March 10, 2020

Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: CEQ-2019-0003, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

Dear Mr. Boling and Ms. Seale,

We appreciate the opportunity to comment on this proposed rulemaking action[1] to revise the Council on Environmental Quality (CEQ) regulations interpreting the requirements of the National Environmental Policy Act (NEPA). We are law students and staff at the University of Arizona James E. Rogers College of Law associated with a Natural Resource Use & Management law clinic,[2] although we write in our individual capacities and not on behalf of the University. We have an interest in the use and management of natural resources in the western United States, which often occurs on public lands or has a federal management or regulatory component that involves environmental review under NEPA. Acknowledging that rulemaking is a powerful tool and that the public comment process is an important policymaking venue[3]—and also recognizing NEPA's transformative role and "quiet" successes in democratizing decisionmaking[4]—we note our support of some aspects of this rulemaking effort but raise our deep concerns with other aspects of the proposed rule.

At the outset, we note that many of our concerns implicate NEPA's directive that federal agencies "use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economics, and other requirements of present *and future generation* of Americans."[5] In this vein, we highlight that NEPA's statutory purpose—of enacting a "national policy of environmental protection" and thus "place[] a

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[1] Council on Environmental Quality, Notice of Proposed Rulemaking, "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," published at 85 Fed. Reg. 1684 (Jan. 10, 2020), available at https://www.federalregister.gov/documents/2020/01/10/2019-28106/update-to-the-regulations-implementing-the-procedural-provisions-of-the-national-environmental.

[2] In general terms, the Clinic works on "matters pertaining to water, endangered species, public lands, climate change, tribal lands and resources, and the myriad natural resource challenges that exist in Arizona and the American West." *Natural Resource Use & Management Clinic*, https://law.arizona.edu/natural-resource-use-management-clinic (last visited Mar. 8, 20220, 08:44 am).

[3] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 Harvard L. Rev. 2246 (2001).

[4] *See, e.g.*, ENVT'L L. INST., *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government* 12-13 (Aug. 2010), https://ceq.doe.gov/docs/get-involved/NEPA_Success_Stories.pdf (detailing successful use of NEPA to protect drinking water from uranium mining waste materials).

[5] 42 U.S.C. § 4331 (emphasis added).

responsibility upon the Federal Government to further specific environmental goals"[6]—is a critical lens through which to review rulemaking under NEPA, and the efficacy of CEQ regulations and proposed changes at issue now.

A. Recognition of Tribal Sovereignty and Interests are an Unequivocally Positive Change

We view the changes that CEQ makes to add "Tribal" to the phrase "State and local" throughout the rule[7] as an unequivocally positive change, and commend CEQ for incorporating this revision in this rulemaking effort. CEQ explains that this change is intended to "ensure consultation with Tribal entities" in response to comments "supporting expansion of the recognition of the sovereign rights, interests, and expertise of Tribes."

These changes appear to reflect a growing body of law, including extant NEPA regulations,[8] that NEPA requires consultation[9] and thus help align NEPA with norms of partnerships and consultation obligations arising out of other legal authorities such as the National Historical Preservation Act Section 106,[10] the Native American Graves Protection and Repatriation Act[11], and numerous treaties. These changes are also timely and relevant. Recent controversies regarding energy resource development projects[12] have highlighted their manifold risks. Indeed, compliance with norms of consultation and environmental justice compliance will be an increasingly salient risk in the future,[13] especially since lead agencies are required under existing CEQ regulations to "[u]se the environmental analysis and proposals of cooperating agencies—such as tribes—with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency."[14]

Another proposed change would eliminate the limitation of Tribal interest to reservations, recognizing the fact that Tribes have interests in land and cultural and historical resources that may occur on land off-reservation.[15] This change promotes both the recognition of Tribal sovereignty and Tribal interests in land that is not limited to those officially designated as reservation lands. Such interests arise out of, *inter alia*, current off-reservation land use patterns

