeholders on the issue of its authority to issue regulations, and which, if any, of its regulations to repeal or modify. That process likely would have identified possible changes short of a wholesale repeal.

CEQ has identified no emergency or other situation compelling CEQ to act within a certain timeframe, nor could it. The Executive Order CEQ points to directs CEQ to "propose rescinding CEQ's NEPA regulations" within thirty days.[123] Additionally, this direction did not order CEQ to actually repeal its regulations. This direction allows CEQ to go through a full notice and comment rulemaking, in which CEQ can consider all comments and decide whether to repeal its NEPA regulations. However, CEQ relies on spurious arguments regarding alleged confusion and an executive deadline to predetermine rescission as a basis for this illegal effort, and thereby endeavor to circumvent thorough public participation in the Repeal Rule.[124]

CEQ should have also independently considered alternatives to a predetermined repeal rulemaking. The failure even to consider any "obvious and less drastic alternatives" is arbitrary and capricious.[125] For example, CEQ could have identified for repeal certain portions of the

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[120] 42 U.S.C. § 4332(2)(C)(ii) (emphasis added).

[121] 40 C.F.R. § 1508.8; *see also* 42 U.S.C. § 4332(2)(F).

[122] *See, e.g.*, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (2020) 591 U.S. 657, 707-08 (Kagan, J., concurring).

[123] Exec. Order 14,154, 90 Fed. Reg. 8353, § 5(b) (Jan. 29, 2025).

[124] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,611 ("CEQ therefore has determined that it is appropriate to remove its regulations from the Code of Federal Regulations.").

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

regulations that it determined were not supported by the underlying statute. CEQ also could have evaluated a repeal of only those sections of its regulations not endorsed by Congress in subsequent legislation or through amendments to NEPA made through the FRA. Either of these options would have better aligned with CEQ's purported basis for its decision, which was a possible lack of authority from Congress. CEQ's Repeal Rule is overbroad and the agency has not provided any explanation for its failure to consider alternatives.

4. CEQ Entirely Failed to Consider Important Aspects of the Problem and Offered an Explanation that Runs Counter to the Evidence Before the Agency.

Moreover, CEQ fails to consider multiple important issues in the Repeal 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."[126] CEQ entirely fails to consider the initial purpose of CEQ issuing NEPA regulations: to provide a unifying approach to NEPA implementation. CEQ also fails to consider the confusion the Repeal Rule will cause. In ignoring evidence of confusion that will be caused by the Repeal Rule, CEQ is making a decision that runs counter to the evidence before the agency.

a. CEQ Failed to Consider the Unifying Function of its Regulations in Promulgating the Repeal Rule

CEQ acted arbitrarily and capriciously by ignoring the coordinating benefit of its regulations in promulgating the Repeal Rule. In 1978 CEQ found that federal agencies developed "inconsistent agency practices and interpretations of the law" under CEQ's then existing non-binding guidance.[127] CEQ went on to explain that this "lack of a uniform, government-wide approach to implementing NEPA has impeded Federal coordination and made it more difficult for those outside government to understand and participate in the environmental review process. It has also caused unnecessary duplication, delay and paperwork."[128] CEQ promulgated regulations in 1978 to address these concerns, in accordance with E.O. 11991. CEQ's NEPA regulations have fulfilled their intended purpose of guiding federal agencies in a "uniform, government-wide approach" to NEPA implementation. CEQ fails entirely to address this previously asserted basis for implementing unifying NEPA regulations in the Repeal Rule. It provides no recognition of the initial rationales for CEQ's NEPA implementing regulations and no explanation why its action repealing the regulations will not implicate the same concerns.

CEQ's new Guidance does not and cannot perform the same unifying function as CEQ's NEPA regulations. The Guidance provides no interpretations of the requirements of NEPA or detailed description of what agencies must analyze in their NEPA documents in order to meet the requirements and policy goals of the statute. The one page of guidance regarding

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

[127] 1978 Final Rule at 55,978.

[128] *Id*.

"Implementation of NEPA" mainly quotes the text of NEPA, adding little or no value.[129] CEQ's initial guidance, issued prior to the 1978 regulations, provided details about what is required under NEPA, including, for example, which actions are covered by NEPA,[130] requirements for the contents of environmental documents,[131] procedures for preparing draft environmental statements,[132] and coordination with federal, state and local governments and the public[133] among many other issues. The Guidance provides none of this information. Rather, the Guidance directs agencies to take actions inconsistent with NEPA: to curtail meaningful public participation by directing agencies to minimize or fully avoid public comment on the NEPA implementing procedures they are directed to promulgate,[134] to prioritize "efficiency and certainty over any other policy objectives,"[135] and to use the unlawful 2020 Rule as an "initial framework" for revising agency NEPA procedures.[136]

In promulgating the Repeal Rule without consideration of the important unifying role CEQ's regulations play, CEQ has "entirely failed to consider an important aspect of the problem" in violation of the APA.[137]

b. CEQ Failed to Evaluate the Uncertainty the Repeal Rule will Cause

While CEQ argues that the Repeal Rule will "minimize and expeditiously resolve" confusion engendered by the various changes to its NEPA regulations over the years, it will do the opposite.[138] CEQ's rationale ignores and minimizes the confusion the Repeal Rule will cause to federal agencies' environmental review under NEPA in the absence of CEQ's unifying regulations. CEQ's explanation for the Repeal Rule also "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."[139] The evidence now before CEQ shows that the Repeal Rule will increase rather than minimize uncertainty and litigation. Congress has incorporated CEQ's regulations

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[129] Guidance at 2-3.

[130] Statements on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. at 7,724.

[131] Statements on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. at 7,725.

[132] Preparation of Environmental Impact Statements: Proposed Guidelines, 38 Fed. Reg. 10,856, 10,858 (May 2, 1973).

[133] Preparation of Environmental Impact Statements: Proposed Guidelines, 38 Fed. Reg. at 10,859.

[134] Guidance at 7.

[135] *Id*. at 4.

[136] *Id*. at 1.

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

[138] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,614.

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

into the text of multiple statutes relating to permitting.[140] As one example, in the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 8611 (codified at 16 U.S.C. § 6591e(b)(1)), Congress amended the Healthy Forest Restoration Act of 2003 to refer the Secretaries of the Interior and Agriculture to the definition of a categorical exclusion in CEQ's regulations for use in developing their own categorical exclusion for greater sage-grouse and mule deer habitats.[141] CEQ's Repeal Rule will inject uncertainty into the Department of the Interior's and the Department of Agriculture's abilities to define categorical exclusions without the benefit of the definition Congress directed them to follow.

Agencies have relied on CEQ's NEPA regulations for decades. As discussed above in Section I.B, CEQ's regulations contain many sections on implementation of NEPA on which agencies have come to rely on to carry out NEPA's core mandates. The loss of the definition of "effects or impacts," for instance, leaves agencies to determine on their own what type of impacts will be required to be analyzed by courts in the absence of CEQ's regulations. CEQ does not analyze at all what impact the disappearance of these guiding regulations will have. While some agencies may have procedures that will "fill in" the hole left by CEQ's Repeal Rule, CEQ does not even try to determine if this is so for any agency. This uncertainty is especially evident for environmental review processes that will straddle the transition period, such as a NEPA review started before the issuance of the Repeal Rule that will finish after agency NEPA regulations are updated pursuant to E.O. 14154. Such a project may be subject to three different NEPA implementing procedures: the current CEQ regulations, CEQ's Guidance, and then the agency's own revised NEPA process. This varied, unpredictable, and evidently elective application of standards and procedures undermines meaningful and timely participation, fails to ensure transparency, and introduces greater ambiguity in the event of judicial review. It is uncertain what legal standards would apply in that time period. This overnight change will create uncertainty and confusion in the short term, which is wholly ignored by CEQ in the Repeal Rule.

Moreover, CEQ's current NEPA regulations are infused throughout the agency-specific NEPA regulations. For example, the regulations of the Army Corps of Engineers, the United States Forest Service and the Federal Highway Administration, refer to rely on and, in some cases, explicitly incorporate CEQ's regulations.[142] EPA's regulations governing EISs, for

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[140] *See, e.g.*, Fixing America's Surface Transp. Act of 2015, Pub. L. No. 114-94, §§ 41001 (codified at 42 U.S.C. §§ 4370m(4), (8), (15)), 41001 (codified at 42 U.S.C. § 4370m-2(e)(1)), 41001 (codified at 42 U.S.C. § 4370m-4(d)(2)); Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 606 (codified at 16 U.S.C. § 6591e(b)(1)); Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005, Pub. L. No. 109-59 § 6002 (codified at 23 U.S.C. § 139(d)(5)); Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, § 1005 (codified at 33 U.S.C. § 2348).

