COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1515, 1516, 1517, and 1518

[CEQ–2019–0003]

RIN 0331–AA03

Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

AGENCY: Council on Environmental Quality.

ACTION: Final rule.

SUMMARY: The Council on Environmental Quality (CEQ) issues this final rule to update its regulations for Federal agencies to implement the National Environmental Policy Act (NEPA). CEQ has not comprehensively updated its regulations since their promulgation in 1978, more than four decades ago. This final rule comprehensively updates, modernizes, and clarifies the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action. The rule will improve interagency coordination in the environmental review process, promote earlier public involvement, increase transparency, and enhance the participation of States, Tribes, and localities. The amendments will advance the original goals of the CEQ regulations to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA.

DATES: This is a major rule subject to congressional review. The effective date is September 14, 2020. However, if congressional review has changed the effective date, CEQ will publish a document in the **Federal Register** to establish the actual effective date or to terminate the rule.

ADDRESSES: CEQ has established a docket for this action under docket number CEQ–2019–0003. All documents in the docket are listed on *www.regulations.gov.*

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SUPPLEMENTARY INFORMATION:

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I. Background

President Nixon signed the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.,* (NEPA or the Act) into law on January 1, 1970. The Council on Environmental Quality (CEQ) initially issued interim guidelines for implementing NEPA in 1970, revised those guidelines in 1971 and 1973, and subsequently promulgated its regulations implementing NEPA in 1978. The original goals of those regulations were to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy established by the Act.

Since the promulgation of the 1978 regulations, however, the NEPA process has become increasingly complicated and can involve excessive paperwork and lengthy delays. The regulations have been challenging to navigate with related provisions scattered throughout, and include definitions and provisions that have led to confusion and generated extensive litigation. The complexity of the regulations has given rise to CEQ's issuance of more than 30 guidance documents to assist Federal agencies in understanding and complying with NEPA. Agencies also have developed procedures and practices to improve their implementation of NEPA. Additionally, Presidents have issued directives, and Congress has enacted legislation to reduce delays and expedite the implementation of NEPA and the CEQ regulations, including for transportation, water, and other types of infrastructure projects.

Despite these efforts, the NEPA process continues to slow or prevent the development of important infrastructure and other projects that require Federal permits or approvals, as well as rulemakings and other proposed actions. Agency practice has also continued to evolve over the past four decades, but many of the most efficient and effective practices have not been incorporated into the CEQ regulations. Further, a wide range of judicial decisions, including those issued by the Supreme Court, evaluating Federal agencies' compliance with NEPA have construed and interpreted key provisions of the statute and CEQ's regulations. CEQ's guidance, agency practice, more recent presidential directives and statutory developments, and the body of case law related to NEPA implementation have not been harmonized or codified in CEQ's regulations.

As discussed further below, NEPA implementation and related litigation can be lengthy and significantly delay major infrastructure and other projects.[1] For example, CEQ has found that NEPA reviews for Federal Highway Administration projects, on average take more than seven years to proceed from a notice of intent (NOI) to prepare an environmental impact statement (EIS) to issuance of a record of decision (ROD). This is a dramatic departure from CEQ's prediction in 1981 that Federal agencies would be able to complete most EISs, the most intensive review of a project's environmental impacts under NEPA, in 12 months or less.[2] In its most recent review, CEQ found that, across the Federal Government, the average time for completion of an EIS and issuance of a ROD was 4.5 years and the median was 3.5 years.[3] CEQ determined that one quarter of EISs took less than 2.2 years, and one quarter of the EISs took more than 6 years. And these timelines do not necessarily include further delays associated with litigation over the legal sufficiency of the NEPA process or its resulting documentation.

Although other factors may contribute to project delays, the frequency and consistency of multi-year review processes for EISs for projects across the Federal Government leaves no doubt that NEPA implementation and related litigation is a significant factor.[4] It is critical to improve NEPA implementation, not just for major projects, but because tens of thousands of projects and activities are subject to NEPA every year, many of which are important to modernizing our Nation's infrastructure.[5]

As noted above, an extensive body of case law interpreting NEPA and CEQ's implementing regulations drives much of agencies' modern day practice. Though courts have correctly recognized that NEPA requires agencies to follow certain procedures and not to reach particular substantive results, the accretion of cases has not necessarily clarified implementation of the law. In light of the litigation risk such a situation presents, agencies have responded by generating voluminous studies analyzing impacts and alternatives well beyond the point where useful information is being produced and utilized by decision makers. In its most recent review, CEQ found that final EISs averaged 661 pages in length, and the median document was 447 pages.[6] One quarter were 748 pages or longer. The page count and document length data do not include

[1] *See infra* sec. I.B.3 and I.C.

[2] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 FR 18026 (Mar. 23, 1981) (''Forty Questions''), *https://www.energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act.* ''The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from NEPA.'' *Id.* at Question 35.

[3] *See infra* sec. I.B.3.

[4] *See also,* Philip K. Howard, Common Good, Two Years, Not Ten: Redesigning Infrastructure Approvals (Sept. 2015) (''Two Years, Not Ten''), *https://www.commongood.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf.*

[5] As discussed in sections II.D and II.C.5, CEQ estimates that Federal agencies complete 176 EISs and 10,000 environmental assessments each year. In addition, CEQ estimates that agencies apply categorical exclusions to 100,000 actions annually. *See infra* sec. II.C.4.

[6] *See infra* sec. I.B.3.

appendices. The average modern EIS is more than 4 times as long as the 150 pages contemplated by the 1978 regulations.

By adopting these regulations following so many decades of NEPA practice, implementation, and litigation, CEQ is acting now to enhance the efficiency of the process based on its decades of experience overseeing Federal agency practice, and clarifying a number of key NEPA terms and requirements that have frequently been subject to litigation. The modifications and refinements reflected in the final rule will contribute to greater certainty and predictability in NEPA implementation, and thus eliminate at least in some measure the unnecessary and burdensome delays that have hampered national infrastructure and other important projects.

In June 2018, CEQ issued an advance notice of proposed rulemaking (ANPRM) requesting comment on potential updates and clarifications to the CEQ regulations.[7] On January 10, 2020, CEQ published a notice of proposed rulemaking [8] (NPRM or proposed rule) in the **Federal Register** proposing to update its regulations for implementing the procedural provisions of NEPA.

Following the publication of the NPRM, CEQ received approximately 1,145,571 comments on the proposed rule.[9] A majority of the comments (approximately 1,136,755) were the result of mass mail campaigns, which are comments with multiple signatories or groups of comments that are identical or very similar in form and content. CEQ received approximately 8,587 unique public comments of which 2,359 were substantive comments raising a variety of issues related to the rulemaking and contents of the proposed rule, including procedural, legal, and technical issues. Finally, 229 comments were duplicate or non-germane submissions, or contained only supporting materials.

The background section below summarizes NEPA, the CEQ regulations, and developments since CEQ issued those regulations. Specifically, section I.A provides a brief summary of the NEPA statute. Section I.B describes the history of CEQ's regulations implementing NEPA and provides an overview of CEQ's numerous guidance documents and reports issued subsequent to the regulations. Section I.C discusses the role of the courts in interpreting NEPA. Section I.D provides a brief overview of Congress's efforts, and section I.E describes the initiatives of multiple administrations to reduce delays and improve implementation of NEPA. Finally, sections I.F and I.G provides the background on this rulemaking, including the ANPRM and the NPRM.

In section II, CEQ provides a summary of the final rule, including changes CEQ made from the proposed rule, which comprehensively updates and substantially revises CEQ's prior regulations. This final rule modernizes and clarifies the CEQ regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies by simplifying regulatory requirements, codifying certain guidance and case law relevant to these regulations, revising the regulations to reflect current technologies and agency practices, eliminating obsolete provisions, and improving the format and readability of the regulations. CEQ's revisions include provisions intended to promote timely submission of relevant information to ensure consideration of such information by agencies. CEQ's revisions will provide greater clarity for Federal agencies, States, Tribes, localities, and the public, and advance the original goals of the CEQ regulations to reduce paperwork and delays and promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA.

CEQ provides a summary of the comments received on the proposed rule and responses in the document titled ''Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act Final Rule Response to Comments'' [10] (''Final Rule Response to Comments''). This document organizes the comments by the parts and sections of the proposed rule that the comment addresses, and includes a subsection on other general or crosscutting topics.

Ultimately, the purpose of the NEPA process is to ensure informed decision making by Federal agencies with regard to the potential environmental effects of proposed major Federal actions and to make the public aware of the agency's decision-making process. When effective and well managed, the NEPA process results in more informative documentation, enhanced coordination, resolution of conflicts, and improved environmental outcomes. With this final rule, CEQ codifies effective agency practice and provides clarity on the requirements of the NEPA process.

A. National Environmental Policy Act

Congress enacted NEPA to establish a national policy for the environment, provide for the establishment of CEQ, and for other purposes. Section 101 of NEPA sets forth a national policy ''to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and [to] fulfill the social, economic, and other requirements of present and future generations of Americans.'' 42 U.S.C. 4331(a). Section 102 of NEPA establishes procedural requirements, applying that national policy to proposals for major Federal actions significantly affecting the quality of the human environment by requiring Federal agencies to prepare a detailed statement on: (1) The environmental impact of the proposed action; (2) any adverse environmental effects that cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action. 42 U.S.C. 4332(2)(C). NEPA also established CEQ as an agency within the Executive Office of the President to administer Federal agency implementation of NEPA. 42 U.S.C. 4332(2)(B), (C), (I), 4342, 4344; *see also Dep't of Transp.* v. *Pub. Citizen*, 541 U.S. 752, 757 (2004); *Warm Springs Dam Task Force* v. *Gribble,* 417 U.S. 1301, 1309–10 (Douglas, J. Circuit Justice 1974).

NEPA does not mandate particular results or substantive outcomes. Rather, NEPA requires Federal agencies to consider environmental impacts of proposed actions as part of agencies' decision-making processes. Additionally, NEPA does not include a private right of action and specifies no remedies. Challenges to agency action alleging noncompliance with NEPA procedures are brought under the Administrative Procedure Act (APA). 5

[7] 83 FR 28591 (June 20, 2018).

[8] 85 FR 1684 (Jan. 10, 2020).

[9] In the NPRM, CEQ listed several methods for members of the public to submit written comments, including submittal to the docket on *regulations.gov,* by fax, or by mail. In addition, CEQ also included an email address (*NEPA-Update@ceq.eop.gov*) in the NPRM for further information. While the NPRM did not list this email address among the several methods for the public to provide comments, CEQ has considered comments received through this email address during the public comment period and included them in the docket on *regulations.gov.*

[10] The Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act Final Rule Response to Comments document is available under ''Supporting Documents'' in the docket on *regulations.gov* under docket ID CEQ–2019–0003.

U.S.C. 551 *et seq.* Accordingly, NEPA cases proceed as APA cases. Limitations on APA cases and remedies thus apply to the adjudication of NEPA disputes.

B. Council on Environmental Quality Regulations, Guidance, and Reports

1. Regulatory History

In 1970, President Nixon issued Executive Order (E.O.) 11514, titled ''Protection and Enhancement of Environmental Quality,'' which directed CEQ to ''[i]ssue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act.'' [11] CEQ issued interim guidelines in April of 1970 and revised them in 1971 and 1973.[12]

In 1977, President Carter issued E.O. 11991, titled ''Relating to Protection and Enhancement of Environmental Quality.'' [13] E.O. 11991 amended section 3(h) of E.O. 11514, directing CEQ to ''[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA] . . . to make the environmental impact statement process more useful to decision[ ]makers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives,'' and to ''require [environmental] impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses.'' E.O. 11991 also amended section 2 of E.O. 11514, requiring agency compliance with the regulations issued by CEQ. The Executive order was based on the President's constitutional and statutory authority, including NEPA, the Environmental Quality Improvement Act, 42 U.S.C. 4371 *et seq.,* and section 309 of the Clean Air Act, 42 U.S.C. 7609. The President has a constitutional duty to ensure that the ''Laws be faithfully executed,'' U.S. Const. art. II, sec. 3, which may be delegated to appropriate officials. 3 U.S.C. 301. In signing E.O. 11991, the President delegated this authority to CEQ.[14]

In 1978, CEQ promulgated its ''National Environmental Policy Act, Regulations, Implementation of Procedural Provisions,'' 40 CFR parts 1500–1508 (''CEQ regulations'' or ''NEPA regulations''), ''[t]o reduce paperwork, to reduce delays, and at the same time to produce better decisions [that] further the national policy to protect and enhance the quality of the human environment.'' [15] The Supreme Court has explained that E.O. 11991 requires all ''heads of [F]ederal agencies to comply'' with the ''single set of uniform, mandatory regulations'' that CEQ issued to implement NEPA's provisions. *Andrus* v. *Sierra Club,* 442 U.S. 347, 357 (1979).

The Supreme Court has afforded the CEQ regulations ''substantial deference.'' *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 355 (1989) (citing *Andrus,* 442 U.S. at 358); *Pub. Citizen,* 541 U.S. at 757 (''The [CEQ], established by NEPA with authority to issue regulations interpreting it, has promulgated regulations to guide [F]ederal agencies in determining what actions are subject to that statutory requirement.'' (citing 40 CFR 1500.3)). The new regulations are intended to embody CEQ's interpretation of NEPA for *Chevron* purposes and to operate as legislative rules.[16] *See Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984); *see also Nat'l Cable & Telecomm. Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 980–86 (2005) (applying *Chevron* deference to Federal Communications Commission regulations); *United States* v. *Mead Corp.,* 533 U.S. 218, 227–30 (2001) (properly promulgated agency regulations addressing ambiguities or gaps in a statute qualify for *Chevron* deference when agencies possess the authority to issue regulations interpreting the statute). The Supreme Court has held that NEPA is a procedural statute that serves the twin aims of ensuring that agencies consider the significant environmental consequences of their proposed actions and inform the public about their decision making. *Balt. Gas & Elec. Co.* v. *Nat. 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, 553 (1978); *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project,* 454 U.S. 139, 143 (1981)).

