This document is scheduled to be published in the Federal Register on 07/31/2023 and available online at **federalregister.gov/d/2023-15405**, and on **govinfo.gov**

COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

[CEQ–2023–0003]

RIN 0331–AA07

National Environmental Policy Act Implementing Regulations Revisions Phase 2

AGENCY: Council on Environmental Quality.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Council on Environmental Quality (CEQ) is proposing this "Bipartisan Permitting Reform Implementation Rule" to revise its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA), including to implement the Fiscal Responsibility Act's amendments to NEPA. CEQ proposes the revisions to provide for an effective environmental review process that promotes better decision making; ensure full and fair public involvement; provide for an efficient process and regulatory certainty; and provide for sound decision making grounded in science, including consideration of relevant environmental, climate change, and environmental justice effects. CEQ proposes these changes to better align the provisions with CEQ's extensive experience implementing NEPA; CEQ's perspective on how NEPA can best inform agency decision making; longstanding Federal agency experience and practice; NEPA's statutory text and purpose, including making decisions informed by science; and case law interpreting NEPA's requirements. CEQ invites comments on the proposed revisions.

DATES: *Comments*: CEQ must receive comments by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Public meetings: CEQ will conduct four virtual public meetings for the proposed rule on Saturday, August 26, 2023, from 1 p.m. to 4 p.m. EDT; Wednesday, August 30, 2023,

from 5 p.m. to 8 p.m. EDT; Monday, September 11, 2023, from 1 p.m. to 4 p.m. EDT; and Thursday, September 21, 2023, from 2 p.m. to 5 p.m. EDT. For additional information and to register for the meetings, please visit CEQ's website at www.nepa.gov.

ADDRESSES: You may submit comments, identified by docket number CEQ–2023–0003, by any of the following methods:

- Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.
- Fax: 202–456–6546.
- Mail: Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503.

Instructions: All submissions received must include the agency name, "Council on Environmental Quality," and docket number, CEQ–2023–0003, for this rulemaking. All comments received will be posted without change to https://www.regulations.gov, including any personal information provided. Please do not submit electronically any information you consider private, Confidential Business Information (CBI), or other information, the disclosure of which is restricted by statute.

Docket: For access to the docket to read background documents or comments received, go to https://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Amy B. Coyle, Deputy General Counsel, 202–395–5750, Amy.B.Coyle@ceq.eop.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. NEPA Statute

Congress enacted NEPA in 1969 by a unanimous vote in the Senate and a nearly unanimous vote in the House to declare an ambitious and visionary national policy to

promote environmental protection for present and future generations.[1] President Nixon signed NEPA into law on January 1, 1970. NEPA seeks to "encourage productive and enjoyable harmony" between humans and the environment, recognizing the "profound impact" of human activity and the "critical importance of restoring and maintaining environmental quality" to the overall welfare of humankind. 42 U.S.C. 4321, 4331.

Furthermore, NEPA seeks to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of people, making it the continuing policy of the Federal Government to use all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans. 42 U.S.C. 4331(a). It also recognizes that each person should have the opportunity to enjoy a healthy environment and has a responsibility to contribute to the preservation and enhancement of the environment. 42 U.S.C. 4331(c).

NEPA requires Federal agencies to interpret and administer Federal policies, regulations, and laws in accordance with NEPA's policies and to consider environmental values in their decision making. 42 U.S.C. 4332. To that end, section 102(2)(C) of NEPA requires Federal agencies to prepare "detailed statements," referred to as environmental impact statements (EISs), for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" and, in doing so, provide opportunities for public participation to help inform agency decision making. 42 U.S.C. 4332(2)(C). The EIS process embodies the understanding that informed decisions are better decisions and lead to better environmental outcomes when decision makers understand, consider, and publicly

[1] *See* Linda Luther, Cong. Rsch. Serv., RL33152, The National Environmental Policy Act: Background and Implementation, 4 (2008), https://crsreports.congress.gov/product/details?prodcode=RL33152.

disclose environmental effects of their decisions. The EIS process also enriches understanding of the ecological systems and natural resources important to the Nation and helps guide sound decision making, such as decisions on infrastructure and energy development, in line with high-quality information, including the best available science, information and data, as well as the environmental design arts.

In many respects, NEPA was a statute ahead of its time and remains relevant and vital today. It codifies the common-sense idea of "look before you leap" to guide agency decision making, particularly in complex and consequential areas, because conducting sound environmental analysis before agencies take actions reduces conflict and waste in the long run by avoiding unnecessary harm and uninformed decisions. *See, e.g.*, 42 U.S.C. 4332. It establishes a framework for agencies to ground decisions in sound science and recognizes that the public may have important ideas and information on how Federal actions can occur in a manner that reduces potential harms and enhances ecological, social, and economic well-being. *See, e.g.*, *id.*

On June 3, 2023, President Biden signed the Fiscal Responsibility Act of 2023 (FRA) into law, which included amendments to NEPA. Specifically, the FRA amended section 102(2)(C) and added sections 102(2)(D) through (F) and sections 106 through 111. The amendments in section 102(2)(C) largely codify longstanding principles that EISs should include discussion of reasonably foreseeable environmental effects of the proposed action, reasonably foreseeable adverse environmental effects that cannot be avoided, and a reasonable range of alternatives to the proposed action. Section 102(2)(D) requires Federal agencies to ensure the professional integrity of the discussion and analysis in an environmental document; section 102(2)(E) requires use of reliable data and resources when carrying out NEPA; and section 102(2)(F) requires agencies to study, develop, and describe technically and economically feasible alternatives.

Section 106 adds provisions for determining the appropriate level of NEPA review. It clarifies that an agency is only required to prepare an environmental document when proposing to take an action that would constitute a final agency action and codifies existing regulations and caselaw that an agency is not required to prepare an environmental document when doing so would clearly and fundamentally conflict with the requirements of another law or a proposed action is non-discretionary. Section 106 also largely codifies the current CEQ regulations and longstanding practice with respect to the use of categorical exclusions (CEs), environmental assessments (EAs), and EISs, as modified by the new provision expressly permitting agencies to adopt CEs from other agencies established in section 109 of NEPA.

Section 107 addresses timely and unified Federal reviews, codifying existing practice with a few minor adjustments, including provisions clarifying lead, joint-lead, and cooperating agency designation, generally requiring development of a single environmental document, directing agencies to develop procedures for project sponsors to prepare EAs and EISs, and prescribing page limits and deadlines similar to current requirements. Section 108 codifies time lengths and circumstances for when agencies can rely on programmatic environmental documents without additional review, and section 109 allows a Federal agency to use another agency's CE. Section 111 adds a variety of definitions. This proposed rule would update the regulations to address how agencies should implement NEPA consistent with the amendments made by the FRA.

B. The Council on Environmental Quality

NEPA established the Council on Environmental Quality (CEQ) in the Executive Office of the President. 42 U.S.C. 4342. For more than 50 years, CEQ has advised presidents on national environmental policy, assisted Federal agencies in their implementation of NEPA, and overseen implementation of a variety of other

environmental initiatives from the expeditious and thorough environmental review of infrastructure projects[2] to the sustainability of Federal operations.[3]

NEPA charges CEQ with overseeing and guiding NEPA implementation across the Federal Government. In addition to issuing the regulations for implementing NEPA, 40 CFR parts 1500 through 1508 (referred to throughout as "the CEQ regulations"), CEQ has issued guidance on numerous topics related to NEPA review. In 1981, CEQ issued the "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,"[4] which CEQ has routinely identified as an invaluable tool for Federal, Tribal, State, and local governments and officials, and members of the public, who have questions about NEPA implementation.

CEQ also has issued guidance on a variety of other topics, from scoping to cooperating agencies to consideration of effects.[5] For example, in 1997, CEQ issued

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[2] *See, e.g.*, E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*, 86 FR 7619 (Feb. 1, 2021); E.O. 13604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*, 77 FR 18885 (Mar. 28, 2012); E.O. 13274, *Environmental Stewardship and Transportation Infrastructure Project Reviews*, 67 FR 59449 (Sept. 23, 2002); *see also* Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures, 78 FR 30733 (May 22, 2013).

[3] *See, e.g.*, E.O. 14057, *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability*, 86 FR 70935 (Dec. 13, 2021); E.O. 13834, *Efficient Federal Operations*, 83 FR 23771 (May 22, 2018); E.O. 13693, *Planning for Federal Sustainability in the Next Decade*, 80 FR 15869 (Mar. 25, 2015); E.O. 13514, *Federal Leadership in Environmental, Energy, and Economic Performance*, 74 FR 52117 (Oct. 8, 2009); E.O. 13423, *Strengthening Federal Environmental, Energy, and Transportation Management*, 72 FR 3919 (Jan. 26, 2007); E.O. 13101, *Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition*, 63 FR 49643 (Sept. 16, 1998). For Presidential directives pertaining to other environmental initiatives, see E.O. 13432, *Cooperation Among Agencies in Protecting the Environment With Respect to Greenhouse Gas Emissions From Motor Vehicles, Nonroad Vehicles, and Nonroad Engines*, 72 FR 27717 (May 16, 2007) (requiring CEQ and OMB to implement the E.O. and facilitate Federal agency cooperation to reduce greenhouse gas emissions); E.O. 13141, *Environmental Review of Trade Agreements*, 64 FR 63169 (Nov. 18, 1999) (requiring CEQ and the U.S. Trade Representative to implement the E.O., which has the purpose of promoting Trade agreements that contribute to sustainable development); E.O. 13061, *Federal Support of Community Efforts Along American Heritage Rivers*, 62 FR 48445 (Sept. 15, 1997) (charging CEQ with implementing the American Heritage Rivers initiative); E.O. 13547, *Stewardship of the Ocean, Our Coasts, and the Great Lakes*, 75 FR 43023 (Jul. 22, 2010) (directing CEQ to lead the National Ocean Council); E.O. 13112, *Invasive Species*, 64 FR 6183 (Feb. 8, 1999) (requiring the Invasive Species Council to consult with CEQ to develop guidance to Federal agencies under NEPA on prevention and control of invasive species).

[4] CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 FR 18026 (Mar. 23, 1981) ("Forty Questions"), https://www.energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act.

[5] *See, e.g.*, CEQ, Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping (Apr.30, 1981), https://www.energy.gov/nepa/downloads/scoping-guidance-memorandum-general-counsels-nepa-liaisons-and-participants-scoping; CEQ, Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under the National Environmental Policy Act (Jan. 1993),

guidance documents on the consideration of environmental justice in the NEPA context[6] under Executive Order (E.O.) 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,[7] and on analysis of cumulative effects in NEPA reviews,[8] two documents that agencies continue to use today. From 2010 to the present, CEQ developed additional guidance on CEs, mitigation, programmatic reviews, and consideration of greenhouse gas (GHG) emissions in NEPA.[9] To ensure coordinated environmental review, CEQ has issued guidance to integrate NEPA reviews with other environmental review requirements such as the National Historic Preservation Act, E.O. 11988, *Floodplain Management*, and E.O. 11990, *Protection of Wetlands*.[10]

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https://ceq.doe.gov/publications/incorporating_biodiversity.html; CEQ, Council on Environmental Quality Guidance on NEPA Analyses for Transboundary Impacts (July 1,1997), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/memorandum-transboundary-impacts-070197.pdf; CEQ, Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (July 28, 1999), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ceqcoop.pdf; CEQ, Identifying Non-Federal Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Sept. 25, 2000), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/memo-non-federal-cooperating-agencies-09252000.pdf; CEQ & DOT Letters on Lead and Cooperating Agency Purpose and Need (May 12, 2003), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-DOT_PurposeNeed_May-2013.pdf.

[6] CEQ, Environmental Justice: Guidance under the National Environmental Policy Act (Dec. 10, 1997) ("Environmental Justice Guidance"), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf.

[7] E.O. 12898, *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 FR 7629 (Feb. 16, 1994).

[8] CEQ, Considering Cumulative Effects Under the National Environmental Policy Act (Jan. 1997), https://ceq.doe.gov/publications/cumulative_effects.html; *see also* CEQ, Guidance on the Consideration of Past Actions in Cumulative Effects Analysis (June 24, 2005), https://www.energy.gov/sites/default/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf.

[9] CEQ, Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act (Nov. 23, 2010) ("CE Guidance"), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf; CEQ, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact (Jan. 14, 2011), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf; CEQ, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 FR 1196 (Jan. 9, 2023) ("2023 GHG Guidance"), https://ceq.doe.gov/guidance/ceq_guidance_nepa-ghg.html.

[10] CEQ, Implementation of Executive Order 11988 on Floodplain Management and Executive Order 11990 on Protection of Wetlands (Mar. 21, 1978), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Memorandum-Implementation-of-EO-11988-and-EO-11990-032178.pdf; CEQ & Advisory Council on Historic Preservation, NEPA and NHPA: A Handbook for Integrating NEPA and Section 106 (Mar. 2013), https://ceq.doe.gov/docs/ceq-publications/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf.

Finally, CEQ has provided guidance to ensure efficient and effective environmental reviews, particularly for infrastructure projects.[11]

In addition to guidance, CEQ engages frequently with Federal agencies on their implementation of NEPA. First, CEQ is responsible for consulting with all agencies on the development of their NEPA implementing procedures and determining that those procedures conform with NEPA and the CEQ regulations. Through this process, CEQ engages with agencies to understand their specific authorities and programs to ensure agencies integrate consideration of environmental effects into their decision-making processes. Additionally, CEQ provides feedback and recommendations on how agencies may effectively implement NEPA through their procedures.

Second, CEQ consults with agencies on the efficacy and effectiveness of NEPA implementation. Where necessary or appropriate, CEQ engages with agencies on NEPA reviews for specific projects or project types to provide advice and identify any emerging or cross-cutting issues that would benefit from CEQ issuing formal guidance or assisting with coordination. This includes establishing alternative arrangements for compliance with NEPA when agencies encounter emergency situations where they need to act swiftly while also ensuring they meet their NEPA obligations. CEQ also advises on NEPA compliance when agencies are establishing new programs or implementing new statutory authorities. Finally, CEQ helps advance the environmental review process for projects or initiatives deemed important to an administration such as nationally and regionally

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[11] *See, e.g.*, CEQ, Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act (Mar. 6, 2012), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf; CEQ, Effective Use of Programmatic NEPA Reviews (Dec. 18, 2014) ("Programmatic Guidance"), https://www.energy.gov/sites/default/files/2016/05/f31/effective_use_of_programmatic_nepa_reviews_18dec2014.pdf; OMB & CEQ, M-15-20, Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects (Sept. 22, 2015), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2015/m-15-20.pdf; OMB & CEQ, M-17-14, Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects (Jan. 13, 2017), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2017/m-17-14.pdf.

significant projects, major infrastructure projects, and consideration of climate change-related effects and effects on communities with environmental justice concerns.[12]

Third, CEQ meets regularly with external stakeholders to understand their perspectives on the NEPA process. These meetings can help inform CEQ's development of guidance or other initiatives and engagement with Federal agencies. Finally, CEQ coordinates with other Federal agencies and components of the White House on a wide array of environmental issues and reviews that intersect with the NEPA process, such as Endangered Species Act consultation or effects to Federal lands and waters from federally authorized activities.

In addition to its NEPA responsibilities, CEQ is currently charged with implementing several of the administration's key environmental priorities. On January 27, 2021, the President signed E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*, to establish a government-wide approach to the climate crisis by reducing GHG emissions across the economy; increasing resilience to climate change-related effects; conserving land, water, and biodiversity; transitioning to a clean-energy economy; advancing environmental justice; and investing in disadvantaged communities.[13] CEQ is leading the President's efforts to secure environmental justice consistent with sections 219 through 223 of the E.O.[14] For example, CEQ has developed the Climate and Economic Justice Screening Tool[15] and collaborates with the Office of

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[12] *See, e.g.*, Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, *Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review* (Aug. 31, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more; E.O. 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, 82 FR 40463 (Aug. 24, 2017).

[13] E.O. 14008, *supra* note 2.

[14] E.O. 14008's direction to advance environmental justice reinforces and reflects longstanding policy established in E.O. 12898 and advances the related though distinct policy defined more broadly in E.O. 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, that the Federal Government "pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality." 86 FR 7009 (Jan. 25, 2021), sec. 1.

[15] CEQ, *Explore the Map*, Climate and Economic Justice Screening Tool, https://screeningtool.geoplatform.gov/.

Management and Budget (OMB) and the National Climate Advisor on implementing the Justice40 initiative, which sets a goal that 40 percent of the overall benefits of certain Federal investments flow to disadvantaged communities.[16]

Section 205 of the E.O. also charged CEQ with developing the Federal Sustainability Plan, a directive that was augmented by E.O. 14057, *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability*,[17] to achieve a carbon pollution-free electricity sector and clean and zero-emission vehicle fleets. CEQ also is collaborating with the Departments of the Interior, Agriculture, and Commerce on the implementation of the America the Beautiful Initiative.[18] Additionally, E.O. 14008 requires the Chair of CEQ and the Director of OMB to ensure that Federal permitting decisions consider the effects of GHG emissions and climate change.[19]

CEQ is also instrumental to the President's efforts to institute a government-wide approach to advancing environmental justice. On April 21, 2023, the President signed E.O. 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*, to further embed environmental justice into the work of Federal agencies and ensure that all people can benefit from the vital safeguards enshrined in the Nation's foundational environmental and civil rights laws.[20] The E.O. charges each agency with making achieving environmental justice part of its mission consistent with statutory authority,[21] and requires each agency to submit to the Chair of CEQ and make publicly available an Environmental Strategic Plan setting forth the agency's goals and plans for advancing

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[16] E.O. 14008, *supra* note 2, sec. 223.
[17] E.O. 14057, *supra* note 3.
[18] E.O. 14008, *supra* note 2.
[19] *Id*. at sec. 213(a); *see also id.*, sec. 219 (directing agencies to "make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities").
[20] E.O. 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*, 88 FR 25251 (Apr. 26, 2023). E.O. 14096 builds upon efforts to advance environmental justice and equity consistent with the policy advanced in documents including E.O. 13985, E.O. 14008, and E.O. 12898. *See, e.g.*, note 14, *supra*.
[21] E.O. 14096, *supra* note 20, sec. 3.

environmental justice.[22] Further, section 8 of the E.O. establishes a White House Office of Environmental Justice within CEQ.

Finally, CEQ is staffed with experts with decades of NEPA experience. CEQ's diverse array of responsibilities and expertise has long influenced the implementation of NEPA, and CEQ relied extensively on this experience in developing this rulemaking.

C. NEPA Implementation 1970–2019

Following shortly after the enactment of NEPA, President Nixon issued E.O. 11514, *Protection and Enhancement of Environmental Quality*, directing CEQ to issue guidelines for implementation of section 102(2)(C) of NEPA.[23] In response, CEQ in April 1970 issued interim guidelines, which addressed the provisions of section 102(2)(C) of the Act regarding EIS requirements.[24] CEQ revised the guidelines in 1971 and 1973 to address public involvement and introduce the concepts of EAs and draft and final EISs.[25]

In 1977, President Carter issued E.O. 11991, *Relating to Protection and Enhancement of Environmental Quality*, amending E.O. 11514 and directing CEQ to issue regulations for implementation of section 102(2)(C) of NEPA and requiring that Federal agencies comply with those regulations.[26] CEQ promulgated its NEPA regulations in 1978.[27] Issued 8 years after NEPA's enactment, the NEPA regulations reflected CEQ's interpretation of the statutory text and Congressional intent, expertise developed through issuing and revising the CEQ guidelines and advising Federal

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[22] *Id.* at sec. 4.
[23] E.O. 11514, *Protection and Enhancement of Environmental Quality*, 35 FR 4247 (Mar. 7, 1970), sec. 3(h).
[24] *See* Statements on Proposed Federal Actions Affecting the Environment, 35 FR 7390 (May 12, 1970) (interim guidelines).
[25] Statements on Proposed Federal Actions Affecting the Environment, 36 FR 7724 (Apr. 23, 1971) (final guidelines); Preparation of Environmental Impact Statements, 38 FR 10856 (May 2, 1973) (proposed revisions to the guidelines); Preparation of Environmental Impact Statements: Guidelines, 38 FR 20550 (Aug. 1, 1973) (revised guidelines).
[26] E.O. 11991, *Relating to Protection and Enhancement of Environmental Quality*, 42 FR 26967 (May 25, 1977).
[27] Implementation of Procedural Provisions, 43 FR 55978 (Nov. 29, 1978).

agencies on their implementation of NEPA, initial interpretations of the courts, and Federal agency experience implementing NEPA. The 1978 regulations reflected the fundamental principles of informed and science-based decision making, transparency, and public engagement Congress established in NEPA. The regulations further required agency-level implementation, directing Federal agencies to issue and update periodically agency-specific implementing procedures to supplement CEQ's procedures and integrate the NEPA process into the agencies' specific programs and processes. Consistent with 42 U.S.C. 4332(2)(B), the regulations also required agencies to consult with CEQ in the development or update of these agency-specific procedures to ensure consistency with CEQ's regulations.

CEQ made typographical amendments to the 1978 implementing regulations in 1979[28] and amended one provision in 1986 (CEQ refers to these regulations, as amended, as the "1978 regulations" in this preamble).[29] Otherwise, CEQ left the regulations unchanged for over 40 years. As a result, CEQ and Federal agencies developed extensive experience implementing the 1978 regulations, and a large body of agency practice and case law developed based on them.

D. 2020 Amendments to the CEQ Regulations

On August 15, 2017, President Trump issued E.O. 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*,[30] which directed CEQ to establish and lead an interagency working group to identify and propose changes to the NEPA regulations.[31] In response, CEQ issued an advance notice of proposed rulemaking (ANPRM) on June 20, 2018,[32]

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[28] Implementation of Procedural Provisions; Corrections, 44 FR 873 (Jan. 3, 1979).
[29] National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 FR 15618 (Apr. 25, 1986) (amending 40 CFR 1502.22).
[30] E.O. 13807, *supra* note 12.
[31] *Id.*, sec. 5(e)(iii).
[32] Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 FR 28591 (June 20, 2018).

and a notice of proposed rulemaking (NPRM) on January 10, 2020, proposing broad revisions to the 1978 regulations.[33] A wide range of stakeholders submitted more than 12,500 comments on the ANPRM[34] and 1.1 million comments on the proposed rule,[35] including from state and local governments, Tribes, environmental advocacy organizations, professional and industry associations, other advocacy or non-profit organizations, businesses, and private citizens. Many commenters provided detailed feedback on the legality, policy wisdom, and potential consequences of the proposed amendments. In keeping with the proposed rule, the final rule, promulgated on July 16, 2020 ("2020 regulations" or "2020 rule"), made wholesale revisions to the regulations; it took effect on September 14, 2020.[36]

In the months that followed the issuance of the 2020 regulations, five lawsuits were filed challenging the 2020 rule.[37] These cases challenge the 2020 rule on a variety of grounds, including under the Administrative Procedure Act (APA), NEPA, and the Endangered Species Act, contending that the rule exceeded CEQ's authority and that the related rulemaking process was procedurally and substantively defective. In response to CEQ's motions and joint motions, the district courts issued temporary stays in each of these cases, except for *Wild Virginia v. Council on Environmental Quality*, which the district court dismissed without prejudice on June 21, 2021.[38] The Fourth Circuit affirmed that dismissal on December 22, 2022.[39]

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[33] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 1684 (Jan. 10, 2020).
[34] *See* Docket No. CEQ–2018–0001, https://www.regulations.gov/document/CEQ-2018-0001-0001.
[35] *See* Docket No. CEQ–2019–0003, https://www.regulations.gov/document/CEQ-2019-0003-0001.
[36] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 43304 (July 16, 2020) ("2020 Final Rule").
[37] *Wild Va. v. Council on Env't Quality*, No. 3:20cv45 (W.D. Va. 2020); *Env't Justice Health All. v. Council on Env't Quality*, No. 1:20cv06143 (S.D.N.Y. 2020); *Alaska Cmty. Action on Toxics v. Council on Env't Quality*, No. 3:20cv5199 (N.D. Cal. 2020); *California v. Council on Env't Quality*, No. 3:20cv06057 (N.D. Cal. 2020); *Iowa Citizens for Cmty. Improvement v. Council on Env't Quality*, No. 1:20cv02715 (D.D.C. 2020). Additionally, in *The Clinch Coalition v. U.S. Forest Serv.*, No. 2:21cv00003 (W.D. Va. 2020), plaintiffs challenged the U.S. Forest Service's NEPA implementing procedures, which established new categorical exclusions, and, relatedly, the 2020 rule's provisions on categorical exclusions.
[38] *Wild Va. v. Council on Env't Quality*, 544 F. Supp. 3d 620 (W.D. Va. 2021).
[39] *Wild Va. v. Council on Env't Quality*, 56 F.4th 281 (4th Cir. 2022).

E. CEQ's Review of the 2020 Regulations

On January 20, 2021, President Biden issued E.O. 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*,[40] to establish an administration policy to listen to the science; improve public health and protect our environment; ensure access to clean air and water; limit exposure to dangerous chemicals and pesticides; hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; reduce GHG emissions; bolster resilience to the impacts of climate change; restore and expand the Nation's treasures and monuments; and prioritize both environmental justice and the creation of well-paying union jobs necessary to achieve these goals.[41] The Executive Order calls for Federal agencies to review existing regulations issued between January 20, 2017, and January 20, 2021, for consistency with the policy it articulates and to take appropriate action.[42] The Executive Order also revokes E.O. 13807 and directs agencies to take steps to rescind any rules or regulations implementing it.[43] An accompanying White House fact sheet, published on January 20, 2021, specifically identified the 2020 regulations for CEQ's review for consistency with E.O. 13990's policy.[44]

Consistent with E.O. 13990 and E.O. 14008, CEQ has reviewed the 2020 regulations and engaged in a multi-phase rulemaking process to ensure that the NEPA implementing regulations provide for sound and efficient environmental review of Federal actions, including those actions integral to tackling the climate crisis, in a manner that enables meaningful public participation, provides for an expeditious process,

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[40] 86 FR 7037 (Jan. 25, 2021).
[41] *Id*. at sec. 1.
[42] *Id*.
[43] *Id.* at sec. 7.
[44] The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

discloses climate change-related effects, advances environmental justice, respects Tribal sovereignty, protects our Nation's resources, and promotes better and more equitable environmental and community outcomes.

First, CEQ issued an interim final rule on June 29, 2021, amending the requirement in 40 CFR 1507.3(b) for agencies to propose changes to existing agency-specific NEPA procedures by September 14, 2021, to make those procedures consistent with the 2020 regulations.[45] CEQ extended the date by 2 years to avoid agencies proposing changes to agency-specific implementing procedures on a tight deadline to conform to regulations that are undergoing extensive review and would likely change in the near future.

Next, on October 7, 2021, CEQ issued a "Phase 1" proposed rule to focus on a discrete set of provisions designed to restore three elements of the 1978 regulations.[46] CEQ proposed changes to the provisions it considered most critical to address, revise, and clarify while completing the comprehensive review. First, CEQ proposed to revise 40 CFR 1502.13 to clarify that agencies have discretion to consider a variety of factors when assessing an application for authorization by removing a requirement that an agency base the purpose and need on the goals of an applicant and the agency's statutory authority. CEQ also proposed a conforming edit to the definition of "reasonable alternatives" in 40 CFR 1508.1(z). Second, CEQ proposed to remove language in 40 CFR 1507.3 that could be construed to limit agencies' flexibility to develop or revise procedures to implement NEPA specific to their programs and functions that may go beyond CEQ's regulatory requirements. Finally, CEQ proposed to revise the definition of "effects" in 40 CFR 1508.1(g) to restore the substance of the definitions of "effects" and "cumulative impacts" contained in the 1978 regulations. CEQ received 94,458 written

[45] Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 FR 34154 (June 29, 2021).
[46] National Environmental Policy Act Implementing Regulations Provisions, 86 FR 55757 (Oct. 7, 2021).

comments in response to the proposed rule. CEQ issued a Phase 1 final rule on April 20, 2022,[47] which finalized the proposed revisions.

CEQ received a variety of comments on the Phase 1 proposed rule suggesting additional provisions or changes that CEQ should consider as part of the Phase 2 rulemaking.[48] For example, commenters requested that CEQ strengthen public participation requirements and encourage more robust public engagement; better incorporate environmental justice and climate change considerations into the regulations; further address the climate and biodiversity crises; modernize environmental review of renewable energy projects; and further refine definitions, including human environment, major Federal action, and effects. In addition, commenters suggested that CEQ address page and time limits; mitigation; tiering; CEs; and improved coordination among Federal, Tribal, State, and local agencies and governments. Additionally, many of the comments on the Phase 1 proposed rule's changes to 40 CFR 1502.13 on purpose and need also included suggestions for changes to 40 CFR 1502.14 and the discussion of alternatives. Where appropriate, CEQ summarizes these Phase 1 comments as they relate to specific subsections of Section II of the preamble.

Here, in this Phase 2 notice of proposed rulemaking (NPRM), CEQ initiates a broader rulemaking to revise, update, and modernize the NEPA implementing regulations. Informed by CEQ's extensive experience implementing NEPA, CEQ proposes further revisions to ensure the NEPA process provides for efficient and effective environmental reviews that are guided by science and are consistent with the statute's text and purpose; enhance clarity and certainty for Federal agencies, project proponents, and the public; inform the public about the potential environmental effects of Federal

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[47] National Environmental Policy Act Implementing Regulations Revisions, 87 FR 23453 (Apr. 20, 2022) ("Phase 1 Final Rule").

[48] *See* CEQ, National Environmental Policy Act Implementing Regulations Revision Phase 1 Response to Comments (Apr. 2022) ("Phase 1 Response to Comments"), https://www.regulations.gov/document/CEQ-2021-0002-39427.

Government actions and enable full and fair public participation; and ultimately promote better informed Federal decisions that protect and enhance the quality of the human environment, including by ensuring climate change, environmental justice, and other environmental issues are fully accounted for in agencies' decision-making processes.

As part of CEQ's review, CEQ engaged in extensive outreach with a wide variety of interested and experienced parties to solicit their feedback and recommendations on what new elements CEQ should consider adding; what elements from the 1978 regulations CEQ should consider restoring; what existing elements of the NEPA regulations CEQ should consider clarifying, revising, or removing; and what existing elements CEQ should retain in their current form. CEQ convened a Federal interagency working group made up of NEPA practitioners, attorneys, and other experts to hear and discuss their recommendations on a wide variety of issues in the NEPA regulations and more generally with the environmental review process. The Federal agency participants represented the broad array of NEPA practice and environmental expertise across the Federal Government, including land management, infrastructure, resource conservation, climate, and environmental justice experts.

CEQ also hosted or participated in over 60 meetings with external parties, such as environmental organizations, business and industry organizations (including timber, energy, air, grazing, mining, and transportation organizations), Tribal Nations, State governments, environmental justice organizations, academics, and labor organizations. Additionally, CEQ held a Tribal consultation specifically on the Phase 2 regulations and the updates to CEQ's GHG guidance on November 12, 2021. CEQ considered the feedback received during these engagements in the development of this proposed rule and has included summaries of the external engagements in the docket.

Finally, as discussed in Section I.B, CEQ relies on its extensive experience overseeing and implementing NEPA in the development of this rule. CEQ has over

50 years of experience advising Federal agencies on the implementation of NEPA. CEQ collaborates daily with Federal agencies on specific NEPA reviews, provides government-wide guidance on NEPA implementation, consults with agencies on the development of agency-specific NEPA implementing procedures and determines they conform with NEPA and the CEQ regulations, and advises the President on a vast array of environmental issues. This experience also enables CEQ to clarify the patchwork of fact-specific judicial decisions that have evolved under NEPA. This rulemaking seeks to bring clarity and predictability to Federal agencies and outside parties whose activities require Federal action and therefore trigger NEPA review, while also facilitating better environmental and social outcomes due to informed decision making.

II. Summary of Proposed Rule

This section summarizes CEQ's proposed revisions to its NEPA implementing regulations and the rationale for the changes. CEQ's proposed changes fall into five general categories. First, CEQ proposes revisions to implement the amendments to NEPA made by the FRA. Second, where CEQ determined it made sense to do so, CEQ proposes to amend provisions, which the 2020 regulations revised, to revert to the language from the 1978 regulations that was in effect for more than 40 years, subject to minor revisions for clarity. Third, CEQ proposes to remove certain provisions added by the 2020 rule that CEQ considers imprudent or legally unsettled. Fourth, CEQ proposes to amend certain provisions to enhance consistency and provide clarity to improve the efficiency and effectiveness of the environmental review process. Fifth, CEQ proposes revisions to the regulations to implement decades of CEQ and agency experience implementing and complying with NEPA, foster science-based decision making—including decisions that account for climate change and environmental justice—improve the efficiency and effectiveness of the environmental review process, and better effectuate NEPA's statutory purposes. CEQ is retaining many of the changes made in the 2020 rulemaking

particularly where those changes codified longstanding practice or guidance or enhanced the efficiency and effectiveness of the NEPA process.

In response to the Phase 1 proposed rule, CEQ received many comments on provisions not addressed in Phase 1. CEQ indicated in the Phase 1 final rule that it would consider such comments during the development of this Phase 2 rulemaking. CEQ has done so, and where applicable, this NPRM provides a high-level summary of the important issues raised in those public comments.

While some comments have advocated for a straight return to the 1978 regulations, CEQ does not consider this to be the appropriate approach. As part of its review, CEQ evaluated the provisions of the 2020 regulations and sought feedback from NEPA experts and interested stakeholders to identify provisions that, as written, add value to the NEPA process or that require amendments to enhance clarity or improve efficiency and effectiveness. For example, CEQ identified for retention the inclusion of Tribal interests throughout the regulations, the integration of mechanisms to facilitate better interagency cooperation, and the reorganization and modernization of provisions addressing certain elements of the process to make the regulations easier to understand and follow. CEQ considers it important that the regulations meet current goals and objectives, including to promote the development of NEPA documents that are concise but also include the information needed to inform decision makers and reflect public input. CEQ's proposed revisions to the regulations emphasize the importance of transparency and public engagement, reflecting modern practices and changing needs, while also recognizing the discretion and flexibility that Federal agencies need to respond and move efficiently and effectively through the NEPA process.

A. Proposed Changes Throughout Parts 1500–1508[49]

CEQ proposes several revisions throughout parts 1500–1508 to provide consistency, improve clarity, and correct grammatical errors. Improved clarity reduces confusion and results in more consistent implementation, thereby improving the efficiency of the NEPA process and reducing the risk of litigation.

For greater consistency and clarity, CEQ proposes to change the word "impact" to "effect" where this term is used as a noun because these two words are synonymous. Throughout the regulations, to improve clarity, CEQ proposes to use the word "significant" only to modify the term "effects." Accordingly, throughout the regulations, where "significant" modifies a word other than "effects," CEQ proposes to replace "significant" with another accurate adjective, typically "important" or "substantial," which have been used throughout the CEQ regulations since 1978. In doing so, CEQ seeks to avoid confusion about what "significant" means in these other contexts by limiting its use to describing "significant effects." The one exception to this change would be that CEQ proposes for the regulations to continue to refer to a finding of no significant impact (FONSI), which CEQ would leave intact because the concept of a FONSI is entrenched in practice and case law. CEQ heard from public comments and agency feedback on the Phase 1 rulemaking that use of the word "significant" in phrases such as "significant issues" or "significant actions" creates confusion on what the word "significant" means.[50] The proposed change also aligns with the proposed definition of "significant effects" in § 1508.1(jj),[51] as discussed in section II.J.13. CEQ does not intend these proposed changes to substantively change the meaning of the provisions.

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[49] CEQ prepared a redline of this proposed rule's changes to the current CEQ regulations and provided it in the docket as a tool to facilitate public review of this NPRM.

[50] Phase 1 Response to Comments, *supra* note 48, at 120–21.

[51] In the preamble, CEQ uses the section symbol (§) to refer to the proposed regulations as set forth in this NPRM and 40 CFR to refer to the current CEQ regulations as set forth in 40 CFR parts 1500-1508. When referencing specific regulatory sections in place prior to the 2020 final rule, CEQ uses 40 CFR but adds "(2019)."

For clarity, CEQ proposes to change "statement" to "environmental impact statement" and "assessment" to "environmental assessment" where the regulations only use the short form in the paragraph. See, e.g., §§ 1502.3 and 1506.3(e)(1) through (e)(3).

CEQ also proposes to make grammatical corrections or other edits throughout the regulations where CEQ considers the changes necessary for the reader to understand fully the meaning of the sentences. Finally, CEQ proposes to update the authorities for each part, update the references to NEPA as amended by the FRA, and fix internal cross references to other sections of the regulations throughout to follow the correct *Federal Register* format.

B. Proposed Revisions to Update Part 1500, Purpose and Policy

1. Purpose (§ 1500.1) and Policy (§ 1500.2)

Consistent with the approach taken in the 1978 regulations, CEQ proposes to address the purpose of the CEQ regulations in § 1500.1, "Purpose," and reinstate § 1500.2, "Policy." In § 1500.1, CEQ proposes to restore much of the language from the 1978 regulations and further incorporate the policies Congress established in the NEPA statute. CEQ is proposing these changes to restore text regarding NEPA's purpose and goals, placing the regulations into their broader context. CEQ also finds value in restating the policies of the Act within the regulations, which would improve readability by avoiding the need for cross references to material outside the four corners of the regulations.

Specifically, CEQ proposes to revise 40 CFR 1500.1(a) by subdividing it into § 1500.1(a), (a)(1), and (a)(2), and restoring language from the 1978 regulations that states the principles and policies Congress established in sections 101 and 102 of NEPA. CEQ is proposing to remove the language that describes NEPA as a purely procedural statute because, while correct, CEQ considers that language to be an inappropriately narrow view of NEPA's purpose that minimizes some of the broader goals of NEPA

described in section I.A. While CEQ agrees that a NEPA analysis does not dictate a particular outcome by the decision maker, Congress established the NEPA process to provide for better informed Federal decision making and improve environmental outcomes, and those goals are not fulfilled if the NEPA analysis is treated merely as a check-the-box exercise. In short, CEQ does not consider it necessary to repeatedly emphasize the procedural nature of NEPA, which may suggest that NEPA mandates a rote paperwork exercise and de-emphasizes the Act's larger goals and purposes. Instead, CEQ remains cognizant of the goals Congress intended to achieve through the NEPA process in developing its implementing regulations, and agencies should carry out NEPA's procedural requirements in a manner faithful to the purposes of the statute.

In § 1500.1(a)(1), CEQ proposes to retain the sentence summarizing section 101(a) of NEPA and add a second sentence summarizing section 101(b) to clarify that agencies also should accomplish the purposes described in section 101(b) through NEPA reviews. Including this language in § 1500.1(a)(1) would help agencies understand what the regulations refer to when the regulations direct or encourage agencies to act in a manner consistent with the purposes or policies of the Act. *See, e.g.*, §§ 1500.2(a), 1500.6, 1501.1(a), 1502.1(a), and 1507.3(b).

In § 1500.1(a)(2), CEQ proposes to restore generally the language of the 1978 regulations stating that the purpose of the regulations is to convey what agencies should and must do to comply with NEPA to achieve its purpose. CEQ proposes to strike the language added by the 2020 rule that NEPA requires Federal agencies to provide a detailed statement for major Federal actions, that the purpose and function of NEPA is satisfied if agencies have considered environmental information and informed the public, and that NEPA does not mandate particular results. While it is true that NEPA does not mandate particular results in specific decision-making processes, this language unduly minimizes Congress's understanding that procedures ensuring that agencies analyze,

consider, and disclose environmental effects will lead to better substantive outcomes, and is inconsistent with Congress's statements of policy in the NEPA statute.

In § 1500.1(b), CEQ proposes to strike the first two sentences added by the 2020 rule and restore language from the 1978 regulations emphasizing the importance of the early identification of high-quality information that is relevant to a decision. Early identification and consideration of issues using high-quality information have long been fundamental to the NEPA process, particularly because this facilitates comprehensive analysis of alternatives and timely and efficient decision making, and CEQ considers it important to emphasize these considerations in this section. The proposed changes also emphasize that the environmental information that agencies use in the NEPA process should be high-quality, science-based, and accessible. CEQ proposes to strike the first two sentences of this paragraph, which the 2020 rule added, because they also provide an unnecessarily narrow view of the purposes of NEPA and its implementing regulations.

Finally, CEQ proposes in a new § 1500.1(c) to restore text from the 1978 regulations, most of which the 2020 rule deleted, emphasizing the importance of NEPA reviews for informed decision making. The proposed changes to § 1500.1 recognize that the procedural provisions of NEPA are intended to further the purpose and goals of the Act. One of those goals is to make improved and sound government decisions.

The 2020 rule struck 40 CFR 1500.2 (2019) and integrated policy language into 40 CFR 1500.1 (2020).[52] CEQ is proposing to once again provide for two sections, renaming § 1500.1 to "Purpose" and restoring § 1500.2 as "Policy." CEQ is proposing to restore with some updates the language of the 1978 regulations to § 1500.2.

In § 1500.2(a), CEQ proposes to restore the 1978 language directing agencies to interpret their authorities consistent with the policies of NEPA and the CEQ regulations to the fullest extent possible. Paragraph (b) would restore with clarifying edits the 1978

[52] 2020 Final Rule, *supra* note 36, at 43316–17.

language directing agencies to implement procedures that facilitate a meaningful NEPA process to the fullest extent possible and emphasize that environmental documents should be concise and clear. Paragraph (c) would direct agencies to integrate NEPA with other planning and environmental review requirements to the fullest extent possible, which promotes efficient processes. CEQ proposes to modernize language from the 1978 regulations in paragraph (d) to emphasize public engagement, including with communities with environmental justice concerns, which often include communities of color, low-income communities, and indigenous communities, and Tribal communities. CEQ views an emphasis on engagement with such communities to be important because agencies have not always meaningfully engaged with them and such communities have been disproportionately and adversely affected by certain Federal activities.

