



December 23, 2020

Office of the Secretary of Transportation  
United States Department of Transportation  
1200 New Jersey Avenue SE, West Building,  
Ground Floor, Room W12-140  
Washington, DC 20590-0001

NAEP Comments on Proposed Rulemaking – Procedures for Considering Environmental  
Impacts - Docket No. DOT–OST–2020–0229

Dear Secretary Elaine Chao,

The National Association of Environmental Professionals (NAEP) is an interdisciplinary organization dedicated to developing the highest standards of ethics and proficiency in the environmental profession. We represent more than 5,000 members and affiliated environmental professionals working across the country in the public and private sectors. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., has been a major focus area of the NAEP for many years and we work closely with CEQ and other agencies and organizations to promote efficient and effective compliance with NEPA.

We respectfully submit the attached comments on the subject notice of proposed rulemaking (NPRM). We support the continuing efforts to improve NEPA practices with the ultimate goals of more effective public involvement and improve decision-making. A hallmark of the current NEPA regulations has been their flexibility. The final rule of the implementing NEPA regulations taking effect on July 16, 2020 reduces this necessary flexibility and imposes unnecessary constraints which ‘trickles down’ to the Department’s Operating Administrations. We understand the USDOT must comply with NEPA and update the current practices found in DOT Order 5610.1C, Procedures for Considering Environmental Impacts while incorporating provisions of SAFETEA-LU, MAP-21, and the FAST Act. Please also consider reviewing the comments we provided in the NPRM NEPA CEQ Docket CEQ-2019-0003 and attached.

Thank you for consideration of these comments. Should you have any questions about our comments, please contact Charles P. Nicholson at [cpnicholson53@gmail.com](mailto:cpnicholson53@gmail.com) or (865) 405-7948.

Sincerely,

A handwritten signature in blue ink that reads "Betty Dehoney".

Betty J. Dehoney, CEP, PMP, ENV SP  
NAEP President

A handwritten signature in black ink that reads "Charles P. Nicholson".

Charles P. Nicholson, PhD  
Chair, NAEP NEPA Practice

A handwritten signature in black ink that reads "Caroline J. Levenda".

Caroline J. Levenda, CEP  
Chair, NAEP Transportation Working Group

## National Association of Environmental Professionals

### Comments on Proposed Rulemaking Updating the Procedures for Considering Environmental Impacts, Docket DOT-OST-2020-0229

#### III. Section-by-Section Description of Changes in the Proposed Rule

##### A. Subpart A—General

This proposed subpart would set forth the Department's overarching environmental policy in the context of its agency mission, which is to ensure the safest, most efficient and modern transportation system in the world, which improves the quality of life for all American people and communities, from rural to urban, and increases the productivity and competitiveness of American workers and businesses.

*The department's overall "environmental" policy makes no mention of environmental consideration in its policy. In fact, it is a statement specifically about and solely on the subject of economic advancement which is counterintuitive to a policy on a systemic interdisciplinary process accounting for environmental resources sustained for future generations.*

The proposed subpart would provide consistency between the Department's NEPA procedures and congressional declarations of policy, which provide that it is in the national interest to "accelerate project delivery and reduce costs" and to ensure that transportation project delivery is completed in "an efficient and effective manner, promoting accountability for public investments and encouraging greater private sector involvement . . . while enhancing safety and protecting the environment."

*There is little evidence accelerated project delivery, cost reduction, and private sector involvement will affect positive environmental outcomes. In fact, these three "goals" largely contributed to the need for NEPA in 1970. Such actions of accelerated project delivery, cost reduction, and private sector involvement were clearly deleterious to environmental resources sustained for future generations.*

Finally, this subpart would support the presumptive time limits established in the updated CEQ regulations to complete environmental documentation.

*The commenter is not aware of any comprehensive analyses that clearly demonstrate that durations to processes to inform decision making as outlined in NEPA have had a net deleterious effect on public health, economy, or environment.*

#### § 13.1 Applicability

##### (a) Applicant.

*This is the applicability section where these regulations should not apply to OAs that have their own NEPA regulations. Unlike OST, several OAs have continuously updated their NEPA regulations and have NEPA statutory provisions not directed at OST. This is an instance where one size does not fit all. Since the CEQ requires the OAs to review and update their regulations it is not necessary for the OST to impose unnecessary regulatory burdens on OAs who have already established efficiencies in completing NEPA reviews.*

### § 13.3 Definitions

(b) Environmental review process. The Department would include this term to emphasize that the Department strives to comply not just with NEPA, but with all applicable environmental requirements in a single process, so as to ensure efficient project delivery and decisionmaking.

*This definition diminishes the comprehensiveness of the referenced term in that said process is a systemic interdisciplinary process accounting for environmental resources sustained for future generations which is just one of several factors accounted for in the “environmental” process; others being, but not limited to, operations, design, costs, public concern. Additionally, not all “applicable” environmental requirements align with durations and sequencing of NEPA in the project development process. The commenter suggests a broader comprehensive definition.*

### § 13.5 Environmental Review Policy

The Department's policies further statutory directives set forth in section 1313 of the FAST Act to: Develop a coordinated and concurrent environmental review and permitting process for transportation projects as well as align Federal reviews; reduce permitting and project delivery timelines; and facilitate interagency collaboration.

*A constant theme is deregulatory in nature. Reduce permitting infers this as well as does “...reduce...project delivery timelines...” As the commenter noted previously, objective, unbiased evidence does not exist that the durations to permit a project or the time to deliver a NEPA process lead to deleterious effects on public health, economy, or environment. It is more plausible that this theme is rooted in an economic based priority of a select few individuals who have vested interests in the outcomes of proposed actions. For example, a developer/political donor who will profit from a new roadway location would certainly say permitting and processes take too long; hence, clearly a biased preference for what is driving the rulemaking now under consideration that discounts sustainable resources for future generations.*

In addition, this proposed section would not include certain policy language from the 1985 procedures to update and align the Department's processes with the updated CEQ regulations and statutory provisions contained in section 1301 of MAP-21 (set out at 23 U.S.C. 101 note) directing the Department to accelerate transportation project delivery, reduce costs, and ensure that transportation projects are completed in a streamlined manner and that environmental reviews are efficient and effective.

*“We choose to go to the moon not because it’s easy, but because it’s hard; because that goal will serve to organize and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one which we intend to win.” A quote from a truly great President.*

*People who delivered the moon to the world did so because it was hard and because they were ultimately qualified and skilled to do so; very much unlike those who look to water down NEPA to nothing but an approval stamp in the false name of economic advancement.*

*This famous, critically important comment resonates today and has direct application to the Department’s Proposed Rulemaking now in front of the USDOT. NEPA was not meant to be easy which make no mistake is exactly what the proposed rulemaking is intended to do. It is hard because it hold us accountable to our actions that will resonate for future generations. It is hard because it requires us to consider our children and their children in balancing an acceptable*

*present for ourselves and even a better one for them.*

*Yet, here we are. For the proposed rulemaking rooted in economic advancement represents a singular focus explicitly remote of original NEPA intention.*

*Delivery of the Environmental Impact Statement (EIS), process is done because an action proposed by a project proponent has the potential to cause “significant” adverse impact on the surrounding communities of human, physical, and natural environment. Considering 0.1 percent of all proposed actions warrant analysis under the EIS process and considering that the environment in which the action will be placed, will have to interact with that action beyond the foreseeable future, then it goes without saying EIS process delivery is hard and it too should measure the best of our energies and skills. Under this pretext, difficulties, and challenges in EIS process is the norm; it is supposed to be hard. But alas, it seems the challenge put in front of the American citizenry in 1961 by a truly great President is a thing of the past. The NEPA rulemaking proposed by the USDOT is indicative of a new era of leadership; if it’s hard, even it is fundamentally right, let us cave to those who spend time complaining (instead of learning) and make the task seemingly easy by avoidance. Let us do this at the detriment of future generations in the hope that we will not have to answer to them.*

*What is being proposed is very much like EIS process delivery itself. The proposed action of “Modernization” is both highly controversial and has the very real potential to cause significant adverse impact. These two elements alone would require this federal action to be subject to an EIS if not for specific court rulings. Modernization is claimed for Purpose and Need. Streamlining to advance the economy and subsequent changes in USDOT rule is the proposed action. Perhaps, an EIS should be prepared for the rule changes proposed.*

For purposes of streamlining the procedures, the Department would clarify in Appendix C its expectation that OAs would integrate into the NEPA process compliance with substantive environmental laws.