Furthermore, in describing the role of NEPA in agencies' decision-making processes, the Supreme Court has stated, ''Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations.'' [17] *Balt. Gas & Elec. Co.,* 462 U.S. at 97 (citing *Strycker's Bay Neighborhood Council* v. *Karlen,* 444 U.S. 223, 227 (1980) (per curiam)). Instead, NEPA requires agencies to analyze the environmental consequences before taking a major Federal action. *Id.* (citing *Kleppe* v. *Sierra Club,* 427 U.S. 390, 410 n.21 (1976)). The Supreme Court has recognized that agencies have limited time and resources and that ''[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of '[insuring] a fully informed and well-considered decision,' . . . is to be accomplished.'' *Metro. Edison Co.* v. *People Against Nuclear Energy,* 460 U.S. 766, 776 (1983) (quoting *Vt. Yankee,* 435 U.S. at 558).

CEQ has substantively amended its NEPA regulations only once, at 40 CFR 1502.22, to replace the ''worst case'' analysis requirement with a provision for the consideration of incomplete or unavailable information regarding reasonably foreseeable significant adverse effects.[18] CEQ found that the amended 40 CFR 1502.22 would

''generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision,'' [19] rather than distorting the decision-making process by overemphasizing highly speculative harms.[20] The Supreme Court found this reasoning to

[11] 35 FR 4247 (Mar. 7, 1970), sec. 3(h).

[12] *See* 35 FR 7390 (May 12, 1970) (interim guidelines); 36 FR 7724 (Apr. 23, 1971) (final guidelines); 38 FR 10856 (May 2, 1973) (proposed revisions to guidelines); 38 FR 20550 (Aug. 1, 1973) (revised guidelines).

[13] 42 FR 26967 (May 25, 1977).

[14] The Presidential directive was consistent with the recommendation of the Commission on Federal Paperwork that the President require the development of consistent regulations and definitions and ensure coordination among agencies in the implementation of Environmental Impact Statement preparation. *See* The Report of the Commission on Federal Paperwork, Environmental Impact Statements 16 (Feb. 25, 1977).

[15] 43 FR 55978 (Nov. 29, 1978); *see also* 44 FR 873 (Jan. 3, 1979) (technical corrections), and 43 FR 25230 (June 9, 1978) (proposed rule).

[16] Even without expressly invoking *Chevron* here and noting that CEQ intends these regulations to operate as legislative rules, *Chevron* would still apply. *See Guedes* v. *ATF,* 920 F.3d 1, 23 (D.C. Cir. 2019) (''And for this Rule in particular, another telltale sign of the agency's belief that it was promulgating a rule entitled to *Chevron* deference is the Rule's invocation of *Chevron* by name. To be sure, an agency of course need not expressly invoke the *Chevron* framework to obtain *Chevron* deference: '*Chevron* is a standard of *judicial* review, not of *agency* action.' *SoundExchange*[, *Inc.* v. *Copyright Royalty Bd.,*] 904 F.3d [41,] 54 [(D.C. Cir. 2018)]. Still, the Bureau's invocation of *Chevron* here is powerful evidence of its intent to engage in an exercise of interpretive authority warranting *Chevron* treatment.'') (emphasis in original).

[17] Section 101 of NEPA provides that it is the Federal Government's policy ''to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and [to] *fulfill the social, economic, and other requirements of present and future generations of Americans.*'' 42 U.S.C. 4331(a) (emphasis added).

[18] 51 FR 15618 (Apr. 25, 1986).

[19] 50 FR 32234, 32237 (Aug. 9, 1985).

[20] 51 FR 15618, 15620 (Apr. 25, 1986).

be a well-considered basis for the change, and that the new regulation was entitled to substantial deference. *Methow Valley,* 490 U.S. at 356.

The NEPA regulations direct Federal agencies to adopt their own implementing procedures, as necessary, in consultation with CEQ. 40 CFR 1507.3. Under this regulation, over 85 Federal agencies and their subunits have developed such procedures.[21]

2. CEQ Guidance and Reports

Over the past four decades, numerous questions have been raised regarding appropriate implementation of NEPA and the CEQ regulations. Soon after the issuance of the CEQ regulations and in response to CEQ's review of NEPA implementation and input from Federal, State, and local officials, including NEPA practitioners, CEQ issued the ''Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations'' [22] in 1981 (''Forty Questions''). This guidance covered a wide range of topics including alternatives, coordination among applicants, lead and cooperating agencies, and integration of NEPA documents with analysis for other environmental statutes. In addition, CEQ has periodically examined the effectiveness of the NEPA process and issued a number of reports on NEPA implementation. In some instances, these reports led to additional guidance. These documents have been intended to provide guidance and clarifications with respect to various aspects of the implementation of NEPA and the definitions in the CEQ regulations, and to increase the efficiency and effectiveness of the environmental review process.[23]

In January 1997, CEQ issued ''The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years.'' [24] In that report, CEQ acknowledged that NEPA has ensured that agencies adequately analyze the potential environmental consequences of their actions and bring the public into the decision-making processes of Federal agencies. However, CEQ also identified matters of concern to participants in the study, including concerns with overly lengthy documents that may not enhance or improve decision making,[25] and concerns that agencies may seek to '' 'litigation-proof' documents, increasing costs and time but not necessarily quality.'' [26] The report further stated that ''[o]ther matters of concern to participants in the Study were the length of NEPA processes, the extensive detail of NEPA analyses, and the sometimes confusing overlay of other laws and regulations.'' [27] The participants in the study identified five elements of the NEPA process' collaborative framework (strategic planning, public information and input, interagency coordination, interdisciplinary place-based decision making, and science-based flexible management) as critical to effective and efficient NEPA implementation.

In 2002, the Chairman of CEQ established a NEPA task force, composed of Federal agency officials, to examine NEPA implementation by focusing on (1) technology and information management and security; (2) Federal and intergovernmental collaboration; (3) programmatic analyses and tiering; (4) adaptive management and monitoring; (5) categorical exclusions (CEs); and (6) environmental assessments (EAs). In 2003, the task force issued a report [28] recommending actions to improve and modernize the NEPA process, leading to additional guidance documents and handbooks.

Over the past 4 decades, CEQ has issued over 30 documents on a wide variety of topics to provide guidance and clarifications to assist Federal agencies in more efficiently and effectively implementing the NEPA regulations.[29] While CEQ has sought to provide clarity and direction related to implementation of the regulations and the Act through the issuance of guidance, agencies continue to face implementation challenges. Further, the documentation and timelines for completing environmental reviews can be very lengthy, and the process can be complex and costly.

In 2018, CEQ and the Office of Management and Budget (OMB) issued a memorandum titled ''One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under E.O. 13807'' (''OFD Framework Guidance'').[30] CEQ and OMB issued this guidance pursuant to E.O. 13807, titled ''Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,'' [31] to improve agency coordination for infrastructure

[21] A list of agency NEPA procedures is available at *https://ceq.doe.gov/laws-regulations/agency_implementing_procedures.html.*

[22] Forty Questions, *supra* note 2.

[23] *See https://www.energy.gov/nepa/ceq-guidance-documents.*

[24] *https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf.*

[25] *Id.* at iii.

[26] *Id.*

[27] *Id.* In the 50 years since the passage of NEPA, Congress has amended or enacted a number of other environmental laws that may also apply to proposed Federal agency actions, such as the Endangered Species Act, the Clean Water Act, the Clean Air Act, and other substantive statutes. *See* discussion *infra* sec. I.D. Consistent with 40 CFR 1502.25, longstanding agency practice has been to use the NEPA process as the umbrella procedural statute, integrating compliance with these laws into the NEPA review and discussing them in the NEPA document. However, this practice sometimes leads to confusion as to whether an agency does an analysis to comply with NEPA or another, potentially substantive, environmental law.

[28] *See* The NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation (Sept. 2003) (''NEPA Task Force Report''), *https://ceq.doe.gov/docs/ceq-publications/report/finalreport.pdf.*

[29] *See, e.g.,* Emergencies and the National Environmental Policy Act (Oct. 2016) (''Emergencies Guidance''), *https://ceq.doe.gov/docs/nepa-practice/Emergencies_and_NEPA.pdf;* Effective Use of Programmatic NEPA Reviews (Dec. 18, 2014) (''Programmatic Guidance''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Effective_Use_of_Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf;* NEPA and NHPA: A Handbook for Integrating NEPA and Section 106 (Mar. 2013), *https://ceq.doe.gov/publications/nepa-handbooks.html;* Memorandum on Environmental Conflict Resolution (Nov. 28, 2005), as expanded by Memorandum on Environmental Collaboration and Conflict Resolution (Sept. 7, 2012), *https://ceq.doe.gov/nepa-practice/environmental-collaboration-and-conflict-resolution.html;* Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act, 77 FR 14473 (Mar. 12, 2012) (''Timely Environmental Reviews Guidance''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf;* Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 FR 3843 (Jan. 21, 2011) (''Mitigation Guidance''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf;* Council on Environmental Quality, Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act, 75 FR 75628 (Dec. 6, 2010) (''CE Guidance''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf;* Letter from the Hon. James L. Connaughton, Chairman, Council on Environmental Quality, to the Hon. Norman Y. Mineta, Secretary, Department of Transportation (May 12, 2003) (''Connaughton Letter''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-DOT_PurposeNeed_May-2013.pdf;* Considering Cumulative Effects Under the National Environmental Policy Act (Jan. 1997) (''Cumulative Effects Guidance''), *https://ceq.doe.gov/publications/cumulative_effects.html;* Environmental Justice: Guidance under the National Environmental Policy Act (Dec. 10, 1997) (''EJ Guidance''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf;* Forty Questions, *supra* note 2. CEQ also issued a resource for the public, A Citizen's Guide to the NEPA: Having Your Voice Heard (Dec. 2007), *https://ceq.doe.gov/get-involved/citizens_guide_to_nepa.html.*

[30] M–18–13 (Mar. 20, 2018), *https://www.whitehouse.gov/wp-content/uploads/2018/04/M-18-13.pdf.*

[31] *82 FR 40463* (Aug. 24, 2017).

projects requiring an EIS and permits or other authorizations from multiple agencies and to improve the timeliness of the environmental review process. *See* E.O. 13807, *infra* sec. I.E. Consistent with the OFD Framework Guidance, *supra* note 30, Federal agencies signed a memorandum of understanding committing to implement the One Federal Decision (OFD) policy for major infrastructure projects, including by committing to establishing a joint schedule for such projects, preparation of a single EIS and joint ROD, elevation of delays and dispute resolution, and setting a goal of completing environmental reviews for such projects within two years.[32] Subsequently, CEQ and OMB issued guidance for the Secretary of Transportation regarding the applicability of the OFD policy to States under the Surface Transportation Project Delivery Program,[33] and for the Secretary of Housing and Urban Development (HUD) regarding the applicability of the OFD policy to entities assuming HUD environmental review responsibilities.[34] CEQ also has provided direction to the Federal Energy Regulatory Commission (FERC) relating to the requirement for joint RODs under the OFD policy.[35]

3. Environmental Impact Statement Timelines and Page Count Reports

CEQ also has conducted reviews and prepared reports on the length of time it takes for agencies to prepare EISs and the length of these documents. These reviews found that the process for preparing EISs is taking much longer than CEQ advised, and that the documents are far longer than the CEQ regulations and guidance recommended. In December 2018, CEQ issued a report compiling information relating to the timelines for preparing EISs during the period of 2010–2017, and the NPRM included a summary of the report. CEQ has since updated this analysis to include EISs completed in 2018, and this section reflects the updated data.[36]

While CEQ's Forty Questions states that the time for an EIS, even for a complex project, should not exceed 1 year,[37] CEQ found that, across the Federal Government, the average time for completion of an EIS and issuance of a ROD was 4.5 years and the median was 3.5 years. One quarter of the EISs took less than 2.2 years, and one quarter of the EISs took more than 6 years.

As reflected in the timelines report, the period from publication of a NOI to prepare an EIS to the notice of availability of the draft EIS took, on average, 58.4 percent of the total time, while preparing the final EIS, including addressing comments received on the draft EIS, took, on average, 32.2 percent of the total time. The period from the final EIS to publication of the ROD took, on average, 9.4 percent of the total time. This report recognized that EIS timelines vary widely and many factors may influence the timing of the document, including variations in the scope and complexity of the actions, variations in the extent of work done prior to issuance of the NOI, and suspension of EIS activities due to external factors.

Additionally, in July 2019, CEQ issued a report on the length, by page count, of EISs (excluding appendices) finalized during the period of 2013–2017, and the NPRM included a summary of the report. CEQ has since updated this analysis to include EISs completed in 2018, and this section reflects the updated data.

While the CEQ regulations include recommended page limits for the text of final EISs of normally less than 150 pages, or normally less than 300 pages for proposals of ''unusual scope or complexity,'' 40 CFR 1502.7, CEQ found that many EISs are significantly longer. In particular, CEQ found that across all Federal agencies, draft EISs averaged 575 pages in total, with a median document length of 397 pages.[38] One quarter of the draft EISs were 279 pages or shorter, and one quarter were 621 pages or longer. For final EISs, the average document length was 661 pages, and the median document length was 447 pages. One quarter of the final EISs were 286 pages or shorter, and one quarter were 748 pages or longer. On average, the change in document length from draft EIS to final EIS was an additional 86 pages or a 15 percent increase.

With respect to final EISs, CEQ found that approximately 7 percent were 150 pages or shorter, and 27 percent were 300 pages or shorter.[39] Similar to the conclusions of its EIS timelines study, CEQ noted that a number of factors may influence the length of EISs, including variation in the scope and complexity of the decisions that the EIS is designed to inform, the degree to which NEPA documentation is used to document compliance with other statutes, and considerations relating to potential legal challenges. Moreover, variation in EIS length may reflect differences in management, oversight, and contracting practices among agencies that could result in longer documents.

While there can be many factors affecting the timelines and length of EISs, CEQ has concluded that revisions to the CEQ regulations to advance more timely reviews and reduce unnecessary paperwork are warranted. CEQ has determined that improvements to agency processes, such as earlier solicitation of information from States, Tribes, and local governments and the public, and improved coordination in the development of EISs, can achieve more useful and timely documents to support agency decision making.

