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Via facsimile, electronic, and first-class mail

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Re: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Docket No. CEQ-2019-0003

Dear Council on Environmental Quality Representative,

The Hydropower Reform Coalition (HRC) provides these comments in response to the Council on Environmental Quality's (CEQ) proposed amendments to the regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA), *see* 85 Fed. Reg. 1684 (Jan. 10, 2020) (Proposed Rule). We intend for these comments to assist CEQ in its evaluation of the legal, policy, and technical implications of the Proposed Rule, and to inform revisions to the Proposed Rule before it is finalized.

The HRC generally supports CEQ's stated objective to ensure that NEPA documents "serve their purpose of informing decision makers regarding the significant potential environmental effects of proposed major Federal actions and the public of the environmental

issues in the pending decision-making process.”¹ We expect some of the changes proposed by CEQ will contribute to this objective – particularly making consultation expressly inclusive of Tribes – but several will not. Our comments focus on provisions that would frustrate rather than contribute to informed agency decision-making through robust and science-based consideration of environmental impacts. In light of our mission, we use licensing proceedings before the Federal Energy Regulatory Commission (FERC or the Commission) to illustrate the negative impacts certain proposed rules would have on federal administrative proceedings.

I. Description of HRC

The HRC is an association of over 160 national, regional, and local membership groups² dedicated to enhancing the quality of rivers controlled by hydropower projects, ensuring public access to these lands and waters, and reforming the federal licensing process to ensure public participation and to improve the quality of the resulting decisions.

Since its founding in 1992, the HRC’s member groups have intervened and participated in a majority of licensing proceedings before FERC. These groups are signatories to more than 200 comprehensive settlement agreements which, as the basis for new licenses, have restored water quality, fisheries, and recreational access to thousands of miles of rivers and streams. The HRC negotiated with the National Hydropower Association, federal and state agencies, and other opinion leaders in hydropower regulation to develop the concepts FERC adopted as the Integrated Licensing Process (ILP) in 2003.

¹ Proposed Rule at 1691.

² These groups represent more than 1.5 million people across the country.

The HRC is governed by a Steering Committee comprised of conservation and recreation organizations that have regional and/or national interests in river protection, *see* <https://www.hydroreform.org/about/steeringcommittee>. Its policies for hydropower regulation, press releases on significant developments, and information on member groups are published at www.hydroreform.org. In addition to participating as members of the HRC, the organizations described below sign-on independently to these comments.

Alabama Rivers Alliance is a statewide network of 50+ groups and 630 members working to protect and restore all of Alabama's water resources through building partnerships, empowering citizens, and advocating for sound water policy and its enforcement.

American Rivers is a national non-profit organization working to protect and restore rivers and streams for the benefit of people, fish, and wildlife. Since 1973, American Rivers has helped foster full consideration of environmental impacts under NEPA through advocacy, science, and on-the-ground projects with local partners and agencies. American Rivers has offices across the country, and more than 350,000 supporters, members, and volunteers nationwide.

American Whitewater is a national 501(c)(3) non-profit organization with a mission to protect and restore America's whitewater rivers and to enhance opportunities to enjoy them safely. Its members are primarily conservation-oriented kayakers, canoeists, and rafters who enjoy exploring whitewater rivers. As outdoor enthusiasts who spend time on and in the water, its members have a direct interest in informing decision-making for environmental impacts for our nation's waterways. American Whitewater works throughout the country to protect healthy free-flowing rivers and restore rivers that have been dammed, degraded, and dewatered through hydropower development.

The Appalachian Mountain Club has promoted the protection, enjoyment, and understanding of the mountains, forests, waters, and trails of the Appalachian region since 1876. It is the largest conservation and recreation organization in the Northeast with more than 90,000 members, many of whom visit and enjoy our rivers for recreation.

The Atlantic Salmon Federation's (ASF) mission is to conserve and restore wild Atlantic salmon and their ecosystems. ASF is the world's largest Atlantic salmon conservation organization and works at the local, regional, national, and international level. ASF has participated in FERC relicensing proceedings for more than 30 years and is a signatory to numerous settlement agreements, including landmark agreements on Maine's Kennebec and Penobscot Rivers.

California Sportfishing Protection Alliance (CSPA) is a non-profit, public benefit fishery conservation organization incorporated in 1983 to protect, restore, and enhance California's fishery resources and their aquatic ecosystems. It works to ensure that public fishery resources are conserved to enable public sport fishing activity. As an alliance, CSPA represents over 1,000 members that reside in California. CSPA is concerned about the prolonged and extensive decline of California's fish species and the subsequent environmental impacts. CSPA works with many government agencies in diverse regulatory proceedings to reverse these declines.

The Connecticut River Watershed Council, Inc., d/b/a the Connecticut River Conservancy (CRC), is a 501(c)(3) organization. Since 1952 the Connecticut River Conservancy has worked to protect and restore New England's Great River in all four watershed states. It brings people together to prevent pollution, improve habitat, and promote enjoyment of their rivers and its tributary streams. For decades CRC's advocacy work has included engaging in

hydropower relicensing, regulations, and policy throughout the watershed. CRC knows that healthy rivers support healthy economies.

Foothill Conservancy is a 501(c)(3) California nonprofit corporation whose mission is to restore, protect, and sustain the natural and human environment in central Sierra counties.

Friends of the River is a non-profit organization founded in 1973. It has more than 3,000 members dedicated to the protection, preservation, and restoration of California's rivers, streams, and aquatic ecosystems. Friends of the River's extensive experience in hydropower relicensing includes aiding in informed decision-making of environmental impacts in 10 relicensing proceedings in the past 15 years.

Idaho Rivers United is a 501(c)(3) non-profit corporation registered in the State of Idaho with 3,500 members. Its mission is to protect and restore the rivers of Idaho. To this end, Idaho Rivers United works to safeguard Idaho's imperiled wild steelhead and salmon, protect and enhance stream flows, improve water quality, and defend and promote the many benefits that flow from Idaho's rivers through advocacy, outreach, and informed decision-making.

Maine Rivers is an advocacy organization led by directors with broad and deep knowledge of the wide range of issues which impact the rivers and watersheds of Maine, including water policy and science. Its mission is to protect, restore and enhance the ecological health of Maine's river systems. It works with individuals, communities, agencies and organizations to foster river restoration.

The Michigan Hydro Relicensing Coalition (MHRC) is a coalition of four statewide, nonprofit conservation groups with an interest in the protection and enhancement of aquatic resources: Michigan United Conservation Clubs, Michigan Council of Trout Unlimited, Great Lakes Council of Flyfishers International, and Anglers of the Au Sable. All members are

501(c)(3) non-profit organizations. Its mission is to ensure that conservation, environmental, and recreational concerns are adequately addressed by decision-makers and given the fullest possible consideration throughout the licensing process. Formed in 1991, the MHRC has participated in every settlement reached in the hydro licensing process in Michigan for more than 25 years.

New England Flow (NE FLOW) is the largest coalition of whitewater boaters in the northeastern United States. Since 1988, NE FLOW has promoted the protection, enjoyment, and understanding of the mountains, forests, waters, and trails of the New England region. Over the past three decades, NE FLOW has encouraged full consideration of environmental impacts and secured agreements that have expanded recreation opportunities at numerous hydropower projects throughout the region.