In proposing to make this change to emphasize public engagement, CEQ notes that the obligation to consult with Tribal Nations on a nation-to-nation basis is distinct from the public engagement requirements of NEPA.[53] CEQ invites comment on whether additional changes to the NEPA regulations would be appropriate in light of the obligation for Tribal consultation.

In paragraph (e), CEQ proposes to restore language from the 1978 regulations regarding the identification of alternatives that avoid or minimize adverse effects. CEQ is proposing to add examples of such alternatives, including those that will reduce climate change-related effects or address effects that disproportionately affect communities with environmental justice concerns consistent with E.O. 12898 and E.O. 14096, to highlight the importance of considering such effects in environmental documents, consistent with

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[53] *See* E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*, 65 FR 67249 (Nov. 9, 2000); Presidential Memorandum, Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 FR 7491 (Jan. 29, 2021), https://www.federalregister.gov/d/2021-02075.

NEPA's requirements, including the consideration of high-quality information, such as best available science and data.[54]

Finally, in paragraph (f), CEQ proposes to restore the direction from the 1978 regulations to use all practicable means to restore and enhance the environment, consistent with the policies of NEPA. These proposed restorations and additions to § 1500.2(d), (e), and (f) reflect longstanding practice among Federal agencies and align with NEPA's statutory policies, including to avoid environmental degradation, preserve historic, cultural, and natural resources, and "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. 4331(b).

The 2020 rule removed the Policy section stating that it was duplicative of other sections.[55] However, CEQ proposes to restore and update this section because a robust articulation of the Act's policy principles is fundamental to the NEPA process. CEQ also considers it helpful to agency practitioners and the public to have a consolidated listing of policy objectives regardless of whether other sections of the regulations address those objectives.

2. NEPA Compliance (§ 1500.3)

CEQ proposes to remove from § 1500.3 provisions added by the 2020 rule regarding exhaustion and remedies, restore some language from the 1978 regulations removed by the 2020 rule, and make other conforming edits. Specifically, in § 1500.3(a), CEQ proposes to remove the phrase "except where compliance would be inconsistent

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[54] Consideration of environmental justice and climate change-related effects has long been part of NEPA analysis. *See, e.g.*, Environmental Justice Guidance, *supra* note 6, and *Ctr. For Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008). *See also* 42 U.S.C. 4331(b) ("[I]t is the continuing responsibility of the Federal Government to . . . assure for *all* Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings . . . [and to] maintain, wherever possible, an environment which supports diversity and variety of individual choice" (emphasis added); 42 U.S.C. 4332(2)(F) ("all agencies of the Federal Government shall . . . recognize the worldwide and long-range character of environmental problems").

[55] 2020 Final Rule, *supra* note 36 at 43317.

with other statutory requirements" because this is addressed by § 1500.6. CEQ also proposes to remove the reference to E.O. 13807, which E.O. 13990 revoked, as well as the reference to section 309 of the Clean Air Act because this provision is implemented by EPA.

CEQ proposes to delete 40 CFR 1500.3(b), including its paragraphs. The process established by the 2020 rule provides that first, an agency must request in its notice of intent (NOI) comments on all relevant information, studies, and analyses on potential alternatives and effects. 40 CFR 1500.3(b)(1). Second, the agency must summarize all the information it receives in the draft EIS and specifically seek comment on it. 40 CFR 1500.3(b)(2), 1502.17, 1503.1(a)(3). Third, decision makers must certify in the record of decision (ROD) that they considered all the alternatives, information, and analyses submitted by public commenters. 40 CFR 1500.3(b)(4), 1505.2(b). Fourth, any comments not submitted within the comment period are considered forfeited as unexhausted. 40 CFR 1500.3(b)(3), 1505.2(b). By adding this exhaustion process, the 2020 rule aimed to limit legal challenges and judicial remedies.[56]

CEQ proposes to remove this process because it establishes an inappropriately stringent exhaustion requirement for public commenters and agencies. It is unsettled whether CEQ has the authority under NEPA to set out an exhaustion requirement that bars parties from bringing claims on the grounds that an agency's compliance with NEPA violated the APA, pursuant to 5 U.S.C. 702. While the 2020 rule correctly identifies instances in which courts have ruled that parties may not raise legal claims based on issues that they themselves did not raise during the comment period,[57] other courts have sometimes ruled that a plaintiff can bring claims where another party raised an issue in

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[56] 2020 Final Rule, *supra* note 36, at 43317–18.

[57] *Id.* (citing *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004); *Karst Env't. Educ. & Prot., Inc. v. Fed. Highway Admin.*, 559 F. App'x 421 (6th Cir. 2014); *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969 (8th Cir. 2011); *Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246 (9th Cir. 2000); *Nat'l Ass'n of Mfrs. v. U.S. Dep't of the Interior*, 134 F.3d 1095 (D.C. Cir. 1998)).

comments or where the agency should have identified an issue on its own. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of Interior*, 929 F. Supp. 2d 1039, 1045–46 (E.D. Cal. 2013); *Wyo. Lodging and Rest. Ass'n v. U.S. Dep't of Interior*, 398 F. Supp. 2d 1197, 1210 (D. Wyo. 2005); *see Pub. Citizen*, 541 U.S. at 765 (noting that "[T]he agency bears the primary responsibility to ensure that it complies with NEPA . . . and an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action"). Because the fundamental question raised by these cases is the availability of a cause of action under the APA, and not a question of interpreting NEPA, CEQ considers this question more appropriate for the courts to determine. Further, nothing in this revision would limit the positions the Federal Government may take regarding whether, based on the facts of a particular case, a particular issue has been forfeited by a party's failure to raise it before the agency, and removing this provision does not suggest that a party should not be held to have forfeited an issue by failing to raise it. By deleting the exhaustion requirements, CEQ does not take the position that plaintiffs may raise new and previously unraised issues in litigation. Rather, CEQ considers this to be a question of general administrative law and therefore the courts to be the proper venue to determine whether any particular claim can proceed.

Moreover, the exhaustion requirement established in the 2020 rule is at odds with longstanding agency practice. While courts have ruled that agencies are not required to do so, *see, e.g.*, *Pub. Citizen*, 541 U.S. at 764–65 (finding that where a party does not raise an objection in their comments on an EA, the party forfeits any objection to the EA on that ground), agencies have discretion to consider and respond to comments submitted after a comment period ends. The exhaustion requirement established in the 2020 regulations could encourage agencies to disregard important information presented to the

agency shortly after a comment period closes, and such a formalistic approach would not advance NEPA's goal of informed decision making.

To be clear, this change does not relieve parties interested in participating in, commenting on, or ultimately challenging a NEPA analysis of the obligation to "structure their participation so that it is meaningful." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978). As CEQ's regulations have made clear since 1978, parties must provide comments that are as specific as possible to enable agencies to consider and address information during the decision-making processes. *See* 40 CFR 1503.3(a). While commenters should follow the appropriate procedures and time limits, the revisions would provide agencies flexibility to address unusual circumstances.

CEQ proposes to redesignate 40 CFR 1500.3(c), "Review of NEPA compliance," as paragraph (b) and move to paragraph (b) the sentence from 40 CFR 1500.3(d) regarding harmless error for minor, non-substantive errors, which is a concept that has been in place since the 1978 regulations. CEQ proposes to delete the remaining text of 40 CFR 1500.3(c), removing language that noncompliance with NEPA and the CEQ regulations should be resolved as expeditiously as possible. While CEQ agrees with expeditious resolution of issues, CEQ considers this inappropriate for regulatory text as these regulations cannot compel members of the public or courts to resolve NEPA disputes. Rather, the regulations promote public engagement, appropriate analysis, and informed decision making to facilitate NEPA compliance and avoid such disputes from the outset. CEQ also proposes to strike the last sentence in this paragraph regarding bonding and other security requirements, which relates to litigation over an agency action and not the NEPA process itself. It is unsettled whether NEPA provides agencies with authority to promulgate procedures that require plaintiffs to post bonds in litigation brought under the APA. In any case, CEQ does not consider it appropriate to address this issue in the NEPA implementing regulations.

With the exception of the last sentence in 40 CFR 1500.3(d) regarding remedies, which CEQ proposes to move, as discussed earlier in this section, CEQ proposes to delete the remainder of the paragraph. It is questionable whether CEQ has the authority to direct courts about what remedies are available in litigation brought under the APA to challenge NEPA compliance and, in any case, CEQ considers the 2020 rule's addition of this paragraph to be inappropriate. CEQ considers courts to be in the best position to determine the appropriate remedies when a plaintiff successfully challenges an agency's NEPA compliance.

Finally, CEQ proposes to redesignate 40 CFR 1500.3(e), "Severability," as paragraph (c), without change. CEQ intends these regulations to be severable. The proposed rule would amend existing regulations and the NEPA regulations could be functionally implemented if each revision proposed in this rule occurred on its own or in combination with any other subset of proposed revisions. As a result, if a court were to invalidate any particular provision of this rule, allowing the remainder of the rule to remain in effect would still result in a functional NEPA review process. This approach to severability is the same as the approach that CEQ took when it promulgated the 2020 regulations, because those amendments similarly could be layered onto the 1978 regulations individually without disrupting the overarching NEPA review process.

3. Concise and Informative Environmental Documents (§ 1500.4)

CEQ proposes to revise § 1500.4 to emphasize the important values served by concise and informative NEPA documents beyond merely reducing paperwork, such as promoting informed and efficient decision making and facilitating meaningful public participation. Section 1500.4 lists examples of provisions in the CEQ regulations that provide mechanisms by which agencies may prepare concise and informative environmental documents. Each paragraph listed in § 1500.4 includes cross references to

regulatory provisions that further the goal of preparing concise and informative documents.

To that end, CEQ proposes to retitle § 1500.4 from "Reducing paperwork" to "Concise and informative environmental documents" and revise the introductory text to clarify that the paragraphs in this section provide examples of the mechanisms in the regulations that agencies can use to prepare concise and informative environmental documents. CEQ proposes to remove paragraphs (a) and (b) from 40 CFR 1500.4 because they are redundant with § 1500.5(a) and (b) and are more appropriately addressed in the section on reducing delay, as well as paragraph (d) because it is addressed in the revised introductory text. CEQ proposes to redesignate 40 CFR 1500.4(c) and (e) through (q) as § 1500.4 (a) and (b) through (n), respectively.

CEQ proposes to add "e.g.," to the cross references listed in § 1500.4(b), (c), and (e) to clarify that they are non-exclusive examples of how agencies can briefly discuss unimportant issues, write in plain language, and reduce emphasis on background material. CEQ would update the cross references to other sections of the subchapter to reflect proposed changes elsewhere in the regulations. In paragraphs (c) and (e), CEQ proposes to expand the reference from EISs to all environmental documents, as the concepts discussed are more broadly applicable. Additionally, in paragraph (e), CEQ proposes to insert "most" before "useful" to clarify that the environmental documents should not contain portions that are useless.

In § 1500.4(f), CEQ proposes to replace "significant" with "important" and insert "unimportant" to modify "issues" consistent with our proposal to only use "significant" to modify "effects." CEQ also proposes to clarify in paragraph (f) that scoping may apply to EAs. Finally, CEQ proposes to expand paragraph (h), regarding programmatic review and tiering, to include EAs to align with the proposed changes to § 1501.11. Finally, in paragraph (m), CEQ proposes to insert "Federal" before "agency" consistent with

§ 1506.3, which allows adoption of NEPA documents prepared by other Federal agencies.

Concise and informational documents make the NEPA process more accessible and transparent to the public, allowing the public an opportunity to contribute to the NEPA process. The changes proposed in § 1500.4 align the regulations with the intent of NEPA to allow the public to provide input, as well as CEQ's stated goal of increasing transparency, while providing agencies flexibility on how to achieve concise and informative documents. These proposed changes aim to encourage the preparation of documents that can be easily read and understood, which in turn promote informed and efficient decision making.

4. Efficient Process (§ 1500.5)

CEQ proposes minor changes to § 1500.5 to provide clarity and flexibility regarding mechanisms by which agencies can apply the CEQ regulations to improve efficiency in the environmental review process. CEQ proposes these changes to acknowledge that unanticipated events and circumstances beyond agency control may delay the environmental review process, and to recognize that, while these approaches may improve efficiency for many NEPA reviews, they could be inefficient for others. To that end, CEQ proposes to retitle § 1500.5 from "Reducing delay" to "Efficient process" and revise the introductory text to reflect the new title. The other proposed changes include adding EAs to paragraph (a) to make the provision consistent with the definition of "categorical exclusion;" changing "real issues" to "important issues that required detailed analysis" in paragraph (f) for consistency with § 1502.4; and expanding the scope of paragraph (h) from EISs to environmental documents to make clear that, regardless of the level of NEPA review, agencies should prepare environmental documents early in the process. Proposed § 1500.5 recognizes the importance of timely

information for decision making and encourages agencies to implement the 12 listed mechanisms to achieve timely and efficient NEPA processes.

5. Agency Authority (§ 1500.6)

In § 1500.6, CEQ proposes to revise the second sentence to remove the qualification added in the 2020 rule that agencies must ensure full compliance with the Act "as interpreted by" these regulations and instead state that agencies must review and revise their procedures to ensure compliance with NEPA and the CEQ regulations. The phrase added in 2020 could be read to indicate that agencies have no freestanding requirement to comply with NEPA itself, which would be untrue. CEQ also considers the proposed change necessary for consistency with § 1507.3(b), which CEQ revised in the Phase 1 rulemaking to make clear that, while agency procedures must be consistent with the CEQ regulations, agencies have discretion and flexibility to develop procedures beyond the CEQ regulatory requirements, enabling agencies to address their specific programs, statutory mandates, and the contexts in which they operate. CEQ proposes to make conforming edits in §§ 1502.2(d) and 1502.9(b) to remove this phrase.

In the third sentence, CEQ proposes to remove the cross-reference to § 1501.1 for consistency with the proposed modifications to § 1501.1 and restore the intent of language from the 1978 regulations, with modification, explaining that the phrase "to the fullest extent possible" means that each agency must comply with section 102 of NEPA unless an agency activity, decision, or action is exempted by law or compliance with NEPA is impossible. Finally, CEQ proposes to strike the last sentence stating that the CEQ regulations do not limit an agency's other authorities or legal responsibilities, which the 2020 rule added to acknowledge the possibility of different statutory authorities with different requirements. While the 2020 regulations contended that this sentence was added for consistency with E.O. 11514, as amended by section 2(g) of E.O. 11991, CEQ considers the sentence superfluous and unnecessarily vague. As stated in the new

proposed text, agencies must comply with NEPA in carrying out an activity, decision, or action unless exempted by law or compliance with NEPA is impossible. That description would reflect accurately the directive that Federal agencies comply with the CEQ regulations "except where such compliance would be inconsistent with statutory requirements."[58]

CEQ's proposed revisions to § 1500.6 would clarify that agencies have an independent responsibility to ensure compliance with NEPA and a duty to harmonize NEPA with their other statutory requirements and authorities to the maximum extent possible. This is true as a general matter of statutory construction as well as under the specific statutory mandate of section 102 of NEPA, which requires that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this [Act]." 42 U.S.C. 4332(1).

Therefore, compliance with NEPA is only impossible within the meaning of this subsection when the conflict between another statute and the requirements of NEPA are clear, unavoidable, and irreconcilable. Absent exemption by Congress or a court, an irreconcilable conflict exists only if the agency's authorizing statute grants it no discretion to comply with NEPA while also satisfying the statutory mandate.

C. Proposed Revisions to Update Part 1501, NEPA and Agency Planning

CEQ is proposing substantive revisions to all sections in part 1501 except § 1501.2, "Apply NEPA early in the process," to which CEQ proposes minor edits for readability that CEQ considers clarifying and non-substantive. CEQ invites comment on whether it should make any substantive changes to that section or other changes to part 1501.

[58] 2020 Final Rule, *supra* note 36, at 43319.

1. Purpose (§ 1501.1)

CEQ proposes to revert and retitle § 1501.1 to "Purpose," to emphasize the goals of part 1501 consistent with the approach in the 1978 regulations. As discussed further below, CEQ proposes to move some of the NEPA thresholds language in 40 CFR 1501.1 to § 1503.1(a), strike the remaining text, and replace it with new provisions similar to those in the 1978 regulations.

In § 1501.1(a), CEQ proposes to highlight the importance of integrating NEPA early in agency planning processes by generally restoring the language from the 1978 regulations, while also emphasizing that this promotes an efficient process and reduces delay. Restoring this language is consistent with section 102(2)(C) of NEPA and the objective to build into agency decision making, beginning at the earliest point, an appropriate consideration of the environmental aspects of a proposed action. 42 U.S.C. 4332(2)(C). CEQ proposes in paragraph (b) to emphasize early engagement in the environmental review process consistent with other changes proposed throughout the regulations to elevate the importance of early coordination and engagement throughout the NEPA process to identify and address potential issues early in a decision-making process, thereby helping to reduce the overall time required to approve a project and improving outcomes. In new paragraph (c), CEQ proposes to restore text from the 1978 regulations regarding expeditious resolution of interagency disputes as promoted in §§ 1501.7 and 1501.8. Paragraph (d) also would restore the direction to identify the scope of the proposed action and important environmental issues consistent with § 1501.3, thereby enhancing efficiency. Finally, paragraph (e) would highlight the importance of schedules consistent with § 1501.10, which includes provisions requiring agencies to develop a schedule for all environmental reviews and authorizations, as well as §§ 1501.7 and 1501.8, which promote interagency coordination including with respect to schedules.

As discussed further in section II.C.2, CEQ proposes to combine the threshold considerations provision with the process to determine the appropriate level of NEPA review in § 1501.3 by moving 40 CFR 1501.1(a)(1), (2), (4), and (5) to proposed § 1501.3(a)(1), (2), (4), and (4)(ii), respectively, and striking the remaining paragraphs. The 2020 regulations replaced the purpose section in 40 CFR 1501.1 with a list of factors agencies should consider in assessing whether NEPA applies or is otherwise fulfilled for a proposed activity or decision, and allows agencies to make these threshold considerations pursuant to their agency NEPA procedures or on an individual basis.

CEQ proposes to delete two of the threshold factors currently in 40 CFR 1501.1(a). First, CEQ proposes to delete the factor currently listed in 40 CFR 1501.1(a)(3), inconsistency with Congressional intent expressed in another statute. Upon further consideration, this factor may inadequately account for agencies' responsibility to harmonize NEPA with other statutes, as discussed further in section II.C.2. As discussed in section II.B.5, the regulations provide that an agency should determine if a statute or court exempts an action from NEPA or if compliance with NEPA and another statute would be impossible; if not, the agency must comply with NEPA. To the extent the factor suggests that Congress's intent regarding NEPA compliance involves considerations other than those two determinations, the factor is incorrect.

Second, CEQ proposes to strike the factor in 40 CFR 1501.1(a)(6) regarding functional equivalence. While certain Environmental Protection Agency (EPA) actions are explicitly exempted from NEPA's environmental review requirements, and courts have found other EPA-administered statutes to be functionally equivalent or otherwise exempt, CEQ considers this language added to the 2020 rule to go beyond the scope of the NEPA statute and case law because the language can be construed to expand functional equivalence beyond the narrow contexts in which it has been recognized. *See,*

e.g., 15 U.S.C. 793(c)(1) (exempting EPA actions under the Clean Air Act); 33 U.S.C. 1371(c)(1) (exempting most EPA actions under the Clean Water Act); *Env't Def. Fund, Inc.* v. *EPA,* 489 F.2d 1247, 1256–57 (D.C. Cir. 1973) (exempting agency actions under FIFRA); *W. Neb. Res. Council* v. *U.S. Env't Prot. Agency,* 943 F.2d 867, 871–72 (8th Cir. 1991) (noting exemptions under the Safe Drinking Water Act). CEQ considers the more appropriate and prudent approach is for agencies to establish mechanisms in their agency NEPA procedures to align processes and requirements from other environmental laws with the NEPA process.

CEQ proposes to eliminate the current language in 40 CFR 1501.1(b) allowing agencies to make threshold determinations individually or in their NEPA procedures because CEQ proposes to move the consideration of thresholds into § 1501.3 to consolidate the steps agencies should take to determine whether NEPA applies and, if so, what level of NEPA review is appropriate. The language in 40 CFR 1501.1(b) is also redundant to language in § 1507.3(d)(1), which would provide that agency NEPA procedures may identify activities or decisions that are not subject to NEPA. CEQ proposes to remove as unnecessary 40 CFR 1501.1(b)(1) because agencies have discretion to consult with CEQ and have done so for decades on a wide variety of matters, including on determining NEPA applicability, without such specific language in the CEQ regulations. Finally, CEQ proposes to eliminate 40 CFR 1501.1(b)(2) directing agencies to consult with another agency when they jointly administer a statute if they are making a threshold applicability determination. While CEQ agrees that consultation is a good practice in such circumstances, it does not consider such a requirement necessary for these regulations because consultation is best determined by the agencies involved.

2. Determine the Appropriate Level of NEPA Review (§ 1501.3)

CEQ proposes substantive revisions to § 1501.3 to provide a more robust and consolidated description of the process agencies should use to determine the appropriate

level of NEPA review, including addressing the threshold question of whether NEPA applies. CEQ also proposes clarifying edits, including adding paragraph headings to paragraphs (a) through (d). This revised provision would clarify the steps for assessing the appropriate level of NEPA review, facilitating a more efficient and predictable review process.

First, as noted in section II.C.1, CEQ proposes to move 40 CFR 1501.1(a)(1) to a new § 1501.3(a), "Applicability," and add a sentence requiring agencies to determine whether NEPA applies to a proposed activity or decision as a threshold matter. CEQ proposes this move because the inquiry into whether NEPA applies is central to determining the level of NEPA review and consolidating the steps in this process in one regulatory section would improve the clarity of the regulations. It is also consistent with the approach in section 106 of NEPA, which addresses threshold considerations. CEQ proposes to strike "or is otherwise fulfilled" in the moved text because, as discussed in section II.C.1, CEQ is proposing to remove the functional equivalence factor from the regulation.

Second, CEQ proposes to move the threshold determination factors agencies should consider when determining whether NEPA applies, currently at 40 CFR 1501.1(a)(1) and (2), to § 1501.3(a)(1) and (2) respectively. CEQ proposes to align the text in paragraph (a)(1) with the language in § 1500.6, "exempted from NEPA by law," and align the text in paragraph (a)(2) with the language in section 106(a)(3) of NEPA, changing "another statute" to "another provision of law" for consistency with the statutory text. Third, CEQ proposes a new factor in paragraph (a)(3) to address circumstances other than those in which Congress or case law have exempted an activity from NEPA, to clarify that there must be an irreconcilable and fundamental conflict between complying with a statutory provision and complying with NEPA—*i.e.*, the other statutory provision must make NEPA compliance impossible. This factor would be

consistent with case law and longstanding principles of statutory construction that require statutes to be read in harmony when it is possible to do so. This approach also reflects the statutory requirement of section 102 of NEPA that agencies interpret and administer "the policies, regulations, and public laws of the United States" in accordance with NEPA's policies and is consistent with CEQ's proposed revisions to § 1500.6, "Agency Authority." 42 U.S.C. 4332; *see* section II.B.5.

Fourth, consistent with section 106(a)(1) and (4) of NEPA, CEQ proposes to move the threshold determination factors regarding whether the activity or decision is a major Federal action from 40 CFR 1501.1(a)(4) and (5), to § 1501.3(a)(4) and (a)(4)(ii), respectively. Consistent with section 106(a)(1) and (4) of NEPA, CEQ proposes to include whether an activity or decision is a final agency action or non-discretionary as subfactors of whether an activity or decision is a major Federal action in § 1501.3(a)(4) because these are also exclusions from the definition of a major Federal action. When agencies assess whether an activity or decision meets the definition of a major Federal action, agencies determine whether they have discretion to consider environmental effects consistent with § 1508.1(u). CEQ invites comment on whether it should make additional changes to § 1501.3(a) in light of the recently enacted provisions in section 106(a) regarding threshold determinations.

Fifth, CEQ proposes to move, with clarifying edits, 40 CFR 1501.9(e), "Determination of scope," to a new proposed § 1501.3(b), "Scope of action and analysis," to provide the next step in determining the appropriate level of NEPA review—the scope of the proposed action and its potential effects. In addition, CEQ proposes moving into § 1501.3(b) one sentence from 40 CFR 1502.4(a) directing agencies to evaluate in a single NEPA review proposals sufficiently closely related to be considered a single action, as well as text from 40 CFR 1501.9(e)(1) regarding connected actions, which are closely related Federal activities or decisions that agencies should

consider in a single NEPA document. CEQ proposes to move 40 CFR 1501.9(e)(1)(i) through (e)(1)(iii) providing the types of connected actions into § 1501.3(b)(1)(i) through (b)(1)(iii), respectively. This longstanding principle from the 1978 regulations that agencies should not improperly segment their actions is relevant not only when agencies are preparing EISs; rather, it is critical for agencies to consider this as part of the determination whether to prepare an EA or apply a CE. CEQ proposes to consolidate this text into § 1501.3(b) because the determination of the scope of the action, including any connected actions, necessarily informs the appropriate level of NEPA review. While 40 CFR 1501.9(e) currently applies to the scope of EISs, CEQ's proposed consolidation would clarify that this analysis is applicable not only to the scope of the environmental document itself but also to the determination of the level of NEPA document the agency must prepare. Because including this provision in § 1501.3 would make it applicable to environmental reviews other than EISs, CEQ proposes to strike the sentence that accompanied the text in 40 CFR 1502.4(a) directing the lead agency to determine the scope and significant issues for analysis in the EIS as part of the scoping process. CEQ would retain in § 1502.4(a), "Scoping," the requirement that agencies determine the scope and significant issues for analysis in an EIS using an early and open process. CEQ proposes in § 1501.3(b)(1)(i) to likewise change "environmental impact statements" to "NEPA review."

In bringing the text from 40 CFR 1501.9(e) to § 1501.3(b), CEQ is proposing to strike 40 CFR 1501.9(e)(2) and (3) relating to alternatives and impacts, respectively. The current CEQ regulations and the proposed revisions in this NPRM address the analyses of alternatives and effects regarding both EISs (§§ 1502.14, 1502.15) and EAs (§ 1501.5(c)(2)(ii) and (c)(2)(iii)). It would be premature in the process, unnecessary, and unhelpful to address alternatives as part of determining the level of NEPA review.

Sixth, CEQ proposes to redesignate 40 CFR 1501.3(a) as paragraph (c), title it "Levels of NEPA review," and retain the existing paragraphs (1) through (3) without change. In paragraph (c), CEQ proposes to incorporate section 106(b)(3) of NEPA addressing the sources of information agencies may rely on when determining the appropriate level of NEPA review. While section 106(b)(3) only directly applies to an agency's determination whether to prepare an EA or an EIS, CEQ views the approach to reliable data and producing new research as consistent with longstanding practice and caselaw and appropriate to apply broadly to an agency's determination of the appropriate level of NEPA review, including a determination that no review is required. This approach avoids creating an implication that an agency could be required to conduct new research in a broader range of circumstances when making threshold determinations outside of whether to prepare an EA or EIS, for example in considering whether a CE applies. CEQ invites comment on this approach.

Seventh, CEQ proposes to redesignate 40 CFR 1501.3(b) as § 1501.3(d), title it "Significance determination—context and intensity," and address factors agencies must consider in determining significance by restoring with some modifications the consideration of "context" and "intensity" from the 1978 regulations, which appeared in the definition of "significantly." *See* 40 CFR 1508.27 (2019). Because this text provides direction on how agencies determine the significance of an effect, rather than a definition, this is a more appropriate location for this provision than § 1508.1.

CEQ proposes to modify the introductory language in § 1501.3(d) by requiring agencies to consider the context of an action and the intensity of the effects when considering whether the proposed action's effects are significant. CEQ proposes to strike the sentence requiring agencies to consider connected actions because this concept would be included in proposed paragraph (c).

Paragraph (d)(1) would restore the consideration of the context of the proposed action as a standalone consideration. Specifically, CEQ proposes to restore language from the 1978 regulations requiring agencies to analyze the significance of an action in several contexts. The proposed provision also provides some examples of contexts for consideration. First, the provision proposes agencies should consider the characteristics of the relevant geographic area such as proximity to unique or sensitive resources or vulnerable communities. Such resources may include historic or cultural resources, Tribal sacred sites, and various types of ecologically sensitive areas. This proposal relates to the intensity factor proposed in (d)(2)(iii), which CEQ is proposing to restore from the 1978 regulations. CEQ is proposing to include it as a context factor as well since it relates to the setting of the proposed action. It also would encourage agencies to consider proximity to communities with environmental justice concerns.

Second, CEQ proposes that agencies should consider the potential global, national, regional, and local contexts, which may be relevant depending on the scope of the action, consistent with the current regulations as well as the 1978 regulations. Third, agencies should consider the duration of the potential effects and whether they are anticipated to be short- or long-term. To that end, CEQ proposes to move and revise text providing that the consideration of short- and long-term effects is relevant to the context of a proposed action from current 40 CFR 1501.3(b)(2)(i) to paragraph (d)(1).

The 2020 rule narrowed the "context" consideration to the potentially affected environment in determining significance, stating that this reframing relates more closely to physical, ecological, and socio-economic aspects of the environment.[59] CEQ has reconsidered this approach and now finds it to be overly limiting. Agencies have decades of experience analyzing their actions within this broader framing of "context." Moreover, this use of "context" is consistent with CEQ's 2022 reinstatement of the concepts of

[59] 2020 Final Rule, *supra* note 36, at 43322.

indirect and cumulative effects. Additionally, the 2020 rule's tying of significance to the affected environment, "usually" only in the local area,[60] could be read as deemphasizing reasonably foreseeable effects beyond the immediate area of the action. The appropriate environment is the one that the agency has identified as the affected environment in § 1502.15, which can include the global, national, regional, and local environment. For example, leases for oil and gas extraction or natural gas pipelines have local effects, but also have reasonably foreseeable global indirect and cumulative effects related to GHG emissions.

CEQ also proposes to reinstate "intensity" as a consideration in determining significance, which CEQ reframed in the 2020 rule as the "degree" of the action's effects. In § 1501.3(d)(2), CEQ proposes to require agencies to assess the intensity of effects from an action and to provide a list of factors, some or all of which may apply to any given action, for agencies to consider in relation to one another, returning to the approach from 1978. In 2020, CEQ justified the removal of intensity as a consideration in part based on the proposition that effects are not required to be intense or severe to be considered significant.[61] However, the intensity factors that CEQ proposes to reinstate with modifications have long provided agencies with guidance in how the intensity of an action's effects may inform the significance determination. CEQ does not consider "intense" to be a synonym for "significant;" rather, it points to factors to inform the determination of significance that are part of longstanding agency practice. CEQ also proposes to clarify that agencies should focus on adverse impacts in determinations of significance. This is consistent with NEPA's policies and goals as set forth in section 101 of the statute. 42 U.S.C. 4331.

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[60] 40 CFR 1501.3(b)(1) ("For instance, in the case of a site-specific action, significance would *usually* depend only upon the effects in the local area.") (emphasis added).
[61] 2020 Final Rule, *supra* note 36, at 43322.

Paragraph (d)(2)(i) would mirror the 1978 rule's reference to beneficial effects with clarifying additions. CEQ proposes to state that only actions with significant adverse effects require an EIS. This is distinct from weighing beneficial effects against adverse effects to determine that an action's effects on the whole are not significant. Rather, this statement reflects the fact that an action with only beneficial effects and no significant adverse effects does not require an EIS, consistent with CEQ's proposed revisions to § 1501.3(d)(2), regarding the meaning of intensity.

CEQ proposes to add to paragraph (d)(2)(i) clarification that agencies should consider the duration of effects and provide an example of an action with short-term adverse effects but long-term beneficial effects. While significant adverse effects may exist even if the agency considers that on balance the effects of the action will be beneficial, the agency should consider any related short- and long-term effects in the same effect category together in evaluating intensity. For example, an agency should consider short-term construction-related GHG emissions from a renewable energy project in light of long-term reductions in GHG emissions when determining the overall intensity of effects. In this situation, the agency could reasonably determine that the climate effects of the proposed action would not be significantly adverse, and therefore an EIS would not be required. As another example, a forest restoration project may have a short-term adverse effect to a species by displacing it from the area while the project is carried out but have long-term beneficial effects to the species by reducing the risk that a severe wildfire will destroy the habitat altogether. An agency should consider both of these effects in assessing whether the action significantly affects the species, and may determine that the overall effects on the species would not be significantly adverse and therefore would not require an EIS.

In paragraph (d)(2)(ii), CEQ proposes to make a clarifying edit to the factor relating to the action's effects on health and safety by adding language indicating that the

relevant consideration is "the degree to which" the proposed action may "adversely" affect public health and safety.

CEQ proposes to add in paragraph (d)(2)(iii) a factor to consider the degree to which the proposed action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, Tribal sacred sites, parkland, and various types of ecologically sensitive areas. This would reinstate a factor from the 1978 regulations, with clarifying edits, which agencies have considered for decades. As noted earlier in this section, CEQ proposes to use the wording from the 1978 factor on unique characteristics because it is a context consideration. Consideration of this factor is consistent with both the definition of effects (§ 1508.1(g)) and the policies and goals of NEPA. 42 U.S.C. 4331.

In paragraph (d)(2)(iv), CEQ proposes to make a clarifying edit to the factor in 40 CFR 1501.3(b)(2)(iv) relating to actions that may violate Federal, State, Tribal, or local law by adding reference to "other requirements." CEQ also proposes to include inconsistencies with policies designed for protection of the environment because agencies should not necessarily limit their inquiry to statutory requirements. Of course, it may be appropriate to give relatively more weight to whether the action threatens a law imposed for environmental protection as opposed to a policy, but policies imposed for the protection of clean air, clean water, or species conservation, for example, may nonetheless be relevant in evaluating intensity. CEQ invites comment on the inclusion of policies in this provision and whether the regulations should reference specific categories of policies.

Next, CEQ proposes to add paragraph (d)(2)(v) to consider the degree to which effects are highly uncertain. The 1978 regulations included factors for "controversial" effects and those that are "highly uncertain or involve unique or unknown risks." CEQ proposes to restore a modified version of this concept that makes clear that the

uncertainty of an effect is the appropriate consideration, and not whether an action is controversial. While a legitimate disagreement on technical grounds may relate to uncertainty, this approach would make clear that public controversy over an activity or effect is not a factor for determining significance.

CEQ proposes to add a factor to paragraph (d)(2)(vi) regarding the action's relationship with other actions. This would reinstate a factor from the 1978 regulations and reinforce the consideration of the scope of the action that agencies should consider in a NEPA document—that an agency cannot avoid significance by terming an action temporary when it is in fact a part of a repeating or ongoing action or segmenting it into smaller parts. This longstanding NEPA principle is consistent with decades of case law prohibiting the segmentation of actions. *See, e.g.*, *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062 (9th Cir. 2002).

CEQ proposes to add a factor to paragraph (d)(2)(vii) relating to actions that would affect historic resources listed or eligible for listing in the National Register of Historic Places. This would generally reinstate a factor from the 1978 regulations, which agencies have decades of experience considering. Consideration of this factor furthers the policies and goals of NEPA, including to "preserve important historic, cultural, and natural aspects of our national heritage . . . ." 42 U.S.C. 4331.

CEQ proposes to add paragraph (d)(2)(viii) to include effects on an endangered or threatened species or its habitat, including critical habitat under the Endangered Species Act. 16 U.S.C. 1532(5). This would be an expansion of an intensity factor from the 1978 regulations, which only addressed critical habitat. CEQ's proposed revision would clarify that agencies should consider effects to the habitat of endangered or threatened species even if it has not been designated as critical habitat.

CEQ proposes to add paragraph (d)(2)(ix) to include consideration of the degree to which the action may have disproportionate and adverse effects on communities with

environmental justice concerns. Evidence continues to accumulate that communities with environmental justice concerns often experience disproportionate environmental burdens such as pollution or urban heat stress, and often experience disproportionate health and other socio-economic burdens that make them more susceptible to adverse effects.

Finally, CEQ proposes to add paragraph (d)(2)(x) to include effects upon the rights of Tribal Nations reserved through treaties, statutes, or Executive Orders. This proposed addition would clarify that agencies should consider how an action may impact the reserved rights of Tribal Nations. Tribes' ability to exercise these rights often depends on protection of the resources that support the rights, and agencies should consider impacts to such resources. CEQ specifically seeks comments from Tribes on this proposed addition.

CEQ invites comments on whether there are other considerations that should be added to the regulations to guide agency evaluation of the context and intensity of an effect as part of a determination of significance.

3. Categorical Exclusions (§ 1501.4)

CEQ proposes revisions to § 1501.4 to clarify this provision, which the 2020 rule added, and provide agencies new flexibility to establish CEs using additional mechanisms and flexibilities outside of their NEPA procedures to promote more efficient and transparent development of CEs that may be tailored to specific environmental contexts or project types.

First, CEQ proposes to edit § 1501.4(a) for consistency with and add a cross reference to § 1507.3(c)(8), which currently requires agencies to establish CEs in their NEPA procedures. This revision would more fully and accurately reflect the purposes of and requirements for CEs. As is reflected in the regulations, CEQ views CEs to be an important mechanism to promote efficiency in the NEPA process where agencies have

long exercised their expertise to identify and substantiate categories of actions that normally do not have a significant effect on the human environment.

CEQ also proposes to add the clause "individually or in the aggregate" to § 1501.4(a)'s description of CEs. This proposal would clarify that when establishing a CE in its procedures, an agency must determine that the application of the CE to a single action and the repeated collective application to multiple actions would not have significant effects on the human environment. This clarification recognizes that agencies often use CEs multiple times over many years. This change is consistent with the definition of "categorical exclusion" provided by section 111(1) as a "category of actions," which highlights the manner in which CEs consider an aggregation of individual actions. This change is similar to the 1978 regulations' definition of CEs as categories of actions that do not "individually or cumulatively" have significant effects, which the 2020 rule removed consistent with its removal of the term "cumulative impacts" from the regulations. The Phase 1 rulemaking reinstated cumulative effects to the definition of "effects,"[62] so the 2020 rule's justification for removing the phrase no longer has a basis. However, CEQ proposes to use the phrase "in the aggregate" rather than "cumulatively" to avoid potential confusion. Cumulative effects refer to the incremental effects of an agency action added to the effects of other past, present, and reasonably foreseeable actions. In the context of establishing CEs, agencies must consider both the effects of a single action as well as the aggregation of effects from anticipated multiple actions covered by the CE such that the aggregate sum of actions covered by the CE does not normally have a significant effect on the human environment. As part of this analysis, agencies consider the effects—direct, indirect, and cumulative—of the individual and aggregated actions. Because the definition of effects includes cumulative effects, CEQ considers the phrase "in the aggregate" to more clearly define

[62] Phase 1 Final Rule, *supra* note 47, at 23469.

what agencies must consider in establishing a CE—the full scope of direct, indirect, and cumulative effects of the category of action covered by the CE. Agencies have flexibility on how to evaluate whether the "aggregate" of actions covered by a CE will not ordinarily have significant effects and may consider the manner in which the agency's extraordinary circumstances may avoid multiple potential actions having reasonably foreseeable significant effects in the aggregate. As discussed further in section II.I.2 CEQ notes that agencies do not need to evaluate the environmental effects of establishing the CE itself, but rather define the category of action and demonstrate in its substantiation that the CE does not normally have significant effects in the absence of extraordinary circumstances. CEQ proposes to add a qualifying clause at the end of the sentence to reference extraordinary circumstances consistent with § 1501.4(b), and add a definition of "extraordinary circumstances" at § 1508.1(m). These provisions are consistent with longstanding practice and recognize that, as the definition provided by section 111(1) indicates, CEs are a mechanism to identify categories of actions that normally do not have significant environmental effects. Extraordinary circumstances serve to identify actions within a category of actions the effects of which exceed those normally associated with that category of action and therefore, do not fall within the bounds of the CE.

Finally, CEQ also proposes to add at the end of paragraph (a) language clarifying that agencies may establish CEs individually or jointly with other agencies. In such cases, agencies may use a shared substantiation document and list the CEs in both agencies' NEPA procedures or identify them through another joint document as provided for by proposed § 1501.4(c). CEQ proposes this addition to provide an additional mechanism for establishing CEs transparently and with appropriate public process. Agencies may find value in establishing a CE jointly for activities that they routinely work on together where having a CE would create efficiency in project implementation. Agencies also may save administrative time by establishing CEs jointly.

CEQ proposes edits to § 1501.4(b)(1) to clarify the standard for applying a CE to a proposed action where extraordinary circumstances exist: an agency may apply a CE if the agency determines that a proposed action does not have the potential to result in significant effects, or the agency modifies the proposed action to address the extraordinary circumstance. This standard is consistent with agency practice and has been upheld in case law. As currently drafted, 40 CFR 1501.4(b)(1) could be construed to mean that agencies may mitigate extraordinary circumstances that would otherwise have the potential for significant effects and thereby apply a CE with no opportunity for public review or engagement on such actions. While the 2020 Response to Comments sought to distinguish "circumstances that lessen the impacts" from required mitigation to address significant effects,[63] based on CEQ's discussions with agency representatives and stakeholders, the potential for confusion remains. CEQ's proposed standard makes clear that if an extraordinary circumstance exists, an agency must make an affirmative determination that there is no potential for significant effects in order to apply a CE. If it finds such potential it must either: (1) modify its proposed action in a way that will address the extraordinary circumstance, or (2) prepare an EA or EIS.

CEQ also proposes to add a documentation requirement in these instances where an agency is applying a CE notwithstanding extraordinary circumstances. CEQ also proposes to add language encouraging agencies to publish such documentation. While not required, CEQ encourages agencies to publish documentation of instances where an agency is applying a CE notwithstanding extraordinary circumstances to provide transparency to the public of an agency determination that there is no potential for significant effects. The proposed language responds to feedback from the public

[63] CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act Final Rule Response to Comments 130 (June 30, 2020) ("2020 Response to Comments"), https://www.regulations.gov/document/CEQ-2019-0003-720629.

requesting such transparency. CEQ invites comment on whether it should require agencies to publish such documentation.