C. Judicial Review of Agency NEPA Compliance

NEPA is the most litigated environmental statute in the United States.[40] Over the past 50 years, Federal courts have issued an extensive body of case law addressing appropriate implementation and interpretation of NEPA and the CEQ regulations.[41] The Supreme Court has directly addressed NEPA in 17 decisions, and the U.S. district and appellate courts issue approximately 100 to 140 decisions

[32] *See* Memorandum of Understanding Implementing One Federal Decision under Executive Order 13807 (2018), *https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf.*

[33] Guidance on the Applicability of E.O. 13807 to States with NEPA Assignment Authority Under the Surface Transportation Project Delivery Program, M–19–11 (Feb. 26, 2019), *https://www.whitehouse.gov/wp-content/uploads/2017/11/20190226OMB-CEQ327.pdf.*

[34] Guidance on the Applicability of E.O. 13807 to Responsible Entities Assuming Department of Housing and Urban Development Environmental Review Responsibilities, M–19–20 (June 28, 2019), *https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-20.pdf.*

[35] *See* Letter from the Hon. Mary B. Neumayr, Chairman, Council on Environmental Quality, to the Hon. Neil Chatterjee, Chairman, Federal Energy Regulatory Comm'n (Aug. 22, 2019), *https://www.whitehouse.gov/wp-content/uploads/2017/11/20190822FERCOFDLetter.pdf.*

[36] *See* Council on Environmental Quality, Environmental Impact Statement Timelines (2010–2018), (June 12, 2020), *https://ceq.doe.gov/nepa-practice/eis-timelines.html.*

[37] Forty Questions, *supra* note 2, at Question 35.

[38] *See* Council on Environmental Quality, Length of Environmental Impact Statements (2013–2018), (June 12, 2020) (''CEQ Length of EISs Report''), *https://ceq.doe.gov/nepa-practice/eis-length.html.*

[39] The page counts compiled for 2010–2017 include the text of the EIS as well as supporting content to which the page limit in 40 CFR 1502.7 does not apply. For 2018, CEQ analyzed the data to determine the length of the text of the EISs and found that 19 percent of the final EISs were 150 pages or shorter and 51 percent were 300 pages or shorter.

[40] James E. Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy* 340 (5th ed. 2019) (''Perhaps surprisingly, there have been thousands of NEPA suits. It might seem strange that NEPA's seemingly innocuous requirement of preparing an EIS has led to more lawsuits than any other environmental statute.'').

[41] The 2019 edition of NEPA Law and Litigation includes a 115–page Table of Cases decisions construing NEPA. *See* Daniel R. Mandelker et al., NEPA Law and Litigation, Table of Cases (2d ed. 2019).

each year interpreting NEPA. The Supreme Court has construed NEPA and the CEQ regulations in light of a ''rule of reason,'' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of information to the decision-making process. *See Marsh* v. *Or. Nat. Res. Council,* 490 U.S. 360, 373–74 (1989). ''Although [NEPA] procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.'' *Methow Valley,* 490 U.S. at 350 (citing *Strycker's Bay Neighborhood Council, Inc.,* 444 U.S. at 227–28; *Vt. Yankee,* 435 U.S. at 558; *see also Pub. Citizen,* 541 U.S. at 756–57 (''NEPA imposes only procedural requirements on [F]ederal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.'' (citing *Methow Valley,* 490 U.S. at 349–50)). The thousands of decisions interpreting NEPA and the current CEQ regulations being amended here drive much of agencies' modern-day practice. A challenge for agencies is that courts have interpreted key terms and requirements differently, adding to the complexity of environmental reviews. For example, in 2018 and 2019, the U.S. Courts of Appeals issued 56 substantive decisions on a range of topics, including assessment of impacts, sufficiency of alternatives, whether an agency's action qualified as Federal action, and purpose and need statements.[42] As discussed below, the final rule codifies longstanding case law in some instances, and, in other instances, clarifies the meaning of the regulations where there is a lack of uniformity in judicial interpretation of NEPA and the CEQ regulations.

D. Statutory Developments

Since the enactment of NEPA in 1970, Congress has amended or enacted a large number of substantive environmental statutes. These have included significant amendments to the Clean Water Act and Clean Air Act, establishment of new Federal land management standards and planning processes for National forests, public lands, and coastal zones, and statutory requirements to conserve fish, wildlife, and plant species.[43] Additionally, the consideration of the effects on historic properties under the National Historic Preservation Act is typically integrated into the NEPA review.[44] NEPA has served as the umbrella procedural statute, integrating these laws into NEPA reviews and discussing them in NEPA documents.

Over the past two decades and multiple administrations, Congress has also undertaken efforts to facilitate more efficient environmental reviews by Federal agencies, and has enacted a number of statutes aimed at improving the implementation of NEPA, including in the context of infrastructure projects. In particular, Congress has enacted legislation to improve coordination among agencies, integrate NEPA with other environmental reviews, and bring more transparency to the NEPA process.

In 2005, Congress enacted 23 U.S.C. 139, ''Efficient environmental reviews for project decisionmaking,'' a streamlined environmental review process for highway, transit, and multimodal transportation projects (the ''section 139 process''), in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, sec. 6002(a), 119 Stat. 1144, 1857. Congress amended section 139 with additional provisions designed to improve the NEPA process in the 2012 Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, sec. 1305–1309, 126 Stat. 405, and the 2015 Fixing America's Surface Transportation (FAST) Act, Public Law 114–94, sec. 1304, 129 Stat. 1312, 1378. Section 139 provides for an environmental review process that is based on and codifies many aspects of the NEPA regulations, including provisions relating to lead and cooperating agencies, concurrent environmental reviews in a single NEPA document, coordination on the development of the purpose and need statement and reasonable alternatives, and adoption of environmental documents. Further, section 139 provides for referral to CEQ for issue resolution, similar to part 1504 of the NEPA regulations, and allows for the use of errata sheets, consistent with 40 CFR 1503.4(c).[45]

When Congress enacted section 2045 of the Water Resources Development Act of 2007, Public Law 110–114, 121 Stat. 1041, 1103, it created a similar environmental review provision for water resources development projects by the U.S. Army Corps of Engineers (Corps). 33 U.S.C. 2348.[46] This project acceleration provision also requires a coordinated environmental review process, provides for dispute resolution, and codifies aspects of the NEPA regulations such as lead and cooperating agencies, concurrent environmental reviews, and the establishment of CEs. Section 2348(o) also directs the Corps to consult with CEQ on the development of guidance for implementing this provision.

In 2015 Congress enacted Title 41 of the FAST Act (FAST–41), to provide for a more efficient environmental review and permitting process for ''covered projects.'' *See* Public Law 114–94, sec. 41001–41014, 129 Stat. 1312, 1741 (42 U.S.C. 4370m—4370m–12). These are projects that require Federal environmental review under NEPA, are expected to exceed $200 million, and involve the construction of infrastructure for certain energy production, electricity transmission, water resource projects, broadband, pipelines, manufacturing, and other sectors. *Id.* FAST–41 codified certain roles and responsibilities required by the NEPA regulations. In particular, FAST–41 imports the concepts of lead and cooperating agencies, and the different levels of NEPA analysis—EISs, EAs, and CEs. Consistent with 40 CFR 1501.5(e) through (f), CEQ is required to resolve any dispute over designation of a facilitating or lead agency for a covered project. 42 U.S.C. 4370m–2(a)(6)(B). Section 4370m–4 codified several requirements from the CEQ

[42] National Association of Environmental Professionals, 2019 Annual NEPA Report of the National Environmental Policy Act (NEPA) Practice (2020) at 30–31, *https://naep.memberclicks.net/assets/annual-report/2019_NEPA_Annual_Report/NEPA_Annual_Report_2019.pdf;* National Association of Environmental Professionals, 2018 Annual NEPA Report of the National Environmental Policy Act (NEPA) Practice (2019) at 41–51, *https://naep.memberclicks.net/assets/documents/2019/NEPA_Annual_Report_2018.pdf.*

[43] *See, e.g.,* the Clean Air Act, 42 U.S.C. 7401–7671q; Clean Water Act, 33 U.S.C. 1251–1388; Coastal Zone Management Act, 16 U.S.C. 1451–1466; Federal Land Policy and Management Act, 43 U.S.C. 1701–1787; Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. 1600–1614; Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801–1884; Endangered Species Act, 16 U.S.C. 1531–1544; Oil Pollution Act of 1990, 33 U.S.C. 2701–2762; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201, 1202, and 1211; and Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675.

[44] Similar to NEPA, section 106 (54 U.S.C. 306108) of the National Historic Preservation Act is a procedural statute.

[45] To facilitate the NEPA process for transportation projects subject to section 139, the statute specifically calls for development of a coordination plan, including development of a schedule, and publicly tracking the implementation of that schedule through use of the Permitting Dashboard. *See infra* sec. I.E. In addition, the section 139 process provides for ''participating'' agencies, which are any agencies invited to participate in the environmental review process. Section 139 also requires, to the maximum extent practicable, issuance of a combined final EIS and ROD.

[46] Congress significantly revised this provision in the Water Resources Reform and Development Act of 2014, Public Law 113–121, sec. 1005(a)(1), 128 Stat. 1193 1199.

regulations, including the requirement for concurrent environmental reviews, which is consistent with 40 CFR 1500.2(c), 1501.7(a)(6), and 1502.25(a), and the tools of adoption, incorporation by reference, supplementation, and use of State documents, consistent with 40 CFR 1506.3, 1502.21, 1502.9(c), and 1506.2.[47] Finally, 42 U.S.C. 4370m–4 addresses interagency coordination on key aspects of the NEPA process, including scoping (40 CFR 1501.7), identification of the range of reasonable alternatives for study in an EIS (40 CFR 1502.14), and the public comment process (40 CFR part 1503).

To ensure a timely NEPA process so that important infrastructure projects can move forward, Congress has also established shorter statutes of limitations for challenges to certain types of projects. SAFETEA–LU created a 180-day statute of limitations for highway or public transportation capital projects, which MAP–21 later reduced to 150 days. 23 U.S.C. 139(l). The Water Resources Reform and Development Act of 2014 established a three-year statute of limitations for judicial review of any permits, licenses, or other approvals for water resources development project studies. 33 U.S.C. 2348(k). Most recently in FAST–41, Congress established a two-year statute of limitations for covered projects. 42 U.S.C. 4370m–6.

There are a number of additional instances where Congress has enacted legislation to facilitate more timely environmental reviews. For example, similar to the provisions described above, there are other statutes where Congress has called for a coordinated and concurrent environmental review. *See, e.g.,* 33 U.S.C. 408(b) (concurrent review for river and harbor permits); 49 U.S.C. 40128 (coordination on environmental reviews for air tour management plans for national parks); 49 U.S.C. 47171 (expedited and coordinated environmental review process for airport capacity enhancement projects).

Additionally, Congress has established or directed agencies to establish CEs to facilitate NEPA compliance. *See, e.g.,* 16 U.S.C. 6554(d) (applied silvicultural assessment and research treatments); 16 U.S.C. 6591d (hazardous fuels reduction projects to carry out forest restoration treatments); 16 U.S.C. 6591e (vegetation management activity in greater sage-grouse or mule deer habitat); 33 U.S.C. 2349 (actions to repair, reconstruct, or rehabilitate water resources projects in response to emergencies); 42 U.S.C. 15942 (certain activities for the purpose of exploration or development of oil or gas); 43 U.S.C. 1772(c)(5) (development and approval of vegetation management, facility inspection, and operation and maintenance plans); MAP–21, Public Law 112–141, sec. 1315 (actions to repair or reconstruct roads, highways, or bridges damaged by emergencies), 1316 (projects within the operational right-of-way), and 1317 (projects with limited Federal assistance); FAA Modernization and Reform Act of 2012, Public Law 112–95, sec. 213(c), 126 Stat. 11, 46 (navigation performance and area navigation procedures); and Omnibus Appropriations Act, 2009, Public Law 111–8, sec. 423, 123 Stat. 524, 748 (Lake Tahoe Basin Management Unit hazardous fuel reduction projects).

Further, in the context of emergency response, including economic crisis, Congress has enacted legislation to facilitate timely NEPA reviews or to exempt certain actions from NEPA review. Congress has directed the use or development of alternative arrangements in accordance with 40 CFR 1506.11 for reconstruction of transportation facilities damaged in an emergency (FAST Act, Pub. L. 114–94, sec. 1432, 129 Stat. 1312, 1429) and for projects by the Departments of the Interior and Commerce to address invasive species (Water Infrastructure Improvements for the Nation Act, Pub. L. 114–322, sec. 4010(e)(3), 130 Stat. 1628, 1877). Section 1609(c) of the American Recovery and Reinvestment Act of 2009 directed agencies to complete environmental reviews under NEPA on an expedited basis using the most efficient applicable process. Public Law 111–5, sec. 1609, 123 Stat. 115, 304.