*NEPA is the substantive environmental law.*

As to this section, the Department is of the view that it is not necessary to include specific references regarding: Preservation of the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites; preservation, restoration, and improvement of wetlands; improvement of the urban physical, social, and economic environment; and provision of opportunities for disadvantaged persons. These matters are otherwise covered in substantive environmental laws.

*NEPA is the substantive environmental law.*

The proposal recognizes that an EIS contains analyses, but is not a decision document like a FONSI or CE determination, and an EIS alone is not final agency action.

*The sentence is comparing apples to oranges. An EA contains analyses as do some CEs. A ROD is a Record of Decision and is the result of the story told in an EIS. A FONSI is a Finding as the result of the story told in the EA. The sentence clearly demonstrates a lack of true understanding of NEPA intent.*

B. Subpart B—NEPA Review Process

§ 13.7 Managing NEPA Compliance

For example, paragraph (c) of § 13.19 would permit either the Assistant Secretary or an OA Administrator to act as the senior agency official for purposes of allowing an OA to exceed the presumptive limit of 75 pages and to establish a new page limit for the EA. Similarly, for purposes of setting EA time limits for EAs, paragraph (c) of § 13.19 would authorize either official to set new time limits.

*Time limits and page durations were already accounted for in original CEQ guidance and do not need to be restated herein.*

Proposed paragraph (c) would identify OGC as legal counsel to the Office of Policy on topics related to the implementation and interpretation of NEPA, the CEQ regulations, this proposed rule, and other applicable laws; charge OGC with providing legal sufficiency determinations on Department NEPA documents; and charge OGC with coordinating with OAs and the Department of Justice on NEPA-related litigation.

*Determination of legal sufficiency should remain at the level of the OA. The OAs are most familiar with NEPA as applied to specific administrations within the Department. Delegation of such authority to the OGC only politicizes what is supposed to be an unbiased, objective process.*

Finally, this proposed section would authorize OAs, subject to 40 CFR 1507.3(a), to rely on their existing procedures until their new procedures are reviewed and revised, and to use, on a discretionary basis, portions of the Department's procedures to the extent such direction has not been incorporated into the OA's procedures.

*Commenter urges the Department to withdraw proposed rulemaking until such time that the Biden Administration is in office as it is probable that said administration may order reversal of some if not all changes to NEPA under recent CEQ directive.*

### § 13.9 Planning and Early Coordination

Nevertheless, in accordance with MAP-21 sec. 1310 and FAST Act sec. 1305, this proposal would recognize the statutory framework that permits the products of statewide and metropolitan planning processes to be adopted for use in the NEPA process.

*Commenter applauds the advancement of integration of planning and NEPA process. However, it must be made clear that statewide and metropolitan planning processes should only be adopted for use in NEPA process as long as said processes satisfy hard look, reasonable person, and full disclosure elemental to NEPA processes.*

### § 13.13 General Principles for the NEPA Review Process

Proposed paragraph (a) would address the integration, to the maximum extent possible and at the earliest possible time, of all environmental reviews into the NEPA process to create a single environmental document.

*See earlier comment on the subject matter.*

To expedite project delivery, proposed paragraph (b) would instruct OAs to incorporate by reference previously prepared and publicly available analyses, whenever possible, and to include a brief summary of the material in the NEPA document.

*NEPA as drafted in 1970 already allows for incorporation by reference and therefore this language is not needed.*

Proposed paragraph (c) would set forth general requirements for NEPA documents, in accordance with 40 CFR 1500.4(d), 1502.2(a) and (c), and 1502.8, including that they be written in plain language and that they address impacts in proportion to their significance.

Proposed paragraph (d) would require OAs to use an interdisciplinary approach, consistent with 40 CFR 1502.6,...

*NEPA as drafted in 1970 already allows for incorporation by reference and therefore this language is not needed.*

In addition, the proposed rule states that the methods to solicit the views of the public should be tailored to reach those persons who are interested or affected by the action, and NEPA documents should be made available online where appropriate and practicable.

*Commenter questions how an OA is to determine "...those persons who are interested or affected by the action..." without at first a comprehensive extensive outreach to allow equal access to the process that informs decision making.*

Accordingly, this paragraph would address the use of contractors in preparing NEPA documents and set forth requirements consistent with 40 CFR 1506.5, which require OAs to provide guidance, participate in the preparation of, and independently review and assume responsibility for the content of all NEPA documents.

*The use of contractors to serve as third party deliverers of EISs is about as absurd as it gets. Typically, third party providers must be able to state for record they have no vested interest in the outcome of the NEPA process; therefore, as it should be, the No Build Alternative is deserved of equal treatment in the process. A contractor clearly has a vested interest in the selection of a build alternative and clearly, an alternative they are prone to favor. Furthermore, for a contractor, time is money meaning contractors would be prone to dismiss the hard look, reasonable person, and full disclosure aspects of NEPA in favor of reaching a favorable decision for a build alternative. Again, this proposal is completely counter to NEPA intent of a systemic interdisciplinary approach to decision making.*

#### § 13.15 Determination of the Level of NEPA Review

Proposed paragraph (d) would reflect the Office of Policy's role as the responsible office for NEPA implementation and compliance and provide guidance to OAs to notify the Office of Policy for situations involving unresolved disagreements between the OA and an applicant regarding the appropriate level of NEPA review.

*See earlier comment regarding the Office of Policy and OGC. There is no need to restate the Office of Policy role here unless for dubious reason.*

#### § 13.17 Categorical Exclusions

Proposed paragraph (b) would provide a list of extraordinary circumstances that an OA must consider before applying a CE listed in proposed Appendix A of part 13. These represent circumstances in which a normally excluded action may have significant environmental effects; this updated list would add substantial increases of noise in a noise-sensitive area; substantial adverse

effects on a species listed or proposed to be listed on the List of Endangered or Threatened Species, or designated Critical Habitat for these species; a site that involves a unique characteristic of the geographic area, such as prime or unique agricultural land, a coastal zone, a historic or cultural resource, park land, wetland, wild and scenic river, designated wilderness or wilderness study area, sole source aquifer (potential sources of drinking water), or an ecologically critical area; as well as inconsistency with any applicable Federal, State, or local air quality standards, including those under the Clean Air Act, as amended; substantial short-or long-term increases in traffic congestion or traffic volumes on any mode of transportation; or substantial impacts on the environment resulting from the reasonably foreseeable, reportable release of hazardous or toxic substances.

*Consideration of extraordinary circumstances is reflective of documented CEs and it is suggested the sentence be revised to include "...this updated list would add, but not be limited to, ..."*

The CEQ regulations allow agencies to establish a process to use other Federal agencies' CEs for their proposed actions after consultation with the other agencies to ensure that use of their CEs is appropriate. The regulations require documentation of the consultation and identification to the public of those CEs that the OA may use for its proposed actions. 40 CFR 1507.3(f)(5). DOT requests comments on whether the Department should create such a process and on the design of any such process, or whether it is more appropriate to direct each OA to develop a process in its own OA Procedures.