[141] *Id.* ("[T]he Secretary concerned shall develop a categorical exclusion (as defined in section 1508.4 of title 40, Code of Federal Regulations (or a successor regulation)) . . . .").

[142] *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

instance, spell out when the agency will prepare an EIS and provide that each EIS must include information on reasonable alternatives, the affected environment, intergovernmental consultation, public meetings, substantive comments received, and responsible staff.[143] CEQ's regulations are far more detailed, providing, 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.[144] For decades, these components have been standardized across all agency EISs because of CEQ's regulations. That standardization makes the NEPA process more accessible and ultimately more useful to the public, including state governments. Without the CEQ regulations, the usefulness of future EISs will suffer. CEQ also fails, in the Repeal Rule and the Guidance, to address how federal agency NEPA procedures that reference or incorporate CEQ's soon to be repealed NEPA regulations will operate after April 11, 2025.

This failure to specify impacts is also a violation of E.O. 12988, Civil Justice Reform, which requires agencies promulgating or reviewing regulations to meet certain requirements, including drafting regulations to minimize litigation, and to assess whether the regulation "specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified."[145] CEQ does not specify in clear language, or otherwise, what impact the Repeal Rule will have on other regulations and legislation that reference or incorporate CEQ's NEPA regulations.

The task of rewriting and rebuilding NEPA processes and programs to address the loss of CEQ's regulations within agencies will be enormous. Confusion will result as agencies scramble to revise or draft new NEPA procedures and policies to replace the holes left by repeal of CEQ's NEPA regulations. Indeed, project developers and the attorneys who represent them have already expressed concern that the Repeal Rule will lead to "tremendous uncertainty" which would "frustrate project backers that want clear, predictable and efficient procedures."[146]

This confusion will be compounded by the fact that CEQ's Guidance urges agencies to use the Trump Administration's 2020 Rule as a model for their work and to rely on those regulations until they revise their own procedures.[147] The Guidance provides this direction even though the 2020 Rule has been subject to legal challenge and was in part superseded by 2021

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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).

[143] 40 C.F.R. § 6.207(a), (d).

[144] 40 C.F.R. § 1502.

[145] Exec. Order 12,988, 61 Fed. Reg. 4279 (Feb. 5, 1996).

[146] *See* Juan Carlos-Rodriguez, *Better Process Not Certain as White House Loses NEPA Regs*, Law 360 (Feb. 20, 2025, 10:15 PM EST), attached here as Exhibit F.

[147] Guidance at 1.

revisions that were never challenged or vacated by a court.[148] The Repeal Rule's complete removal of all of CEQ's NEPA regulations forces the States, applicants, and the public to guess what NEPA procedures a federal agency may follow and whether any agency's continuing voluntary compliance with aspects of the 2020 Rule will be upheld in court. The Repeal Rule will thus disrupt NEPA reviews throughout the federal government and across the nation, increasing project delays and uncertainty.

The Repeal Rule also may significantly increase litigation. Currently, most NEPA analyses do not result in litigation.[149] 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."[150] "Given that the number of federal actions potentially subject to NEPA is roughly 100,000 or so annually, litigation rates are exceedingly low."[151] Even for Environmental Impact Statements, which represent a small fraction of NEPA review processes, on average 20% are challenged and just 13% are actually litigated."[152] Following implementation of the Repeal Rule, however, federal actions may be subject to an increasing number of legal challenges in the absence of CEQ's guiding NEPA regulations. Where agencies follow a process that is different from what has been upheld by courts in relation to CEQ's existing regulations, that will lead to legal challenges. In the context of those challenges, courts will have to determine whether an agency's new approach is consistent with NEPA. In addition, there will be legal uncertainty because parties and courts will need to sift through existing precedent to determine if that precedent is dependent on CEQ regulations and the deference afforded to CEQ. There is large body of NEPA case law, but much of it interprets CEQ's implementing regulations. CEQ's assertion that the Repeal Rule will "minimize and expeditiously resolve" confusion surrounding its regulations thus "runs counter to the evidence before the agency, or is so implausible that it

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[148] Based on significant concerns with the legality of CEQ's 2020 Rule, a coalition of States and territories challenged it in court. First Amended Compl. for Declaratory & Injunctive Relief, *State of California, et al. v. Council on Envtl. Quality, et al.*, Case No. 3:20-cv-06057-RS, Doc. 75 (filed Nov. 23, 2020) included here as Exhibit 1 to Exhibit 3 of attached Exhibit A. As detailed in the lawsuit, the 2020 Rule is arbitrary, capricious, and contrary to law, exceeds CEQ's statutory authority, and was promulgated without observance of procedure required by law. Among other things, the 2020 Rule illegally directed agencies to exclude consideration of environmental justice and cumulative impacts from environmental reviews.

[149] GAO Report, *supra* note 10, at 19.

[150] *Id*.

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

[152] *Id*.; *see also* GAO Report, *supra* note 10, 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://www.law.harvard.edu/faculty/rlazarus/docs/articles/Lazarus_APeekBehindtheCurtain_2012.pdf (as of 2012, the Supreme Court had decided only 17 NEPA cases).

could not be ascribed to a difference in view or the product of agency expertise."[153] This position is thus arbitrary and capricious.

5. CEQ's Repeal Rule Fails to Address the Serious Reliance Interests Engendered by its NEPA Regulations

CEQ argues, in the briefest of terms, that its NEPA-implementing regulations relate only to procedural obligations so it has no duty to consider reliance interests engendered by CEQ's NEPA regulations.[154] In addition, CEQ asserts in a header, but with no analysis, that there are no serious reliance interests engendered by its NEPA implementing regulations.[155] CEQ's assertions are contrary to caselaw and belied by the long history of reliance by States, applicants, and the public on CEQ's NEPA regulations.

Under the APA, an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate …when its prior policy has engendered serious reliance interests that must be taken into account." [156] Where decades of reliance on an agency position exist, the agency must provide more than a "summary discussion" of the change.[157] "An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[158] 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."[159]

Over their nearly fifty-year lifespan, significant reliance interests in uniform NEPA-implementing regulations have developed across the nation. CEQ's regulations have been in place as legislative rules since 1978. As discussed above in Section I.B, CEQ's regulations are intertwined throughout federal agency regulations and procedures, relied on by states, industry, and the public. The principles outlined in CEQ's current NEPA regulations are infused throughout the agency-specific NEPA regulations, as CEQ readily admits.[160] The task of rewriting and rebuilding NEPA processes and programs to account for the lack of CEQ's NEPA implementing regulations will be enormous.[161] At the state level, as discussed above, States

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

[154] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,613-14.

[155] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,613.

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

[157] *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).

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

[159] *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1914-15 (2020).

[160] *See, e.g.*, Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10,614 n.34.

[161] E.O. 14154.

drafted their little NEPAs in reliance on CEQ's NEPA implementing regulations providing clarity as to the content of federal environmental reviews. States conduct environmental reviews at the state level in coordination with federal reviews. With the sudden repeal of CEQ's NEPA implementing regulations, States will have to reassess not only their little NEPA processes, but also the procedures applicable to and content of individual environmental reviews to ensure they meet the statutory goals and requirements of state law. The repeal of CEQ's regulations will "necessitate systemic, significant changes" for all who interact with NEPA.[162]

Considering this reliance on CEQ's NEPA regulations, CEQ's cursory dismissal of reliance interests is wrong and renders its decision to repeal its implementing regulations arbitrary and capricious. CEQ states that "[b]ecause CEQ's NEPA regulations speak to the procedural obligations of Federal agencies as they implement NEPA, rather than imposing liability, fines, or a tangible burden on third parties, CEQ, when revising or removing those regulations, has no obligation to provide special consideration of reliance interests."[163] But, to the contrary, these "procedural obligations" form a central, and until now enduring, part of an environmental review infrastructure relied upon by the States, applicants and the public across the country.[164] In addition, the *type* of reliance interests at issue goes to the possible *significance* of those interests, not whether any interests exist. CEQ 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.[165]

CEQ appears to argue that reliance interests are unaffected because federal agencies have their own NEPA-implementing regulations and can choose to continue to follow CEQ's soon to be repealed regulations.[166] But CEQ fails to support these arguments. As explained above, most federal agencies that have their own NEPA-implementing regulations or procedures that build upon or incorporate by reference to CEQ's regulations. CEQ nowhere explains how or if those agencies can continue to rely on regulations, either directly or through a cross-reference in their own agency regulations, that will be removed from the Code of Federal Regulations. Indeed, by arguing that agencies can continue to rely on CEQ's longstanding NEPA-implementing regulations, CEQ itself acknowledges that those regulations have engendered reliance.