In 2013, Congress also enacted section 429 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (''Stafford Act''), 42 U.S.C. 5189g, which directed the President, in consultation with CEQ and the Advisory Council on Historic Preservation, to ''establish an expedited and unified interagency review process to ensure compliance with environmental and historic requirements under Federal law relating to disaster recovery projects, in order to expedite the recovery process, consistent with applicable law.'' Sandy Recovery Improvement Act of 2013, Public Law 113–2, sec. 1106, 127 Stat. 4, 45–46. This unified Federal environmental and historic preservation review (UFR) process is a framework for coordinating Federal agency environmental and historic preservation reviews for disaster recovery projects associated with presidentially declared disasters under the Stafford Act. The goal of the UFR process is to enhance the ability of Federal environmental review and authorization processes to inform and expedite disaster recovery decisions for grant applicants and other potential beneficiaries of disaster assistance by improving coordination and consistency across Federal agencies, and assisting agencies in better leveraging their resources and tools.[48]

Finally, in some instances, Congress has exempted actions from NEPA. In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, which authorized the waiver of NEPA for the construction of the physical barriers and roads between the United States and Mexico border when necessary to ''ensure expeditious construction.'' Public Law 104–208, sec. 102(c), 110 Stat. 3009.[49] In 2013, Congress exempted certain disaster recovery actions or financial assistance to restore ''a facility substantially to its condition prior to the disaster or emergency.'' 42 U.S.C. 5159. In 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, which created an exemption from NEPA for the General Services Administration's acquisition of real property and interests in real property or improvements in real property in response to coronavirus in

[47] For covered projects, section 4370m–4 authorizes lead agencies to adopt or incorporate by reference existing environmental analyses and documentation prepared under State laws and procedures if the analyses and documentation meet certain requirements. 42 U.S.C. 4370m–4(b)(1)(A)(i). This provision also requires that the lead agency, in consultation with CEQ, determine that the analyses and documentation were prepared using a process that allowed for public participation and consideration of alternatives, environmental consequences, and other required analyses that are substantially equivalent to what a Federal agency would have prepared pursuant to NEPA. *Id.*

[48] *See generally* Memorandum of Understanding Establishing the Unified Federal Environmental and Historic Preservation Review Process for Disaster Recovery Projects (July 29, 2014), *https://www.fema.gov/media-library-data/1414507626204-f156c4795571b85a4f8e1c1f4c4b7de1/Final_Signed_UFR_MOU_9_24_14_508_ST.PDF.*

[49] The Homeland Security Act of 2002 transferred responsibility for the construction of border barriers from the Attorney General to the Department of Homeland Security. Public Law 107–296, 116 Stat. 2135. In 2005, the REAL ID Act amended the waiver authority of section 102(c) expanding the Secretary of DHS' authority to waive ''all legal requirements'' that the Secretary, in his or her own discretion, determines ''necessary to ensure expeditious construction'' of certain ''barriers and roads.'' Public Law 109–13, Div. B, tit. I, sec. 102, 119 Stat. 231, 302, 306. It also added a judicial review provision that limited the district court's jurisdiction to hear any causes or claims concerning the Secretary's waiver authority to solely constitutional claims. *Id.* sec. 102(c)(2)(A). Further, the provision directed that any review of the district court's decision be raised by petition for a writ of certiorari with the Supreme Court of the United States. *Id.* sec. 102(c)(2)(C). *See In re Border Infrastructure Envtl. Litig.,* 284 F. Supp. 3d 1092 (S.D. Cal. 2018).

conjunction with the provision of additional funding to prevent, prepare for, and respond to the coronavirus. Public Law 116–136, Div. B.

These statutes reflect that Congress has recognized that the environmental review process can be more efficient and effective, including for infrastructure projects, and that in certain circumstances, Congress has determined it appropriate to exempt certain actions from NEPA review. Congress also has identified specific process improvements that can accelerate environmental reviews, including improved interagency coordination, concurrent reviews, and increased transparency.

E. Presidential Directives

Over the past two decades and multiple administrations, Presidents also have recognized the need to improve the environmental review process to make it more timely and efficient, and have directed agencies, through Executive orders and Presidential memoranda, to undertake various initiatives to address these issues. In 2002, President Bush issued E.O. 13274 titled ''Environmental Stewardship and Transportation Infrastructure Project Reviews,'' [50] which stated that the development and implementation of transportation infrastructure projects in an efficient and environmentally sound manner is essential, and directed agencies to conduct environmental reviews for transportation projects in a timely manner.

In 2011, President Obama's memorandum titled ''Speeding Infrastructure Development Through More Efficient and Effective Permitting and Environmental Review'' [51] directed certain agencies to identify up to three high-priority infrastructure projects for expedited environmental review and permitting decisions to be tracked publicly on a ''centralized, online tool.'' This requirement led to the creation of what is now the Permitting Dashboard, *www.permits.performance.gov.*

In 2012, E.O. 13604, titled ''Improving Performance of Federal Permitting and Review of Infrastructure Projects,'' [52] established an interagency Steering Committee on Federal Infrastructure Permitting and Review Process Improvement (''Steering Committee'') to facilitate improvements in Federal permitting and review processes for infrastructure projects. The Executive order directed the Steering Committee to develop a plan ''to significantly reduce the aggregate time required to make Federal permitting and review decisions on infrastructure projects while improving outcomes for communities and the environment.'' Similarly, E.O. 13616, titled ''Accelerating Broadband Infrastructure Deployment,'' [53] established an interagency working group to, among other things, avoid duplicative reviews and coordinate review processes to advance broadband deployment.

A 2013 Presidential Memorandum titled ''Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures'' [54] directed the Steering Committee established by E.O. 13604 to work with agencies, OMB, and CEQ to ''modernize Federal infrastructure review and permitting regulations, policies, and procedures to significantly reduce the aggregate time required by the Federal Government to make decisions in the review and permitting of infrastructure projects, while improving environmental and community outcomes'' and develop a plan to achieve this goal. Among other things, the memorandum directed that the plan create process efficiencies, including additional use of concurrent and integrated reviews; expand coordination with State, Tribal, and local governments; and expand the use of information technology tools. CEQ and OMB led the effort to develop a comprehensive plan to modernize the environmental review and permitting process while improving environmental and community outcomes, including budget proposals for funding and new authorities. Following the development of the plan, CEQ continued to work with agencies to improve the permitting process, including through expanded collection of timeframe metrics on the Permitting Dashboard. In late 2015, these ongoing efforts were superseded by the enactment of FAST–41, which codified the use of the Permitting Dashboard, established the Federal Permitting Improvement Steering Council (''Permitting Council''), and established other requirements for managing the environmental review and permitting process for covered infrastructure projects.

On August 15, 2017, President Trump issued E.O. 13807 titled ''Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.'' [55] Section 5(e)(i) directed CEQ to develop an initial list of actions to enhance and modernize the Federal environmental review and authorization process, including issuing such regulations as CEQ deems necessary to: (1) Ensure optimal interagency coordination of environmental review and authorization decisions; (2) ensure that multi-agency environmental reviews and authorization decisions are conducted in a manner that is concurrent, synchronized, timely, and efficient; (3) provide for use of prior Federal, State, Tribal, and local environmental studies, analysis, and decisions; and (4) ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays, including by using CEQ's authority to interpret NEPA to simplify and accelerate the NEPA review process. In response to E.O. 13807, CEQ published an initial list of actions and stated its intent to review its existing NEPA regulations in order to identify potential revisions to update and clarify these regulations.[56]

F. Advance Notice of Proposed Rulemaking

Consistent with E.O. 13807 and CEQ's initial list of actions, and given the length of time since CEQ issued its regulations, on June 20, 2018, CEQ published an ANPRM titled ''Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.'' [57] The ANPRM requested public comments on how CEQ could ensure a more efficient, timely, and effective NEPA process consistent with the Act's national environmental policy and provided for a 30-day comment period.[58]

The ANPRM requested comment on potential revisions to update and clarify the NEPA regulations, and included a list of questions on specific aspects of the regulations. For example, with respect to the NEPA process, the ANPRM asked whether there are provisions that CEQ could revise to ensure more efficient environmental reviews and authorization decisions, such as facilitating agency use of existing environmental studies, analyses and decisions, as well as improving interagency coordination. The ANPRM also requested comments on the scope of NEPA reviews, including whether CEQ should revise, clarify, or add definitions. The ANPRM also asked whether additional revisions relating to

[50] 67 FR 59449 (Sept. 23, 2002).

[51] *https://www.govinfo.gov/content/pkg/DCPD-201100601/pdf/DCPD-201100601.pdf.*

[52] 77 FR 18887 (Mar. 28, 2012).

[53] 77 FR 36903 (June 20, 2012).

[54] 78 FR 30733 (May 22, 2013).

[55] 82 FR 40463 (Aug. 24, 2017).

[56] 82 FR 43226 (Sept. 14, 2017).

[57] 83 FR 28591 (June 20, 2018).

[58] In response to comments, CEQ extended the comment period 31 additional days to August 20, 2018. 83 FR 32071 (July 11, 2018).

environmental documentation issued pursuant to NEPA, including CEs, EAs, EISs, and other documents, would be appropriate. Finally, the ANPRM requested general comments, including whether there were obsolete provisions that CEQ could update to reflect new technologies or make the process more efficient, or that CEQ could revise to reduce unnecessary burdens or delays.

In response to the ANPRM, CEQ received over 12,500 comments, which are available for public review.[59] These included comments from a wide range of stakeholders, including States, Tribes, localities, environmental organizations, trade associations, NEPA practitioners, and interested members of the public. While some commenters opposed any updates to the regulations, other commenters urged CEQ to consider potential revisions. Though the approaches to the update of the NEPA regulations varied, most of the substantive comments supported some degree of updating of the regulations. Many noted that overly lengthy documents and the time required for the NEPA process remain real and legitimate concerns despite the NEPA regulations' explicit direction with respect to reducing paperwork and delays. In general, numerous commenters requested that CEQ consider revisions to modernize its regulations, reduce unnecessary burdens and costs, and make the NEPA process more efficient, effective, and timely.

G. Notice of Proposed Rulemaking

On January 9, 2020, President Trump announced the release of CEQ's NPRM titled ''Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act'' and the rule was published in the **Federal Register** on January 10, 2020.[60] The NPRM provided a 60-day comment period, and the comment period ended on March 10, 2020.

CEQ hosted two public hearings in Denver, Colorado on February 11, 2020, and in Washington, DC on February 25, 2020.[61] CEQ also notified all federally recognized Tribes and over 400 interested groups, including State, Tribal, and local officials, environmental organizations, trade associations, NEPA practitioners, and interested members of the public representing a broad range of diverse views, that CEQ had issued the proposed rule for public comment.[62] Additionally, CEQ made information to aid the public's review of the proposed rule available on its websites at *www.whitehouse.gov/ceq* and *www.nepa.gov,* including a redline version of the proposed changes to the regulations posted on *www.regulations.gov,* along with a presentation on the proposed rule and other background information.[63] CEQ also conducted additional public outreach to solicit comments, including meetings with Tribal representatives in Denver, Colorado, Anchorage, Alaska, and Washington, DC.[64]

In response to the NPRM, CEQ received comments from a broad range of stakeholders on a diversity of issues relating to the proposed rule. These included comments from members of Congress, State, Tribal, and local officials, environmental organizations, trade associations, NEPA practitioners, and interested members of the public. CEQ also received a large number of campaign comments, including comments with multiple signatories or groups of comments that were identical or very similar in form or content. The comments received on the NPRM raised a variety of issues related to the rulemaking and contents of the proposed rule, including procedural, legal, and technical issues. The Final Rule Response to Comments provides a summary of the comments and responses to those comments.

II. Summary of Final Rule

In this section, CEQ summarizes the NPRM proposed changes and the final rule, including any changes or additions to what CEQ proposed. CEQ makes the additions, clarifications, and updates to its regulations based on its record evaluating the implementation of the NEPA regulations, suggestions in response to the ANPRM, and comments provided in response to the NPRM. The revisions finalized in this rule advance the original objectives of the 1978 regulations [65] ''[t]o reduce paperwork, to reduce delays, and at the same time to produce better decisions [that] further the national policy to protect and enhance the quality of the human environment.'' [66]

In this final rule, CEQ makes various revisions to align the regulations with the text of the NEPA statute, including revisions to reflect the procedural nature of the statute, including under section 102(2). CEQ also revises the regulations to ensure that environmental documents prepared pursuant to NEPA are concise and serve their purpose of informing decision makers regarding significant potential environmental effects of proposed major Federal actions and the public of the environmental issues in the pending decision-making process. CEQ makes changes to ensure that the regulations reflect changes in technology, increase public participation in the process, and facilitate the use of existing studies, analyses, and environmental documents prepared by States, Tribes, and local governments.

CEQ also makes its regulations consistent with the OFD policy established by E.O. 13807 for multi-agency review and related permitting and other authorization decisions. The Executive order specifically instructed CEQ to take steps to ensure optimal interagency coordination, including through a concurrent, synchronized, timely, and efficient process for environmental reviews and authorization decisions. In response to the NPRM, CEQ received many comments supporting revisions to codify key aspects of the OFD policy in the NEPA regulations, including by providing greater specificity on the roles and responsibilities of lead and cooperating agencies. Commenters also suggested that the regulations require agencies to establish and adhere to timetables for the completion of reviews, another key element of the OFD policy. To promote improved interagency coordination and more timely and efficient reviews and in response to these comments, CEQ codifies and generally applies a number of key elements from the OFD policy in this final rule. These include development by the lead agency of a joint schedule, procedures to elevate delays or disputes, preparation of a single EIS and joint ROD to the extent practicable, and a two-year goal for completion of environmental reviews. Consistent with section 104 of NEPA (42 U.S.C. 4334), codification of these policies will not limit or affect the authority or legal responsibilities of agencies under other statutory mandates that may be covered by joint schedules,

[59] *See https://www.regulations.gov,* docket no. CEQ–2018–0001.

[60] *Supra* note 8.

[61] Transcripts of the two public hearings with copies of testimony and written comments submitted at the hearings are available in the docket on *www.regulations.gov,* docket ID CEQ–2019–0003.

[62] Notices are available under ''Supporting Documents'' in the docket, *www.regulations.gov,* docket ID CEQ–2019–0003, *https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=SR%2BO&D=CEQ-2019-0003.*

[63] *Id.*

[64] CEQ also includes meeting summaries under supplemental materials. *Id.*

[65] In this final rule, CEQ uses the term ''1978 regulations'' to refer to the regulations as they exist prior to this final rule's amendment thereof, which includes the 1986 amendment to 40 CFR 1502.22.

[66] 43 FR 55978 (Nov. 29, 1978).

and CEQ includes language to that effect in § 1500.6.[67]

CEQ also clarifies the process and documentation required for complying with NEPA by amending part 1501 to add sections on threshold considerations, determination of the appropriate level of NEPA review, and the application of CEs; and revising sections in part 1501 on EAs and findings of no significant impact (FONSIs), and EISs in part 1502. CEQ further revises the regulations to promote more efficient and timely environmental reviews, including revisions to promote interagency coordination by amending sections of parts 1501, 1506, and 1507 relating to lead, cooperating, and participating agencies, timing of agency action, scoping, and agency NEPA procedures.