The South Yuba River Citizens League (SYRCL) is a membership-based public benefit 501(c)(3) non-profit organization with over 3,500 members and nearly 1,000 active annual volunteers supporting the mission to protect and restore the Yuba river and the greater Yuba watershed. SYRCL is a member organization of the Hydropower Reform Coalition and has been heavily engaged in the relicensing efforts for both the Yuba-Bear/Drum-Spaulding and Yuba River Development hydroelectric projects.

Trout Unlimited (TU) is the nation's largest coldwater fisheries conservation organization with over 300,000 members and supporters nationwide. TU's mission is to conserve, protect, and restore North America's coldwater fisheries and their watersheds. Its national office is in Arlington, Virginia and it has offices and/or local chapters in several states across the country. TU has actively participated in dozens of hydropower proceedings with the potential to adversely affect salmon, steelhead, and trout populations. It has a strong interest in ensuring that the

environmental impacts of hydropower and other large interstate energy and infrastructure projects are thoroughly considered under NEPA.

II. Implementation of NEPA Procedures in FERC Licensing Proceedings

While HRC's member groups participate in a wide range of federal permitting proceedings, the HRC's focus is on proceedings before FERC to license, relicense, or amend licenses for non-federal hydropower projects.

Under the Federal Power Act (FPA), FERC has exclusive jurisdiction to issue a license to construct, operate, and maintain a non-federal hydropower project located on navigable waters, federal lands, or otherwise affecting interstate or foreign commerce.³ Section 6 of the FPA provides that licenses shall be issued for a term not to exceed 50 years.⁴ Upon license expiration, the licensee must apply for a new license. Section 15 of the FPA provides that new licenses shall be issued for a term "not less than 30 years, nor more than 50 years, from the date on which the license is issued."⁵ Thus, licensing and re-licensing proceedings provide a once-in-a-generation opportunity to re-evaluate and re-design the comprehensive plan of development⁶ for the waterway(s) on which a given project is located.

Licensing is an important milestone in the regulation of rivers because a hydropower project can be the primary point of control for many miles on a given waterway. There is no dispute that hydropower projects affect environmental quality.

³ 16 U.S.C. § 817(1).

⁴ 16 U.S.C. § 799.

⁵ 16 U.S.C. § 808.

⁶ See 16 U.S.C. § 803(a)(1) (any license as issued "shall be ... best adapted to a comprehensive plan for improving or developing a waterway").

The Integrated Licensing Process (ILP) is the default set of procedures for FERC’s processing of a license application. The ILP specifically was “designed to create efficiencies” by integrating the licensee’s pre-application consultation with stakeholders and FERC’s scoping under NEPA.⁷ The FPA presumes licensing will generally take 5 years; simpler, uncontroversial projects may take less time and complex projects more time.

Key features of the ILP are FERC’s issuance of a Notice of Intent to prepare a NEPA document and completion of scoping at the beginning of the proceeding⁸ and approval of a study plan that is implemented by the applicant to obtain information regarding the proposed project’s direct, indirect, and cumulative impacts⁹ and inform the applicant’s preparation of the license application.¹⁰ FERC Staff issues a Notice of Readiness for Environmental Analysis (REA) soliciting public comments on the application after it confirms the approved studies and application are complete.¹¹ Following receipt of REA comments and resolution of disputes regarding conditions proposed by other jurisdictional agencies, FERC Staff¹² proceeds to draft the NEPA document, which is then published for comment.¹³ FERC generally relies on its Staff’s findings in the final NEPA document as the basis for its final license decision.

⁷ Hydroelectric Licensing Under the Federal Power Act, 68 Fed. Reg. 51070-01 (Aug. 25, 2003).

⁸ 18 C.F.R. § 5.10.

⁹ 18 C.F.R. § 5.9(b)(5).

¹⁰ 18 C.F.R. § 5.15.

¹¹ 18 C.F.R. § 5.22.

¹² See 40 C.F.R. § 1502.9(a). FERC may use a qualified contractor paid for by the licensee to prepare the NEPA document. Third-party contractors can be used when the processing schedule is important to the applicant or if the applicant wants FERC to be involved early in the process. FERC has sole responsibility for determining the scope of work, reviewing, and approving the work.

¹³ See 18 C.F.R. § 5.23.

In sum, FERC’s licensing procedures are designed to integrate information gathering, consultation with various stakeholders (resource agencies, Tribes, and the public), and environmental analysis by FERC Staff in a manner that will satisfy legal requirements under NEPA, the FPA, and other relevant statutes such as the Endangered Species Act and National Historic Preservation Act. As described below, several of the proposed changes to CEQ’s rules would disrupt FERC’s licensing process and potentially lead to FERC’s non-compliance with statutory requirements.

III. Several of the Changes Proposed in the Rulemaking Are Unlawful, Would Disrupt Licensing Proceedings, and Degrade Environmental Quality

A. Purpose and Policy of NEPA

NEPA declares a “national policy to protect the environment.”¹⁴ It “makes environmental protection a part of the mandate of every federal agency and department.... Perhaps the greatest importance of NEPA is to require agencies to *consider* environmental issues just as they consider other matters within their mandates.”¹⁵

The primary mechanism for agencies’ consideration of environmental issues is the requirement that each agency prepare an Environmental Impact Statement (EIS) for federally initiated or permitted actions affecting the environment:

- (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
 - (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
 - (iii) alternatives to the proposed action,

¹⁴ Linda Luther, “CRS Report for Congress, The National Environmental Policy Act: Background and Implementation” (Nov. 16, 2005) (CRS Report 2015), p. 1; 42 U.S.C. § 4331.

¹⁵ *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (emphasis in original).

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.¹⁶

NEPA does not supplant a federal agency's substantive obligations under its organic statute. Rather, it directs that agency to comply with its substantive obligations in a manner consistent with "the Act's national environmental objectives."¹⁷

B. CEQ's Role in Administering NEPA

CEQ is an agency established to assist with administration of NEPA.¹⁸ Its duties and functions include:

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies *to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation.*¹⁹

CEQ's primary role has been the promulgation of interpretative regulations and guidance regarding agencies' implementation of NEPA procedures.

CEQ has advisory duties under NEPA. Each federal agency retains discretion to interpret its obligations under NEPA in light of its existing authority.²⁰ However, federal agencies are

¹⁶ 42 U.S.C. § 4332(2)(C).

¹⁷ 40 C.F.R. § 1500.6.

¹⁸ 42 U.S.C. § 4344.

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* at § 4334.

expected to adopt their own regulations for implementing NEPA *that are consistent with CEQ's regulations*.²¹ Further, courts defer to CEQ's interpretation of NEPA.²² Thus, while NEPA reserves federal agencies' discretion to interpret NEPA consistent with NEPA's goals and their respective statutory mandates, in practice, they and the courts follow CEQ's interpretations.

In contrast to its current regulations and guidance, which in our experience do facilitate an agency's consideration of environmental impacts in a manner consistent with other legal requirements, several of the proposed changes if enacted and followed by other agencies would detract from and/or prevent agencies' consideration of environmental impacts consistent with their statutory obligations under NEPA and other applicable statutes. These changes are contrary to CEQ's duties and function under NEPA to promote improvement of environmental quality. Further, CEQ's promulgation of rules that interpret agencies' duties in a manner that contradict NEPA and how CEQ and the courts have historically interpreted NEPA will cause, rather than avoid, confusion, delay, and litigation. We describe how the proposed changes would specifically interfere with FERC's licensing procedures below.