Nor does CEQ's Guidance eliminate the need for CEQ to consider reliance interests. The Guidance directs agencies to use the 2020 Rule "as an initial framework for the development of revisions to their NEPA implementing procedures,"[167] and encourages agencies to voluntarily

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

[163] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,613.

[164] *See* sections 1.B, II.A, *infra.*

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

[166] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,613-14.

[167] Guidance at 1-2.

rely on those regulations in completing ongoing NEPA reviews.[168] While agencies could continue to follow CEQ's NEPA regulations, they may choose to not follow them when they are removed from the Code of Federal Regulations and their legal status becomes dubious. Uncertainty as to which procedures to follow will disrupt environmental reviews across the country, where States already have significant resources devoted to NEPA implementation. It will also require 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.

CEQ argues in the alternative that, if there are any reliance interests, those interests have been lessened by changes to CEQ's implementing regulations over the years. This argument is similarly unavailing.[169] While there have been "seriatim amendments" to CEQ's NEPA implementing regulations, there has never been an effort to wholesale repeal the regulations.[170] The basic structure and many fundamental requirements of the regulations have stayed the same over time, despite efforts in the 2020 Rule to weaken their protectiveness.[171] Reliance interests developed with respect to there being one guiding set of NEPA regulations which all NEPA practitioners must follow, even if a portion of the specific contents have changed from time to time.

Finally, CEQ's reference to recent court decisions is insufficient. Its citation to the decision in *Marin Audubon* does not address the circumstances surrounding the case that were addressed above in Section II.A.1, including the party presentation issues, the peripheral nature of the discussion of CEQ's authority compared to the ultimate holding in the case, the dissenting opinion, and the subsequent concurrence in an *en banc* hearing denial.[172] CEQ's dismissive assertion that reliance interests are lessened because there have been some changes in the regulations over time and a few court decisions questioning the regulations has not met the heightened standard requiring CEQ to explain its change in position where there are significant reliance interests and thus CEQ should not have proceeded with an interim final rule.

B. The Repeal Rule Would Unlawfully Limit the Scope of Impacts Considered Under NEPA and Curtail Public Participation

CEQ's elimination of regulations requiring consideration of cumulative and indirect effects and ensuring meaningful public participation violates NEPA and is thus "not in

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[168] Guidance at 4.

[169] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,614.

[170] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,614.

[171] While the 2020 Rule made significant changes to CEQ's NEPA regulations, a redline of the changes shows that much of the structure and text remains. *See* redline, attached here as Exhibit G.

[172] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,614 n.25; *Marin Audubon Soc'y v. Fed. Aviation Admin*., No. 23-1067, 2025 WL 374897, at *1 (D.C. Cir. Jan. 31, 2025).

accordance with law" under the APA.[173] As noted above, CEQ's current NEPA regulations define the effects that federal agencies must consider in a NEPA analysis to include "direct effects," "indirect effects," and "cumulative effects."[174] CEQ's Repeal Rule, however, would strike these definitions entirely, leaving a definitional void. The recission of CEQ's regulations on public participation is similarly unlawful—particularly as it is replaced by Guidance directing agencies to both prioritize efficiency and certainty over any other policy objectives and model future rulemaking on a 2020 Rule that curtailed and burdened public participation. These changes are contrary to NEPA and decades of CEQ policy and practice, and case law.[175]

1. CEQ's Repeal Rule and Guidance Unlawfully Limit Agencies' Responsibility to Consider "Indirect" and "Cumulative" Effects

Analysis of cumulative and indirect effects is not simply reasonable, but necessary to allow for the full consideration of significant impacts required by NEPA. The Repeal Rule and Guidance's hinderance 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."[176] NEPA requires federal agencies to prepare a "detailed statement" on the impacts of certain actions prior to making decisions.[177] Section 102 of NEPA requires that agencies disclose "any adverse environmental effects which cannot be avoided" if the agency action goes forward.[178] And NEPA requires agencies to consider the larger context, directing them to "recognize the worldwide and long-range character of environmental problems."[179]

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."[180]

Consistent with NEPA's plain text and purpose, for over 40 years the courts and CEQ itself have interpreted NEPA to require consideration of direct, indirect, and cumulative

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[173] 5 U.S.C. § 706(2).

[174] 40 C.F.R. § 1508.8.

[175] *See, e.g.*, *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988) (EIS must analyze the combined effects of the actions in sufficient detail to be "useful to a decisionmaker in deciding whether, or how, to alter the program to lessen cumulative environmental impacts.").

[176] *Am. Rivers,* 895 F.3d at 49 (citations and internal quotation marks omitted).

[177] 42 U.S.C. § 4332(2)(C).

[178] *Id.* § 4332(2)(C)(ii).

[179] *Id*. § 4332(2)(F).

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

effects.[181] And courts have repeatedly recognized that NEPA's "hard look" requires consideration of cumulative impacts.[182] 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.[183] For example, the Second Circuit in *Hanly v. Kleindienst* held that an environmental assessment must consider:

(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.[184]

This 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*, "[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."[185] Courts have continued to reinforce the critical role of impacts analysis in the "hard look" required by NEPA.[186] As the Supreme Court has explained, "[b]y so focusing agency attention [on the environmental effects of proposed agency action], NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct."[187]

And, indeed, 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

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[181] 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(c); *Kleppe*, 427 U.S. at 410.

[182] *Kleppe*, 427 U.S. at 410 (citing NEPA and specifying that agencies have an obligation to evaluate the "cumulative or synergistic" environmental impacts that may occur when there are several pending actions that may have similar effects); *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.").

[183] 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.").

[184] 471 F.2d 823, 830–31 (2d Cir. 1972).

[185] *Id.* at 831.

[186] *See, e.g.*, *Kleppe*, 427 U.S. at 409 (explaining that Congress intended Section 102 of NEPA as a directive to "all agencies to assure consideration of the environmental impact of their actions in decisionmaking") (citing Conference Report on NEPA, 115 Cong. Rec. 40416 (1969)).

[187] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)*; see also Robertson*, 490 U.S. at 349 (NEPA's purpose is to "ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts").

substantial than the primary effects of the original action itself."[188] And even before that, CEQ recognized that the effects of many decisions can be "individually limited but cumulatively considerable."[189] More recently, CEQ reaffirmed that "cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment."[190] And CEQ itself again reaffirmed this mandate in its 2021 Phase 1 rulemaking re-instating a definition of effects that requires consideration of direct, indirect, and cumulative effects.[191]

CEQ's Repeal Rule, however, would eliminate a clear requirement to consider the three categories of effects, replacing them only with the vague Guidance directing agencies to consider only "'reasonably foreseeable' effects, regardless of whether or not those effects might be characterized as 'cumulative.'"[192] CEQ asserts that the proposed revisions aim to focus agencies on the most significant effects. But NEPA requires that an agency assess *all* of the project's reasonably foreseeable significant impacts, not merely the "most significant."[193] And CEQ's Repeal Rule and Guidance would exclude impacts that are "remote in time" or "geographically remote," which unlawfully would take such "long range" environmental impacts out of NEPA's purview. Accordingly, CEQ's proposal would undermine NEPA's mandate and purpose to ensure that agencies are fully equipped to make decisions concerning all significant environmental impacts.[194] To the extent that agencies ignore significant impacts under the Repeal Rule because they interpret CEQ's Guidance as no longer requiring consideration of cumulative impacts, they will not have complied with NEPA's admonitions to "recognize the worldwide and long-range character of environmental problems,"[195] and to disclose "*any* adverse environmental effects which cannot be avoided."[196]

The Repeal Rule's elimination of the NEPA regulations in conjunction with the Guidance's treatment of "remote" impacts also ignores the reality that some major federal

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[188] Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20,550, 20,553 (Aug. 1, 1973).

[189] Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7,724–29 (Apr. 23, 1971) (The 1971 Guidelines were later revised in 1973 (38 Fed. Reg. 20,549–62 (Aug. 1, 1973)) (codified at 40 C.F.R. § 1502)).

[190] Considering Cumulative Effects Under The National Environmental Policy Act (Jan. 1997)[hereinafter Considering Cumulative Effects], https://ceq.doe.gov/publications/cumulative_effects.html.

[191] 40 C.F.R. § 1508.1(g).

[192] Guidance at 5.