To promote a more efficient and timely NEPA process, CEQ amends provisions in parts 1501, 1506, and 1507 relating to applying NEPA early in the process, scoping, tiering, adoption, use of current technologies, and avoiding duplication of State, Tribal, and local environmental reviews; revises parts 1501 and 1502 to provide for presumptive time and page limits; and amends part 1508 to clarify the definitions. For example, CEQ includes two new mechanisms to facilitate the use of CEs when appropriate. Under § 1506.3(d), an agency can adopt another agency's determination that a CE applies to a proposed action when the adopting agency's proposed action is substantially the same. This extends the adoption process and standards from EISs to CE determinations.[68] This allows agencies to ''piggyback'' where more than one agency is taking an action related to the same project or activity. Alternatively, to apply CEs listed in another agency's procedures (without that agency already having made a determination that a CE applies to a substantially similar action), agencies can establish a process in their agency NEPA procedures to coordinate and apply CEs listed in other agencies' procedures.

Another efficiency included in this final rule is the ability for agencies to identify other requirements that serve the function of agency compliance with NEPA. Under §§ 1501.1 and 1507.3(d)(6), agencies may determine that another statute's requirements serve the function of agency compliance with NEPA. Alternatively, agencies may designate in their agency NEPA procedures one or more procedures or documents under other statutes or Executive orders that satisfy one or more requirements in the NEPA regulations, consistent with § 1507.3(c)(5). Finally, § 1506.9 allows agencies to substitute processes and documentation developed as part of the rulemaking process for corresponding requirements in these regulations.

As noted above, NEPA is a procedural statute that has twin aims. The first is to promote informed decision making, while the second is to inform the public about the agency's decision making. In this final rule, CEQ amends parts 1500, 1501, 1502, 1503, 1505, and 1508 to ensure that agencies solicit and consider relevant information early in the NEPA process and have the maximum opportunity to take that information into account in their decision making.

In situations where an EIS is required, this process takes place in two discrete steps. First, § 1501.9(d) directs agencies to include information on the proposed action in the NOI, including its expected impacts and alternatives, and a request for comments from interested parties on the potential alternatives, information, and analyses relevant to the proposed action. Second, § 1503.1(a) requires agencies to request comments on the analysis and conclusions of the draft EIS. The purpose of these two provisions is to bring relevant comments, information, and analyses to the agency's attention, as early in the process as possible, to enable the agency to make maximum use of this information.

To facilitate this process, § 1503.3 requires comments on the draft EIS to be submitted on a timely basis and to be as specific as possible. Similarly, § 1503.1(a)(3) requires agencies to invite interested parties to comment specifically on the alternatives, information, and analyses submitted for consideration in the development of the draft EIS. Finally, § 1503.3(b) provides that comments, information, and analyses on the draft EIS not timely received are deemed unexhausted and therefore forfeited. The intent of these amendments is two-fold: (1) To ensure that comments are timely received and at a level of specificity where they can be meaningfully taken into account, where appropriate; and (2) to prevent unnecessary delay in the decision-making process.

Consistent with this intent, § 1500.3(b)(2) also directs agencies to include a new section in both the draft and final EIS that summarizes all alternatives, information, and analyses submitted by interested parties in response to the agency's requests for comment in the NOI and on the draft EIS. In addition, §§ 1502.17(a)(2) and 1503.1(a)(3) direct agencies to request comment on the summary in the draft EIS. The purpose of these provisions is to ensure that the agency, through outreach to the public, has identified all relevant information submitted by State, Tribal, and local governments and other public commenters. Although not a substitute for the entire record, the summary will assist agency decision makers in their consideration of the record for the proposed action. As the Supreme Court observed in *Metropolitan Edison Co.* v. *People Against Nuclear Energy,* ''[t]he scope of [an] agency's inquiries must remain manageable if NEPA's goal of '[insuring] a fully informed and well-considered decision' . . . is to be accomplished.'' 460 U.S. at 776 (quoting *Vt. Yankee,* 435 U.S. at 558).

Finally, informed by the summary included in the final EIS pursuant to §§ 1500.3(b)(2) and 1502.17 and the response to comments pursuant to § 1503.4, together with any other material in the record that he or she determines to be relevant, the decision maker is required under § 1505.2(b) to certify in the ROD that the agency has considered the alternatives, information, analyses, and objections submitted by State, Tribal, and local governments and public commenters for consideration in the development of the final EIS. Section 1505.2(b) further provides that a decision certified in this manner is entitled to a presumption that the agency has adequately considered the submitted alternatives, information, and analyses, including the summary thereof, in reaching its decision. This presumption will advance the purposes of the directive in E.O. 11991 to ensure that EISs are supported by evidence that agencies have performed the necessary environmental analyses. *See* E.O. 11991, sec. 1 amending E.O. 11514, sec. 3(h). This presumption is also consistent with the longstanding presumption of regularity that government officials have properly discharged their official duties. *See U.S. Postal Serv.* v. *Gregory,* 534 U.S. 1, 10 (2001) (''[W]e note that a presumption of regularity attaches to the actions of government agencies.'' (citing *United States* v. *Chem. Found., Inc.,* 272 U.S. 1, 14–15 (1926)); *INS* v. *Miranda,* 459 U.S. 14, 18 (1982) (specific evidence required to overcome presumption that public officers have executed their responsibilities properly); *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 415 (1971) (Although a

[67] In the preamble, CEQ uses the section symbol (§) to refer to the final regulations as set forth in this final rule and 40 CFR to refer to the 1978 CEQ regulations as set forth in 40 CFR parts 1500–1508.

[68] The final rule also extends the adoption process and standards, which only applies to EISs under the 1978 regulations, to EAs as well.

statute prohibited Federal funds for roads through parks absent a feasible and prudent alternative, and although the Secretary of Transportation approved funds without formal findings, the Secretary's decision-making process was nevertheless entitled to a presumption of regularity.); *Fed. Commc'ns Comm'n* v. *Schreiber,* 381 U.S. 279, 296 (1965) (noting ''the presumption to which administrative agencies are entitled—that they will act properly and according to law''); *Phila. & T. Ry.* v. *Stimpson,* 39 U.S. (14 Pet.) 448, 458 (1840) (Where a statute imposed certain conditions before a corrected patent could issue, the signatures of the President and the Secretary of State on a corrected patent raised a presumption that the conditions were satisfied, despite absence of recitals to that effect on face of patent.); *Martin* v. *Mott,* 25 U.S. (12 Wheat.) 19, 33 (1827) (''Every public officer is presumed to act in obedience to his duty, until the contrary is shown . . . .''); *Udall* v. *Wash., Va. & Md. Coach Co.,* 398 F.2d 765, 769 (D.C. Cir. 1968) (The Secretary of the Interior's determination that limitation of commercial bus service was required to preserve a parkway's natural beauty was entitled to presumption of validity, and the burden was on the challenger to overcome it.).

In light of this precedent and the interactive process established by these regulations, under which the agency and interested parties exchange information multiple times, the agency compiles and evaluates summaries of that information, and a public official is required to certify the agency's consideration of the record, it is CEQ's intention that this presumption may be rebutted only by clear and convincing evidence that the agency has not properly discharged its duties under the statute.

Finally, CEQ revises the regulations to make them easier to understand and apply. CEQ reorganizes the regulatory text to move topics addressed in multiple sections and sometimes multiple parts into consolidated sections. CEQ simplifies and clarifies part 1508 to focus on definitions by moving operative requirements to the relevant regulatory provisions. CEQ revises the regulations to consolidate provisions and reduce duplication. Such consolidation, reordering, and reorganization promotes greater clarity and ease of use.

A. Changes Throughout Parts 1500–1508

CEQ proposed several revisions throughout parts 1500–1508 to provide consistency, improve clarity, and correct grammatical errors. CEQ proposed to make certain grammatical corrections in the regulations where it proposed other changes to the regulations to achieve the goals of this rulemaking, or where CEQ determined the changes are necessary for the reader to understand fully the meaning of the sentence. CEQ proposed to revise sentences from passive voice to active voice to help identify the responsible parties. CEQ also proposed to correct the usage of the term ''insure'' with ''ensure'' consistent with modern usage. ''Insure'' is typically used in the context of providing or obtaining insurance, whereas ''ensure'' is used in the context of making something sure, certain, or safe. While NEPA uses the term ''insure,'' the context in which it is used makes it clear that Congress meant ''ensure'' consistent with modern usage. Similarly, CEQ proposed to correct the use of ''which'' and ''that'' throughout the rule.

CEQ proposed to add paragraph letters to certain introductory paragraphs where it would improve clarity. Finally, CEQ invited comment on whether it should make these types of grammatical and editorial changes throughout the rule or if there are additional specific instances where CEQ should make these types of changes. In the final rule, CEQ adopts the proposed revisions to provide consistency and clarity and to correct grammatical errors and makes these types of changes throughout.

CEQ proposed to add ''Tribal'' to the phrase ''State and local'' throughout the rule to ensure consultation with Tribal entities and to reflect existing NEPA practice to coordinate or consult with affected Tribal governments and agencies, as necessary and appropriate for a proposed action. CEQ also proposed this change in response to comments on the ANPRM supporting expansion of the recognition of the sovereign rights, interests, and expertise of Tribes. CEQ proposed to eliminate the provisions in the regulations that limit Tribal interest to reservations. CEQ adopts these proposals in the final rule and makes these additions and revisions in §§ 1500.3(b)(2)–(4), 1500.4(p), 1500.5(j), 1501.2(b)(4)(ii), 1501.3(b)(2)(iv), 1501.5(e), 1501.7(b) and (d), 1501.8(a), 1501.9(b), 1501.10(f), 1502.5(b), 1502.16(a)(5), 1502.17(a) and (b), 1502.20(a), 1503.1(a)(2)(i) and (ii), 1505.2(b), and 1506.1(b), 1506.2, 1506.6(b)(3)(i)–(iii), and 1508.1(e), (k), and (w). As noted in the NPRM, these changes are consistent with and in support of government-to-government consultation pursuant to E.O. 13175, titled ''Consultation and Coordination With Indian Tribal Governments.'' [69]

CEQ proposed several changes for consistent use of certain terms. In particular, CEQ proposed to change ''entitlements'' to the defined term ''authorizations'' proposed in § 1508.1(c) throughout the regulations and added ''authorizations'' where appropriate to reflect the mandate in E.O. 13807 for better integration and coordination of authorization decisions and related environmental reviews. CEQ is adopting these revisions in the final rule in §§ 1501.2(a), 1501.7(i), 1501.9(d)(4) and (f)(4), 1502.13, 1502.24(b), 1503.3(d), and 1508.1(w).

CEQ proposed to use the term ''decision maker'' to refer to an individual responsible for making decisions on agency actions and ''senior agency official'' to refer to the individual who oversees the agency's overall compliance with NEPA. CEQ adopts these changes in the final rule. There may be multiple individuals within certain departments or agencies that have these responsibilities, including where subunits have developed agency procedures or NEPA compliance programs.

CEQ proposed to replace ''circulate'' or ''circulation'' with ''publish'' or ''publication'' throughout the rule and make ''publish or publication'' a defined term in § 1508.1(y), which provides agencies with the flexibility to make environmental review and information available to the public by electronic means not available at the time of promulgation of the CEQ regulations in 1978. As explained in the NPRM, historically, the practice of circulation included mailing of hard copies or providing electronic copies on disks or CDs. While it may be necessary to provide a hard copy or copy on physical media in limited circumstances, agencies now provide most documents in an electronic format by posting them online and using email or other electronic forms of communication to notify interested or affected parties. This change will help reduce paperwork and delays, and modernize the NEPA process to be more accessible to the public. CEQ finalizes these changes in §§ 1500.4(o), 1501.2(b)(2), 1502.9(b) and (d)(3), 1502.20, 1503.4(b) and (c), 1506.3(b)(1) and (2), and 1506.8(c)(2).

CEQ proposed to change the term ''possible'' to ''practicable'' in the NPRM in a number of sections of the regulations. As noted in the NPRM, ''practicable'' is the more commonly used term in regulations to convey the ability for something to be done,

[69] 65 FR 67249 (Nov. 9, 2000).

considering the cost, including time required, technical and economic feasibility, and the purpose and need for agency action. The term ''practicable,'' which is in the statute (42 U.S.C. 4331(a), (b)) and used many times in the 1978 regulations,[70] is consistent with notions of feasibility, which the case law has recognized as part of the NEPA process. *See, e.g., Vt. Yankee,* 435 U.S. at 551 (''alternatives must be bounded by some notion of feasibility''); *Kleppe,* 427 U.S. at 414 (''[P]ractical considerations of feasibility might well necessitate restricting the scope'' of an agency's analysis.) CEQ makes these changes in the final rule in §§ 1501.7(h)(1) and (2), 1501.8(b)(1), 1502.5, 1502.9(b), 1504.2, and 1506.2(b) and (c).

Similarly, CEQ proposed to change ''no later than immediately'' to ''as soon as practicable'' in § 1502.5(b), and CEQ finalizes this change. Finally, CEQ proposed to refer to the procedures required in § 1507.3 using the term ''agency NEPA procedures'' throughout. CEQ makes this change in the final rule.

CEQ proposed to eliminate obsolete references and provisions in several sections of the CEQ regulations. In particular, CEQ proposed to remove references to the 102 Monitor in 40 CFR 1506.6(b)(2) and 1506.7(c) because the publication no longer exists, and OMB Circular A–95, which was revoked pursuant to section 7 of E.O. 12372 (47 FR 30959, July 16, 1982), including the requirement to use State and area-wide clearinghouses in 40 CFR 1501.4(e)(2), 1503.1(a)(2)(iii), 1505.2, and 1506.6(b)(3)(i). CEQ removes these references in the final rule.

CEQ proposed changes to citations and authorities in parts 1500 through 1508. CEQ is updating the authorities sections for each part to correct the format. CEQ also is removing cross-references to the sections of part 1508, ''Definitions,'' and updates or inserts new cross-references throughout the rule to reflect revised or new sections. CEQ makes these changes throughout the final rule.