In addition, CEQ proposes to add a new § 1501.4(c) to provide agencies more flexibility to establish CEs outside of their NEPA procedures. This provision would allow agencies to establish CEs through a land use plan, a decision document supported by a programmatic EIS or EA, or other equivalent planning or programmatic decisions. Once established, agencies could apply CEs to future actions addressed in the program or plan, including site-specific or project-level actions. CEQ anticipates that expanding the mechanisms through which agencies may establish CEs will encourage agencies to conduct programmatic and planning reviews, increase the speed with which agencies can establish CEs while ensuring public participation and adequate substantiation, promote the development of CEs that are tailored to specific contexts, geographies, or project-types, and allow decision makers to consider the cumulative effects of related actions on a geographic area over a longer time frame than agencies generally consider in a review of a single action. This provision would not require agencies to establish CEs through the mechanism added in § 1501.4(c) but rather would provide new options for agencies to consider. CEQ also notes that this mechanism does not preclude agencies from conducting and relying on programmatic analyses in making project-level decisions consistent with § 1501.11. Additionally, it does not require agencies to conduct a NEPA analysis to establish CEs generally, consistent with § 1507.3(c)(8).

Establishing a CE through this alternative approach could be beneficial by providing agencies with more flexibility on how to identify categories of actions that normally will not have significant effects and establishing a CE for them. A programmatic EIS supporting a program decision or land use plan could, for example, provide the analysis necessary to substantiate a new CE established by the associated decision document that makes sense in the context of the overall program decision or

land use plan. For example, a land management agency could consider establishing a CE for zero or minimal impact resilience-related activities. Enabling an agency to establish a CE through this mechanism would reduce duplication of effort by obviating the need for the agency to revise their NEPA procedures consistent with § 1507.3 after completing the programmatic EIS. Agencies also may find it efficient to establish a CE through a land use planning process rather than undertaking a separate process to establish the CE via agency procedures after completion of the land use planning process.

Paragraphs (c)(1) through (c)(6) would set forth the requirements for the establishment of CEs through mechanisms other than an agency's NEPA procedures. Paragraphs (c)(1) and (c)(2) would require agencies to provide CEQ an opportunity to review and comment and provide opportunities for public comment. Agencies may satisfy the requirement for notification and comment under paragraph (c)(2) by incorporating the proposed CEs into any interagency and public review process that involves notice and comment opportunities applicable to the relevant programmatic or planning document.

Proposed paragraphs (c)(3) and (c)(4) would include the same requirements for agencies to substantiate CEs and provide for extraordinary circumstances when they establish CEs under this section as when they establish CEs through their agency NEPA procedures pursuant to § 1507.3. Specifically, first, agencies would have to substantiate their determinations that the category of actions covered by a CE normally will not result in significant effects, individually or in the aggregate. Second, agencies would need to identify extraordinary circumstances. This could be the same list set forth in the agency's NEPA procedures, a list specific to this set of CEs, or a combination of both. While agencies would need to satisfy these requirements in a manner consistent with the establishment of CEs under § 1507.3, agencies could document their compliance with these requirements in the relevant programmatic or planning documents.

Proposed paragraph (c)(5) would direct agencies to establish a process for determining that a CE applies to a specific action in the absence of extraordinary circumstance, or determine the CE still applies notwithstanding the presence of extraordinary circumstances. Finally, paragraph (c)(6) would direct agencies to maintain a list of all such CEs on their websites, similar to the requirement for agencies to publish CEs established in their agency NEPA procedures consistent with §§ 1507.3(b)(2) and 1507.4(a). Agency websites should clearly link the CEs to their underlying programmatic or planning documents. Additionally, agencies may want to incorporate CEs established through these mechanisms into their agency NEPA procedures during a subsequent revision. CEQ encourages agencies to list all agency CEs in one location, regardless of how the agency established the CE, so that the public can easily access the full list of an agency's CEs.

Proposed § 1501.4(d) would identify a list of examples of features agencies may want to consider including when establishing CEs, regardless of what mechanism they use to do so. Paragraph (d)(1) would note that CEs may cover specific geographic areas or areas that share common characteristics, such as a specific habitat type for a given species.

To promote experimentation and evaluation, paragraph (d)(2) would indicate that agencies may establish CEs for a limited duration. Doing so would enable agencies to narrow the scope of analysis necessary to substantiate that a class of activities normally will not have a significant environmental effect where uncertainty exists about changes to the environment that may occur later in time that could affect the analysis. As with all CEs, agencies should review their continued validity periodically, consistent with CEQ's proposed review timeframe in § 1507.3(c)(9). Once the limited duration threshold is met, agencies could either consider the CE expired, conduct additional analysis to create a permanent CE, or reissue the CE for a new period.

Paragraph (d)(3) provides that a CE may include mitigation measures to address potential significant effects. A CE that includes mitigation is different than an agency modifying an action to avoid an extraordinary circumstance that would otherwise require preparation of an EA or EIS. Paragraph (d)(3) makes clear that an agency may establish a CE for a class of activities that include mitigation requirements as part of the CE application. Agencies would implement the activities covered by the CE as well as the mitigation incorporated into those activities as part of the CE. As an illustrative example, an agency could conclude that, as a category, a type of activity that degrades five acres of habitat will not ordinarily have significant effects where five acres of equivalent habitat are effectively restored or conserved elsewhere. As another example, a CE could allow for vegetation management activities but require specific mitigation if a certain habitat type is disturbed, such as implementing vegetation activities on 10 acres of sage grouse habitat and requiring restoration or compensatory mitigation for an equivalent 10 acres of sage grouse habitat. Where an agency establishes a CE with a mitigation requirement, the agency would need to include such mitigation in their proposed actions in order for the CE to apply.

Paragraph (d)(4) would provide that agencies can include criteria for when a CE might expire, such that, if such criteria were present, the agency could no longer apply that CE. For example, an agency could establish a CE for certain activities up to a threshold, such as a specified number of acres or occurrences. Once the agency applied that CE up to the threshold number of proposed actions, the agency could no longer use the CE. An agency might set an expiration date or threshold where their record indicates a potential for significant effects after a certain number of applications of the CE to proposed actions; where there is uncertainty beyond that threshold; or where it is unclear how widely the agency would apply the CE. In other situations, an agency may want to make a CE time limited because its authority over the actions is likewise time limited.

Finally, CEQ proposes to strike the provision that would allow an agency to establish a process in its agency NEPA procedures to apply a CE listed in another agency's NEPA procedures in 40 CFR 1507.3(f)(5) and replace it with a provision in § 1501.4(e) that is consistent with the process for adoption established by section 109 of NEPA. While section 109 uses the term "adopt" CEQ is proposing to use "apply" to distinguish this provision from the longstanding use of "adoption" in the CEQ regulations to refer to an agency's reliance on another agency's previously completed analysis, including the determination that a CE applies to a proposed action.

First, paragraph (e)(1) would require the borrowing agency to identify the proposed action or category of proposed actions that falls within the CE. In instances where an agency would like to use the CE on a long-term basis, CEQ encourages agencies to establish the CE either in their own procedures or through the process set forth in § 1501.4(c). However, this provision would serve as an important bridge when agencies are implementing new programs where they have not yet established relevant CEs or when existing programs begin to undertake new categories of actions but where other agencies have experience with similar actions and have established a CE for those actions. In these circumstances, the agency could immediately begin to implement the new programs and new activities based on another agencies CE for similar actions without the need to first develop a CE to cover them. CEQ also notes that, consistent with the requirement of section 109(2) that an agency consult with "the agency that established the categorical exclusion," this provision would only apply to CEs established administratively by the agency, including those that Congress directs agencies to establish administratively, but not those CEs created by statute. While CEQ encourages agencies to include legislative CEs established by statute in their NEPA procedures to provide transparency, they are not "established" by the agency, but rather by Congress. CEQ invites comment on this approach.

Second, under paragraph (e)(2), the borrowing agency would consult with the agency that has the listed CE to ensure application of the CE is appropriate. Third, under paragraph (e)(3), the borrowing agency would evaluate for extraordinary circumstances, consistent with § 1501.3(b) to incorporate the process for documenting use of the CE when extraordinary circumstances are present, but application of the CE is still appropriate. Finally, under paragraphs (e)(4) and (e)(5), the borrowing agency would document application of the CE, provide public notice of the CE that the agency plans to use, and publish the documentation of the application of the CE. Neither the statute or the proposed regulation requires the agency to accept comment on the public notice of the CE that the agency plans to use. In cases where an agency is applying CEs to a category of actions, the agency could conduct a single consultation and publish a consolidated notice, for example. CEQ invites comment on its proposed process. CEQ invites comment on whether the regulations implementing section 109 should include additional provisions to facilitate the use of CEs while ensuring CEs are not used improperly to authorize actions that have reasonably foreseeable significant effect.

CEQ notes that there has been some confusion regarding the difference between the use or borrowing of another agency's CE proposed in § 1501.4(e), which section 109 of NEPA refers to as adoption and is currently provided by 40 CFR 1507.3(f)(5) and adoption of a CE determination under § 1506.3(d). In the latter case of adoption of a CE determination, an agency with a CE has applied the CE to its own proposed action. A second agency then adopts that determination for the second agency's action that is substantially the same. Under § 1501.4(e), an agency may use a CE from another agency that has not itself determined that the CE applies to an action. In such circumstances, an agency would be borrowing the CE of another agency and applying it to a new, separate action, rather than adopting a CE determination for an action that is substantially the same.

4. Environmental Assessments (§ 1501.5)

CEQ proposes to revise § 1501.5 for consistency with sections 106(b)(2) and 107(e)(2) of NEPA, and to provide greater clarity to agencies on the requirements that apply to the preparation of EAs and to codify agency practice. CEQ proposes edits to address what agencies must discuss in an EA, how agencies should consider public comments they receive on draft EAs, what page limits apply to EAs, and what other requirements in the CEQ regulations agencies should apply to EAs.

Regarding the contents of an EA, CEQ proposes to split 40 CFR 1501.5(c)(2), which requires an EA to briefly discuss the purpose and need for the proposed action, alternatives, and effects, into paragraphs (c)(2)(i) through (iii) to improve readability and provide a clearly defined list of requirements. This formatting change would make it easier for the public and the agencies to ascertain whether an EA includes the necessary contents. For example, when an agency develops an EA for a proposal involving unresolved conflicts concerning alternative uses of available resources, section 102(2)(H) requires an analysis of alternatives, which will generally require analysis of one or more reasonable alternatives, in addition to a proposed action and no action alternative. 42 U.S.C. 4332(2)(H).

CEQ proposes to move from 40 CFR 1501.5(c)(2) into its own paragraph at § 1501.5(c)(3) the requirement for EAs to list the agencies and persons consulted in the development of the EA. CEQ also proposes to clarify in this paragraph that agencies include Federal agencies as well as State, Tribal, and local governments and agencies. CEQ also proposes to add in paragraph (c)(4) a requirement that the EA include a unique identification number that can be used for tracking purposes that would then be carried forward to all other documents related to the environmental review of the action, including the FONSI. Identification numbers can help the public and agencies track the progress of an EA for a specific action as it moves through the NEPA process and may

allow for more efficient and effective use of technology such as databases. CEQ also is proposing a similar requirement for EISs in § 1502.4(e)(9).

To reflect current agency practice and provide the public with a clearer understanding about potential public participation opportunities with respect to EAs, CEQ proposes to add a new paragraph (e) that provides that if an agency chooses to publish a draft EA, it must invite public comment on the draft and consider those comments when preparing a final EA. This provision reflects the fact that one of the primary purposes for which agencies choose to prepare draft EAs is to enable public participation. Codifying this practice will enhance the public's understanding of the NEPA process and meaningful public engagement and does not restrict agency discretion over whether to choose to prepare a draft EA for public comment. CEQ would redesignate the current 40 CFR 1501.5(e) and (f) to § 1501.5(f) and (g) respectively.

CEQ also proposes to revise § 1501.5(g) to dispense with the requirement for senior agency official approval to exceed 75 pages, not including any citations or appendices, for consistency with section 107(e)(2) of NEPA.

CEQ proposes to add paragraph (h) to clarify that agencies may reevaluate or supplement an EA if a major Federal action remains to occur and the agency considers it appropriate to do so. Paragraph (h) also would provide that agencies may reevaluate an environmental assessment or otherwise document a finding that changes to the proposed action or new circumstances or information relevant to environmental concerns are not substantial, or the underlying assumptions of the analysis remain valid. CEQ adds this to clarify that an agency may apply the provisions at § 1502.9 regarding supplemental EISs to a supplemental EA to improve efficiency and effectiveness.

Finally, CEQ proposes to clarify the provisions that agencies should or may apply to EAs. In a new paragraph (i), CEQ proposes to clarify that agencies generally should apply the provisions of § 1502.21 regarding incomplete or unavailable information and

§ 1502.23 regarding scientific accuracy. The 2020 regulations added these as provisions agencies "may apply;" however, on reflection, CEQ considers it important to disclose where information is incomplete or unavailable, and ensure scientific accuracy for all levels of NEPA review, not just EISs. Then, CEQ proposes to provide in paragraph (j) that agencies may apply the other provisions of parts 1502 and 1503 where they consider it appropriate to improve efficiency and effectiveness of EAs. This provision includes a list of example provisions where this might be the case—scoping (§ 1502.4), cost-benefit analysis (§ 1502.22), environmental review and consultation requirements (§ 1502.24), and response to comments (§ 1503.4).

5. Findings of no Significant Impact (§ 1501.6)

CEQ proposes two revisions to § 1501.6 on findings of no significant impact (FONSIs) to clarify the 2020 rule's codification of the longstanding agency practice of relying on mitigated FONSIs in circumstances where the agency incorporates mitigation into the proposed action to reduce its effects below significance. This is an important efficiency tool for NEPA compliance because it expands the circumstances in which an agency may prepare an EA and reach a FONSI, rather than preparing an EIS, consistent with the requirements of NEPA.

Paragraph (a) currently describes that an agency prepares a FONSI when it determines, as a result of an EA, not to prepare an EIS because the proposed action will not have significant effects. At the end of paragraph (a), CEQ proposes to clarify that agencies can prepare a mitigated FONSI if the action will include mitigation to avoid the significant effects that would otherwise occur or minimize or compensate for them to the point that the effects are not significant. So long as the agency can conclude that effects will be insignificant in light of mitigation, the agency can issue a mitigated FONSI. CEQ considers this an important clarification for consistency with the language in § 1501.6(c).

Codification of these best practices also aligns with guidance CEQ has issued on appropriate use of mitigation, monitoring, and mitigated FONSIs.[64]

Paragraph (c) currently addresses what an agency must include in a FONSI regarding mitigation. The text provides that when an agency relies on mitigation to reach a FONSI, the mitigated FONSI must state the enforceable mitigation requirements or commitments that avoid the potentially significant effects. CEQ proposes to clarify in the second sentence that the FONSI must state the enforceable mitigation requirements or commitments, as well as the authorities for them, since they must be enforceable for agencies to reach a mitigated FONSI. CEQ proposes this change because, where a proposed action evaluated in an EA may have significant effects, and an agency is not preparing an EIS, the FONSI must include mitigation of the significant effects. At the end of paragraph (c), CEQ proposes additional language to provide additional details on what is needed to demonstrate that mitigation requirements or commitments are enforceable. Specifically, the proposed language would direct agencies to identify the authority that is being exercised to make the mitigation enforceable.

Finally, as discussed in section II.G.2, CEQ proposes to add a new sentence at the end of paragraph (c) to require a monitoring and compliance plan when the EA relies on mitigation as a component of the proposed action and incorporates the mitigation into the FONSI, consistent with proposed § 1505.3(c). These changes will help effectuate NEPA's purpose as articulated in section 101, including to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences" and to "preserve important historic, cultural, and natural aspects of our national heritage . . . ." 42 U.S.C. 4331(b).

6. Lead Agency; Cooperating Agencies (§§ 1501.7 and 1501.8)

[64] CEQ, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact (Jan. 14, 2011), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

CEQ proposes to eliminate the reference to "complex" environmental assessments. The 2020 rule added this term without definition. CEQ invites comment on whether it should retain a complex EA in the regulations, and if so, how CEQ should define a complex EA.

CEQ proposes to retitle § 1501.7 "Lead Agency" to align with section 107(a) of NEPA. CEQ proposes to revise paragraph (b) regarding joint lead agencies for consistency with section 107(a)(1)(B) of NEPA to clarify that the participating Federal agencies may designate a Federal, State, Tribal, or local agency as a joint lead agency upon invitation to and acceptance by such agency. CEQ includes Federal agencies in the list of potential joint lead agencies because there are circumstances in which having another agency serving as a joint lead agency will enhance efficiency. CEQ does not read the text in section 107(a)(1)(B) of NEPA as precluding this approach, but rather Congress specified that State, Tribal, and local agencies may serve as joint lead agencies because they are ineligible to serve as the lead agency. CEQ invites comment on whether it should make additional changes to this paragraph.

CEQ proposes to revise paragraph (c) for consistency with section 107(a)(1) of NEPA to clarify that the participating Federal agencies determine the agency that will be lead and any joint lead agencies, and that the lead agency determines any cooperating agencies. This change also would make this paragraph consistent with the text in § 1506.2(c) on joint EISs. In § 1501.7(d), CEQ proposes to revise the text for consistency with section 107(a)(5)(B) of NEPA and make a non-substantive change to replace the phrase "private person" with the word "individual" for consistency with this term's use in other sections of the regulations. In paragraph (e), CEQ proposes to revise the text for consistency with section 107(a)(4) of NEPA, clarify that the 45 days is calculated from the date of the written request to the senior agency officials as set forth in § 1501.7(d), and replace "persons" with "individuals" for consistency with the rest of regulations.

In paragraph (f), CEQ proposes to revise the text for consistency with section 107(a)(5)(D) of NEPA, to change "within 20 days" to "no later than 20 days" in the first sentence, and "20 days" to "40 days" and "determine" to "designate" in the second sentence.

Currently, 40 CFR 1501.7(g), addressing combined documents, is consistent with the text of section 107(b) of NEPA with respect to EISs, EAs, and FONSIs. The statute does not address joint RODs. CEQ proposes to revise § 1501.7 to add a caveat that agencies must issue joint RODs except where it is inappropriate or inefficient to do so, such as when an agency has a separate statutory directive, or it would take significantly longer to issue a joint ROD than separate ones. CEQ recognizes that, in some cases, requiring a joint ROD could inadvertently slow the NEPA process down because, for example, agencies may have different procedures for issuing authorizations under their applicable legal authorities or may need to consider different factors. But in other cases, it could improve efficiency by avoiding duplication of effort or analysis. Additionally, for consistency with § 1501.5, CEQ proposes to add that agencies can jointly determine to prepare an EIS if a FONSI is inappropriate.

In § 1501.7(h)(2), CEQ proposes to add a clause consistent with section 107(a)(2)(C) of NEPA requiring the lead agency to give consideration to a cooperating agency's analyses and proposals. In the existing clause, CEQ proposes to move the qualifier, "to the extent practicable" to clarify that it only modifies the second clause, and change "proposals" to "information" to make the text consistent with § 1501.8(b)(3). Further, the use of "proposal" here is inconsistent with the definition of "proposal" provided in § 1508.1(cc). CEQ also proposes to remove the reference to jurisdiction by law or special expertise as unnecessarily redundant given that the definition of "cooperating agencies" in § 1508.1(e) incorporates those phrases.

As discussed further in section II.C.8, CEQ proposes to move the requirements for schedules and milestones currently in 40 CFR 1501.7(i) and (j) to proposed § 1501.10(c) in order to consolidate provisions related to deadlines, schedules, and milestones in one section.

CEQ proposes an addition to § 1501.8 to clarify the meaning of the phrase "special expertise." Paragraph (a) provides that a lead agency may request an agency with special expertise to serve as a cooperating agency. CEQ proposes to clarify in paragraph (a) that special expertise can include Indigenous Knowledge. This proposed change helps ensure that Federal agencies respect and benefit from unique knowledge that Tribal governments may bring to the environmental review process. CEQ notes that the Office of Science and Technology Policy and CEQ have issued a Guidance Memorandum for Federal Departments and Agencies on Indigenous Knowledge,[65] but does not define Indigenous Knowledge. CEQ invites comment on whether it should include such a definition in the regulations. Finally, CEQ notes that even where a federally recognized Tribe participates as a cooperating agency, the agency also may have an obligation to engage in government-to-government consultation on the proposed action consistent with the agency's obligations under E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*.[66]

In paragraph (b)(7), CEQ proposes to strike the second clause requiring cooperating agencies to limit their comments to align this paragraph with section 107(a)(3) of NEPA. Finally, CEQ invites comment on whether it should make any additional changes to these sections to promote or improve lead and cooperating agency

[65] Office of Science and Technology Policy and CEQ, Guidance for Federal Departments and Agencies on Indigenous Knowledge (Nov. 30, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf.
[66] E.O. 13175, *supra* note 53.

engagement on the preparation of NEPA documents or increase the efficiency of the preparation process.

7. Public and Governmental Engagement (§ 1501.9)

CEQ proposes to address public and governmental engagement in a revised § 1501.9 by moving and updating 40 CFR 1506.6, "Public involvement," to § 1501.9, and moving provisions specific to the EIS scoping process to § 1502.4. CEQ proposes these updates to continue to provide agencies with flexibility to tailor their engagement specific to their programs and actions while also maintaining the requirements to engage the public and affected parties in the NEPA process. CEQ proposes revisions to § 1501.9 to emphasize the importance of creating an accessible and transparent NEPA process. CEQ also proposes many of these changes in response to feedback on the Phase 1 proposed rule, the 2020 proposed rule, and input received from stakeholders and agencies during development of this proposed rule. Much of that feedback requested increased opportunities for public engagement and increased transparency about agency decision making, along with general requests that CEQ elevate the importance of public engagement in the NEPA process. Finally, CEQ proposes to move the requirements related to public engagement to part 1501 to emphasize that it is a core component of the NEPA process and agency planning, regardless of the level of NEPA analysis being undertaken.

To accomplish this goal, CEQ is proposing changes to multiple sections of the regulations. First, CEQ is proposing to move the existing provisions of 40 CFR 1501.9 on scoping, specifically paragraphs (a), (b), (c), (d), (d)(1) through (8), (f), and (f)(1) through (5) to proposed § 1502.4, "Scoping." As discussed in sections II.C.2 and II.C.9, CEQ proposes to move the existing provisions in 40 CFR 1502.4 on "Major Federal actions requiring the preparation of environmental impact statements" to §§ 1501.3 and 1501.11. Also, as discussed in section II.C.2, CEQ proposes to move the remaining text of existing

40 CFR 1501.9(e) and (e)(1) through (3) on the determination of scope to proposed § 1501.3 because determining the scope of actions applies to all levels of NEPA review.

CEQ proposes to retitle § 1501.9 to "Public and governmental engagement" and accordingly update references to "public involvement" within this section and throughout the CEQ regulations to "public engagement." CEQ is proposing this change because the word "engagement" better reflects how Federal agencies should be interacting with the public. The word "engagement" reflects a process that is more interactive and collaborative compared to simply including or notifying the public of an action. Engagement is also a common term for Federal agencies with experience developing public engagement strategies or that work with public engagement specialists. CEQ proposes to add "governmental" to the title to better reflect the description of the provisions proposed to be included in the section, which relate to both public and governmental entities.

Next, CEQ proposes to add paragraphs (a) and (b) to articulate the purposes of public and governmental engagement and to identify the responsibility of agencies to determine the appropriate methods of public and governmental engagement and conduct scoping consistent with § 1502.4 for EISs. CEQ proposes to use the phrase "meaningful" engagement to better describe the purpose of this process because public and governmental engagement should not be a mere check-the-box exercise, and agencies should conduct engagement with appropriate planning and active dialogue or other interaction with stakeholders in which all parties can contribute. For example, such engagement can inform the potential for significant effects or identify alternatives that avoid or reduce effects. Agencies should determine the appropriate level of outreach needed to engage meaningfully and effectively with affected communities.

Paragraph (c) would list what actions the lead agency should take when conducting outreach for public and governmental engagement. Proposed paragraph (c)(1)

would recommend agencies invite likely affected agencies and governments, and paragraph (c)(2) would recommend agencies conduct early engagement with likely affected or interested members of the public. CEQ modeled these provisions on the existing approaches in 40 CFR 1501.7(a)(1) (2019) and 40 CFR 1501.9(b) (2020) to invite early participation of likely affected parties. Paragraph (c)(3) would provide flexibility to agencies to tailor engagement strategies, considering the scope, scale, and complexity of the proposed action and alternatives, the degree of public interest, and other relevant factors. CEQ proposes to move from 40 CFR 1506.6(c) to § 1501.9(c)(3) the requirement that agencies consider the ability of affected parties to access electronic media when selecting the appropriate methods of notification. CEQ also proposes to add a clause to the end of paragraph (c)(3) to require agencies to consider the primary language of affected persons when determining the appropriate notification methods to use.

CEQ then proposes to move and modify the rest of 40 CFR 1506.6 to proposed §§ 1501.9(d), (e), and (f). Specifically, CEQ proposes to move the introductory clause of 40 CFR 1506.6 and 40 CFR 1506.6(b), including its paragraphs, to § 1501.9(d) and (d)(2), respectively, and make minor revisions to improve readability and consistency with the rest of § 1501.9, including adding the paragraph heading "notification." CEQ also proposes in (d)(2) to clarify that agencies should make environmental documents available, as appropriate, to help inform the public engagement process. CEQ proposes here and throughout the CEQ regulations to replace the word "notice" with "Notification," except where "notice" is used in reference to a *Federal Register* notice. This proposed change is intended to clearly differentiate between those requirements to publish a notice in the *Federal Register* and other requirements to provide notification of an activity, which may include a notice in the *Federal Register* or use of other mechanisms.

CEQ proposes a new paragraph (d)(1) to require agencies to publish notification of proposed actions they are analyzing through an EIS. CEQ proposes this requirement in response to feedback from multiple stakeholders and members of the public requesting more transparency about agency proposed actions. Agencies may publish notification through websites, email notifications, or other mechanisms such as the Permitting Dashboard,[67] so long as the notification method or methods are designed to adequately inform the persons and agencies who may be interested or affected, consistent with the definition of "publish" in § 1508.1(ee). A notice of intent in the *Federal Register*, consistent with § 1502.4(e), can fulfill the notification requirement, but agencies also may elect to use additional notification methods. CEQ proposes to combine the provisions from 40 CFR 1506.6(b)(3)(i) and (ii) on notice to State, Tribal, and local governments and agencies in proposed § 1501.9(d)(2)(iii)(A) to consolidate similar provisions. CEQ also proposes to recommend in paragraph (d)(2)(iii)(I) that agencies establish email notification lists or similar methods for the public to easily request electronic notifications for proposed actions.

As discussed in section II.I.3, CEQ proposes to move the requirement for agencies to explain in their NEPA procedures where interested persons can get information on EISs and the NEPA process from 40 CFR 1506.6(e) to § 1507.3(c)(11) since this is a requirement for NEPA procedures, not public engagement. CEQ proposes to move the requirements to make EISs available under FOIA from 40 CFR 1506.6(f) to § 1501.9(d)(3).

CEQ proposes to delete 40 CFR 1506.6(d) on soliciting information from the public because CEQ proposes to include that concept in the purpose and language of § 1501.9. CEQ proposes to move 40 CFR 1506.6(c) on public meetings and hearings to

[67] *See* Fed. Permitting Improvement Steering Council, Permitting Dashboard for Federal Infrastructure Projects, https://www.permits.performance.gov/.

§ 1501.9(e), with modification, including adding the heading "Public meetings and hearings" to the paragraph, making minor revisions for clarity, consistency, and readability, and adding a phrase to clarify that when an agency accepts comments for electronic or virtual meetings, agencies must allow the public to submit them electronically or via regular mail. CEQ also proposes to add in paragraph (e) a sentence encouraging agencies to consider the needs of affected communities when determining what format to use for a public hearing or public meeting because the best option for the communities involved may vary.

Finally, CEQ proposes to move 40 CFR 1506.6(a) on public involvement for NEPA procedures to new paragraph § 1501.9(f), adding a paragraph heading "Agency procedures" and changing the word "involve" to "engage." CEQ is proposing to move this provision to its own paragraph because engagement in the development of agency NEPA procedures does not align with the new title added for paragraph (d) and its paragraphs on notification requirements.

CEQ invites comment on whether and how it can make any additional changes to this or other provisions in the regulations to enhance community engagement. This could include adding provisions to the NEPA regulations to further address the responsibilities of the Chief Public Engagement Officers proposed in § 1507.2(a) to facilitate community engagement across the agency and technical assistance to communities. CEQ welcomes other ideas.

8. Deadlines and Schedule for the NEPA Process (§ 1501.10)

CEQ proposes to retitle § 1501.10 to "Deadlines and schedule for the NEPA process" and revise the section to direct agencies to set deadlines and schedules for NEPA reviews to achieve efficient and informed NEPA analyses consistent with section 107 of NEPA. The proposed changes in this section would improve transparency and predictability for stakeholders and the public regarding NEPA reviews.

In paragraph (a), CEQ proposes edits to emphasize that while NEPA reviews should be efficient and expeditious, they also must include sound analysis. The proposal would direct agencies to set deadlines and schedules tailored to individual or types of proposed actions to facilitate meeting the deadlines proposed in § 1501.10(b). Consistent with section 107(a)(2)(D) of NEPA, CEQ also proposes in this paragraph to require, where applicable, the lead agency to consult with and seek concurrence of joint lead, cooperating, and participating agencies and consult with project sponsors and applicants when establishing and updating schedules.

CEQ proposes to update paragraph (b) for consistency with section 107(h) of NEPA. Paragraph (b)(1) would require agencies to complete an EA within one year and paragraph (b)(2) would require EIS completion in two years unless the lead agency extends the deadline in consultation with any applicant or project sponsor and sets a new deadline. In circumstances where there is no applicant or project sponsor, the consultation requirement is inapplicable to extension of deadlines. Paragraph (b)(3) would identify the starting points from which the deadline is measured and require agencies to measure from the soonest of the three dates identified in section 107(g) of NEPA, as applicable. CEQ notes that section 107(g)(3) of NEPA provides a mechanism for project sponsors to petition the courts for relief if an agency fails to meet the deadlines. Finally, paragraph (b)(4) would require agencies to submit the report to Congress on any missed deadlines required by section 107(h) of NEPA.

To enhance predictability, CEQ proposes to add a new paragraph (c), which would contain text moved from 40 CFR 1501.7(i) and modified for consistency with section 107(a)(2)(D) and (E) of NEPA requiring the lead agency to develop schedules for EISs and EAs. The schedule would include key milestones for the environmental review process, including reviews, permits, and authorizations, and the lead agency would develop it in consultation with the applicant or project sponsor and in consultation with

and seek the concurrence of any joint lead, cooperating, and participating agencies. CEQ proposes to allow schedules to be tailored to proposed actions and to highlight factors that may help agencies set specific schedules to meet the deadlines. Finally, CEQ proposes to move to the end of this paragraph text from 40 CFR 1501.7(j) with modifications, including for consistency with section 107(a)(2)(E) of NEPA, and provide clarification to enhance interagency communication and issue resolution. The proposed changes would require that, when the lead agency or any participating agency anticipates a missed milestone, that agency notifies the responsible agency (and the lead agency if identified by another agency) and request that they take action to comply with the schedule. To emphasize the importance of informed and efficient decision making, CEQ proposes to require agencies to elevate any unresolved disputes contributing to the missed milestone to the appropriate officials for resolution within the deadlines for the individual action.

CEQ proposes to redesignate 40 CFR 1501.10(c) as paragraph (d), which addresses factors in setting deadlines, and make changes to the text for consistency with the proposed changes to paragraph (b). Specifically, CEQ proposes to change the reference to "deadlines" to add a reference to "the schedule" and add a reference to the "lead agency," to consider the listed factors in setting schedules. CEQ proposes to add an additional factor to (d)(7), redesignating 40 CFR 1501.10(c)(7) to be paragraph (d)(8), to add the degree to which a substantial dispute exists on the proposed action and its effects. This would restore and clarify a factor included in the 1978 regulations at 40 CFR 1501.8(a)(vii) (2019) regarding the degree to which the action is controversial. While the 2020 regulations removed this factor because it overlapped with other factors, CEQ is proposing to restore and clarify it in the list of factors, focusing on substantial disputes over the size, location, nature, or consequences of the proposed action and its effects. CEQ considers this an important factor that could have implications for establishing

schedules and milestones. In such instances, agencies should seek ways to resolve disputes early in the process, including using conflict resolution and other tools, to achieve efficient outcomes and avoid costly and time-consuming litigation later in the process.

CEQ proposes to redesignate 40 CFR 1501.10(d) as paragraph (e) and require a schedule to include a list of specific milestones. Proposed paragraphs (e)(1) through (e)(5) would require EIS schedules to include proposed dates for publication of the NOI, issuance of the draft EIS, the public comment period, issuance of the final EIS, and issuance of the ROD. CEQ proposes to remove paragraphs 40 CFR 1501.10(d)(2), (d)(6), and (d)(7) because they are either covered by proposed (e)(1) through (e)(3) or unnecessary. CEQ proposes in paragraph (f) and (f)(1) through (f)(4) to identify the milestones that agencies must include in schedules for EAs.

CEQ proposes to redesignate 40 CFR 1501.10(e) as paragraph (g). Finally, to increase predictability and enhance agency accountability, CEQ proposes to strike 40 CFR 1501.10(f) and add a new paragraph (h) to require agencies to make schedules for EISs publicly available and to publish revisions to the schedule. It also would require agencies to publish revisions to the schedule and include an explanation for substantial revisions to increase transparency and public understanding of decision making and to encourage agencies to avoid unnecessary delays.

9. Programmatic Environmental Document and Tiering (§ 1501.11)

CEQ proposes to revise and retitle § 1501.11, "Programmatic environmental document and tiering," for consistency with section 108 of NEPA, to consolidate relevant provisions, and to add new language to codify best practices for developing programmatic NEPA reviews and tiering, which are important tools to facilitate more efficient environmental reviews and project approvals. The revisions to this section

propose to move portions of 40 CFR 1502.4 on EISs for broad Federal actions to proposed § 1501.11 because agencies can review actions at a programmatic level in both EAs and EISs. CEQ has encouraged agencies to engage in environmental reviews for broad Federal actions through the NEPA process since CEQ's initial guidelines. This continues to be a best practice for addressing broad actions, such as programs, policies, rulemakings, series of projects, and larger or multi-phase projects. CEQ developed guidance in 2014 on Effective Use of Programmatic NEPA Reviews,[68] compiling best practices across the Federal Government on the development of programmatic environmental reviews. In this proposed rule, CEQ would codify some of these principles.

CEQ proposes to first address programmatic environmental documents and then tiering in § 1501.11. Accordingly, CEQ proposes to redesignate existing 40 CFR 1501.11(a), (b), and (c), which address tiering, to be proposed paragraphs (b), (b)(1), and (b)(2), respectively, with some modifications. CEQ proposes to add a new paragraph (a) to address programmatic environmental documents. Proposed paragraph (a) would encourage the use of programmatic environmental documents through an EIS or EA that evaluates the environmental effects of policies, programs, plans, or groups of related activities. CEQ proposes to move text from 40 CFR 1502.4(b) to § 1501.11(a) and revise it to include EAs, providing that programmatic environmental documents should be relevant to the agency decisions and timed to coincide with meaningful points in agency planning and decision making. Finally, paragraph (a) would clarify that agencies can use programmatic environmental documents in a variety of ways, highlighting some examples for agencies to consider to facilitate better and more efficient environmental reviews.

[68] Programmatic Guidance, *supra* note 11.

CEQ proposes to move the list of ways agencies may find it useful to evaluate a proposal when preparing programmatic documents from 40 CFR 1502.4(b)(1) and (b)(1)(i) through (b)(1)(iii) to § 1501.11(a)(1) and (a)(1)(i) through (a)(1)(iii), respectively, and expand the list to apply to environmental documents rather than just EISs to encompass EAs. CEQ proposes to modify paragraph (a)(1)(ii) to clarify "[g]enerically" to mean "[t]hematically or by sector," and add technology as an example action type.

CEQ proposes to add paragraph (a)(2) to provide examples of the types of agency actions that may be appropriate for programmatic environmental documents, including programs, policies, or plans; regulations; national or regional actions; or actions with multiple stages and are part of an overall plan or program. CEQ proposes to move 40 CFR 1502.4(b)(2) to § 1501.11(a)(3) and recommend that agencies employ scoping and other tools to describe the relationship between programmatic environmental document and related actions to reduce duplication. CEQ proposes to strike the last sentence of 40 CFR 1502.4(b)(2) stating that agencies may tier their analyses because tiering and programmatic environmental documents would now be addressed together in this section rendering the language unnecessary.

As referenced earlier in this section, CEQ proposes to redesignate the existing paragraphs on tiering to paragraphs (b), (b)(1) and (b)(2). CEQ proposes to title paragraph (b) "Tiering" and add new language to describe when agencies may employ tiering. CEQ proposes to strike as redundant the reference to issues not yet ripe for decision as well as the last sentence on applying tiering to different stages of actions.

In § 1501.11(b)(1) CEQ proposes to add programmatic environmental document to the list of documents from which agencies may tier. This paragraph also would clarify that agencies need to discuss the relationship between the tiered analysis and the previous

review; evaluate site-, phase-, or stage-specific conditions and effects; and allow for public engagement opportunities that are appropriate for the location, phase, or stage.

Programmatic documents can most effectively address later activities when they provide a description of planned activities that would implement the program and consider the effects of the program as specifically and comprehensively as possible. A sufficiently detailed programmatic analysis with such project descriptions can allow agencies to rely upon programmatic environmental documents for further actions with no or little additional environmental review necessary. When conducting programmatic analyses, agencies should engage the public throughout the NEPA process and consider when it is appropriate to re-engage the public prior to implementation of the action.

In paragraph (c), CEQ proposes to include the provisions in section 108 of NEPA, which address when an agency may rely on a programmatic document in subsequent environmental documents. CEQ notes that it interprets the reference to "judicial review" in paragraph (c)(1) to mean an opportunity for a party to challenge the programmatic document, including an administrative proceeding or challenge under the Administrative Procedure Act. CEQ invites comment on whether to provide additional information in the regulations to clarify this provision. CEQ proposes in paragraph (c)(2) to require agencies to briefly document their reevaluations when relying on programmatic environmental documents older than 5 years. CEQ invites comment on whether and how to more closely align this provision with the reevaluation and supplementation provisions in §§ 1501.5(h) and 1502.9(d).

CEQ invites comment on any additional changes that would promote effective use of programmatic environmental reviews to facilitate efficient and non-duplicative subsequent review of project-specific actions, including through tiering.

10. Incorporation by Reference into Environmental Documents (§ 1501.12)

CEQ proposes minor modifications to § 1501.12 to emphasize the importance of transparency and accessibility of material that agencies incorporate by reference. CEQ proposes to add a specific requirement for agencies to briefly explain the relevance of any material incorporated into the environmental document to clarify that agencies must do this. CEQ proposes this addition because explaining the relevance of incorporated material in addition to summarizing it will better inform the decision maker and the public. CEQ encourages agencies to integrate the description of relevance into the summary of the material. CEQ also proposes to change "may not" to "shall not" to eliminate a potential ambiguity over whether agencies must make material they incorporate by reference reasonably available for public inspection. CEQ also proposes to add a reference to "publicly accessible website" as an example of a mechanism for making material incorporated by reference available to the public, and clarify that an agency may meet this obligation by posting documents on a website. Finally, CEQ proposes to add language encouraging agencies to provide digital references, such as hyperlinks, to incorporated material or otherwise indicate how the public can access the material for inspection.

D. Proposed Revisions to Update Part 1502, Environmental Impact Statements

CEQ is proposing revisions to many sections of part 1502. CEQ is not proposing any substantive changes to § 1502.3, but is revising the section title to read "Statutory requirements for environmental impact statements." CEQ is not proposing substantive changes to § 1502.6, Interdisciplinary preparation; § 1502.13, Purpose and need; § 1502.18, List of preparers; § 1502.19, Appendix; § 1502.20, Publication of the environmental impact statement; § 1502.22, Cost-benefit analysis; or § 1502.24,

Environmental review and consultation requirements. CEQ invites comment on whether it should make any changes to these sections or other changes to part 1502.

CEQ particularly invites comment on whether it should codify any or all of its 2023 GHG guidance, and, if so, which provisions of part 1502 or other provisions of the regulations CEQ should amend. CEQ proposes to incorporate some or all of the 2023 GHG guidance, which would require making additional changes in the final rule to codify the guidance in whole or part, as is or with changes, based on the comments CEQ receives on this proposed rule.[69]

1. Purpose (§ 1502.1)

CEQ proposes to divide § 1502.1 into paragraphs (a), (b), and (c) to enhance readability and amend the text in the section to restore the approach taken in the 1978 regulations regarding the purpose of EISs as they relate to NEPA.

In paragraph (a), CEQ proposes to restore language from the 1978 regulations clarifying that one purpose of an EIS is to serve as an action-forcing device for implementing the policies set out in section 101 of NEPA by ensuring agencies consider the environmental effects of their action in decision making. Congress did not enact NEPA to create procedure for procedure's sake; NEPA's procedures serve the substantive policies and goals Congress established and restoring the action-forcing language would clarify how EISs serve this broader function. This proposed change is consistent with the proposed edits in § 1500.1. *See* section II.B.1.