C. Proposed Changes Would Interfere Specifically with FERC's Compliance with Relevant Legal Requirements

FERC has adopted regulations to comply with procedures under NEPA.²³ Under its regulations, FERC has committed to comply with CEQ's regulations for implementing NEPA "except where those regulations are inconsistent with the statutory requirements of the Commission."²⁴

²¹ *Andrus v. Sierra Club*, 442 U.S. 347, 357 (1979).

²² *Id.* at 358.

²³ 18 C.F.R. § 380.1.

²⁴ *Id.*
Hydropower Reform Coalition's Comments
Docket No. CEQ-2019-0003

Under FPA section 10(a)(1), FERC is required to ensure that any project it licenses:

shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife ... and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes²⁵

Thus, FERC has a “specific planning responsibility” to improve beneficial uses of a given river basin over the next generation.²⁶ The statute “requir[es] consideration of all factors affecting the public interest” in fulfilling this responsibility.²⁷ The courts have found, and FERC has acknowledged, this includes consideration of the cumulative effects of the proposed license.²⁸ While this is an independent obligation under NEPA, courts have relied on CEQ’s definition of, and guidance for, considering cumulative effects under NEPA.²⁹

FERC’s comprehensive planning responsibility also requires study of alternatives to a proposed license. As stated above, FPA section 10(a)(1) is a “broad public interest standard, requiring consideration of all factors affecting the public interest.”³⁰ This includes a duty to

²⁵ 16 U.S.C. § 803(a)(1).

²⁶ *Scenic Hudson Preservation Conference v. FPA*, 354 F.2d 609, 613 n.9 (2d Cir. 1965).

²⁷ *Green Island Power Auth. v. FERC*, 577 F.3d 148, 166 (2d Cir. 2009) (*Green Island*).

²⁸ *See National Wildlife Federation v. FERC*, 801 F.2d 1505, 1507 (9th Cir. 1986) (“The Commission concedes the Federal Power Act requires development of a comprehensive plan and consideration of cumulative impacts before licenses are issued . . .”); *LaFlamme v. FERC*, 852 F.2d 389, 401 (1988).

²⁹ *See, e.g., Am. Rivers v. FERC*, 895 F.3d 32, 54 (D.C. Cir. 2018); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314-1315 (D.C. Cir. 2014).

³⁰ *Green Island*, 577 F.3d at 166.

undertake a thorough study of alternatives to the proposed license that is based on a complete record.³¹

Thus, in enacting the FPA, Congress determined that FERC's consideration of cumulative effects and a study of alternatives was relevant and meaningful to FERC's decisions regarding how best to develop and improve the Nation's waterways and adjacent lands for energy, water supply, and environmental uses. This substantive duty under Section 10(a)(1) parallels FERC's procedural obligation under NEPA to consider a reasonable range of alternatives prior to making a licensing decision, as discussed above.

FERC's practice is to rely on its NEPA document as the embodiment of the comprehensive plan of development required under FPA section 10(a)(1). This practice has been upheld on judicial review.

In *LaFlamme v. FERC*,³² the U.S. Court of Appeals for the Ninth Circuit held that FERC's preparation of a NEPA document that provides a complete analysis of all environmental resources under alternatives was sufficient to satisfy FERC's legal requirement under FPA section 10(a)(1) to prepare a comprehensive plan for developing or improving a waterway as part of licensing:

... the Commission must, under the FPA, consider all facts relevant to the public interest in developing a comprehensive plan. *LaFlamme*, 852 F.2d at 402–03; *see also Udall v. F.P.C.*, 387 U.S. 428, 450, 87 S.Ct. 1712, 1724, 18 L.Ed.2d 869 (1967); *National Wildlife Federation v. FERC*, 801 F.2d 1505, 1507 (9th Cir.1986). This consideration necessarily includes a comprehensive analysis of the water system of which the Project is a part, and the interdependent impact of the Project on other projects in the region. *LaFlamme*, 852 F.2d at 402–03.

³¹ *See Scenic Hudson*, 354 F.2d at 612; *Green Island*, 577 F.3d at 168.

³² 945 F.2d 1124, 1128 (9th Cir.1991).

The [Environmental Assessment's (EA)] analysis of the water system, and the Project's impact on that system is adequate.... The EA fully examines the effects of the Project including its cumulative impacts combined with other proposed projects The EA also made a complete analysis of all environmental resources under the three alternatives presented

The record supports the Commission's conclusion that it satisfied the FPA's requirement of developing a comprehensive plan for the Project, despite the fact that no document entitled "Comprehensive Plan" was prepared or filed.³³

Two major changes in the Proposed Rule are the elimination of consideration of cumulative effects from NEPA documents and the narrowing of the definition of reasonable alternatives. If these proposed changes are enacted and adopted by FERC, it would create a disconnect between the scope of environmental analysis FERC is ostensibly required to undertake under NEPA versus what is required under the FPA. This would be problematic because as discussed in *LaFlamme*, FERC, like many other agencies, uses the NEPA process as "a framework to coordinate or demonstrate compliance with any studies, reviews, or consultations required by any other environmental laws."³⁴ If the NEPA process was no longer adequate to serve this function, it could lead FERC to adopt additional procedures in order to satisfy other environmental laws or, if FERC did not supplement its NEPA analysis, non-compliance with those other laws resulting in litigation and environmental degradation.

The conflicts are not unique to FERC: the proposed changes are inconsistent with the legal requirements of the Fish and Wildlife Service and National Marine Fisheries Service under the Endangered Species Act, the U.S. Forest Service under the Multiple-Use Sustained Yield Act of 1960, and the National Park Service under its Organic Act of 1916, to name a few. There is

³³ *Id.*

³⁴ CRS Report 2015, p. 2.

no value in CEQ proposing regulations for implementing NEPA that conflict with rather than complement agencies' substantive mandates under other statutes. Again, this will lead to confusion and disputes, fostering rather than avoiding inefficiencies and litigation regarding federal actions.

For these reasons, CEQ should reconsider and withdraw proposed revisions to its regulations that would conflict with agencies' legal responsibilities under other statutes or otherwise interfere with agencies' implementation of NEPA procedures in a manner consistent with their other legal responsibilities and appropriate to the circumstances of a given proceeding.

IV. Specific Provisions of the Proposed Rule are Unlawful and Unworkable

A. Part 1500 – Purpose and Policy

1. Section 1500.1 Purpose and Policy

Section 1500.1 as proposed summarizes the purpose and policy of NEPA, stating in part: “[t]he purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision making process.”³⁵

We agree with this statement of purpose. However, as discussed above, changes to the definition of effects and reasonable alternatives are contrary to this stated purpose because they would result in the omission of relevant environmental information from NEPA documents.

2. Section 1500.3 NEPA Compliance

Section 1500.3 as proposed states that the proposed regulations, Parts 1500 through 1508, “are applicable to and binding on all Federal agencies for implementing the procedural

³⁵ Proposed Rule, p. 1712.

provisions” of NEPA, “except where compliance would be inconsistent with other statutory requirements.”³⁶ As stated throughout, many of the proposed revisions to the existing rules would conflict with agencies’ statutory requirements to consider cumulative effects of their actions and *all* reasonable alternatives to a proposed action. As such, the proposed rulemaking would likely result in confusion and in legal challenges regarding the adequacy of agencies’ environmental analysis and their ultimate decisions.