Finally, CEQ is reorganizing chapter V of title 40 of the Code of Federal Regulations to place the NEPA regulations into a new subchapter A, ''National Environmental Policy Act Implementing Regulations,'' and organizing its other regulations into their own new subchapter B, ''Administrative Procedures and Operations.'' References to ''parts 1500 through 1508'' in the proposed rule are referenced to ''this subchapter'' in the final rule. CEQ notes that the provisions of the NEPA regulations, which the final rule comprehensively updates, should be read in their entirety to understand the requirements under the modernized regulations.[71]

B. Revisions To Update the Purpose, Policy, and Mandate (Part 1500)

In part 1500, CEQ proposed several revisions to update the policy and mandate sections of the regulations to reflect statutory, judicial, policy, and other developments since the CEQ regulations were issued in 1978. CEQ includes the proposed changes with some revisions in the final rule.

1. Purpose and Policy (§ 1500.1)

In the NPRM, CEQ proposed to retitle and revise § 1500.1, ''Purpose and policy,'' to align this section with the statutory text of NEPA and certain case law, and reflect the procedural requirements of section 102(2) (42 U.S.C. 4332(2)). These changes also are consistent with the President's directive to CEQ to ''[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)).'' E.O. 11514, as amended by E.O. 11991, sec. 3(h). Many commenters supported these revisions to promote more efficient and timely reviews under NEPA, while others opposed the changes and requested that CEQ maintain the existing language. CEQ revises this section in the final rule consistent with its proposal.

Section 1500.1 provides that NEPA is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process. The Supreme Court has made clear that NEPA is a procedural statute that does not mandate particular results; ''[r]ather, NEPA imposes only procedural requirements on [F]ederal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.'' *Pub. Citizen,* 541 U.S. at 756–57 (citing *Methow Valley,* 490 U.S. at 349–50); *see also Vt. Yankee,* 435 U.S. at 558 (''NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.'').

As proposed in the NPRM, CEQ revises § 1500.1(a) to summarize section 101 of the Act (42 U.S.C. 4331) and to reflect that section 102(2) establishes the procedural requirements to carry out the policy stated in section 101. CEQ revises § 1500.1(a) consistent with the case law to reflect that the purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision-making process, and to reflect that NEPA does not mandate particular results or substantive outcomes. *Marsh,* 490 U.S. at 373–74; *Vt. Yankee,* 435 U.S. at 558. CEQ replaces the vague reference to ''action-forcing'' provisions ensuring that Federal agencies act ''according to the letter and spirit of the Act'' (as well as consistently with their organic and program-specific governing statutes) with a more specific reference to the consideration of environmental impacts of their actions in agency decisions. These changes codify the Supreme Court's interpretation of section 102 in two important respects: Section 102 ''ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision[-]making process and the implementation of that decision.'' *Methow Valley,* 490 U.S. at 349; *see also Winter* v. *Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 23 (2008); *Pub. Citizen,* 541 U.S. at 756–58.

Consistent with CEQ's proposal in the NPRM, CEQ revises § 1500.1(b) to describe the NEPA regulations as revised in this final rule. In particular, CEQ revises this paragraph to reflect that the regulations include direction to Federal agencies to determine what actions are subject to NEPA's procedural requirements and the level of NEPA review, where applicable. The revisions also ensure that Federal agencies identify and consider relevant environmental information early in the process in order to promote informed decision making. These revisions reduce unnecessary burdens and delays consistent with E.O. 13807 and the purposes of the regulations as originally promulgated in 1978. These amendments emphasize that the policy of integrating NEPA with other environmental reviews is to promote concurrent and timely reviews and decision making consistent with statutes, Executive orders, and CEQ guidance. *See, e.g.,* 42 U.S.C. 5189g; 23 U.S.C. 139; 42 U.S.C. 4370m *et seq.;* E.O. 13604; E.O. 13807; Mitigation

[70] *See* 40 CFR 1500.2(f), 1501.4(b), 1501.7, 1505.2(c), 1506.6(f) and 1506.12(a).

[71] While the final rule retains, in large part, the numbering scheme used in the 1978 regulations, the final rule comprehensively updates the prior regulations. The new regulations should be consulted and reviewed to ensure application is consistent with the modernized provisions. Assumptions should not be made concerning the degree of change to, similarity to, or any interpretation of the prior version of the regulations.

Guidance, *supra* note 29, and Timely Environmental Reviews Guidance, *supra* note 29.

2. Remove and Reserve Policy (§ 1500.2)

CEQ proposed to remove and reserve 40 CFR 1500.2, ''Policy.'' The section included language that is identical or similar to language in E.O. 11514, as amended. That Executive order directed CEQ to develop regulations that would make the ''[EIS] process more useful to decision makers and the public; and . . . reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives.'' *See* E.O. 11514, as amended by E.O. 11991, sec. 3(h). The Executive order also directed CEQ to require EISs to be ''concise, clear and to the point, and supported by evidence that agencies have made the necessary environmental analyses.'' *Id.* CEQ proposed to remove this section because it is duplicative of other sections of the regulations, thereby eliminating redundancy. CEQ is making this change in the final rule.

Specifically, 40 CFR 1500.2(a) restated the statutory text in section 102 of NEPA (42 U.S.C. 4332) and is duplicative of language in § 1500.6, ''Agency authority,'' requiring each agency to interpret the provisions of NEPA as a supplement to its existing authority and as a mandate to view policies and missions in light of the Act's national environmental objectives. Paragraph (b) required agencies to implement procedures to make the NEPA process more useful to decision makers and the public; reduce paperwork and accumulation of extraneous background data; emphasize relevant environmental issues and alternatives; and make EISs concise, clear, and to the point and supported by evidence that thy have made the necessary analyses. This paragraph is duplicative of language in § 1502.1, ''Purpose of environmental impact statement,'' and paragraphs (c)through (i) of § 1500.4, ''Reducing paperwork.''

Paragraph (c) of 40 CFR 1500.2, requiring agencies to integrate NEPA requirements with other planning and review procedures to run concurrently rather than consecutively, is duplicative of language in § 1502.24, ''Environmental review and consultation requirements,'' § 1501.2, ''Apply NEPA early in the process,'' § 1501.9, ''Scoping,'' and § 1500.4, ''Reducing paperwork.'' Paragraph (d) encouraging public involvement is duplicative of sections that direct agencies to provide notice and information to and seek comment from the public regarding proposed actions and environmental documents, including provisions in § 1506.6, ''Public involvement,'' § 1501.9, ''Scoping,'' and § 1503.1, ''Inviting comments and requesting information and analyses.'' [72] Paragraph (e), which required agencies to use the NEPA process to identify and assess reasonable alternatives to proposed actions that will avoid or minimize adverse effects, is duplicative of language in § 1502.1, ''Purpose of environmental impact statement,'' and paragraph (c) of § 1505.2, ''Record of decision in cases requiring environmental impact statements.''

Paragraph (f) of 40 CFR 1500.2 required agencies to use all practicable means, consistent with the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment. The rule specifically directs agencies to consider reasonable alternatives to avoid or minimize adverse environmental impacts in § 1502.1, ''Purpose of environmental impact statement.'' The final rule also provides direction to agencies about the relevant environmental information to be considered in the decision-making process, including potential adverse effects and alternatives, and expressly directs agencies to identify alternatives considered (§§ 1502.14 and 1502.16), and to state in their RODs whether they have adopted all practicable means to avoid or minimize environmental harm from the alternative selected (§ 1505.2).

3. NEPA Compliance (§ 1500.3)

CEQ proposed numerous changes and additions to § 1500.3, ''NEPA compliance,'' including the addition of paragraph headings to improve readability. In paragraph (a), ''Mandate,'' CEQ proposed to update the authorities under which it issues the regulations. CEQ adds these references, including to E.O. 13807, in the final rule. In the NPRM, CEQ proposed to add a sentence to this paragraph regarding agency NEPA procedures not imposing additional procedures or requirements beyond those set forth in the regulations. To address confusion expressed by some commenters, CEQ does not include this sentence in the final rule because it includes this requirement in § 1507.3, ''Agency NEPA procedures.''

CEQ proposed to add a new paragraph (b), ''Exhaustion,'' to summarize public comment requirements and an exhaustion requirement. Specifically, CEQ proposed in paragraph (b)(1) to require that, in a NOI to prepare an EIS, agencies request comments from interested parties on the potential effects of and potential alternatives to proposed actions, and also request that interested parties identify any relevant information, studies, or analyses of any kind concerning such effects. CEQ includes this provision in the final rule to ensure that agencies solicit and consider relevant information early in the development of an EIS.

In paragraph (b)(2) of § 1500.3, CEQ proposed to require that the EIS include a summary of all the comments received for consideration in developing the EIS. CEQ includes this provision in the final rule with some changes. For consistency with the language in § 1502.17, the final rule specifies that the draft and final EISs must include a summary of ''all alternatives, information, and analyses.'' Also, in response to comments requesting clarification on the meaning of ''public commenters,'' the final rule changes this phrase in paragraphs (b)(2) and (3) of § 1500.3 and in § 1502.17 to ''State, Tribal, and local governments and other public commenters'' for consistency with §§ 1501.9 and 1506.6 and to clarify that public commenters includes governments as well as other commenters such as organizations, associations, and individuals.

In paragraph (b)(3) of § 1500.3, CEQ proposed to require that public commenters timely submit comments on draft EISs and any information on environmental impacts or alternatives to a proposed action to ensure informed decision making by Federal agencies. CEQ further proposed to provide that comments not timely raised and information not provided shall be deemed unexhausted and forfeited. This reinforces the principle that parties may not raise claims based on issues they themselves did not raise during the public comment period. *See, e.g., Pub. Citizen,* 541 U.S. at 764–65 (finding claims forfeited because respondents had not raised particular objections to the EA in their comments); *Karst Envtl. Educ. & Prot., Inc.* v. *Fed. Highway Admin.,* 559 Fed. Appx. 421, 426–27

[72] Section 1506.6 includes detailed provisions directing agencies to facilitate public involvement, including by providing the public with notice regarding actions, holding or sponsoring public hearings, and providing notice of NEPA-related hearings, public meetings, and other opportunities for public involvement, and the availability of environmental documents. Section 1501.9 requires agencies to issue a public notice regarding proposed actions for which the agencies will be preparing an EIS and to include specific information for, and to solicit information from the public regarding such proposed actions. Section 1503 provides direction to agencies regarding inviting comments from the public and requesting information and analyses.

(6th Cir. 2014) (concluding that comments did not raise issue with ''sufficient clarity'' to alert the Federal Highway Administration to concerns); *Friends of the Norbeck* v. *U.S. Forest Serv.,* 661 F.3d 969, 974 (8th Cir. 2011) (concluding that comments were insufficient to give the Forest Service an opportunity to consider claim and that judicial review was therefore improper); *Exxon Mobil Corp.* v. *U.S. EPA,* 217 F.3d 1246, 1249 (9th Cir. 2000) (arguments not raised in comments are waived); *Ass'n of Mfrs.* v. *Dep't of the Interior,* 134 F.3d 1095, 1111 (D.C. Cir. 1998) (failure to raise argument in rulemaking constitutes failure to exhaust administrative remedies). Finally, CEQ proposed to require that the public raise any objections to the submitted alternatives, information, and analyses section within 30 days of the notice of availability of the final EIS.

The final rule includes paragraph (b)(3) with some modifications. The final rule requires State, Tribal, and local governments and other public commenters to submit comments within the comment periods provided under § 1503.1 and that comments be as specific as possible under § 1503.3. The rule specifies that comments or objections of any kind not submitted ''shall be forfeited as unexhausted'' to clarify any ambiguity about forfeiture and exhaustion. CEQ received comments opposing the proposal to require the public to raise objections to the submitted alternatives, information, and analyses section within 30 days of the notice of availability of the final EIS. The final rule does not include the proposed mandatory 30-day comment period. However, § 1506.11 retains from the 1978 regulations the 30-day waiting period prior to issuance of the ROD, subject to limited exceptions, and under § 1503.1(b), agencies may solicit comments on the final EIS if they so choose. Each commenter should put its own comments into the record as soon as practicable to ensure that the agency has adequate time to consider the commenter's input as part of the agency's decision-making process. Finally, to ensure commenters timely identify issues, CEQ expresses its intention that commenters rely on their own comments and not those submitted by other commenters in any subsequent litigation, except where otherwise provided by law.

CEQ also proposed in paragraph (b)(4) of § 1500.3 to require that the agency decision maker certify in the ROD that the agency has considered all of the alternatives, information, and analyses submitted by public commenters based on the summary in the EIS. CEQ includes this section in the final rule with some modifications. The final rule requires the decision maker, informed by the final EIS (including the public comments, summary thereof, and responses thereto) and other relevant material in the record, certify that she or he considered the alternatives, information, and analyses submitted by States, Tribes, and local governments and other public commenters. Relevant material includes both the draft and final EIS as well as any supporting materials incorporated by reference or appended to the document. The final rule does not specify the decision maker ''for the lead agency'' to account for multiple decision makers, consistent with the OFD policy.

CEQ proposed to add a new paragraph (c), ''Review of NEPA compliance,'' to § 1500.3 to reflect the development of case law since the promulgation of the CEQ regulations. Specifically, CEQ proposed to revise the sentence regarding timing of judicial review to strike references to the filing of an EIS or FONSI and replace them with the issuance of a signed ROD or the taking of another final agency action. CEQ includes this change in the final rule. Judicial review of NEPA compliance for agency actions can occur only under the APA, which requires finality. 5 U.S.C. 704. A private right of action to enforce NEPA, which is lacking, would be required to review non-final agency action. In addition, non-final agency action may not be fit for judicial review as a matter of prudential standing. *See Abbott Labs* v. *Gardner,* 387 U.S. 136, 148–49 (1967). Under the APA, judicial review does not occur until an agency has taken final agency action. *Bennett* v. *Spear,* 520 U.S. 154, 177–78 (1997) (''[T]he action must mark the 'consummation' of the agency's decision[-]making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow''' (citations omitted)). Because NEPA's procedural requirements apply to proposals for agency action, judicial review should not occur until the agency has completed its decision-making process, and there are ''direct and appreciable legal consequences.'' *Id.* at 178. Final agency action for judicial review purposes is not necessarily when the agency publishes the final EIS, issues a FONSI, or makes the determination to categorically exclude an action.