In paragraph (b), CEQ proposes minor edits for clarity and consistency with other changes proposed throughout the regulations. CEQ proposes to change "It" to "Environmental impact statements" to improve readability in light of the proposal to add paragraphs to the section. CEQ also proposes to change "significant" to "important" before "environmental issues" and insert "reasonable" before "alternatives" for

[69] *See* 2023 GHG Guidance, *supra* note 9.

consistency with similar phrasing throughout the regulations. In paragraph (c), CEQ proposes to restore the 1978 language clarifying that an EIS is more than a disclosure document and that agencies must use EISs concurrently with other relevant information to make informed decisions. CEQ considers this language to provide important direction to agencies to ensure that EISs inform planning and decision making and do not serve as a perfunctory check-the-box exercise.

2. Implementation (§ 1502.2)

CEQ proposes minor modifications in § 1502.2. First, CEQ proposes to restore from the 1978 regulations the introductory paragraph directing agencies to prepare EISs to meet the purpose established in § 1502.1. Upon reconsideration, CEQ is proposing to restore this language that was removed as unnecessary by the 2020 rule to provide clarity on the purpose of this section and improve readability.

Next, in paragraph (b) CEQ proposes to replace the word "significant" with "important" and add reference to an environmental assessment for clarity and consistency. In paragraph (c), CEQ proposes to change "analytic" to "analytical," and "project size" to "the scope and complexity of the action" since this provision is applicable to more than projects, and the length of an EIS should be proportional to the scope and complexity of the action analyzed in the document.

CEQ proposes to delete "as interpreted in" before "the regulations in this subchapter" in paragraph (d), for the reasons discussed above for making a similar change in section II.B.5. CEQ is concerned that this phrase may inappropriately constrain agencies whose agency NEPA procedures go beyond the CEQ regulations. Under the proposal, EISs must state how alternatives and decisions will or will not achieve the requirements of NEPA, the CEQ regulations, and other environmental laws and policies. Finally, CEQ proposes to delete the word "final" in paragraph (f) because there is no

distinction between a decision and final decision and for consistency with use of "decision" elsewhere in the regulations.

3. Scoping (§ 1502.4)

As discussed in section II.C.7 on § 1501.9, "Public and governmental engagement," and § 1501.11, "Programmatic review and tiering," CEQ proposes to revise § 1502.4 by retitling it "Scoping" and moving provisions from the current 40 CFR 1501.9 to this section. This proposal would move the requirements of scoping for EISs to part 1502, which addresses the requirements of EISs, while moving requirements for determining the appropriate level of NEPA review applicable to all environmental reviews to § 1501.3(b). CEQ also proposes to revise the provisions moved from the current 40 CFR 1501.9 to align scoping with related changes made on public engagement in § 1501.9 and to add requirements focused on increasing efficiency in the EIS scoping process.

CEQ has heard from multiple Federal agencies that there is uncertainty over the differences between the scoping process required for EISs and other public involvement or engagement requirements for NEPA reviews more generally. By proposing the revised§ 1501.9 on public and governmental engagement and moving the scoping provisions to § 1502.4, CEQ is emphasizing the importance of public engagement in the NEPA process generally, clarifying what requirements are unique to EISs, and clarifying what requirements and best practices agencies should consider regardless of the level of NEPA review.

As noted in sections II.C.2 and II.C.9, with the revision of this section to address scoping, CEQ proposes to move the existing provisions of 40 CFR 1502.4, "Major Federal actions requiring the preparation of environmental impact statements" to §§ 1501.3 and 1501.11.

CEQ proposes to move 40 CFR 1501.9(a), outlining the general purpose of scoping, to § 1502.4(a) and proposes to change the words "significant" and "non-significant" to "important" and "unimportant," respectively, to align with CEQ's proposed change to only use the word "significant" when describing effects. CEQ intends this to be a clarifying, non-substantive change. CEQ proposes to move 40 CFR 1501.9(c) on scoping outreach to paragraph (b) and add a sentence requiring agencies to facilitate notification to persons and agencies who may be interested or affected by an agency's proposed action, consistent with the public engagement requirements in proposed § 1501.9. CEQ proposes to move 40 CFR 1501.9(b) on cooperating and participating agencies to paragraph (c) and retitle it "Inviting participation" to better reflect that the paragraph covers cooperating and participating agencies as well as proponents of the action and other likely affected or interested persons. CEQ notes that agencies invited to serve as cooperating or participating agencies should respond in a timely manner to facilitate the inclusion in the NOI any information that these agencies may need as part of the scoping process.

CEQ proposes to move 40 CFR 1501.9(f) and (f)(1) through (f)(5) on additional scoping responsibilities to paragraph (d) and (d)(1) though (d)(5), respectively. Within this list, CEQ proposes modifications to paragraph (d)(1) to change "significant" to "important" to align with changes in paragraph (a) and the use of "significant" throughout the regulations, which CEQ intends to be a clarifying, non-substantive change.

CEQ proposes to move the requirements for an NOI from 40 CFR 1501.9(d) and (d)(1) through (d)(8) to § 1502.4(e) and (e)(1) through (e)(8), respectively. CEQ proposes to delete the reference to 40 CFR 1507.3(f)(3) because CEQ is proposing to remove that provision from the regulations, as discussed in section II.I.2. CEQ proposes to revise the language in paragraph (e)(7) for consistency with section 107(c) requiring the NOI to

include a request for public comment on alternatives or impacts and on relevant information, studies, or analyses, delete the cross reference to § 1502.17 because CEQ proposes to broaden the language in § 1502.17. Further, this cross reference would no longer be necessary since CEQ proposes to remove the exhaustion process in 40 CFR 1500.3, which relies, in part, on this provision as the first step in that process. Additionally, the purpose of scoping is to receive input from the public on the proposed action and alternatives as well as other information relevant to consideration of the proposed action. CEQ considers the language in this paragraph to be redundant to the other required information in paragraph (e).

To this list of NOI requirements, CEQ proposes to add paragraph (e)(9) to require the lead agency to list any cooperating and participating agencies that have been identified at the time of the NOI, as well as any information those agencies require to facilitate their decisions or authorizations related to the EIS. CEQ proposes to add this requirement to ensure that lead and cooperating agencies are communicating about any unique statutory or regulatory requirements of each agency so that the necessary information is included in the initial NOI and does not require re-issuance of a second NOI by the cooperating or participating agency. For example, the U.S. Forest Service's regulations regarding administrative review require the responsible official to disclose during the NEPA scoping process that a proposed project or activity or proposed plan, plan amendment, or plan revision is subject to one of its administrative review regulations. 36 CFR 218.7(a), 219.52(a). When the Forest Service acts as a cooperating agency and the lead agency does not include the necessary information in the NOI, the Forest Service then must issue its own NOI, which can add additional time in the NEPA process.

CEQ also proposes to add paragraph (e)(10) to require that the NOI include a unique identification number for tracking purposes that would be carried forward to all

other documents related to the action such as the draft and final EISs and ROD. Identification numbers can help both the public and agencies track the progress of an EIS for a specific action as it moves through the NEPA process. CEQ has similarly proposed to require agencies to use tracking numbers for environmental assessments in § 1501.5. *See* section II.C.4.

CEQ proposes to move and edit the second sentence regarding supplemental notices in 40 CFR 1507.3(f)(3) to paragraph (f), "Notices of withdrawal or cancellation," to require that an agency publish in the *Federal Register* a notice of withdrawal of the NOI or a supplemental notice to inform the public that it is no longer considering a proposed action and, therefore, discontinuing preparation of an EIS. Agencies should publish such notices if they withdraw, cancel, or otherwise cease the consideration of a proposed action before completing a final EIS. CEQ proposes this requirement to codify common agency practice and to increase transparency to the public. Such a notice does not need to be lengthy, but should clearly reference the original NOI, name of the project in the original notice, unique identification number, and who to contact for additional information.[70] Finally, CEQ proposes to move 40 CFR 1501.9(g) on NOI revisions to § 1502.4(g), updating the paragraph references and changing "significant" to "important" and "impacts" to "effects," which CEQ intends to be a clarifying, non-substantive edit. These edits would align the text with the proposed changes to § 1502.9(d)(1)(ii).

4. Timing (§ 1502.5)

CEQ proposes to make three clarifying amendments to § 1502.5. First, in paragraph (a), CEQ proposes to add "e.g.," in the parenthetical "(go/no-go)." CEQ proposes this amendment in response to agency feedback during the development of the

[70] Examples of NOI Withdrawals: Powell Ranger District; Utah; Powell Travel Management Project; Withdrawal of Notice of Intent to Prepare an Environmental Impact Statement, 87 FR 1109 (Jan. 10, 2022); Withdrawal of the Notice of Intent to Prepare an Environmental Impact Statement for the Carpinteria Shoreline, a Feasibility Study in the City of Carpinteria, Santa Barbara County, CA, 86 FR 41028 (July 30, 2021).

proposed rule to clarify that the feasibility analysis and the "go/no-go" stage may not occur at the same point in time and may differ depending on what is included in the feasibility analysis and how the agency has structured that analysis. This change would be consistent with the longstanding practice that agencies have discretion to decide the appropriate time to begin the NEPA analysis, but also that agencies should integrate the NEPA process and other planning or authorization processes early. *See* § 1501.2(a).

Second, CEQ proposes to add "complete" in the first sentence of paragraph (b) to clarify that agencies must begin preparing an EIS after receiving a complete application, though agencies can elect to begin the process earlier if they choose to do so. CEQ also proposes to add "together and" in the second sentence of paragraph (b) to clarify further that agencies should work "together and with" potential applicants and other entities before receiving the application. Based on CEQ's experience, early conversations and coordination among Federal agencies, the applicant, and other interested entities can improve efficiencies in the NEPA process and ultimately lead to better environmental outcomes. Additionally, similar to the proposed change to paragraph (a), this proposed change is consistent with other directions in the regulations to integrate the NEPA process and other processes early. *See* §§ 1500.5(h), (i), 1501.2(a).

5. Page Limits (§ 1502.7)

CEQ proposes to amend § 1502.7, to align the text with section 107(e) of NEPA, which sets page limits for EISs at 150 pages or 300 pages for proposals of extraordinary complexity, not including citations or appendices. CEQ proposes to remove the requirement for the senior agency official of the lead agency to approve longer documents for consistency with the statute, which does not provide a mechanism to approve longer documents.

CEQ strongly encourages agencies to prepare concise EISs that are both comprehensive and understandable to the decision maker and the public. Agencies should

consider establishing within their procedures mechanisms to do so that will be most effective for their programs and activities. Such mechanisms might include placing technical analyses in appendices and summarizing them in plain language in the EIS; making use of visual aids, which are excluded from the definition of "page," including sample images, maps, drawings, charts, graphs, and tables; and using insets, colors, and highlights to create visually interesting ways to draw attention to key information and conclusions. Agencies should consider making EISs and technical appendices machine readable, where possible and feasible, to facilitate data sharing and reuse in future analyses. CEQ invites comment on whether CEQ should modify the regulations to appropriately encourage agencies to do so.

6. Writing; and Draft, Final, and Supplemental Statements (§§ 1502.8 and 1502.9)

CEQ proposes minor edits to § 1502.8 to make the text consistent with modifications proposed in § 1502.12 regarding visual aids or charts.

CEQ proposes to delete "as interpreted" before "in the regulations in this subchapter" in § 1502.9(b), as section II.B.5 explains. CEQ also proposes to clarify that it is the agency preparing a draft EIS that determines a draft statement requires supplementation to inform its decision-making process.

In § 1502.9(c), CEQ proposes to clarify that a final EIS should "consider and respond" to comments rather than just "address" them, restoring language from the 1978 regulations and aligning the language with text at § 1503.4(a) regarding consideration of comments. The 2020 rule did not explain the change to "address,"[71] and CEQ is concerned that it could be read as weakening the standard for responding to comments within § 1502.9 and in § 1503.4. In paragraphs (d)(1)(ii) and (d)(4), CEQ proposes to replace the word "significant" with "important" and "impacts" with "effects" (except

[71] *See* 2020 Final Rule, *supra* note 36.

where "impact" is used as part of the term FONSI) for consistency, as discussed in section II.A. In paragraph (d)(1)(ii), CEQ also proposes to add "substantial or" before "important new circumstances or information," for consistency with its use section 108(1) of NEPA, which confirms that an agency may rely on the analysis in an existing programmatic environmental document for five years without having to supplement or reevaluate the analysis, provided no substantial new circumstances or information exist. CEQ invites comment on whether it should revise the language in paragraphs (d)(1)(i) and (d)(1)(ii) to more specifically identify situations where supplementation is required.

CEQ proposes to redesignate 40 CFR 1502.9(d)(4) as § 1502.9(e), title it "Reevaluation," making this a standalone paragraph rather than a paragraph of supplemental EISs to clarify that reevaluation is a separate tool to document when supplementation is not required. CEQ proposes to add in paragraph (e) that agencies may "reevaluate" an EIS in part to determine "that the underlying assumptions of the analysis remains valid." That language is generally consistent with section 108(2) of NEPA's rule that an agency may rely on programmatic documents that are more than five years old if it reevaluates the underlying analysis. However, while section 108(2) requires reevaluation for programmatic documents more than five years old, CEQ proposes to leave agencies discretion over whether and when to reevaluate non-programmatic documents.

7. Recommended Format and Cover (§§ 1502.10 and 1502.11)

CEQ proposes to revise the recommended format of an EIS. CEQ proposes to include the summary of scoping information required by § 1502.17 and the list of preparers required by § 1502.18 in appendices, rather than the main body of the EIS. Therefore, CEQ proposes to remove 40 CFR 1502.10(a)(7) through (9), and add a new paragraph (a)(7) requiring appendices including the scoping summary and list of preparers.

CEQ proposes to clarify in § 1502.11(a) that the list of "responsible agencies" on an EIS cover are the lead, joint lead, and any cooperating agencies. Consistent with the proposed change in § 1502.4(e)(10), CEQ proposes to amend paragraph (g) to require the cover to include the identification number identified in the NOI to make clear the relationships of documents to one another and help the public and decision makers easily track the progress of the EIS as it moves through the NEPA process and to facilitate digitization and analysis.

CEQ proposes to strike the existing requirement in 40 CFR 1502.11(g) to include on the cover of the final EIS the estimated preparation cost, a change that multiple Federal agencies requested during development of this proposed rule. The 2020 rule stated that including estimated total costs would be helpful for tracking such costs, and that agencies could develop their own methodologies for tracking EIS preparation costs in their agency NEPA procedures.[72] However, Federal agency commenters stated that agencies typically do not estimate total costs, that they are difficult to monitor especially when project sponsors and contractors are bearing some of the cost, that the methodology for estimating costs is inconsistent across agencies, and that providing these estimates would be burdensome. At least one agency commenter noted that agencies inconsistently implemented a similar requirement in E.O. 13807, which undermined the utility of the estimates, that tracking costs added a significant new burden on staff, and that it was not clear whether tracking such costs provided useful information for agencies or the public.

CEQ does not consider EIS costs to be germane to the purpose of an EIS. Requiring that they be included on the cover could incorrectly lead the public and decision makers to believe that those costs relate to the proposed action addressed in the EIS. In general, the purpose of the cover is to indicate the subject matter of the document and provide the public with an agency point of contact, provide a short abstract of the

[72] *Id*.

EIS, and indicate the date by which the public must submit comments. Further, CEQ is concerned that requiring agencies to calculate the costs may unnecessarily add time to the EIS preparation process, particularly where aspects of an environmental review serve multiple purposes and allocating costs to NEPA compliance and other obligations may be complicated.

CEQ recognizes the value in gathering information on overall costs, trends in costs, and approaches that can reduce costs, as this can provide a full picture of how and whether agencies are effectively using their resources, including to conduct environmental reviews. Each agency should track and monitor these costs through their own procedures and mechanisms and consult with CEQ about any lessons learned to inform CEQ's ongoing evaluation of the efficiency and effectiveness of the NEPA process. CEQ does not consider requiring in the NEPA regulations that agencies publish costs on the cover of EISs to be the appropriate mechanism to develop that information.

8. Summary (§ 1502.12)

CEQ proposes modifications to § 1502.12 to clarify the purpose of the summary and update what elements agencies should include in the summary with a goal of creating summaries that are more useful to the public and agencies. The summary serves to provide the public and decision makers with a clear, high-level overview of the proposed action and alternatives, the significant effects, and other critical information in the EIS.

CEQ proposes a few changes to the second sentence in § 1502.12. First, CEQ proposes to replace the word "stress" with "include" in describing the contents of the summary to clarify that an adequate and accurate summary may include more than what is listed in § 1502.12. Next, CEQ proposes to clarify that the summary should summarize disputed issues, any issues to be resolved, and key differences among alternatives. CEQ proposes this change to provide the public and decision makers with a more complete picture of the disputed issues rather than focusing on "areas of" disputed issues and to

facilitate informed decision making and transparency. These edits are also consistent with § 1502.14(b), which requires agencies to discuss alternatives in detail. Summarizing the key differences of alternatives could enhance the public's and decision makers' understandings of the relative trade-offs of the alternatives considered in detail.

CEQ also proposes to add language to the second sentence to require that the summary identify the environmentally preferable alternative or alternatives. Adding the environmentally preferable alternative to the summary would enhance the public's and decision makers' understandings of the alternative or alternatives that will best promote the national environmental policy as expressed in section 101 of NEPA by providing a summary of that alternative early on in the document.

CEQ proposes to add a fourth sentence to § 1502.12 to make summaries easier to read and understand by requiring agencies to write the summary in plain language and encouraging use of visual aids and charts. Existing regulatory text already requires agencies to write environmental documents in plain language as a means to preparing readable, concise, and informative documents. *See, e.g.*, §§ 1500.4 and 1502.8. Agencies commonly use visual aids, such as graphics, maps, and pictures, throughout their environmental documents.

Finally, similar to other changes proposed regarding page limits, CEQ proposes to allow agencies flexibility in the length of a summary. In the existing text, summaries are limited to 15 pages. CEQ proposes instead to encourage summaries to not exceed 15 pages. Although summaries should be brief, CEQ acknowledges with this proposed change that some proposed actions are more complex and may require additional pages.

9. Purpose and need; Alternatives Including the Proposed Action (§§ 1502.13 and 1502.14)

CEQ proposes to revise § 1502.13 to align the language with the text of section 107(d) of NEPA requiring an EIS to include statement that briefly summarizes the underlying purpose and need for the proposed agency action.

CEQ proposes revisions to § 1502.14 to promote the rigorous analysis and consideration of alternatives, consistent with the longstanding principle that agencies take a "hard look" at their actions. To that end, CEQ proposes to reintroduce much of the 1978 text to § 1502.14 that the 2020 rule removed and modernize it to ensure agency decision makers are well-informed. Many commenters on the Phase 1 rule requested CEQ revise this provision to revert to the 1978 language or revise it to ensure agencies fully explore the reasonable alternatives to their proposed actions.[73]

CEQ proposes to revise the introductory paragraph of § 1502.14 to reinstate the language from the 1978 regulations that the alternatives analysis "is the heart of the environmental impact statement." While the 2020 rule described this clause as "colloquial language" to justify its removal,[74] CEQ now considers this to be an integral policy statement necessary to emphasize the importance of the alternatives analyses to allow decision makers to assess a reasonable range of possible approaches to the matters before them and notes that numerous court decisions quoted this language from the 1978 regulations in stressing the importance of the alternatives analysis. *See, e.g.*, *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1243 (10th Cir. 2011). Numerous commenters on the 2020 rule and the 2022 Phase 1 rule supported inclusion of this language.[75]

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[73] *See* Phase 1 Response to Comments, *supra* note 48, at 162.
[74] 2020 Final Rule, *supra* note 36, at 43330.
[75] *See, e.g.*, 2020 Response to Comments, *supra* note 63, at 274; Phase 1 Response to Comments, *supra* note 48, at 55.

CEQ proposes a clarifying edit in the introductory paragraph, replacing "present" the environmental effects with "identify" the "reasonably foreseeable" environmental effects consistent with § 1500.2(e) and section 102(2)(C)(i) of NEPA. Finally, in the introductory paragraph, CEQ proposes to state that the alternatives analysis should sharply define issues for the decision maker and the public and provide a clear basis for choice in the options. CEQ proposes reintroducing this language from the 1978 regulations because it provides an important policy statement, concisely explaining the end goals for the alternatives analysis.

CEQ proposes in paragraph (a) to restore the clause that agencies must "rigorously explore and objectively" evaluate reasonable alternatives at the beginning of the first sentence. CEQ proposes to reinsert this language because it provides a standard for how agencies should analyze alternatives. CEQ proposes to add two additional sentences to paragraph (a). One statement would clarify that agencies need not consider every conceivable alternative to a proposed action but rather must consider a reasonable range of alternatives that fosters informed decision making. CEQ proposes to add this sentence to replace the statement in the current 40 CFR 1502.14(f) requiring agencies to limit their consideration to a reasonable number of alternatives, which CEQ proposes to strike. This proposed language is consistent with longstanding CEQ guidance[76] and would reinforce that the alternative analysis is not boundless; the key is to provide the decision maker with reasonable options to ensure informed decision making. To that end, CEQ also proposes in paragraph (a) to clarify that agencies have the discretion to consider reasonable alternatives not within their jurisdiction, but NEPA and the CEQ regulations generally do not require them to do so. Such alternatives may be relevant, for

[76] Forty Questions, *supra* note 4.

instance, when agencies are considering program-level decisions[77] or anticipate funding for a project not yet authorized by Congress.[78] CEQ anticipates that such consideration would be a relatively infrequent occurrence and notes that such alternatives would still need to be technically and economically feasible and meet the purpose and need for the proposed action, consistent with the definition of "reasonable alternatives." CEQ considers adding this language to paragraph (a) to improve the consistency of the regulations with the "hard look" principle of NEPA.

Some commenters—both on the 2020 rule and the Phase 1 rule—supported the removal of the 1978 regulations' requirement to consider alternatives outside the jurisdiction of the lead agency, contending that such alternatives are inherently infeasible.[79] However, many commenters on the Phase 1 rule supported the reintroduction of this language.[80] CEQ's proposal is intended to strike a balance; the proposal would not require agencies to consider alternatives outside their jurisdiction or preclude agencies from doing so. Further, it would retain the direction that the agency need only consider reasonable alternatives.

CEQ proposes to replace paragraph (f) with a requirement to identify the environmentally preferable alternative. In addition to the proposed definition of environmentally preferable alternative in § 1508.1(*l*), this provision would describe elements that the environmentally preferable alternative may generally include. The list uses "or" to make clear that the environmentally preferable alternative need not include each delineated element and recognizes that identifying the environmentally preferable

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[77] *See, e.g.*, Fed. R.R. Admin., Final Program Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for the proposed California High-Speed Train System (2005), https://hsr.ca.gov/programs/environmental-planning/program-eir-eis-documents-for-the-statewide-high-speed-rail-system-tier-1/final-program-environmental-impact-report-environmental-impact-statement-eir-eis-for-the-proposed-california-high-speed-train-system-2005/.
[78] *See, e.g.*, U.S. Army Corps of Eng'rs, *Final Environmental Impact Statement for Savannah Harbor Expansion Project* (rev. July 2012), https://www.sas.usace.army.mil/Missions/Civil-Works/Savannah-Harbor-Expansion/Final-Environmental-Impact-Statement/.
[79] 2020 Final Rule, *supra* note 36, at 43330–31; 2020 Response to Comments, *supra* note 63, at 45, 57.
[80] Phase 1 Response to Comments, *supra* note 48, at 162.

alternative may entail making tradeoffs in some cases. This approach would provide agencies flexibility to rely on their discretion and expertise to strike an appropriate balance in identifying the environmentally preferable alternative. Finally, paragraph (f) would clarify that the environmentally preferable alternative may be the proposed action, no action alternative, or a reasonable alternative. Agencies may identify more than one environmentally preferable alternative as they deem appropriate.

The CEQ regulations, at 40 CFR 1505.2, always have required agencies to identify the environmentally preferable alternative in a ROD. CEQ's proposal would provide more context for what this alternative entails, improving consistency and furthering NEPA's goal of ensuring that agencies make informed decisions regarding actions that impact the environment. Additionally, requiring that the draft and final EIS identify the environmentally preferable alternative would provide more transparency to the public as to the agency's decision-making process at an earlier stage, as well as an opportunity to comment on it before the agency makes its decision.

10. Affected Environment (§ 1502.15)

CEQ proposes revisions to § 1502.15 to emphasize the use of high-quality information, including best available science and data; clarify considerations of reasonably foreseeable environmental trends; and emphasize efficiency and concise documents. CEQ also proposes to divide § 1502.15 into paragraphs (a), (b), and (c) to improve readability.

CEQ proposes to discuss data in a new paragraph (b), which would encourage agencies to use high-quality information, including best available science and data, in recognition that these should inform all agency decisions. This paragraph would articulate clearly NEPA's statutory mandate that science inform agencies' decisions as part of a systematic, interdisciplinary approach. *See* 42 U.S.C. 4332(2)(A). In addition, the paragraph would clarify that this information should inform agencies' consideration

of "reasonably foreseeable environmental trends," noting explicitly that this includes anticipated climate-related changes to the environment.

CEQ proposes this language to clarify that agencies should consider reasonably foreseeable future climate conditions on affected areas rather than merely describing general climate change trends at the global or national level. In line with scientific projections, accurate baseline assessment of the affected environment over an action's lifetime should incorporate forward-looking climate projections rather than relying on historical data alone. CEQ also proposes language in paragraph (b) to connect the description of baseline environmental conditions and reasonably foreseeable trends to an agency's analysis of environmental consequences and mitigation measures.

CEQ proposes to move the second and third through fifth sentences of 40 CFR 1502.15 to new paragraph (c). CEQ also proposes minor revisions to the relocated language and a new sentence to provide that agencies may combine the affected environment and environmental consequences sections in an EIS, which should be no longer than necessary to understand the relevant affected environment and the effects of the alternatives.

11. Environmental Consequences (§ 1502.16)

CEQ proposes several changes to § 1502.16 to clarify priorities and methods of analysis and make updates to ensure that agencies integrate climate change and environmental justice considerations into the analysis of environmental effects.

CEQ proposes in paragraph (a)(1) to modify the sentence requiring agencies to base the comparison of the proposed action and reasonable alternatives on the discussion of effects to add "reasonably foreseeable" before "environmental effects" for consistency with the text of section 102(2)(C)(i) of NEPA and to focus the comparison of the proposed action and reasonable alternatives on the "significant or important effects" to emphasize that agencies' analyses of effects should be proportional to the significance of

the effects. The FRA's amendments to NEPA codified the longstanding principle from the 1978 regulations and long recognized by the courts that effects must be reasonably foreseeable. Consistent with this provision, agencies should identify the effects they deem significant whenever possible to inform the public and decision makers. Finally, CEQ proposes adding a new sentence to the end of paragraph (a)(1) clarifying the proper role of the no action alternative to ensure that the comparative analysis is not distorted by selecting a different alternative (for example, the preferred alternative) as the baseline against which all other alternatives are measured. In formulating the no action alternative, agencies should make reasonable assumptions. CEQ invites comment on whether it should include additional direction or guidance regarding the no action alternative in the final rule.

Next, CEQ proposes to add "reasonably foreseeable" in paragraph (a)(1) before "environmental effects" for consistency with section 102(2)(C)(i) of NEPA and in paragraph (a)(2) before "adverse environmental effects" for consistency with section 102(2)(C)(ii) of NEPA. CEQ proposes to add a new paragraph (a)(3) requiring an analysis of effects of the no action alternative, including any adverse environmental effects consistent with section 102(2)(C)(iii) of NEPA, which requires an analysis of any negative environmental impacts of not implementing the proposed action in the case of a no action alternative. CEQ interprets "negative" to have the same meaning as the term "adverse." For example, an environmental restoration project that helps mitigate the effects of climate change and restores habitat could have adverse effects if it were not implemented or the construction of a commuter transit line could have adverse effects from persistent traffic congestion, air pollution, and related effects to environmental justice communities if it were not implemented. To accommodate this additional paragraph, CEQ proposes to redesignate 40 CFR 1502.15(a)(3) through (a)(5) as

paragraphs (a)(4) through (a)(6) accordingly. In paragraph (a)(5), CEQ proposes to insert "Federal" before "resources" for consistency with section 102(2)(C)(v) of NEPA.

Then, CEQ proposes to add reference to two specific elements and revise the reference to an existing element that agencies must include in the analysis of environmental consequences, all related to climate change. First, CEQ proposes to revise paragraph (a)(6) to broaden it from land use plans to plans generally and clarify that this element includes plans and policies addressing climate change. Second, CEQ proposes to add a new paragraph (a)(7) to clarify that the discussion of environmental consequences in an EIS must include any reasonably foreseeable climate change-related effects, including effects of climate change on the proposed action and alternatives (which may in turn alter the effects of the proposed action and alternatives). CEQ would then redesignate the paragraphs at 40 CFR 1502.16(a)(6) and(a)(7) as paragraphs (a)(8) and (a)(9), respectively. Third, CEQ proposes to add a new paragraph (a)(10), which would require agencies to address any risk reduction, resiliency, or adaptation measures included in the proposed action and alternatives. This would ensure agencies consider resiliency to the risks associated with a changing climate, including wildfire risk, extreme heat and other extreme weather events, drought, flood risk, loss of historic and cultural resources, and food scarcity. This analysis would further NEPA's mandate that agencies use "the environmental design arts" in decision making and consider the relationship between the "uses" of the environment "and the maintenance and enhancement of long-term productivity." 42 U.S.C. 4332(2)(A) and (2)(C)(iv). It also would help achieve NEPA's goals of protecting the environment across generations, preserving important cultural and other resources, and attaining "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. 4331(b)(3).

These proposed revisions would clarify that agencies must address both effects of the proposed action and alternatives on climate change, and the resiliency of the proposed action and alternatives in light of climate change.[81] These proposed revisions are consistent with what NEPA has long required: using science to make informed decisions. This proposal is also consistent with NEPA's specific requirement to study the effects of the Federal action because effects on the Federal action due to climate change may in turn alter the effects that the project has on its environment. These proposed revisions also align well with the definition of effects to encompass reasonably foreseeable indirect and cumulative effects, which are integral to NEPA analyses.

To accommodate the new paragraph (a)(10), CEQ proposes to redesignate 40 CFR 1502.16(a)(8) through (a)(10) as paragraphs (a)(11) through (a)(13), respectively. Finally, CEQ proposes to add paragraph (a)(14) to provide that agencies must discuss the potential for disproportionate and adverse health and environmental effects on communities with environmental justice concerns. The addition of this paragraph would clarify that EISs generally must include an environmental justice analysis to ensure that agency actions do not unintentionally impose disproportionate and adverse effects on these communities.

Finally, CEQ proposes to strike "and give appropriate consideration to" from paragraph (b). CEQ proposes this revision to remove unnecessary language that could be read to require the decision maker to make consideration of such effects a higher priority than other effects listed in this section.

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[81] Such analysis is not new and CEQ has issued guidance consistent with these proposed provisions for nearly a decade. *See generally* CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 FR 51866 (Aug. 8, 2016), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf, and 2023 GHG Guidance, *supra* note 9.

12. Summary of Scoping Information (§ 1502.17)

CEQ proposes to revise § 1502.17 and retitle it "Summary of scoping information" to more accurately reflect the proposed content of this section and align it with the common practice of what many agencies produce via scoping reports. CEQ proposes other changes in this section to simplify and remove unnecessary or redundant text and clarify requirements.

CEQ proposes to revise paragraph (a) to require agencies to include a summary of the information they receive from commenters during the scoping process in draft EISs consistent with the proposed revisions to §§ 1500.3, 1501.9, and 1502.4. CEQ proposes to replace "State, Tribal, and local governments and other public commenters" with "commenters" because this phrase is all encompassing. CEQ also proposes to clarify that a draft EIS should include a summary of information, including alternative and analyses, that commenters submitted during scoping. This change provides agencies flexibility to develop a broader summary of information received during scoping. While agencies should still summarize alternatives and analyses, this provision would not require them to provide a specific summary of every individual alternative, piece of information, or analysis commenters submit during scoping.

CEQ proposes to redesignate paragraph (a)(1) as paragraph (b) and modify it to clarify that agencies can either append to the draft EIS or otherwise make publicly available comments received during scoping. This modification clarifies that the requirements of this paragraph can be met through means other than an appendix, such as a scoping report, which is common practice for some Federal agencies. CEQ proposes a conforming edit in paragraph (d) of § 1502.19, "Appendix," for consistency with this language.

Finally, CEQ proposes to delete the current 40 CFR 1502.17(a)(2) and (b) because the requirements of these paragraphs are redundant to the requirements in part

1503 for Federal agencies to invite comment on draft EISs in their entirety and review and respond to public comments.

13. Incomplete or Unavailable Information (§ 1502.21)

CEQ proposes one revision to paragraph (b) of § 1502.21 to strike "but available," which addresses situations where an agency encounters incomplete or unavailable information during its evaluation of a proposed action's reasonably foreseeable significant adverse effects. CEQ proposes to strike "but available," a phrase added by the 2020 rule, to clarify that agencies must obtain information relevant to reasonably foreseeable significant adverse effects that is essential to a reasoned choice between alternatives where the overall costs of doing so are not unreasonable, and the means of obtaining that information are known. This qualifier, which CEQ proposes to remove, could be read to significantly narrow agencies' obligations to obtain additional information even when it is easily attainable and the costs are reasonable. CEQ has reconsidered this change and now considers it vital to the NEPA process for agencies to undertake studies and analyses where necessary rather than relying solely on available information where the costs of obtaining the relevant information are not unreasonable.

Agency feedback received during the development of this proposed rule supports this change. Agency NEPA experts indicated that this qualifier could be read to say that agencies do not need to collect additional information that could and should otherwise inform the public and decision makers. Removing this phrase also would be consistent with other provisions in the regulations emphasizing the importance of relying on high-quality and accurate information in implementing NEPA. *See, e.g.*, § 1500.1(b).

14. Methodology and Scientific Accuracy (§ 1502.23)

CEQ proposes changes to § 1502.23 to promote use of high-quality information, such as best available science and data; require agencies to explain assumptions; and, where appropriate, incorporate projections, including climate change-related projections,

in the evaluation of reasonably foreseeable effects. CEQ proposes to separate existing 40 CFR 1502.23 into paragraphs (a) and (b), with some modification, and add a new paragraph (c). The proposed changes to this section would provide additional guidance on how Federal agencies can meet NEPA's statutory requirement to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal" as set forth in section 102(2)(H) of NEPA.

In paragraph (a), CEQ proposes to reinstate the term high-quality information, as used in the 1978 regulations, and clarify that such information includes best available science and reliable data, models, and resources. Also, CEQ proposes clarifying edits, including moving the word "existing" in the second sentence of paragraph (a) to the end of the sentence and adding reference to sources and materials. CEQ proposes these changes to clarify that while agencies must use reliable data and resources, which can include existing data and resources, they are not limited to use of existing materials. Public commenters on the 2020 rule and Federal agency experts who provided input on this proposed rule raised concerns that the 2020 language could limit agencies to "existing" resources and preclude agencies from undertaking site surveys, conducting investigation, and performing other forms of data collection, which have long been standard practice when analyzing an action's potential environmental effects and may be necessary for agencies to understand particular effects.

For example, in the context of analyzing historical, cultural, or biological effects, survey work is often revisited and reassessed periodically, and an agency should not be required to rely on outdated data. While there are numerous reliable data sources for a variety of resources analyzed in NEPA documents, and the CEQ regulations encourage the use of existing information wherever possible, *see* § 1501.12, agencies should be permitted to exercise their good judgment in determining when new data and analyses are necessary. Indigenous Knowledge also can be a source of high-quality information.

CEQ proposes to add a new sentence at the end of paragraph (a) encouraging agencies to explain their assumptions and any limitations of their models and methods. CEQ proposes this addition to support this section's overall purpose of ensuring the integrity of the discussions and analyses in environmental documents. Additionally, this would codify typical agency practice to explain relevant assumptions or limitations of the information in environmental documents.

CEQ proposes to strike the statement that agencies are not required to undertake new research to inform their analyses consistent with the changes to paragraph (a). As noted in this section, it is common practice for agencies, when necessary or appropriate, to engage in additional research and create new data based on an action's particular circumstances (such as the affected environment) when analyzing proposed actions under NEPA. Further, by simply striking the sentence added in 2020, CEQ is not proposing to add an across-the-board requirement that agencies must undertake new research in all cases.

Finally, CEQ proposes to add a new paragraph (c), which would require agencies to use projections when evaluating reasonably foreseeable effects, including climate change-related effects, where appropriate. CEQ also proposes to clarify that such projections may employ mathematical or other models that project a range of possible future outcomes, so long as agencies disclose the relevant assumptions or limitations. This addition is consistent with the amendments proposed in paragraphs (a) and (b). Based on existing agency practice and academic literature on climate science, agencies can and do use reliable projections to analyze reasonably foreseeable climate change-related effects. Where available and appropriate, agencies also can use or rely on projections that are scaled to a more targeted and localized geographic scope, such as land use projections, air emissions, and modeling, or to evaluate climate effects experienced locally in relation to the proposed action. When doing so, agencies should

explain the basis for relying on those projections and their underlying assumptions. Climate projections can vary based on different factors and assumptions such as geography, location, and existing and future GHG emissions. For that reason, agencies can use models that analyze a range of possible future outcomes, but agencies must disclose the underlying relevant assumptions or limitations of those models.

CEQ expects that modeling techniques will continue to improve in the future, resulting in more precise climate projections. To be consistent with proposed changes with paragraph (a) in this section, as climate modeling techniques advance, agencies should rely on high-quality information when evaluating reasonably foreseeable climate change-related effects.

E. Proposed Revisions to Update Part 1503, Commenting on Environmental Impact Statements

CEQ is proposing substantive revisions to all sections of part 1503, except § 1503.2, Duty to comment. CEQ invites comments on whether it should make changes to this section or other changes to part 1503.

1. Inviting Comments and Requesting Information and Analyses (§ 1503.1)

CEQ proposes to delete 40 CFR 1503.1(a)(3) requiring agencies to invite comment specifically on the submitted alternatives, information, and analyses and the summary thereof for consistency with proposed changes to §§ 1500.3 and 1502.17. This requirement would be unnecessary with the removal of the exhaustion provision. It also is redundant as Federal agencies invite comment on all sections of draft EISs and therefore need not invite comment on one specific section of an EIS.

2. Specificity of Comments and Information (§ 1503.3)

CEQ proposes edits to § 1503.3 to clarify the expected level of detail in comments submitted by the public and other agencies to facilitate their consideration by

agencies in the decision-making process. The proposal would remove or otherwise modify provisions that could inappropriately restrict public comments and place unnecessary burden on public commenters.

CEQ proposes to remove language from § 1503.3(a) added in the 2020 rule that requires comments to be as detailed as necessary to meaningfully participate and fully inform the agency of the commenter's position because this requirement could lead commenters to provide unnecessarily long comments that will impede efficiency. Paragraph (a) already requires comments to be "as specific as possible," and the language CEQ proposes to remove could be read to require commenters to provide detailed information that is not pertinent to the NEPA analysis about the commenter's position on the proposed action, the project proponent, the Federal agency, or other issues. For example, the text could be read to require a commenter to provide a detailed explanation of a moral objection to a proposed action or a personal interest in it if those inform the commenter's position on the project. The text also could imply that commenters must either be an expert on the subject matter or hire an expert to provide the necessary level of detail. The current text could be read to imply that commenters are under an obligation to collect or produce information necessary for agencies to fully evaluate issues raised in comments even if the commenters do not possess that information or the skills necessary to produce it. Some commenters on the 2020 rule raised this issue, expressing concerns that this language could be read to require the general public to demonstrate a level of sophistication and technical expertise not required historically under the CEQ regulations or consistent with the NEPA statute.[82] Commenters also expressed concern that the requirement would discourage or preclude laypersons or communities with environmental justice concerns from commenting.[83] Other commenters on the 2020 rule

[82] 2020 Response to Comments, *supra* note 63, at 326–27.
[83] *Id.*at 327.

expressed concern that the changes would shift the responsibility of analysis from the agencies to the general public.[84] Finally, CEQ proposes to remove this language because the requirements that comments provide as much detail as necessary to "meaningfully" participate and "fully inform" the agency are vague and put the burden on the commenter to anticipate the appropriate level of detail to meet those standards.

CEQ also proposes to delete from paragraph (a) language describing the types of impacts that a comment should cover, including the reference to economic and employment impacts. CEQ proposes this deletion because this language imposes an inappropriate burden on commenters by indicating that comments need to explain why an issue matters for economic and employment purposes. NEPA requires agencies to analyze the potential effects on the human environment and does not require that these effects be specified in economic terms or related specifically to employment considerations. Therefore, it is inappropriate to single out these considerations for special treatment and unduly burdensome to expect commenters to address economic and employment impacts. The proposed revision would not have the effect of limiting commenters from addressing these issues but would avoid the implication that members of the public are welcome to comment only if they address those issues. CEQ proposes to delete the reference to "other impacts affecting the quality of the human environment" because it is unnecessary and duplicative of "consideration of potential effects and alternatives."

Finally, in paragraph (a), CEQ proposes changes to the last sentence to clarify that, only where possible, the public should include citations or proposed changes to the EIS or describe the data, sources, or methodologies that support the proposed changes in their comments. While such information is helpful to the agency whenever it is readily

[84] *Id.* at 328.

available, CEQ has concerns that this could be construed to place an unreasonable burden on commenters.

CEQ proposes to strike 40 CFR 1503.3(b) and redesignate 40 CFR 1503.3(c) through (d) as § 1503.3(b) and (c). CEQ proposes the deletion of paragraph (b) for consistency with proposed changes to § 1500.3's exhaustion requirement and corresponding changes to § 1502.17. The paragraph also is unrelated to the subject addressed in § 1503.3, which addresses the specificity of comments, rather than when commenters should file their comments. Further, agencies have long had the discretion to consider special or unique circumstances that may warrant consideration of comments outside those time periods. CEQ proposes to strike "site-specific" in paragraph (c) to clarify that cooperating agencies must identify additional information needed to address significant effects generally. This proposed change would enhance efficiency because it would ensure that cooperating agencies have the information they need to fully comment on EISs averting potential delay in the environmental review process.