[193] 42 U.S.C. § 4332. Moreover, CEQ itself previously stated that "[p]erhaps the most significant environmental impacts result from the combination of existing stresses on the environment with the individually minor, but cumulatively major, effects of multiple actions of over time." CEQ, NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS, at 29 (Jan. 1997), https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf . CEQ provides no reasoned explanation for its change in position from previously recognizing cumulative impacts as often the "most significant."

[194] *Robertson*, 490 U.S. at 349.

[195] 42 U.S.C. § 4332(2)(F).

[196] *Id.* § 4332(2)(C)(ii) (emphasis added).

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 U.S. 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.[197]

If agencies omit relevant impacts from their analysis—as they may under the Repeal Rule in conjunction with the Guidance—then the agencies and the public will not be fully informed about the environmental implications of the agency decisions, as NEPA requires. The Repeal Rule would unlawfully permit agencies to conduct NEPA analyses without taking the requisite "hard look" at such impacts.

2. The Repeal Rule, Along with CEQ's Guidance, Would Unlawfully Curtail the Public Participation at the Heart of the NEPA Process

The elimination of CEQ's unifying regulations through the Repeal Rule, in tandem with CEQ's Guidance, would erode the public participation that is both necessary for a robust NEPA process and required under the statute and decades of case law.

Public involvement by our agencies and residents is critical in 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.[198] Indeed, public participation is one of its "twin aims."[199] 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."[200] 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

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[197] In fact, 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).

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

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

[200] *Id.*

actions are taken[,]"[201] just as courts even predating the 1978 regulations have recognized the public's role in making certain federal decision-making is "premised on the fullest possible canvassing of environmental issues[.]"[202]

NEPA explicitly provides for participation by other governmental entities, including state and local government agencies, in the NEPA process.[203] NEPA requires federal agencies to "consult with and obtain the comments of" other federal, state, and local agencies with jurisdiction over the environmental effects of major federal actions.[204] The requirement to consult with other agencies with "jurisdiction by law with respect to any environment [sic] impact" was intended to be a prerequisite to the preparation of the required analysis of environmental effects.[205] Such collaboration between "federal agencies and those who will bear the environmental, social, and economic impacts of agency decisions" has been recognized by CEQ and stakeholders alike as NEPA's "most enduring legacy."[206]

CEQ not only will eliminate all existing CEQ regulations—including all provisions aimed at ensuring meaningful participation—through the Repeal Rule, but also supplant those unifying requirements through Guidance that undermines the necessary and mandated public participation at the core of the NEPA process. CEQ's Guidance that agencies "must prioritize efficiency and certainty over any other policy objectives" serves as a clear directive to deprioritize meaningful and transparent public participation, contrary to the NEPA statute.

Moreover, the Guidance points agencies to the 2020 Rule as CEQ's preferred model—a rule that imposed rigid deadlines and other measures that would allow proponents to circumvent public process and removed all references to public participation. The 2020 Rule notably removed language mandating that agencies "to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment"[207] and ensuring that agencies provide environmental information to the public "early in the process before decisions are made and before actions are taken."[208] CEQ's message to curtail meaningful public participation is further developed by the directive in the Guidance that agencies should minimize or fully avoid public comment on the NEPA implementing procedures they are directed to promulgate. Together, the Repeal Rule and the Guidance unlawfully threaten

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[201] 40 C.F.R. § 1500.1(b).

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

[203] *See* 42 U.S.C. §§ 4331(a), 4332(2)(C), 4336a(3) & (4).

[204] *Id*. § 4332(2)(C).

[205] 115 Cong. Rec. 40420 (1969).

[206]The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years, CEQ at 7 (1997), https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf.

[207] Compare 40 C.F.R. § 1500.2, with Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 1,712 (proposed 40 C.F.R. § 1500.2).

[208] Compare 40 C.F.R. § 1500.1, with Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 1,712 (proposed 40 C.F.R. § 1500.1).

the public participation and robust, informed federal decision making processes that States rely upon in protecting our residents and environmental resources.

In sum, CEQ's proposed elimination of regulations governing the definition of effects and public participation would strike at the heart of NEPA's purpose and environmental review requirements, in violation of NEPA and, accordingly, the APA.

C. CEQ's Repeal Rule Violates the APA's Notice and Comment Provisions

Whenever an agency, like CEQ, engages in rulemaking, it is required to provide notice, give interested persons an opportunity to participate by providing comments, and "consider[]" the materials presented before incorporating a statement of the basis and purpose of the rule.[209] An agency must consider and respond to significant comments received during the public comment period.[210] The APA's notice and comment rulemaking requirements apply regardless of whether an agency is creating or repealing a rule. "Rule making" is defined as the process of "formulating, amending, or *repealing* a rule."[211] Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[212]

CEQ's Repeal Rule constitutes a rulemaking under the APA that requires notice and comment because the rules that it repeals were promulgated through notice and comment processes under the APA. Indeed, many of the States participated in these earlier rulemakings by submitting comments.[213] The Repeal Rule "removes all iterations of [CEQ's] NEPA implementing regulations" from the Code of Federal Regulations, "including 40 CFR parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508."[214] Those regulations were put in place through a series of proposed and final rules, with several months for public comment, multiple public meetings hosted by CEQ, and responses to comments received. The proposed 1978 regulations were issued in draft form on June 9, 1978 (43 Fed. Reg. 25,230). Comments were due August 11, 1978 (63 days later), and the regulations were finalized nearly two months later on November 9, 1978 (43 Fed. Reg. 55,978). CEQ noted that the final 1978 regulations

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[209] 5 U.S.C. § 553(c).

[210] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015).

[211] 5 U.S.C. § 551(5) (emphasis added).

[212] *Perez*, 575 U.S. at 101 (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")).

[213] *See* Comments of Attorneys General of Washington, *et al* on the Proposed Phase 2 Rule, 88 Fed. Reg. 49,924 (Sept. 29, 2023), Comments of Attorneys General of Washington, et al., on the Interim Final Rule, 86 Fed. Reg. 34,154 (July 29, 2021); Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking, 86 Fed. Reg. 55,757 (Nov. 22, 2021); Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking, 85 Fed. Reg. 1,684 (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).

[214] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,611.

"reflect[ed] changes made as a result of [the notice and comment] process." 43 Fed. Reg. at 55,978. The 2020 Rule was previewed in CEQ's advance notice of proposed rulemaking on June 20, 2018 (83 Fed. Reg. 28,591) prior to a proposed rule on January 10, 2020 (85 Fed. Reg. 1,684). Comments were due on March 10, 2020 (60 days later) and a final rule was published on July 16, 2020, more than four months later (85 Fed. Reg. 43,304). On October 7, 2021, CEQ issued a proposed "Phase 1" rule to amend the 2020 Rule and restore portions of the 1978 regulations (86 Fed. Reg. 55,757). Comments were due on November 22, 2021 (46 days later) and CEQ finalized the rule nearly five months later on April 20, 2022 (87 Fed. Reg. 23,453). Finally, the proposed "Phase 2" rule was issued on July 31, 2023 (88 Fed. Reg. 49,924). Comments were due on September 29, 2023 (60 days later) and CEQ finalized the rule after six months of further consideration on May 1, 2024 (89 Fed. Reg. 35,442).

Here, although CEQ is plainly engaging in rulemaking by issuing the Repeal Rule, it is not following the required process because it is finalizing a rule prior to considering and responding to comments. CEQ published the Repeal Rule in the Federal Register as a "final rule," which is effective without further action by CEQ on April 11, 2025.[215] The effective date is just 15 days after comments on the rule are due on March 27, 2025.[216]

CEQ argues that an interim final rule is appropriate, and a process to receive and respond to comments is not required, because the "good cause," "rules of agency organization, procedure, or practice," "interpretative rules," or "general statements of policy" exceptions at 5 U.S.C. 553(b) apply. 90 Fed. Reg. at 10614-15. However, none of the APA exceptions to notice and comment rulemaking apply in this situation. CEQ may not repeal its NEPA regulations rules without the required notice and comment process.

1. The "Good Cause" Exception Does Not Apply

CEQ 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."[217] But neither of these purported justifications constitutes "good cause."

The APA 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."[218] However, this exception "should be limited to emergency situations,"[219] or

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[215] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,610.

[216] The Repeal Rule inconsistently states that comments are due by March 27, 2025, Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,610, and April 11, 2025, *id.* at 10,611 ("Public comments on the matters addressed in this interim final rule are due by April 11, 2025").

[217] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,614.

[218] 5 U.S.C. § 553(b)(B).

[219] *Consumer Energy Council of America v. Fed. Energy Regul. Comm'n*, 673 F.2d 425, 448 (D.C. Cir. 1982),

scenarios where notice and comment "could result in serious harm"[220] The good cause exception is "narrowly construed and only reluctantly countenanced."[221] Neither the self-imposed Executive Order deadlines nor purported agency confusion fit into these categories.