CEQ also proposed in paragraph (c) to clarify that any allegation of noncompliance be resolved as expeditiously as possible, and that agencies may structure their decision making to allow private parties to seek agency stays or provide for efficient mechanisms, such as imposition of bonds, for seeking, granting, and imposing conditions on stays. The final rule clarifies that it is CEQ's intention that any allegation of noncompliance be resolved as expeditiously as possible. The final rule also clarifies that agencies may structure their procedures consistent with their organic statutes, and as part of implementing the exhaustion provisions in paragraph (b) of § 1500.3, to include an appropriate bond or other security requirement to protect against harms associated with delays.

Consistent with their statutory authorities, agencies may impose, as appropriate, bond and security requirements or other conditions as part of their administrative processes, including administrative appeals, and a prerequisite to staying their decisions, as courts do under rule 18 of the Federal Rules of Appellate Procedure and other rules.[73] *See, e.g.,* Fed. R. App. P. 18(b); Fed. R. App. P. 8(a)(2)(E); Fed. R. Civ. P. 65(c); Fed. R. Civ. P. 62(b); Fed. R. Civ. P. 62(d). CEQ notes that there is no ''NEPA exception'' that exempts litigants bringing NEPA claims from otherwise applicable bond or security requirements or other appropriate conditions, and that some courts have imposed substantial bond requirements in NEPA cases. *See, e.g., Save Our Sonoran, Inc.* v. *Flowers,* 408 F.3d 1113, 1125–26 (9th Cir. 2005) (concluding that district court's imposition of a $50,000 bond was appropriate and supported by the record); *Stockslager* v. *Carroll Elec. Co-op Corp.,* 528 F.2d 949 (8th Cir. 1976) (concluding that district court's imposition of a $10,000 bond was appropriate).

CEQ proposed to add a new paragraph (d), ''Remedies,'' to § 1500.3. CEQ proposed to state explicitly that harm from the failure to comply with NEPA can be remedied by compliance with NEPA's procedural requirements, and that CEQ's regulations do not create a cause of action for violation of NEPA. The statute does not create any cause of action, and agencies may not create private rights of action by regulation; ''[l]ike substantive [F]ederal law itself, private rights of action to enforce [F]ederal law must be created by Congress.'' *Alexander* v. *Sandoval,* 532 U.S. 275, 286 (2001) (citing *Touche Ross*

[73] *See, e.g.,* 26 CFR 2.6 (Bureau of Indian Affairs' regulatory provision that allows a person that believes he or she may suffer a measurable and substantial financial loss as a result of the delay caused by an appeal to request that the official require the posting of a reasonable bond).

& Co. v. *Redington,* 442 U.S. 560, 578 (1979)). This is particularly relevant where, as here, the counterparty in any action to enforce NEPA would be a Federal officer or agency. *See San Carlos Apache Tribe* v. *United States,* 417 F.3d 1091, 1096–97 (9th Cir. 2005) (''[C]reating a direct private action against the federal government makes little sense in light of the administrative review scheme set out in the APA.'').

The CEQ regulations create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm. As the Supreme Court has held, the irreparable harm requirement, as a prerequisite to the issuance of preliminary or permanent injunctive relief, is neither eliminated nor diminished in NEPA cases. A showing of a NEPA violation alone does not warrant injunctive relief and does not satisfy the irreparable harm requirement. *See Monsanto Co.* v. *Geertson Seed Farms,* 561 U.S. 139, 157 (2010) (''[T]he statements quoted [from prior Ninth Circuit cases] appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted.''); *Winter,* 555 U.S. at 21–22, 31–33; *see also Amoco Prod. Co.* v. *Vill. of Gambell,* 480 U.S. 531, 544–45 (1987) (rejecting proposition that irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action). Moreover, a showing of irreparable harm in a NEPA case does not entitle a litigant to an injunction or a stay. *See Winter,* 555 U.S. at 20 (''A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an injunction is in the public interest.'') (emphasis added); *Geertson Seed Farms,* 561 U.S. at 157 (''The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation.....An injunction should issue only if the traditional four-factor test is satisfied.'').

Consistent with the Supreme Court's analysis in *Geertson Seed Farms,* agencies (as well as applicants) should give practical consideration to measures that might serve to anticipate, reduce, or eliminate possible adverse effects from a project. To the extent such measures are incorporated into an agency's ROD, they may provide grounds upon which a court, presented with an alleged violation of NEPA, might reasonably conclude that injunctive relief is not warranted because the measures prevent any irreparable harm from occurring. *See* § 1505.3. For example, regular inspections or requirements that applicants obtain third-party insurance, for example, might constitute such measures in certain circumstances. Inspections can reveal defects before they cause harm. Third-party insurers, because of their exposure to risk, have an economic incentive to conduct thorough inspections, facilitating discovery of defects. Such measures would be relevant to whether a valid claim of irreparable harm has been established.

CEQ also proposed to state that any actions to review, enjoin, vacate, stay, or alter an agency decision on the basis of an alleged NEPA violation be raised as soon as practicable to avoid or minimize any costs to agencies, applicants, or any affected third parties. As reflected in comments received in response to the ANPRM, delays have the potential to result in substantial costs. CEQ also proposed to replace the language providing that trivial violations should not give rise to an independent cause of action with language that states that minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action. Invalidating actions due to minor errors does not advance the goals of the statute and adds delays and costs. CEQ includes paragraph (d) in the final rule with a change to clarify that it is CEQ's intention that the regulations create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm. As noted above, NEPA is a procedural statute and any harm is thus reparable by providing the necessary environmental documentation in accordance with the Act and these regulations. CEQ also adds ''vacate, or otherwise'' to the types of actions that may alter a decision to address situations where there may be a nationwide or other vacatur and ''after final agency action'' to clarify when the actions should be raised.

Finally, CEQ proposed to add a new paragraph (e), ''Severability,'' to § 1500.3 to address the possibility that this rule, or portions of this rule, may be challenged in litigation. CEQ finalizes this paragraph as proposed, correcting the cross reference. As stated in the NPRM, it is CEQ's intention that the individual sections of this rule be severable from each other, and that if a court stays or invalidates any sections or portions of the regulations, this will not affect the validity of the remainder of the sections, which will continue to be operative.

4. Reducing Paperwork and Delay (§§ 1500.4 and 1500.5)

In the NPRM, CEQ proposed to reorder the paragraphs in § 1500.4, ''Reducing paperwork,'' and § 1500.5, ''Reducing delay,'' for a more logical ordering, consistent with the three levels of NEPA review. CEQ also proposed edits to §§ 1500.4 and 1500.5 for consistency with proposed edits to the cross-referenced sections. CEQ makes these proposed changes in the final rule. Additionally, the final rule revises the language in paragraphs (a) and (b) of §§ 1500.4 and 1500.5 to make the references to CEs and FONSIs consistent with the language in §§ 1501.4(a) and 1501.6(a), respectively. CEQ also proposed conforming edits to § 1500.4(c) to broaden the paragraph to include EAs by changing ''environmental impact statements'' to ''environmental documents'' and changing ''setting'' to ''meeting'' since page limits would be required for both EAs and EISs. CEQ makes these changes in the final rule and corrects the cross-reference. CEQ revises paragraph (h) of § 1500.4 to add ''*e.g.*'' to the citations to clarify that these are just examples of the useful portions of EISs and to correct the cross-reference to background material from § 1502.16 to § 1502.1. CEQ revises the citations in paragraph (k) of § 1500.4 to make them sequential. Finally, CEQ revises paragraph (d) of § 1500.5 for clarity.

5. Agency Authority (§ 1500.6)

CEQ proposed to add a savings clause to § 1500.6, ''Agency authority,'' to clarify that the CEQ regulations do not limit an agency's other authorities or legal responsibilities. This clarification is consistent with section 104 of NEPA (42 U.S.C. 4334), section 2(g) of E.O. 11514, and the 1978 regulations, but acknowledges the possibility of different statutory authorities that may set forth different requirements, such as timeframes. In the final rule, CEQ makes the proposed changes and clarifies further that agencies interpret the provisions of the Act as a mandate to view the agency's policies and missions in the light of the Act's national environmental objectives, to the extent NEPA is consistent with the agency's existing authority. This is consistent with E.O. 11514, which provides that Federal agencies shall ''[i]n carrying out their responsibilities under the Act and this Order, comply with the [CEQ regulations] except where such compliance would be inconsistent with statutory requirements.'' E.O. 11514, as amended by E.O. 11991, sec. 2(g). CEQ also proposed to clarify that compliance

with NEPA means the Act ''as interpreted'' by the CEQ regulations. CEQ makes this change in the final rule in § 1500.6, as well as in §§ 1502.2(d) and 1502.9(b), to clarify that agencies should implement the statute through the framework established in these regulations. Finally, CEQ revises the sentence explaining the meaning of the phrase ''to the fullest extent possible'' in section 102, to replace ''unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible'' with ''consistent with § 1501.1.'' As discussed in section II.C.1, § 1501.1 sets forth threshold considerations for assessing whether NEPA applies or is otherwise fulfilled, including considerations related to other statutes with which agencies must comply.

C. Revisions to NEPA and Agency Planning (Part 1501)

CEQ proposed significant changes to modernize and clarify part 1501. CEQ proposed to replace the current 40 CFR 1501.1, ''Purpose,'' because it is unnecessary and duplicative, with a new section, ''NEPA threshold applicability analysis,'' to address threshold considerations of NEPA applicability. CEQ proposed to add additional sections to address the level of NEPA review and CEs. CEQ further proposed to consolidate and clarify provisions on EAs and FONSIs, and relocate to part 1501 from part 1502 the provisions on tiering and incorporation by reference. CEQ also proposed to set presumptive time limits for the completion of NEPA reviews, and clarify the roles of lead and cooperating agencies to further the OFD policy and encourage more efficient and timely NEPA reviews. CEQ makes many of these changes in the final rule with modifications as discussed further in this section.

1. NEPA Thresholds (§ 1501.1)

Since the enactment of NEPA, courts have examined the applicability of NEPA to proposed agency activities and decisions, based on a variety of considerations. Courts have found that NEPA is inapplicable when an agency's statutory obligations clearly or fundamentally conflict with NEPA compliance; when Congress has established requirements under another statute that displace NEPA compliance in some fashion; when an agency is carrying out a non-discretionary duty or obligation (in whole or in part); or when environmental review and public participation procedures under another statute satisfy the requirements (*i.e.,* are functionally equivalent) of NEPA.

CEQ proposed a new § 1501.1 to provide a series of considerations to assist agencies in a threshold analysis for determining whether NEPA applies to a proposed activity or whether NEPA is satisfied through another mechanism. CEQ proposed to title this section ''NEPA threshold applicability analysis'' in the NPRM. CEQ includes this provision in the final rule at § 1501.1, ''NEPA thresholds.'' This section recognizes that the application of NEPA by Congress and the courts has evolved over the last four decades in light of numerous other statutory requirements implemented by Federal agencies. CEQ reorders these considerations in the final rule and adds a new consideration to paragraph (a)(1)—whether another statute expressly exempts a proposed activity or decision from NEPA. *See, e.g.,* 15 U.S.C. 793(c)(1) (exempting Environmental Protection Agency (EPA) actions under the Clean Air Act); 33 U.S.C. 1371(c)(1) (exempting certain EPA actions under the Clean Water Act); 42 U.S.C. 5159 (exempting certain actions taken or assistance provided within a Presidentially declared emergency or disaster area); and 16 U.S.C. 3636(a) (exempting regulation of Pacific salmon fishing).

The second consideration in paragraph (a)(2) is whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute. *See, e.g., Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n,* 426 U.S. 776, 791 (1976) (concluding that the Secretary of Housing and Urban Development could not comply with NEPA's EIS requirement because it conflicted with requirements of the Interstate Land Sales Full Disclosure Act). The third consideration in paragraph (a)(3) is whether compliance with NEPA would be inconsistent with congressional intent expressed in another statute. *See, e.g., Douglas County* v. *Babbitt,* 48 F.3d 1495, 1503 (9th Cir. 1995) (holding that NEPA was displaced by the Endangered Species Act's procedural requirements for designating critical habitat); and *Merrell* v. *Thomas,* 807 F.2d 776, 778–80 (9th Cir. 1986) (holding that NEPA did not apply to the EPA's registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

The fourth and fifth considerations in paragraphs (a)(4) and (5) are whether the proposed activity or decision meets the definition of a major Federal action generally and whether the proposed activity or decision does not meet the definition because it is non-discretionary such that the agency lacks authority to consider environmental effects as part of its decision-making process. *See, e.g., Pub. Citizen,* 541 U.S. at 768–70 (concluding that, because the Federal Motor Carrier Safety Administration lacked discretion to prevent the entry of Mexican trucks into the United States, the agency did not need to consider under NEPA the environmental effects of Mexican trucks' cross-border operations that the President authorized); *Nat'l Wildlife Fed'n* v. *Sec'y of the U.S. Dep't. of Transp.,* 2020 U.S. App. LEXIS 17723, at *15–18 (6th Cir. June 5, 2010) (applying *Public Citizen* and finding NEPA not applicable as EPA lacked discretion to reject Clean Water Act oil spill response plans that satisfied enumerated criteria); *Citizens Against Rails-To-Trails* v. *Surface Transp. Bd.,* 267 F.3d 1144, 1152–54 (D.C. Cir. 2001) (concluding that because the Surface Transportation Board lacked significant discretion regarding issuance of a certificate of interim trail use under the National Trails System Act, NEPA was not applicable); *South Dakota* v. *Andrus,* 614 F.2d 1190, 1193–95 (8th Cir. 1980) (concluding that the granting of a mineral patent for a mining claim was a non-discretionary, ministerial act and non-discretionary acts should be exempt from NEPA). Consistent with *Public Citizen,* 541 U.S. at 768–70, NEPA applies to the portion of an agency decision that is discretionary. In *Public Citizen,* the Supreme Court considered whether the Federal Motor Carrier Safety Administration was required to consider the effects of a non-discretionary action in its NEPA document and concluded that it was not required to do so because it had no authority to prevent the cross-border entry of Mexican motor carriers, which was the result of presidential action. *Id.*

Finally, the sixth consideration in paragraph (a)(6) is whether the proposed action is an action for which another statute's requirements serve the function of agency compliance with NEPA. *See, e.g., Envtl. Def. Fund, Inc.* v. *U.S. EPA,* 489 F.2d 1247, 1256–57 (D.C. Cir. 1973) (concluding that the substantive and procedural standards of FIFRA were functionally equivalent to NEPA and therefore formal compliance was not necessary); *W. Neb. Res. Council* v. *U.S. EPA,* 943 F.2d 867, 871–72 (8th Cir. 1991) (finding that the procedures of the Safe Drinking Water Act were functionally equivalent to those required by NEPA); *Cellular Phone Taskforce* v. *Fed. Commc'ns Comm'n,* 205 F.3d 82, 94–95 (2d Cir. 2000) (concluding that the procedures followed by the Federal Communications Commission were

functionally compliant with EA and FONSI requirements under NEPA). Paragraph (b) of § 1501.1 clarifies that agencies can make this determination in their agency NEPA procedures in accordance with § 1507.3(d) or on a case-by-case basis. The final rule adds a new paragraph (b)(1) to state that agencies may request assistance from CEQ in making a case-by-case determination under this section, and a new paragraph (b)(2) to require agencies to consult with other Federal agencies for their concurrence when making a determination where more than one Federal agency administers the statute (*e.g.,* the Endangered Species Act (ESA)). Agencies may document these consultations, as appropriate. Agencies will only apply the thresholds in this section after consideration on a case-by-case basis, or after agencies have determined whether and how to incorporate them into their own agency NEPA procedures.