*The Department should direct each OA to develop a process in its own OA Procedures to consult with and adopt other agencies' CEs when and where appropriate.*

This rule also would add two new CEs relating to rulemaking and policy activities. The first would cover the promulgation, modification, or revocation of rules and development of policies, notices, and other guidance documents that are strictly administrative, organizational, or procedural in nature; or are corrective, technical, or minor (proposed CE 10).

*The first CE should be stricken from implementation. It is clear by the rulemaking herein that revocation of rules that appears to be procedural can and will lead to significant impacts that should be accounted for in a robust environmental review process.*

The second CE would cover the promulgation, modification, revocation, or interpretation of safety standards, rules, and regulations that do not result in a substantial increase in emissions of air or water pollutants, noise, or traffic congestion, or increase the risk of reportable release of hazardous materials or toxic substances (proposed CE 11).

*Considering the science demonstrating the adversity of climate change and its direct ties to emissions, the second CE should cover standards, rules and regulations that clearly and undeniably result in a zero net increase in emissions of air or water pollutants.*

### § 13.19 Environmental Assessments

Proposed paragraph (b) would provide the required elements for an EA, consistent with 40 CFR 1501.5, while proposed paragraph (c) would set forth an EA page limit of 75 pages consistent with 40 CFR 1501.5(f) unless a senior agency official approves in writing an EA to exceed 75 pages and establishes a new page limit.

*While page limits have been established for EAs and EISs in past regulation, 75 pages continues to be arbitrary.*

Proposed paragraph (e) addresses the alternatives analysis for EAs, which may be limited to the proposed action and no action alternative, and may be analyzed to a degree commensurate with the nature of the proposed action and the OA's experience with the potential environmental impacts of similar projects.

*One thing of 50 years of NEPA has taught true practitioners is that each project is unique. Suggest striking "...and the OA's experience with the potential environmental impacts of similar projects."*

Rather than providing in this proposed rule specific direction on compliance with substantive requirements contained in other environmental statutes, the Department instead proposes to include in Appendix C a non-exhaustive list of relevant environmental reviews, authorizations, and consultations that OAs would be expected to integrate into the NEPA process.

*Commenters should be allowed to review and comment on the proposed list referenced.*

#### §§ 13.23-13.27 Environmental Impact Statements

The detailed discussion of the contents of an EIS that is in Attachment 2 to the 1985 procedures, as well as discussions regarding documenting impacts to specific resources, is not included in the proposed rule.

*Commenter seeks clarification if the statement means Attachment 2 is excluded or if it remains unchanged.*

Specifically, proposed paragraph (e)(2) would emphasize that the draft EIS should identify the OA's preferred alternative(s), if one or more exists, unless in conflict with other laws; otherwise the OA should provide agencies and the public with the opportunity to assess the environmental consequences of the preferred alternative prior to issuing a combined FEIS/ROD, or the OA should provide the public with an opportunity to evaluate the preferred alternative during a waiting period after the publication of the notice of availability of the FEIS.

*As written, the sentence makes little sense. If the OA has not identified a preferred alternative, then it is not possible to allow agencies or the public to comment on a preferred alternative prior to FEIS/ROD issuance (as this would typically be the comment period for the DEIS. Does this mean that the OA would be obligated to include another comment period after the DEIS comment period but before FEIS/ROD issuance? It seems highly unlikely that any federal agency would be willing to do this.*

Proposed paragraph (h) would reflect Departmental policy and CEQ regulations at 40 CFR 1502.11(g) to require OAs to include the total cost of the EIS on the cover page of an FEIS and a supplemental EIS. The amount reported would include the entire cost of the environmental review.

*This requirement should be stricken entirely from the record. The inclusion of such a requirement clearly demonstrates the lack of understanding of the NEPA process and doesn't account for the cost of any alternative to the NEPA process. Further, inclusion of cost is intentionally misleading. Studies time and again have shown that added cost and schedule during an EIS process is not the result of the process itself but is often political in nature or subject to the ebb and flow of economic conditions and effects of such upon a project sponsor's capabilities to fund a proposed action. Further, typical elements of an EIS process is preliminary engineering of the proposed action and its alternatives, public outreach, and legal analyses for sufficiency purposes; are these costs to be*

*included? This is not a requirement of conceptual studies, feasibility studies and other arguably trivial, non-essential project-related reports.*

#### § 13.29 Records of Decision

In general, if a combined FEIS/ROD will not be prepared, and when the proposal requires action by multiple Federal agencies, proposed § 13.29 clarifies that the OA should issue a single ROD with the other Federal agencies.

*The sentence should be amended to state "...when the proposal requires action by multiple Federal agencies, proposed § 13.29 clarifies that the OA should issue a single ROD with the other Federal agencies, when practicable."*

#### § 13.31 Adoption

Proposed paragraph (a) would discuss the adoption by OAs of EISs prepared by a lead agency on an action for which the OA is a cooperating agency, in accordance with 40 CFR 1506.3(b)(2)), while proposed paragraph (b) would provide information on adoption when the OA is not a cooperating agency but the action covered by the original EIS and the proposed action are substantially the same, including circulation requirements, in accordance with 40 CFR 1506.3(b)(1). Proposed paragraph (c) would cover the full or partial adoption of EISs when the OA is not a cooperating agency and the actions covered are not substantially the same, in accordance with 40 CFR 1506.3(b).

*What constitutes "substantially the same" should be clearly defined under these provisions.*

Proposed paragraph (f) would require re-evaluation of an EIS or EA that is more than 5 years old prior to its full or partial adoption, in accordance with proposed § 13.33 and 40 CFR 1502.9(d)(4). Proposed paragraph (g) would require filing with the EPA when an OA adopts and publish an EIS, and finally, proposed paragraph (h) would allow an OA to adopt an EA, DEIS, or FEIS of another OA under 49 U.S.C. 304a(c)(2).

*Five years is arbitrary. What drives need for re-evaluation is rate of change to environmental conditions, changes in regulatory environment, changes in the design of the proposed action.*

#### § 13.33 Re-Evaluation and Supplementation

In addition, the Department would revise the interval for re-evaluation from three to five years.

*See comment immediately above. The interval is arbitrary.*

Additionally, proposed paragraph (a)(2) would require OAs to re-evaluate in writing DEISs if the OA has not issued an FEIS within five years of circulation of the DEIS, and FEISs if major steps toward implementation have not commenced within five years of FEIS approval.

*See comment immediately above. The interval is arbitrary.*

#### Appendix C to Part 13—Environmental Requirements for Integration with the NEPA Process

To assist the Department's NEPA practitioners in harmonizing these reviews, Appendix C would provide a non-exhaustive list of the environmental requirements that should be integrated with the NEPA process.

*Appendix C should CLEARLY state the list presented is non-exhaustive.*

#### IV. Rulemaking Analyses and Notices

(a) Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulations (49 CFR Part 5)

E.O. 12866 and E.O. 13563 require agencies to regulate in the “most cost-effective manner,” to make a “reasoned determination that the benefits of the intended regulation justify its costs,” and to develop regulations that “impose the least burden on society.”. The rule would implement several changes to Department policies, procedures, and internal coordination to streamline project delivery.