3. Section 1500.4 Reducing Paperwork

Section 1500.4 as proposed requires agencies to “reduce excessive paperwork by,” among other actions “[i]ntegrating NEPA requirements with other environmental review and consultation requirements.”³⁷

The HRC supports the integration of NEPA requirements with other environmental analysis. However, certain provisions of the Proposed Rule would effectively restrict federal agencies’ ability and discretion to do this. Prescriptive page and time limits may interfere with federal agencies’ ability to cooperate in the preparation of a single, comprehensive NEPA document intended to satisfy multiple agencies’ responsibilities under various statutes. For example, FERC is the lead agency for purposes of preparing a NEPA document prior to a license decision, but several federal agencies with concurrent jurisdiction over resources affected by licensing rely on FERC’s NEPA document rather than prepare their own. In some cases, at its discretion, FERC will address multiple projects located on the same waterway that are undergoing relicensing concurrently. While these measures increase efficiency by avoiding duplicative and sequential efforts, they often result in documents that are longer than 300 pages

³⁶ *Id.*

³⁷ Proposed Rule, p. 1715.
Hydropower Reform Coalition’s Comments
Docket No. CEQ-2019-0003

and take more than one year to prepare. Indeed, under FERC’s ILP, the NEPA process takes multiple years by design in order to encourage early identification of issues and informational needs. Lead agencies should have discretion to extend page limits or timelines as necessary to integrate other environmental requirements into NEPA documents without having to seek formal approval from a senior official. Additional approvals could delay the process and may be seen as an opportunity for interlocutory appeal, leading to more disputes.

4. Section 1500.5 Reducing Delay

Section 1500.5 as proposed requires agencies to “reduce delay by:

...

(f) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.9).

(g) Meeting appropriate time limits for the environmental assessment and environmental impact statement processes (§1501.10).

(h) Preparing environmental impact statements early in the process (§ 1502.5).”

The HRC supports early scoping to identify environmental issues the lead agency must consider in the NEPA document. As discussed above, FERC’s ILP was specifically designed to increase overall efficiency by moving FERC’s Notice of Intent and scoping to the start of the proceeding. However, the incentive to undertake early scoping will be undermined if it starts the one- or two-year clock for completion of an environmental document,³⁸ especially in permitting processes like FERC relicensing that take multiple years due to their large scale and complexity.

³⁸ *Id.* at 1717.

5. Section 1500.6 Agency Authority

Section 1500.6 as proposed requires each agency to “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. 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 as interpreted by the regulations in parts 1500 through 1508.”³⁹ However, Section 1500.6 also cautions: “[n]othing contained in the regulations in parts 1500 through 1508 is intended or should be construed to limit an agency’s other authorities or legal responsibilities.”⁴⁰

As discussed throughout, we dispute CEQ’s claims that the proposed changes are accurate interpretations of NEPA’s goals for environmental protection and directives for consideration of environmental impacts. We also are concerned that CEQ’s promulgation of regulations that contradict agencies’ duties to comply with substantive environmental laws will create numerous difficulties in administrative proceedings, uninformed agency decision-making, and degradation of the environment.

B. Part 1501 – NEPA and Agency Planning

1. Section 1501.1 NEPA Threshold Applicability Analysis

Section 1501.1 as proposed directs agencies, in assessing whether NEPA applies, to determine: “[w]hether the proposed action is an action for which the agency has determined that

³⁹ *Id.* at 1714.

⁴⁰ *Id.* (emphasis added).

other analyses or process under other statutes serve the function of agency compliance with NEPA.”⁴¹

NEPA is a procedural statute.⁴² Its primary benefit is to establish a common set of procedures that all federal agencies must follow to ensure that they have fully considered the environmental impacts of a proposed action and to disclose such consideration to the public.⁴³ As the U.S. Court of Appeals for the D.C. Circuit has explained, “[t]he procedures required by NEPA ... are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed”⁴⁴ Given the procedural nature of NEPA, it is not clear to the HRC that there are standardized, functionally equivalent processes that could obviate an agency’s obligation to prepare an environmental document under NEPA.

2. Section 1501.10 Time Limits

Section 1501.10 as proposed requires federal agencies to set time limits for conducting NEPA reviews.⁴⁵ It purports to establish prescriptive time limits – an EA must be completed within 1 year and an EIS completed within 2 years – and requires a senior agency official of the lead agency approve any longer periods in writing.⁴⁶ Proposed sub-section (b)(2) specifies that

⁴¹ Proposed Rule at 1714.

⁴² *Delaware Riverkeeper Network v. FERC*, 753 F.3d at 1309- 1310.

⁴³ “NEPA commands agencies to imbue their decisionmaking, through the use of certain procedures, with our country's commitment to environmental salubrity.” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193–94 (D.C. Cir. 1991) (citing *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989), 40 C.F.R. § 1502.1).

⁴⁴ *Delaware Riverkeeper Network v. FERC*, 753 F.3d at 1310 (quoting *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir.1974)).

⁴⁵ Proposed Rule at 1717.

⁴⁶ *Id.*
Hydropower Reform Coalition’s Comments
Docket No. CEQ-2019-0003

the 2 years for completion of an EIS runs from the date of the Notice of Intent to prepare an EIS to the date the record of decision is signed.⁴⁷

Under the current rule, agencies are directed to establish time limits *if* an applicant requests them, but has discretion to determine appropriate time limits.⁴⁸ The agency’s discretion in establishing time limits is to be informed by “the purposes of NEPA and other essential considerations of national policy.”⁴⁹ Thus, under the current rule, acceleration of the timeline should not come at the cost of full disclosure of the environmental impacts of a proposed action and consideration of alternatives and mitigation measures that would lessen or avoid those impacts. The current rule expressly rejects universal, prescriptive time limits for the NEPA process as too “inflexible.”⁵⁰

The proposed rule if implemented would constrain agencies’ flexibility to manage their own resources and schedules to produce high quality NEPA documents efficiently in favor of universal, prescriptive time limits. CEQ does not explain why prescriptive time limits, which it long viewed as too inflexible and unnecessary, are now appropriate. Rather than effectively preserve agency discretion, the requirement that any extension of the prescriptive time limits be approved by a senior official adds red tape to the NEPA process. It also creates a new decision point that could result in additional disputes if participants disagree over a time extension.

As discussed above, the proposal that the two-year clock on an EIS start to run on the date the Notice of Intent is issued would interfere with FERC’s ILP. Under the FPA, a licensee

⁴⁷ *Id.*

⁴⁸ *See* 40 C.F.R. § 1501.8.

⁴⁹ *Id.*

⁵⁰ *Id.*

Hydropower Reform Coalition’s Comments
Docket No. CEQ-2019-0003

must notify FERC of its intent to seek a new license 5 to 5.5 years before the existing license expires. FERC issues its Notice of Intent to prepare an EA or EIS shortly after the licensee notifies FERC of its intent to seek a new license, but years before the licensee files an application containing its specific proposal for a new license. Under the proposed Section 1501.10, FERC would be discouraged from undertaking scoping early in the process to inform studies and other information gathering that provide the basis for the NEPA document and FERC's ultimate licensing decision. This is at cross-purposes of proposed Section 1501.9, which directs agencies to begin scoping as soon as "practicable."

CEQ should avoid setting universal, prescriptive time limits that would unnecessarily limit agencies' discretion to manage their NEPA processes. This would create more red tape without improving efficiency or the quality of the environmental analysis.

