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Proposed Action Memo: CEQ Rollbacks to the National Environmental Policy Act

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*This memorandum was prepared for the *Reversing Environmental Rollbacks* project led by the Center for Law, Energy and the Environment (CLEE) at UC Berkeley School of Law in partnership with Governing for Impact. The project seeks to track, analyze, and develop strategies to reverse the environmental policy rollbacks of the previous federal administration, offering a comprehensive database and targeted analyses to complement the efforts of peer institutions. CLEE thanks Dan Farber (Berkeley Law) and Jim McElfish (Environmental Law Institute) for their thoughtful review and feedback on this memorandum.

I. Summary

The Council on Environmental Quality's changes to the regulations implementing the National Environmental Policy Act (NEPA) have major effects on the federal environmental review process. These changes limit consideration of climate change and environmental justice impacts. They also restrict public participation and judicial review of federal agency action impacting the environment. This memo addresses how these rollbacks to NEPA can be reversed while also streamlining environmental review for clean energy projects.

Rollbacks:

- *Council Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 FED. REG. 43304 (July 16, 2020).
- *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 FED. REG. 30097 (June 25, 2019).

Agency:

- Council on Environmental Quality, Executive Office of the President

Impact:

- CEQ's 2020 revisions to the NEPA regulations severely weaken the federal environmental review process by: (1) reducing the number of federal agency actions subject to environmental review; (2) limiting the breadth and depth of federal environmental analysis (including by limiting analysis of federal greenhouse gas emissions and environmental justice impacts); and (3) restricting public participation in the NEPA review process.

Recommended Action:

- Issue interim guidance, which would restore some limited protections from the 1978 regulations and indicate CEQ's desire to revise the 2020 regulations.
- Manage pending litigation by requesting abeyances in the four pending challenges to the 2020 regulations.
- Initiate notice-and-comment rulemaking to revise the 2020 Rules. This rulemaking should seek to improve the federal environmental review process by:
    - Restoring key protections from the 1978 regulations, such as CEQ's prior definition of "indirect" and "cumulative" impacts;
    - Clarifying agency analysis of greenhouse gas emissions and climate change impacts, including by standardizing review of upstream and downstream emissions and accounting for the climate benefits of renewable energy or carbon storage projects; and
    - Facilitating the development of renewable energy projects by encouraging programmatic environmental impact statements and better promoting interagency collaboration.

II. Justification for Revising the 2020 Rule

President-elect Biden has signaled that, in his administration, the United States will rejoin the Paris Climate Agreement and seek to achieve net-zero emissions economy-wide no later than 2050.[2] However, the 2020 Rule came about because of the Trump administration's desire to promote fossil fuel development.[3] Given this shift in government policy, CEQ should reconsider its 2020 Rule to promote the government's new net-zero ambition. Such a change in government policy is a sufficient legal basis to revoke and replace a prior regulation, assuming that the agency acknowledges the change in policy, "the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency believes it to be better."[4]

Additionally, the 2020 Rule upends decades of environmental law while injecting substantial uncertainty into the long-developed practices of federal agencies. During the Trump administration, both the Forest Service and the Department of Energy began revising their agency-specific NEPA procedures based on the 1978 regulations.[5] All agencies have based their NEPA review processes on the prior CEQ regulations, as well as their guidance documents, training materials, and internal procedures. CEQ did not consider the uncertainty created by their 2020 revision.

The 2020 Rule also undermines NEPA's "twin aims": promoting thorough environmental review and informing the public about the environmental impacts of government action.[6] The 2020 Rule restricts the range of actions subject to environmental review, limits the breadth and depth of environmental analysis, and minimizes public and judicial scrutiny of agency action. Each of these changes undermines the national policy created by NEPA, which directs the government "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony."[7] The rule is also inconsistent with the statute's recognition of the "worldwide and long-range character of environmental problems."[8]

Finally, the 2020 Rule creates substantial uncertainty about how the federal government should consider both "indirect" and "cumulative" impacts. In contradiction to long-standing government practice, the 2020 Rule limits the range of scenarios in which agencies should consider both the environmental justice and the climate-change impacts of government action. Moreover, while the 2020 Rule limits consideration of "cumulative" and "indirect" impacts, it does not clarify how CEQ's past guidance on environmental justice or draft guidance on climate change analysis should be implemented consistent with the 2020 Rule. CEQ has an opportunity to clarify proper agency

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[2] Biden Harris Transition, Priorities: Climate Change ("At this moment of profound crisis, we have the opportunity to build a more resilient, sustainable economy — one that will put the United States on an irreversible path to achieve net-zero emissions, economy-wide, by no later than 2050 . . . [President-elect Biden] will not only recommit the United States to the Paris Agreement on climate change – he will go much further than that. He is working to lead an effort to get every major country to ramp up the ambition of their domestic climate targets.") https://buildbackbetter.com/priorities/climate-change/.

[3] Executive Order 13807 (August 15, 2017) (stating desire for "more efficient and effective Federal infrastructure decisions" as purpose of NEPA review); Executive Order 13783 (March 28, 2017) (directing agencies to "review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.")

[4] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009). Moreover, the agency "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.*

[5] *See* Department of Energy, *National Environmental Policy Act Implementing Procedures* 85 Fed. Reg 25340 (May 1, 2020); U.S.D.A. Forest Service, *National Environmental Policy Act (NEPA) Compliance*, 84 Fed. Reg. 26544 (June 13, 2019).

[6] *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

[7] 42 U.S.C. 4331(a).

[8] 42 U.S. Code § 4332(f).

consideration of "indirect" and "cumulative" impacts in a revision to the Trump administration's rule.

Like Trump's other environmental rollbacks, the 2020 Rule focuses on minimizing costs with zero attention to the benefits of protecting the environment. The driving goals are reducing the cost of time needed for NEPA compliance to the bare minimum, without regard to environmental benefits of more careful evaluation of environmental issues.

III. Background: NEPA's Structure and the Role of CEQ

When it was enacted in 1970, NEPA became the "first major environmental law in the United States."[9] Over time, it has become known as the "magna carta" of environmental law both because of its fundamental legal importance and because of its impact on the nation's environmental quality.[10] NEPA has "twin aims." First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.[11] Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.[12] The sweeping policy goals announced in NEPA are "realized through a set of action-forcing procedures that require agencies take a 'hard look' at environmental consequences."[13] While NEPA's "action-forcing procedures are almost certain to affect the agency's substantive decision," it is firmly established that NEPA "does not mandate particular results"; instead, it "prohibits uninformed—rather than unwise—agency action."[14] In other words, NEPA allows agencies to take environmentally harmful actions, so long as they consider the harmful impacts. Still, by raising the salience of environmental degradation, NEPA has prevented the government from taking actions that endanger people, public health, and biodiversity.[15]

Whenever the federal government takes a "major federal action significantly affecting the quality of the human environment," NEPA requires a "detailed statement" of that action's environmental effects.[16] This "detailed statement" has become known as an "environmental impact statement" ("EIS") and must include: 1) the proposed action's environmental impact; 2) unavoidable adverse effects of the proposed action; 3) alternatives to the proposed action; 4) the relationship between local short-term environmental uses and long-term productivity; and 5) any irreversible resource commitment the proposed action entails.[17]

Because NEPA only requires an EIS for "major federal actions significantly affecting" the

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[9] National Environmental Policy Act (NEPA), NEPA.GOV, (calling NEPA "the first major environmental law in the United States") https://ceq.doe.gov/.

[10] *See, e.g.*, Amanda Jahshan, *NEPA: The Magna Carta of Environmental Law*, NATURAL RESOURCES DEFENSE COUNCIL (July 26, 2013) ("Much like the Magna Carta protected people from the dangers of monarchical rule, NEPA protects people by providing transparency in federal projects."). https://www.nrdc.org/experts/amanda-jahshan/nepa-magna-carta-environmental-law; Richard J. Lazarus, *The Greening of American and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 77 (2001) (**"**NEPA's essentially procedural requirement had a massive impact on governmental decision-making").

[11] *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 98 S. Ct. 1197 (1978)).

[12] *Id.*

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

[14] *Id.*

[15] *See, e.g.*, Elly Pepper, *Never Eliminate Public Advice: NEPA Success Stories*, NATURAL RESOURCES DEFENSE COUNCIL (NRDC) (Feb. 01, 2015) (Collecting NEPA success stories) *available at* https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories.

[16] 42 USC § 4332(c).

[17] *Id.*

environment, agencies often complete an "environmental assessment" (EA) to determine whether an EIS is necessary.[18] An EA examines the "context" and intensity" of a proposed action; it is typically shorter and less resource intensive than an EIS.[19] If the agency determines their action will not significantly affect the environment, the agency issues a "Finding of No Significant Impact" (FONSI) and no EIS is required.[20] Otherwise, the agency prepares a full EIS.

CEQ promulgates the regulations governing agency NEPA review.[21] CEQ sits in the Executive Office of the President and was established by NEPA.[22] While CEQ regulates agency NEPA review, it has no authority to enforce its own rules.[23] Still, agencies that depart from CEQ-approved processes are vulnerable to lawsuits, especially since many courts have described CEQ regulations as binding on agencies.[24] Moreover, the Supreme Court has noted that CEQ's regulations are "entitled to substantial deference" in determining what NEPA-mandated reviews require.[25] Accordingly, CEQ can substantially influence the NEPA process through its interagency regulatory power.