First there was no "emergency" created by E.O. 14154 and the deadlines it imposed. E.O. 14154 directed CEQ to "*propose* rescinding CEQ's NEPA regulations found at 20 CFR 1500 *et seq.*" within 30 days.[222] Direction to propose a rescission is not the same as a direction to finalize one. In fact, CEQ's use of the interim final rule process is inconsistent with Executive Order 14154's instruction. By directing CEQ to "propose" rescinding its NEPA regulations, the Executive Order contemplates a rulemaking process that involves a proposal, comments on that proposal, and a final rule that incorporates CEQ's responses to comments.

Second, even if CEQ misinterpreted the Executive Order as *requiring* it to issue a final rule to rescind CEQ'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 *Natural Resources Defense 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."[223] 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."[224] Here, similarly, the mere existence of arbitrary deadlines set out in the Executive Order does not constitute good cause. Delaying rulemaking past those deadlines poses no "serious harm" to the public and is therefore not "contrary to the public interest."[225]

Third, CEQ fails to explain in the Repeal 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 public and agency input on a rule that repeals all NEPA implementing regulations would reduce rather than exacerbate agency confusion. Moreover, CEQ nowhere explains how repealing its NEPA implementing regulations would serve the purported purpose of resolving agency confusion. Rather, CEQ directly undercuts any such rationale by simultaneously issuing the Guidance directing agencies to continue voluntarily relying on CEQ's NEPA implementing regulations

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[220] *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).

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

[222] Exec. Order 14,154, 90 Fed. Reg. 8,353 (Jan. 29, 2025), Sec. 5(b) (emphasis added).

[223] 355 F.3d at 205.

[224] *Id.*

[225] *Chamber of Commerce of U.S.*, 443 F.3d at 908; 5 U.S.C. § 553(b)(B).

until the agencies establish or revise their own NEPA implementing procedures.[226] The Guidance specifically states that "although CEQ is rescinding its NEPA implementing regulations at 40 C.F.R. parts 1500–1508, agencies should consider voluntarily relying on those regulations in completing ongoing NEPA reviews or defending against challenges to reviews completed while those regulations were in effect."[227] It is simply illogical for CEQ to claim that there is an "emergency" need to remove all of CEQ's NEPA implementing regulations from the Code of Federal Regulations and at the same time direct agencies to continue to rely on those removed regulations. And CEQ's repeal of the regulations while simultaneously directing agencies to continue relying on them, if anything, *increases* agency confusion. For all these reasons, the "good cause" exception does not apply to the Repeal Rule.

2. CEQ's NEPA Implementing Regulations Are "Legislative" or "Substantive" Rules and the APA Exceptions for Non-Legislative Rules Do Not Apply

In the Repeal Rule, CEQ repeatedly argues that "CEQ regulations" are not "legislative rules" but "may be characterized as rules of agency procedure and practice," "interpretative rules," or "general statements of policy" because they do not create "enforceable rights or obligations."[228] In other words, CEQ argues not only that the Repeal Rule falls within the APA exceptions for non-legislative rules at 5 U.S.C. § 553(b)(A), but that all prior CEQ regulations implementing NEPA were necessarily non-legislative rules and also fall within those exceptions. This is incorrect.

Legislative rules are rules through which an agency "intends to create a new law, rights or duties." [229] CEQ's previous regulations implementing NEPA were all promulgated through notice and comment without referring to any exception in 5 U.S.C. § 553(b). And the NEPA regulations are indisputably "binding" on other agencies. Indeed, CEQ has repeatedly acknowledged as much:

- National Environmental Policy Act-Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. at 55,978 (Nov. 9, 1978) - "the Council's regulations are binding on all Federal agencies" and replace "inconsistent agency practices and interpretations of the law."
- Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,358 (July 16, 2020) - Updating 40 C.F.R. § 1500.3 but maintaining the language within it that states "This subchapter is applicable to and binding on all Federal agencies . . ." In response to comments, CEQ

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[226] Guidance at 4.

[227] *Id*.

[228] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,615; *see also id.* at 10,613 n.3 (arguing CEQ has no authority to issue "legislative rules with the force and effect of law.").

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

reiterated that "Successful implementation of NEPA across the Federal government depends on agencies having review processes that can be integrated and are under the direction of CEQ" and the CEQ regulations are "binding on all Federal agencies."[230]

- National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. at 35,554 (May 1, 2024) - Updating 40 C.F.R. § 1500.3 but maintaining the language within it that states "This subchapter is applicable to and binding on all Federal agencies . . ." In response to comments, CEQ confirmed that its regulations are binding on agencies.[231]

CEQ's NEPA regulations created requirements that federal agencies must follow when undertaking environmental review of certain projects.[232] The CEQ's NEPA-implementing rules promulgated between 1978 and 2024 are therefore textbook examples of legislative rules. Repealing these regulations is also a rulemaking regarding the duties of federal agencies and is thus legislative.

3. The "Rule of Agency Organization, Procedure, or Practice" Exception Does Not Apply

CEQ argues that "[b]ecause E.O. 14154 rescinded E.O. 11991, the Repeal Rule is a procedural and ministerial step to implement the President's directive" and that "CEQ's regulations implementing NEPA's procedural requirements may be characterized as rules of agency procedure and practice."[233] However, CEQ is mistaken because the President lacks authority to repeal regulations through an executive order, and the regulations CEQ is repealing have impacts far beyond the technical details of CEQ's intra-agency operations.

The APA exempts from notice and comment "rules of agency organization, procedure, or practice."[234] To qualify for the "rule of agency procedure" exception, an agency rule must have only an intra-agency impact.[235] Courts have defined agency procedural rules as the "technical regulation of the form of agency action and proceedings . . . which merely prescribes order and formality in the transaction of . . . business."[236] The exception does not include any action "which is likely to have considerable impact on ultimate agency decisions" or that "substantially

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[230] Final Rule Response to Comments RIN 0331-AA03 at 435-37 (June 30, 2020).

[231] Final Rule Response to Comments RIN 0331-AA07 at 20-21 (April 2024).

[232] *See* 40 C.F.R. § 1507.1 ("All agencies of the Federal Government shall comply with the regulations in this subchapter.")

[233] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,615.

[234] 5 U.S.C. § 553(b)(B).

[235] Cong. Research Serv., *A Brief Overview of Rulemaking and Judicial Review* at 7 (Mar. 27, 2017), https://crsreports.congress.gov/product/pdf/R/R41546.

[236] *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113-14 (D.C. Cir. 1974).

affects the rights of those over whom the agency exercises authority."[237] Further, courts look to whether the agency action "encodes a substantial value judgment or puts a stamp of approval or disapproval on a given type of behavior."[238]

The Repeal Rule cannot be categorized as simply a ministerial, procedural step to "implement the President's directive,"[239] because the President is not empowered to repeal regulations through an executive order. Agencies must use the required rulemaking procedure, which includes notice and comment, to effectuate a regulatory repeal.[240]

CEQ also obfuscates the nature of its NEPA-implementing regulations when it characterizes them as procedural rules that are exempt from full APA notice and comment requirements. It is true that NEPA is a "procedural" statute in the sense that it does not mandate particular substantive results, and instead prescribes the necessary process for environmental review of proposed projects. It sets out "'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences, and that provide for broad dissemination of relevant environmental information."[241] However, the fact that the statute mandates a process for environmental review does not mean that CEQ's NEPA regulations are "rules of procedure" within the meaning of the APA. CEQ's implementing regulations do not govern the internal operations of CEQ.[242] Instead, they set out required processes that all federal agencies subject to NEPA must follow.[243] Those regulations "encode[] a substantial value judgment or put[] a stamp of approval or disapproval on a given type of behavior" and are binding across numerous federal agencies.[244] In repealing its NEPA implementing regulations, CEQ does not merely incidentally affect the practices and duties of those agencies and external parties, it changes the rules that govern them.

Examples of the way that CEQ's NEPA regulations govern federal agencies may be found in provisions from the Phase I Rule which are included in the currently applicable regulations following a district court's vacatur of the 2024 Phase II Rule. 40 C.F.R. Part 1502.13 requires environmental impact statements that federal agencies prepare to "specify the underlying purpose and need to which the agency is responding in proposing the alternatives

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[237] *Pickus*, 507 F.2d at 1114.

[238] *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

[239] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,615.

[240] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. at 96.