C. Part 1502 – Environmental Impact Statement

1. Section 1502.5 Timing

Section 1502.5 as proposed directs agencies "to commence preparation of an environmental impact statement as close as practicable to the time the agency is developing or is presented with 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 HRC supports starting preparation of the NEPA document in time for it to be completed to inform agency recommendations and actual decision-making. However, we are concerned that prescriptive time limits in proposed Section 1501.10 will discourage agencies from starting NEPA early in the process.

2. Section 1502.7 Page Limits

Section 1502.7 as proposed sets page limits for EISs:

The text of final [EISs] (*e.g.*, paragraphs (a)(4) through (6) of § 1502.10) shall be 150 pages or fewer and, for proposals of unusual scope or complexity, shall be 300 pages or fewer unless a senior agency official of the lead agency approves in writing a statement to exceed 300 pages and establishes a new page limit.

CEQ provides inadequate basis for its proposal to make the recommended page limits in the current version of Section 1502.7 prescriptive. It does not explain how adding the requirement that a senior agency official approve any deviation from the universal page limits will increase the efficiency of the process. It does not explain how prescriptive page limits generally will improve the quality of environmental documents. To the contrary, if implemented by FERC, prescriptive page limits would interfere with its analysis of complex energy infrastructure projects.

As stated above, FERC issues licenses for a term of 30 to 50 years. A license may regulate a project that includes multiple dams affecting many river miles and multiple beneficial uses including power generation, water supply, flood control, fish and wildlife, and recreation. Given the breadth of the resources and interests affected by a licensing decision, it is common for FERC's NEPA documents to exceed 300 pages, not including appendices. For example, the EISs for the following proceedings exceeded 300 pages: Susquehanna River Hydroelectric Projects, Merced and Merced Falls Project, Yuba River Development Project, and Yuba-Bear/Drum Spaulding Projects.⁵¹ HRC members participated in each of these proceedings. The length of the NEPA document was not a disputed issue in any of them.

⁵¹ See Final EISs for Susquehanna River Hydroelectric Projects, eLibrary no. 20150311-4005; Merced and Merced Falls, eLibrary no. 20151204-4003; Yuba River Development Project, eLibrary no. 20190102-3000; Yuba-Bear/Drum-Spaulding Projects, eLibrary no. 20141219-4003.

3. Section 1502.14 Alternatives Including the Proposed Action

Section 1502.14 as proposed describes the lead agency's duty to evaluate reasonable alternatives to the proposed action.⁵² Under the proposal, language describing the alternatives analysis as the "heart of the statement" would be deleted, as would the requirement for agencies to consider reasonable alternatives outside of their jurisdiction.

The HRC disagrees with the proposal to eliminate the description of the alternatives analysis as the "heart of the statement," but recognizes that this proposed change will not alter an agency's duty to evaluate reasonable alternatives to a proposed action. We are more concerned by the proposal to eliminate the requirement to consider reasonable alternatives outside of the lead agency's jurisdiction. The purpose of an EIS is to force agencies to consider and disclose the environmental consequences of their actions and whether there are measures or alternatives that would avoid, lessen, or mitigate those actions. For that reason, consideration of reasonable alternatives that might avoid or lessen the impacts of the proposed action is consistent with the purpose of NEPA, regardless of whether the lead agency ultimately has discretion to require an applicant to implement the alternative. Again, NEPA was not designed to compel a specific outcome, but to bring about informed decision-making. The availability of a superior alternative, regardless of whether the lead agency has exclusive authority to require it, is relevant to a lead agency's decision whether to issue a permit and the applicant's decision whether to proceed with, modify, or abandon its proposal.

CEQ seeks comments on whether it should establish a presumptive maximum number of alternatives for evaluation of a proposed action or categories of proposed actions.⁵³ The HRC

⁵² Proposed Rule, p. 1720.

⁵³ *Id.* at 1702.
Hydropower Reform Coalition's Comments
Docket No. CEQ-2019-0003

does not recommend that CEQ establish a presumptive maximum number of alternatives. We support CEQ's current guidance, which explains that the range of reasonable alternatives is fact-specific:

When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.⁵⁴

In the HRC members' collective experience, it is far more common for agencies to consider too few alternatives rather than too many, rendering the proposal for a presumptive maximum number of alternatives a solution in search of a problem.

4. Section 1502.18 Certification of Submitted Alternatives, Information, and Analyses Section

Section 1502.18 as proposed requires the decision-maker for the lead agency to certify that the lead agency has considered information regarding alternatives and comments received and that this certification will establish a conclusive presumption that the lead agency has satisfied its duty in this respect:

Based on the summary of the submitted alternatives, information, and analyses section, the decision maker for the lead agency shall certify in the record of decision that the agency has considered all of the alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the [EIS]. Agency EISs certified in accordance with this section are entitled to a conclusive presumption that the agency has considered the information included in the submitted alternatives, information, and analyses section.

The intended legal effect of the proposed "conclusive presumption" is not clear. The HRC is concerned that it is intended to impermissibly insulate federal agencies' implementation

⁵⁴ Forty Most Asked Questions, Answer 1b.

of NEPA from judicial review. It is well-established that agency action under NEPA is subject to judicial review under Administrative Procedure Act section 10(e), 5 U.S.C. § 706(2)(A).⁵⁵ Under Section 10(e), a “reviewing court may set aside agency action which is ‘arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.’”⁵⁶ CEQ cannot by regulation eliminate courts’ jurisdiction to review an agency’s compliance with NEPA.

5. Section 1502.22 Incomplete or Unavailable Information

Section 1502.22 as proposed describes a lead agency’s duty to disclose and/or complete gaps in information relevant to the evaluation of reasonably foreseeable significant adverse effects.⁵⁷ The proposed language states that the agency should obtain the missing information if it is “relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not unreasonable” Under the current rule, the agency should obtain the information if the costs for doing so are not “exorbitant.” Exorbitant means unreasonably high. Thus, we understand the standard to remain the same despite the proposed change in terminology. The reasonableness of costs will depend on the circumstances of a given proceeding, e.g., scope of the project or the significance of the potential effects. However, we would support CEQ providing additional guidance as to the criteria an agency should consider in determining whether the cost of obtaining missing information is reasonable.

⁵⁵ *Life of the Land v. Brinegar*, 485 F.2d 460, 469 (9th Cir. 1973).

⁵⁶ *Id.* (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)); see also *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006).

⁵⁷ Proposed Rule, p. 1721.

6. Section 1502.24 Methodology and Scientific Accuracy

Section 1502.24 as proposed requires agencies to ensure the scientific integrity of the analyses in their NEPA documents, and emphasizes reliance on existing data rather than new studies:

Agencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents. Agencies shall make use of reliable existing data and resources and are not required to undertake new scientific and technical research to inform their analyses. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models. They shall identify any methodologies used and shall make explicit reference to the scientific and other sources relied upon for conclusions in the statement....⁵⁸

The HRC supports the emphasis on agencies' duty to disclose and ensure the integrity of methodologies, data, and information relied upon to prepare NEPA documents. Ensuring the integrity of scientific data is key to achieving NEPA's purpose of protecting the environment, including "attain[ment of] the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."⁵⁹

The HRC agrees that a lead agency should make use of *reliable* existing data. However, existing data will not always be adequate to evaluate a proposed action's impacts on the environment. For example, the D.C. Circuit vacated a license decision in part because FERC's environmental analysis relied on "more-than-a-decade-old" applicant-supplied data that was not "site-specific," and thus provided an inadequate basis to evaluate the proposed project's effects over a 30 to 50-year license term.⁶⁰ Although it did not do so in that case, FERC has sufficient authority to require a licensee to study a project's direct, indirect, and cumulative effects on

⁵⁸ *Id.*

⁵⁹ 42 U.S.C. § 4331(b)(3).