IV. The 2020 Rule: a Major NEPA Revision

In the summer of 2020, CEQ finalized a major revision to its NEPA regulations (the "2020 Rule").[26] These regulations undermine NEPA's twin aims of obligating agencies to consider the environmental impacts of their actions and of promoting public participation in this environmental review process. The 2020 Rule undermines agency environmental reviews by subjecting fewer agency actions to NEPA review in the first place and, subsequently, by limiting the breadth and detail of EA and EIS review. This includes limiting consideration of how agency actions impact environmental justice and climate change. Additionally, the 2020 Rule limits the public's ability to engage with, and scrutinize, environmental reviews.

i. Limiting the Range of Actions Subject to NEPA Review

The 2020 Rule limits the range of federal actions subject to environmental review under NEPA by: (a) narrowing the definition of "Major Federal Action"; (b) expanding the practice of categorical exclusions; and (c) increasing the threshold for making a "significance" determination triggering NEPA review. Because these revisions limit the number of projects subject to NEPA review,

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[18] *See* 40 C.F.R. § 1501.4 (1978) (explaining that an agency must make its decision to regulate based on an environmental assessment if the proposed action does not categorically require or avoid environmental impact statements).
[19] 40 C.F.R. § 1508.27 (1978).
[20] 40 C.F.R. § 1508.13 (1978).
[21] *See Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947, 949 (7th Cir. 2000) ("The Council on Environmental Quality ("CEQ") administers NEPA and promulgates regulations related to NEPA that are binding on federal agencies.").
[22] 42 U.S.C. § 4342.
[23] *Compare Id.* (tasking CEQ with "apprais[ing] programs and activities of the Federal Government in the light of the policy set forth in title I of this Act") with CONG. RESEARCH SERV., RL33152 *The National Environmental Policy Act: Background and Implementation* 1 (2011) ("CEQ was not authorized to enforce those regulations.").
[24] *See, e.g.*, Mid State Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 549 (8th Cir. 2003) (describing CEQ regulations as "binding on the agenc[y]"); *Nat. Res. Def. Council v. U.S. Dept. of Interior*, 397 F. Supp. 3d 430, 453-54 (S.D.N.Y. 2019) (describing CEQ as "promulgating rules applicable to and binding on all Federal agencies"); *but see Taxpayers of Michigan Against Casinos (TOMAC) v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) (noting that "the binding effect of CEQ regulations is far from clear").
[25] *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 372 (1989*); Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355–56 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).
[26] *Council Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 FED. REG. 43304 (July 16, 2020).

environmental justice communities will see a greater number of projects with less disclosure and environmental reviews and suffer greater health burdens as a result.[27]

a. Narrowing Definition of "Major Federal Action"

Agencies only conduct NEPA reviews for "major federal actions." The 2020 Rule changed CEQ's long-standing definition of "major federal action." Previously, "major federal actions" included "actions with effects that may be major and which are *potentially* subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly."[28]

CEQ revised "major federal action" to mean "an activity or decision subject to Federal control and responsibility," without consideration of the impacts that follow from the action.[29] Therefore, a "major federal action" and the "significance" of its effects are two separate determinations, rather than one as under the 1978 regulations. Therefore, a minor federal action with a significant effect on the human environment would not be subject to environmental review.

The 2020 Rule provides that "[m]ajor Federal action does not include," among other things, "[n]on-Federal projects with minimal Federal funding or minimal Federal involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project."[30] This definition excludes "[l]oans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance."[31] Accordingly, an action that requires some small amount of federal funding or involvement, or depends upon large federal loans, will not undergo NEPA review, even if the action has harsh environmental or health effects.

The new rule also excludes actions that do not constitute "final agency action" under the Administrative Procedure Act or other statute with a finality requirement.[32] This revision may undermine the basis for "programmatic" environmental impact statements.[33]

b. Expanding the Practice of Categorical Exclusions

The 2020 Rule substantially expands the scope and application of "categorical exclusions" (CEs). A CE is a systematic determination that a class of actions do not have a significant impact on the environment, and therefore do not merit either an EIS or an EA.[34] Normally, agencies adopt CEs after public notice and comment and CEQ review to simplify NEPA compliance in routine activities.

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[27] *See, e.g.*, Lesley Fleischman & Marcus Franklin, *Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities*, CLEAN AIR TASK FORCE / NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) (2017) (finding that African Americans are exposed to 38% more polluted air than white Americans, and are 75% more likely to live in fence-line communities, i.e. communities affected by noise, odor, traffic, and chemical emissions from an adjacent company, industrial, or service facility) http://www.catf.us/wp-content/uploads/2017/11/CATF_Pub_FumesAcrossTheFenceLine.pdf.

[28] 40 C.F.R. § 1508.18 (1978).

[29] 85 Fed. Reg. at 43,375.

[30] *Id.*

[31] 85 Fed. Reg. at 43,375.

[32] 40 C.F.R. 1508.1(q)(2020).

[33] *See* James M. McElfish, Jr., *What did CEQ Do?* ENVIRONMENTAL LAW INSTITUTE (Sept. 14, 2020) https://www.eli.org/vibrant-environment-blog/what-did-ceq-do.

[34] *See* COUNCIL ON ENVIRONMENTAL QUALITY, *National Environmental Policy Act: Categorical Exclusions* (2020) https://ceq.doe.gov/nepa-practice/categorical-exclusions.html#:~:text=A%20categorical%20exclusion%20(CE)%20is,impact%20statement%20is%20normally%20required.

CEQ's prior regulations directed agencies adopting CEs to determine that the excluded actions "normally do not have an *individually or cumulatively* significant effect on the human environment."[35] The 2020 Rule eliminates the phrase "individually or cumulatively."[36] Going forward, actions that were significant because of their cumulative impacts could be subject to a CE. Additionally, the 2020 Rule encourages federal agencies to use *other agencies'* CEs when acting as the lead agency on a federal approval.[37] Both these actions expand the scope of CEs, which are typically narrow exceptions tailored to specific and routine agency undertakings.

Under CEQ's prior regulations, agencies adopting CEs had to provide for "extraordinary circumstances" in which a normally excluded action may have a significant environmental effect. However, regardless of whether extraordinary circumstances exist, the 2020 Rule allows federal agencies to use a categorical exclusion if there are "circumstances that lessen the impacts or other conditions sufficient to avoid significant effects"; but does not require the utilization of these other "circumstances" or "conditions."[38] In effect, this revision allows agencies to use CEs when they would have otherwise needed to conduct a full environmental review.

In another form of expanding CEs, the 2020 Rule expands the use of "functional equivalent" substitutes for NEPA documents, which would "allow agencies to substitute other procedures for EAs and EISs."[39] This would allow an agency to determine in its NEPA procedures that its regulatory processes or documents could satisfy "some or all of the requirements" of the regulations, and substitute them, subject to disclosure of which requirements are satisfied.[40]

c. Increasing Threshold for "Significance" Determination

Under NEPA, only federal actions "significantly" affecting the human environment are subject to environmental review. CEQ's prior regulations allowed agencies to consider three types of effects when determining whether an action was "significant": (i) direct effects, which are "caused by the action and occur at the same time and place,"[41] (ii) indirect effects, which are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,"[42] and (iii) cumulative effects, which result from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions."[43]

However, under the 2020 Rule, agencies will no longer consider either cumulative or indirect impacts when determining whether a project will have a significant environmental impact. The 2020 Rule limits indirect impact analysis by stating that, "effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain."[44] The 2020 Rule also directs agencies not to go beyond the definition of effects in CEQ's 2020 Rule.[45] The 2020 Rule's changes to "cumulative" and "indirect" impacts are further detailed below. Contrary to over forty years of NEPA practice, these changes in the 2020 Rule will limit NEPA review for "major

[35] 40 C.F.R. § 1508.4 (1978).
[36] 40 C.F.R. § 1508.1 (2020).
[37] 40 C.F.R. § 1506.3(f)(2020).
[38] 40 C.F.R. § 1501.4(b)(1)(2020).
[39] James M. McElfish, Jr., *What did CEQ Do?* ENVIRONMENTAL LAW INSTITUTE (Sept. 14, 2020).
[40] 40 C.F.R. § 1506.9, 1507.3(c)(5) (2020)
[41] 40 CFR § 1508.8 (1978).
[42] *Id.*
[43] *Id.* at § 1508.7.
[44] 40 C.F.R. 1508.1(g) (2020).
[45] *Id.*

federal actions" that have "significant" indirect or cumulative impacts but insignificant direct impacts.

ii. Limiting the Breadth and Detail of Environmental Analysis

The 2020 Rule would greatly limit the breadth and detail of environmental review. Primarily, the new regulations restrict review of "cumulative" and "indirect" impacts; and in turn, the analysis of climate change, environmental justice, and ecological harm brought about by federal agencies.[46] Additionally, the rule sets arbitrary time and page limits.

It has long been CEQ's position 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."[47] CEQ has further stated that "demographic, geographic, economic, and human health and risk factors all contribute to whether the populations of concern face disproportionately high and adverse effects."[48] CEQ's 1978 regulations required environmental documents to consider both cumulative impacts and indirect effects.[49] Much of cumulative and indirect impact analysis under NEPA involves the "effects on watersheds, habitat, fisheries, local air pollution, and human health."[50]

But as stated above, the 2020 Rule eliminates the definition of cumulative impact and the requirement to consider such impacts.[51] The 2020 Rule also eliminates all references to "indirect" effects[52] and revises the definition of "effects" to include only effects that are "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives," while stating that a "but–for" causal relationship is insufficient "to make an agency responsible for a particular effect under NEPA."[53] Because many environmental harms are cumulative and inter-connected (such as the effects of greenhouse gas emissions), evaluating only harms with a "reasonably close causal connection" to the proposed action will lead to agency's ignoring many devasting environmental impacts.