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[6] Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976).
[7] 85 Fed. Reg. at 1692.
[8] *See* 40 C.F.R. § 1501.7(a)(1) (requiring federal agencies invite tribal participation early in the EIS scoping phase); *see also id,* § 1501.2(d)(2); *id*. 1502.25(a) (directing agencies to prepare draft EIS "concurrent with and integrated with" relevant legal authorities, including the National Historic Preservation Act of 1966; *id*. § 1508.5 (providing for tribes' participation of "cooperating agencies").
[9] *See, e.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, No. 1:16-cv-1534-JEB, 81-90, Memorandum Opinion (June 14, 2017).
[10] 54 U.S.C.A. § 306108
[11] 25 U.S.C.A. § 3001, et seq.
[12] *See, e.g.*, Walter Stern, *NEPA Evaluation of Cultural Resources, Tribal Value, and Environment Justice: Lessons from Standing Rock Indian Tribe, et al. v. U.S. Army Corps of Engineers and Dakota Access Pipeline Controversy*, at Pt. V, 13A-13–19, in ROCKY MTN. MIN. L. FDN, *National Environmental Policy Act* 13A (2017).
[13] *See id*.
[14] 40 C.F.R. § 1501.7(a)(1).
[15] *Accord* Stern, *supra* n.13, at 13A-25.

related to aboriginal use and occupancy patterns.[16] We thus support broader recognition of tribal interests and sovereignty and the critical implications that follow this recognition.

B. Streamlining Complex Regulatory Processes, While Laudable, Should be Undertaken with Care

Permitting "Bottleneck"

We recognize that NEPA's regulatory and administrative requirements have grown complex over time,[17] as a bipartisan group of Western lawmakers noted in 2019[18] when the Forest Service's proposed NEPA changes were under consideration. The resultant permitting bottleneck can delay important natural resources infrastructure projects, including renewable energy development needed for sustainable growth and climate change mitigation.[19] Such sustainable natural resources development also provides critical diversity to our domestic energy supply—a matter of national security.

Information Complexity, Accessibility, and a "Meaningful Opportunity to Comment"

Another effect of this complex regulatory process is often to leave community members and stakeholders without an easy ability to engage meaningfully in the lengthy and complex documents produced in the process. This effect raises concerns regarding the public's "meaningful opportunity to comment,"[20] which courts have described as requiring that "potential commenters [need to] have known that an issue in which they were interested was 'on the table' and was to be addressed by the final rule."[21] Where federal actions spark complex scientific review of environmental impacts under NEPA, requiring detailed expert analyses and lengthy

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[16] *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142-43 (1810) (discussing "original Indian title" or the "Indian right of occupancy" as a matter of first impression), Johnson V. M'Intosh, 21 U.S. (8Wheat) 543 (1823) (elaborating on aboriginal title, noting it extinguishes only upon affirmative act of Congress, and comprises, *inter alia*, land and usufructuary rights appurtenant to the land), and United States v. Winans, 198. U.S. 371, 378-79 (1905) (establish aboriginal water rights).

[17] See generally Christopher DeMuth, Can the Administrative State be Tamed? 8 J. Legal Analysis 121 (2016); cf. Francis Fukuyama, Political Order and Political Decay, Chs. 32-33 (noting bipartisan "mistrust" of bureaucracy and concomitant role of "adversarial legalism" in shaping modern American administrative state, yielding a "decentralized, legalistic approach to administration" where recourse to courts can result in voluminous litigation, slow decision making, and inconsistent enforcement of law; and concluding that when Congress issues "complex and often []contradictory mandate to agencies," "interest groups undermine bureaucratic autonomy required for efficient and efficacious agency decision making."); id. at Figs. 22-23 (illustrating, graphically, that decision costs increase along with political participation in the process and that decision making is more difficult under conditions of "veto players" and checks and balances.")

[18] Nick Bowlin, *Forest Service Might Limit Public Comments,* HIGH COUNTRY NEWS (JUNE 27, 2019).

[19] *Cf.*, Kelsea Brugger, E&E News, *NEPA Rewrite Reveals Tension Between Greens, Renewables* (Jan. 13, 2020) (reporting on aspects of proposed changes viewed favorably by alternative energy interests, including wind and solar developers, including streamlining of permitting).

[20] *See* Long Island Health Care at Home, Ltd., 551 U.S. 158, 174 (2007) (requiring final rule required to be "logical outgrowth" of proposed rule).