⁶⁰ *Am. Rivers v. FERC*, 895 F.3d at 50.

resources.⁶¹ As described above, CEQ’s regulations should require a lead agency to obtain information necessary to evaluate a proposed action’s effects unless the agency demonstrates the costs for obtaining the information would be exorbitant.

D. Part 1503 – Commenting on Environmental Impact Statements

1. Section 1503.3 Specificity of Comments and Information

Section 1503.3 describes requirements for comments on a draft EIS or a proposed action. It directs commenters to provide detailed information regarding the commenter’s position, specific proposed changes that would address the commenter’s concern, and the data the commenter is relying upon for the proposed changes. It also provides, “[c]omments on the submitted alternatives, information, and analyses section (§1502.17)” must be raised within 30 days of the publication of the final EIS or else they will be considered forfeited.⁶²

The HRC agrees that comments should provide sufficient information for the lead agency and any cooperating agencies to understand the commenter’s position. We further agree that agencies and professional organizations should be able to submit comments that identify data sources that support their position on a given issue, and that increased specificity in comments should improve the quality of a final NEPA document. However, we are concerned that strict requirements to provide specific revisions to analysis and citations to data sources may discourage comments from individuals who may be affected by a proposed action but not have the time or resources to prepare highly detailed or technical comments. Further, it shifts responsibility for analyzing a project’s impacts and evaluating alternatives from the lead agency

⁶¹ See 18 C.F.R. § 5.9(b).

⁶² Proposed Rule, p. 1722.

and applicant to the public. Under NEPA section 102(2)(C), it is federal agencies' responsibility to analyze the environmental effects of a proposed action and develop alternatives, not individual commenter's.

Many commenters on draft NEPA documents are motivated by the need to express an interest that otherwise is not on record. For example, a score of bass anglers attended a public meeting regarding the draft EIS for the Don Pedro Hydroelectric Project relicensing to discuss bass fishing in the lower Tuolumne River.⁶³ To that point, the proceeding had prioritized the salmon fishery over the recreational bass fishery, and the anglers' comments disclosed a potential impact that had not been considered in the draft EIS. While one commenter mentioned a relicensing study, most of the bass anglers relied on their direct experience. Comments like these by people who do not regularly participate in administrative proceedings are important to full disclosure of a proposed action's environmental impacts.

Further, CEQ does not provide adequate justification for the proposed rule that comments not filed within 30 days of the final EIS will be deemed forfeited. NEPA is intended to provide full disclosure of the environmental impacts of a proposed action. To the extent there is new information or changed circumstances that come to light 30 days after publication of the final EIS that are relevant to the analysis in the final EIS and the agency has not yet taken final action, the policy and purpose behind NEPA support the agency's consideration of those comments. By contrast, the purpose of NEPA is not served by preventing an agency's consideration of relevant information based solely on an arbitrary 30-day deadline. Such a rule is not necessary because agencies would have discretion not to address comments that are meritless.

⁶³ Don Pedro Draft EIS meeting transcript (evening), eLibrary no. 20190503-4001.
Hydropower Reform Coalition's Comments
Docket No. CEQ-2019-0003

2. Section 1503.4 Response to Comments

Section 1503.4 as proposed describes the lead agency's duty to respond only to substantive comments received on a draft EIS: "[a]n agency preparing a final [EIS] shall consider substantive comments timely submitted during the public comment period and may respond individually and collectively."⁶⁴

The Proposed Rule does not provide a basis for limiting an agency's duty to respond to substantive comments. As stated above, NEPA is a procedural statute. That said, how an agency implements the NEPA procedures can affect the substantive outcome of a proceeding. For that reason, an agency should also be required to respond to procedural comments timely received.

The HRC agrees that a lead agency should have discretion to respond collectively to identical or substantially similar comments. However, CEQ should include safeguards against a lead agency's attempt to respond collectively to dissimilar comments by providing a vague or generic response. For example, the lead agency should be required to clearly identify the commenters and comments that a collective response is intended to address.

E. Part 1506 – Other Requirements of NEPA

1. Section 1506.5 Agency Responsibility for Environmental Documents

Section 1506.5 as proposed states that, to the extent it intends to rely on data submitted by applicants or contractors, the lead agency should provide direction as to what information is required to prepare the environmental document and also independently verify the information submitted.⁶⁵ It also requires disclosure of the names of the persons responsible for the

⁶⁴ Proposed Rule, p. 1722.

⁶⁵ *Id.* at 1725.
Hydropower Reform Coalition's Comments
Docket No. CEQ-2019-0003

independent verification. Section 1506.5(c) allows for the preparation of an EIS by a contractor or applicant, subject to the direction and independent verification by the lead agency.⁶⁶

We recognize that agencies' delegation of tasks related to preparation of NEPA documents has become common practice despite concerns regarding the potential conflicts of interest this presents. For example, FERC permits preparation of NEPA documents by third-party contractors selected by and under the exclusive direction of FERC Staff, but paid for by the applicant.⁶⁷ However, the FPA requires that FERC have procedural safeguards to avoid conflicts of interest, including the requirement that the contractor "execute a disclosure statement prepared by the Commission specifying that it has no financial or other interest in the outcome of the project."⁶⁸ The statute further requires FERC to "establish the scope of work and procedures to assure that the contractor, consultant or other person has no financial or other potential conflict of interest in the outcome of the proceeding."⁶⁹ FERC's "Handbook for Using Third-Party Contractors To Prepare Environmental Documents," describes the procedural safeguards to limit bias in environment documents prepared by third contractors.

FERC's rules also allow for an applicant, subject to direction from FERC staff, to prepare an EA that will inform FERC's decision whether to prepare an EIS. However, FERC's rules do not permit an applicant to prepare an EIS.

⁶⁶ *Id.*

⁶⁷ *See* 16 U.S.C. § 797d.

⁶⁸ *Id.*

⁶⁹ *Id.*

The delegation of EIS preparation to a private applicant, as proposed by Section 1506.5(c) raises serious conflict of interest concerns. The U.S. Court of Appeals for the Second Circuit rejected the Federal Power Commission’s, FERC’s predecessor, reliance on an applicant-prepared EIS to satisfy its NEPA obligations, explaining:

The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of [the applicant] for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions.⁷⁰

For the reasons identified by the Second Circuit, CEQ should require a lead agency to prepare the EIS, subject to assistance from a contractor under its exclusive control, and should prohibit reliance on an applicant-prepared EIS. CEQ also should require safeguards to ensure the lead agency retains control over the environmental analysis and against conflicts of interest to the extent the agency relies upon contractors to assist in the preparation of a NEPA document.

2. Section 1506.6 Public Involvement

Section 1506.6 as proposed describes the efforts agencies should make “to involve the public in preparing and implementing their NEPA procedures.”⁷¹ Under Section 1506.6(c), federal agencies would be allowed to “conduct public hearings and public meetings by means of electronic communication” unless otherwise prohibited.⁷²

The HRC supports the direction to federal agencies to make “diligent efforts” to involve the public in the NEPA process. Public hearings are a critical opportunity to involve the public,

⁷⁰ *Greene Cty. Planning Bd. v. Fed. Power Comm'n*, 455 F.2d 412, 420 (2d Cir. 1972).