Finally, CEQ proposes in paragraph (d) to strike the requirement for cooperating agencies to cite their statutory authority for recommending mitigation. This requirement is unnecessary since, at this stage, those agencies with jurisdiction by law have already established their legal authority to participate as cooperating agencies. CEQ also proposes in paragraph (d) to replace the reference to "permit, license, or related requirements" with "authorizations" because the definition of "authorization" in § 1508.1(c) is inclusive of those terms.

3. Response to Comments (§ 1503.4)

CEQ proposes to revise paragraph (a) to clarify that agencies must respond to comments but may do so either individually, in groups, or in some combination thereof. The current use of "may," which the 2020 regulations changed from "shall," creates ambiguity that could be read to mean that agencies have discretion in whether to respond

to comments at all, not just the way they respond, i.e., individually or in groups. Some comments on the 2020 proposed rule construed the change to "may" as weakening the longstanding requirement to respond to comments. The proposed change removes any ambiguity created by revisions to the paragraph in the 2020 regulations and is consistent with the longstanding requirement and expectation for agencies to respond to comments received on an EIS while also clarifying that agencies have discretion on how to respond to comments to promote the efficiency of the NEPA process.

In paragraph (c), CEQ proposes changes to clarify that when an agency uses an errata sheet, the agency must publish the entire final EIS, which would include the errata sheet, the draft EIS, and the comments with their responses. CEQ proposes these edits to reflect the typical Federal agency practice and to reflect the current requirement for electronic submission of EISs rather than the old practice of printing EISs for distribution.

F. Proposed Revisions to Update Part 1504, Pre-Decisional Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory

1. Purpose (§ 1504.1)

CEQ proposes in § 1504.1(a) to add language encouraging agencies to engage early with each other to resolve interagency disagreements concerning proposed major Federal actions before such disputes are referred to CEQ. CEQ also proposes to add language clarifying that part 1504 establishes procedures for agencies to submit requests to CEQ for informal dispute resolution, expanding the purpose to reflect changes proposed in §§ 1504.2 and described in section II.F.2. This proposal is consistent with CEQ's ongoing role in promoting the use of environmental collaboration and conflict

resolution,[85] and serving as a convener and informal mediator for interagency disputes. CEQ strongly encourages agencies to resolve disputes informally and as early as possible so that referrals under part 1504 are used only as a last resort. Early resolution of disputes is essential to ensuring an efficient and effective environmental review process.

In paragraph (b), which addresses EPA's role pursuant to section 309 of the Clean Air Act, CEQ proposes to strike the parenthetical providing the term "environmental referrals," as this term is not used elsewhere in part 1504. Further, CEQ notes that EPA's section 309 authority is distinct from the ability of an agency to make a referral pursuant to this part. Finally, CEQ proposes to revise the second sentence in paragraph (c) to eliminate the passive voice to improve clarity.

2. Early Dispute Resolution (§ 1504.2)

As discussed further in section II.F.3, CEQ proposes to move the provisions in existing 40 CFR 1504.2 to § 1504.3(a) to repurpose § 1504.2 for a new section on early dispute resolution. CEQ proposes to add this section to codify the current practice of agencies to engage with one another and enlist CEQ to help resolve interagency disputes. The added text would codify CEQ's role in convening discussions, mediating issues, and recommending resolutions. While the proposed provisions in § 1504.2 are non-binding, they would serve to encourage agencies to use this informal process to resolve interagency disputes early in the process and provide transparency to the public that this process occurs.

Proposed paragraph (a) would encourage agencies to engage in interagency coordination and collaboration within planning and decision-making processes and to identify and resolve interagency disputes. Further, paragraph (a) would encourage

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[85] *See* OMB & CEQ, Memorandum on Environmental Collaboration and Conflict Resolution (Sept. 7, 2012), https://www.energy.gov/sites/default/files/OMB_CEQ_Env_Collab_Conflict_Resolution_20120907-2012.pdf; OMB & CEQ, Memorandum on Environmental Conflict Resolution (Nov. 28, 2005), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/OMB_CEQ_Joint_Statement.pdf.

agencies to elevate issues to appropriate agency officials or to CEQ in a timely manner that is consistent with the schedules for the proposed action established under § 1501.10.

Paragraph (b) would allow a Federal agency to request that CEQ engage in informal dispute resolution. When making such a request to CEQ, the agency must provide CEQ with a summary of the proposed action, information on the disputed issues, and agency points of contact. CEQ proposes this provision to codify the longstanding practice of CEQ helping to mediate and resolve interagency disputes outside of and well before the formal referral process (§ 1504.3) and to provide additional direction to agencies on what information CEQ needs to effectively mediate.

Paragraph (b) would provide CEQ with several options to respond to a request for informal dispute resolution, including requesting additional information, convening discussions, and making recommendations, as well as the option to decline the request.

3. Criteria and procedure for referrals and response (§ 1504.3)

As noted in section II.F.2, CEQ proposes to move the criteria for referral currently set forth in 40 CFR 1504.2 to a new § 1504.3(a) and redesignate 40 CFR 1504.3(a) through (h) as § 1504.5(b) through (i), respectively. As a result of this consolidation, CEQ would revise the title of § 1504.3 to "Criteria and procedure for referrals and response." The criteria and procedures for agencies to make a referral apply to agencies that make a referral under the NEPA regulations and do not apply to EPA when exercising its referral authority under section 309 of the Clean Air Act (42 U.S.C. 7609).

G. Proposed Revisions to NEPA and Agency Decision Making (Part 1505)

1. Record of Decision in Cases Requiring Environmental Impact Statements (§ 1505.2)

CEQ proposes modifications in § 1505.2 to align this section with other proposed changes to the regulations and clarify the alternatives agencies must identify in RODs. CEQ also proposes to modify the provision on mitigation.

As discussed further in this section, CEQ proposes to strike 40 CFR 1505.2(b), make 40 CFR 1505.2(a) an undesignated introductory paragraph in § 1505.2, and redesignate 40 CFR 1505.2(a)(1) through (3) as § 1505.2(a) through (c), respectively. In § 1505.2(b), CEQ proposes to restructure the first two sentences to improve readability and clarify that agencies must identify one or more environmentally preferable alternatives in the ROD, consistent with proposed changes to § 1502.14(f) requiring agencies to identify them in the EIS and § 1508.1(*l*), defining "environmentally preferable alternative." Further, in the second sentence of paragraph (b), CEQ proposes to add "environmental" to the list of relevant factors upon which an agency may base discussion of preferences among alternatives. In paragraph (c), CEQ proposes to change "avoid or minimize" to "mitigate" in the first sentence for consistency with the remainder of the paragraph. CEQ also proposes to clarify that any mitigation must be enforceable, such as through permit conditions or grant agreements, if an agency includes it as a component of a proposed action and relies on its implementation to analyze the action's reasonably foreseeable environmental effects. Additionally, CEQ proposes to require agencies to identify the authority for enforceable mitigation, and adopt a mitigation and compliance plan consistent with § 1505.3(c).

CEQ proposes to strike 40 CFR 1505.2(b), which requires a decision maker to certify in the ROD that the agency has considered all of the alternatives, information, and

analyses submitted under 40 CFR 1502.17(b) and states that such certification is entitled to a presumption that the agency has considered such information in the EIS. CEQ proposes to strike 40 CFR 1505.2(b) because it is redundant—the discussion in the ROD and the decision maker's signature on such document has long served to verify the agency has considered the EIS's analysis of the proposed action, alternatives, and effects, as well as the public comments received. Additionally, while CEQ agrees that agencies are entitled to a presumption of regularity under the tenets of generally applicable administrative law, this presumption does not arise from NEPA, and therefore, CEQ considers it inappropriate to address in the NEPA regulations.

Finally, CEQ proposes to strike 40 CFR 1505.2(b) consistent with the proposal to remove the exhaustion provision in 40 CFR 1500.3, as discussed in section II.B.2. As CEQ discussed in that section, CEQ now considers it more appropriately the purview of the courts to make determinations regarding exhaustion. The certification requirement would no longer be necessary since it was intended to trigger the exhaustion provision in judicial review.

2. Implementing the Decision (§ 1505.3)

CEQ proposes revisions to § 1505.3 to add provisions for mitigation and related monitoring and compliance plans. To accommodate the proposed changes, CEQ proposes to designate the undesignated introductory paragraph of 40 CFR 1505.3 as paragraph (a) and redesignate 40 CFR 1505.3(a) and (b) as § 1505.3(a)(1) and (a)(2), respectively.

CEQ proposes to add new § 1505.3(b) to encourage lead and cooperating agencies to incorporate, where appropriate, mitigation measures addressing a proposed action's significant adverse human health and environmental effects that disproportionately and adversely affect communities with environmental justice concerns. This addition would highlight the importance of considering environmental justice and addressing disproportionate effects through the NEPA process and the

associated decision. CEQ proposes this addition based on public and agency feedback received during development of this proposed rule requesting that the regulations address mitigation of disproportionate effects. Additionally, this proposed change would encourage agencies to incorporate mitigation measures to address disproportionate burdens on communities with environmental justice concerns.

CEQ proposes to strike the text in paragraph (c) regarding mitigation and strike existing 40 CFR 1505.3(d) regarding publication of monitoring, replacing them with the new language in § 1505.3(c) regarding the contents of a monitoring and compliance plan. A revised paragraph (c) would require agencies to prepare a monitoring and compliance plan when the agency relies on and commits to mitigation in a ROD, FONSI, or separate document, which could be issued after the decision. This provision would require a plan for any mitigation relied upon and adopted as the basis for analyzing the reasonably foreseeable effects of a proposed action, not just mitigation to address significant effects. CEQ views this plan as necessary for an agency to conclude that it is reasonably foreseeable that a mitigation measure will be implemented. Further, the plan is necessary for the agency to conclude that the effects of the action without the mitigation measure are not reasonably foreseeable and, therefore, do not need to be analyzed and disclosed. CEQ does not propose to require a monitoring and compliance plan where an agency analyzes and discloses the effects of the action without the mitigation measure. In that circumstance, the agency would not rely on the mitigation measure as the basis for identifying reasonably foreseeable effects.

New paragraphs (c)(1) and (c)(1)(i) through (c)(1)(vi) would describe the contents of a monitoring and compliance plan and provide agencies flexibility to tailor plans to the complexity of the mitigation that the agency has incorporated into a ROD, FONSI, or other documents. Contents would include a description of the mitigation measures; the parties responsible for monitoring and implementation; how the information will be made

publicly available, as appropriate; the timeframe for the mitigation; the standards for compliance; and how the mitigation will be funded. Agencies may tailor monitoring and compliance plans to the particular action, but they should contain sufficient detail to inform the participating and cooperating agencies and the public about relevant considerations, such as the magnitude of the environmental effects that would be subject to mitigation, the degree to which the mitigation represents an innovative approach, the degree of uncertainty about the efficacy of the mitigation, and other relevant facts that support a determination that the mitigation will be effective. Where a proposed action involves more than one agency, the lead and cooperating agencies should collaboratively develop a monitoring and compliance plan that clearly defines agency roles and avoids duplication of effort.

Requiring agencies to prepare a monitoring and compliance plan for mitigation relied upon in a decision is intended to address concerns that mitigation measures included in agency decisions are not always carried out or monitored for effectiveness. If it is reasonably foreseeable that a mitigation measure will not be effective, then the agency could not appropriately rely on the mitigation measure in determining that an effect is not significant. A monitoring and compliance plan would address this concern and support an agency relying on mitigation for purposes of accurately assessing the environmental effects of a proposed action, and, in some circumstances, concluding that a FONSI is appropriate.

A new paragraph (c)(2) would state that any new information developed through the monitoring and compliance plan would not require an agency to supplement their environmental documents solely because of this new information. This provision is intended to clarify that the existence of a monitoring and compliance plan by itself would not mean that the action to which it relates is an ongoing action if it would otherwise be considered completed; however, if an action remains to occur notwithstanding the

monitoring and compliance plan, the agency may need to supplement its analysis in light of new information if the criteria for supplementation in § 1502.9(d) are met.

The proposed changes to § 1505.3 would be consistent with proposed revisions to 40 CFR 1505.2(c), which direct agencies to adopt and summarize a monitoring and enforcement program for any enforceable mitigation requirements or commitments for a ROD, and changes to § 1501.6(a) to clarify the use of mitigated FONSIs. The changes also would provide more consistency in the content of monitoring and compliance plans, increase transparency in the disclosure of mitigation measures, and provide the public and decision makers with relevant information about mitigation measures and the process to comply with them.

H. Proposed Revisions to Other Requirements of NEPA (Part 1506)

CEQ proposes multiple revisions to part 1506, as described in this section. As noted in section II.C.7, CEQ proposes to move 40 CFR 1506.6, "Public involvement," to proposed § 1501.9, "Public and governmental engagement." CEQ is not proposing changes to § 1506.2, Elimination of duplication with State, Tribal, and local procedures; § 1506.4, Combining documents; or § 1506.8, Proposals for legislation. CEQ invites comment on whether it should make changes to these sections or other changes to part 1506.

1. Limitations on Actions During NEPA Process (§ 1506.1)

CEQ proposes to edit § 1506.1(b) to provide further clarity on the limitations on actions during the NEPA process to ensure that agencies and applicants do not take actions that will adversely affect the environment or limit the choice of reasonable alternatives until an agency concludes the NEPA process.

CEQ is proposing to amend the last sentence in paragraph (b), which provides that agencies may authorize certain activities by applicants for Federal funding while the NEPA process is ongoing. To better align this provision with NEPA's requirements, CEQ

proposes to add a clause to the sentence clarifying that such activities cannot limit the choice of reasonable alternatives, and the Federal agency must notify the applicant that the agency retains discretion to select any reasonable alternative or the no action alternative regardless of any potential prior activity taken by the applicant prior to the conclusion of the NEPA process. This proposal would provide additional clarity consistent with 40 CFR 1506.1(a) and the 2020 Response to Comments, which state that this provision allows certain activities to proceed, prior to a ROD or FONSI, so long as they do not have an adverse environmental impact or limit the choice of reasonable alternatives.[86] It also is responsive to comments received on the 2020 rule expressing concern that the proposed language could allow pre-decisional activities to proceed that would inappropriately narrow the range of alternatives considered by an agency. To address this concern, these commenters requested that the CEQ clarify in the regulations that these pre-decisional activities cannot limit the range of alternatives an agency considers under NEPA.[87] CEQ's proposed amendments to this paragraph would provide clarity on this issue within the regulatory text.

CEQ also proposes to strike "required" in paragraph (c). This edit is consistent with § 1506.11, which encourages, but does not require, the use of programmatic environmental reviews.

2. Adoption (§ 1506.3)

The CEQ regulations have always allowed agencies to adopt all or part of an EIS. The 2020 regulations expanded the adoption provisions to codify longstanding agency practice of adopting EAs and explicitly allowed for adoption of other agencies' prior CE determinations. CEQ has heard from multiple stakeholders, including clean energy and other stakeholders, that CEQ should retain these provisions because they create

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[86] 2020 Response to Comments, *supra* note 63, at 356.
[87] *Id.* at 355.

efficiencies in the NEPA process. Conversely, other stakeholders, including environmental organizations, have raised concerns about potential abuse of the adoption process, especially for CE determinations. CEQ proposes changes to this provision to facilitate use of these efficiency mechanisms in an appropriate and transparent manner. CEQ proposes modifications to § 1506.3 to improve clarity, reduce redundancy, and ensure that when a Federal agency adopts an EIS, EA, or CE determination, the agency conducts an independent review to determine that the EIS, EA, or CE determination meets certain basic standards. CEQ also proposes to add new requirements regarding the adoption of another agency's CE determination to increase public transparency.

In paragraph (a), CEQ proposes to strike the language requiring an EIS, EA, or CE determination to meet relevant standards and instead capture the standards in paragraphs (b) through (d) addressing adoption of EISs, EAs, and CE determinations, respectively. CEQ proposes to replace this clause with a statement that requires adoption to be done "consistent with this section." CEQ proposes to remove "Federal" as unnecessary and to make clear that agencies can adopt NEPA documents prepared by non-Federal entities that are doing so pursuant to delegated authority from a Federal agency. *See, e.g.*, 23 U.S.C. 327.

Accordingly, in paragraph (b), CEQ proposes to add introductory text clarifying the standard for adopting an EIS. The language would provide that an agency may adopt a draft or final EIS, or a portion of a draft or final EIS, if the adopting agency independently reviews the statement and concludes it meets the standards for an adequate statement pursuant to the CEQ regulations and the agency's NEPA procedures. In paragraph (b)(1), which addresses adoption of an EIS for actions that are substantially the same, CEQ proposes to insert "and file" after "republish" to improve consistency with § 1506.9 and because agencies must both publish the EIS and file it with EPA. Further in paragraph (b)(1), CEQ proposes to add text to clarify that agencies should supplement or

reevaluate an EIS if the agency determines that the EIS requires additional analysis. For example, this may be necessary if an agency is adopting an EIS for an action that was evaluated 5 years earlier, and there is more recent data or updated information available on one of the categories of effects. In such instances, the agency would adopt the EIS, prepare a supplemental analysis reevaluating the particular category of effects for which updated information is available, and issue both for public comment. Similarly, if an action is not substantially the same and the adopting agency determines that the EIS requires supplemental analysis, the agency would treat the EIS as a draft, prepare the additional analysis, and publish the new draft EIS for notice and comment. Where a proposed action is not substantially the same, an agency must, at minimum, supplement the adopted EIS to ensure it covers its proposed action.

Additionally, in paragraph (b)(2), which addresses adoption of an EIS by a cooperating agency, CEQ proposes to clarify that this provision is triggered when a cooperating agency does not issue a joint or concurrent ROD consistent with § 1505.2. For example, this provision covers instances when a cooperating agency adopts an EIS for an action the cooperating agency did not anticipate at the time the EIS was issued, such as a funding action for a project that was not contemplated at the time of the EIS. In such instances, the cooperating agency may issue a ROD adopting the EIS of the lead agency without republication. CEQ proposes to strike the text at the end of paragraph (b)(2) regarding independent review because that standard would be captured in paragraph (b).

In paragraph (c), CEQ proposes to add introductory language to clarify the standard for adopting an EA, which mirrors the standard for adoption of an EIS. CEQ similarly proposes edits to align the process with EISs by clarifying that the adopting agency may adopt the EA, and supplement or reevaluate it as necessary, in its FONSI.

For additional clarity, CEQ proposes to add "determinations" to the title of paragraph (d). CEQ also proposes to revise this paragraph to improve readability and clarify that the adopting agency is adopting another agency's already made determination that a CE applies to a particular proposed action where the adopting agency's proposed action is substantially the same. This provision does not allow an agency to unilaterally use another agency's CE for an independent proposed action; rather, that process is addressed in § 1501.4(e).

To ensure that there is public transparency for adoption of CE determinations, like adoption of EAs and EISs, CEQ proposes to require agencies to document and publish their adoption of CE determinations, such as on their website. Proposed changes to paragraph (d)(1) would specify that agencies must document a determination that the proposed action is substantially the same as the action covered by the original CE determination, and there are no extraordinary circumstances present requiring preparation of an EA or EIS. Because agencies typically already make such determinations in the course of adopting CE determinations for actions that are substantially the same, CEQ does not view this documentation requirement as onerous or time consuming.

Finally, CEQ proposes to add paragraph (d)(2) requiring agencies to publicly disclose when they are adopting a CE determination. This proposed change is intended to increase transparency on use of CEs in response to feedback from stakeholders that they often do not know when an agency is proceeding with a CE. This adds a standard to adoption of CE determinations that is similar to the practice for adoption of EAs and EISs. Agencies, however, would have flexibility to determine how to make this information publicly available, including through posting on an agency's website.

3. Agency Responsibility for Environmental Documents (§ 1506.5)

CEQ proposes modification and additions to § 1506.5 to clarify the requirements related to a Federal agency's role in preparing environmental documents and for consistency with section 107(f) of NEPA, which requires agencies to prescribe procedures to allow project sponsors to prepare EAs and EISs under the agencies' supervision and to independently evaluate and take responsibility for such documents. The 2020 rule amended this provision to allow an applicant to prepare EISs on behalf of the agency; however, the 2023 amendments to NEPA make clear that agencies must establish procedures for project sponsors to prepare environmental documents, not the CEQ regulations. CEQ understands the 2023 amendments to NEPA to use the terms applicant and project sponsor interchangeably and, therefore, CEQ proposes to remove references to applicants from this section other than to cross-reference the requirement that agencies establish procedures in their agency NEPA procedures for project sponsors to prepare environmental documents. See section II.I.2. However, CEQ notes that applicants and project sponsors may still provide information to agencies so that they or their contractors may prepare environmental documents consistent with § 1506.5(b).

In paragraph (a), CEQ proposes to clarify that, regardless of who prepares an environmental document, the agency must ensure they are prepared with professional and scientific integrity using reliable data and resources, consistent with sections 102(2)(D) and (2)(E) of NEPA, and exercise its independent judgment to review, take responsibility for, and briefly document its determination that the document meets all necessary requirements and standards related to NEPA, the CEQ regulations, and the agency's NEPA procedures. Agencies do not need to document this determination separately and, for example, could include a certification statement in the environmental document.

Paragraph (b) would provide that agencies can authorize a contractor to draft a FONSI or ROD, but the agency is responsible for its accuracy, scope, and contents. Because a FONSI or ROD represents an agency's conclusions regarding potential environmental impacts and other aspects of a proposed action, CEQ proposes these changes to exclude applicants from directly preparing these documents and to clarify the role of contractors. A lead agency must prescribe procedures to allow a project sponsor to prepare an environmental assessment or an environmental impact statement, consistent with section 107(f) of NEPA, and CEQ proposes to require agencies to include these procedures as part of their agency NEPA procedures in § 1507.3(c)(12). Finalizing and verifying the contents of these decision documents is appropriately the responsibility of the Federal agency and is consistent with longstanding agency practice.

CEQ proposes to revise paragraph (b)(4) to clarify that the Federal agency is responsible for preparing a disclosure statement for the contractor to execute, specifying that the contractor does not have any financial or other interest in the outcome of the proposed action. The proposed language is generally consistent with the approach in the 1978 regulations.

Finally, CEQ proposes to remove the paragraph headings because they do not accurately or helpfully describe the contents of the paragraphs.

4. Further Guidance (§ 1506.7)

CEQ proposes to simplify § 1506.7(a) by deleting references to Executive Orders that have been revoked. CEQ will continue to provide guidance concerning NEPA and its implementation on an as-needed basis. Any such guidance will be consistent with NEPA, the CEQ regulations, and any other applicable requirements. Future guidance could include updates to existing CEQ guidance[88] or new guidance. CEQ also proposes to update paragraph (b) to reflect the date upon which a final rule is effective. If there is a

[88] *See* CEQ, *CEQ Guidance Documents*, https://ceq.doe.gov/guidance/guidance.html.

conflict between existing guidance and an issued final rule, the final rule would prevail after the date upon which it becomes effective.

5. Proposals for Regulations (40 CFR 1506.9)

CEQ proposes to strike 40 CFR 1506.9, "Proposals for regulations." The 2020 rule added this provision to allow agencies to substitute processes and documentation as part of the rulemaking process for corresponding requirements in these regulations.[89] Since 1978, the CEQ regulations have encouraged agencies to combine environmental documents with any other agency document to reduce duplication and paperwork (40 CFR 1506.4), and agencies also may combine procedural steps, for example, to satisfy the public comment requirements of a rulemaking process and NEPA. *See* § 1507.3(c)(5). As such, CEQ expects that the provision at 40 CFR 1506.9 is unnecessary to achieve the desired effect of improved efficiency. Removing this section would avoid confusion and controversy over whether the procedures of a separate process meet the requirements of CEQ's regulations. Further, courts have questioned whether separate regulatory processes can be a substitute for NEPA in some cases. *See e.g.*, *Sierra Club v Fed. Energy Regul. Comm'n*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) ("[T]he existence of permit requirements overseen by another [F]ederal agency or [S]tate permitting authority cannot substitute for a proper NEPA analysis."). Additionally, CEQ does not consider it appropriate to single out one particular type of action—rulemaking—for aligning or combining procedural steps. Indeed, one of the key objectives of agency NEPA procedures is to integrate the NEPA process into other agency processes. Therefore, CEQ suggests the more prudent approach is for agencies to combine NEPA reviews with other reviews for rulemaking, similar to longstanding agency practice to combine NEPA documents with other review processes, such as compliance with section 106 of the National Historic Preservation Act or section 7 of the Endangered Species Act, or set out

[89] 2020 Final Rule, *supra* note 36, at 43338-39.

processes in their NEPA procedures to comply concurrently with multiple legal requirements.

6. Filing Requirements (§ 1506.9)

CEQ proposes to redesignate 40 CFR 1506.10 as § 1506.9, which would restore the same numbering for this and subsequent sections used in the 1978 regulations. CEQ proposes to replace the acronym for EPA with the full name "Environmental Protection Agency" here and in § 1506.10, consistent with the format in the rest of the CEQ regulations. CEQ also proposes to clarify that agencies must notify EPA when they adopt an EIS consistent with § 1506.3(b). CEQ proposes this change to codify common practice and guidance from EPA.[90] EPA notification ensures initiation of the appropriate comment or review period. Such notification, even where a cooperating agency is adopting without public comment consistent with § 1506.3(b)(1), improves transparency to the public regarding the status of an EIS and also helps track the status of EISs across the Federal Government.

7. Timing of Agency Action (§ 1506.10)

To accommodate the change in numbering described in section II.H.6, CEQ proposes to renumber 40 CFR 1506.11 "Timing of agency action" to § 1506.10. CEQ proposes in paragraph (b) to change "may not" to "shall not" to eliminate a potential ambiguity. CEQ proposes changes to paragraph (c)(1) to update this provision to reflect current practices within Federal agencies. Specifically, CEQ proposes to change references to "appeal processes" to "administrative review processes" and add examples, which can include processes such as appeals, objections, and protests. CEQ further proposes updates to align the text to provide flexibility in timing to agencies that use

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[90] *See* EPA, *Environmental Impact Statement Filing Guidance*, https://www.epa.gov/nepa/environmental-impact-statement-filing-guidance. EPA must be notified when a Federal agency adopts an EIS to commence the appropriate comment or review period. If a Federal agency chooses to adopt an EIS written by another agency, and it was not a cooperating agency in the preparation of the original EIS, the EIS must be republished and filed with EPA.

these administrative review processes and clarify that such a process may be initiated either prior to or after the filing and publication of a final EIS with EPA depending on the specifics of the agency's authorities. Depending on the agency involved and their associated authorities, administrative review processes generally allow other agencies or the public to raise issues about a decision and make their views known. CEQ proposes to clarify that the period for administrative review of the decision and the 30-day review period prescribed in paragraph (b)(2) for when a ROD can be issued may run concurrently. CEQ proposes these changes to reflect changes in Federal agency regulations and procedures since this text was promulgated in 1978 and to allow for greater efficiency.

For example, the U.S. Department of Agriculture's Forest Service has an objections process outlined at 36 CFR part 218 where the public can object to a draft decision; these regulations replaced the prior appeal process formerly used by the agency. To initiate the objections process, Forest Service regulations require that the final EIS and a draft ROD be made available to the public, but the Forest Service does not have to publish the final EIS with EPA until the conclusion of the objections process. *See* 36 CFR 218.7(b). The objections process can take 120 to 160 days, during which the agency makes the final EIS widely available to the public. Allowing the agency to file the final EIS with EPA and issue a ROD at the same time as the conclusion of the objections process rather than waiting an additional 30 days following the official filing will add efficiency to the process. These proposed changes also would accommodate similar administrative review procedures. *See e.g.*, 43 CFR 1610.5–2 (outlining the Bureau of Land Management (BLM) protest procedures).

CEQ also proposes minor edits in paragraphs (d) and (e) for clarity and readability.

8. Emergencies (§ 1506.11)

Consistent with changes in the preceding sections, CEQ proposes to renumber 40 CFR 1506.12 "Emergencies" to § 1506.11. CEQ proposes to strike the last sentence stating other actions remain subject to NEPA review. This erroneously implies that actions covered by § 1506.11 are not subject to NEPA review. Instead, CEQ proposes to replace the sentence with language clarifying that alternative arrangements are not a waiver of NEPA; rather, they establish an alternative means for NEPA compliance.

This longstanding provision on emergencies has generated some confusion[91] as to whether, during emergencies, agency actions are exempted from NEPA review. CEQ proposes these changes to clarify that the regulations do not create a NEPA exemption; rather, they provide a pathway for compliance with NEPA where the exigencies of emergency situations do not provide sufficient time for an agency to complete an EIS for an action with significant environmental effects. As has been the long-standing practice, agencies may continue to determine how to proceed with actions to respond to emergencies that do not have significant environmental effects and that would ordinarily be analyzed through an EA. As discussed in section II.I.2, some agencies include procedures for addressing such situations in their agency NEPA procedures.

CEQ does not have the authority to exempt agency actions from NEPA, regardless of whether an emergency exists. The proposed changes to § 1506.11 clarify that CEQ does not offer "alternative arrangements" to circumvent appropriate NEPA analysis but rather allows Federal agencies to establish alternative means for NEPA compliance to ensure that agencies can act swiftly to address emergencies while also meeting their statutory obligations under NEPA. CEQ's proposal would clarify that when emergencies arise, § 1506.11 allows agencies to adjust the means by which they achieve

[91] 2020 Response to Comments, *supra* note 63, at 417–19.

NEPA compliance. This approach is also consistent with CEQ's guidance on NEPA and emergencies, updated in 2020.[92]

9. Innovative Approaches to NEPA Reviews (§ 1506.12)

CEQ proposes to add a new section to the regulations in § 1506.12 to allow CEQ to grant a request for modification to authorize Federal agencies to pursue innovative approaches to comply with NEPA and the regulations in order to address extreme environmental challenges. CEQ's intent is for this section to maximize agency flexibility, creativity, and efficiency while still meeting the requirements of NEPA and providing for sound environmental review. This is a new concept, distinct from the emergency provisions in § 1506.11, and different considerations apply for determining the existence of an extreme environmental challenge sufficient to trigger the proposed § 1506.12 than those for determining the existence of an emergency requiring alternative arrangements pursuant to § 1506.11. For example, an extreme environmental challenge might have a longer time horizon than is typical for an emergency action. As another example, it might be appropriate for an agency to determine that a forest ecosystem presenting a high risk of severe wildfire that could threaten water supplies presents extreme environmental challenges, even though restoration activities would take many years to complete. The intent of this approach is to allow for agencies to take innovative approaches when exploring how to address extreme environmental challenges, which could include, for instance, sea level rise or increased wildfire risk, or bolstering the resilience of infrastructure to increased disaster risk from the effects of climate change; water scarcity; degraded water or air quality; species loss; disproportionate and adverse effects on communities with environmental justice concerns; imminent or reasonably foreseeable loss of historic, cultural, or Tribal resources; and impaired ecosystem health.

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[92] CEQ, Emergencies and the National Environmental Policy Act Guidance (Sept. 14, 2020), https://ceq.doe.gov/docs/nepa-practice/emergencies-and-nepa-guidance-2020.pdf.

Paragraph (a) would provide that the purpose of this section is to allow agencies to comply with NEPA using procedures modified from the requirements of these regulations to address extreme environmental challenges.

Paragraph (b) would require CEQ approval for any innovative approaches and make clear that approval does not waive the requirement to comply with the statute. Rather, this section establishes an alternative means for NEPA compliance to address extreme environmental challenges.

Paragraph (c) would outline what an agency must include in its request for approval of an innovative approach. Agencies would have to identify each provision of the regulations for which they are requesting modification and explain how the innovative approach they propose to ensure NEPA compliance. Agencies also must explain the extreme environmental challenge they are trying to address, why the alternative means are needed to address the challenge, and how the innovative approach would facilitate sound and efficient environmental review. Finally, agencies would need to consult with any potential cooperating agencies and include a summary of their comments with the request.

Paragraph (d) would provide CEQ's process for reviewing and approving such requests. Under this provision, CEQ would evaluate requests within 60 days and may choose whether to approve the approach, approve it with revision, or deny the request. Further, as is stipulated in paragraph (e), CEQ would post on its website all modification requests it has approved or denied.

Examples of innovative approaches that could be the basis for a request include new ways to use information technology; cooperative agreements or work with local communities; methods more fully incorporating, while protecting, Indigenous Knowledge; new ways to work with project proponents and communities to advance proposals; and innovative tools for engaging the public and providing public comment

opportunities, which could enhance participation from communities with environmental justice concerns. CEQ acknowledges that the proposed regulations would not include explicit limits in any of these areas. The intent of proposed § 1506.12 is to help ensure that the regulations have the maximum ability to accommodate ideas not yet put forward to improve NEPA implementation. The proposed regulation would encourage innovation where needed to address extreme environmental challenges, consistent with the purposes and policies expressed in the NEPA statute including to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of [humans]," 42 U.S.C. 4321, and "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences," 42 U.S.C. 4331(b)(3). CEQ invites public comment on this proposed provision to determine if it is necessary. Specifically, CEQ would like input on whether such a provision is needed to address extreme environmental challenges and what Federal agencies would be able to carry out under this proposed provision that they cannot currently accomplish in the current regulations. CEQ also invites public comment on whether CEQ should add additional procedures or limitations to ensure that innovative approaches are used appropriately.

10. Effective Date (§ 1506.13)

CEQ proposes to remove the 2020 effective date and replace it with the date upon which a final rule is effective. CEQ notes that Federal agencies would not need to redo or supplement a completed NEPA review (e.g., where a CE determination, FONSI, or ROD has been issued) as a result of the issuance of this rulemaking.

I. Proposed Revisions to Agency Compliance (Part 1507)

CEQ proposes substantive revisions to all sections in part 1507. CEQ invites comment on whether it should make other changes to this section.

1. Compliance (§ 1507.1)

CEQ proposes to add a second sentence to § 1507.1, restoring language from the 1978 regulations, to state that agencies have flexibility to adapt their implementing procedures to the requirements of other applicable laws. Restoring this language is consistent with the changes CEQ made to 40 CFR 1507.3 in its Phase 1 rulemaking to restore the agency discretion to tailor their NEPA procedures to their unique missions and contexts, creating opportunity for agencies to innovate and improve efficiency.

2. Agency Capability to Comply (§ 1507.2)

CEQ proposes edits to § 1507.2 to emphasize agencies' responsibilities under NEPA, including to incorporate the requirements added to section 102(2) of NEPA by the FRA, and require agencies to designate a Chief Public Engagement Officer. First, CEQ proposes to move the first sentence of 40 CFR 1507.2(a) to a new § 1507.2(b) and require agencies to identify a Chief Public Engagement Officer who would be responsible for facilitating community engagement across the agency and, where appropriate, the provision of technical assistance to communities. Next, CEQ proposes to redesignate 40 CFR 1507.2(b) and (c) as § 1507.2(c) and (d), respectively. Then, CEQ proposes to redesignate the existing 40 CFR 1507.2(d) through (f) as § 1507.2(h) through (j) and add a new paragraph (e) to require agencies to prepare environmental document with professional integrity consistent with section 102(2)(D) of NEPA. In a new paragraph (f), CEQ proposes to require agencies to make use of reliable data and resources, consistent with section 102(2)(E) of NEPA. And in a new paragraph (g), CEQ proposes to require agencies to study, develop, and describe technically and economically feasible alternatives, consistent with section 102(2)(F) of NEPA. Finally, in redesignated paragraph (j), CEQ proposes to delete the reference to E.O. 13807 because E.O. 13990 revoked E.O. 13807.

3. Agency NEPA Procedures (§ 1507.3)

CEQ proposes several updates to § 1507.3 to reorganize paragraphs to improve readability, consolidate related provisions, restore text from the 1978 regulations, and codify CEQ guidance on CEs.

In paragraphs (a) and (b), CEQ would update the effective date to reflect the effective date of a final rule. In paragraph (b), CEQ proposes to give agencies 12 months after the effective date to develop proposed procedures and initiate consultation with CEQ to implement the CEQ regulations. CEQ also proposes moving, with some modification, language from paragraph (c) to paragraph (b) for clarity and to improve organization since the language is generally applicable to all agency NEPA procedures. CEQ would clarify that proposed procedures should facilitate efficient decision making and ensure that agencies make decisions in accordance with the policies and requirements of NEPA.

In paragraph (b)(2), CEQ proposes to change "adopting" to "issuing" to avoid confusion with adoption under § 1506.3. CEQ also proposes to restore text from the 1978 regulations requiring agencies to continue to review their policies and procedures and revise them as necessary to be in full compliance with NEPA. The 2020 rule deleted this language as redundant to language added to 40 CFR 1507.3(b) requiring agencies to update their procedures to implement the final rule.[93] CEQ is proposing to restore this language because CEQ views the requirement for an agency to continue to review their policies and procedures as different than the requirement in paragraph (b) to initially update procedures consistent with a final rule. Further, restoring this requirement is consistent with the proposal in paragraph (c)(9) for agencies to review CEs at least every 10 years. CEQ proposes a new paragraph (b)(3) to explicitly clarify that, consistent with longstanding practice, the issuance of new agency procedures or an update to existing

[93] 2020 Final Rule, *supra* note 36, at 43340.

agency procedures is not subject to NEPA review. To align with these changes with paragraph (b) and its paragraphs, CEQ proposes to strike the first clause in 40 CFR 1507.3(e) because it is unnecessary and could create confusion and move the other text in 40 CFR 1507.3(e) into § 1507.3(c) as discussed below. This provision does not provide any additional direction given the regulations' longstanding existing requirements that agencies develop agency NEPA procedures, and CEQ determinations that they conform to the NEPA regulations. Further, its requirement that agency procedures "comply" with the CEQ regulations could be read to suggest that agencies must complete a NEPA review when establishing their procedures.

Paragraphs (c) and (c)(1) through (c)(10) would list the items that all agency NEPA procedures must include. CEQ proposes minor revisions to paragraphs (c)(1) through (c)(4) to improve clarity and conciseness. CEQ proposes to modify paragraph (c)(3) to clarify that procedures should integrate environmental review into agency decision-making processes so decision makers can make use of them in making the decision. CEQ proposes to modify paragraph (c)(5) to emphasize that combining environmental documents should be done to facilitate sound and efficient decision making and avoid duplication. CEQ proposes to strike the language from this paragraph allowing agencies to designate and rely on other procedures or documents to satisfy NEPA compliance. As discussed further in sections II.C.1 and II.C.2, CEQ has concerns about this language added by the 2020 rule to substitute other reviews as functionally equivalent for NEPA compliance, and therefore proposes to remove it.

To consolidate into one paragraph the required aspects of agency NEPA procedures, CEQ proposes to move 40 CFR 1507.3(e)(1), (e)(2), (e)(2)(i), and (e)(2)(iii) to paragraphs (c)(6), (c)(7), (c)(7)(i) and (c)(7)(ii), respectively, with minor wording modification for readability. CEQ proposes to move with modification 40 CFR 1507.3(e)(2)(ii), requiring agencies to establish CEs and identify extraordinary

circumstances to paragraph (c)(8). CEQ proposes in paragraphs (c)(8)(i) through (c)(8)(iii) to include more specificity about the process for establishing new or revising existing CEs consistent with CEQ's 2010 CE guidance and agency practice. Paragraph (c)(8)(i) would include the existing requirement from 40 CFR 1507.3(e)(2)(i) that agencies identify when documentation is required for a determination that a CE applies to a proposed action. Paragraph (c)(8)(ii) would require agencies to substantiate new or revised CEs and make the documentation publicly available. This is consistent with the 2010 guidance and CEQ's longstanding practice requiring agencies to demonstrate that agency activities are eligible for CEs.[94] CEQ proposes to add paragraph (c)(8)(iii) to require agencies to describe how agencies will consider extraordinary circumstances; this requirement is currently addressed in existing 40 CFR 1507.3(c)(2)(ii).

CEQ proposes to add paragraph (c)(9) to require agencies to include in their NEPA procedures a process for reviewing their CEs every 10 years. This would codify recommendations in CEQ's guidance on establishing CEs,[95] which encourages agencies to review CEs periodically. While the guidance recommends every 7 years,[96] CEQ is proposing for review to occur at least every 10 years. In CEQ's experience, it can take an agency a year or more to conduct such a review and revision given the steps involved, including conducting the review, developing a proposal to update procedures to reflect the review, consulting with CEQ, soliciting public comment, developing final procedures, and receiving a CEQ conformity determination. Federal agencies should review their CEs for multiple reasons, including to determine if CEs remain useful, whether they should modify them, and to determine if circumstances have changed resulting in an existing category raising the potential for significant effects.

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[94] CE Guidance, *supra* note 9.
[95] *Id.*
[96] *Id.* at 16.

CEQ proposes to move 40 CFR 1507.3(e)(3) to paragraph (c)(10) without substantive change. Finally, CEQ proposes to move the requirement for agencies to explain in their NEPA procedures where interested persons can get information on EISs and the NEPA process from 40 CFR 1506.6(e) to § 1507.3(c)(11) and add a reference to EAs as well.

CEQ proposes to codify section 107(f) of NEPA in a new paragraph (c)(12) requiring agencies to include procedures, where applicable, to allow a project sponsor to prepare EAs and EISs consistent with § 1506.5. Since not all agency actions involve project sponsors, CEQ proposes to include "where applicable" to qualify this requirement. CEQ includes "consistent with § 1506.5" so that such procedures would ensure environmental documents prepared by project sponsors (or a contractor on the project sponsor's behalf) are prepared with professional and scientific integrity, and ensure that the agency independently evaluates and takes responsibility for the contents of such documents. It also would ensure agencies require project sponsors to execute a disclosure statement to address financial or other interests. In addition to procedures, agencies may provide project sponsors with guidance and assist in the preparation of the documents consistent with § 1506.5(b)(1). CEQ invites comment on whether it should include additional provisions that agencies should consider or address in establishing such procedures.