[241] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[242] *See* Congressional Research Service, R41546, A Brief Overview of Rulemaking and Judicial Review at 7 (Mar. 27, 2017), https://crsreports.congress.gov/product/pdf/R/R41546 ("agency procedural rules" subject to exception must have "intra-agency impact").

[243] 40 C.F.R. §1500.3(a).

[244] *American Hosp. Ass'n*, 834 F.2d at 1047.

including the proposed action."[245] 40 C.F.R. Part 1508.1(g) defines the effects or impacts to be analyzed in association with the proposed action or alternatives to include direct, indirect, and cumulative effects.[246] These requirements and definitions specify the way federal agencies must conduct environmental review, requiring them to prepare environmental analyses under NEPA that contain particular information. If an environmental analysis does not include the specified information required by CEQ's NEPA regulations, the agency's analysis may not withstand judicial review.

The Repeal Rule alters the duties of all agencies that undertake NEPA analyses. Each agency must now develop its own NEPA implementing regulations, and the requirements agencies set out for themselves may diverge. For example, following the Repeal Rule agencies may take different approaches in defining the "reasonably foreseeable" effects of the proposed project and alternatives that must be analyzed and disclosed. The Guidance in fact suggests that agencies need not analyze "cumulative" effects.[247] These examples and many others demonstrate the substantive impacts of CEQ's NEPA implementing regulations on all federal agencies and clearly show that they are not mere technical rules of internal CEQ procedure.

Moreover, the Supreme Court has noted that the NEPA procedures that shape the dissemination of relevant environmental information "are almost certain to affect the agency's substantive decision."[248] Without the uniformity of CEQ's NEPA implementing regulations, individual agencies must now amend their own regulations to clarify what information will be analyzed and reported to the public. The Repeal Rule's changes in NEPA procedures are therefore "likely to have considerable impact on ultimate agency decisions."[249] For all these reasons, the "rule[] of agency organization, procedure, or practice" exception does not apply to the Repeal Rule.

4. The "Interpretive Rule" Exception Does Not Apply

For similar reasons, CEQ is simply incorrect in arguing that the Repeal 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."[250]

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."[251] These rules allow "agencies to

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[245] National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. at 23,469.

[246] *Id*.

[247] Guidance at 5.

[248] *Robertson*, 490 U.S. at 350.

[249] *Pickus*, 507 F.2d at 1114.

[250] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,615.

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

explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings. . . . '[R]egulations,' 'substantive rules,' or 'legislative rules' are those which create law, usually complementary to an existing law; whereas interpretive rules are statements as to what administrative officer thinks the statute or regulation means."[252] Interpretive rules do not "effect[] a substantive change in the regulations."[253] If a "rule effectively amends a prior legislative rule," it is a "legislative, not an interpretive rule."[254]

The Repeal Rule substantively changes CEQ'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 agencies 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."[255]

CEQ's NEPA-implementing regulations went through notice and comment and were repeatedly characterized by CEQ as "binding" on agencies.[256] 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 Repeal Rule.

5. The "General Statement of Policy" Exception Does Not Apply

Nor can CEQ succeed in arguing that the Repeal 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."[257] Rather, the Repeal Rule is a final and specific action repealing CEQ's longstanding regulations for all federal agencies.

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."[258] Such

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

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

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

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

[256] *Supra* at Section III.C.2.

[257] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,615.

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

statements are distinguished from substantive rules because they do not establish binding norms but instead "announce[] the agency's tentative intentions for the future." [259]

CEQ's Repeal Rule is not a tentative announcement that is nonbinding or an expression of future intentions. Instead, the Repeal Rule is final and decisive. It removes all iterations of CEQ's NEPA implementing regulations from the Code of Federal Regulations on April 11, 2025.[260] In repealing all of CEQ's NEPA implementing regulations, CEQ establishes that agencies are no longer required to follow CEQ's NEPA regulations. Those previous requirements in fact will no longer exist. Further, CEQ has made clear that there will not be "implementation [of a policy] in future rulemakings or adjudications."[261] The rule is "final" and there is no suggestion that CEQ will undertake future rulemaking to resurrect regulations that apply across agencies. The "general statement of policy" exception does not apply to the Repeal Rule.

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

6. CEQ's Request for Comments Does Not Cure the APA Rulemaking Notice and Comment Violations

As an alternative to its argument that notice and comment rulemaking is not required, CEQ argues that the Repeal Rule "contains all of the APA-required elements for notice-and-comment rulemaking," including "reference to legal authority," "a description of the terms and substance," and "a request for public comment."[262]

Section 553(c) of the APA requires more than the "request for comment" that CEQ references. It states: "[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."[263] Courts have held that "an agency must consider and respond to significant comments received during the period for public comment."[264]

By issuing a final rule that goes into effect just eleven business days after comments are due, regardless of whether comments are received, CEQ signals that it is not open to feedback

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[259] *Pac. Gas & Elec. Co.*, 506 F.2d at 38.

[260] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,611.

[261] *Pac. Gas & Elec. Co.*, 506 F.2d at 38.

[262] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,614 (citing 5 U.S.C. §§ 553(b)(2), (b)(3), & (c)).

[263] 5 U.S.C. § 553(c).

[264] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).

and that the comments are practically meaningless. Under this framework, the comment period does not provide an "opportunity to *participate* in the rule making" required by 5 U.S.C. § 553(c). CEQ also must consider and respond to significant comments and should only finalize the rule "[a]fter consideration of the relevant matter presented."[265] However, the Repeal Rule's effective date is not contingent on the completion of CEQ's review of comments, nor does it provide the agency time to consider and respond to comments received.

The Repeal Rule states that "CEQ will consider and respond to comments before finalizing the interim final rule."[266] But even if CEQ does eventually respond to comments, CEQ's NEPA implementing regulations will already have been repealed, and the agency will have totally constrained the options it can take in response to comments. Given the April 11, 2025, effective date, the agency has eliminated any possibility of, for example, making modifications to its regulations or determining whether certain changes should be made permanent, since a permanent repeal will have already occurred.

Moreover, even if CEQ intends to respond to comments before finalizing the Repeal Rule, 30 days for comment is insufficient. CEQ's Repeal Rule fundamentally changes how every agency in the federal government, as well as those state agencies that rely on CEQ's NEPA regulations, must consider the environmental impacts of major federal actions. 30 days is nowhere near enough time for the public to properly understand and meaningfully respond to the Repeal Rule. CEQ's previous rulemakings for revisions to NEPA regulations have provided 45 or 60 days for comment and multiple public hearings. Only one of those revisions did not involve a 60-day comment period.[267] CEQ and the Office of Management and Budget both determined that this rule is significant and that Executive Order 12866 applies.[268] Therefore, CEQ was 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."[269]

A minimum of 60 days should be provided for the public to comment on the significant legal and factual issues implicated in the Repeal Rule, including CEQ's authority to issue binding regulations, the extent to which others federal and state agencies rely on CEQ's NEPA implementing regulations, and more.

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[265] 5 U.S.C. § 553(c).

[266] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,611.

[267] *Supra* at Section I.A.

[268] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,615.

[269] Exec. Order. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

CEQ's 30-day comment period and interim final rule approach violates the APA.

IV. CEQ MUST CONDUCT NEPA REVIEW OF THE REPEAL RULE

CEQ failed to consider properly whether the Repeal Rule itself triggers NEPA review, thus requiring preparation of an Environmental Assessment (EA) or an EIS prior to the issuance of a final rule. Instead, CEQ summarily states it "has determined that the [proposed] rule [would] not have a significant effect on the environment because it [would] not authorize any [] activity or commit resources to a project that may affect the environment."[270] CEQ acknowledges that it prepared EAs for its promulgation of NEPA regulations in 1978 and amendments in 1986 and the Phase 1 and Phase 2 regulations in 2021 and 2024.[271] But here, CEQ contends that it is not required to conduct a NEPA analysis on its Repeal Rule because "CEQ does not require any Federal Agency to conduct NEPA analysis for the development of agency procedures for the implementation of NEPA and the CEQ regulations."[272] This is not the relevant standard for determining whether environmental review is required.

CEQ's decision to forgo NEPA review for the Repeal Rule violates NEPA because repealing CEQ's NEPA regulations is a major federal action that will have a significant impact on the environment. CEQ's justification also conflicts with NEPA and the case law interpreting it.