[21] Am. Medical Ass'n v. United States, 778 F.2d 760, 768 (7th Cir. 1989).

reports with data and appendices beyond the understanding of the lay public, some of the changes proposed may well help in achieving the goal of improved accessibility and efficiency in the NEPA process.

The proposed changes run the risk of causing further adverse effects that neither promote accessibility of information—and concomitant transparency and public participation—nor adequately satisfy the overarching NEPA goal of "encourag[ing] productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment. . . and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation."

We hope that these consequences are properly understood before CEQ finalizes a rule that would affect agencies across the federal government in such a substantial manner. One such example is CEQ's proposal to strike entirely 40 C.F.R. 1500.2, "Policy," reasoning that it will "simplify the regulations and eliminate redundancy and repetition" and "is duplicative of subsequent sections of the regulations."[22] However, the section to be struck includes language that highlights that federal agencies "shall to the fullest extent possible" "encourage and facilitate public involvement in decisions which affect the quality of the human environment."[23] Stakeholders and community members often find that their only opportunity to learn about and comment on proposed federal actions in their backyard occurs through the public hearings and other opportunities for public engagement that arise through the NEPA process. Although it may only appear as a rhetorical benefit, having the goal of public involvement (along with the others listed) appear at the outset of the NEPA regulations cements their importance in the process. We recommend that these policy considerations are not stricken without ensuring that their importance remains undisturbed.

Effective Agency Decision-Making

We also raise concerns regarding some potentially counterproductive changes proposed with the ostensible goal of efficiency but that, instead, may only increase the amount of confusion and paperwork resulting from individual agency compliance with the new rules. Multiple changes proposed in this rulemaking would impose additional work on individual agencies to review and revise their own procedures, including:

- amending 40 C.F.R. 1500.3(a) to "clarify that agency NEPA procedures … shall not impose additional procedures or requirements beyond those set forth in the CEQ regulations except as otherwise provided by law or for agency efficiency";[24]

[22] 85 Fed. Reg. at 1693.
[23] 40 C.F.R. 1500.2(d).
[24] 85 Fed. Reg. at 1693.

- adding a new 1500.3(c) to establish that EIS/FONSI/categorical exclusion determinations are not necessarily final agency actions, yet allowing an agency to designate any of these as a final action if they choose;[25] and

- the suggestion that agency structure processes and develop procedures to incorporate stays of their decisions under the Administrative Procedure Act and their organic statutes.[26]

Each of these suggestions appear to create more work for agencies to review and revise their individual agency procedures to comply with the new CEQ regulations once finalized, and raises the question of whether these proposed changes would save time, reduce project delays, or contribute to consistency across the government after all.

These changes, which attempt to promote accessibility and efficiency, may also undermine the more central purpose of NEPA and its implementing regulations. Contrary to CEQ's assertion that "[t]he original goals of those regulations were to reduce paperwork and delays,"[27] the primary purpose of the NEPA regulations is to "[e]nsure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."[28] While recognizing that "NEPA's purpose is not to generate paperwork" or for "amassing needless detail," the production of high quality information to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment" remains the fundamental and original purpose.[29]

1. *Page Limits and Time Limits Could Detract from the Quality of Scientific Analysis*

Proposed Part 1501.10 would impose presumptive time limits of 12 and 24 months for preparation of an Environmental Assessment (EA) or EIS, respectively.[30] Even though setting an expectation for a time limit seems like an improvement of the process that should help reduce the duration of reviews, we believe that the two year limit is an ambitious goal[31] and will likely damage the integrity of the NEPA process and the gathering of information. The process of collecting critical data about the impacts of a project and the required research into finding alternatives, or in some cases finding options to mitigate the effects of a project, historically

[25] 85 Fed. Reg. at 1693-4.
[26] 85 Fed. Reg. at 1694.
[27] 85 Fed. Reg. at 1684.
[28] 40 C.F.R. 1500.1(b), available at https://ceq.doe.gov/laws-regulations/regulations.html.
[29] 40 C.F.R. 1500.1(b) and (c).
[30] 85 Fed. Reg. 1699.
[31] The time taken for agencies to complete environmental reviews can range from 18 months to 4.4 years. See Dan Bosch and Ewelina Czapla, "Will Proposed NEPA Rule Achieve its Goals?," Insight, American Action Forum, Jan. 14, 2020, available at https://www.americanactionforum.org/insight/will-proposed-nepa-rule-achieve-its-goals/; see also Julia S. Thrower, "Is the National Environmental Policy Act in Need of Change?" Idaho State Bar Advocate, January 2019.

takes longer than the limit proposed. Therefore, this short timeframe could weaken the thoroughness of the agency analysis and decision-making.