*Both E.O.’s place cost above all else in terms of informed decision making. It is this illogic that led to NEPA being enacted in the first place. At times, difficult decisions are necessary that due burden society but force society to come up with a better way, a better path. The intent to streamline project delivery is a case study in such direction. It was in part the expedited delivery, the race to deliver infrastructure that led to a societal realization that speed of delivery can hurt irreversibly the human, physical, and natural environments. Yet, here we are, looking to revert back to a project delivery approach that would be more of the same catastrophic activities that generated the societal awareness that the collective we wanted something better for our future generations.*

- Setting presumptive NEPA document page limit provisions and increasing the timeframe that NEPA documents remain valid from three to five years would reduce the Departmental time and resources required to develop, issue, or review NEPA documents

*See earlier comments on page limits and timeframes. Both are arbitrary and should be stricken from the proposed rulemaking.*

- Removing prescriptive EIS contents that were included in Attachment 2 of the 1985 procedures would allow documents to be tailored to use a more effective format for communication, thereby saving the Department and project sponsors time and resources in document preparation.

*The concept is counter to what many DOTs are doing in terms of tailoring documents. There are DOTs that are looking to “template” EIS format and content with the intention (which is still questionable) to ease the review process.*

Project sponsors may also incur de minimis costs from the rule, such as staff time to calculate and provide the total cost of the environmental review process on the final environmental impact statement cover page.

*See earlier comment on inclusion of “environmental review costs” on the cover page. The provision/requirement should be stricken from the rulemaking. It is quite realistic to think that public comment on a DEIS will focus on the cost of the process which has little to do with the informed decision making that NEPA supports.*

However, the Department expects that project sponsors would also achieve cost and time savings in the environmental review process which would outweigh these costs.

*If the cost of the environmental process is included on the cover page, then the cost savings in the*

*process AND for the project should be included as well.*

Additional internal coordination and reporting requirements would increase the accountability and transparency of the environmental review process for project sponsors, and will allow for earlier identification and mitigation of risks that could otherwise slow down the overall environmental review process.

*Will the cost of added internal coordination and reporting be attached to specific environmental review processes for specific projects? Also, there is little proof that this earlier administrative activities will lead to earlier identification of risk. NEPA is rooted in critical thought which requires time. Diverse opinions are brought to every EIS and the project sponsor and lead agency are asking for such opinions to align around a common idea. That action takes time to gestate. Everything about the rulemaking is to simplify and expedite which is counter to the challenge of using NEPA to support informed decision making. An unpublished survey was undertaken of the American public in 2018. In that survey, the majority surveyed agreed that projects should be delivered faster; BUT, an even higher percentage of the American public preferred projects should take longer to be delivered to ensure the human, physical, and natural environments would be adequately protected.*

The Department also expects that these changes would reduce the time required for projects to move through the environmental review process. As a result, projects may be completed earlier, and the benefits of transportation infrastructure improvements or research would accrue to the public sooner than they otherwise would have.

*The assertion that projects moving through the environmental review process is a benefit to the public is not rooted in a factual basis. One recent project took 17 years from NOI to ROD. In 2000, the project cost \$3.2 billion estimated dollars; by the time of the ROD, that price was just over \$1 billion dollars and the finished project meets the purpose and need and is being used every day. Further, the local economy grew at record pace despite not having the transportation infrastructure in place.*

Finally, shorter environmental documents would facilitate reviews by decisionmakers and the public.

*The comment makes questionable assertion. A shorter document may in fact be more difficult to understand because critical thought is not fully embellished leaving the reader with questions and confusion.*

Subpart A – General

§ 13.3 Definitions.

(b) Environmental review process means the integrated process for compliance with NEPA and any other applicable environmental statutes, regulations, or Executive Orders (E.O.), including those that require a permit, approval, consultation, or authorization to proceed with an action.

*This is a poor definition of the environmental review process. Such a process is a systemic interdisciplinary process accounting for engineering, science, and the arts in informing decision making.*

(d) NEPA document means an EIS, record of decision (ROD), EA, finding of no significant impact (FONSI), or any documentation prepared to support the application of a CE to a proposed action.

*NEPA documents also include those documents that make up the suite of documents that inform*

*the EIS – preliminary design concept reports and technical studies are two examples of such documents.*

## Subpart B – Nepa Review Process

### § 13.7 Managing NEPA Compliance

(d,e) This is the applicability section and the OA procedures section where these regulations should not apply to OAs that have their own NEPA regulations.

*Unlike OST, several OAs have continuously updated their NEPA regs and have NEPA statutory provisions not directed at OST. This is an instance where one size does not fit all. Since the CEQ requires the OAs to review and update their regulations it is not necessary for the OST to impose unnecessary regulatory burdens on OAs who have already established efficiencies in completing NEPA reviews.*

(e)(2) This section says that OAs need to identify which CEs require documentation. 13.3(d) defines a NEPA documentation as any documentation developed in support of a CE.

*There is an implication for an expectation for documentation in support of a CE, if minimally to demonstrate that the CE determination was not arbitrary and capricious. CEs cannot both be NEPA documents and have flexibility not to be NEPA documents. Either the definition of NEPA document should remove the inclusion of CE documentation or paragraph (e)(2) should be revised to explain the expected documentation for a CE action.*

(e)(4) Unnecessary and redundant requirement for OAs to develop a plan and schedule, within 30 days of the effective date of this rule, to make the OA procedures consistent with CEQ regs and the OST rule.

*OAs are already evaluating and expect to issue a NPRM for OA procedures according to the CEQ timeframe. That proposed rule will be subject to OST review pursuant to 13.7(e)(3). Therefore, OST gets to review and provide comments for consistency in an efficient manner already without introducing unnecessary plans and schedules. OA regs should not apply to OAs with implementing regulations, this provision would not apply. Revise section such that this requirement only applies to OAs who lack NEPA implementing regulations.*

### § 13.13 General principles for the NEPA review process.

(a) Integration of all environmental reviews into the NEPA process.

To the extent practicable, OAs should develop a single NEPA document for all Federal agency actions necessary for a proposed activity or project. (See 40 CFR 1501.7(g)).

*See earlier comment on the subject matter. Not all agency mandates align on a need specific to a transportation agency and shouldn't be expected therefore to support such action when it is deleterious to the mission of a given agency.*

(h)(1) This section says that commenters be provided notice that comments not submitted shall be forfeited as unexhausted.

*This requirement is inconsistent with the CEQ notion of "exhaustion" in that commenters be first notified of a comment period and that any comments received after the close of that period be*

*possibly forfeited as unexhausted. Instead, this section should underscore the value of timely comments and participating in the scoping process. Comments not submitted or submitted after the close of a comment period may not be able to be considered.*

(i) Use of contractors. Decisionmaking under NEPA is an inherently governmental function. OAs may use contractors to assist in the preparation of NEPA documents, but must require contractors to comply with this part and OA procedures, and follow relevant guidance. OAs must furnish guidance, participate in the preparation of, and independently evaluate NEPA documents, taking responsibility for their accuracy, scope, and contents. (See 40 CFR 1506.5).

(1) When an OA acts as the lead agency and uses a contractor, it may select the contractor for preparation of an EIS or EA, consistent 40 CFR 1506.5. The OA may select the contractor in cooperation with cooperating agencies.

(2) Prior to entering into a contract for the preparation of an EIS or EA, the OA must require the contractor or applicant to execute a disclosure statement specifying any financial or other interest if applicable, or stating it has no financial or other interests in the outcome of the proposed action. (40 CFR 1506.5).