CEQ proposes to delete the provisions in 40 CFR 1507.3(d) and its paragraphs, which recommend agency procedures identify different classes of activities or decisions that may not be subject to NEPA. CEQ proposes to revise § 1507.3(d) to provide a list of items that agencies may include in their procedures, as appropriate, which would include, at paragraph (d)(1), identifying activities or decisions that are not subject to NEPA. Proposing to delete the specific categories of such activities or decisions is consistent with the proposed changes to § 1501.1. *See* section II.C.1 and II.C.2. Paragraph (d)(2)

would allow agencies to include processes for emergency actions that would not result in significant environmental effects. This provision is similar to CEQ's own emergency process for EISs provided in § 1506.11 but relates to activities that would not require preparation of an EIS. Some agencies have programs that focus on these types of emergency actions and may need to consider special arrangements for their environmental assessments in these circumstances. These special arrangements could focus on the format of the documents, special distribution and public involvement procedures, and timing considerations. Some agencies have already established such processes in their procedures to ensure efficient NEPA compliance in an emergency. *See, e.g.*, 36 CFR 220.4(b); Dep't of Homeland Sec., Instruction Manual #023-01-001-01, Section VI.[97] CEQ proposes to move, without modification, 40 CFR 1507.3(f)(1) and (f)(2) to paragraphs (d)(3) and (d)(4), respectively. CEQ proposes to remove 40 CFR 1507.3(f)(4) regarding combining the agency's EA process with its scoping process as unnecessary. Section 1501.5(j) clarifies that agencies can employ scoping at their discretion when it will improve the efficiency and effectiveness of EAs, including combining scoping with a comment period on a draft EA. In addition, CEQ proposes to remove, as superfluous, the first sentence of 40 CFR 1507.3(f)(3) regarding lengthy periods between an agency's decision to prepare an EIS and actual preparation, as the regulations do not prescribe specific timelines for preparation of environmental documents. As discussed in section II.D.3, CEQ proposes to move the second sentence of 40 CFR 1507.3(f)(3) regarding supplemental notices when an agency withdraws, cancels, or otherwise ceases the consideration of a proposed action before completing an EIS to § 1502.4(f) with modifications.

[97] https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf.

Finally, as discussed in section II.C.3, CEQ is proposing to strike 40 CFR 1507.3(f)(5) and replace it with a provision in § 1501.4(e) that is consistent with the process established by section 109 of NEPA for adoption or use of another agency's CE.

4. Agency NEPA Program Information (§ 1507.4)

CEQ proposes revisions to § 1507.4, which describes the use of agency websites and other information technology to promote transparency and efficiency in the NEPA process. In paragraph (a), CEQ proposes revisions to remove "environmental" before "documents" because "environmental documents" is a defined term, and the intent of the sentence is to refer to NEPA-related information and documents more broadly; CEQ proposes the same edit in paragraph (a)(1). CEQ also proposes to require agencies to provide on their websites or other information technology tools (to account for new technologies) their agency NEPA procedures and a list of EAs and EISs that are in development and complete. CEQ proposes to revise paragraph (a)(2) to encourage agencies to post their environmental documents to their websites. CEQ proposes to encourage rather than simply allow agencies to include the information listed in paragraphs (a)(1) through (a)(4). Finally, CEQ proposes edits to paragraph (b), which promotes interagency coordination of environmental program websites and shared databases, to provide agencies with additional flexibility and clarify that the section is not limited to the listed technology.

J. Proposed Revisions to Definitions (Part 1508)

Within part 1508, CEQ proposes revisions to the definitions of "cooperating agency," "effects" or "impacts," "environmental assessment," "environmental document," "environmental impact statement," "finding of no significant impact," "human environment," "lead agency," "major Federal action," "mitigation," "notice of intent," "page," "scope," and "tiering." CEQ proposes to add definitions for "environmental justice," "environmentally preferable alternative," "extraordinary

circumstances," "joint lead agency," "participating Federal agency," "programmatic environmental document," and "significant effects."

CEQ does not propose substantive edits to any other definitions, but would redesignate the paragraphs to keep the list of terms in alphabetical order. CEQ invites comment on whether CEQ should modify other definitions or add new definitions. In particular, CEQ invites comment on whether it should define any additional terms used in NEPA, as amended by the FRA, including "applicant" or "project sponsor." CEQ is not proposing to separately define the phrase "communities with environmental justice concerns," but intends that phrase would mean communities that do not experience environmental justice as defined in § 1508.1(k). CEQ is particularly interested in comment on whether to provide a separate definition of "communities with environmental justice concerns," and if so, how the regulations should define that term.

1. Cooperating Agency (§ 1508.1(e))

CEQ proposes to revise the definition of "cooperating agency" in § 1508.1(e) for clarity and consistency with the definition of "cooperating agency" in section 111(2) of NEPA defining this term to mean "any Federal, State, Tribal, or local agency with jurisdiction by law or special expertise that has been designated as a cooperating agency by the lead agency . . . ."

2. Effects or Impacts (§ 1508.1(g))

In § 1508.1(g), CEQ proposes to make clarifying edits and to add and modernize examples. Paragraph (g)(4) lists common types of effects that may arise during NEPA review. CEQ proposes to update the list to add disproportionate and adverse effects to communities with environmental justice concerns and climate change-related effects. For climate change effects, CEQ proposes to clarify that this can include both the contributions to climate change from a proposed action and its alternatives as well as the potential effects of climate change on the proposed action and its alternatives. These

changes would update the definition to include effects that have been an important part of NEPA analysis for more than a decade and will continue to be relevant, consistent with best available science and NEPA's requirements. Also, CEQ proposes these changes in response to comments received during the Phase 1 rulemaking that the definition of "effects" or "impacts" should explicitly address environmental justice and climate change.[98]

3. Environmental Assessment (§ 1508.1(h))

CEQ proposes to update the definition of "environmental assessment" in § 1508.1(h) for consistency with sections 106(b)(2) and 111(4) of NEPA, 40 CFR 1501.5, and longstanding agency practice. CEQ proposes to strike "prepared by" and change it to "for which a Federal agency is responsible" for consistency with section 107(f) of NEPA and § 1506.5, which allow a contractor or project sponsor (following agency issuance of procedures) to prepare an EA but requires that the agency take responsibility for the accuracy of its contents irrespective of who prepares it. This change would be consistent with longstanding agency practice to allow applicants and contractors to prepare EAs, so long as the agency is ultimately responsible for the contents.

To improve readability, CEQ proposes edits to add text from § 1501.5 clarifying that an agency prepares an EA when a proposed action is not likely to have a significant effect or the significance of the effects is unknown. CEQ also proposes to simplify language in the rest of the paragraph by deleting superfluous text. These proposed changes do not alter the intention that an EA is used to support an agency's determination whether to prepare an EIS (part 1502) or issue a FONSI (§ 1501.6).

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[98] Phase 1 Response to Comments, *supra* note 48, at 87, 99.

4. Environmental Document (§ 1508.1(i))

CEQ proposes to add "record of decision" to the definition of "environmental document" in § 1508.1(i) for clarity. CEQ also proposes to add a documented CE determination to the definition to reflect the longstanding agency practice of documenting some CE determinations. This change also is consistent with the change CEQ proposes to §§ 1501.4 and 1507.3 to add references to CE determinations. Therefore, for clarity and efficiency, CEQ is proposing to incorporate documented CE determinations into the definition of "environmental document." CEQ notes that section 111(5) of NEPA defines "environmental document" more narrowly to only include EISs, EAs, and FONSIs. However, CEQ is proposing to retain and expand the regulatory definition since the term is used more broadly in the CEQ regulations.

5. Environmental Impact Statement (§ 1508.1(j))

CEQ proposes to change "as required" to "that is required" in the definition of EIS in § 1508.1(j) for consistency with the definition of "environmental impact statement" in section 111(6) of NEPA.

6. Environmental Justice (§ 1508.1(k))

CEQ proposes to add a new definition of "environmental justice" at § 1508.1(k). This definition would align with the definition set forth in section 2(b) of E.O. 14096.[99] This provision would define "environmental justice" as the just treatment and meaningful involvement of all people so that they are fully protected from disproportionate and adverse human health and environmental effects and hazards, and have equitable access to a healthy, sustainable, and resilient environment. The proposed definition of environmental justice uses the phrase "cumulative impacts," rather than the phrase "cumulative effects," which are used elsewhere in the proposed regulations. That is because the phrase "cumulative impacts" has a meaning in the context of environmental

[99] E.O. 14096, *supra* note 20, at 25253.

justice relating to the aggregate effect of multiple stressors and exposures on a person, community, or population. *See, e.g.*, Environmental Protection Agency, Cumulative Impacts Research: Recommendations for EPA's Office of Research and Development (2022). CEQ views the evolving science on cumulative impacts as sufficiently distinct from the general meaning of cumulative effects under the NEPA regulations that using a different term could be helpful to agencies and the public. CEQ invites comment on this approach.

7. Environmentally Preferable Alternative (§ 1508.1(*l*))

CEQ proposes to add a new definition of "environmentally preferable alternative" at § 1508.1(*l*). Since 1978, the CEQ regulations have required agencies to identify the environmentally preferable alternative or alternatives in the ROD (§ 1505.2(b)). While the regulations did not define the term, CEQ's Forty Questions document provided an explanation, upon which CEQ has based the proposed definition.[100] The environmentally preferable alternative is the alternative that will best promote the national environmental policy as expressed in section 101 of NEPA. 42 U.S.C. 4331. Application of the term "environmentally preferable alternative" is also described in § 1502.14(f) and discussed in section II.D.9.

8. Extraordinary Circumstances (§ 1508.1(m))

CEQ proposes to add a definition of "extraordinary circumstances" at § 1508.1(m). The 1978 regulations included the meaning of extraordinary circumstances in the definition of "categorical exclusion" at 40 CFR 1508.4 (2019), which the 2020 rule moved to 40 CFR 1501.4(b) (describing how to apply extraordinary circumstances when considering use of a CE) and 40 CFR 1507.3(e)(2)(ii) (requiring agencies to establish extraordinary circumstances for CEs in their procedures).[101] CEQ proposes to create a

[100] Forty Questions, *supra* note 4.
[101] 2020 Final Rule, *supra* note 36, at 43322, 43342–43.

standalone definition of "extraordinary circumstances" to improve clarity when this term is used throughout the rule.

CEQ also proposes to add several examples of extraordinary circumstances to help agencies and the public understand common situations that agencies may consider in determining whether application of a CE is appropriate. The examples would include impacts on sensitive environmental resources, disproportionate and adverse effects on communities with environmental justice concerns, effects associated with climate change, and effects on historic properties or cultural resources. This list of examples would not be exclusive, and agencies would continue to have the discretion to identify extraordinary circumstances in their NEPA implementing procedures that are specific and appropriate to their particular actions and CEs consistent with § 1507.3.

9. Finding of No Significant Impact (§ 1508.1(o))

In the definition of FONSI in § 1508.1(o), CEQ proposes to insert "agency's determination that and" after "presenting the" for consistency with the definition of FONSI in section 111(7) of NEPA, which defines the term to mean "a determination by a Federal agency that a proposed agency action does not require the issuance of an environmental impact statement."

10. Human Environment or Environment (§ 1508.1(p))

CEQ proposes to clarify that "human environment" and "environment" are synonymous in the regulations given that the latter is the more commonly used term. CEQ proposes a minor edit to "human environment" in § 1508.1(p) to remove "of Americans" after "present and future generations." This minor edit improves consistency with NEPA in section 101(a), which speaks more generally about the impact of people's "activity on the interrelations of all components of the natural environment" and the need "to create and maintain conditions under which [humans] and nature can exist in productive harmony." 42 U.S.C. 4331(a).

In the 2020 rule, CEQ changed "people" to "of Americans," explaining that it was done to be consistent with section 101(a) of NEPA.[102] However, CEQ now considers this explanation to overlook the context in which the phrase "present and future generations of Americans" is used in section 101(a). That paragraph of the Act refers to Americans at the end of the last sentence after using the broader term "man" three times. A reasonable interpretation is that human environment refers broadly to the interrelationship between people and the environment. The phrase "present and future generations of Americans" is used in a narrower context to "fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. 4331(a).

11. Joint lead agency (§ 1508.1(q))

CEQ proposes to add a definition for "joint lead agency" consistent with the usage of that term in section 107(a)(1)(B) of NEPA and § 1501.7(b) and (c).

12. Lead Agency (§ 1508.1(s))

CEQ proposes to revise the definition of "lead agency" for consistency with the definition of "lead agency" in section 111(9) of NEPA and to expand the definition of "lead agency" in § 1508.1(s) to also include EAs, consistent with longstanding practice.

13. Major Federal Action (§ 1508.1(u))

CEQ proposes to move the definition of "major Federal action" currently provided in 40 CFR 1508.1(q) to § 1508.1(u), revise it to clarify the list of example activities or decisions that meet the definition, and revise the list of exclusions from the definition consistent with section 111(10) of NEPA. CEQ notes that the determination of whether an activity or decision is a major Federal action is a fact-specific analysis that agencies have long engaged in to determine where they have substantial control and responsibility to consider environmental effects in their decision making.

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[102] *Id.* at 43344–45.

CEQ proposes to reorder and revise the definition to list the examples of activities or decisions that may be included in the definition of "major Federal action" in paragraph (u)(1), redesignating current 40 CFR 1508.1 (q)(3)(i) through (q)(3)(iv) as paragraphs (u)(1)(ii) through (u)(1)(v). To paragraph (u)(1), CEQ proposes to revise the current example in 40 CFR 1508.1(q)(2) in paragraph (u)(1)(i) and add one example of potential major Federal actions.

First, CEQ proposes to strike 40 CFR 1508.1(q)(2) and replace it with paragraph (u)(1)(i) to include the granting of authorizations such as permits, licenses, and rights-of way. CEQ proposes to strike the existing examples since regulated activities would be addressed in this revised example, and the others are redundant to the other examples listed in paragraphs (u)(1)(ii) through (u)(1)(vi).

Second, CEQ proposes to revise the phrase "connected agency decisions" to "related agency decisions" in paragraph (u)(1)(iv) to clarify that the concept in this paragraph is not meant to refer to "connected actions" as defined in § 1501.3. CEQ considers this a non-substantive, clarifying change to avoid any confusion with connected actions.

Third, CEQ proposes to revise paragraph (u)(1)(v) to change "approval of" to "carrying out" specific projects to address projects carried out directly by a Federal agency. CEQ proposes to strike "located in a defined geographic area" from the example of management activities; while this is merely an example, CEQ is concerned it could be read as limiting. CEQ also proposes to strike the sentence regarding permits and regulatory decisions as this would be addressed by the example in paragraph (u)(1)(i).

Fourth, CEQ proposes to add a new example at § 1508.1(u)(1)(vi) to explain when Federal financial assistance is a major Federal action. Generally, Federal financial assistance, other than minimal Federal funding, is a major Federal action where the Federal agency has authority and discretion over the financial assistance in a manner that

could address environmental effects from the activities receiving the financial assistance. In such circumstances, the agency has sufficient control and responsibility over the use of the funds or the effects of the action for the decision to provide financial assistance to constitute a major Federal action consistent with the definition in section 111(10) of NEPA. This includes circumstances where the agency could deny the financial assistance, in whole or in part, due to environmental effects from the activity receiving the financial assistance, or could impose conditions on the financial assistance that could address the effects of such activity.

To improve clarity and ensure appropriate application of NEPA, CEQ proposes this example of what a major Federal action may include. CEQ considers that, other than for minimal Federal Funding, where an agency has substantial control and responsibility over a recipient's environmental effects or sufficient discretion to consider the environmental effects when making decisions, the appropriate approach is for agencies to identify the corresponding scope of analysis rather than excluding an activity or decision from NEPA review altogether. For example, if a Federal agency operates a loan guarantee program, the agency may have discretion in the types of activities to which it might issue a loan guarantee. A NEPA review that analyzes the environmental effects of potential project types could help inform how the agency designs the program. Depending on the terms of the loan guarantee program, the agency may have substantial control and responsibility over the use of the funds such that an environmental analysis can inform the decision making. As noted in section II.C.2 and earlier in this section, this is a fact-specific analysis agencies undertake based on the specifics of their authority for a particular action.

In § 1508.1(u)(2), CEQ proposes to replace the exclusions currently in 40 CFR 1508.1(q)(1)(i) through (vi) with the exclusions from the definition of major Federal action codified in the definition in section 111(10)(B) of NEPA. Paragraph (u)(2)(i)(A)

and (B) would include the exclusion of non-Federal actions with no or minimal funding; or with no or minimal Federal involvement where the agency cannot control the outcome of the project consistent with section 111(10)(B)(i) of NEPA. These exclusions would replace the current exclusion in 40 CFR 1508.1(q)(1)(vi), which CEQ proposes to strike. CEQ invites comment on whether it should add additional provisions to the regulations to implement the "minimal Federal funding" exclusion in § 1508.1(u)(2)(i)(A). Agencies currently evaluate the provision of minimal Federal funding based on specific factual contexts. CEQ is interested in whether additional procedures, including thresholds for the amount or proportion of Federal funding necessary for an agency action to constitute major Federal action, could increase predictability while ensuring that Federal agencies do not overlook effects to vital components of the human environment, including the health of children and vulnerable populations, drinking water, communities with environmental justice concerns, and similar considerations.

Paragraph (u)(2)(ii) would include the exclusion of funding assistance solely in the form of general revenue sharing funds consistent with section 111(10)(B)(ii) of NEPA. This exclusion would replace the current, similar exclusion in 40 CFR 1508.1(q)(1)(v), which CEQ proposes to strike.

Paragraph (u)(2)(iii) would include the exclusion of loans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effects of the action, consistent with section 111(10)(B)(iii) of NEPA.

Paragraph (u)(2)(iv) would include the exclusion of certain business loan guarantees provided by the Small Business Administration, consistent with section 111(10)(B)(iv) of NEPA. These exclusions would replace the current, similar exclusion in 40 CFR 1508.1(q)(1)(vii), which CEQ proposes to strike. In particular, CEQ proposes to strike the example currently in 40 CFR 1508.1(q)(1)(vii) for farm ownership and

operating loan guarantees by the Farm Service Agency pursuant to 7 U.S.C. 1925 and 1941 through 1949. CEQ considers it best left to agencies to identify exclusions from the definition of major Federal action absent specific statutory authority like those for the Small Business Administration loan guarantees.

Next, CEQ proposes to move the existing exclusions, currently in 40 CFR 1508.1(q)(1)(iv), (q)(1)(i), and (q)(1)(ii) to paragraphs (u)(2)(v) through (u)(2)(vii), respectively. Section 111(10)(B)(v) through (vii) of NEPA codified these exclusions. Paragraph (u)(2)(v) would exclude bringing judicial or administrative civil or criminal enforcement actions. Paragraph (u)(2)(vi) would exclude extraterritorial activities or decisions.[103] Paragraph (u)(2)(vii) would exclude activities or decisions that are non-discretionary. CEQ notes that there may be activities or decisions that are partially non-discretionary. In such circumstances, an agency may conclude that the non-discretionary components of an activity or decision are not major Federal actions and exclude the non-discretionary components from analysis. In such circumstances, the agency would consider the discretionary components of the activity or decision. For example, if a statute mandated an agency to make an affirmative decision once a set of criteria are met, but the agency has flexibility in how to meet those criteria, the agency still has some discretion to consider alternatives and effects. Similarly, if a statute directs an agency to take an action, but the agency has discretion in how it takes that action, the agency can still comply with NEPA while carrying out its statutory mandate.

CEQ proposes to move the exclusion regarding final agency actions from 40 CFR 1508.1(q)(1)(iii) to § 1508.1(u)(2)(viii) and make changes for consistency with section 106(a)(1). While section 106(a)(1) of NEPA includes this as a threshold factor for not requiring an EIS or EA, it is consistent with longstanding caselaw to exclude non-final

[103] CEQ notes that the statutory exclusion of these activities from the definition of major Federal action and therefore NEPA review does not change the scope of environmental effects that agencies should assess for actions that are subject to NEPA review.

agency actions from the definition of major Federal action. Therefore, CEQ proposes to include this as a threshold consideration as well as an exclusion from the definition of major Federal action.

Finally, CEQ proposes a new exclusion in § 1508.1(u)(2)(ix) for activities or decisions for projects approved by a Tribal Nation that occur on or involve land held in trust or restricted status when the activities involve no Federal funding or other Federal involvement. Recognizing the unique circumstances facing Tribal Nations due to the United States holding land in trust for them or the Tribal Nation holding land in restricted status, CEQ proposes this exclusion to clarify that activities or decisions for projects approved by a Tribal Nation on trust lands are not major Federal actions where such activities do not involve Federal funding or other Federal involvement. Tribal leaders raised this issue during consultations that CEQ held on its NEPA regulations and voiced concerns that the NEPA process placed Tribal Nations in a disadvantageous position relative to State and local governments because of the United States' ownership interest in Tribal lands. Categories of activities on trust lands that typically will not constitute major Federal actions include transfer of existing operation and maintenance activities of Federal facilities to Tribal groups, water user organizations, or other entities; human resources programs such as social services, education services, employment assistance, Tribal operations, law enforcement, and credit and financing activities not related to development; self-governance compacts for Bureau of Indian Affairs programs; service line agreements for an individual residence, building, or well from an existing facility where installation will involve no clearance of vegetation from the right-of-way other than for placement of poles, signs (including highway signs), or buried power/cable lines; and approvals of Tribal regulations or other documents promulgated in exercise of Tribal sovereignty, such as Tribal Energy Resource Agreements, certification of a Tribal Energy Development Organization, Helping Expedite and Advance Responsible Tribal

Homeownership Act Tribal regulations, Indian Trust Asset Reform Act Tribal regulations and trust asset management plans, and Tribal liquor control ordinances.

14. Mitigation (§ 1508.1(w))

CEQ proposes three edits to the definition of "mitigation" in § 1508.1(w). First, CEQ proposes to change "nexus" to the more commonly used word "connection" to describe the relationship between a proposed action or alternatives and any associated environmental effects. Second, CEQ proposes to delete the sentence that NEPA "does not mandate the form or adoption of any mitigation" because this sentence is unnecessary and could mislead readers by not acknowledging that agencies may use other authorities to require mitigation or may incorporate mitigation in mitigated FONSIs (§ 1501.6) and RODs (§ 1505.2). Third, CEQ proposes to add the clause "in general order of priority" to the sentence, "Mitigation includes" which introduces the list of mitigation types. This change would clarify that the types of mitigation provided in paragraphs (u)(1) though (u)(5) are listed in general order of priority, consistent with the familiar "mitigation hierarchy."[104] This list was prioritized in the 1978 regulations with avoidance coming before other types of mitigation and this proposed addition highlights that intent, which is consistent with longstanding agency practice.[105]

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[104] *See e.g.*, U.S. Dep't of the Interior, A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior 2–3 (Apr. 2014), https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Mitigation-Report-to-the-Secretary_FINAL_04_08_14.pdf (discussing the development of a "mitigation hierarchy"—which starts with avoidance—in the implementation of NEPA and the Clean Water Act); Bureau of Land Mgmt., H-1794-1, Mitigation Handbook (P) 2-1 (Sept. 22, 2021), https://www.blm.gov/sites/default/files/docs/2021-10/IM2021-046_att2.pdf (citing CEQ regulations and noting that the "five aspects of mitigation (avoid, minimize, rectify, reduce/eliminate, compensate) are referred to as the mitigation hierarchy because they are generally applied in a hierarchical manner"); U.S. Env't Prot. Agency & U.S. Dep't of Def., Memorandums of Agreement (MOA); Clean Water Act Section 404(b)(1) Guidelines; Correction, 55 FR 9210, 9211 (Mar. 12, 1990) (noting that under section 404 of the Clean Water Act, the Army Corps of Engineers evaluates potential mitigation efforts sequentially, starting with avoidance, minimization, and then compensation).

[105] *See, e.g.*, 10 CFR 900.3 (defining a regional mitigation approach under NEPA as "an approach that applies the mitigation hierarchy (first seeking to avoid, then minimize impacts, then, when necessary, compensate for residual impacts)"); Presidential Memorandum, Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment, 80 FR 68743, 68745 (Nov. 6, 2015) (addressing five agencies and noting that, "[a]s a practical matter, [mitigation is] captured in the terms avoidance, minimization, and compensation. These three actions are generally applied

15. Notice of Intent (§ 1508.1(y))

CEQ proposes to modify the definition of notice of intent to include environmental assessments, as applicable. CEQ proposes this change for consistency with § 1501.5(j), which provides that agencies may issue an NOI for an EA where it is appropriate to improve efficiency and effectiveness, and § 1501.10(b)(3)(iii), which sets forth one of the three potential starting points from which deadlines are measured for environmental assessments consistent with section 107(g)(1)(B)(iii).

16. Page (§ 1508.1(z))

CEQ proposes to modify the definition of "page" consistent with section 107(e) of NEPA to exclude citations from the page limits for EISs and EAs. CEQ proposes to retain the exclusions for maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information from the definition of "page" to facilitate better NEPA documents. While agencies could move these visual representations of information to appendices, which could come at the end of an EIS or the end of EIS chapters, CEQ is concerned that this will make the documents less functional to decision makers and the public. Further, such graphical displays themselves could be considered appendices consistent with the ordinary definition of appendix—supplementary material usually attached at the end of a piece of writing.[106] CEQ invites comment on its proposed definition of "page."

17. Participating Federal Agency (§ 1508.1(bb))

CEQ proposes to add a definition of "participating Federal agency" to § 1508.1(bb) and define it consistent with the definition of the same term in section 111(8) of NEPA.

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sequentially . . . .");Fed. Highway Admin., *NEPA and Transportation Decisionmaking: Questions and Answers Regarding the Consideration of Indirect and Cumulative Impacts in the NEPA Process* Question 9, https://www.environment.fhwa.dot.gov/nepa/QAimpact.aspx (describing the importance of "sequencing," which refers to the process of prioritizing avoidance and minimization of effects over replacement or compensation for NEPA mitigation efforts).

[106] Merriam-Webster, https://www.merriam-webster.com/dictionary/appendix.

18. Programmatic Environmental Document (§ 1508.1(cc))

CEQ proposes to add a definition of "programmatic environmental document" to § 1508.1(cc) and define it consistent with the definition of the same term in section 111(11) of NEPA.

19. Scope (§ 1508.1(ii))

CEQ proposes to expand the definition of "scope" to include EAs and revise the definition to include both the range and breadth of the actions, alternatives, and effects to be considered in an EIS or EA, consistent with CEQ's proposed relocation of the discussion of scope in § 1501.3(b). As discussed further in section II.C.2, agencies have long examined the scope of their actions to determine what alternatives and effects they must analyze. This is a fact-specific analysis that agencies undertake informed by their statutory authority and control and responsibility over the activity. CEQ also proposes to strike the last sentence regarding tiering because it is not definitional language and is unnecessary because this concept is more fully addressed in § 1501.11.

20. Significant Effects (§ 1508.1(kk))

CEQ proposes to add a definition for "significant effects" to provide a definition for those effects that are of vital importance in the NEPA process in determining the appropriate level of review. The proposed definition would align with the restoration of the context and intensity factors for determining significance in § 1501.3(d). CEQ proposes to define "significant effects" as adverse effects identified by an agency as significant based on the criteria set forth in § 1501.3(d). This would clarify that beneficial effects are not significant effects as the phrase is used in NEPA and, therefore, do not require an agency to prepare an EIS. CEQ proposes this as an alternative approach to the proposal in § 1501.3(d)(2)(i) where an action "does not" require an EIS when it would result only in significant beneficial effects. If CEQ includes this definition in the final rule, this approach would mean that an agency would not need to prepare an EIS if a

proposed action's effects are exclusively beneficial. However, irrespective of the level of NEPA review, agencies would still need to analyze both adverse and beneficial effects in NEPA documents if they are reasonably foreseeable. CEQ invites comment on the definition, specifically on the inclusion of "adverse" in the definition, and comments on whether the approach in § 1501.3(d)(2)(i) or § 1508.1(kk) is preferred and the reasons why. Finally, CEQ invites the public to submit any examples of EAs or EISs where there were significant effects that were purely beneficial.

21. Tiering (§ 1508.1(mm))

CEQ proposes to revise the definition of tiering to cross reference the process as set forth in § 1501.11. CEQ is proposing this revision to avoid any potential inconsistencies between the definition and the provisions of § 1501.11.

III. Rulemaking Analyses and Notices

A. Executive Order 12866, Regulatory Planning and Review

E.O. 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules.[107] E.O. 13563 reaffirms the principles of E.O. 12866, calling for improvements in the Federal Government's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory objectives.[108] This proposed rule is a significant regulatory action under section 3(f)(1) of E.O. 12866 that CEQ submitted to OMB for review. The proposed changes would improve the CEQ regulations to benefit agencies and the public. Furthermore, an effective NEPA process can save time and reduce overall project costs by providing a clear process for evaluating alternatives and effects, coordinating agencies and relevant stakeholders including the public, and identifying and avoiding problems—including potential significant

[107] *Regulatory Planning and Review*, 58 FR 51735 (Oct. 4, 1993).
[108] E.O. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (Jan. 21, 2011).

effects—that may occur in later stages of project development.[109] Additionally, if agencies choose to consider additional alternatives and conduct clearer or more robust analyses, such analyses should improve societal outcomes by improving agency decision making. Because individual cases will vary, the magnitude of potential costs and benefits resulting from these proposed changes are difficult to anticipate, but CEQ has prepared a qualitative analysis in the accompanying regulatory impact analysis.

B. Regulatory Flexibility Act and Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act (RFA), as amended, 5 U.S.C. 601 *et seq.*, and E.O. 13272, *Proper Consideration of Small Entities in Agency Rulemaking*,[110] require agencies to assess the impacts of proposed and final rules on small entities. Under the RFA, small entities include small businesses, small organizations, and small governmental jurisdictions. An agency must prepare an Initial Regulatory Flexibility Analysis unless it determines and certifies that a proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). The proposed rule would not directly regulate small entities. Rather, the proposed rule would apply to Federal agencies and set forth the process for their compliance with NEPA. Accordingly, CEQ hereby certifies that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

C. National Environmental Policy Act

Under the CEQ regulations, major Federal actions may include regulations. When CEQ issued regulations in 1978, it prepared a "special environmental assessment" for

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[109] *See generally* Linda Luther, Cong. Rsch. Serv. R42479, The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress (2012), https://crsreports.congress.gov/product/pdf/R/R42479.
[110] 67 FR 53461 (Aug. 16, 2002).

illustrative purposes pursuant to E.O. 11991.[111] The NPRM for the 1978 rule stated "the impacts of procedural regulations of this kind are not susceptible to detailed analysis beyond that set out in the assessment."[112] Similarly, in 1986, while CEQ stated in the final rule that there were "substantial legal questions as to whether entities within the Executive Office of the President are required to prepare environmental assessments," it also prepared a special EA.[113] The special EA issued in 1986 supported a FONSI, and there was no finding made for the assessment of the 1978 final rule. CEQ also prepared a special EA and reached a FONSI for the Phase 1 rulemaking.

CEQ continues to take the position that a NEPA analysis is not required for establishing or updating NEPA procedures. *See Heartwood v. U.S. Forest Serv.*, 230 F.3d 947, 954–55 (7th Cir. 2000) (finding that neither NEPA or the CEQ regulations required the Forest Service to conduct an EA or an EIS prior to the promulgation of its procedures creating a CE). Nevertheless, based on past practice, CEQ has developed a special EA and has posted it in the docket. CEQ invites comments on the special EA.

D. Executive Order 13132, Federalism

E.O. 13132 requires agencies to develop an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.[114] Policies that have federalism implications include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.[115] CEQ does not anticipate that this proposed rule has federalism implications because it applies to

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[111] National Environmental Policy Act—Regulations: Proposed Implementation of Procedural Provisions, 43 FR 25230, 25232 (June 9, 1978); *see* E.O. 11991, *supra* note 26.
[112] National Environmental Policy Act—Regulations: Proposed Implementation of Procedural Provisions, *supra* note 111, at 25232.
[113] National Environmental Policy Act Regulations; Incomplete or Unavailable Information, *supra* note 29, at 15619.
[114] E.O. 13132, *Federalism*, 64 FR 43255 (Aug. 10, 1999).
[115] *Id*.

Federal agencies, not States.

E. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

E.O. 13175 requires agencies to have a process to ensure meaningful and timely input by Tribal officials in the development of policies that have Tribal implications.[116] Such policies include regulations that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.[117] CEQ has assessed the impact of this proposed rule on Indian Tribal governments and has determined preliminarily that the proposed rule does significantly or uniquely affect these communities and seeks comment on this preliminary determination. CEQ engaged in government-to-government consultation with federally recognized Tribes on the Phase 2 rulemaking. As required by E.O. 13175, CEQ held a Tribal consultation on this rulemaking on November 12, 2021, and will be holding additional consultations during the public comment period.

F. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All

E.O. 12898 requires agencies to make achieving environmental justice part of their missions by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on communities of color and low-income communities.[118] E.O. 14096 charges agencies to make achieving environmental justice part of its mission consistent with statutory

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[116] E.O. 13175, *supra* note 53.
[117] *Id*.
[118] E.O. 12898, *supra* note 7.

authority by identifying, analyzing, and addressing disproportionate and adverse human health and environmental effects and hazards of Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns.

CEQ has analyzed this proposed rule and preliminarily determined that it would not cause disproportionate and adverse human health or environmental effects on communities with environmental justice concerns. This rule would set forth implementing regulations for NEPA; it is in the agency implementation of NEPA when conducting reviews of proposed agency actions where consideration of environmental justice effects typically occurs. CEQ invites comment on this preliminary determination.

G. Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use

Agencies must prepare a Statement of Energy Effects for significant energy actions under E.O. 13211.[119] CEQ has preliminarily determined that this rulemaking is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

H. Executive Order 12988, Civil Justice Reform

Under section 3(a) of E.O. 12988, agencies must review their proposed regulations to eliminate drafting errors and ambiguities, draft them to minimize litigation, and provide a clear legal standard for affected conduct[120] Section 3(b) provides a list of specific issues for review to conduct the reviews required by section 3(a).[121] CEQ has conducted this review and determined that this proposed rule complies with the requirements of E.O. 12988.

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[119] E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*, 66 FR 28355 (May 22, 2001).
[120] E.O. 12988, *Civil Justice Reform*, 61 FR 4729, 4731 (Feb. 7, 1996).
[121] *Id*.

I. Unfunded Mandate Reform Act

Section 201 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531, requires Federal agencies to assess the effects of their regulatory actions on Tribal, State, and local governments, and the private sector to the extent that such regulations incorporate requirements specifically set forth in law. Before promulgating a rule that may result in the expenditure by a Tribal, State, or local government, in the aggregate, or by the private sector of $100 million, adjusted annually for inflation, in any 1 year, an agency must prepare a written statement that assesses the effects on Tribal, State, and local governments and the private sector. 2 U.S.C. 1532. This proposed rule would apply to Federal agencies and would not result in expenditures of $100 million or more for Tribal, State, and local governments, in the aggregate, or the private sector in any 1 year. This proposed action also would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of 2 U.S.C. 1531–1538.

J. Paperwork Reduction Act

This proposed rule would not impose any new information collection burden that would require additional review or approval by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

Administrative practice and procedure; Environmental impact statements; Environmental protection; Natural resources.

Brenda Mallory,

Chair.

For the reasons discussed in the preamble, the Council on Environmental Quality proposes to amend 40 CFR chapter V by revising subchapter A to read as follows:

1. Revise subchapter A to read as follows:

PART 1500—PURPOSE AND POLICY

Sec.
1500.1 Purpose.
1500.2 Policy.
1500.3 NEPA compliance.
1500.4 Concise and informative environmental documents.
1500.5 Efficient process.
1500.6 Agency authority.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

PART 1501—NEPA AND AGENCY PLANNING

Sec.
1501.1 Purpose.
1501.2 Apply NEPA early in the process.
1501.3 Determine the appropriate level of NEPA review.
1501.4 Categorical exclusions.
1501.5 Environmental assessments.
1501.6 Findings of no significant impact.
1501.7 Lead agency.
1501.8 Cooperating agencies.
1501.9 Public and governmental engagement.
1501.10 Deadlines and schedule for the NEPA process.
1501.11 Programmatic environmental documents and tiering.
1501.12 Incorporation by reference into environmental documents.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.
1502.1 Purpose of environmental impact statement.
1502.2 Implementation.
1502.3 Statutory requirements for environmental impact statements.
1502.4 Scoping.
1502.5 Timing.

1502.6 Interdisciplinary preparation.
1502.7 Page limits.
1502.8 Writing.
1502.9 Draft, final, and supplemental statements.
1502.10 Recommended format.
1502.11 Cover.
1502.12 Summary.
1502.13 Purpose and need.
1502.14 Alternatives including the proposed action.
1502.15 Affected environment.
1502.16 Environmental consequences.
1502.17 Summary of scoping information.
1502.18 List of preparers.
1502.19 Appendix.
1502.20 Publication of the environmental impact statement.
1502.21 Incomplete or unavailable information.
1502.22 Cost-benefit analysis.
1502.23 Methodology and scientific accuracy.
1502.24 Environmental review and consultation requirements.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and

E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991,

42 FR 26967, 3 CFR, 1977 Comp., p. 123.

PART 1503—COMMENTING ON ENVIRONMENTAL IMPACT STATEMENTS

Sec.
1503.1 Inviting comments and requesting information and analyses.
1503.2 Duty to comment.
1503.3 Specificity of comments and information.
1503.4 Response to comments.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and

E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991,

42 FR 26967, 3 CFR, 1977 Comp., p. 123.

PART 1504—PRE-DECISIONAL REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.
1504.1 Purpose.
1504.2 Early dispute resolution.
1504.3 Criteria and procedure for referrals and response.

PART 1505—NEPA AND AGENCY DECISION MAKING

Sec.
1505.1 [Reserved]
1505.2 Record of decision in cases requiring environmental impact statements.
1505.3 Implementing the decision.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and

E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991,

42 FR 26967, 3 CFR, 1977 Comp., p. 123.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.
1506.1 Limitations on actions during NEPA process.
1506.2 Elimination of duplication with State, Tribal, and local procedures.
1506.3 Adoption.
1506.4 Combining documents.
1506.5 Agency responsibility for environmental documents.
1506.6 [Reserved]
1506.7 Further guidance.
1506.8 Proposals for legislation.
1506.9 Filing requirements.
1506.10 Timing of agency action.
1506.11 Emergencies.
1506.12 Innovative approaches to NEPA reviews.
1506.13 Effective date.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and

E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991,

42 FR 26967, 3 CFR, 1977 Comp., p. 123.

PART 1507—AGENCY COMPLIANCE

Sec.
1507.1 Compliance.
1507.2 Agency capability to comply.
1507.3 Agency NEPA procedures.
1507.4 Agency NEPA program information.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and

E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991,

42 FR 26967, 3 CFR, 1977 Comp., p. 123.

PART 1508—DEFINITIONS

Sec.
1508.1 Definitions.

1508.2 [Reserved]

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

PART 1500—PURPOSE AND POLICY

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is the basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides direction (section 102) for carrying out the policy.

(1) Section 101(a) of NEPA establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which people and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations. Section 101(b) of NEPA establishes the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to help each generation serve as a trustee of the environment for succeeding generations; assure for all people safe, healthful, productive, and aesthetically and culturally pleasing surroundings; attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(2) Section 102(2) of NEPA establishes procedural requirements to carry out the policy and responsibilities established in section 101 of NEPA and contains "action-forcing" procedural provisions to ensure Federal agencies implement the letter and spirit of the Act. The purpose of the regulations in this subchapter is to set forth what Federal agencies must and should do to comply with the procedures and achieve the goals of the Act. The President, the Federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the policy goals of section 101.

(b) Federal agency NEPA procedures must ensure that agencies identify, consider, and disclose to the public relevant environmental information early in the process before decisions are made and before actions are taken. The information should be of high quality, science-based, and accessible. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, environmental documents must concentrate on the issues that are truly relevant to the action in question, rather than amassing needless detail. The regulations in this subchapter also are intended to ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable, and timely manner, and to reduce unnecessary burdens and delays. Finally, the regulations in this subchapter promote concurrent environmental reviews to ensure timely and efficient decision making.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on an understanding of environmental consequences and take actions that protect, restore, and enhance the environment. The regulations in this subchapter provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decision makers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize important environmental issues and alternatives. Environmental documents shall be concise, clear, and supported by evidence that agencies have conducted the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public engagement in decisions that affect the quality of the human environment, including meaningful engagement with communities with environmental justice concerns, which often include communities of color, low-income communities, indigenous communities, and Tribal communities.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment, such as alternatives that will reduce climate change-related effects or address adverse health and environmental effects that disproportionately affect communities with environmental justice concerns.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 NEPA compliance.

(a) *Mandate*. This subchapter is applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of

1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act). The regulations in this subchapter are issued pursuant to NEPA; the Environmental Quality Improvement Act of 1970, as amended (Pub. L. 91–224, 42 U.S.C. 4371 *et seq.*); and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970), as amended by Executive Order 11991, Relating to the Protection and Enhancement of Environmental Quality (May 24, 1977). The regulations in this subchapter apply to the whole of section 102(2) of NEPA. The provisions of the Act and the regulations in this subchapter must be read together as a whole to comply with the Act.

(b) *Review of NEPA compliance*. It is the Council's intention that judicial review of agency compliance with the regulations in this subchapter not occur before an agency has issued the record of decision or taken other final agency action, except with respect to claims brought by project sponsors related to deadlines under section 107(g)(3) of NEPA. It is also the Council's intention that minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action.