CEQ also proposes a page limit for Environmental Impact Statements with the purported goal of making them more accessible to the lay public.[32] This change, however, may have the unintended but pernicious effect of excluding valuable information and analysis. This eventuality would compromise NEPA's science-based approach to environmental regulation.

Finally, the proposed amendment to have NEPA permitting for infrastructure projects be overseen by just one federal agency[33] would limit critical EPA oversight, particularly in terms of the Clean Air Act. This change would also seem to have the undesirable effects of (1) generating a burden-shifting with respect to NEPA compliance, laying increased NEPA compliance and monitoring costs on civil society, (2) limiting necessary analysis, and (3) elevating agencies' litigation risk as well as increasing the likelihood of judicial reversal of agency action in response to as a result of likely allegations of "arbitrary and capricious" decisionmaking.

2. Suggested Improvements to Public Participation and Agency Decisionmaking

Proposed changes to streamline[34] NEPA regulations are an understandable response to what is widely understood as an unwieldy complex regulatory processes, but miss the mark. There has been what has been described as a "deluge" of comments submitted on federal rulemaking in recent years. One team of legal scholars noted a "floodgates of participation in agency rulemaking" opened during the Obama administration and identified 2.5 million or so public comments on State Department's Keystone XL pipeline decision; "over 1.25 million" regarding proposed net neutrality rules; and "over four million" on the Clean Power Plan regulations.[35] This comment "flood" is due at least in part to the heightened substantive stakes—cultural and economic—of major infrastructure and energy projects, as well as technology-driven decreases in participation costs.[36]

This "deluge" of public comments and attendant complexity is a perennial agency challenge but also an opportunity. While there certainly are manageability issues inherent in responding to tens of thousands unique and specific substantive comments, voluminous comments may contain valuable, but difficult to process, information which would require a "substantial commitment of agency resources."[37] Among other opportunities to improve NEPA-related agency decisionmaking *not* addressed but the proposed CEQ regulation include, creating

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[32] 85 Fed. Reg. at 1700.
[33] 85 Fed. Reg at 1698.
[34] See, e.g., 85 Fed. Reg. at 1692-1704, passim.
[35] Edelman, *supra*, at 235.
[36] Id.
[37] Id. at 238.

value-added from this trove of information could potential yield insights into "interaction of a rulemaking with technological innovation or business practices."[38]

In this vein, we would inquire as to CEQ and other agencies' efforts to: first, increase the value of the public comment process, by

- extracting additional meaning from comments in their current form,
- better understanding how agencies interact with the public, and
- improving those agency public/interactions to it process,"

and, second, enhance public participation, particularly in the face of NEPA's role in democratizing decisionmaking and the attendant litigation risk agencies face.[39] Because comment sometimes represents a first step on the path to litigation,[40] agencies may be incentivized to manage their legal exposure by assuring the final rule not stray far from the one originally proposed.[41] This fear, however, may compromise public participation, a rich source of information that could be leveraged instead of treating the final rule, in effect, as a *fait accompli*.[42]

While there is "broad consensus" in the academic literature that "highly substantive comments have obvious information value" that admonishes improved consideration and analysis of such information, we encourage CEQ affirmatively consider how best to respond to small stakeholders and interested individuals whose voluminous comments may be perceived as less sophisticated.[43] In light of the "haystack" and "forest" problems which NEPA comment deluges entail,[44] CEQ should consider and attempt to identify emergent meaning through the use of enhanced processes.[45] In light of CEQ's proposed changes to streamline the NEPA process, such technologies such as machine learning may offer significant opportunities to improve agency decisionmaking.