*The use of contractors to serve as third party deliverers of EISs is about as absurd as it gets. Typically, third party providers must be able to state for record they have no vested interest in the outcome of the NEPA process; therefore, as it should be, the No Build Alternative is deserved of equal treatment in the process. A contractor clearly has a vested interest in the selection of a build alternative and clearly, an alternative they are prone to favor. Furthermore, for a contractor, time is money meaning contractors would be prone to dismiss the hard look, reasonable person, and full disclosure aspects of NEPA in favor of reaching a favorable decision for a build alternative. Again, this proposal is completely counter to NEPA intent of a systemic interdisciplinary approach to decision making.*

#### § 13.15 Determination of the level of NEPA review.

(c) In considering whether the effects of the proposed action are significant, agencies must analyze the potentially affected environment and degree of the effects of the action. Agencies should consider connected actions consistent with § 1501.9(e)(1). In considering the degree of the effects, agencies should consider the following, as appropriate to the specific action, where the effects are reasonably foreseeable and have a reasonably close causal relationship to the proposed action:

(1) Both short- and long-term effects.

(2) Both beneficial and adverse effects.

(3) Effects on public health and safety.

(4) Effects that would violate Federal, State, Tribal, or local law protecting the environment. (See 40 CFR 1501.3(b)).

*The discussion of impacts fails to recognize impacts that are specific to environment and would have indirect yet significant effect on public health and safety. Not disclosing this infers such impacts need not be described. A definition is warranted as to what features constitute public health and safety.*

### § 13.19 Environmental Assessments

(c) Page limits. EAs must be no more than 75 pages unless a senior agency official approves in writing an EA to exceed 75 pages and establishes a new page limit. OAs must obtain approval from an OA Administrator when the Administrator has been designated as a senior agency official for the OA or, for OST actions, the Assistant Secretary if an EA is anticipated to exceed the page limits. An EA should be as concise as possible while proportional to the magnitude of the proposed action and anticipated impacts.

(d) Time limits: EAs should be completed within one year from the agency's' determination to prepare an EA. If during development of the EA, the OA concludes that there will be significant impacts, the OA should issue an NOI and the time limits for EISs would apply. OAs must obtain approval from an OA Administrator when the Administrator has been designated as a senior agency official for the OA or, for OST actions, the Assistant Secretary if an EA needs a longer time period than one year. This request must be in writing and provide a reasonable timeframe for the OA to complete the EA. 40 CFR 1501.10(a)(1).

*While page limits have been established for EAs and EISs in past regulation, page limits and durations respectively continue to be arbitrary.*

(e) Alternatives. The EA must include the alternatives the OA will consider in its decisionmaking, which may be limited to the proposed action and no action alternative to the extent consistent with applicable authority including NEPA Section 102(2)(E). The EA should address alternatives to a degree commensurate with the nature of the proposed action and OA experience with the environmental issues involved. The EA should indicate a preferred alternative, if the OA identified one. For alternatives considered and eliminated from further study, an EA should briefly explain why they were eliminated.

*One thing of 50 years of NEPA has taught true practitioners is that each project is unique. Suggest striking "...and the OA's experience with the potential environmental impacts of similar projects."*

### § 13.23 Environmental Impact Statements

(h) Document cost. The OA must include the total cost (Federal and non-Federal) of the EIS on the cover page of the FEIS and Supplemental Environmental Impact Statement (SEIS), which includes the entire cost of the environmental review to the extent practicable. (See 40 CFR 1502.11(g)).

*This requirement should be stricken entirely from the record. The inclusion of such a requirement clearly demonstrates the lack of understanding of the NEPA process and doesn't account for the cost of any alternative to the NEPA process. Further, inclusion of cost is intentionally misleading. Studies time and again have shown that added cost and schedule during an EIS process is not the result of the process itself but is often political in nature or subject to the ebb and flow of economic conditions and effects of such upon a project sponsor's capabilities to fund a proposed action. Further, typical elements of an EIS process is preliminary engineering of the proposed action and its alternatives, public outreach, and legal analyses for sufficiency purposes; are these costs to be included? This is not a requirement of conceptual studies, feasibility studies and other arguably trivial, non-essential project-related reports.*

§ 13.31 Adoption.

(b) If an OA is not a cooperating agency, but the action covered by the original EIS and the proposed action are substantially the same, the OA is not required to publish it except as an FEIS. (See 40 CFR 1506.3(b)(1)). To the maximum extent practicable, the OA must issue a combined FEIS and ROD consistent with 49 U.S.C. 304a(b) or 23 U.S.C. 139(n), as applicable, and § 13.27(c).

*What constitutes “substantially the same” should be clearly defined under these provisions.*

(f) Before adopting all or a portion of another Federal agency's EIS or EA that is more than five years old, an OA must re-evaluate the relevant portion of the other agency's EA or EIS in accordance with § 13.33.

*Five years is arbitrary. What drives need for re-evaluation is rate of change to environmental conditions, changes in regulatory environment, changes in the design of the proposed action.*

§ 13.33 Re-Evaluation and Supplementation

(2) An OA must re-evaluate in writing a DEIS if the OA has not issued an FEIS within five years from the circulation date of the DEIS. An OA must re-evaluate in writing an FEIS if major steps toward implementation have not commenced within five years from the date of approval of the FEIS or FEIS supplement.

*The interval is arbitrary.*

*What is the basis for prolonging the uncertainty in the NEPA decision making for entities affected by a project? Must residents and business remain in limbo regarding whether or not a project will take their properties for two additional years when the thrust of these and the CEQ regulations is to expedite project delivery? Instead of extending the time frame where no action has been taken on a DEIS or FEIS from 3 to 5 years, keep the 3 year time frame and have a result of the written evaluation determine whether the project is still a valid project and if not, the NOI should be rescinded. A project may become invalid if the sponsor loses faith in its continuation due to insufficient funding or changed priorities. In that way, even when there is now an expectation for an EIS to be completed in 2 years, if a project were to reach 3 years w/o completion, the re-evaluation would serve as a basis for justifying whether the NOI would be rescinded or not.*



March 10, 2020

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

NAEP Comments on Proposed Rulemaking – Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act – Docket CEQ-2019-0003

Dear Associate Director Edward Boling,

The National Association of Environmental Professionals (NAEP) is an interdisciplinary organization dedicated to developing the highest standards of ethics and proficiency in the environmental profession. We represent more than 5,000 members and affiliated environmental professionals working across the country in the public and private sectors. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., has been a major focus area of the NAEP for many years and we work closely with CEQ and other agencies and organizations to promote efficient and effective compliance with NEPA.

We respectfully submit the attached comments on the subject notice of proposed rulemaking (NPRM). While the current NEPA regulations have been and remain effective, we support their updating to incorporate recent and evolving practices. We also support the continuing efforts to improve NEPA practices with the ultimate goals of more effective public involvement and improve decision-making. A hallmark of the current NEPA regulations has been their flexibility. As noted in our comments, some of the proposed revisions reduce this necessary flexibility and impose unnecessary constraints.

Thank you for consideration of these comments. We look forward to continuing to work closely with CEQ and other agencies to improve the implementation of NEPA. Should you have any questions about our comments, please contact Charles P. Nicholson at [cpnicholson53@gmail.com](mailto:cpnicholson53@gmail.com) or (865) 405-7948.

Sincerely,

Betty J. Dehoney, CEP, PMP, ENV SP  
President, NAEP

Charles P. Nicholson, PhD  
Chair, NAEP NEPA Practice

## National Association of Environmental Professionals

### Comments on Proposed Rulemaking Updating the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 40 CFR Parts 1500 – 1508, Docket CEQ-2019-0003

#### Part I, Section K. CEQ Guidance Documents

The NPRM on page 1710 states that following the final rulemaking, CEQ will withdraw all previous NEPA guidance. We strongly oppose this withdrawal. Many of the changes in the proposed rulemaking codify practices that are the subject of this guidance. The relevant guidance usually provides much more detail on the practices than will be available in the final rulemaking. Other guidance documents describing process that are not codified in the proposed rulemaking contain practical and useful information helpful to NEPA practitioners, National Historic Preservation Act practitioners (the NEPA and NHPA integration handbook), and the general public (the Citizens Guide). In the event that particular items in the existing guidance conflict with the final rulemaking, CEQ should continue to make the guidance available but add a sheet pointing out the conflicting parts of the guidance. We are not aware of conflicts between the proposed rulemaking and the entirety of any current guidance. Based on the rate at which CEQ has issued guidance over the last several years and its need to process upcoming revisions to agency NEPA procedures, it will likely be many years before CEQ replaces all of the existing guidance with updated versions.