(c) *Severability*. The sections of this subchapter are separate and severable from one another. If any section or portion therein is stayed or determined to be invalid, or the applicability of any section to any person or entity is held invalid, it is the Council's intention that the validity of the remainder of those parts shall not be affected, with the remaining sections to continue in effect.

§ 1500.4 Concise and informative environmental documents.

Agencies shall prepare analytical, concise, and informative environmental documents by:

(a) Meeting appropriate page limits (§§ 1501.5(g) and 1502.7 of this subchapter).

(b) Discussing only briefly issues other than important ones (*e.g.,* § 1502.2(b) of this subchapter).

(c) Writing environmental documents in plain language (*e.g.,* § 1502.8 of this subchapter).

(d) Following a clear format for environmental impact statements (§ 1502.10 of this subchapter).

(e) Emphasizing the portions of the environmental document that are most useful to decision makers and the public (*e.g.*, §§ 1502.14, 1502.15, and 1502.16 of this subchapter) and reducing emphasis on background material (*e.g.,* § 1502.1 of this subchapter).

(f) Using the scoping process to identify important environmental issues deserving of study and to deemphasize unimportant issues, narrowing the scope of the environmental impact statement process (or, where an agency elects to do so, the environmental assessment process) accordingly (§§ 1501.9 and 1502.4 of this subchapter).

(g) Summarizing the environmental impact statement (§ 1502.12 of this subchapter).

(h) Using programmatic environmental documents and tiering from documents of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§ 1501.11 of this subchapter).

(i) Incorporating by reference (§ 1501.12 of this subchapter).

(j) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.24 of this subchapter).

(k) Requiring that comments be as specific as possible (§ 1503.3 of this subchapter).

(*l*) Attaching and publishing only changes to the draft environmental impact statement, rather than rewriting and publishing the entire statement, when changes are minor (§ 1503.4(c) of this subchapter).

(m) Eliminating duplication with State, Tribal, and local procedures, by providing for joint preparation of environmental documents where practicable (§ 1506.2 of this subchapter), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another Federal agency (§ 1506.3 of this subchapter).

(n) Combining environmental documents with other documents (§ 1506.4 of this subchapter).

§ 1500.5 Efficient process.

Agencies shall improve efficiency of their NEPA processes by:

(a) Using categorical exclusions to define categories of actions that normally do not have a significant effect on the human environment (§ 1501.4 of this subchapter) and therefore do not require preparation of an environmental assessment or environmental impact statement.

(b) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1501.6 of this subchapter) and therefore does not require preparation of an environmental impact statement.

(c) Integrating the NEPA process into early planning (§ 1501.2 of this subchapter).

(d) Engaging in interagency cooperation before or during the preparation of an environmental assessment or environmental impact statement, rather than waiting to submit comments on a completed document (§§ 1501.7 and 1501.8 of this subchapter).

(e) Ensuring the swift and fair resolution of lead agency disputes (§ 1501.7 of this subchapter).

(f) Using the scoping process for early identification of the important issues that require detailed analysis (§ 1502.4 of this subchapter).

(g) Meeting appropriate deadlines for the environmental assessment and environmental impact statement processes (§ 1501.10 of this subchapter).

(h) Preparing environmental documents early in the process (§ 1502.5 and § 1501.5(d) of this subchapter).

(i) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.24 of this subchapter).

(j) Eliminating duplication with State, Tribal, and local procedures by providing for joint preparation of environmental documents where practicable (§ 1506.2 of this subchapter) and with other Federal procedures by providing that agencies may jointly prepare or adopt appropriate environmental documents prepared by another agency (§ 1506.3 of this subchapter).

(k) Combining environmental documents with other documents (§ 1506.4 of this subchapter).

(*l*) Using accelerated procedures for proposals for legislation (§ 1506.8 of this subchapter).

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view policies and missions in the light of the Act's national environmental objectives, to the extent consistent with its existing authority. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to ensure full compliance with the purposes and provisions of the Act and the regulations in this subchapter. The phrase "to the fullest extent possible" in section 102 of NEPA means that each agency of the Federal Government shall comply with that section unless an agency activity, decision, or action is exempted from NEPA by law or compliance with NEPA is impossible.

PART 1501—NEPA AND AGENCY PLANNING

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into agency planning at an early stage to facilitate appropriate consideration of NEPA's policies, promote an efficient process, and reduce delay.

(b) Providing for early engagement in the environmental review process with other agencies, State, Tribal, and local governments, and affected or interested persons, entities, and communities before a decision is made.

(c) Providing for the swift and fair resolution of interagency disputes.

(d) Identifying at an early stage the important environmental issues deserving of study, and deemphasizing unimportant issues, narrowing the scope of the environmental review and enhancing efficiency accordingly.

(e) Promoting accountability by establishing appropriate deadlines and requiring schedules.

§ 1501.2 Apply NEPA early in the process.

(a) Agencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time to ensure that agencies consider environmental impacts in their planning and decisions, to avoid delays later in the process, and to head off potential conflicts.

(b) Each agency shall:

(1) Comply with the mandate of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach, which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making that may have an impact on the human environment, as specified by § 1507.2(a) of this subchapter.

(2) Identify environmental effects and values in adequate detail so the decision maker can appropriately consider such effects and values alongside economic and technical analyses. Whenever practicable, agencies shall review and publish environmental documents and appropriate analyses at the same time as other planning documents.

(3) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources, as provided by section 102(2)(H) of NEPA.

(4) Provide for actions subject to NEPA that are planned by applicants or other non-Federal entities before Federal involvement so that:

(i) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(ii) The Federal agency consults early with appropriate State, Tribal, and local governments and with interested individuals and organizations when their involvement is reasonably foreseeable.

(iii) The Federal agency commences its NEPA process at the earliest reasonable time (§§ 1501.5(d) and 1502.5(b) of this subchapter).

§ 1501.3 Determine the appropriate level of NEPA review.

(a) *Applicability*. As a threshold determination, an agency shall assess whether NEPA applies to the proposed activity or decision. In assessing whether NEPA applies, Federal agencies should determine:

(1) Whether the proposed activity or decision is exempted from NEPA by law;

(2) Whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another provision of law;

(3) Whether statutory provisions applicable to the agency's proposed activity or decision make compliance with NEPA impossible; and

(4) Whether the proposed activity or decision is a major Federal action, including whether:

(i) The proposed activity or decision is a final agency action within the meaning of such term in chapter 5 of title 5, United States Code (§ 1508.1(u)(2)(viii)); or

(ii) The proposed activity or decision is a non-discretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action (§ 1508.1(u)(2)(vi)).

(b) *Scope of action and analysis*. If the agency determines that NEPA applies, the agency shall consider the scope of the proposed action and its potential effects to inform the agency's determination of the appropriate level of NEPA review. The agency shall evaluate, in a single review, proposals or parts of proposals that are related closely enough to be, in effect, a single course of action. The agency also shall consider whether there are connected actions, which are closely related Federal activities or decisions that should be considered in the same NEPA review that:

(1) Automatically trigger other actions that may require NEPA review;

(2) Cannot or will not proceed unless other actions are taken previously or simultaneously; or

(3) Are interdependent parts of a larger action and depend on the larger action for their justification.

(c) *Levels of NEPA review*. In assessing the appropriate level of NEPA review, agencies may make use of any reliable data source and are not required to undertake new scientific or technical research unless it is essential to a reasoned choice among alternatives, and the overall costs and timeframe of obtaining it are not unreasonable. Agencies should determine whether the proposed action:

(1) Normally does not have significant effects and is categorically excluded (§ 1501.4);

(2) Is not likely to have significant effects or the significance of the effects is unknown and is therefore appropriate for an environmental assessment (§ 1501.5); or

(3) Is likely to have significant effects and is therefore appropriate for an environmental impact statement (part 1502 of this subchapter).

(d) *Significance determination—context and intensity*. In considering whether the effects of the proposed action are significant, agencies shall examine both the context of an action and the intensity of the effects.

(1) Agencies shall analyze the significance of an action in several contexts. Agencies should consider the characteristics of the relevant geographic area, such as proximity to unique or sensitive resources or vulnerable communities. Depending on the scope of the action, agencies should consider the potential global, national, regional, and local contexts as well as the duration, including short-and long-term effects.

(2) Agencies shall analyze the intensity of effects considering the following factors, as applicable and in relationship to one another:

(i) Effects may be beneficial or adverse. However, only actions with significant adverse effects require an environmental impact statement. A significant adverse effect may exist even if the agency considers that on balance the effects of the action will be beneficial. Agencies should consider the duration of effects; for instance, a proposed action may have short-term adverse effects but long-term beneficial effects.

(ii) The degree to which the proposed action may adversely affect public health and safety.

(iii) The degree to which the proposed action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, park lands, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(iv) Whether the action may violate relevant Federal, State, Tribal, or local laws or other requirements or be inconsistent with Federal, State, Tribal, or local policies designed for the protection of the environment.

(v) The degree to which the potential effects on the human environment are highly uncertain.

(vi) The degree to which the action may relate to other actions with adverse environmental effects, including actions that are individually insignificant but significant in the aggregate. Significance cannot be avoided by terming an action temporary that is not temporary in fact or by segmenting it into small component parts.

(vii) The degree to which the action may adversely affect resources listed or eligible for listing in the National Register of Historic Places.

(viii) The degree to which the action may adversely affect an endangered or threatened species or its habitat, including habitat that has been determined to be critical under the Endangered Species Act of 1973.

(ix) The degree to which the action may have disproportionate and adverse effects on communities with environmental justice concerns.

(x) The degree to which the action may adversely affect rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders.

§ 1501.4 Categorical exclusions.

(a) For efficiency and consistent with § 1507.3(c)(8)(ii) of this subchapter, agencies shall establish categorical exclusions for categories of actions that normally do not have a significant effect on the human environment, individually or in the aggregate, and therefore do not require preparation of an environmental assessment or environmental impact statement unless extraordinary circumstances exist that make application of the categorical exclusion inappropriate, consistent with paragraph (b) of this section. Agencies may establish categorical exclusions individually or jointly with other agencies.

(b) If an agency determines that a categorical exclusion identified in its agency NEPA procedures covers a proposed action, the agency shall evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect.

(1) If an extraordinary circumstance exists, the agency nevertheless may apply the categorical exclusion if the agency conducts an analysis and determines that the proposed action does not in fact have the potential to result in significant effects notwithstanding the extraordinary circumstance or the agency modifies the action to address the extraordinary circumstance. In such cases, the agency shall document such determination and should publish it on the agency's website or otherwise make it publicly available.

(2) If the agency cannot categorically exclude the proposed action, the agency shall prepare an environmental assessment or environmental impact statement, as appropriate.

(c) In addition to the process for establishing categorical exclusions under § 1507.3(c)(8) of this subchapter, agencies may establish categorical exclusions through a land use plan, a decision document supported by a programmatic environmental impact statement or programmatic environmental assessment, or other equivalent planning or programmatic decision, so long as the agency:

(1) Provides the Council an opportunity to review and comment prior to public comment;

(2) Provides notification and an opportunity for public comment;

(3) Substantiates its determination that the category of actions normally does not have significant effects, individually or in the aggregate;

(4) Identifies extraordinary circumstances;

(5) Establishes a process for determining that a categorical exclusion applies to a specific action or actions in the absence of extraordinary circumstances, or, where extraordinary circumstances are present, for determining the agency may apply the categorical exclusion consistent with (b)(1) of this section; and

(6) Publishes a list of all categorical exclusions established through these mechanisms on its website.

(d) Categorical exclusions established consistent with paragraph (c) of this section or § 1507.3(c)(8) may:

(1) Cover specific geographic areas or areas that share common characteristics, e.g., habitat type;

(2) Have a limited duration;

(3) Include mitigation measures that, in the absence of extraordinary circumstances, will ensure that any environmental effects are not significant, so long as a process is established for monitoring and enforcing any required mitigation measures, including through the suspension or revocation of the relevant agency action; or

(4) Provide criteria that would cause the categorical exclusion to expire because the agency's determination that the category of action does not have significant effects, individually or in the aggregate, is no longer applicable, including, as appropriate, because:

(i) The number of individual actions covered by the categorical exclusion exceeds a specific threshold;

(ii) Individual actions covered by the categorical exclusion are too close to one another in proximity or time; or

(iii) Environmental conditions or information upon which the agency's determination was based have changed.

(e) An agency may apply a categorical exclusion listed in another agency's NEPA procedures to a proposed action or a category of proposed actions consistent with this paragraph. The agency shall:

(1) Identify the categorical exclusion listed in another agency's NEPA procedures that covers its proposed action or a category of proposed actions;

(2) Consult with the agency that established the categorical exclusion to ensure that the proposed application of the categorical exclusion is appropriate;

(3) Evaluate the proposed action or category of proposed actions for extraordinary circumstances, consistent with paragraph (b) of this section;

(4) Provide public notice of the categorical exclusion that the agency plans to use for the proposed action or category of proposed actions; and

(5) Publish the documentation of the application of the categorical exclusion.

§ 1501.5 Environmental assessments.

(a) An agency shall prepare an environmental assessment for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown unless the agency finds that a categorical exclusion (§ 1501.4) is applicable or has decided to prepare an environmental impact statement.

(b) An agency may prepare an environmental assessment on any action to assist agency planning and decision making.

(c) An environmental assessment shall:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact;

(2) Briefly discuss the:

(i) Purpose and need for the proposed agency action;

(ii) Alternatives as required by section 102(2)(H) of NEPA; and

(iii) Environmental effects of the proposed action and alternatives;

(3) List the Federal agencies; State, Tribal, and local governments and agencies; or persons consulted; and

(4) Provide a unique identification number for tracking purposes, which the agency shall reference on all associated environmental review documents prepared for the proposed action.

(d) For applications to the agency requiring an environmental assessment, the agency shall commence the environmental assessment as soon as practicable after receiving the application.

(e) If an agency publishes a draft environmental assessment, the agency shall invite public comment and consider those comments in preparing the final environmental assessment.

(f) Agencies shall involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable in preparing environmental assessments (*see* § 1501.9).

(g) The text of an environmental assessment shall not exceed 75 pages, not including any citations or appendices.

(h) Agencies may supplement environmental assessments if a major Federal action remains to occur, and the agency determines supplementation is appropriate. Agencies may reevaluate an environmental assessment or otherwise document a finding that changes to the proposed action or new circumstances or information relevant to environmental concerns are not substantial, or the underlying assumptions of the analysis remain valid.

(i) Agencies generally should apply the provisions of §§ 1502.21 and 1502.23 to environmental assessments.

(j) As appropriate to improve efficiency and effectiveness of environmental assessments, agencies may apply the other provisions of part 1502 and 1503 of this subchapter, including §§ 1502.4, 1502.22, 1502.24, and 1503.4, to environmental assessments.

§ 1501.6 Findings of no significant impact.

(a) An agency shall prepare a finding of no significant impact if the agency determines, based on the environmental assessment, not to prepare an environmental

impact statement because the proposed action will not have significant effects, or a mitigated finding of no significant impact because the proposed action will not have significant effects due to mitigation.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1501.9(d)(2) of this subchapter.

(2) In the following circumstances, the agency shall make the finding of no significant impact available for public review for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin:

(i) The proposed action is or is closely similar to one that normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3 of this subchapter; or

(ii) The nature of the proposed action is one without precedent.

(b) The finding of no significant impact shall include the environmental assessment or incorporate it by reference and shall note any other environmental documents related to it (§ 1502.4(d)(3)). If the environmental assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

(c) The finding of no significant impact shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions. If the agency finds no significant effects based on mitigation, the mitigated finding of no significant impact shall state the enforceable mitigation requirements or commitments that will be undertaken and the authority to enforce them, such as permit conditions, agreements, or other measures. In addition, the agency shall prepare a monitoring and compliance plan for any mitigation the agency relies on as a component of the proposed action consistent with § 1505.3(c) of this subchapter.

§ 1501.7 Lead agency.

(a) A lead agency shall supervise the preparation of an environmental impact statement or environmental assessment if more than one Federal agency either:

(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.

(b) Federal, State, Tribal, or local agencies may serve as a joint lead agency to prepare an environmental impact statement or environmental assessment (§ 1506.2 of this subchapter). A joint lead agency shall jointly fulfill the role of a lead agency.

(c) If an action falls within the provisions of paragraph (a) of this section, the participating Federal agencies shall determine, by letter or memorandum, which agencies will be lead or joint lead agencies, and the lead agency shall determine which agencies will be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement;

(2) Project approval or disapproval authority;

(3) Expertise concerning the action's environmental effects;

(4) Duration of agency's involvement; and

(5) Sequence of agency's involvement.

(d) Any Federal, State, Tribal, or local agency or individual substantially affected by the absence of a lead agency designation, may make a written request to the senior agency officials of the potential lead agencies that a lead agency be designated. An agency that receives a request under this paragraph shall transmit such request to each participating Federal agency and to the Council.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted in a lead agency designation within 45 days of the written request to the senior agency officials, any of the agencies or individuals concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency. The Council shall transmit a copy of the request to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action; and

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) Any potential lead agency may file a response no later than 20 days after a request is filed with the Council. As soon as possible, but not later than 40 days after receiving the request and all responses to it, the Council shall designate which Federal agency will be the lead agency and which other Federal agencies will be cooperating agencies.

(g) To the extent practicable, if a proposal will require action by more than one Federal agency and the lead agency determines that it requires preparation of an environmental impact statement, the lead and cooperating agencies shall evaluate the proposal in a single environmental impact statement and shall issue, except where inappropriate or inefficient, a joint record of decision. To the extent practicable, if a proposal will require action by more than one Federal agency and the lead agency determines that it requires preparation of an environmental assessment, the lead and cooperating agencies shall evaluate the proposal in a single environmental assessment and issue a joint finding of no significant impact or jointly determine to prepare an environmental impact statement.

(h) With respect to cooperating agencies, the lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest practicable time;

(2) Consider any analysis or proposal created by a cooperating agency and, to the maximum extent practicable, use the environmental analysis and information provided by cooperating agencies;

(3) Meet with a cooperating agency at the latter's request; and

(4) Determine the purpose and need, and alternatives in consultation with any cooperating agency.

§ 1501.8 Cooperating agencies.

(a) The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any Federal agency with jurisdiction by law shall be a cooperating agency. In addition, upon request of the lead agency, any other Federal agency with special expertise with respect to any environmental issue may be a cooperating agency. A State, Tribal, or local agency of similar qualifications may become a cooperating agency by agreement with the lead agency. Relevant special expertise may include Indigenous Knowledge. An agency may request that the lead agency designate it a cooperating agency, and a Federal agency may appeal a denial of its request to the Council, in accordance with § 1501.7(e).

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest practicable time.

(2) Participate in the scoping process (described in § 1502.4).

(3) On request of the lead agency, assume responsibility for developing information and preparing environmental analyses, including portions of the environmental impact statement or environmental assessment concerning which the cooperating agency has special expertise.

(4) On request of the lead agency, make available staff support to enhance the lead agency's interdisciplinary capability.

(5) Normally use its own funds. To the extent available funds permit, the lead agency shall fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(6) Consult with the lead agency in developing the schedule (§ 1501.10), meet the schedule, and elevate, as soon as practicable, to the senior agency official of the lead agency any issues relating to purpose and need, alternatives, or other issues that may affect any agencies' ability to meet the schedule.

(7) Meet the lead agency's schedule for providing comments.

(8) To the maximum extent practicable, jointly issue environmental documents with the lead agency.

(c) In response to a lead agency's request for assistance in preparing the environmental documents (described in paragraph (b)(3), (4), or (5) of this section), a cooperating agency may reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement or environmental assessment. The cooperating agency shall submit a copy of this reply to the Council and the senior agency official of the lead agency.

§ 1501.9 Public and governmental engagement.

(a) *Purpose*. Agencies conduct public engagement to inform the public of an agency's proposed action, allow for meaningful engagement during the NEPA process, and ensure decision makers are informed by the views of the public. Agencies conduct governmental engagement to identify the potentially affected Federal, State, Tribal, and local governments, invite them to serve as cooperating agencies, as appropriate, and ensure that participating agencies have opportunities to engage in the environmental review process, as appropriate.

(b) *Responsibility.* Agencies shall determine the appropriate methods of public and governmental engagement. For environmental impact statements, in addition to the requirements of this section, agencies also shall comply with the requirements for scoping set forth in § 1502.4 of this subchapter.

(c) *Outreach*. The lead agency should:

(1) Invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, as early as practicable, including, as appropriate, as cooperating agencies under § 1501.8 of this subchapter;

(2) Conduct early engagement with likely affected or interested members of the public (including those who might not be in accord with the action), unless there is a limited exception under § 1507.3(d)(3) of this subchapter; and

(3) Consider what methods of outreach and notification are necessary and appropriate based on the likely affected entities; the scope, scale, and complexity of the proposed action and alternatives; the degree of public interest; and other relevant factors. When selecting appropriate methods for providing public notification, agencies shall consider the ability of affected persons and agencies to access electronic media and the primary language of affected persons.

(d) *Notification*. Agencies shall:

(1) Publish notification of proposed actions they are analyzing through an environmental impact statement.

(2) Provide public notification of NEPA-related hearings, public meetings, and other opportunities for public engagement, and, as appropriate, the availability of environmental documents to inform those persons and agencies who may be interested or affected by their proposed actions.

(i) In all cases, the agency shall notify those who have requested notification on an individual action.

(ii) In the case of an action with effects of national concern, notice shall include publication in the *Federal Register*. An agency also may notify entities and persons who have requested regular notification.

(iii) In the case of an action with effects primarily of local concern, the notification may include distribution to or through:

(A) State, Tribal, and local governments and agencies that may be interested or affected by the proposed action.

(B) Following the affected State or Tribe's public notification procedures for comparable actions.

(C) Publication in local newspapers having general circulation.

(D) Other local media.

(E) Potentially interested community organizations including small business associations.

(F) Publication in newsletters that may be expected to reach potentially interested persons.

(G) Direct mailing to owners and occupants of nearby or affected property.

(H) Posting of notification on- and off-site in the area where the action is to be located.

(I) Electronic media (*e.g.*, a project or agency website, dashboard, email list, or social media). Agencies should establish email notification lists or similar methods for the public to easily request electronic notifications for a proposed action.

(3) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act, as amended (5 U.S.C. 552).

(e) *Public meetings and hearings*. Agencies may hold or sponsor public hearings, public meetings, or other opportunities for public engagement whenever appropriate or in

accordance with statutory or regulatory requirements or applicable agency NEPA procedures. Agencies may conduct public hearings and public meetings by means of electronic communication except where another format is required by law. When determining the format for a public hearing or public meeting, agencies should consider the needs of affected communities. When accepting comments for electronic or virtual public hearings or meetings, agencies shall allow the public to submit comments electronically, by regular mail, or by other appropriate methods.

(f) *Agency procedures.* Agencies shall make diligent efforts to engage the public in preparing and implementing their NEPA procedures (§ 1507.3 of this subchapter).

§ 1501.10 Deadlines and schedule for the NEPA process.

(a) To ensure that agencies conduct sound NEPA reviews as efficiently and expeditiously as practicable, Federal agencies shall set deadlines and schedules appropriate to individual actions or types of actions consistent with this section and the time intervals required by § 1506.10 of this subchapter. Where applicable, the lead agency shall establish the schedule and make any necessary updates to the schedule in consultation with and seek the concurrence of joint lead, cooperating, and participating agencies, and in consultation with project sponsors or applicants.

(b) To ensure timely decision making, agencies shall complete:

(1) Environmental assessments within 1 year, unless the lead agency extends the deadline in writing and in consultation with any applicant or project sponsor, and establishes a new deadline that provides only so much additional time as is necessary to complete the environmental assessment.

(2) Environmental impact statements within 2 years, unless the lead agency extends the deadline in writing and in consultation with any applicant or project sponsor and establishes a new deadline that provides only so much additional time as is necessary to complete the environmental impact statement.

(3) The deadlines in paragraphs (b)(1) and (b)(2) of this section are measured from the sooner of, as applicable:

(i) the date on which the agency determines that NEPA requires an environmental impact statement or environmental assessment for the proposed action;

(ii) the date on which the agency notifies an applicant that the application to establish a right-of-way for the proposed action is complete; and

(iii) the date on which the agency issues a notice of intent for the proposed action.

(4) The lead agency shall annually submit the report to Congress on missed deadlines for environmental assessments and environmental impact statements required by section 107(h) of NEPA.

(c) To facilitate predictability, the lead agency shall develop a schedule for completion of environmental impact statements and environmental assessments as well as any authorizations required to carry out the action. The lead agency shall set milestones for all environmental reviews, permits, and authorizations required for implementation of the action, in consultation with any project sponsor or applicant and in consultation with and seek the concurrence of all joint lead, cooperating, and participating agencies, as soon as practicable. Schedules may vary depending on the type of action and in consideration of other factors in paragraph (d). The lead agency should develop a schedule that is based on its expertise reviewing similar types of actions under NEPA. If the lead agency or any participating agency anticipates that a milestone, including those for a review, permit, or authorization, will not be completed, it shall notify the agency responsible for the milestone or issuance of the review, permit, or authorization and the lead agency, as applicable, and request that they take appropriate measures to comply with the schedule. As soon as practicable, the lead and any other agency affected by a potentially missed milestone shall elevate any unresolved disputes contributing to the

missed milestone to the appropriate officials of the agencies responsible for the missed milestone, to ensure timely resolution within the deadlines for the individual action.

(d) The lead agency may consider the following factors in determining the schedule and deadlines:

(1) Potential for environmental harm.

(2) Size of the proposed action.

(3) State of the art of analytic techniques.

(4) Degree of public need for the proposed action, including the consequences of delay.

(5) Number of persons and agencies affected.

(6) Availability of relevant information.

(7) Degree to which a substantial dispute exists as to the size, location, nature, or consequences of the proposed action and its effects.

(8) Time limits imposed on the agency by law, regulation, or Executive order.

(e) The schedule for environmental impact statements shall include the following milestones:

(1) The publication of the notice of intent;

(2) The issuance of the draft environmental impact statement;

(3) The public comment period on the draft environmental impact statement, consistent with § 1506.10 of this subchapter;

(4) The issuance of the final environmental impact statement; and

(5) The issuance of the record of decision.

(f) The schedule for environmental assessments shall include the following milestones:

(1) Decision to prepare an environmental assessment;

(2) Issuance of the draft environmental assessment, where applicable;

(3) The public comment period on the draft environmental assessment, consistent with § 1501.5 of this subchapter, where applicable; and

(4) Issuance of the final environmental assessment and decision on whether to issue a finding of no significant impact or issue a notice of intent to prepare an environmental impact statement.

(g) An agency may designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(h) For environmental impact statements, agencies shall make schedules for completing the NEPA process publicly available, such as on their website or another publicly accessible platform. If agencies make subsequent changes to the schedule, agencies shall publish revisions to the schedule and explain the basis for substantial changes.

§ 1501.11 Programmatic environmental documents and tiering.

(a) *Programmatic environmental document.* Agencies may prepare programmatic environmental documents, which may be either environmental impact statements or environmental assessments, to evaluate the environmental effects of policies, programs, plans, or groups of related activities. When agencies prepare such documents, they should be relevant to the agency decisions and timed to coincide with meaningful points in agency planning and decision making. Agencies may use programmatic environmental documents to conduct a broad or holistic evaluation of effects or policy alternatives; evaluate widely applicable measures; or avoid duplicative analysis for individual actions by first considering relevant issues at a broad or programmatic level.

(1) When preparing programmatic environmental documents (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(i) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(ii) Thematically or by sector, including actions that have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, technology, media, or subject matter.

(iii) By stage of technological development, including Federal or federally assisted research, development, or demonstration programs for new technologies that, if applied, could significantly affect the quality of the human environment. Documents on such programs should be completed before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(2) Agency actions that may be appropriate for programmatic documents include:

(i) Programs, policies, or plans, including land use or resource management plans;

(ii) Regulations;

(iii) National or regional actions;

(iv) Actions that have multiple stages or phases, and are part of an overall plan or program; or

(v) A group of projects or related types of projects.

(3) Agencies should, as appropriate, employ scoping (§ 1502.4 of this subchapter), tiering (paragraph (b) of this section), and other methods listed in §§ 1500.4 and 1500.5 of this subchapter, to describe the relationship between the programmatic document and related individual actions and to avoid duplication and delay.

(b) *Tiering*. Where an existing environmental impact statement, environmental assessment, or programmatic environmental document is relevant to a later proposed action, agencies may employ tiering. Tiering allows subsequent tiered environmental analysis to avoid duplication and focus on issues, effects, or alternatives not fully

addressed in a programmatic document, environmental impact statement, or environmental assessment prepared at an earlier phase or stage. Agencies generally should tier their environmental impact statements and environmental assessments when it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided.

(1) When an agency has prepared a programmatic environmental review or other environmental impact statement or environmental assessment for a program or policy and then prepares a subsequent statement or assessment on an action included within the program or policy (such as a project- or site-specific action), the tiered document shall discuss the relationship between the tiered document and the previous review, and summarize and incorporate by reference the issues discussed in the broader document. The tiered document shall concentrate on the issues specific to the subsequent action, analyzing site-, phase-, or stage-specific conditions and reasonably foreseeable effects. The agency shall provide for public engagement opportunities consistent with the type of environmental document prepared and appropriate for the location, phase, or stage. The tiered document shall state where the earlier document is publicly available.

(2) Tiering is appropriate when the sequence from an environmental impact statement or environmental assessment is:

(i) From a programmatic, plan, or policy environmental impact statement or environmental assessment to a program, plan, or policy statement or assessment of lesser or narrower scope or to a site-specific statement or assessment.

(ii) From an environmental impact statement or environmental assessment on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or assessment at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the agency

to focus on the issues that are ripe for decision and exclude from consideration issues already decided or not yet ripe.

(c) When an agency prepares a programmatic environmental document for which judicial review was available, the agency may rely on the analysis included in the programmatic environmental document in a subsequent environmental document for related actions as follows:

(1) Within 5 years and without additional review of the analysis in the programmatic environmental document, unless there are substantial new circumstances or information about the significance of adverse effects that bear on the analysis; or

(2) After 5 years, so long as the agency reevaluates the analysis in the programmatic environmental document and any underlying assumption to ensure reliance on the analysis remains valid. The agency shall briefly document its reevaluation and explain why the analysis remains valid considering any new and substantial information or circumstances.

§ 1501.12 Incorporation by reference into environmental documents.

Agencies shall incorporate material, such as planning studies, analyses, or other relevant information, into environmental documents by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. Agencies shall cite the incorporated material in the document, briefly describe its content, and briefly explain the relevance of the incorporated material to the environmental document. Agencies shall not incorporate material by reference unless it is reasonably available for inspection, such as on a publicly accessible website, by potentially interested persons within the time allowed for comment. Agencies should provide digital references, such as hyperlinks, to the incorporated material or otherwise indicate how the public can access the material for inspection. Agencies shall not incorporate by reference material based on proprietary data that is not available for review and comment.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

§ 1502.1 Purpose of environmental impact statement.

(a) The primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA is to serve as an action-forcing device by ensuring agencies consider the environmental effects of their action in decision making, so that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.

(b) Environmental impact statements shall provide full and fair discussion of significant effects and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse effects or enhance the quality of the human environment. Agencies shall focus on important environmental issues and reasonable alternatives and shall reduce paperwork and the accumulation of extraneous background data.

(c) Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. Federal agencies shall use environmental impact statements in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall not be encyclopedic.

(b) Environmental impact statements shall discuss effects in proportion to their significance. There shall be only brief discussion of other than important issues. As in an environmental assessment and finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be analytical, concise, and no longer than necessary to comply with NEPA and with the regulations in this subchapter. Length should be proportional to potential environmental effects and the scope and complexity of the action.

(d) Environmental impact statements shall state how alternatives considered in them and decisions based on them will or will not achieve the requirements of sections 101 and 102(1) of NEPA, the regulations in this subchapter, and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the decision maker.

(f) Agencies shall not commit resources prejudicing the selection of alternatives before making a decision (*see also* § 1506.1 of this subchapter).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for environmental impact statements.

As required by section 102(2)(C) of NEPA, environmental impact statements are to be included in every Federal agency recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.

§ 1502.4 Scoping.

(a) *Generally*. Agencies shall use an early and open process, consistent with § 1501.9 of this subchapter, to determine the scope of issues for analysis in an environmental impact statement, including identifying the important issues and eliminating from further study unimportant issues. Scoping may begin as soon as practicable after the proposal for action is sufficiently developed for agency consideration. Scoping may include

appropriate pre-application procedures or work conducted prior to publication of the notice of intent (see §§ 1501.3 and 1501.9 of this subchapter).

(b) *Scoping outreach*. When preparing an environmental impact statement, agencies shall facilitate notification to persons and agencies who may be interested or affected by an agency's proposed action, consistent with § 1501.9 of this subchapter. As part of the scoping process, the lead agency may hold a scoping meeting or meetings, publish scoping information, or use other means to communicate with those persons or agencies who may be interested or affected, which the agency may integrate with any other early planning meeting.

(c) *Inviting participation*. As part of the scoping process, and consistent with § 1501.9 of this subchapter, the lead agency shall invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and other likely affected or interested persons (including those who might not be in accord with the action), unless there is a limited exception under § 1507.3(d)(3) of this subchapter.

(d) *Additional scoping responsibilities*. As part of the scoping process, the lead agency shall:

(1) Identify and eliminate from detailed study the issues that are not important or have been covered by prior environmental review(s) (§§ 1501.12 and 1506.3 of this subchapter), narrowing the discussion of these issues in the environmental impact statement to a brief presentation of why they will not be important or providing a reference to their coverage elsewhere.

(2) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(3) Indicate any public environmental assessments and other environmental impact statements that are being or will be prepared and are related to but are not part of the scope of the environmental impact statement under consideration.

(4) Identify other environmental review, authorization, and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently and integrated with the environmental impact statement, as provided in § 1502.24 of this subchapter.

(5) Indicate the relationship between the timing of the preparation of environmental analyses and the agencies' tentative planning and decision-making schedule.

(e) *Notice of intent*. As soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an environmental impact statement, the lead agency shall publish a notice of intent to prepare an environmental impact statement in the *Federal Register*. In addition to the *Federal Register* notice, an agency also may publish notification in accordance with § 1501.9 of this subchapter. The notice shall include, as appropriate:

(1) The purpose and need for the proposed action;

(2) A preliminary description of the proposed action and alternatives the environmental impact statement will consider;

(3) A brief summary of expected effects;

(4) Anticipated permits and other authorizations;

(5) A schedule for the decision-making process;

(6) A description of the public scoping process, including any scoping meeting(s);

(7) A request for comment on alternatives and effects, as well as on relevant information, studies, or analyses with respect to the proposed action;

(8) Contact information for a person within the agency who can answer questions about the proposed action and the environmental impact statement;

(9) Identification of any cooperating and participating agencies, and any information that such agencies require in the notice to facilitate their decisions or authorizations that will rely upon the resulting environmental impact statement; and

(10) A unique identification number for tracking purposes, which the agency shall reference on all environmental documents prepared for the proposed action.

(f) *Notices of withdrawal or cancellation*. If an agency withdraws, cancels, or otherwise ceases the consideration of a proposed action before completing a final environmental impact statement, the agency shall publish a notice in the *Federal Register*.

(g) *Revisions*. An agency shall revise the determinations made under paragraphs (b), (c), and (d) of this section if substantial changes are made later in the proposed action, or if important new circumstances or information arise that bear on the proposal or its effects.

§ 1502.5 Timing.

An agency should commence preparation of an environmental impact statement as close as practicable to the time the agency is developing or receives a proposal so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made (§§ 1501.2 of this subchapter and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies, the agency shall prepare the environmental impact statement at the feasibility analysis (*e.g.,* go/no-go) stage and may supplement it at a later stage, if necessary.

(b) For applications to the agency requiring an environmental impact statement, the agency shall commence the statement as soon as practicable after receiving the complete

application. Federal agencies should work together and with potential applicants and applicable State, Tribal, and local agencies and governments prior to receipt of the application.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances, the statement may follow preliminary hearings designed to gather information for use in the statement.

(d) For informal rulemaking, the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Agencies shall prepare environmental impact statements using an interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of NEPA). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1502.4 of this subchapter).

§ 1502.7 Page limits.

The text of final environmental impact statements, not including citations or appendices, shall not exceed 150 pages except for proposals of extraordinary complexity, which shall not exceed 300 pages.

§ 1502.8 Writing.

Agencies shall write environmental impact statements in plain language and should use, as relevant, appropriate visual aids or charts so that decision makers and the public can readily understand such statements. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which shall be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

(a) *Generally*. Except for proposals for legislation as provided in § 1506.8 of this subchapter, agencies shall prepare environmental impact statements in two stages and, where necessary, supplement them as provided in paragraph (d)(1) of this section.

(b) *Draft environmental impact statements*. Agencies shall prepare draft environmental impact statements in accordance with the scope decided upon in the scoping process (§ 1502.4 of this subchapter). The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this subchapter. To the fullest extent practicable, the draft statement must meet the requirements established for final statements in section 102(2)(C) of NEPA and in the regulations in this subchapter. If the agency determines that a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish a supplemental draft of the appropriate portion. At appropriate points in the draft statement, the agency shall discuss all major points of view on the environmental effects of the alternatives, including the proposed action.

(c) *Final environmental impact statements*. Final environmental impact statements shall consider and respond to comments as required in part 1503 of this subchapter. At appropriate points in the final statement, the agency shall discuss any responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(d) *Supplemental environmental impact statements*. Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and:

(i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or

(ii) There are substantial or important new circumstances or information relevant to environmental concerns and bearing on the proposed action or its effects.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall prepare, publish, and file a supplement to a statement (exclusive of scoping (§ 1502.4 of this subchapter)) as a draft and final statement, as is appropriate to the stage of the statement involved, unless the Council approves alternative procedures (§ 1506.12 of this subchapter).

(e) *Reevaluation*. An agency may reevaluate an environmental impact statement and find that changes to the proposed action or new circumstances or information relevant to environmental concerns are not substantial or that the underlying assumptions of the analysis remains valid, and therefore do not require a supplement under paragraph (d) of this section. The agency should document the finding consistent with its agency NEPA procedures (§ 1507.3 of this subchapter), or, if necessary, in a finding of no significant impact supported by an environmental assessment.

§ 1502.10 Recommended format.

(a) Agencies shall use a format for environmental impact statements that will encourage good analysis and clear presentation of the alternatives, including the proposed action. Agencies should use the following standard format for environmental impact statements unless the agency determines that there is a more effective format for communication:

(1) Cover (§ 1501.11);

(2) Summary (§ 1502.12);

(3) Table of contents;

(4) Purpose of and need for action (§ 1502.13);

(5) Alternatives including the proposed action (sections 102(2)(C)(iii) and 102(2)(H) of NEPA) (§ 1502.14);

(6) Affected environment and environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA) (§§ 1502.15 and 1502.16); and

(7) Appendices (§ 1502.19), including the summary of scoping information (§ 1502.17) and the list of preparers (§ 1502.18).

(b) If an agency uses a different format, it shall include paragraph (a) of this section, as further described in §§ 1502.11 through 1502.19, in any appropriate format.

§ 1502.11 Cover.

The environmental impact statement cover shall not exceed one page and shall include:

(a) A list of the lead, joint lead and any cooperating agencies;

(b) The title of the proposed action that is the subject of the statement (and, if appropriate, the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction(s), if applicable) where the action is located;

(c) The name, address, and telephone number of the person at the agency who can supply further information;

(d) A designation of the statement as a draft, final, or draft or final supplement;

(e) A one-paragraph abstract of the statement;

(f) The date by which the agency must receive comments (computed in cooperation with the Environmental Protection Agency under § 1506.10 of this subchapter); and

(g) The identification number included in the notice of intent (§ 1502.4(e)(10)).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary that adequately and accurately summarizes the statement. The summary shall include the major conclusions and summarize any disputed issues raised by agencies and the public, any issues to be

resolved, and key differences among alternatives, and identify the environmentally preferable alternative or alternatives. Agencies shall write the summary in plain language and should use, as relevant, appropriate visual aids and charts. The summary normally should not exceed 15 pages.

§ 1502.13 Purpose and need.

The environmental impact statement shall include a statement that briefly summarizes the underlying purpose and need for the proposed agency action.

§ 1502.14 Alternatives including the proposed action.

The alternatives section is the heart of the environmental impact statement. The alternatives section should identify the reasonably foreseeable environmental effects of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16). In doing so, the analysis should sharply define the issues for the decision maker and the public and provide a clear basis for choice among options. In this section, agencies shall:

(a) Rigorously explore and objectively evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination. The agency need not consider every conceivable alternative to a proposed action; rather, it shall consider a reasonable range of alternatives that will foster informed decision making. Agencies also may include reasonable alternatives not within the jurisdiction of the lead agency.

(b) Discuss each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.

(c) Include the no action alternative.

(d) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(e) Include appropriate mitigation measures not already included in the proposed action or alternatives.

(f) Identify the environmentally preferable alternative or alternatives. The environmentally preferable alternative will best promote the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits, such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal, and natural resources, including rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders; or causing the least damage to the biological and physical environment. The environmentally preferable alternative may be the proposed action, the no action alternative, or a reasonable alternative.

§ 1502.15 Affected environment.

(a) The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s).

(b) Agencies should use high-quality information, including the best available science and data, to describe reasonably foreseeable environmental trends, including anticipated climate-related changes to the environment, and when such information is lacking, provide relevant information consistent with § 1502.21. This description of baseline environmental conditions and reasonably foreseeable trends should inform the agency's analysis of environmental consequences and mitigation measures (§ 1502.16).