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[46] The rule explicitly states "Cumulative impact, defined in 40 CFR 1508.7(1978) is repealed." 40 CFR §1508.1(g)(3)(2020). As in the proposed rule, the final rule deletes the terms "cumulative" and "cumulatively" from the previous 40 CFR §§1500.4(p) ("reducing paperwork"), 1500.5(k) ("reducing delay"), 1508.4 ("categorical exclusion"), 1508.7 (definition of "cumulative impact"), 1508.8(b) ("effects"), 1508.25(a)(2) & (c)(3) ("scope"), and 1508.27(b)(7) ("significantly"). With respect to indirect effects, the final rule does not include an affirmative statement that consideration of indirect effects is not required. However, the term "indirect effects" is entirely excised from the definition of "effects or impacts" (§1508.1(g)) and from the evaluation of "environmental consequences" (§1502.16), as well as all other places where it formerly appeared in the regulations. The new definition of "effects or impacts" reproduces some language from the prior version of §1508.8(b). But it explicitly deletes "indirect effects," the phrase "whether direct, indirect or cumulative," and the statement that "indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." James M. McElfish, Jr, *Practitioner's Guide to the Proposed NEPA Regulations*, ENVIRONMENTAL LAW INSTITUTE (February 2020) https://www.eli.org/sites/default/files/eli-pubs/practioners-guide-proposed-nepa-regulations-2020.pdf.

[47] COUNCIL ON ENVIRONMENTAL QUALITY, *Considering Cumulative Effects Under the National Environmental Policy Act* 1 (Jan. 1997).

[48] *Id.* at 27.

[49] 40 C.F.R. §§ 1502.16, 1508.7, 1508.8, 1508.27(b)(7) (1978).

[50] James M. McElfish, Jr, *Practitioner's Guide to the Proposed NEPA Regulations*, ENVIRONMENTAL LAW INSTITUTE (February 2020) https://www.eli.org/sites/default/files/eli-pubs/practioners-guide-proposed-nepa-regulations-2020.pdf.

[51] 85 FED. REG. at 43,375.

[52] *Id.*

[53] *Id.* at 43,343.

a. Climate Change Impacts

By limiting the consideration of "indirect" and "cumulative" impacts, the 2020 Rule allows agencies to underestimate their contributions to climate change. Prior to the enactment of the 2020 Rule, courts had repeatedly found that federal agencies must analyze potential climate-related impacts in their NEPA analysis.[54] For instance, the D.C. Circuit found that greenhouse gases resulting from the combustion of gas "are an indirect effect" of authorizing a natural gas pipeline, and consequently held that the government must estimate the pipeline's greenhouse gas emissions.[55] Other courts have found that agencies must evaluate greenhouse gas emissions as part of their "indirect" and "cumulative" impact analysis.[56] By limiting consideration of "cumulative" and "indirect" impacts, the rule intends to limit the extent of climate change analysis under NEPA.

Still, CEQ's 2020 Rule leaves some room to consider climate change. The rule states that "agencies will consider predictable environmental trends in the area in the baseline analysis of the affected environment," and that "[t]rends determined to be a consequence of climate change would be characterized in the baseline analysis of the affected environment rather than as an effect of the action."[57] However, this statement seems not to apply to the proposed action's impact on climate change. Instead, it indicates that agencies could evaluate the how the locality has already been affected by climate change.

CEQ further clarifies that "[d]iscussion of the affected environment should be informative but should not be speculative"[58] and notes in the rule's preamble that "the analysis of the impacts on climate change will depend on the specific circumstances of the proposed action." Given these changes, CEQ's final rule does not preclude consideration of greenhouse gases; it merely limits the scenarios in which it is required.

Some practitioners have argued that CEQ included this language to placate environmental groups concerned that the eliminations of "cumulative impact" analysis would eliminate analysis of greenhouse gas or climate change impacts under NEPA.[59] Despite this attempt, "challengers to the rule will likely argue that the effect of the proposed revisions is to drastically reduce the extent to

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[54] For just a few examples of cases in which courts demand agencies account for greenhouse gases under NEPA, *see Sierra Club v. Fed. Energy Reg. Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017); *San Juan Citizens All. v. BLM*, 326 Supp. 3d 1227 (D.N.M. 2018); *W. Org. of Res. Councils v. United States BLM*, No. CV 16-21-GF-BMM, 2018 U.S. Dist. LEXIS 49635 (D. Mont. Mar. 26, 2018); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019); *Indigenous Envtl. v. U.S. Dep't of State*, 347 F. Supp. 3d 561 (2018).

[55] *Sierra Club v. Fed. Energy Reg. Comm'n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (stating that greenhouse gas emissions from the combustion of gas "are an indirect effect of authorizing this [pipeline] project, which [the agency] could reasonably foresee" and "conclude[ing] that the EIS for the . . . Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so").

[56] *See, e.g.*, *San Juan Citizens All. v. BLM*, 326 Supp. 3d 1227 (D.N.M. 2018).

[57] 85 FED. REG. at 43331.

[58] *Id.*

[59] *See* Fred R. Wagner et al., *CEQ Finalizes Amendments to NEPA Regulations but Challenges Lie Ahead* (July 29, 2020) https://www.venable.com/insights/publications/2020/07/ceq-finalizes-amendments-to-nepa-regulations; *see also* Edward McTiernan et al, *CEQ Finalizes Comprehensive Changes to NEPA Regulations*, ARNOLD & PORTER (July 30, 2020) ("Environmental justice advocates and other critics claimed that the deletion of cumulative impacts was intended to scale back consideration of climate change impacted under NEPA. In response to these concerns, CEQ included language emphasizing the potential impacts of climate change on the environment and proposed actions but said little to allay concerns that the new rule would curtail consideration of a proposed action's impacts on climate change.") https://www.arnoldporter.com/en/perspectives/publications/2020/07/ceq-finalizes-changes-to-nepa-regs.

which agencies consider climate change impacts."[60] For instance, in a recent lawsuit, Native American and environmental groups claimed that the Bureau of Land Management failed to consider the "cumulative" climate change impacts of 30 oil and gas leases sold near the Navajo Nation.[61] Under the 2020 Rule, similar lawsuits will need "to cite other, more immediate impacts, in order to trigger a NEPA review."[62]

Relatedly, CEQ refrained from finalizing the repeal of CEQ's outstanding Draft NEPA Guidance on Consideration of Greenhouse Gas Emissions.[63] The Obama administration issued a guidance memorandum to federal agencies on how to assess greenhouse gas emissions and climate change in NEPA reviews ("Obama Guidance").[64] Pursuant to an executor order early in the Trump administration, this guidance document was rescinded in April 2017.[65] In 2019, the Trump administration issued a new, draft guidance to replace the Obama Guidance ("2019 Draft Guidance"). Among other things, this draft guidance replaced an entire section from the Obama guidance devoted to how agencies should consider climate change with a single, vague sentence: "agencies should consider whether the proposed action would be affected by foreseeable changes to the affected environment under a reasonable scenario."[66] In the 2020 Rule, CEQ did not provide any meaningful direction to supplement the 2019 Draft Guidance. As a result, there remains significant uncertainty about how climate change will be considered under the new regulations.[67]

b. Environmental Justice Impacts

Apart from restricting consideration of climate change, CEQ's elimination of "cumulative impacts" analysis limits the extent to which agencies are required to consider environmental justice. Since the 1990s, environmental justice analysis has been a key part of NEPA. In 1994, Executive Order 12898

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[60] *See* Scot Anderson et al, *Final NEPA rule and its consequences*, HOGAN LOVELLS (July 28, 2020) https://www.engage.hoganlovells.com/knowledgeservices/news/final-nepa-rule-and-its-consequences.

[61] *See* PETITION FOR REVIEW OF AGENCY ACTION *Diné Citizens Against Ruining Our et al. v. United States Bureau Of Land Management* 1:20-cv-00673 (July 9, 2020) ("To comply with NEPA, BLM was required to take a hard look at cumulative GHG emissions, including the context and severity of the impacts of those emissions on climate change and otherwise, for the December 2018 RPFO lease sale. Where information relevant to foreseeable adverse impacts is unavailable, agencies must nonetheless evaluate "such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. § 1502.22(b)(4). There are several accepted approaches for evaluating the impacts of GHG emissions to climate and society, including the Social Cost of Carbon and Carbon Budgeting. BLM failed to take a hard look at cumulative GHG emissions and cumulative climate impacts, and failed to discuss the severity of those impacts, when proceeding with the December 2018 lease sales.") *available at* https://westernlaw.org/wp-content/uploads/2020/07/2020.07.09-Rio-Puerco-Oil-and-Gas-Leasing-Complaint.pdf.

[62] Scot Anderson et al, *Final NEPA rule and its consequences*, HOGAN LOVELLS (July 28, 2020) *available at* https://www.engage.hoganlovells.com/knowledgeservices/news/final-nepa-rule-and-its-consequences.

[63] *Id.* ("In the meantime, those looking for greater clarity on evaluation of greenhouse gas emissions under NEPA can look to CEQ's Draft NEPA Guidance on Consideration of Greenhouse Gas Emissions (84 Fed. Reg. 30,097), for which the comment period ended in August 2019."); Edward McTiernan et al, *CEQ Finalizes Comprehensive Changes to NEPA Regulations*, ARNOLD & PORTER (July 30, 2020) https://www.arnoldporter.com/en/perspectives/publications/2020/07/ceq-finalizes-changes-to-nepa-regs.