#### Public Involvement

Public involvement is embedded in NEPA and specifically required in several sections of the act. The proposed rulemaking makes several changes to public involvement during the NEPA process. Some of these changes will increase public involvement while others will have the opposite effect.

We strongly oppose the revision to §1500.3(c) authorizing agencies to impose bond or security requirements as a condition for challenging an agency's action under NEPA. This will have a chilling effect on NEPA litigation and likely result in irreparable harm that may otherwise have been avoided by an injunction. See *Critics Flag Host of Measures in NEPA Proposal That Chill Public Input*, Inside EPA, Jan. 31, 2020. We do not understand the justification for the statement in §1500.3(d) that "These regulations do not create a cause of action or right of action for violation of NEPA, which contains no such cause of action or right of action." A violation of a duly promulgated regulation in the CFR is a violation of law, which, in the case of NEPA, includes the Administrative Procedures Act (5 U.S.C. §702). This statement has consequences in terms of accountability, judicial review, and potential recourse for concerned and affected members of the public and may not survive a court challenge.

We support the requirement in §1507.4(a) that agencies provide a website or other means with information about their NEPA process, and a directory of final and pending NEPA documents, including all environmental assessments (EAs) and environmental impact statements (EISs). At a minimum, recently completed NEPA documents, NEPA documents for projects that are under construction, and NEPA documents for long-term plans that are in effect should be posted on the website. The websites should be user-friendly and not require a complex docket search, as is currently the case with online NEPA documents issued by some agencies.

We support the statements in several parts of the proposed rule (e.g., §§1502.21, 1503.1, 1506.6, 1508.1) encouraging the use of electronic communications. The various forms of electronic communication must be designed in a readily understandable and intuitive manner with user-friendly interfaces. This is particularly important for online commenting, where some systems currently used by agencies do not meet these standards. As noted on page 1710 of the NPRM, however, the lack of electronic communications resources suitable for fully participating in the NEPA process persists in many parts of the country, both rural and urban. Many communities lacking these resources have high proportions of minority and low income residents and some have historically been disproportionately

affected by the adverse environmental impacts of a range of actions. Agencies must continue and increase efforts to fully involve all of the affected public in the NEPA process.

#### §1500.3(a) NEPA Compliance – Mandate

This section contains the following: "[a]gency NEPA procedures to implement these regulations shall not impose additional procedure or requirement beyond those set forth in these regulations, except as otherwise provided by law or for agency efficiency." This sentence limits agencies in different ways that would be contrary to improved agency decisionmaking. First, agencies differ in their efforts to meet the policy established in NEPA Section 101, which is implemented in part through the NEPA review process established in NEPA Section 102. An agency may, for example, conduct increased public participation and involvement or other NEPA processes that extend beyond the limits in the NPRM, leading to a better decision and more fully meeting the goals of the law. Second, the language is vague and unclear; agencies will have difficulty meeting the spirit and intent of this proposal, especially, when they must undergo Office of Management and Budget review.

#### §1501.1 NEPA Threshold Applicability Analysis

One of the factors listed in determining whether NEPA applies is (a)(1) "Whether the proposed action is a major Federal action." It is long established NEPA practice, long supported by case law, part of §1508.18 in the current regulations, and NEPA §102(2)(C), that major does not have a meaning independent of significantly and both major and significant are relevant to the decision of whether to prepare an EIS and not whether NEPA applies. "Major Federal action" is defined in §1507.4(q), in part, as a Federal action with effects that may be significant. This reinforces the need to prepare an EIS for major Federal actions. §1501.1(a)(1) therefore states that NEPA does not apply to proposed actions that are not major Federal actions, and under the current NEPA regulations would be the subject of an environmental assessment or eligible for a categorical exclusion.

§1501.1(a)(2), the applicability criteria of whether the proposed action is in whole or in part non-discretionary, is unnecessarily vague. The boundaries of this discretion need to be more particularly described. For example, what is the threshold for the proportion of the proposed action that is non-discretionary that determines whether NEPA applies? Is this to be determined through litigation? Are agencies to define the threshold in their NEPA procedures? This will result in different agencies defining different thresholds, and therefore different levels of environmental impacts that result from their actions but exempted from NEPA review. This is likely to result in unforeseen consequences, including litigation.

Overall, §1501.1 promotes the concept that an increased proportion of agency actions are not subject to NEPA. This is contrary to NEPA Sections 101 and 102.

#### §1501.1(a)(3) and §1506.9 Functional Equivalents of NEPA

These sections state that NEPA does not apply to actions that are the subject of environmental review processes that are the functional equivalent of NEPA. Such functionally equivalent processes are at present extremely limited and mostly or entirely actions undertaken by the Environmental Protection Agency. Courts have rejected arguments by some other agencies to substitute processes the agencies claim are functional equivalents. Such processes claimed to be functional equivalents are often not equivalent due to restricted public involvement, limited range of action alternatives, and narrow scope of impact analyses, including the omissions of specific requirements listed in NEPA Section 102(2)(C). The purported functionally equivalent documents, including documents produced by the Environmental Protection Agency, are also often highly technical and much less reader-friendly than are well-written EAs and EISs. We believe that the substitution of functionally equivalent processes and documents will be best remain very limited and oppose its widespread use.

#### §1501.4 Categorical Exclusions

We support the establishment of government-wide categorical exclusions. Due to the large differences in agency actions and missions, we recommend that the actions addressed in such categorical exclusions be limited to routine administrative actions and other actions that normally have no or very minimal direct effect on the environment. Agencies with such categorical exclusions do not, however, normally review the actions they address for extraordinary circumstances or document eligibility determinations each time the actions are taken. Therefore, we believe the establishment of government-wide categorical exclusions will result in minimal time savings, cost savings, or other efficiencies.

The explanation of the revised §1501.4 on page 1696 states that it provides additional clarity on the process of applying a categorical exclusion. “Extraordinary circumstances,” however, remains undefined in the proposed regulations and subject to different interpretations by different agencies. We note that the practice of categorically excluding actions where potentially significant impacts are mitigated to insignificant levels is already common practice at some agencies. With the proposed revision to §1501.4(1), we are concerned that agencies will increasingly use categorical exclusions with multiple required, substantial mitigation measures necessary to avoid significant impacts and comply with multiple other environmental regulations. Such actions would otherwise likely have been the subject of environmental assessments with public involvement. Many Federal agencies have little or no public involvement in making categorical exclusion determinations and categorically exclude actions with otherwise multiple potentially significant impacts is contrary to the public involvement spirit of NEPA. This may be an invitation for litigation.

#### §1501.5 Environmental Assessments

§1501.5(c)(2) states that EAs briefly discuss alternatives as required by section 102(2)(E) of NEPA. This discussion must include sufficiently detailed descriptions of the action alternatives that allow a reader to evaluate the accuracy of the descriptions of the environmental impacts. The EA should also contain a discussion of any alternatives it eliminated from detailed analysis, including those suggested in public comments, and a discussion of the reasons the alternatives were eliminated.

