CLEAN AIR TASK FORCE

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

Dear Council on Environmental Quality,

Clean Air Task Force offers our comments on the Council on Environmental Quality ("CEQ") Notice of Proposed Rulemaking ("NPRM or proposal"), "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," 85 Fed. Reg. 1,684 (Jan. 10, 2020). We strongly oppose this effort to undermine protective National Environmental Policy Act (NEPA) requirements.

The proposal prioritizes non-statutory goals in derogation of NEPA's statutory purpose, eliminates established NEPA procedures, is an unnecessary effort to streamline NEPA review in light of Congressional enactments, and constrains public participation in the review process. *See Gresham v. Azar*, No. 19-5094, 2020 WL 741278, at *7 (D.C. Cir. Feb. 14, 2020) ("While we have held that it is not arbitrary or capricious to prioritize one statutorily identified objective over another, it is an entirely different matter to prioritize non-statutory objectives to the exclusion of the statutory purpose"). Efficiency in processes is a laudable aim but it must not come at the expense of effective review, or of furthering the purposes of the NEPA statute "to promote efforts which will prevent or eliminate damage to the environment and biosphere…". 42 U.S.C. § 4321. NEPA's sweeping goals have long been understood by the courts to be realized through procedures requiring agencies to take a "hard look" at environmental consequences. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA has twin aims: (1) to place upon the "agency the obligation to consider every significant aspect of the environmental impact of a proposed action" and (2) to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). This proposal undermines both aims.

Though the proposal purports to update regulations in line with judicial and policy actions, it instead narrows NEPA review by a significant degree. While CEQ regulations have required indirect and cumulative impact analysis for decades, the proposal not only strikes references to indirect or direct effects but also states that "[a]nalysis of cumulative effects is not required." 85 Fed. Reg. 1,729. Further, the proposal would significantly narrow effects that agencies could

analyze to those that are "not the result of a lengthy causal chain" or that an agency has no statutory authority to prevent. *Id.* These changes would narrow NEPA review in ways counter to caselaw that upholds, as consistent with the broad NEPA policy to take a "hard look" at the consequences of actions *before* they occur, the longstanding CEQ regulations requiring review of these effects. *See 40 C.F.R. § 1508.7*; *See also S. Fork Band Council v. BLM*, 588 F.3d 718, 725–26 (9th Cir. 2009) (requiring agency consideration of air quality impacts associated with transport and off-site processing of refractory ore as indirect effects); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (agency must evaluate potential air quality impacts associated with increase in coal consumption); *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation & Enf't*, 82 F. Supp. 3d 1201, 1214 (D. Colo. 2015) (agency must discuss the mercury-related indirect effects of proposed mine expansion).

While CEQ asserts that the proposal would "facilitate more efficient, effective, and timely NEPA reviews," *id.* at 1,691, in fact the proposed changes are unnecessary in light of previous Congressional action and would actually reduce NEPA review effectiveness. Congress has enacted a series of laws that streamline NEPA review, in specific applications, such as Title 41 of the FAST Act ("FAST-41"), which provides for additional review processes for infrastructure projects. The current proposal, however, goes much further to apply that kind of streamlining to all projects. But had Congress intended the FAST-41 style streamlining to apply more broadly, it certainly could have said so. *Russello v. U.S.*, 464 U.S. 16, 23 (1983)("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Congress has repeatedly signaled its intent to streamline NEPA review for categories of projects rather than to fundamentally alter the procedures at the heart of NEPA, which CEQ now seeks to do.

While FAST-41 increased transparency and improved interagency review, this proposal attempts to shorten NEPA review by removing steps and curtailing opportunity for public input. *See* 42 U.S.C. § 4370m. In addition to eliminating cumulative effect review, the proposal would also severely constrain the number and type project alternatives to be considered from "all reasonable alternatives" to a much narrower set of reasonable alternatives that are "technically and economically feasible" and within the jurisdiction of the agency. *Id* at 1,710. By shifting to technical and economic feasibility, the proposal drifts away from the essential purpose of NEPA that "environmental concerns be integrated into the very process of agency decision-making." *Andrus v. Sierra Club*, 442 US. 347, 350 (1979). These limitations on alternative analysis could render the alternative review process largely meaningless if the most preferable alternatives are determined to fall outside the siloed jurisdictional of the reviewing agency.