[64] COUNCIL ON ENVIRONMENTAL QUALITY, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews* https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf,

[65] EXECUTIVE ORDER 12783, *Presidential Executive Order on Promoting Energy Independence and Economic Growth* (MARCH. 28, 2017) https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-energy-independence-economic-growth/.

[66] COUNCIL ON ENVIRONMENTAL QUALITY, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 FED. REG. 30097 (2019)(.

[67] Edward McTiernan et al, *CEQ Finalizes Comprehensive Changes to NEPA Regulations*, ARNOLD & PORTER (July 30, 2020) https://www.arnoldporter.com/en/perspectives/publications/2020/07/ceq-finalizes-changes-to-nepa-regs.

directed federal agencies to make environmental justice part of their mission and to identify and address the disproportionate environmental and health effects of their activities.[68] In 1997, CEQ published guidance directing federal agencies to consider environmental justice at "each and every step" of the NEPA process.[69]

A federal agency cannot effectively consider environmental justice "at every step" of the NEPA process without also identifying and considering the "cumulative impacts" of the project under review. In the 2020 Rule, CEQ concludes that the 2020 Rule regulations would "not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations."[70] However, CEQ makes this conclusion without any factual findings. It seems highly likely that eliminating "cumulative impact" analysis would disproportionately impact minority and low-income populations. These communities have already had higher exposure to land, air, and water pollution, which often stems from multiple historic or active sources of pollution. "Cumulative impact" analysis is therefore essential for gauging the true extent of environmental harm inflicted by a given federal action. Additionally, NEPA "was created to give a voice to those who are often rendered voiceless and has successfully allowed impacted populations to challenge projects that negatively affect their water quality, air quality, economic prosperity, and overall health and safety."[71]

c. Imposing Arbitrary Time and Page Limits

The 2020 Rule imposes arbitrary time and page limits. The rule imposes a one-year presumptive limit for the completion of an environmental assessment and a two-year presumptive limit for the completion of an environmental impact statement.[72] The 2020 Rule imposes a 75-page limit for an environmental assessment.[73] It also sets a 150-page limit for an environmental impact statement, allowing 300 pages only for "proposals of unusual complexity."[74] These time and page limits apply unless a "senior agency official" approves a longer time period or extends the page limit, on a case-by-case basis.[75] CEQ claims these time and page limits are necessary to achieve "more timely reviews and reduce unnecessary paperwork."[76]

Given the complexity of some federal projects, these time limits are unreasonably short. The deadlines could incentivize agencies to avoid necessary field research. If an agency finds itself nearing the time or page limit but concludes that additional research is necessary, it is now likely to forgo this additional research. This incentive to short shrift an EIS is particularly pronounced when paired with a new directive from CEQ that agencies "are not required to undertake new scientific

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[68] *See* Exec. Order No. 12898, 59 FED. REG. 7629 (Feb. 16, 1994).
[69] COUNCIL ON ENVIRONMENTAL QUALITY, *Environmental Justice Guidance Under the National Environmental Policy Act* 8 (1997).
[70] 85 FED. REG. at 43,356.
[71] *See* U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, *Senate, House Environmental Justice Caucus Urge President Trump to Reverse Course on NEPA Rollback* (July 9, 2020) https://www.epw.senate.gov/public/index.cfm/2020/7/senate-house-environmental-justice-caucuses-urge-president-trump-to-reverse-course-on-nepa-rollback.
[72] 85 Fed. Reg. at 43,362-63.
[73] *Id.* at 43,360.
[74] *Id.* at 43,364.
[75] *Id.* at 43,360, 43,362-63, 43,364. The 2020 Rule defines "senior agency official" as "an official of assistant secretary rank or higher (or equivalent) that is designated for overall agency NEPA compliance, including resolving implementation issues." *Id.* at 43,376.
[76] *Id.* at 43,309.

and technical research to inform their analyses."[77] While agencies are "required to disclose in the EIS that information is incomplete or unavailable,"[78] they would still be allowed to deprive the public of complete environmental analysis based on CEQ's arbitrarily set time limit.

iii. Limiting Public Participation & Scrutiny of the NEPA Process

In a third type of revision, the 2020 Rule seeks to undermine public participation in the NEPA process, even though public involvement is one of NEPA's "twin aims."[79] The 2020 Rule signals its intent to restrict public involvement by deleting language from the 1978 regulations directing federal agencies "to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment" and "[u]se all practicable means . . . to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their action upon the quality of the human environment."[80]

Apart from this tonal change, the 2020 Rule limits public participation in, and scrutiny of, the NEPA process by: (a) enacting burdensome procedural requirements, (b) imposing strict substantive requirements on public comments, (c) empowering agencies to ignore public comments, and (d) limiting judicial scrutiny of agency action.

a. Burdensome Procedural Requirements

CEQ's 2020 Rule imposes procedural barriers that will make it more difficult for the public to participate in the NEPA process in two ways.

First, the 2020 Rule imposes burdensome exhaustion requirements on public commentators. The Rule provides: "Comments or objections of any kind not submitted, including those based on submitted alternatives, information, and analyses, shall be forfeited as unexhausted."[81] Additionally, "If the agency requests comments on the final environmental impact statement before the final decision, consistent with § 1503.1(b), comments and objections of any kind shall be raised within the comment period provided by the agency. Comments and objections of any kind not provided within the comment period(s) shall be considered unexhausted and forfeited, consistent with § 1500.3(b) of this chapter."[82] Members of the public that do not meet these standards will not be entitled to a response from the reviewing agency.

Second, the 2020 Rule limits the public's access to an agency's draft documents and internal deliberations. Most significantly, the new Rule no longer requires agencies to circulate draft EISs that satisfy NEPA standards. [83] As a result, agencies could circulate incomplete or misleading draft EISs that undercut the public's ability to comment. Additionally, the 2020 Rule eliminates the scoping process for EAs, an important step that allows the public to provide comment to federal agencies regarding developing alternatives for further review.[84] Without the scoping process, the public will lose the ability to bring issues to the government's attention, potentially resulting in a FONSI when a full EIS would have been appropriate. Additionally, the new regulations require agencies to "involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable in preparing environmental assessments" but do not mandate

[77] 40 C.F.R. § 1502.23 (2020).
[78] 85 FED. REG. at 43,332.
[79] *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).
[80] *Compare* 40 C.F.R. § 1500.2 (1978), with Final Rule, 85 Fed. Reg. at 43,317, 43,358 (removing and reserving § 1500.2.
[81] 85 Fed. Reg. at 43,358.
[82] *Id.* at 43,368.
[83] 40 C.F.R. § 1502.9 (2020).
[84] *Id.* at § 1501.9(a).

any specific actions for facilitating public involvement.[85]

b. Strict Substantive Requirements for Public Comments

Apart from these procedural hurdles, the 2020 Rule imposes unnecessary, prescriptive requirements on public comments. The 2020 Rule forces commentators to not only provide "data sources and methodologies supporting the proposed changes" to agency action, but also comment on the "economic and employment impacts" of that change.[86] This modification imposes obligations on the public to provide technically specific and detailed comments on an agency action. However, many commentators have useful environmental, cultural, social, or other knowledge that can inform agency decision making, yet lack the technical knowledge to express that information consistent with the 2020 Rule.

c. Empowers Agencies to Ignore Public Comments

While the 2020 Rule makes it harder for the public to comment during the NEPA process, it makes it easier for agencies to ignore those comments. The 2020 Rule allows agencies to respond to public comments without detailed explanation and citation to authorities,[87] makes responding to comments permissive rather than obligatory,[88] and broadens the agency's discretion to respond to substantive public comments generically rather than specifically.[89] Additionally, the 2020 Rule eliminates the requirement that a federal agency "assess and consider" public comments and instead allows a brief summary of comments.[90] It also replaces the requirement to assess and consider comments with a statement "certifying" that the agency "considered" the comments.[91] However, despite CEQ's intentions, agencies will still be subject to arbitrary-and-capricious review under the Administrative Procedure Act, and will likely have their actions struck down in court if they fail to respond to significant arguments or evidence.

d. Attempts to Limit Judicial Scrutiny of Agency Action

Last but not least, the 2020 Rule seeks to limit judicial remedies in NEPA actions, namely by directing courts not to invalidate agency actions or grant injunctive relief when an agency violates the statue. The Rule claims to "create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm." It further notes that "minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action."[92] By attempting to limit the remedies available for NEPA violations, the 2020 Rule reduces incentives for agencies to comply with the regulations at all.

V. Proposed Action(s) for Reversal

i. Preliminary Considerations: Type of Agency Action

Before deciding on the substantive revisions that it would like to make to the 2020 Rule, CEQ must decide how it would like to implement any changes to the rule. Broadly speaking, CEQ is faced with

[85] *Id.* at § 1501.5(e).
[86] *Id.* at § 1503.3(a) (2020).
[87] *Id.* at § 1503.4(a)(5).
[88] *Id.*
[89] *Id.* at §§ 1503.4(a), (a)(5).
[90] *Id.* at §§ 1503.4(a), § 1502.17.
[91] *Id.* at § 1505.2.
[92] *Id.* at § 1500.3(d).

two options: it can follow the traditional notice-and-comment procedures of the Administrative Procedure Act (APA) or it can seek some exception from the APA's requirements.

The APA requires agencies generally to use certain procedures when issuing a rule. Pursuant to APA section 553, they must publish a proposed rule in the *Federal Register*, provide opportunity for interested persons to submit comments on the proposal, publish a final rule that includes a "concise general statement" of the "basis and purpose" of the rule, and provide at least a 30-day waiting period before the rule can take effect.