#### §1501.5 and 1502.7 Page Limits

Complex proposals with multiple reasonable alternatives can require lengthy EAs and EISs. Text that otherwise would have been in the body of the EA or EIS will be moved to appendices, resulting in more summary descriptions of alternatives, existing environment, and environmental consequences in the body of the EA or EIS. This may make the body of the EA or EIS more readable, as it will contain less detailed information. It will, however, be necessary for readers to read detailed explanations in appendices to fully understand the alternatives and their impacts. We do not see how this will substantively reduce preparation time or cost. We also question how CEQ determined that 75 pages is an appropriate page limit for EAs.

While §1501.5 and 1502.7 allow for increased page limits upon written approval by the “senior agency official” who is unlikely to be the decision-maker, this approval process is likely to cause delays in meeting the EA and EIS time limits. This concern also applies to the senior agency official written approval required to exceed the §1501.10 time limits.

#### §1501.6 Finding of No Significant Impact

§1501.6(a)(2) should be revised to state that the agency should provide a draft of the environmental assessment and a draft of the finding of no significant impact available for public review before making the formal determination of whether an EIS is necessary. Providing only the draft finding for review will not provide the public with sufficient information to evaluate its conclusions.

§1501.6(c) requires agencies to state the “means of and authority for” included mitigation measures. We understand “means of” to be a listing of the mitigation measures that will be implemented. This is already a standard practice at many agencies. We presume “authority for” means stating the statute that requires the particular mitigation measure. More clarification and examples of this would be helpful. Is NEPA itself, for example, the statute that will be cited for mitigation measures that are not required by any of the resource-specific statutes, such as for scenic impacts in many areas? Requiring citations to specific statutes may also discourage agencies from including mitigation measures for impacts that are not associated with a resource-specific statute. Another problem with this requirement is that some permitting processes result in the issuance of the permit, including it required mitigation measures, after the issuance of the FONSI. In such cases, the list of mitigation measures in the FONSI would not be complete, particularly with the 1-year time limit.

#### §§1501.9, 1501.10, 1506.1 Scoping, Time Limits, and Limitations on Actions during NEPA Process

Because the 2-year timespan for completing an EIS begins with the publication of the NOI, more extensive pre-NOI planning activities will be required for many proposed actions. This will not necessarily reduce the overall environmental review and planning time as it will shift part of the process to precede the NOI. To be successful and fully meet the intent and spirit of NEPA, these expanded pre-NOI activities must be undertaken with extensive public involvement as they will largely define the proposed action, other action alternatives, and the scope of the impact analyses. Otherwise, the pre-NOI activities, in concert with the proposed revision to §1506.1 relaxing restrictions on commitments on resources during the NEPA process, will increase the perception that the formal scoping process is perfunctory and any public scoping comments are after-the-fact. We have, for example, observed how the purchase of land and site preparation by agencies and applicants both before and during the formal NEPA process has influenced the range of alternatives. This is likely to occur more often under the revised §1506.1. And, with the time limit, agencies may be averse to adding new, reasonable alternatives suggested during formal scoping that require extensive analysis, including seasonally constrained fieldwork, beyond that completed or underway for the previously defined alternatives. The proposed §1502.17 and §1502.18 do not ameliorate this concern because they do not require an explanation of why the new alternatives and other information submitted during scoping were not analyzed.

It is not uncommon for the resource-specific review processes necessary for some proposed actions to exceed one and even two years. The National Historic Preservation Act Section 106 compliance process is a good example of this. Proposed actions that are likely to adversely affect historic resources, particularly infrastructure projects that impact large land areas, often require extensive and time-consuming Phase 1 and Phase 2 studies, which may be seasonally constrained, and the development of a Memorandum of Agreement that must be approved by the consulting parties before the NEPA decision document is issued.

§1501.9(d) requires notices of intent to include a summary of the expected environmental impacts. Depending on the amount of pre-NOI work, such a summary will either be speculative or will be definitive despite not having addressed topics raised during public scoping. The latter case may discourage public participation during scoping as it would reinforce the opinion that the scoping process is perfunctory. Any such summary should state that it is speculative and subject to revision based on the results of additional analyses.

#### §1501.10 Time Limits

The start of the 1-year timeframe for completing an environmental assessment is defined as the date the decision is made to prepare the environmental assessment. This date will likely be defined differently by different agencies, and, as with the timing of the issuance of NOIs for EISs, will be set as late in the overall review process as necessary to meet the timeframe. Extensive prework will be required for many proposed actions. The degree to which the overall process timeframe will be shortened is questionable.

## §1502.10 Recommended Format

We support the elimination of the distribution list from EISs. Such lists are normally incomplete because they only reflect the initial distribution and do not include many who access the EISs online. We note, however, that elimination of the distribution list may cause some agencies to neglect notifying agencies and organizations that would otherwise have been on the list and routinely receive distribution notifications. For administrative record purposes, agencies should be required to maintain a list of agencies, organizations, and individuals that the agency notified during public scoping and on the availability of the draft and final EISs. This list should be posted on the agency's project webpage or otherwise be made readily available without requiring a FOIA request.

## §1502.11 Cover

We strongly oppose §1502.11(g) on disclosing the cost of preparing the EIS in its present form because it does not adequately define how agencies are to determine this cost. Some of the highest costs incurred while the NEPA process is underway are for designing the project and compliance with other laws that are usually addressed simultaneously with and under the general umbrella of NEPA. The sometimes high cost of field surveys necessary for National Historic Preservation Act and Clean Water Act compliance are examples of the latter. Different agencies have different methods of accounting for such costs. Project proponents likewise have different methods of accounting for "NEPA compliance" costs. Consequently, the reported costs are likely to be misleading and can inflate the true EIS preparation cost. An example is the Proposed East Smoky Panel Mine Project at Smoky Canyon Mine FEIS for which the Notice of Availability was published on February 28, 2020. It reports preparations costs of \$92,000 for the Bureau of Land Management and \$8.2 million for the project proponent. We question the proportion of the proponent's \$8.2 million that was for NEPA compliance, *sensu stricto*, and suspect that the majority of this was for general project planning and compliance with other laws and regulations. The proponent would likely have incurred the majority of the \$8.2 million had its proposal not been the subject of the EIS. §1502.11 should contain explicit instructions on reporting EIS preparation costs that differentiate the cost of NEPA compliance, *sensu stricto*, from any other costs reported by the agencies involved, contractors and project proponents.

The intent of publishing the cost is not clear and, regardless of the amount and the proportion paid by Federal or state revenues, will be seen by many as an unnecessary expenditure. We also note that the cost of preparing a NEPA document is, at best, weakly correlated with the quality and adequacy of the document. We strongly recommend that, should the requirement for publishing the EIS preparation cost be maintained, agencies are required to publish the costs of implementing the action that are borne by both agencies and project proponents. This will provide a better perspective of the cost of the EIS in relation to the overall project costs and lessen the likely punitive perception of the EIS cost.

## §1502.13 and §1501.5(c)(2) Purpose and Need

"Purpose and need" for the proposed action have long been described in NEPA documents as either a single concept or the separate concepts. The proposed revisions do not clarify this ambiguity. Most references to purpose and need in the proposed rulemaking treat it as a single concept, i.e., "the purpose and need." It is unclear whether this is the intent in the proposed rulemaking. We recommend that CEQ replace "purpose and need" with "need." Otherwise, CEQ should explain the differences between the "purpose" and the "need" for a proposed action.

We question using an applicant's goals as a basis for the purpose and need for the proposed action. The proposed action is the agency's action and not the applicant's action. The agency's action is to make the decision on whether to authorize, fund, license, or otherwise approve the applicant's proposed action. The goals of private applicants are almost always to make money.