In terms of public participation, one final note: it is particularly concerning that a recent comment in this very docket reported a potential "back door portal" — NEPA-update@ceq.eop.gov — purportedly made available privately to and "likely at the request of" an industry-affiliated group, in order to facilitate an "easier way to provide comment and drive comments from multiple

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[38] Id. at 237.
[39] This inquiry draws heavily on Edelman, *supra*, at 238, 253-77.
[40] We do recognize that agencies are under no obligations to "discuss every items of fact of opinion" offered in a comment but are generally required to respond in a manner that shows "major issues of policy were ventilated." *Automotive Part & Accessories v. Boyd*, 407 F.2d, 330, 338 (D.C. Cir. 1968); *see also Pub. Citizen Inc. v. FAA* 186, 197 (D.C. Cir. 1993) (emphasizing import of (a) considering scientific or technical information contained in comments, (b) highlighting undesirable consequences of proposed rule, and (c) proffering alternative courses of action.).
[41] Vlad Edelman, et al., Analyzing Public Comments, in Law as Data, Ch. 9, at 235 (Michael Livermore and Daniel Rockmore, eds.).
[42]
[43] Edelman, *supra* at 255, n.1 and accompanying text.
[44] *Id*. at 255-56, 264-67.
[45] *Id*. at 268-70 (proposing novel machine learning-enhanced, two-step notice and comment process).

sources[.]"[46] If true, this would impugn the integrity of the public comment process and foreground concerns raised recently by members of Congress[47] and others[48] regarding the adequacy public participation in this rulemaking process—only two public hearings ever held, despite their being fully subscribed nearly instantaneously. This raises concerns apart from the changes proposed in this rulemaking, but should be addressed urgently. And whether or not these allegations are true, even a perception of agencies operating outside the NEPA and CEQ regulations, contributes to a perception that technocratic and elite modes of engagement are favored over grassroots engagement.[49]

C. The Proposed Amendment to § 1501.2(b)(2) is Unnecessary and Might Frustrate NEPA's Statutory Purpose

CEQ proposes to amend 40 CFR 1501.2(b)(2) "to clarify that agencies should consider economic and technical analyses along with environmental effects."[50] The proposed amended language is unnecessary and runs the risk of placing focus on a goal that differs from the ultimate purpose of NEPA. The current language of section 1501.2(b) states that agencies shall identify "environmental impacts and values in adequate detail so they can be *compared to* economic and technical analyses,"[51] only to be replaced by language identifying "environmental effects and values in adequate detail so they can be *appropriately considered along with* economic and technical analyses."[52] The current language already implies a comparison of the environmental effects of a project to the economic effects of a project, and thus the NEPA process sufficiently accounts for economic and technical analyses in keeping with the priorities

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[46] Comment from Ann Mesnikoff, CEQ-2019-0003-31908, Letter to Request Clarification of Public Comment Procedures and an Extension of Comment Period, March 5, 2020), https://www.regulations.gov/document?D=CEQ-2019-0003-31908 (requesting, on this basis requesting a 60-day comment period extension to publicize this new "comment avenue" in the Federal Register,)

[47] Peter DeFazio, et al., Letter to Mary Neumayr, Chairman, Council on Environmental Quality [CEQ] Requesting Extension of Comment Period Associate with CEQ Proposed Rule [Docket No. CEq-2019-0003], Jan. 21, 2020 (requesting 60-day comment period extension on basis of "all-encompassing [environmental] policy" NEPA comprises and associated regulations comprise, especially in light of insufficient quantity of public hearings to date (two) as compared with the three full days of hearings convened on the occasion of CEQ NEPA regulations' only other rewrite, in 1978, which made only modest changes);

[48] See, e.g., Letter of 324 Public Interest Organizations to CEQ to Requesting 180-day Extension on Update to Regulations for Implementing the [NEPA's] Procedural Provisions [Docket No. CEQ-2019-0003] (noting inadequacy of currently open comment period in light of, inter alia, the "sweeping" nature of the proposed changes to the CEQ ruleset which applies to "more than 50,000 federal actions each year" and highlighting the "woefully inadequate" 60-day comment period on the 47-page Notice of Proposed Rulemaking in this instant matter as compared the 60-day comment period for the two-page Advance Notice of Proposed Rulemaking issued in June 2018),

[49] See generally Jedediah Purdy, The Long Environmental Justice Movement, 44 Ecology L.Q. 809 (2018)

[50] 85 Fed. Reg at 1695.