Typically, courts will not abide corner-cutting in rulemaking. The Trump administration is a cautionary tale: many of its rules were struck down because of self-inflicted errors.[93] Even sympathetic judges who are open to deferring to expert agencies exhibit frustration with corner-cutting. Judge David Tatel of the D.C. Circuit gave a speech at the close of the George W. Bush administration urging agencies generally, and the EPA in particular, to get back to observing the fundamentals of administrative law.[94] There is no need to commit unforced errors. Taking the time to do things properly will decrease the likelihood of being overturned, and has other benefits, notably allowing full participation by stakeholders, including environmental justice communities. Accordingly, CEQ would be well advised to follow the traditional notice-and-comment rulemaking procedures when revising the general NEPA regulations. However, there are at least three alternative routes that CEQ could attempt.

a. Alternative One: Direct Final Rulemakings

The first involves making use of the APA's "good cause" exception, which allows an agency to issue a rule without notice and comment or waive the 30-day waiting period before the rule can take effect. When agencies use the "good cause" exception they must show that the typical notice-and-comment procedures are "impracticable, unnecessary, or contrary to the public interest."[95] The agency must give supporting reasons for invoking the good cause exception, and its invocation of good cause is subject to judicial review. CEQ could employ the "good cause" exemption to engage in "direct final" rulemaking.

Agencies may use direct final rulemaking when they deem a rule routine or noncontroversial. Under direct final rulemakings (DFR), an agency will issue a final rule without prior notice and comment and then generally establish a period during which the agency is open to receiving comments. The rule may take effect unless at least one adverse comment is received by the agency, in which case the agency will withdraw the rule and proceed with the normal notice-and-comment procedures.[96] If no adverse comments are received, the rule will become effective within 60 days.[97] The EPA has used direct final rulemaking in a small number of specific circumstances, including what it believed to be non-controversial updates to state implementation plans for national air quality standards.

However, DFRs are a poor fit for ambitious or highly impactful regulatory measures; the "purpose of the direct final rulemaking technique is to streamline the rulemaking process in situations in which a rule is considered so noncontroversial that the most minimal procedures should be

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[93] One win-loss tracker estimated the Trump administration's rate of success on relevant rules at 17%. *See* https://policyintegrity.org/trump-court-roundup filtered for "environment, energy, and natural resources."

[94] *See,* The Honorable David S. Tatel, The Administrative Process and the Rule of Administrative Law.

[95] § 553(b)(3)(B).

[96] CONGRESSIONAL RESEARCH SERVICE, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations and Pages in the Federal Register* (Sept. 3, 2019) [*hereinafter* CRS Report].

[97] *See* Ronald M Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995-1996) ("In most cases, the agency asks to receive objections within thirty days and make the rule effective after sixty days if no one objects.")

adequate."[98] Or as a recent Brookings Institution report noted, "[t]his stuff is supposed to be boring."[99] DFRs were meant for "noncontroversial matters, generally deep in the regulatory weeds and far from the headlines."[100] The reason for this is straightforward: any adverse comment can delay promulgation of the rule. "If the agency proves mistaken in its prediction that no one will seek to comment adversely, and the rule has to be withdrawn and resubmitted for notice-and comment, the ultimate issuance of the rule will take longer than if the agency had never tried to use direct final rulemaking."[101]

Nonetheless, some agencies have attempted to issue substantive proposals through DFRs. These attempts typically lead to the DFRs' withdrawal and subsequent delays.[102] Moreover, during the Trump administration, even noncontroversial proposals have been subject to litigation and delay.[103] Many of the "adverse" comments received by the Trump administration amounted to nothing more than "throwing sands in the gear"; disgruntled citizens registering general disproval with the administration.[104] Even comments devoid of regulatory substance, such as ""#resist" or "please do not repeal or defund the EPA," result in regulatory delays as the agency is forced to withdraw the DFR in favor of traditional notice-and-comment procedures.[105] Opponents of a substantive proposal adopted through a DFR would find it relatively easy to impede its implementation. Accordingly, CEQ should refrain from implementing new NEPA regulations through DFR.

b. Alternative Two: Emergency Rulemaking

CEQ could also try to make use of the "good cause" exception of the APA to engage in emergency rulemaking. However, there does not seem to be a relevant "emergency" that would justify invoking emergency rulemaking powers. In the past, agencies have adopted regulations without following normal procedures in "emergency situations . . . or when delay could result in serious harm."[106]

For example, post-9/11, Federal Aviation Administration (FAA) regulations providing for automatic suspension of pilot certificates for any alien found by the Travel Security Administration (TSA) to present a security risk were upheld, despite being promulgated without notice and comment.[107] The D.C. Circuit found that requiring notice and comment "could delay the ability of TSA and the FAA to take effective action to keep persons found by TSA to pose a security threat from holding an airman certificate."[108] Federal agencies have also issued interim and temporary rules through the APA's good-cause exemption in response to the COVID-19 pandemic. For instance, on March 26, 2020, the Securities and Exchange Commission (SEC) announced a "temporary final rule" providing

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[98] *Id* at 2.
[99] Phillip A. Wallach & Nicholas W. Zeppos, *Contestation of direct final rules during the Trump administration*, THE BROOKINGS INSTITUTION (Oct. 8, 2018).
[100] *Id.*
[101] Ronald M Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1, 23 (1995-1996).
[102] Michael Kolber, *Rulemaking Without Rules: An Empirical Study Of Direct Final Rulemaking*, 72 ALB. L. REV. 79 (Finding the FDA used direct final rulemakings for substantive rules, leading to a high rule withdrawal rate and subsequent delays).
[103] In 2017, one-third of all DFRs received adverse comments. Previously the highest proportion of DFRs ever withdrawn was 16% in 2001, and most years have a withdrawal rate between 5-10%. Phillip A. Wallach & Nicholas W. Zeppos, *Contestation of direct final rules during the Trump administration*, THE BROOKINGS INSTITUTION (Oct. 8, 2018).
[104] *Id.*
[105] *Id.*; *but see* Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 418 ("It bears repeating that direct final rulemaking may proceed even in the face of numerous, though insignificant adverse comments.")
[106] *See Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1179 (D.C. Cir 2004) (internal citations omitted).
[107] *Id.*
[108] *Id.*

relief from certain filing requirements, emphasizing the "temporary nature of the relief" and the "significant and immediate impact of COVID-19 on affected issuers" justified forgoing notice and comment under the good cause exception."[109]

Perhaps the Biden-Harris administration could declare climate change a national emergency and then using this emergency power to claim an exception to the APA's procedural requirements.[110] While some of the impacts of climate change are clearly immediate,[111] many judges will likely find the link between environmental studies under NEPA and rising sea levels or record wildfire and hurricane seasons to be attenuated.[112] In the past, some members of the Supreme Court have been skeptical that regulations that curb *actual* greenhouse gas emissions cause climate-related injuries.[113] They would be hard-pressed to find that environmental studies, some of which have little to do with greenhouse gas emissions, bear a sufficient connection to climate change to justify use of the APA's emergency procedures. Given the absence of an intervening event requiring streamlined environmental reviews, and the policy goal of establishing robust and long-lasting revisions to the NEPA regulations (as opposed to temporary expedients), CEQ should also refrain from using emergency rulemaking procedures.

c. Alternative Three: Issue an Executive Order

A third (more ambitious) alternative, would argue that NEPA regulations are not subject to the APA at all. Under NEPA, CEQ does not have any rulemaking or adjudicatory power. The statutory section on CEQ's duties and functions limits CEQ's basic functions to gathering information and advising the president.[114] While some courts have described CEQ's NEPA regulations as "binding on the agencies,"[115] others have noted that the binding effect of CEQ's regulations are "far from clear."[116] CEQ was only empowered to promulgate binding regulations by an executive order (EO) issued by President Jimmy Carter in 1977.[117]

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[109] The rule provides temporary relief "for Form ID filers and for issuers subject to reporting obligations pursuant to Regulation Crowdfunding and Regulation A." SECS. AND EXCH. COMM'N, *Relief for Form ID Filers and Regulation Crowdfunding and Regulation A Issuers Related to Coronavirus Disease 2019* (COVID-19) (2020), https://www.sec.gov/rules/interim/2020/33-10768.pdf.

[110] *See, e.g.*, The #ClimatePresident Action Plan: 10 Steps for the Next Administration's First 10 Days (suggesting that the President should declare climate change a national emergency on their first day in office) https://www.climatepresident.org/; *cf* Tara Golshan, *Bernie Sanders and AOC want Congress to declare a national emergency over climate change*, VOX (July 9, 2019) (discussing a Congressional resolution that sought to have the United States declare a "climate emergency"). https://www.vox.com/2019/7/9/20687526/bernie-sanders-aoc-national-climate-change-emergency.

[111] *See*, CLIMATE NEXUS, *Right Here, Right Now: How Climate Change Impacts Us Today (*describing the reality and harms of climate change in the present) https://theyearsproject.com/learn/news/right-here-right-now/; *see also*

[112] *Cf Massachusetts v. EPA*, 549 U.S. 497 (2007) (Roberts, C.J., dissenting) (casting doubt on whether automotive emissions accounting for about 4 percent of global greenhouse gas emissions contributed to rising sea levels off the coast of Massachusetts).

[113] *Id.*

[114] *See, e.g.*, 42 U.S.C. §4344.

[115] *See, e.g.*, *Mid State Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (describing CEQ regulations as "binding on the agenc[y]"); *Nat. Res. Def. Council v. U.S. Dept. of Interior*, 397 F. Supp. 3d 430, 453-54 (S.D.N.Y. 2019) (describing CEQ as "promulgating rules applicable to and binding on all Federal agencies.").