⁷¹ Proposed Rule, p. 1725.

⁷² *Id.*

and the HRC is concerned that limiting hearings to electronic communications would undercut the public’s opportunity to be heard and learn about the proposed project from agency staff. Federal agencies should be required to provide the public an opportunity to be heard at in-person meetings.

F. Part 1508 – Definitions

1. Section 1508.1 Definitions

a) *Effects or impacts*

Sub-section 1508.1(a) as proposed defines “effects or impacts” as “effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. Effects include reasonably foreseeable effects that are later in time or farther removed in distance.”⁷³

The explanatory statement states:

Under the proposed definition, effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives; a “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. This close causal relationship is analogous to proximate cause in tort law.

The explanatory statement cites *Department of Transportation v. Public Citizen*⁷⁴ (*Public Citizen*) as the basis for this clarification “on the bounds of effects”:

... CEQ proposes to codify a key holding of *Public Citizen* relating to the definition of effects to make clear that effects do not include effects that the agency has no authority to prevent or would happen even without the agency action, because they would not have a sufficiently close causal connection to the proposed action.⁷⁵

⁷³ Proposed Rule, p. 1729.

⁷⁴ 541 U.S. 752 (2004).

⁷⁵ Proposed Rule, p. 1708.

In *Public Citizen*, the action under review was a proposed rulemaking by the Federal Motor Carrier Safety Administration (FMCSA) to regulate the operation of Mexican trucks in the United States. At the time, there was a moratorium on Mexican trucks operating in the United States. Congress had authorized the President to lift the moratorium after FMCSA had promulgated safety rules. FMCSA prepared an Environmental Assessment which considered the effects (including cumulative effects) of the proposed rules.⁷⁶ However, Plaintiffs challenged FMCSA's failure to prepare an EIS that evaluated the effects of Mexican trucks entering the United States, not just the effects of the proposed rules. The Supreme Court upheld the adequacy of FMCSA's NEPA document on review, finding that "the causal connection between FMCSA's issuance of the proposed regulations and the entry of the Mexican trucks is insufficient to make FMCSA responsible under NEPA to consider the environmental effects of the entry."⁷⁷ It explained, "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium"⁷⁸ It held:

where an agency *has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions*, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a "major Federal action." Because the President, not FMCSA, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMCSA has no discretion to prevent the entry of Mexican trucks, its EA did not need to consider the environmental effects arising from the entry.⁷⁹

⁷⁶ *Public Citizen*, 541 U.S. at 769.

⁷⁷ *Id.* at 768.

⁷⁸ *Id.* at 769 (emphasis in original).

⁷⁹ *Id.* at 770 (emphasis added).

Public Citizen is of limited value for “clarifying” rules of general NEPA interpretation because in most cases the lead agency will have sufficient statutory authority to act on information regarding the direct, indirect, and cumulative effects of a proposed action.⁸⁰

We read CEQ’s proposed definition of effects to encompass direct and indirect effects – at least to the extent they are subject to the lead agency’s control – as defined by the existing regulations. The HRC supports inclusion of indirect effects in the proposed definition.

However, according to the explanatory statement, the proposed definition, relying in part on *Public Citizen*, does not encompass cumulative effects:

... CEQ proposes a change in position to state that analysis of cumulative effects, as defined in CEQ’s current regulations, is not required under NEPA. While CEQ has issued detailed guidance on considering cumulative effects, categorizing and determining the geographic and temporal scope of such effects has been difficult and can divert agencies from focusing their time and resources on the most significant effects. Excessively lengthy documentation that does not focus on the most meaningful issues for the decision maker’s consideration can lead to encyclopedic documents that include information that is irrelevant or inconsequential to the decision-making process. Instead, agencies should focus their efforts on analyzing effects that are most likely to be potentially significant and be effects that would occur as a result of the agency’s decision.... With the proposed change and the proposed elimination of the definition of cumulative impacts, it is CEQ’s intent to focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action.⁸¹

This is a significant reversal of CEQ’s longstanding position that analysis of cumulative effects is an essential part of the environmental analysis.⁸² CEQ’s explanatory statement does

⁸⁰ See *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 73–74 (D.D.C. 2019) (“Defendants’ reliance on *Public Citizen*, *Sierra Club (Freeport)*, and their progeny is unpersuasive because unlike the agencies in those cases, here BLM could act on information regarding downstream GHG emissions.”); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (distinguishing the situation in *Public Citizen* where the agency had “no ability” to address the impact from situation where the National Park Service had authority under its organic statute to address the environmental impacts.).

⁸¹ Proposed Rule, p. 1708.

⁸² See, e.g., CEQ, “Considering Cumulative Effects Under the National Environmental Policy Act,” (1997). An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is “entitled to considerably less deference” than a consistently held agency view. *Watt v. Alaska*, 451 U.S. 259, 273, (1981); see also *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).
Hydropower Reform Coalition’s Comments
Docket No. CEQ-2019-0003

not provide a valid reason for this reversal. Notably, the Supreme Court in *Public Citizen* did not excuse FMSCA from analyzing the cumulative effects of the proposed rulemaking; rather, it found that the FMSCA did not have to consider the cumulative effects of a related action that was entirely beyond its authority to control, i.e., the entry of Mexican trucks into the United States.⁸³

CEQ's explanatory statement does not provide specific analysis or data to support its claims that agencies continue to spend an undue amount of time categorizing and determining the geographic and temporal scope of such effects.⁸⁴ In the collective experience of HRC members, in most licensing proceedings this task is completed without difficulty at the scoping stage.

CEQ does not provide valid basis for its claim that issues related to the cumulative effects of a project are not meaningful or are irrelevant or inconsequential to the decision-making process. Again, this is a reversal from its existing rules and guidance which characterize analysis of cumulative effects as critical: “[e]vidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.”⁸⁵

CEQ has found that agencies' focus on direct effects is not adequate to prevent environmental degradation:

⁸³ *Public Citizen*, 541 U.S. at 769.

⁸⁴ CEQ published guidance explaining how agencies should consider cumulative effects more than 40 years ago, which is still applicable and followed today. See *Considering Cumulative Effects, generally*.

⁸⁵ CEQ, “Consider Cumulative Effects under the National Environmental Policy Act,” (Jan. 1997) (*Considering Cumulative Effects*), p. 1.

The fact that the human environment continues to change in unintended and unwanted ways in spite of improved federal decisionmaking resulting from the implementation of NEPA is largely attributable to this incremental (cumulative) impact. Although past environmental impact analyses have focused primarily on project-specific impacts, NEPA provides the context and carries the mandate to analyze the cumulative effects of federal actions.⁸⁶

CEQ explained that consideration of cumulative, not just direct, effects was necessary to move toward sustainability:

The passage of time has only increased the conviction that cumulative effects analysis is *essential* to effectively managing the consequences of human activities on the environment. The purpose of cumulative effects analysis, therefore, is to ensure that federal decisions consider the full range of consequences of actions. *Without incorporating cumulative effects into environmental planning and management, it will be impossible to move towards sustainable development, i.e., development that meets the needs of the present without compromising the ability of future generations to meet their own needs ...*⁸⁷

Based on the HRC's collective experience, consideration of the cumulative effects of a given hydropower project, that is its incremental impact on resources within a given watershed in light of other past and concurrent activities, may be just as, if not more, important to environmental restoration than consideration of a project's direct effects.