#### §1502.14 Alternatives Including the Proposed Action

We recommend reinserting the discussion that alternatives are the “heart of the EIS.” In addition, the NPRM invites comments on establishing a limit on the number of alternatives. We are concerned that such a limit is arbitrary and may not give agencies enough discretion to fully consider its impacts except in certain limited circumstances. Therefore, we disagree with setting any limit on the number of action alternatives in an EIS. Setting such a limit will unnecessarily constrain some EISs, particularly EISs that address long-term plans and programs, where there are often several reasonable alternatives that achieve the agency goals. In some EISs, alternatives are presented as a matrix of various combinations of, for example, routing, siting, and/or process options. The number of discrete action alternatives is difficult to determine in such EISs.

Although it has long been standard practice, mandated by the current regulations, to include a comparison of the impacts of the proposed actions in the alternatives section, this comparison is also a component of the EIS Summary and is the comparison is frequently identical in the two EIS sections. Including it in the alternatives section is therefore duplicative and should not be required.

#### §1502.17 Summary of Submitted Alternatives, Information, and Analyses

It is already a standard practice for agencies to describe submitted alternatives, information, and analyses received during public scoping and how the agency is addressing this information in the draft and final EIS. Similarly, it is already a requirement that agencies consider this information when it is submitted in comments on the draft EIS and that agencies describe their consideration of this information in the responses to such comments. The inclusion of a new separate section in the EIS to address this information is therefore superfluous.

We also question the utility of the required “senior agency official” certification of the summary of submitted alternatives, information, and analyses. The fact that the agency is publishing the EIS, which would otherwise summarize this information received during scoping and in comments on the draft EIS as well as a description of how the agency utilizes the submitted information, implies agency certification of the entirety of the contents of the EIS. Similarly, the Record of Decision represents the decision of the agency and should not need any additional certification by a “senior agency official.” And finally, a mere summary of the submitted information, without an explanation of how the agency utilized the information in developing the EIS is not responsive to public involvement.

We also question the associated and required 30-day public comment period on the summary of submitted information section in the final EIS (§1503.1). How will this work with the increased use of joint final EISs and RODs?

#### §1502.24 Methodology and Scientific Accuracy

The current §1502.24 implicitly allows agencies to utilize any reliable source of information, including remote sensing and statistical modeling. Agencies have been using such information for many years and we are not aware of court rulings that have invalidated the use of such information. We strongly oppose the addition of the statement that “agencies are not required to undertake new scientific and technical research to inform their analyses.” If a similar statement must be included, we recommend it be revised to state “agencies should undertake new scientific and technical research necessary to inform their analyses consistent with §1502.22(b).” This should also apply to environmental assessments.

The rationale for this change is not stated and we assume it is to reduce cost and preparation time. We strongly oppose this change because existing environmental information is frequently inadequate to make the informed decisions mandated by NEPA. Reliance on reliable existing data only, and not undertaking new scientific and technical research is contrary to the long-standing “hard look” principle and will result in poorly informed or uninformed decisions on numerous proposed actions. While there are numerous reliable data sources for a variety of resources analyzed in NEPA documents, these data are frequently

incomplete, outdated, and/or not readily accessible. Relying solely on these data will, in many cases, lead to unsupportable conclusions that impacts are not significant.

New research is often essential to designing the proposed action; an example is hydrologic modeling for a water resources project. New research is also often essential for complying with many of the environmental laws and regulations addressed in NEPA reviews. Examples include monitoring and modeling for Clean Air Act compliance; wetland delineations for Clean Water Act compliance; field surveys and habitat assessments for Endangered Species Act compliance; and field surveys for National Historic Preservation Act compliance. It is unclear whether the proposed revision applies to these acts. Adequately assessing impacts to several other resources normally assessed in NEPA reviews that are not the subject of specific laws and regulations is also frequently necessary. Such resources include vegetation and wildlife, aesthetics, recreation, and transportation.

#### §1503.4 Response to Comments

§1503.4(a) states “[a]n agency preparing a final environmental impact statement shall consider substantive comments timely submitted during the public comment period...” This implies that agencies are not to consider substantive comments submitted outside of formal comment periods. Such comments can contain useful information and agencies should have the ability to consider these comments. Ignoring such comments is can also discourage stakeholder participation in the NEPA process.

#### §1506.5 Agency Responsibility for Environmental Documents

We oppose the elimination of the requirement that contractors preparing EISs for the lead agency or for a project proponent execute a disclosure statement on their interest in the outcome of the project. We also recommend that the lead agency approve the project proponent's selection of a contractor to prepare the EIS. We have seen instances where project proponents have selected poorly qualified contractors, resulting in costly and time-consuming rework by the lead agency.

#### §§1506.13 and 1507.3 Effective Date and Agency NEPA Procedures

These sections should be clarified to state whether agencies are to comply with the revised final regulations upon their publication or whether their compliance is delayed until agencies revise their agency-specific NEPA procedures.

#### §1507.2 Agency Capability to Comply

We support the revisions to this section and the reiteration of the requirement that each agency shall have adequate personnel and other resources necessary to fully comply with NEPA. This is particularly important in light of the proposed changes in §1506.5 to encourage project sponsors to prepare NEPA documents evaluating their proposed actions. In our experience, some agencies do not presently have adequate resources to oversee the preparation of such documents and conducted an informed evaluation of their accuracy. This oversight and evaluation is inherently an agency function. The time limits imposed on preparing EAs and EISs in §1501.10 may constrain the evaluation of applicant-prepared NEPA documents, particularly when the agency does not have adequate qualified staff. This evaluation frequently requires at least two rounds, and sometimes three rounds, of agency review.

#### §1508.1(g) Effects or Impacts

We recognize that the elimination of the requirement to analyze indirect and cumulative impacts is one of the most controversial items in the proposed rulemaking. Whether or not the elimination of the differentiation between direct, indirect, and cumulative impacts reduces confusion and unnecessary litigation, however, remains to be seen. We believe that, at least in the short term, it will increase litigation based on the courts' interpretation of NEPA Section 102. We agree that differentiating between the three types of effects has, at times, been confusing and resulted in unnecessary hair-splitting. Nevertheless,

the three types of effects are valid and necessary concepts. In many cases, the causal chain does include clearly identifiable impacts caused by the action alternatives that are not necessarily under the direct control of the lead and cooperating agencies. Eliminating the discussion of such impacts will result in less-informed decision making. Restricting the scope of the impact analysis in time, as the revisions attempt to do, contradicts the NEPA Section 101(b) mandate to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations. Restricting the scope of the impact analysis in geography is contrary to NEPA Section 2 – Purpose “to promote efforts which will prevent or eliminate damage to the environment and biosphere.” Restricting the scope of the impact analysis will also result in possible environmental justice implications, as indirect and cumulative effects may disproportionately impact minority and low income populations. This is contrary to the intent of Executive Order 12898 on environmental justice.

The cumulative aspect of impacts to several environmental resources is important and must be considered to properly comply with NEPA and some other environmental laws and regulations. Examples include air quality and the emissions of air pollutants including greenhouse gases, water quality and discharges of pollutants, and noise levels. In such cases, it is essential to define both present and future quantities and thresholds, and how those will change both with and without the implementation of the action alternatives. A cumulative impact analysis is also necessary for many proposed actions that are to be implemented in phases. Predicting the impacts of the phases to be implemented in the future requires describing the changed future conditions resulting from predicted environmental trends, as well as the impacts of the other reasonably foreseeable actions by the lead and cooperating agencies and by other entities.

#### §1508.4(q) Major Federal Action

Major Federal action is defined, in part, as excluding non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project. We request that CEQ clarify federal control and minimal federal involvement. The current language is unclear and vague as different agencies will have different definitions “minimal.” We also note that Federal agencies providing “minimal” funding or involvement frequently exert some level of control over many non-Federal actions. Although such actions may not be major Federal actions requiring an EIS, they are still subject to NEPA.