[116] *See Taxpayers of Michigan Against Casinos (TOMAC) v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) (noting that "the binding effect of CEQ regulations is far from clear"); *see also City of Alexandria v. Slater*, 198 F.3d 862, 866 n.3 (D.C. Cir. 1999) (stating that CEQ "has no express regulatory authority under [NEPA]," as it was only empowered to issue "binding" regulations by presidential executive order).

[117] *Executive Order No. 11991*, 42 FED. REG. 26,967 (1977) (empowering CEQ to "issue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA]").

Accordingly, CEQ could argue that its regulations are not "legislative rules" subject to the APA's notice-and-comment procedures but instead fall under the APA's exemption for "interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice."[118] In this case, the Biden-Harris administration could simply issue an EO telling agencies to continue following the 1978 regulations.

The D.C. Circuit has explained that"[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties ... is a legislative rule," while "[a]n agency action that merely explains how the agency will enforce a statute or regulation . . . is a general statement of policy."[119] A legislative rule can serve as "the basis for an enforcement action for violation" of its requirements,[120] but a policy statement, which is not legally binding, may not.[121] Under these guidelines, CEQ's regulations seem to fall outside the definition of "legislative rules." CEQ imposes no legally binding obligations on regulated parties; its rules are instead targeted squarely at internal agency review processes. Additionally, CEQ only serves in an advisory and informational role and has no power to enforce its regulations. The original EO by President Carter reinforces this view by explicitly directing agencies to "comply with regulations issued by the Council."[122] Such a directive would be unnecessary if CEQ had any independently binding authority. Because CEQ has no binding authority, it can argue that its regulations are "interpretive rules" or "general policy statements" that are exempt from the procedural formalities of the Administrative Procedure Act.

However, this maneuver would entail litigation risks. If CEQ revised the NEPA revisions unilaterally and without notice and comment, it would break decades of its own regulatory practice. In 1978, CEQ issued its first comprehensive NEPA regulations through notice-and-comment procedures. Since then, it issued two minor amendments to its regulations, in 1986 and 2005, both of which were subject to APA procedures. Finally, CEQ subjected its 2020 Rule to an extended comment period. By reversing its own long-standing practices and bypassing notice-and-comment procedures, CEQ would subject itself to claims that it is acting arbitrarily by undertaking a major revision to its own procedures without any public involvement.

ii. Step 1: Issue Interim Guidance for NEPA Review

To immediately restore NEPA, CEQ should issue an interim guidance document outlining the government's updated approach to environmental reviews. By issuing guidance, CEQ will signal to courts reviewing the 2020 Rule that the government is reconsidering its position. Additionally, CEQ's guidance can help agencies properly comply with NEPA while the 2020 Rule is reviewed.

In some cases, the 2020 Rule lowered the floor for NEPA but still allowed agencies to engage in more substantive review, such as with review of "cumulative" and "indirect" effects. Accordingly, CEQ's guidance should clarify that agencies should:

- Refrain from systematically expanding CEs pending CEQ's review of the 2020 Rule;
- Analyze both "cumulative" and "indirect" impacts when making a threshold "significance" finding;
- Continue to follow CEQ's Draft NEPA Guidance on Consideration of Greenhouse Gas

[118] *See* 5 USC 553(b)(3)(a).
[119] *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014).
[120] *Id.* at 251.
[121] *Id.* at 253.
[122] *Executive Order No. 11991*, 42 FED. REG. 26,967 (1977).

Emissions;[123]

- Continue to analyze the environmental justice impacts of proposed agency action;
- Circulate draft EISs that otherwise meet NEPA's standards before initiating the public comment period; and
- Respond to public comments specifically, with detailed explanation, and with citations to relevant authorities.

This interim guidance should further describe plans to petition all pending district court cases for an abeyance while CEQ reconsiders the 2020 Rule. Additionally, the guidance should note CEQ's intention to initiate a rulemaking process to reconsider the 2020 Rule. Until such time as CEQ can fully revisit the 2020 Rule, agencies should continue to proceed under the 2020 Rule, CEQ's interim guidance, and their own agency-specific regulations. Additionally, CEQ should clarify that any pending litigation over NEPA reviews for discrete projects will not be impacted by a revision to the 2020 Rule.

CEQ should not move to suspend or stay the 2020 Rule. The CEQ rule went into effect in September. Both the Trump and Reagan administrations attempted to indefinitely delay or suspend regulations that had already gone into effect.[124] However, courts pushed back on these attempts, holding that indefinite delays were "tantamount to a revocation" and that the APA's procedural requirements applied to those delays just like they would apply to a repeal.[125] Accordingly, should CEQ move to suspend the 2020 Rule, it would have to go through the same notice-and-comment requirements and pass the same arbitrary-and-capricious review under the APA as would be required if it moved to repeal and replace the 2020 Rule.[126] By issuing a suspension or delay of the 2020 Rule, CEQ would only invite litigation and delay reforms to their NEPA regulations.

iii. *Step 2: Manage Pending Litigation*

Currently, there are at least four cases pending in U.S. district courts challenging the validity of the administration's changes; additional challenges could arise before President-elect Biden is inaugurated.[127] Before revising the NEPA regulations, CEQ must first coordinate with the Justice Department to manage this litigation. The Justice Department should then request an abeyance in pending cases because an adverse decision in any of the pending challenges could complicate CEQ's future rulemakings.

An abeyance is a court order that puts off briefing, argument, and a final decision, and can create

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[123] *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,097 (June 26, 2019)

[124] *See* Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 33 (2019) (explaining how the Trump Administration attempted to suspend effective rules but met judicial resistance); *see also* William M. Jack, *Taking Care that Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1498-99 (2002) (explaining that Reagan delayed as many as 119 regulations and that many of those suspensions led to lawsuits).

[125] *See, e.g.*, *Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 762 n.23 (3d Cir. 1982); *accord Envtl. Def. Fund v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) ("The suspension or delayed implementation of a final rulemaking normally constitutes substantive rulemaking.").

[126] *See Pub. Citizen v. Steed*, 733 F.2d 93, 99-105 (D.C. Cir 1984) (finding an indefinite suspension to be arbitrary and capricious); *accord Air All. Houston v. EPA*, 906 F.3d 1049, 1066 (D.C. Cir. 2018) (finding a delay arbitrary and capricious under the State Farm standard).

[127] *See, e.g.*, *Wild Virginia v. Council on Envtl. Quality*, No. 3:20-cv-00045 (W.D. Va.*); Alaska Community Action on Toxics v. Council on Envtl. Quality*, No. 3:20-cv-05199 (N.D. Cal.); *Envtl. Just. Health All. v. Council on Envtl. Quality*, No. 20-cv-06143 (S.D.N.Y.); *California v. CEQ*, No. 3:20-cv-06057 (N.D. Cal.). Harvard Law School has tracked the Trump administration's revision of the NEPA regulations and provides periodic updates on pending litigation.

time and space for CEQ to re-initiate rulemaking.[128] Typically, abeyances in a pending lawsuit are granted to allow a new rulemaking to "run its course" and save the judicial resources, which would otherwise be involved in deciding the pending matter.[129] In this way, the court can avoid getting into an "abstract disagreement[]" while the agency reconsiders the rule. If the agency ultimately revises the challenged rule in a way that moots the issues in the pending case,[130] the abeyance saves the court the resources that it would have expended on that case.[131] If the agency decides not to change the rule under review, the court can proceed with the pending case, avoiding a situation where the challengers are forced to bring a new suit.[132] None of the four challenges to the 2020 Rule are sufficiently advanced such that a court would not grant an abeyance while CEQ reconsiders its regulations.

iv. *Step 3: Initiate New Rulemaking*

Once CEQ and the Justice Department resolve pending litigation, CEQ should reinitiate the notice-and-comment rule-making process to revise the 2020 Rule. This rulemaking should accomplish three separate goals: (i) reinstating key NEPA processes; (ii) improving climate change analysis; and (iii) considering how to expedite clean energy projects.

Some of these goals may be in tension. For instance, just as the Trump administration intended to promote fossil fuel infrastructure, clean energy and transmissions infrastructure may benefit from parts of the 2020 Rule, such as the expanded use of CEs and a more narrow definition of "major federal action." Additionally, requiring more detailed, consistent, and robust climate change analysis may extend the time and resources required for a full EIS and, consequently, may delay the deployment of critical clean energy infrastructure. When seeking public comments on the 2020 Rule, CEQ should consider how to strike the appropriate balance between revising prior NEPA protections, improving climate change accounting, and expediting clean energy infrastructure projects.

a. Reinstate Past NEPA Protections

A revision to the 2020 Rule should principally seek to reinstate the prior NEPA protections. This revision would proceed in three parts.