A. Completely Repealing CEQ's NEPA Regulations is a Major Federal Action Affecting the Environment

CEQ's NEPA regulations, in effect today, identify agency rules as "major" federal actions which may require NEPA review.[273] If an agency's rulemaking may significantly impact the environment, NEPA review is required. This includes CEQ's repeal of its NEPA implementing regulations in the Repeal Rule. CEQ's NEPA implementing regulations are relied upon by all federal agencies and have been in place since 1978. Because agencies will no longer be required to structure their environmental reviews using CEQ's regulations, the Repeal Rule will likely lead agencies to ignore impacts or develop individual agency procedures with weaker, less environmentally protective requirements. Accordingly, CEQ must undertake the necessary NEPA review of its rulemaking, and its failure to do so is contrary to law.[274]

CEQ's complete repeal of its NEPA regulations alters how federal agencies must consider the environmental effects of proposed projects across the nation. A major purpose of

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[270] Interim Final Rule – Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. at 10,615.

[271] *Id.*

[272] *Id*.

[273] 40 C.F.R. § 1508.1(w) ("Actions include . . . new or revised agency rules, regulations, plans, policies, or procedures").

[274] *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 476–78 (2d Cir. 2012) (vacating agency's rulemaking, which the court considered to be a major federal action, because of deficient NEPA review).

NEPA is to ensure that an agency will have available, and will carefully consider, detailed information concerning significant environmental impacts, and guarantee that the relevant information will be made available to the larger public audience.[275] But CEQ's Repeal Rule will undermine that purpose and is likely to have significant effects on the environment, thus warranting NEPA review. Without CEQ's regulations in place, agencies may attempt to avoid consideration of indirect and cumulative impacts, including public health and environmental justice, for instance, unless those elements are separately incorporated into the agency's own NEPA implementing regulations. Where an agency does not consider potentially significant cumulative impacts of an agency action it may approve that action without the opportunity to propose mitigation of those significant cumulative impacts, which will the harm the environment.

By eschewing any kind of environmental review of the Repeal Rule, CEQ has not taken the "hard look" to determine whether the Repeal Rule will significantly impact the environment.

B. CEQ Misstates and Ignores the Governing Law Requiring NEPA Review

CEQ contends that it is not required to conduct NEPA review of its implementing regulations because there is no regulation that specifically requires it. However, NEPA does not allow for such a conclusion. The language in section 102(2)(C) of NEPA which compels environmental review of "major federal actions [] significantly affect[ing] the quality of the human environment" "is intentionally broad to force the government to consider the environmental effects of its actions."[276] Existing CEQ regulations provide, and numerous courts have confirmed[277] that a "major federal action" includes" new or revised agency rules, regulations, plans, policies, or procedures" where those actions may significantly affect the environment.[278] Regardless of whether the Repeal Rule is characterized as a rule, regulation, or procedure, it is still subject to NEPA review.

As with other agency actions, changes to NEPA's implementing regulations, such as a wholesale repeal of the regulations, require their own NEPA review if they create the possibility

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[275] *Ctr. for Biological Diversity*, 538 F.3d at 1185.

[276] *Found. for Horses & Other Animals v. Babbitt*, 995 F. Supp. 1088, 1093 (C.D. Cal. 1998) (citing *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1177 (9th Cir. 1982)).

[277] *See, e.g.*, *California ex rel. Lockyer v. U.S. Dep't of Agric*., 575 F.3d 999, 1012–18 (9th Cir. 2009) (agency repeal of roadless rule and replacement with new regulations required NEPA review); *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 18–32 (D.D.C. 2007) (vacating federal rule requiring NEPA review); *Natural Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1542 (E.D. Cal. 1991) (setting aside federal rule due to failure to perform EIS) *American Pub. Transit Ass'n v. Goldschmidt*, 485 F. Supp. 811, 831–36 (D.D.C. 1980), reversed on other grounds by *Am. Pub. Transit Ass'n v. Lewis*, 655 F2d 1272 (D.C. Cir. 1981) (regulations requiring many individual actions, each significantly affecting the environment, must itself be regarded as significantly affecting the environment requiring NEPA analysis).

[278] 40 C.F.R. § 1508.1(w) (emphasis added). *See also* 40 C.F.R. § 1507.3(b) (requiring each federal agency to adopt or revise "procedures to implement the regulations in this subchapter").

of significant impacts on the environment.[279] In *Sierra Club v. Bosworth*, for example, the Ninth Circuit held that the Forest Service's adoption of a new categorical exclusion for fuel reduction projects up to 1,000 acres and prescribed burns up to 4,500 acres on all national forest lands in the United States violated NEPA by failing to take the requisite "hard look" at the possibility of significant impacts of this rulemaking on the environment.[280] In particular, the Ninth Circuit found that the Forest Service failed to properly assess the scope of potential impacts and failed to adequately consider the NEPA significance factors, including cumulative impacts and the extent to which the categorical exclusion was highly controversial and the risks uncertain.[281] Consequently, the Ninth Circuit ordered the district court "to enter an injunction precluding the Forest Service from implementing the [categorical exclusion] pending its completion of an adequate assessment of the significance of the categorical exclusion from NEPA."[282]

There is similarly no rational basis for bypassing NEPA review of the Repeal Rule. First, the Repeal Rule will affect the approval of federal agency actions nationwide. The Repeal Rule will make it more likely that actions with significant undisclosed effects, the kind of effects that would be analyzed under CEQ's current regulations but will not necessarily be reviewed in their absence, are approved. As in *Bosworth*, here CEQ has failed to take the "hard look" at the likelihood of significant impacts resulting from this rulemaking and fails to provide "a reasonably thorough discussion of the significant aspects of the probable environmental consequences."[283] Unless and until CEQ properly considers whether the Repeal Rule may have a significant impact on the environment, it is in direct violation of NEPA.

Moreover, CEQ is subject to its own regulations that define "rules, procedures, and regulations," as "major federal actions." The current CEQ regulations further clarify that "[a]gencies should integrate the NEPA process with other planning [] at the earliest reasonable time to ensure" that planning and decisions reflect environmental values, "to avoid delays later in the process, and to head off potential conflicts."[284] Here, CEQ was required to request comments on the appropriate scope of environmental review of the Repeal Rule and then prepare, and notice for public comment, an EIS or an EA analyzing the Repeal Rule's potential impacts before, or in tandem with, its publication. CEQ knows that it is required to conduct environmental review for the Repeal Rule, as evidenced by CEQ's environmental review for prior revisions to CEQ's NEPA implementing regulations. Now, CEQ proposes to jettison its regulations entirely without performing any environmental review. The Repeal Rule thus violates

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[279] *See Sierra Club v. Bosworth*, 510 F. 3d. 1016 (9th Cir. 2007).

[280] *Id*. at 1025–34.

[281] *Id*. at 1026–32.

[282] *Id*. at 1034.

[283] *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir.1998), overruled on other grounds by *The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (en banc) (quoting *Or. Nat. Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997)).

[284] 40 C.F.R § 1501.2.

NEPA and must be withdrawn. At the very least, CEQ should suspend rulemaking for the Repeal Rule, request NEPA scoping comments, and prepare an EIS or an EA.

V. CEQ MUST CONSULT UNDER THE ENDANGERED SPECIES ACT

The Endangered Species Act (ESA) was enacted by Congress in 1973 out of deep concern for the preservation of America's imperiled plants and wildlife. The Act aims "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."[285] As the U.S. Supreme Court has stated, Congress intended "to halt and reverse the trend toward species extinction, whatever the cost."[286] Thus, "the language, history, and structure of the [ESA] [] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."[287]

There are presently 1,896 animal species and 1,065 plant species listed as threatened or endangered, respectively, in the United States, many of which live in the undersigned States.[288] The listing of a species under the ESA is a last resort to conserve endangered and threatened species and the ecosystems on which they depend. The National Oceanic and Atmospheric Administration and U.S. Fish and Wildlife Services (the Services) manage listed species and their designated critical habitats.

Section 7 of the ESA reflects "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species," elevating concern for species protection "over the 'primary missions' of federal agencies.'"[289] Section 7 requires all federal agencies to "insure"[sic] that any action they propose to authorize, fund, or carry out "is not likely to jeopardize the continued existence" of any endangered or threatened species or "likely to result in the destruction or adverse modification of" any designated critical habitat.[290] Federal agency action subject to consultation is broadly defined and includes "the promulgation of regulations" as well as "actions directly or indirectly causing modifications to the land, water, or air."[291]

For discretionary actions that occur in an action area in which listed species or critical habitat is or may be present, the first step is for action agencies to determine whether the proposed action may affect the listed species or critical habitat that is present.[292] The agency can

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[285] 35 U.S.C. § 1531(b).

[286] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

[287] *Id. at* 174-75.

[288] *See* 50 C.F.R. § 17.11 (animals), § 17.12 (plants).

[289] *Hill*, 437 U.S. at 185.

[290] 16 U.S.C. § 1536(a)(2).