[51] 40 C.F.R. 1501.2(b)(2) (emphasis added).

[52] 85 Fed. Reg. at 1714 (emphasis added).

and purpose of the environmentally focused statute.[53] The purpose of NEPA is to promote a "productive harmony"[54] between man and the environment; NEPA, in turn, requires agencies give effect to this purpose by thoroughly analyzing the environmental effects of a certain project to promote the prevention of damage to the environment.[55]

Indeed, any proposed project will have an economic and technical analysis completed by the project proponent, raising the question of whether the agencies involved need to create their own economic assessment. Contrary to the intent of the proposed amendment, the additional analyses might simply create more work for the agency permitting the project and further slow down the NEPA process.

The proposed language also creates additional unanswered questions as to what types of economic impacts and technical analyses should be considered. For example, local and national economic impacts may be easy to identify and quantify, but it may be a harder task to quantify the economic value of the ecological benefit of public lands and undisturbed ecosystems. Not only do such lands provide critical ecosystem services that would be reduced or negated by a project that damages the health of the ecosystem, but there are also many economic benefits that are generated from millions of Americans having recreational access to public lands. For example, the outdoor recreation industry represents substantial economic activity generated in part from use of public lands.[56] Under CEQ's proposed changes, would the economic analysis include impacts of decreased tourism to the project area because of environmental damage? A list of factors to be considered would reduce vagueness of the language and provide an opportunity for CEQ to ensure that the fundamental purpose of NEPA remains intact.

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[53] To this point, environmental anthropologist Fabiana Li offers insight, concluding, based on extensive ethnographic work, that environmental impact statements and related documents play a key role mediating conflict in the domain of large-scale mining project.She highlights how such "practices of accountability" entail a risk management framework that can results in a "false equivalences" which "disqualify[ies] discrepant arguments, [which are] discounted as 'belief,' while privileging that knowledge of experts[,] and questioning whether "technical evidence is free of politics *and* belief." UNEARTHING CONFLICT 222-29 (2015) (); *see also id*. at 215 ("They say that if a government [official] says 'technical' three times in front of a mirror, a fairly that resolves social conflict appears.").

[54] 42 U.S.C. § 4331.

[55] *See generally* Murray Feldman and Kristin Nichols, *NEPA Scientific and Information Standards—Taking the Harder Look*, in ROCKY MTN. MIN. L. FDN, *National Environmental Policy Act* 6 (2017) (highlighting, in light of NEPA statutory and regulatory framework, "contemporary issues in ['']harder-look['] [judicial] review, including data sufficiency and date gaps; "stale" data; considering "opposing" scientific perspectives; as well as assumptions and methodologies of, *inter alia*, modeling used by agencies in NEPA documents).

[56] *See, e.g.* Cheyenne Grabiec, *Promoting Land Stewardship Through Outdoor Recreation*, INDIGENOUS STEWARDS, Vol. 4, at 14 (2019), https://journals.uair.arizona.edu/index.php/indst/article/view/23556/22252 (highlighting Indigenous-owned, outdoor retail, advisory and company, *NativesOutdoors*, which "works directly with tribal governments, community organizations, and individuals on increasing access to outdoor recreation and connecting resources and opportunities within the outdoor industry."); *see also* NATIVES-OUTDOORS.COM ("outdoor apparel & media company" with mission to "empower indigenous communities through our own product and storytelling for a sustainable word.).