First, it would expand the range of actions subject to NEPA review by returning to the 1978 regulation's definition of "major federal action";[133] incorporating "cumulative" and "indirect" impact analysis into "significance determinations;"[134] and returning to 1978 regulation's guidance on agency CE determinations.[135]

Second, the 2020 Rule revision should promote complete environmental analysis by reinstating the

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[128] *See Am. Petrol. Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012); *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015).
[129] *Am. Petrol. Inst.*, 683 F.3d at 386; *FBME Bank Ltd.*, 142 F. Supp. 3d at 73.
[130] See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-76 (1997); *Akichcak Native Cmt. V. U.S. Dep't of Interior* 827 F. 3d 100, 105-06 (D.C. Cir. 2016).
[131] *See, e.g.*, *California v. EPA* No. 08-1178 (D.C. Cir Sept. 3, 2009) (dropping suit over denial of a wavier to enforce the state's own emission standards after EPA granted California's waiver).
[132] *Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013) (explaining that the court had granted an abeyance to allow the agency to decide whether to reconsider a rule).
[133] *Supra* II.i.a. Narrowing Definition of "Major Federal Action."
[134] *Supra* II.i.d Increasing Threshold for "Significance Determination."
[135] *Supra* II.i.b. Expanding the Practice of Categorical Exclusions.

requirement that agencies analyze cumulative and indirect impacts within an EIS,[136] and rescinding the 2020 Rule's arbitrary time and page limits.[137]

Finally, the revision to the 2020 Rule should seek to promote public participation by eliminating the 2020 Rule's exhaustion requirements for public comments, eliminating the 2020 Rule's bond-and-security requirements for judicial review, eliminating the 2020 Rule's rejection of narrative comments lacking empirical or economic analysis, and require agencies to specifically respond to each substantive comment.[138]

Still, in order to promote President-elect Biden's goal to achieve a carbon-free power sector by 2035 and achieve net-zero emission economy-wide no later than 2050, CEQ should welcome public comment on which aspects of the 2020 Rule strike the appropriate balance between ensuring federal agencies do not act in an environmentally harmful manner while still helping critical energy infrastructure avoid permitting delays. The goal should be to reform the process and improve environmental outcomes (including climate outcomes), not just streamline the process at all costs.

b. Improve Climate Change Accounting

When reconsidering its 2020 Rule, EPA should provide clearer guidance on how federal agencies should consider analyze climate change impacts. As noted earlier, even prior to the 2020 Rule, courts repeatedly found that federal agencies must analyze climate-related impacts as part of "indirect" and "cumulative" impact analysis .[139] Even the 2020 Rule does not go so far as to preclude consideration of climate-related impacts. Instead, it notes that "analysis of the impacts on climate change will depend on the specific circumstances of the proposed action."[140] However, despite the 2020 Rule and the clarity given by federal courts, "there remains significant uncertainty about how climate change will be considered under the new regulation."[141]

Adding to the confusion, CEQ has (in recent years) issued two separate guidance documents meant to guide agency consideration of climate impacts. In 2016, the Obama administration issued guidance for federal agencies on how to consider greenhouse gas emission and climate change effects in NEPA reviews.[142] In 2017, CEQ withdrew this guidance before issuing new, draft guidance in 2019.[143] The 2019 guidance created new uncertainty by: (i) eliminating any discussion of mitigation (though this featured prominently in the 2016 guidance); (ii) making a "cryptic statement"

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136 *Supra* II.ii.a. Cumulative and Indirect Impacts; II.ii.c Consideration of Environmental Justice Impacts.
137 *Supra* II.ii.e. Imposing Arbitrary Time and Page Limits.
138 *See Supra* II.iii. *Limiting Public Participation and Scrutiny of the NEPA Process*.
139 For just a few examples of cases in which courts demand agencies account for greenhouse gases under NEPA, *see Sierra Club v. Fed. Energy Reg. Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017); *San Juan Citizens All. v. BLM*, 326 Supp. 3d 1227 (D.N.M. 2018); *W. Org. of Res. Councils v. United States BLM*, No. CV 16-21-GF-BMM, 2018 U.S. Dist. LEXIS 49635 (D. Mont. Mar. 26, 2018); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019); *Indigenous Envtl. v. U.S. Dep't of State*, 347 F. Supp. 3d 561 (2018).
140 85 FED. REG. 43344.
141 McTiernan et al, *CEQ Finalizes Comprehensive Changes to NEPA Regulations*, ARNOLD & PORTER (July 30, 2020) https://www.arnoldporter.com/en/perspectives/publications/2020/07/ceq-finalizes-changes-to-nepa-regs.
142 *See* Christina Goldfuss, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, COUNCIL ON ENVIRONMENTAL QUALITY (Aug. 1, 2016) *available at* https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.
143 Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 82 Fed. Reg. 16576 (April 5, 2017) (rescinding 2016 guidance); *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30097 (June 26, 2019) (proposing new draft guidance).

that agencies need not study indirect climate effects whether there is merely a "but for" causal connection with the proposed action; and (iii) remaining silent about how the agency will address climate change through adaption and resilience measures in the proposed action.[144] Though it could have answered these questions, the 2020 Rule did not clarify the responsibility of federal agencies for climate-related analysis.

To clarify federal responsibilities under NEPA, CEQ should issue final guidance on climate analysis and "establish a best-practice template for transparently estimating projects' climate impacts."[145] These best practices would then cohere climate-impact evaluations across federal agencies.

Most of these guidelines should target promoting consistency in federal climate evaluations. For instance, CEQ should maintain a list of updated and specific greenhouse gas estimation tools for use across federal agencies to ensure that federal data is consistent across agencies.[146] Because many estimates of future emissions depend (in part) on assumptions about the future state of the economy, CEQ should establish scenarios for this analysis that rely in part on common international benchmarks used by the IPCC and EIA.[147]

Additionally, CEQ should instruct agencies to better account for both upstream and downstream greenhouse gas emissions. As the names imply, upstream emissions occur earlier in the project supply chain and downstream emission occur later in the project supply chain. For instance, for a federal permit for fossil fuel transportation infrastructure, such as a natural gas pipeline, upstream emissions would include emissions from gas extraction, while downstream emissions would include emissions from the end use of natural gas.

Already, the D.C. Circuit has concluded that agencies approving interstate pipelines must consider the greenhouse gas implications of downstream combustion as "indirect" effects under NEPA.[148] Similarly, the D.C. District Court found that downstream oil and gas use is not only the foreseeable result of a lease sale (and therefore subject to NEPA review) but also the "project's entire purpose."[149] Courts have repeatedly come to similar results, finding that downstream emissions are properly subject to NEPA review.[150] Under the reasoning applicable to downstream emissions, courts would find that upstream emissions are properly included in NEPA's scope.[151] To standardize the currently inconsistent approach of federal agencies, CEQ should require that any "major federal

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144 *See, e.g.*, Ethan Shenkman, *CEQ's Proposed Guidance on NEPA Climate Reviews Replaces Obama's*, ENVIRONMENTAL LAW INSTITUTE (2019) (raising these complaints with the 2019 guidance) https://www.arnoldporter.com/-/media/files/perspectives/publications/2019/11/ceq-proposed-guidance-on-nepa.pdf.

145 Derek Sylvan, *Building a Foundation for a Sustainable Infrastructure*, INSTITUTE FOR POLICY INTEGRITY | NEW YORK UNIVERSITY SCHOOL OF LAW (October 2020).

146 *Id.* at 12-14 ("CEQ should offer updated, specific recommendations for estimation tools and encourage agencies to use a consistent set of options. Both the U.S. government and other entities around the world have developed numerous relevant tools, many of which are specifically designed for infrastructure evaluation and could be useful parts of CEQ's recommended toolkit. CEQ could also borrow elements of California's approach, which requires all projects to complete a uniform list of questions about impacts and use the same model to quantify emissions (including full-lifecycle impacts and offsite/indirect impacts, with separate estimates for "uncontrolled" emissions and emissions after any mitigation measures are taken.")

147 *Id.*

148 *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017)

149 *WildEarth Guardians v. Zinke*, 386 F. Supp. 3d 41 (D.D.C. 2019).

150 *San Juan Citizens Alliance v. Bureau of Land Management* 326 F. Supp. 3d. 1227, 1242-43 (noting that several courts had determined that consumption-related downstream emission were indirect effects and that these effects should be accounted for in NEPA analyses as early as feasible.)

151 Jayni Foley Hein & Natalie Jacewicz, *Implementing NEPA in the Age of Climate Change*, 10 MICH. J. ENVT'L & ADMIN. L. _ (2020) (forthcoming).

action" involving fossil fuel infrastructure consider both the upstream and downstream greenhouse gas impacts of that action.

Other changes could explicitly consider the greenhouse gas emission benefits of a project. Many new infrastructure projects are desirable specifically because of their ability to help reduce GHG emissions or sequester carbon but "[e]stimating avoided or sequestered emissions is a relatively new practice."[152] To help agencies navigate this new space, CEQ should evaluate "existing methodologies and compile specific recommendations for how this analysis should be conducted and which tools or models should be used."[153]

c. Consider Ways to Expedite Clean Energy Projects

Finally, CEQ should consider how this rulemaking can promote clean energy development. As noted earlier, environmental groups have been successful in thwarting pipeline construction by challenging fossil fuel permitting decisions under NEPA and other statutes, but the same "legal strategies that have derailed pipelines can also be turned against clean energy projects urgently needed to combat climate change."[154] Just like many fossil-fuel projects, clean-energy projects have impacts that may subject them to time-consuming regulatory reviews: solar projects in western deserts threaten endangered tortoises,[155] while Northeastern offshore wind projects interfere with commercial fishing routes.[156]

However, to meet decarbonization targets in line with the Paris Climate Accord, renewable energy generation must increase 3.5 times by 2030.[157] At the moment, NEPA reviews entail substantial delays. CEQ has found that NEPA reviews (on average) take 4.5 years to complete, with some agencies averaging more than seven years to proceed from a notice of intent to prepare an EIS to issuance of a record of decision.[158] This is a dramatic departure from CEQ's prediction in 1981 that federal agencies would be able to complete most EISs in 12 months or less.[159] Given President-elect Biden's promises to prioritize the development of climate-related infrastructure,[160] CEQ should consider how to resolve regulatory conflicts without engendering project delays.