(c) The environmental impact statement may combine the description of the affected environment with evaluation of the environmental consequences (§ 1502.16). The description should be no longer than necessary to understand the relevant affected environment and the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the effect, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

(a) The environmental consequences section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA that are within the scope of the environmental impact statement and as much of section 102(2)(C)(iii) of NEPA as is necessary to support the comparisons. This section should not duplicate discussions in § 1502.14. The discussion shall include:

(1) The reasonably foreseeable environmental effects of the proposed action and reasonable alternatives to the proposed action and the significance of those effects (§ 1501.3 of this subchapter). The comparison of the proposed action and reasonable alternatives shall be based on the discussion of the effects, focusing on the significant or important effects. The no action alternative should serve as the baseline against which the proposed action and other alternatives are compared.

(2) Any reasonably foreseeable adverse environmental effects that cannot be avoided should the proposal be implemented.

(3) An analysis of the effects of the no action alternative, including any adverse environmental effects.

(4) The relationship between short-term uses of the human environment and the maintenance and enhancement of long-term productivity.

(5) Any irreversible or irretrievable commitments of Federal resources that would be involved in the proposal should it be implemented.

(6) Possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local plans, policies, and controls for the area concerned, including those addressing climate change (§ 1506.2(d) of this subchapter).

(7) Any reasonably foreseeable climate change-related effects, including the effects of climate change on the proposed action and alternatives.

(8) Energy requirements and conservation potential of various alternatives and mitigation measures.

(9) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(10) Any relevant risk reduction, resiliency, or adaptation measures incorporated into the proposed action or alternatives, informed by relevant science and data on the affected environment and expected future conditions.

(11) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(12) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(e)).

(13) Where applicable, economic and technical considerations, including the economic benefits of the proposed action.

(14) The potential for disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.

(b) Economic or social effects by themselves do not require preparation of an environmental impact statement. However, when the agency determines that economic or social and natural or physical environmental effects are interrelated, the environmental impact statement shall discuss these effects on the human environment.

§ 1502.17 Summary of scoping information.

(a) The draft environmental impact statement shall include a summary of information, including alternatives and analyses, submitted by commenters during the scoping process for consideration by the lead and cooperating agencies in their development of the draft environmental impact statement.

(b) The agency shall append to the draft environmental impact statement or otherwise make publicly available all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process.

§ 1502.18 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or important background papers, including basic components of the statement. Where possible, the environmental impact statement shall identify the persons who are responsible for a particular analysis, including analyses in background papers. Normally the list will not exceed two pages.

§ 1502.19 Appendix.

If an agency prepares an appendix, the agency shall publish it with the environmental impact statement, and it shall consist of, as appropriate:

(a) Material prepared in connection with an environmental impact statement (as distinct from material that is not so prepared and is incorporated by reference (§ 1501.12 of this subchapter)).

(b) Material substantiating any analysis fundamental to the impact statement.

(c) Material relevant to the decision to be made.

(d) For draft environmental impact statements, all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process that identified information for the agency's consideration.

(e) For final environmental impact statements, the comment summaries and responses consistent with § 1503.4 of this chapter.

§ 1502.20 Publication of the environmental impact statement.

Agencies shall publish the entire draft and final environmental impact statements and unchanged statements as provided in § 1503.4(c) of this subchapter. The agency shall transmit the entire statement electronically (or in paper copy, if requested due to economic or other hardship) to:

(a) Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State, Tribal, or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement, any person, organization, or agency that submitted substantive comments on the draft.

§ 1502.21 Incomplete or unavailable information.

(a) When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement, and there is incomplete or unavailable information, the agency shall make clear that such information is lacking.

(b) If the incomplete information relevant to reasonably foreseeable significant adverse effects is essential to a reasoned choice among alternatives, and the overall costs

of obtaining it are not unreasonable, the agency shall include the information in the environmental impact statement.

(c) If the information relevant to reasonably foreseeable significant adverse effects cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable;

(2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse effects on the human environment;

(3) A summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant adverse effects on the human environment; and

(4) The agency's evaluation of such effects based upon theoretical approaches or research methods generally accepted in the scientific community.

(d) For the purposes of this section, "reasonably foreseeable" includes effects that have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the effects is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

§ 1502.22 Cost-benefit analysis.

If an agency is considering a cost-benefit analysis for the proposed action relevant to the choice among alternatives with different environmental effects, the agency shall incorporate the cost-benefit analysis by reference or append it to the statement as an aid in evaluating the environmental consequences. In such cases, to assess the adequacy of compliance with section 102(2)(B) of NEPA (ensuring appropriate consideration of unquantified environmental amenities and values in decision making, along with economical and technical considerations), the statement shall discuss the relationship

between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, agencies need not display the weighing of the merits and drawbacks of the various alternatives in a monetary cost-benefit analysis and should not do so when there are important qualitative considerations. However, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, that are likely to be relevant and important to a decision.

§ 1502.23 Methodology and scientific accuracy.

(a) Agencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents. Agencies shall use high-quality information, such as best available science and reliable data, models, and resources, including existing sources and materials, to analyze effects resulting from a proposed action and alternatives. Agencies may use any reliable data sources, such as remotely gathered information or statistical models. Agencies should explain any relevant assumptions or limitations of the information or the particular model or methodology selected for use.

(b) Agencies shall identify any methodologies used and shall make explicit reference to the scientific and other sources relied upon for conclusions in the statement. Agencies may place discussion of methodology in an appendix. Nothing in this section is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research.

(c) Where appropriate, agencies shall use projections when evaluating the reasonably foreseeable effects, including climate change-related effects. Such projections may employ mathematical or other models that project a range of possible future outcomes, so long as agencies disclose the relevant assumptions or limitations.

§ 1502.24 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive orders applicable to the proposed action, including the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*), and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other authorizations that must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other authorization is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING ON ENVIRONMENTAL IMPACT STATEMENTS

§ 1503.1 Inviting comments and requesting information and analyses.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or is authorized to develop and enforce environmental standards; and

(2) Request the comments of:

(i) Appropriate State, Tribal, and local agencies that are authorized to develop and enforce environmental standards;

(ii) State, Tribal, or local governments that may be affected by the proposed action;

(iii) Any agency that has requested it receive statements on actions of the kind proposed;

(iv) The applicant, if any; and

(v) The public, affirmatively soliciting comments in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action.

(b) An agency may request comments on a final environmental impact statement before the final decision and set a deadline for providing such comments. Other agencies or persons may make comments consistent with the time periods under § 1506.10 of this subchapter.

(c) An agency shall provide for electronic submission of public comments, with reasonable measures to ensure the comment process is accessible to affected persons.

§ 1503.2 Duty to comment.

Cooperating agencies and agencies that are authorized to develop and enforce environmental standards shall comment on environmental impact statements within their jurisdiction, expertise, or authority within the time period specified for comment in § 1506.10 of this subchapter. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that the environmental impact statement adequately reflects its views, it should reply that it has no comment.

§ 1503.3 Specificity of comments and information.

(a) To promote informed decision making, comments on an environmental impact statement or on a proposed action shall be as specific as possible, and may address either the adequacy of the statement or the merits of the alternatives discussed or both. Comments should explain why the issues raised are important to the consideration of potential environmental effects and alternatives to the proposed action. Where possible, comments should reference the corresponding section or page number of the draft environmental impact statement, propose specific changes to those parts of the statement, and describe any data, sources, or methodologies that support the proposed changes.

(b) When a participating agency criticizes a lead agency's predictive methodology, the participating agency should describe the alternative methodology that it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental review or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or authorizations.

(d) A cooperating agency with jurisdiction by law shall specify mitigation measures it considers necessary to allow the agency to grant or approve applicable authorizations or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall consider substantive comments timely submitted during the public comment period. The agency shall respond to individual comments or groups of comments. In the final environmental impact statement, the agency may respond by:

(1) Modifying alternatives including the proposed action;

(2) Developing and evaluating alternatives not previously given serious consideration by the agency;

(3) Supplementing, improving, or modifying its analyses;

(4) Making factual corrections; or

(5) Explaining why the comments do not warrant further agency response, recognizing that agencies are not required to respond to each comment.

(b) An agency shall append or otherwise publish all substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous).

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, an agency may write any changes on errata sheets and attach the responses to the statement instead of rewriting the draft statement. In such cases, the agency shall publish the final statement (§ 1502.20 of this subchapter), which includes the draft statement, the comments, responses to those comments, and errata sheets. The agency shall file the final statement with the Environmental Protection Agency (§ 1506.10 of this subchapter).

PART 1504—PRE-DECISIONAL REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements, and encourages Federal agencies to engage with each other as early as practicable to resolve interagency disagreements concerning proposed major Federal actions before referring disputes to the Council. This part also establishes procedures for Federal agencies to submit a request to the Council to provide informal dispute resolution on NEPA issues before formally referring disputes to the Council.

(b) Section 309 of the Clean Air Act (42 U.S.C. 7609) directs the Administrator of the Environmental Protection Agency to review and comment publicly on the environmental impacts of Federal activities, including actions for which agencies prepare environmental impact statements. If, after this review, the Administrator determines that the matter is

"unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council.

(c) Under section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)), other Federal agencies may prepare similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These agencies must make these reviews available to the President, the Council, and the public.

§ 1504.2 Early dispute resolution.

(a) Federal agencies should engage in interagency coordination and collaboration in their planning and decision-making processes and should identify and resolve disputes concerning proposed major Federal actions early in the NEPA process. To the extent practicable, agencies should elevate issues to appropriate agency officials or the Council in a timely manner that will accommodate schedules consistent with § 1501.10 of this subchapter.

(b) A Federal agency may request that the Council engage in informal dispute resolution to provide recommendations on how to resolve an interagency dispute concerning an environmental review. In making the request, the agency shall provide the Council with a summary of the proposed action, information on the disputed issues, and agency points of contact.

(c) In response to a request for informal dispute resolution, the Council may request additional information, provide non-binding recommendations, convene meetings of those agency decision makers necessary to resolve disputes, or determine that informal dispute resolution is unhelpful or inappropriate.

§ 1504.3 Criteria and procedure for referrals and response.

(a) Federal agencies should make environmental referrals to the Council only after concerted, timely (as early as practicable in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections

to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental effects, considering:

(1) Possible violation of national environmental standards or policies;

(2) Severity;

(3) Geographical scope;

(4) Duration;

(5) Importance as precedents;

(6) Availability of environmentally preferable alternatives; and

(7) Economic and technical considerations, including the economic costs of delaying or impeding the decision making of the agencies involved in the action.

(b) A Federal agency making the referral to the Council shall:

(1) Notify the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached;

(2) Include such a notification whenever practicable in the referring agency's comments on the environmental assessment or draft environmental impact statement;

(3) Identify any essential information that is lacking and request that the lead agency make it available at the earliest possible time; and

(4) Send copies of the referring agency's views to the Council.

(c) The referring agency shall deliver its referral to the Council no later than 25 days after the lead agency has made the final environmental impact statement available to the Environmental Protection Agency, participating agencies, and the public, and in the case of an environmental assessment, no later than 25 days after the lead agency makes it available. Except when the lead agency grants an extension of this period, the Council will not accept a referral after that date.

(d) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it; and

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any disputed material facts and incorporate (by reference if appropriate) agreed upon facts;

(ii) Identify any existing environmental requirements or policies that would be violated by the matter;

(iii) Present the reasons for the referral;

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason;

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time; and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(e) No later than 25 days after the referral to the Council, the lead agency may deliver a response to the Council and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral;

(2) Be supported by evidence and explanations, as appropriate; and

(3) Give the lead agency's response to the referring agency's recommendations.

(f) Applicants may provide views in writing to the Council no later than the response.

(g) No later than 25 days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the referring and lead agencies should further negotiate the issue, and the issue is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including, where appropriate, a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(h) The Council shall take no longer than 60 days to complete the actions specified in paragraph (g)(2), (3), or (5) of this section.

(i) The referral process is not intended to create any private rights of action or to be judicially reviewable because any voluntary resolutions by the agency parties do not represent final agency action and instead are only provisional and dependent on later consistent action by the action agencies.

PART 1505—NEPA AND AGENCY DECISION MAKING

§ 1505.1 [Reserved]

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10 of this subchapter) or, if appropriate, its recommendation to Congress, each agency shall prepare and timely publish a concise public record of decision or joint record of decision. The record, which each agency may integrate into any other record it prepares, shall:

(a) State the decision.

(b) Identify alternatives considered by the agency in reaching its decision. The agency also shall specify the environmentally preferable alternative or alternatives (§ 1502.14(f) of this subchapter). The agency may discuss preferences among alternatives based on relevant factors, including environmental, economic, and technical considerations and agency statutory missions. The agency shall identify and discuss all such factors, including any essential considerations of national policy, that the agency balanced in making its decision and state how those considerations entered into its decision.

(c) State whether the agency has adopted all practicable means to mitigate environmental harm from the alternative selected, and if not, why the agency did not. When an agency includes mitigation as a component of the proposed action and relies on implementation of that mitigation to analyze the reasonably foreseeable environmental effects, the mitigation shall be enforceable, such as through permit conditions, agreements, or other measures. The agency shall identify the authority for enforceable mitigation, and adopt a monitoring and compliance plan consistent with § 1505.3(c).

§ 1505.3 Implementing the decision.

(a) Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(1) Include appropriate conditions in grants, permits, or other approvals; and

(2) Condition funding of actions on mitigation.

(b) The lead or cooperating agency should, where relevant and appropriate, incorporate mitigation measures that address or ameliorate significant adverse human health and environmental effects of proposed Federal actions that disproportionately and adversely affect communities with environmental justice concerns.

(c) The lead or cooperating agency shall prepare a monitoring and compliance plan when the environmental assessment or environmental impact statement relies on mitigation as a component of the proposed action to analyze the reasonably foreseeable environmental effects, including to determine the significance of those effects, and the agency incorporates the mitigation into a record of decision, finding of no significant impact, or separate document, consistent with the following:

(1) *Contents*. The agency should tailor the plan to the complexity of the mitigation committed to and include:

(i) A basic description of the mitigation measure or measures;

(ii) The parties responsible for monitoring and implementing the mitigation;

(iii) If appropriate, how monitoring information will be made publicly available;

(iv) The anticipated timeframe for implementing and completing mitigation;

(v) The standards for determining compliance with the mitigation and the consequences of non-compliance; and

(vi) How the mitigation will be funded.

(2) *No ongoing Federal action*. An agency does not need to supplement its environmental impact statement or environmental assessment or revise its record of decision or finding of no significant impact or separate decision document based solely on new information developed through the monitoring and compliance plan.

PART 1506—OTHER REQUIREMENTS OF NEPA

§ 1506.1 Limitations on actions during NEPA process.

(a) Except as provided in paragraphs (b) and (c) of this section, until an agency issues a finding of no significant impact, as provided in § 1501.6 of this subchapter, or record of decision, as provided in § 1505.2 of this subchapter, no action concerning the proposal may be taken that would:

(1) Have an adverse environmental effect; or

(2) Limit the choice of reasonable alternatives.

(b) If an agency is considering an application from a non-Federal entity and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to ensure that the objectives and procedures of NEPA are achieved. This section does not preclude development by applicants of plans or designs or performance of other activities necessary to support an application for Federal, State, Tribal, or local permits or assistance. An agency considering a proposed action for Federal funding may authorize such activities, including, but not limited to, acquisition of interests in land (*e.g.*, fee simple, rights-of-way, and conservation easements), purchase of long lead-time equipment, and purchase options made by applicants, if the agency determines that such activities would not limit the choice of reasonable alternatives and notifies the applicant that the agency retains discretion to select any reasonable alternative or the no action alternative regardless of any potential prior activity taken by the applicant prior to the conclusion of the NEPA process.

(c) While work on a programmatic environmental review is in progress and the action is not covered by an existing programmatic review, agencies shall not undertake in the

interim any major Federal action covered by the program that may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental review; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

§ 1506.2 Elimination of duplication with State, Tribal, and local procedures.

(a) Federal agencies are authorized to cooperate with State, Tribal, and local agencies that are responsible for preparing environmental documents, including those prepared pursuant to section 102(2)(G) of NEPA.

(b) To the fullest extent practicable unless specifically prohibited by law, agencies shall cooperate with State, Tribal, and local agencies to reduce duplication between NEPA and State, Tribal, and local requirements, including through use of studies, analysis, and decisions developed by State, Tribal, or local agencies. Except for cases covered by paragraph (a) of this section, such cooperation shall include, to the fullest extent practicable:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) To the fullest extent practicable unless specifically prohibited by law, agencies shall cooperate with State, Tribal, and local agencies to reduce duplication between NEPA and comparable State, Tribal, and local requirements. Such cooperation shall include, to the fullest extent practicable, joint environmental impact statements. In such cases, one or more Federal agencies and one or more State, Tribal, or local agencies shall

be joint lead agencies. Where State or Tribal laws or local ordinances have environmental impact statement or similar requirements in addition to but not in conflict with those in NEPA, Federal agencies may cooperate in fulfilling these requirements, as well as those of Federal laws, so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State, Tribal, or local planning processes, environmental impact statements shall discuss any inconsistency of a proposed action with any approved State, Tribal, or local plan or law (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law. While the statement should discuss any inconsistencies, NEPA does not require reconciliation.

§ 1506.3 Adoption.

(a) *Generally*. An agency may adopt a draft or final environmental impact statement, environmental assessment, or portion thereof, or categorical exclusion determination, consistent with this section.

(b) *Environmental impact statements*. An agency may adopt a draft or final environmental impact statement, or portion thereof, provided that the adopting agency conducts an independent review of the statement and concludes that it meets the standards for an adequate statement, pursuant to the regulations in this subchapter and the adopting agency's NEPA procedures.

(1) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the adopting agency shall republish and file it as a final statement consistent with § 1506.9 of this subchapter. If the actions are not substantially the same or the adopting agency determines that the statement requires supplementation, the adopting agency shall treat the statement as a draft, supplement or

reevaluate it as necessary, and republish and file it, consistent with § 1506.9 of this subchapter.

(2) Notwithstanding paragraph (b)(1) of this section, if a cooperating agency does not issue a record of decision jointly or concurrently consistent with § 1505.2 of this subchapter, a cooperating agency may issue a record of decision adopting the environmental impact statement of a lead agency without republication.

(c) *Environmental assessments*. An agency may adopt an environmental assessment, or portion thereof, if the actions covered by the original environmental assessment and the proposed action are substantially the same, and the assessment meets the standards for an adequate environmental assessment under the regulations in this subchapter and the adopting agency's NEPA procedures. If the actions are not substantially the same or the adopting agency determines that the environmental assessment requires supplementation, the adopting agency may adopt the environmental assessment, and supplement or reevaluate it as necessary, in its finding of no significant impact and provide notice consistent with § 1501.6 of this subchapter.

(d) *Categorical exclusion determinations*. An agency may adopt another agency's determination that a categorical exclusion applies to a particular proposed action if the action covered by that determination and the adopting agency's proposed action are substantially the same.

(1) The adopting agency shall document its adoption, including the determination that its proposed action is substantially the same as the action covered by the original categorical exclusion determination and that there are no extraordinary circumstances present that require the preparation of an environmental assessment or environmental impact statement.

(2) The adopting agency shall publish its adoption determination on an agency website or otherwise make it publicly available.

(e) *Identification of certain circumstances*. The adopting agency shall specify if one of the following circumstances is present:

(1) The agency is adopting an environmental assessment or environmental impact statement that is not final within the agency that prepared it.

(2) The action assessed in the environmental assessment or environmental impact statement is the subject of a referral under part 1504 of this subchapter.

(3) The environmental assessment or environmental impact statement's adequacy is the subject of a judicial action that is not final.

§ 1506.4 Combining documents.

Agencies should combine, to the fullest extent practicable, any environmental document with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility for environmental documents.

(a) The agency is responsible for the accuracy, scope (§ 1501.3(b) of this subchapter), and content of environmental documents and shall ensure they are prepared with professional and scientific integrity, using reliable data and resources, regardless of whether they are prepared by the agency or a contractor under the supervision of the agency or by the applicant or project sponsor under procedures the agency adopts pursuant to section 107(f) of NEPA and § 1507.3(c)(1) of this subchapter. The agency shall exercise its independent judgment and briefly document its determination that an environmental document meets the standards under NEPA, the regulations in this subchapter, and the agency's NEPA procedures.

(b) An agency may require an applicant to submit environmental information for possible use by the agency in preparing an environmental document. An agency also may authorize a contractor to prepare an environmental assessment or environmental impact statement under the supervision of the agency and may authorize a contractor to draft a

finding of no significant impact or record of decision, but the agency is responsible for its accuracy, scope, and contents.

(1) The agency should assist the applicant by outlining the types of information required for the preparation of environmental documents. The agency shall provide guidance to the contractor and participate in and supervise the document's preparation.

(2) The agency shall independently evaluate the information submitted and the environmental document and shall be responsible for their accuracy, scope, and contents, and document its evaluation in the environmental document.

(3) The agency shall include in the environmental document the names and qualifications of the persons preparing environmental documents, and conducting the independent evaluation of any information submitted or environmental documents prepared by a contractor, such as in the list of preparers for environmental impact statements (§ 1502.18 of this subchapter). It is the intent of this paragraph (b)(3) that acceptable work not be redone, but that it be verified by the agency.

(4) The lead agency or cooperating agency, where appropriate, shall prepare a disclosure statement for the contractor's execution specifying that the contractor has no financial or other interest in the outcome of the action. Such statement need not include privileged or confidential trade secrets or other confidential business information.

(5) Nothing in this section is intended to prohibit an agency from requesting any person, including the applicant, to submit information to it or to prohibit any person from submitting information to an agency for use in preparing environmental documents.

§ 1506.6 [Reserved]

§ 1506.7 Further guidance.

(a) The Council may provide further guidance concerning NEPA and its procedures.

(b) To the extent that Council guidance issued prior to [EFFECTIVE DATE OF THE FINAL RULE] is in conflict with this subchapter, the provisions of this subchapter apply.

§ 1506.8 Proposals for legislation.

(a) When developing legislation, agencies shall integrate the NEPA process for proposals for legislation significantly affecting the quality of the human environment with the legislative process of the Congress. Technical drafting assistance does not by itself constitute a legislative proposal. Only the agency that has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

(b) A legislative environmental impact statement is the detailed statement required by law to be included in an agency's recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later to allow time for completion of an accurate statement that can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(c) Preparation of a legislative environmental impact statement shall conform to the requirements of the regulations in this subchapter, except as follows:

(1) There need not be a scoping process.

(2) Agencies shall prepare the legislative statement in the same manner as a draft environmental impact statement and need not prepare a final statement unless any of the following conditions exist. In such cases, the agency shall prepare and publish the statements consistent with §§ 1503.1 of this subchapter and 1506.11:

(i) A Congressional committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects that the agency recommends be located at specific geographic locations.

For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(d) Comments on the legislative statement shall be given to the lead agency, which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

(a) Agencies shall file environmental impact statements together with comments and responses with the Environmental Protection Agency, Office of Federal Activities, consistent with the Environmental Protection Agency's procedures.

(b) Agencies shall file statements with the Environmental Protection Agency no earlier than they are also transmitted to participating agencies and made available to the public. The Environmental Protection Agency may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10.

(c) Agencies shall notify the Environmental Protection Agency when they adopt an environmental impact statement consistent with § 1506.3(b).

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the *Federal Register* each week of the environmental impact statements filed since its prior notice. The minimum time periods set forth in this section are calculated from the date of publication of this notice.

(b) Unless otherwise provided by law, including statutory provisions for combining a final environmental impact statement and record of decision, Federal agencies shall not

make or issue a record of decision under § 1505.2 of this subchapter for the proposed action until the later of the following dates:

(1) 90 days after publication of the notice described in paragraph (a) of this section for a draft environmental impact statement.

(2) 30 days after publication of the notice described in paragraph (a) of this section for a final environmental impact statement.

(c) An agency may make an exception to the rule on timing set forth in paragraph (b) of this section for a proposed action in the following circumstances:

(1) Some agencies have formally established administrative review processes (e.g., appeals, objections, protests), which may be initiated prior to or after filing and publication of the final environmental impact statement with the Environmental Protection Agency, that allow other agencies or the public to raise issues about a decision and make their views known. In such cases where a real opportunity exists to alter the decision, the agency may make and record the decision at the same time it publishes the environmental impact statement. This means that the period for administrative review of the decision and the 30–day period set forth in paragraph (b)(2) of this section may run concurrently. In such cases, the environmental impact statement shall explain the timing and the public's right of administrative review and provide notification consistent with § 1506.9; or

(2) An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety may waive the time period in paragraph (b)(2) of this section, publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement, and provide notification consistent with § 1506.10, as described in paragraph (a) of this section.

(d) If an agency files the final environmental impact statement within 90 days of the filing of the draft environmental impact statement with the Environmental Protection Agency, the minimum 30–day and 90–day periods may run concurrently. However, subject to paragraph (e) of this section, agencies shall allow at least 45 days for comments on draft statements.

(e) The lead agency may extend the minimum periods in paragraph (b) of this section and provide notification consistent with § 1506.10. Upon a showing by the lead agency of compelling reasons of national policy, the Environmental Protection Agency may reduce the minimum periods and, upon a showing by any other Federal agency of compelling reasons of national policy, also may extend the minimum periods, but only after consultation with the lead agency. The lead agency may modify the minimum periods when necessary to comply with other specific statutory requirements (§ 1507.3(d)(4) of this subchapter). Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, the Environmental Protection Agency may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period it shall notify the Council.

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant effects without observing the provisions of the regulations in this subchapter, the Federal agency taking the action should consult with the Council about alternative arrangements for compliance with section 102(2)(C) of NEPA. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Alternative arrangements do not waive the requirement to comply with the statute, but establish an alternative means for NEPA compliance.

§ 1506.12 Innovative approaches to NEPA reviews.

(a) The Council may authorize an innovative approach to NEPA compliance that allows an agency to comply with the Act following procedures modified from the requirements of the regulations in this subchapter, to facilitate sound and efficient environmental review for actions to address extreme environmental challenges consistent with section 101 of NEPA. Examples of extreme environmental challenges may relate to sea level rise, increased wildfire risk, or bolstering the resilience of infrastructure to increased disaster risk due to climate change; water scarcity; degraded water or air quality; disproportionate and adverse effects on communities with environmental justice concerns; imminent or reasonably foreseeable loss of historic, cultural, or Tribal resources; species loss; and impaired ecosystem health.

(b) The Council may approve an innovative approach if it is consistent with this section, and such approval does not waive the requirement to comply with the statute, but establishes an alternative means for NEPA compliance.

(c) An agency request for an innovative approach shall:

(1) Identify each provision of this subchapter from which the agency seeks a modification and how the innovative approach the agency proposes to ensure compliance with NEPA;

(2) Explain the extreme environmental challenge the approach would address, why the alternative means are needed to address the challenge, and how the alternative means would facilitate the sound and efficient environmental review; and

(3) Consult with any potential cooperating agencies and include a summary of their comments.

(d) The Council shall evaluate the agency's request within 60 days to determine if it meets the requirements in this section. The Council may:

(1) Approve the request for modification;

(2) Approve the request for modification with revisions; or

(3) Deny the request for modification.

(e) The Council shall publish on its website any request for modification that it has approved, approved with revisions, or denied.

§ 1506.13 Effective date.

The regulations in this subchapter apply to any NEPA process begun after [EFFECTIVE DATE OF THE FINAL RULE]. An agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before [EFFECTIVE DATE OF THE FINAL RULE].

PART 1507—AGENCY COMPLIANCE

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with the regulations in this subchapter. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements of NEPA and the regulations in this subchapter. Such compliance may include use of the resources of other agencies, applicants, and other participants in the NEPA process, but the agency using the resources shall itself have sufficient capability to evaluate what others do for it and account for the contributions of others. Agencies shall:

(a) Agencies shall designate a senior agency official to be responsible for overall review of agency NEPA compliance, including resolving implementation issues, and a Chief Public Engagement Officer to be responsible for facilitating community

engagement across the agency and, where appropriate, the provision of technical assistance to communities.

(b) Fulfill the requirements of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making that may have an impact on the human environment.

(c) Identify methods and procedures required by section 102(2)(B) of NEPA to ensure that presently unquantified environmental amenities and values may be given appropriate consideration.

(d) Prepare adequate environmental impact statements pursuant to section 102(2)(C) of NEPA and cooperate on the development of statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(e) Ensure environmental documents are prepared with professional integrity, including scientific integrity, consistent with section 102(2)(D) of NEPA.

(f) Make use of reliable data and resources in carrying out their responsibilities under NEPA, consistent with section 102(2)(E) of NEPA.

(g) Study, develop, and describe technically and economically feasible alternatives, consistent with section 102(2)(F) of NEPA.

(h) Study, develop, and describe alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources, consistent with section 102(2)(H) of NEPA.

(i) Comply with the requirement of section 102(2)(K) of NEPA that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(j) Fulfill the requirements of sections 102(2)(I), 102(2)(J), and 102(2)(L), of NEPA, and Executive Order 11514, Protection and Enhancement of Environmental Quality, section 2, as amended by Executive Order 11991, Relating to Protection and Enhancement of Environmental Quality.

§ 1507.3 Agency NEPA procedures.

(a) The Council has determined that the categorical exclusions contained in agency NEPA procedures as of [EFFECTIVE DATE OF THE FINAL RULE] are consistent with this subchapter.

(b) No more than 12 months after [EFFECTIVE DATE OF THE FINAL RULE], or 9 months after the establishment of an agency, whichever comes later, each agency shall develop or revise, as necessary, proposed procedures to implement the regulations in this subchapter, facilitate efficient decision making, and ensure that agencies make decisions in accordance with the policies and requirements of the Act. When the agency is a department, it may be efficient for major subunits (with the consent of the department) to adopt their own procedures.

(1) Each agency shall consult with the Council while developing or revising its proposed procedures and before publishing them in the *Federal Register* for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants.

(2) Agencies shall provide an opportunity for public review and review by the Council for conformity with the Act and the regulations in this subchapter before issuing their final procedures. The Council shall complete its review within 30 days of the receipt of the proposed final procedures. Once in effect, agencies shall publish their NEPA procedures and ensure that they are readily available to the public. Agencies shall continue to review their policies and procedures, in consultation with the Council, to

revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(3) The issuance or update of agency procedures is not subject to NEPA review under this subchapter.

(c) Agency procedures shall:

(1) Designate the major decision points for the agency's programs and actions subject to NEPA, ensuring that the NEPA process begins at the earliest reasonable time, consistent with § 1501.2 of this subchapter, and aligns with the corresponding decision points;

(2) Require that relevant environmental documents, comments, and responses be part of the record in rulemaking and adjudicatory proceedings;

(3) Integrate the environmental review into the decision-making process by requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that decision makers use them in making decisions;

(4) Require that the alternatives considered by the decision maker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decision maker consider the alternatives described in the environmental documents. If another decision document accompanies the relevant environmental documents to the decision maker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives;

(5) Require the combination of environmental documents with other agency documents to facilitate sound and efficient decision making and avoid duplication, where consistent with applicable statutory requirements;

(6) Include those procedures required by §§ 1501.2(b)(4) (assistance to applicants);

(7) Include specific criteria for and identification of those typical classes of action that normally:

(i) Require environmental impact statements; and

(ii) Require environmental assessments but not necessarily environmental impact statements;

(8) Establish categorical exclusions and identify extraordinary circumstances. When establishing new or revising existing categorical exclusions, agencies shall:

(i) Identify when documentation of a determination that a categorical exclusion applies to a proposed action is required;

(ii) Substantiate the proposed new or revised categorical exclusion with sufficient information to conclude that the category of actions does not have a significant effect, individually or in the aggregate, on the human environment and provide this substantiation in a written record that is made publicly available as part of the notice and comment process (§ 1507.3(b)(1) and (2)); and

(iii) Describe how the agency will consider extraordinary circumstances in determining whether additional analysis in an environmental assessment or environmental impact statement is required;

(9) Include a process for reviewing the agency's categorical exclusions at least every 10 years;

(10) Include a process for introducing a supplement to an environmental assessment or environmental impact statement into its formal administrative record, if such a record exists;

(11) Explain where interested persons can get information or status reports on environmental impact statements, environmental assessments, and other elements of the NEPA process; and

(12) Where applicable, include procedures to allow a project sponsor to prepare environmental assessments and environmental impact statements under the agency's supervision consistent with § 1506.5 of this subchapter.

(d) Agency procedures also may:

(1) Identify activities or decisions that are not subject to NEPA;

(2) Include processes for consideration of emergency actions that would not result in significant effects;

(3) Include specific criteria for providing limited exceptions to the provisions of the regulations in this subchapter for classified proposals. These are proposed actions that are specifically authorized under criteria established by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order or statute. Agencies may safeguard and restrict from public dissemination environmental assessments and environmental impact statements that address classified proposals in accordance with agencies' own regulations applicable to classified information. Agencies should organize these documents so that classified portions are included as annexes, so that the agencies can make the unclassified portions available to the public; and

(4) Provide for periods of time other than those presented in § 1506.10 of this subchapter when necessary to comply with other specific statutory requirements, including requirements of lead or cooperating agencies.

§ 1507.4 Agency NEPA program information.

(a) To allow agencies and the public to efficiently and effectively access information about NEPA reviews, agencies shall provide for agency websites or other information technology tools to make available documents, relevant notices, and other relevant information for use by agencies, applicants, and interested persons. The website or other such means of publication shall include the agency's NEPA procedures, including those

of subunits, and a list of environmental assessments and environmental impact statements that are in development and complete. As appropriate, agencies also should include:

(1) Agency planning and other documents that guide agency management and provide for public involvement in agency planning processes;

(2) Environmental documents;

(3) Agency policy documents, orders, terminology, and explanatory materials regarding agency decision-making processes;

(4) Agency planning program information, plans, and planning tools; and

(5) A database searchable by geographic information, document status, document type, and project type.

(b) Agencies shall provide for efficient and effective interagency coordination of their environmental program websites and other information technology tools, such as use of shared databases or application programming interfaces, in their implementation of NEPA and related authorities.

PART 1508—DEFINITIONS

§ 1508.1 Definitions.

The following definitions apply to the regulations in this subchapter. Federal agencies shall use these terms uniformly throughout the Federal Government.

(a) *Act* or *NEPA* means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*).

(b) *Affecting* means will or may have an effect on.

(c) *Authorization* means any license, permit, approval, finding, determination, or other administrative decision issued by an agency that is required or authorized under Federal law in order to implement a proposed action.

(d) *Categorical exclusion* means a category of actions that an agency has determined, in its agency NEPA procedures (§ 1507.3 of this subchapter) or pursuant to § 1501.4(c) of this subchapter, normally does not have a significant effect on the human environment.

(e) *Cooperating agency* means any Federal, State, Tribal, or local agency with jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal that has been designated by the lead agency.

(f) *Council* means the Council on Environmental Quality established by title II of the Act.

(g) *Effects* or *impacts* means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and include the following:

(1) Direct effects, which are caused by the action and occur at the same time and place.

(2) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

(3) Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from actions with individually minor but collectively significant effects taking place over a period of time.

(4) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, such as disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative.

Effects also include climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial.

(h) *Environmental assessment* means a concise public document, for which a Federal agency is responsible, for an action that is not likely to have a significant effect or for which the significance of the effects is unknown (§ 1501.5 of this subchapter), that is used to support an agency's determination of whether to prepare an environmental impact statement (part 1502 of this subchapter) or a finding of no significant impact (§ 1501.6 of this subchapter).

(i) *Environmental document* means an environmental assessment, environmental impact statement, documented categorical exclusion determination, finding of no significant impact, record of decision, or notice of intent.

(j) *Environmental impact statement* means a detailed written statement that is required by section 102(2)(C) of NEPA.

(k) *Environmental justice* means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that affect human health and the environment so that people:

(1) Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and

(2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

(*l*) *Environmentally preferable alternative* means the alternative or alternatives that will best promote the national environmental policy as expressed in section 101 of NEPA.

(m) *Extraordinary circumstances* are factors or circumstances that indicate a normally categorically excluded action may have a significant environmental effect. Examples of extraordinary circumstances include potential substantial effects on sensitive environmental resources, potential disproportionate and adverse effects on communities with environmental justice concerns, potential substantial effects associated with climate change, and potential adverse effects on historic properties or cultural resources.

(n) *Federal agency* means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. For the purposes of the regulations in this subchapter, Federal agency also includes States, units of general local government, and Tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute.

(o) *Finding of no significant impact* means a document by a Federal agency briefly presenting the agency's determination that and reasons why an action, not otherwise categorically excluded (§ 1501.4 of this subchapter), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.

(p) *Human environment* or *environment* means comprehensively the natural and physical environment and the relationship of present and future generations with that environment. (*See also* the definition of "effects" in paragraph (g) of this section.)

(q) *Joint lead agency* means a Federal, State, Tribal, or local agency designated pursuant to § 1501.7(c) that shares the responsibilities of the lead agency for preparing the environmental impact statement or environmental assessment.

(r) *Jurisdiction by law* means agency authority to approve, veto, or finance all or part of the proposal.

(s) *Lead agency* means the Federal agency that proposes the agency action or is designated pursuant to § 1501.7(c) for preparing or having primary responsibility for preparing the environmental impact statement or environmental assessment.

(t) *Legislation* means a bill or legislative proposal to Congress developed by a Federal agency, but does not include requests for appropriations or legislation recommended by the President.

(u) *Major Federal action* or *action* means an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility.

(1) Major Federal actions generally include:

(i) Granting authorizations, including permits, licenses, rights-of-way, or other authorizations.

(ii) Adoption of official policy, such as rules, regulations, and interpretations adopted under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, or other statutes; implementation of treaties and international conventions or agreements, including those implemented pursuant to statute or regulation; formal documents establishing an agency's policies that will result in or substantially alter agency programs.

(iii) Adoption of formal plans, such as official documents prepared or approved by Federal agencies, which prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(iv) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and related agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(v) Carrying out specific projects, such as construction or management activities.

(vi) Providing financial assistance, including through grants, cooperative agreements, loans, loan guarantees, or other forms of financial assistance, where the agency has the authority to deny in whole or in part the assistance due environmental effects, impose conditions on the receipt of the financial assistance to address environmental effects, or otherwise has sufficient control and responsibility over the subsequent use of the financial assistance or the effects of the activity for which the agency is providing the financial assistance.

(2) Major Federal actions do not include the following:

(i) Non-Federal actions:

(A) With no or minimal Federal funding; or

(B) With no or minimal Federal involvement where the Federal agency cannot control the outcome of the project;

(ii) Funding assistance solely in the form of general revenue sharing funds that do not provide Federal agency compliance or enforcement responsibility over the subsequent use of such funds;

(iii) Loans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effects of the action;

(iv) Business loan guarantees provided by the Small Business Administration pursuant to section 7(a) or (b) and of the Small Business Act (15 U.S.C. 636(a) and (b)), or title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 through 697g);

(v) Judicial or administrative civil or criminal enforcement actions;

(vi) Extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States;

(vii) Activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority;

(viii) Activities or decisions that are not a final agency action within the meaning of such term under the Administrative Procedure Act; and

(ix) Activities or decisions for projects approved by a Tribal Nation that occur on or involve land held in trust or restricted status by the United States for the benefit of that Tribal Nation or by the Tribal Nation when such activities or decisions involve no Federal funding or other Federal involvement.

(v) *Matter* includes for purposes of part 1504 of this subchapter:

(1) With respect to the Environmental Protection Agency, any proposed legislation, project, action, or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(2) With respect to all other agencies, any proposed major Federal action to which section 102(2)(C) of NEPA applies.

(w) *Mitigation* means measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document or record of decision and that have a connection to those effects. Mitigation includes, in general order of priority:

(1) Avoiding the effect altogether by not taking a certain action or parts of an action.

(2) Minimizing effects by limiting the degree or magnitude of the action and its implementation.

(3) Rectifying the effect by repairing, rehabilitating, or restoring the affected environment.

(4) Reducing or eliminating the effect over time by preservation and maintenance operations during the life of the action.

(5) Compensating for the effect by replacing or providing substitute resources or environments.

(x) *NEPA process* means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

(y) *Notice of intent* means a public notice that an agency will prepare and consider an environmental impact statement or environmental assessment, as applicable.

(z) *Page* means 500 words and does not include citations, explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information.

(aa) *Participating agency* means a Federal, State, Tribal, or local agency participating in an environmental review or authorization of an action.

(bb) *Participating Federal agency* means a Federal agency participating in an environmental review or authorization of an action.

(cc) *Programmatic environmental document* means an environmental impact statement or environmental assessment analyzing all or some of the environmental effects of a policy, program, plan, or group of related actions.

(dd) *Proposal* means a proposed action at a stage when an agency has a goal, is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and can meaningfully evaluate its effects. A proposal may exist in fact as well as by agency declaration that one exists.

(ee) *Publish* and *publication* mean methods found by the agency to efficiently and effectively make environmental documents and information available for review by interested persons, including electronic publication, and adopted by agency NEPA procedures pursuant to § 1507.3 of this subchapter.

(ff) *Reasonable alternatives* means a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action.

(gg) *Reasonably foreseeable* means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.

(hh) *Referring agency* means the Federal agency that has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

(ii) *Scope* consists of the range and breadth of actions, alternatives, and effects to be considered in an environmental impact statement or environmental assessment.

(jj) *Senior agency official* means an official of assistant secretary rank or higher (or equivalent) that is designated for overall agency NEPA compliance, including resolving implementation issues.

(kk) *Significant effects* means adverse effects that an agency has identified as significant based on the criteria in § 1501.3(d) of this subchapter.

(*ll*) *Special expertise* means statutory responsibility, agency mission, or related program experience.

(mm) *Tiering* refers to the process described in § 1501.11 of this subchapter.

§ 1508.2 [Reserved]

[FR Doc. 2023-15405 Filed: 7/28/2023 8:45 am; Publication Date: 7/31/2023]