D. This Rulemaking Itself Requires NEPA Procedural Safeguards

We note that a sweeping regulatory overhaul such the one contemplated here will undoubtedly have significant impacts on the way the government conducts environmental analyses of major federal actions going forward. This matches the description of the type of "proposals for major Federal actions significantly affecting the quality of the human environment" for which NEPA applies the procedural requirements of environmental analysis.[57]

The NEPA rule changes proposed here themselves likely require an Environmental Impact Statement (EIS) because they are a major federal action that will have a significant environmental impact. NEPA requires an EIS for "major Federal actions significantly affecting the quality of the human environment."[58] Pursuant to NEPA, CEQ defines "major Federal actions" as those having "effects that may be major and which are potentially subject to Federal control and responsibility." In turn, the term of "[m]ajor reinforces but does not have a meaning independent of [how] [']*significantly*['] [an action affects the environment] (§ 1508.27).[59] This definition encapsulates, *inter alia*: Adoption of official . . . rules [and] *regulations*. . . adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; *which will . . . substantially alter agency programs*.[60]

The purpose of NEPA is to ensure that federal agencies have rationally considered the environmental effects of proposed major actions. To fulfill this purpose EIS review must be conducted while the agency is in "*active* consideration of whether or not to act."[61] In turn, CEQ provides guidance on defining "significant" actions in terms of both "context" and "intensity" of environmental effects, enumerating a list of ten intensity factors which includes "[t]he degree to which the effect on the quality of the human environments are likely to be highly controversial.[62] This threshold determination is critical, since "significant" actions require an articulation of the cumulative effects of the proposed action.

Here, the proposed rule changes to NEPA are major federal actions because of their broad and far-reaching consequences for the environment across the millions of acres of federally controlled land. Moreover, NEPA specifically defines agency rulemaking as an agency action subject to the NEPA process. Even if the impact on a specific project is small, the cumulative

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[57] 85 Fed. Reg. 1684, at 1685; 42 U.S.C. 4332(2)(C).
[58] 42 U.S.C.A. § 4332.
[59] 40 C.F.R. § 1508.18.
[60] 40 C.F.R. § 1508.18 (emphasis added)..
[61] *Sierra Club v. United States Army Corps of Engineers*, 64 F. Supp. 3d 128, 141 (D.D.C. 2014), *aff'd sub nom. Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015)
[62] 40 C.F.R. 1508.27(a), (b) (defining "significantly" in terms of "context" and "intensity" and enumerating a list of ten factors, including "[t]he degree to which the effect on the quality of the human environments *are likely to be highly contr*oversial"); *see also* William Murray Tabb, *The Role of Controversy in Nepa: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 175, 231 (1997)

effect of reduced or streamlined environmental consideration in aggregate across all federal agencies and lands certainly crosses the threshold for significance. Since the rule change under consideration is a major federal action with significant environmental consequences, an EIS is required before implementation.

It appears, therefore, that this very rulemaking implicates the NEPA regulations currently in effect and should trigger an environmental review of the impacts it will have on future federal actions. We refer to the comments of others with substantial NEPA expertise who have raised this concern, such as Professor Oliver Houck, and we expect that CEQ will incorporate into this rulemaking the proper environmental analysis as required by law with additional opportunity for public comment after the environmental impacts have been adequately described.

CONCLUSION

This rulemaking proposes changes to the regulations implementing NEPA that are sweeping and comprehensive, and will have large-scale impacts on how agencies across the federal government comply with NEPA's statutory mandate going forward. Some of these changes are clearly positive and overdue, such as the changes to recognize tribal sovereignty and incorporate tribal consultation. We support these changes. Other changes are ambiguous, made with the positive intent of increasing efficiency and public accessibility, but may have unintended consequences that impede the realization of these goals and instead further gum up the regulatory works. We encourage CEQ to take a hard look at these changes and revise them to prevent these unintended consequences.

Finally, some changes proposed will likely have negative impacts on the quality of environmental analysis produced, and other changes will hamper the ability for public engagement and input in the decisionmaking process. They will also stymie the public's ability to provide oversight of agency actions through judicial review after decisions are made (which we were not able to fully detail in this letter, given time constraints). We do not support the changes in this last category, and urge CEQ to remove these in the final rule.

Fortunately, because it appears that this rulemaking must also undergo the appropriate environmental reviews under currently applicable NEPA regulations, there is time and space in the rule development process for CEQ to address these issues. We look forward to the ability to comment further as the environmental analyses proceed.

Sincerely,

Priya Sundareshan, staff
Colin McKenzie, staff
Luke Erickson, student
Braelan Barnett, student
Cora Varas, student