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[152] Derek Sylvan, *Building a Foundation for a Sustainable Infrastructure*, INSTITUTE FOR POLICY INTEGRITY | NEW YORK UNIVERSITY SCHOOL OF LAW (October 2020).

[153] *Id.*

[154] Jason Bordoff, *Will Clean Energy Projects Face Troubles That Have Bedeviled Pipelines?* NEW YORK TIMES (July 20, 2020) https://www.nytimes.com/2020/07/20/opinion/pipelines-clean-energy.html.

[155] *See, e.g.*, Michelle Evans, *Finding Ways to Balance Energy Development and Species Conservation on Public Lands*, DEFENDERS OF WILDLIFE (Sept. 13, 2020) (discussing challenge posed by solar panel development in Mojave Desert tortoise's habitat) https://defenders.org/blog/2019/09/tortoise-and-solar-panel.

[156] *See* Scott Carpenter, *Offshore Wind Companies Are Racing To Develop America's East Coast. First They Must Appease The Fishermen*., FORBES (Jun. 16, 2016) (discussing tension between commercial fisheries and offshore wind industry) https://www.forbes.com/sites/scottcarpenter/2020/06/16/offshore-wind-companies-are-racing-to-develop-americas-east-coast-first-they-must-appease-the-fishermen/?sh=6fab0c7e37d8.

[157] Jeffrey Sachs et al., *America's Zero Carbon Action Plan*, Sustainable Development Solutions Network (SDSN) (2020) *available at* https://irp-cdn.multiscreensite.com/6f2c9f57/files/uploaded/zero-carbon-action-plan.pdf.

[158] *See* COUNCIL ON ENVIRONMENTAL QUALITY, *Environmental Impact Statement Timelines* (2010-2018) at 10 (June 12, 2020) ("2020 Timelines Report"), *available at* https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

[159] *See* 46 FED. REG. 18,026, 18,037 (Mar. 23, 1981).

[160] *See, e.g.*, BIDEN FOR PRESIDENT, *The Biden Plan To Build A Modern, Sustainable Infrastructure And An Equitable Clean Energy Future* ("Joe Biden's Build Back Better plan . . . will launch a national effort aimed at creating the jobs we need to build a modern, sustainable infrastructure now and deliver an equitable clean energy future . . . Biden will make a $2 trillion accelerated investment, with a plan to deploy those resources over his first term, setting us on an irreversible course to meet the ambitious climate progress that science demands.") https://joebiden.com/clean-energy/#.

As a first step, CEQ should improve early-stage analysis of critical infrastructure projects, including by developing long-term development plans (such as programmatic impact statements), as opposed to relying on case-by-case project reviews.[161] Reviewing and permitting projects one at a time is "very cumbersome and time consuming . . . [it] is much better to look at broad geographic areas and conduct the necessary studies comprehensively."[162] Such an approach would allow federal agencies to approve applications for specific projects quickly.

To an extent, the federal government has already adopted such an approach for solar development on western public lands and for offshore wind development in the northeastern United States. Under the Bureau of Land Management's (BLM) Western Solar Plan, the government conducted a comprehensive review of the environmental impacts that utility-scale solar development would have in six states. By conducting a large, comprehensive review upfront, BLM is able to "tier" site-specific project approvals (essentially, BLM refers to the regional environmental analysis in the streamlined site-specific analysis).[163] Through the Western Solar Plan, BLM has established a streamlined and efficient method of approving up to 23,700 megawatts of solar energy projects, while maintaining the integrity of environmental reviews.[164] As for offshore wind, the Bureau of Ocean Energy Management (BOEM) recently completed a supplemental EIS for the Vineyard Wind Project. BOEM maintains that this environmental review was necessary to account for anticipated growth in the offshore wind industry,[165] but members of the Massachusetts congressional delegation accused the Trump administration of applying a double standard "in which fossil fuel projects are expediated while renewable energy projects are delayed."[166] Regardless of BOEM's motivations for conducting this larger, cumulative assessment of the entire Northeastern offshore wind industry, the Biden administration is now in a position to accelerate the review and permitting of offshore wind projects in the Atlantic, relying upon this extensive analysis conducted under the Trump administration.[167] By expanding this approach and studying the broad environmental impacts of a renewable sector (such as onshore wind) on a large geographical region (such as several mid-western states), the Biden-Harris administration could promote renewable energy development. CEQ could lead this charge by directing agencies to conduct programmatic reviews where possible to streamline project

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[161] *See* Derek Sylvan, *Building a Foundation for a Sustainable Infrastructure*, INSTITUTE FOR POLICY INTEGRITY | NEW YORK UNIVERSITY SCHOOL OF LAW (October 2020).

[162] Michael Gerrard, *Testimony Before the Subcommittee on Energy and Mineral Resources*, HEARING: PUBLIC LANDS AND OUR CLEAN ENERGY FUTURE (May 8, 2019) https://blogs.ei.columbia.edu/2019/05/08/climate-law-expert-testifies-congress-renewable-energy/.

[163] BUREAU OF LAND MANAGEMENT, *Solar Energy Program* https://blmsolar.anl.gov/program/.

[164] *See* BUREAU OF LAND MANAGEMENT, *Western Solar Program – Solar Energy Fact Sheet* (March 2018) https://www.blm.gov/sites/blm.gov/files/energy_renewablesolarfactsheet.pdf.

[165] *See* VINEYARD WIND PRESS RELEASE (August 12, 2019) *Shareholders Affirm Commitment to Deliver Offshore Wind Farm but with Revised Schedule* ("In public statements, the United States Bureau of Ocean Energy Management (BOEM) has indicated the supplemental process is needed to examine the effects from the many offshore wind projects that are expected to follow development of the Vineyard Wind project.") *available at* https://www.vineyardwind.com/press-releases/2019/8/12/shareholders-affirm-commitment-to-deliver-offshore-wind-farm-but-with-revised-schedule-1.

[166] *Letter to Gene L. Dodaro, Comptroller General, U.S. Government Accountability Office from Members of the Massachusetts Delegation* (February 5, 2020) *available at* https://www.warren.senate.gov/imo/media/doc/2020.02.05%20Letter%20to%20GAO%20re%20Letter%20to%20GAO%20re%20wind%20energy%20fossil%20fuel.pdf.

[167] *See* Hilary Tompkins, *The future of public lands under the Biden Administration*, HOGAN LOVELLS (Nov. 9, 2020) *available at* https://www.lexology.com/library/detail.aspx?g=6f4c7cdd-5574-4150-a611-82fe10c05cdd; *see also* Martin Levy, *BOEM predicts offshore wind boom, but where does the industry stand today?*, HARVARD ENVIRONMENTAL & ENERGY LAW PROGRAM (July 7, 2020) (noting that BOEM has a backlog of offshore wind permits) *available at* https://eelp.law.harvard.edu/2020/07/boem-predicts-offshore-wind-boom-but-where-does-the-industry-stand-today/.

approvals.

Additionally, CEQ should further consider ways to increase interagency cooperation on major infrastructure projects.[168] By promoting interagency cooperation, CEQ would be building on the work of the Obama administration and the Trump administration. In 2015, Congress enacted the Fixing America's Surface Transportation (FAST) Act, which created a Federal Permitting Improvement Steering Council (Permitting Council) to reduce inefficiencies in the permitting process for some of the largest infrastructure projects.[169] Projects subject to the FAST Act have seen review times reduced by 1.5 years[170] and, increasingly, renewable energy projects have been targeted by the FAST Act Council.[171] Building on the FAST Act, the Trump administration issued its "One Federal Decision" executive order and a subsequent memorandum of understanding between implementing agencies.[172] This Executive Order required CEQ to consult with the Permitting Council and the Office of Management and Budget to develop a framework for interagency cooperation to expedite the timely processing of environmental review for major projects. However, to date, these coordination efforts have not been well-staffed or prioritized.[173] In revisions to its NEPA regulations, CEQ could promote interagency coordination by drawing on the principles set both by the Fast Act and the "One Federal Decision" policy to promote interagency cooperation. This will help ensure agencies with different missions and priorities work together to promote renewable energy.

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[168] *See* David J. Hayes, *Leaning on NEPA to Improve the Federal Permitting Process*, ENVIRONMENTAL LAW INSTITUTE (2015) ("by laying out exact requirements for interagency cooperation in reviewing and permitting projects, and by establishing a new, accountable Interagency Review and Permitting Council to enforce such requirements, revised NEPA regulations can ensure that agencies with different missions, priorities, and resources will work together cooperatively, both in preparing EISs and in completing their related review and permitting responsibilities in an efficient and timely manner.")
[169] 42 U.S.C. § 4370m et seq.
[170] FAST-41 PERMITTING DASHBOARD, *Press Release for FAST-41 Annual Report to Congress for FY 2019* https://www.permits.performance.gov/about/announcements/press-release-fast-41-annual-report-congress-fy-2019.
[171] Mark C. Kaplan & Taite R. McDonald, *Using FAST-41 to Streamline Federal Permitting Process*, HOLLAND & KNIGHT (noting how Bay State Wind is now subject to FAST-41 processes) https://www.hklaw.com/en/case-studies/using-fast41-to-streamline-federal-permitting-proc.
[172] *See* Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (April 2018) https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf.
[173] *See, e.g.*, Kelsey Brugger, *Trump Admin Boosts Obscure Permitting Agency*, E&E News (Jan. 17, 2020) (noting how the Permitting Council's Staff increased from 6 to 10) https://www.eenews.net/stories/1062106611.