In our experience, defining the geographic and temporal scope of cumulative effects in a licensing proceeding is not unduly difficult and does not unnecessarily divert FERC's resources from more important analysis. Rather, the scope of analysis, including cumulative effects, is typically resolved early in the process with FERC's issuance of a Scoping Document.⁸⁸ Similarly, FERC does not appear to spend undue resources on the actual analysis of cumulative effects. A review of the final EIS for relicensing the Merced River Project and Merced Falls

⁸⁶ *Id.*

⁸⁷ *Id.* at 3 (emphasis added).

⁸⁸ 18 C.F.R. § 5.8(c).
Hydropower Reform Coalition's Comments
Docket No. CEQ-2019-0003

Project, which exceeded 300 pages, shows that agency staff spent two pages on geographic and temporal scope, three pages on cumulative effects to aquatic resources, and two pages on cumulative effects to threatened and endangered resources.⁸⁹ This is consistent with other statements for complex licensing proceedings in California. The preparation time and length of FERC’s NEPA documents is more appropriately attributable to the extensive resource impacts of hydropower projects than to any “encyclopedic” coverage of cumulative effects.

Hydropower projects by their nature implicate multiple activities and resources. Their footprints often cover hundreds of square miles of rivers and adjacent lands. Many if not most were constructed and are operated for multiple purposes, including water supply, power generation, and flood control. There are often multiple hydropower projects in a watershed. In California, for example, multiple FERC-licensed projects are located in the Pit River, Feather River, Yuba River, American River, and Stanislaus River basins. In some cases, like the Feather and the Pit, one entity operates all or most of the hydropower projects in a watershed; in others, there are multiple operators. Even where one operator owns all or most of the projects, the timing of FERC licensing often differs, largely depending on the date when FERC or its predecessor originally licensed the project.

The operation of upstream projects affects environmental conditions downstream. Water temperature is a good example.⁹⁰ On the North Fork Feather River, for instance, one power company operates four separate hydropower projects, each licensed separately on different

⁸⁹ FERC, *Final Environmental Impact Statement for Hydropower Licenses, Merced River Hydroelectric Project—FERC Project No. 2179-043—California, Merced Falls Hydroelectric Project—FERC Project No. 2467-020—California* (Dec. 4, 2015), eLibrary no. 20151204-4003, pp. 3-5 to 3-7; 3-178 to 3-182; 3-269 to 3-271.

⁹⁰ “[B]locking of fish passage by multiple hydropower dams and [U.S. Army Corps of Engineers] reservoirs in the same river basin” is another good example of a cumulative effects situation. *Considering Cumulative Effects*, p. 2.
Hydropower Reform Coalition’s Comments
Docket No. CEQ-2019-0003

schedules. Cold freshwater habitat is one of the most sensitive beneficial uses of the North Fork Feather. The upstream project warms water as it moves downstream, making it difficult to maintain summer coldwater habitat at downstream projects without coordinated action upstream.

We are concerned that CEQ's proposed definition, with its strict interpretation of "close causal connection" between the proposed action and an effect and elimination of cumulative effects, would impede FERC's consideration and mitigation of cumulative effects, resulting in significant environmental harm. In the North Fork Feather example, the rule might be interpreted to preclude consideration of the cumulative effects of the multiple projects on water temperature, where each project incrementally warms the temperature of water as it flows downstream. If FERC only considered how much the downstream project would increase water temperature, and not the extent to which inflows to the project were already warmed by the upstream project, it would result in an incomplete and inaccurate understanding of the project's effects on coldwater habitat and prevent disclosure and consideration of effective mitigation measures.

Courts have vacated licensing decisions where FERC prepared a NEPA document that was too narrow in temporal and geographic scope and as a result, did not accurately disclose or evaluate the significant, watershed-wide environmental impacts of the project. For example, the D.C. Circuit vacated the license for the Coosa River Project located in Alabama based on FERC's failure to consider the project's direct and cumulative effects under NEPA, the FPA, and the Endangered Species Act.⁹¹ The court admonished FERC for considering the project and its

⁹¹ *Am. Rivers v. FERC*, 895 F.3d at 55.

effects “in a vacuum,”⁹² finding that FERC’s analysis improperly isolated the project temporally and geographically:

The Commission gave scant attention to those past actions that had led to and were perpetuating the Coosa River’s heavily damaged and fragile ecosystem. Nor did it offer any substantive analysis of how the present impacts of those past actions would combine and interact with the added impacts of the 30-year licensing decision. The Commission’s cumulative impact analysis left out critical parts of the equation and, as a result, fell far short of the NEPA mark.⁹³

The court deemed FERC’s environmental analysis deficient for its failure to disclose the extent of the cumulative effects of issuing a new 30-year license in a system that already was heavily degraded.⁹⁴ We read the proposed definition as inconsistent with this decision.

Rather than implement the proposed changes to the definition of “effects,” CEQ should affirm its existing rules and guidance requiring agencies to consider the direct, indirect, and cumulative effects of proposed actions.

b) Human environment

Sub-section 1508.1(m) as proposed defines “human environment” to mean: “comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment.”⁹⁵

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Proposed Rule, 1729.

As discussed above and explained by CEQ in previous guidance, a proposed action's effects on future generations' relationship with the environment cannot be identified or evaluated without consideration of cumulative effects.⁹⁶

c) *Mitigation*

Sub-section 1508.1(s) as proposed defines "mitigation" as "measures that avoid, minimize, or compensate for reasonably foreseeable impacts to the human environment caused by a proposed action as described in an environmental document or record of decision and that have a nexus to the effects of a proposed action."⁹⁷

It is not clear whether this definition precludes a lead agency's consideration of out-of-kind or offsite mitigation. We agree that mitigation with a nexus to the effects of the proposed action is preferred. However, lead agencies should have discretion to consider out-of-kind or offsite mitigation where in-kind or onsite mitigation is not feasible. This is consistent with FERC's policy to favor onsite mitigation but consider offsite mitigation that would provide greater benefits: "we have a preference for mitigation or enhancement measures that are located in the vicinity of the project unless this is impractical or unless substantially increased overall project benefits can be realized from adopting off-site measures."⁹⁸

V. Conclusion

NEPA was enacted to restore and maintain environmental quality by ensuring that federal decision-makers systematically consider the environmental consequences of their proposed

⁹⁶ See CEQ, "Consider Cumulative Effects under the National Environmental Policy Act," (Jan. 1997), pp. 1-3.

⁹⁷ Proposed Rule, p. 1729.

⁹⁸ FERC, "Policy Statement On Hydropower Licensing Settlements," (Sept. 21, 2006), p. 8.

actions. Several of the changes CEQ has proposed to the regulations for implementing NEPA run counter to this purpose. Rather than increase efficiency or quality of environmental documents, proposed changes like prescriptive time and page limits would interfere with agencies' discretion to implement NEPA in a manner that is appropriate to the circumstances of a particular proceeding and consistent with their compliance with other substantive legal requirements. The proposed elimination of cumulative effects from environmental analysis and narrowing of the definition of reasonable alternatives would result in incomplete information, deficient analysis, and decisions that contribute to degradation rather than protection of the environment. For these reasons we urge CEQ to reconsider and revise or withdraw these and other proposed changes as discussed above.

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