While CEQ claims its proposal is "intended to provide greater clarity" to the public, 85 Fed. Reg. 1,685, it will instead likely limit public information and participation. First, as noted, this proposal will eliminate consideration of indirect and cumulative effects while severely limiting analysis of alternatives. Without plausible alternatives to compare, the public (never mind the agency staff who must review the submissions) is unlikely to be able to meaningfully evaluate a project's impacts. Further, the proposal would expand the number of projects that qualify for a categorical exclusion ("CE") to projects that can be tailored to avoid extraordinary circumstances. *Id* at 1,696. Categorically excluding more projects would eliminate EAs or EISs for these projects, further reducing the environmental analysis available to the public if this proposal is ever promulgated.

CEQ not only seeks to limit analysis that would permit a full understanding of projects' environmental impacts, but also seeks to impose new procedural barriers to public participation. CEQ's proposed "Exhaustion" category would require agencies to solicit comments in the notice of intent to prepare an EIS and that comments not timely raised would be unexhausted and forfeited. *Id.* at 1,693. Other components of the proposal that could limit public information and participation include a presumptive 75-page limit on EAs with limited background materials and presumptive time limits on EAs and EISs (one and two years, respectively). 85 Fed. Reg. 1,698-1,699 (proposed 40 C.F.R. § 1501.5(e); 40 C.F.R. § 1501.10). These limits could encourage agencies to skip or omit analysis, contravening longstanding precedent holding that NEPA requires a hard look at environmental consequences. These changes cut against NEPA's goal of providing for "broad dissemination of relevant environmental information." *Methow Valley*, 490 U.S. at 350. But even more importantly, the proposed changes to establish a presumptive limit on the required explanation contradicts the statutory requirements to provide a "detailed statement" that lists all of the specified factors. 42 U.S.C. § 4332(C).

CEQ also includes several proposed regulatory changes that would reduce transparency in the EIS preparation process under 40 C.F.R. § 1502.22. First, the proposal would strike the word "always" in the sentence that requires agencies to *always* make clear that information regarding reasonably foreseeable significant adverse effects on the human environment is incomplete or unavailable. 85 Fed. Reg. 1,703. Thus, agencies would be free of the requirement to always make clear such information is incomplete or lacking. Next, CEQ would change "exorbitant" to "unreasonable" when determining what type of costs would allow agencies to not obtain missing information. Both changes would limit the requirement to provide information about significant adverse effects on the environment, and thereby reduce transparency by limiting public knowledge about such effects.

In addition to reducing transparency in the EIS process, the proposal would also impose additional requirements on public comments, requiring a level of expertise and analysis from commenters that is nowhere authorized by the statute. Specifically, CEQ proposes that comments should explain the significance and possible impacts of the issue raised, rather than simply stating concerns for the Agency to analyze and address. *Id.* at 1,703. This shifts the burden from the applicant and the Agency to the public, and also raises the concern that agencies could have discretion to limit public participation in the NEPA process under the proposal.

In sum, CEQ's proposed rule runs afoul of the text and purposes of the NEPA statute, while purporting to improve the efficiency of NEPA review by effectively dismantling fundamental parts of the NEPA process. The proposal contradicts CEQ's long-standing interpretations that require analysis of cumulative and indirect impacts while reducing the scope of environmental analysis to a limited proximate cause chain. Further, the proposal would meaningfully limit public participation in the NEPA process through constraints on impact and alternative analysis, artificial caps on page length and duration of analyses, and new sections that require exhaustion of comments on EISs.

For all of these reasons, the proposal runs afoul of the statute's broadly framed purpose "to promote efforts to prevent or eliminate damage to the environment and biosphere." 41 U.S.C. § 4321. Had Congress intended for review to include only direct project effects, or to prevent or eliminate only some damages, it would have said so when is passed NEPA. Failing to adequately reflect the primary underlying purposes of the NEPA statute renders this proposal, if finalized as drafted, arbitrary and capricious. See *Gresham v. Azar*, No. 19-5094, 2020 WL 741278, at *7 (D.C. Cir. Feb. 14, 2020) ("While we have held that it is not arbitrary or capricious to prioritize one statutorily identified objective over another, it is an entirely different matter to prioritize non-statutory objectives to the exclusion of the statutory purpose.")

For all of these reasons the proposal should be withdrawn.

Sincerely,

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