[291] 50 C.F.R. § 402.02; *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994.)

[292] 50 C.F.R. § 402.14(a). The Ninth Circuit assesses the "action" inquiry under the ESA in two steps: "First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we

avoid consultation with the Services only if it determines the action will have no effect on endangered or threatened species.[293] The Services' ESA Section 7 Consultation Handbook states that, at minimum, the action agency "must provide the Services with an account of the basis for evaluating the likely effects of the action" if listed species or critical habitat is likely to be affected by the action."[294]

Under Section 7 of the ESA, federal agencies, including CEQ, must engage in a consultation process with the appropriate Service before taking action that "may affect" listed species.[295] Typically, the Services will prepare a "biological opinion" evaluating the impacts of the agency action. If they determine that the action is likely to result in jeopardy or adverse modification of critical habitat, the Services will impose "reasonable and prudent alternatives" to avoid this result, and also will impose "reasonable and prudent measures" to minimize and mitigate the impacts of the proposed federal agency action.[296]

Finally, Section 7(d) of the Act prohibits any "irretrievable commitment of resources" pending the completion of consultation.[297] The purpose of section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d)'s prohibition remains in effect throughout the consultation period and until the federal agency has satisfied its obligation under section 7(a)(2) to ensure that the action will not result in jeopardy to the species or adverse modification of its critical habitat.[298]

A. The Repeal Rule and Guidance Will Harm Listed Species

CEQ's Repeal Rule in conjunction with CEQ's Guidance will significantly impair the NEPA regulatory process for federal agencies and review of impacts to listed species.

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determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020–21 (9th Cir. 2012) (en banc). "There is 'agency action' whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed." *Id.* at 1011.

[293] *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447–48 (9th Cir. 1996); *Pac. Rivers Council,* 30 F.3d at 1054 n.8 ("[I]f the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered.") *cert. denied,* 514 U.S. 1082 (1995); *see also Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1175 (W.D. Wash. 2004) (distinguishing these Ninth Circuit cases and noting that some documentation is required to support a "no effect" determination).

[294] FWS and NMFS, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, (March 1998), pp. 3-11, at https://www.fws.gov/endangered/esa_library/pdf/esa_section7_handbook.pdf., excerpted pages 1 and 61-81 attached here as Exhibit H.

[295] 50 C.F.R. § 402.14(a).

[296] 50 C.F.R. § 402.14; *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007).

[297] 16 U.S.C. § 1536(d).

[298] *See, e.g., Pac. Rivers Council*, 30 F.3d at 1056-57; *Defs. of Wildlife v. Jackson,* 791 F. Supp. 2d 96, 113 (D.D.C. 2011).

Environmental review under NEPA plays an important role in ensuring agency actions are "not likely to jeopardize the continued existence" of any endangered or threatened species.[299] NEPA review is particularly critical to ensure that federal agencies consider potential impacts to fish and wildlife, including federally listed species, when planning and undertaking projects. NEPA review may show the presence of a federally listed species in a project area or might reveal potential impacts on those species that agencies might otherwise overlook. With this information in hand, federal agencies can alter the proposed action or implement mitigation measures to avoid or decrease adverse impacts to listed species. In addition, courts have held that the scope of NEPA's cumulative effects analysis under the 1978 regulations is broader than that required under the ESA itself.[300] Thus, the elimination of evaluation of cumulative effects as part of NEPA analysis is immediately likely to impact listed species. Federal agencies operating in the regulatory confusion created by the Repeal Rule will likely severely constrain the consideration of environmental impacts, including impacts to listed species. These changes threaten significant harm to listed species.

For example, the Guidance suggests that agencies need not consider "cumulative impacts"—that is, the environmental impacts of a proposed action combined with the anticipated impacts of other existing or future projects.[301] Such cumulative impacts can be particularly devastating for listed species while one intrusion into a species' habitat might cause minimal harm, multiple incursions into the same region may contract the species' range or extirpate it from an area entirely. If agencies are permitted to avoid consideration of cumulative effects, they will inevitably fail to address, mitigate, or avoid such impacts in approving major federal projects throughout the country. Courts have held that the scope of NEPA's cumulative effects analysis under the 1978 regulations is broader than that required under the ESA itself.[302] Thus, the elimination of evaluation of cumulative effects as part of NEPA analysis is immediately likely to impact listed species.

B. CEQ Failed to Comply with its Mandatory Duty to Consult with the Services on the Final Rule's Impact to Listed Species

CEQ's complete lack of explanation for not consulting under Section 7 of the ESA violates the ESA. First, "[t]he threshold for triggering the Endangered Species Act is relatively low: consultation is required whenever a federal action '*may affect* listed species or critical habitat.'"[303] As discussed, the Repeal Rule threatens significant harm to endangered and threatened species throughout the United States, and thus easily passes the low threshold for consultation.

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[299] 16 U.S.C. § 1536(a)(2).

[300] *Fund for Animals v. Hall,* 448 F. Supp. 2d 127, 136 (D.D.C. 2006).

[301] Guidance at 5.

[302] *Fund for Animals v. Hall,* 448 F. Supp. 2d 127, 136 (D.D.C. 2006).

[303] *California ex rel. Lockyer,*575 F.3d at 1018 (emphasis in original) (quoting 50 C.F.R. § 402.14(a)).

ESA consultation is required for agency actions that, like the Repeal Rule, authorize activity that harms listed species, even if the opportunity exists for a later project specific examination of impacts.[304] For example, the Ninth Circuit has held that ESA consultation was required before the U.S. Forest Service could repeal the National Roadless Rule, a "categorical, programmatic approach to roadless area management," which generally prohibited roadbuilding and logging in "inventoried roadless areas" in the national forests but did not by itself authorize or prohibit any specific on-the-ground activity.[305] While the United States Department of Agriculture (USDA) argued that individual challenges could be brought to management of specific areas, the Ninth Circuit found that repeal of the Roadless Rule itself triggered consultation under the ESA.[306]

CEQ did not identify, quantify, or consider the adverse impacts of repealing all of its NEPA regulations on a programmatic level, nor did it consider the impacts to any specific threatened or endangered species prior to finalizing the rulemaking.[307] Instead, it conducted zero analysis of potential impacts to the approximately 1,900 listed species in the United States and hundreds of millions of acres of critical habitat, despite the different threats that each one faces. CEQ does not have the expertise to determine impacts to listed species from the Final Rule without seeking the expertise that lies with the Services. It is for precisely this reason that consultation requirement exists.

Indeed, CEQ failed to even make a "no effects" determination in an attempt to avoid consultation. This is a change from the rulemaking for the 2020 Rule, when CEQ made such a determination when it revised its NEPA regulations.[308] The Services Handbook outlines that CEQ was at minimum obligated to "provide the Services with an account of the basis for evaluating the likely effects of the action."[309] Several cases similarly confirm that a "no effects"

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[304] *See, e.g., Pac. Rivers Council*, 30 F.3d at 1055 (9th Cir. 1994); *see also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496-97 (9th Cir. 2011) (ESA consultation required before Bureau of Land Management could revise regulations governing the agency's grazing program nationwide); *Citizens for Better Forestry v. U.S. Dep't of Agric*., 481 F. Supp. 2d 1059, 1097 (N.D. Cal. 2007) (consultation required before Forest Service could revise regulations governing development of forest management plans for the National Forests).

[305] *California ex rel. Lockyer*, 575 F.3d at 1019.

[306] *Id*. at 1019.

[307] *See generally*, Repeal Rule.

[308] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,354.

[309] FWS and NMFS, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, (March 1998), pp. 3-11, at https://www.fws.gov/endangered/esa_library/pdf/esa_section7_handbook.pdf., excerpted pages 1 and 61-81 attached here as Exhibit H.

determination must be documented.[310] An agency cannot say that an effects determination is not possible to make, and the determination may not be contrary to evidence in the record.

In sum, by finalizing the Repeal Rule without first complying with the ESA's substantive and procedural requirements, CEQ has failed to ensure that its actions will not jeopardize the numerous listed species in the United States or adversely modify their critical habitat. This failure undermines the plain language and fundamental purposes of the ESA.[311] We urge CEQ to perform its mandatory duties under Section 7 of the ESA.

VI. CONCLUSION

For all the reasons stated above, the undersigned States strongly urge CEQ to withdraw its unlawful and unsupported Repeal Rule.

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[310] *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151 (W.D. Wash. 2004); *Am. Fuel & Petrochemical Manufacturers v. Env't Prot. Agency*, 937 F.3d 559, 598 (D.C. Cir. 2019).

[311] 16 U.S.C. § 1531(b).

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