Some agencies already include information related to the applicability of NEPA to their actions in their agency NEPA procedures. For example, EPA's NEPA procedures include an applicability provision that explains which EPA actions NEPA does not apply to, including actions under the Clean Air Act and certain actions under the Clean Water Act. *See* 40 CFR 6.101. The final rule codifies the agency practice of including this information in agency NEPA procedures but also provides agencies' flexibility to make case-by-case determinations as needed.

2. Apply NEPA Early in the Process (§ 1501.2)

CEQ proposed to amend § 1501.2, ''Apply NEPA early in the process,'' designating the introductory paragraph as paragraph (a) and changing ''shall'' to ''should'' and ''possible'' to ''reasonable.'' CEQ makes these changes in the final rule. Agencies need the discretion to structure the timing of their NEPA processes to align with their decision-making processes, consistent with their statutory authorities. Agencies also need flexibility to determine the appropriate time to start the NEPA process, based on the context of the particular proposed action and governed by the rule of reason, so that the NEPA analysis meaningfully informs the agency's decision. The appropriate time to begin the NEPA process is dependent on when the agency has sufficient information, and on how it can most effectively integrate the NEPA review into the agency's decision-making process. Further, some courts have viewed this provision as a legally enforceable standard, rather than an opportunity for agencies to integrate NEPA into their decision-making programs and processes. *See, e.g., N.M. ex rel. Richardson* v. *Bureau of Land Mgmt.,* 565 F.3d 683 (10th Cir. 2009); *Metcalf* v. *Daley,* 214 F.3d 1135 (9th Cir. 2000). As discussed above, only final agency action is subject to judicial review under the APA. CEQ's view is that agencies should have discretion with respect to timing, consistent with the regulatory provisions in §§ 1501.11 and 1502.4 for deferring NEPA analysis to appropriate points in the decision-making process. As noted in the NPRM, this change is consistent with CEQ guidance that agencies should ''concentrate on relevant environmental analysis'' in their EISs rather than ''produc[ing] an encyclopedia of all applicable information.'' Timely Environmental Reviews Guidance, *supra* note 29; *see also* §§ 1500.4(b), 1502.2(a). Therefore, CEQ makes these changes to clarify that agencies have discretion to structure their NEPA processes in accordance with the rule of reason. CEQ also proposed to change ''possible'' to ''reasonable'' in paragraph (b)(4)(iii) and ''shall'' to ''should'' in the introductory paragraph of § 1502.5 for consistency with the changes to § 1501.2. CEQ makes these changes in the final rule.

CEQ also proposed to change ''planning and decisions reflect environmental values'' to ''agencies consider environmental impacts in their planning and decisions'' in paragraph (a). CEQ makes this change in the final rule because ''consider environmental impacts'' provides more explicit direction to agencies and is more consistent with the Act and the CEQ regulations.

CEQ proposed to redesignate the remaining paragraphs in § 1501.2 to list out other general requirements for agencies. In paragraph (b)(1), the final rule removes the direct quote of NEPA consistent with the **Federal Register's** requirements for the Code of Federal Regualtions. In paragraph (b)(2), CEQ proposed to clarify that agencies should consider economic and technical analyses along with environmental effects. This change is consistent with section 102(2)(B) of NEPA, which directs agencies, in consultation with CEQ, to identify and develop methods and procedures to ensure environmental amenities and values are considered along with economic and technical considerations in decision making. CEQ makes this change in the final rule and revises the second sentence in this paragraph to qualify that agencies must review and publish environmental documents and appropriate analyses at the same time as other planning documents ''whenever practicable.'' CEQ recognizes that it is not always practicable to publish such documents at the same time because it can delay publication of one or the other. Finally, CEQ proposed to amend paragraph (b)(4)(ii) to change ''agencies'' to ''governments'' consistent with and in support of government-to-government consultation pursuant to E.O. 13175 [74] and E.O. 13132, ''Federalism.'' [75] CEQ makes these changes in the final rule.

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

As discussed in the NPRM, NEPA requires a ''detailed statement'' for ''major Federal actions significantly affecting the quality of the human environment.'' 42 U.S.C. 4332(2)(C). To determine whether an action requires such a detailed statement, the 1978 regulations provided three levels of review for Federal agencies to assess proposals for agency action. Specifically, the CEQ regulations allow agencies to review expeditiously those actions that normally do not have significant effects by using CEs or, for actions that are not likely to have significant effects, by preparing EAs. By using CEs and EAs whenever appropriate, agencies then can focus their limited resources on those actions that are likely to have significant effects and require the ''detailed statement,'' or EIS, required by NEPA.

While the 1978 CEQ regulations provided for these three levels of NEPA review, they do not clearly set out the decisional framework by which agencies should assess their proposed actions and select the appropriate level of review. To provide this direction and clarity, the NPRM proposed to add a new section at § 1501.3, ''Determine the appropriate level of NEPA review.'' The proposal described the three levels of NEPA review and the basis upon which an agency makes a determination regarding the appropriate level of review for a proposed action. CEQ includes the proposal in the final rule at paragraph (a) of § 1501.3.

CEQ proposed to address the consideration of significance in paragraph (b) since it is central to determining the appropriate level of review. CEQ proposed to move the language from 40 CFR 1508.27, ''Significantly,'' since it did not contain a definition, but rather set forth factors for considering whether an effect is significant, to paragraph (b). CEQ also proposed to eliminate most of the

[74] *Supra* note 69.

[75] 64 FR 43255 (Aug. 10, 1999).

factors in favor of a simpler, more flexible approach for agencies to assess significance. Specifically, CEQ proposed to change ''context'' to ''potentially affected environment'' and ''intensity'' to ''degree'' to provide greater clarity as to what agencies should consider in assessing potential significant effects. The phrase ''potentially affected environment'' relates more closely to physical, ecological, and socio-economic aspects than ''context.'' The final rule reorganizes several factors formerly categorized under ''intensity'' to clarify further this distinction. The final rule uses the term ''degree'' because some effects may not necessarily be of an intense or severe nature, but nonetheless should be considered when determining significance. While 40 CFR 1508.27 used several different words to explain what was meant by ''intensity,'' it also used ''degree'' numerous times. Therefore, the consistent use of ''degree'' throughout is clearer. In the final rule, CEQ includes these proposed changes in paragraph (b) with some additional revisions in response to comments. CEQ clarifies in paragraph (b)(1) that agencies ''should'' (rather than ''may'') consider the affected area specific to the proposed action, consistent with the construction of paragraph (b)(2), and the affected area's resources. The final rule includes one example, listed species and designated critical habitat under the Endangered Species Act, but this could include any type of resource such as historic, cultural, or park lands. The final rule also modifies the example of significance varying with the setting, because there was some misunderstanding of the proposed change from ''world'' to ''Nation.'' This sentence merely serves as an example. Consistent with the NPRM, paragraph (b)(2) addresses considerations of the degree of effects. CEQ moves short- and long-term effects from ''affected environment'' in (b)(1) to ''degree'' in paragraph (b)(2)(i). CEQ proposed to exclude consideration of controversy (40 CFR 1508.27(b)(4)) because the extent to which effects may be controversial is subjective and is not dispositive of effects' significance. Further, courts have interpreted controversy to mean scientific controversy, which the final rule addresses within the definition of effects, as the strength of the science informs whether an effect is reasonably foreseeable. The controversial nature of a project is not relevant to assessing its significance.

Additionally, CEQ proposed to remove the reference in 40 CFR 1508.27(b)(7) to ''[s]ignificance cannot be avoided by terming an action temporary or by breaking it down into small component parts'' because this is addressed in the criteria for scope in §§ 1501.9(e) and 1502.4(a), which would provide that agencies evaluate in a single EIS proposals or parts of proposals that are related closely enough to be, in effect, a single course of action. Commenters noted that §§ 1501.9 and 1502.4 are applicable only to EISs. Therefore, in the final rule CEQ includes a sentence in paragraph (b) stating that agencies should consider connected actions when determining the significance of the effects of the proposed action.

4. Categorical Exclusions (§ 1501.4)

Under the 1978 regulations, agencies could categorically exclude actions from detailed review where the agency has found in its agency NEPA procedures that the action normally would not have significant effects. Over the past 4 decades, Federal agencies have developed more than 2,000 CEs.[76] CEQ estimates that each year, Federal agencies apply CEs to approximately 100,000 Federal agency actions that typically require little or no documentation.[77] While CEs are the most commonly used level of NEPA review, CEQ has addressed CE development and implementation in only one comprehensive guidance document, *see* CE Guidance, *supra* note 29, and the 1978 regulations did not address CEs in detail.

In response to the ANPRM, many commenters requested that CEQ update the NEPA regulations to provide more detailed direction on the application of CEs. To provide greater clarity, CEQ proposed to add a new section on CEs in proposed § 1501.4, ''Categorical exclusions,'' to address in more detail the process by which an agency considers whether a proposed action is categorically excluded under NEPA.

Proposed paragraph (a) stated that agencies identify CEs in their NEPA procedures. CEQ adds this paragraph to the final rule, reiterating the requirement in § 1507.3(e)(2)(ii) that agencies establish CEs in their agency NEPA procedures. The NPRM proposed in paragraph (b) to set forth the requirement to consider extraordinary circumstances once an agency determines that a CE covers a proposed action, consistent with the current requirement in 40 CFR 1508.4. CEQ includes this provision in the final rule, changing the language from passive to active voice. CEQ proposed in paragraph (b)(1) to provide that, when extraordinary circumstances are present, agencies may consider whether mitigating circumstances, such as the design of the proposed action to avoid effects that create extraordinary circumstances, are sufficient to allow the proposed action to be categorically excluded. CEQ includes this paragraph in the final rule, but revises it to address confusion over whether CEQ is creating a ''mitigated CE.'' In the final rule, paragraph (b)(1) provides that an agency can categorically exclude a proposed action when an environmental resource or condition identified as a potential extraordinary circumstance is present if the agency determines that there are ''circumstances that lessen the impacts'' or other conditions sufficient to avoid significant effects. This paragraph clarifies that agencies' extraordinary circumstances criteria are not intended to necessarily preclude the application of a CE merely because a listed factor may be present or implicated. Courts have rejected a ''mere presence'' test for CEs. *Sierra Club* v. *U.S. Forest Serv.,* 828 F.3d 402 (6th Cir. 2016); *Sierra Club* v. *Bosworth,* 510 F.3d 1016 (9th Cir. 2007); *Utah Envtl. Cong.* v. *Bosworth,* 443 F.3d 732 (10th Cir. 2006); *Sw. Ctr. for Biological Diversity* v. *U.S. Forest Serv.,* 100 F.3d 1443, 1450 (9th Cir. 1996); *cf. Rhodes* v. *Johnson,* 153 F.3d 785 (7th Cir. 1998). Instead, the agency may consider in light of the extraordinary circumstances criteria, whether the proposed action would take place in such a way that it would not have significant effects, or whether the agency could modify the proposed action to avoid the extraordinary circumstances so that the action remains eligible for categorical exclusion. While this reflects current practice for some agencies,[78] this revision would assist agencies as they consider whether to categorically exclude an action that would otherwise be considered in an EA and FONSI.

Finally, CEQ proposed paragraph (b)(2) to address agencies' obligation to prepare an EA or EIS, as appropriate, if the agency cannot categorically exclude

[76] *See* Council on Environmental Quality, List of Federal Agency Categorical Exclusions (June 18, 2020), *https://ceq.doe.gov/nepa-practice/categorical-exclusions.html.*

[77] *See, e.g.,* Council on Environmental Quality, The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects (Nov. 2, 2011), *https://ceq.doe.gov/docs/ceq-reports/nov2011/CEQ_ARRA_NEPA_Report_Nov_2011.pdf.*

[78] *See, e.g.,* Forest Service categorical exclusions, 36 CFR 220.6(b)(2); surface transportation categorical exclusions, 23 CFR 771.116–771.118.

a proposed action. CEQ includes this provision in the final rule revising the language to active voice and making it consistent with the format of paragraph (b).

CEQ invited comment on the proposed revisions and asked whether it should address any other aspects of CEs in its regulations. CEQ also invited comment on whether it should establish government-wide CEs in its regulations to address routine administrative activities, for example, internal orders or directives regarding agency operations, procurement of office supplies and travel, and rulemakings to establish administrative processes such as those established under the Freedom of Information Act or Privacy Act. After considering the comments, as discussed in the Final Rule Response to Comments, CEQ is not including any additional provisions on CEs in the final rule.

5. Environmental Assessments (§ 1501.5)

Under the 1978 regulations, when an agency has not categorically excluded a proposed action, the agency can prepare an EA to document its effects analysis. If the analysis in the EA demonstrates that the action's effects would not be significant, the agency documents its reasoning in a FONSI, which completes the NEPA process; otherwise, the agency uses the EA to help prepare an EIS. CEQ estimates that Federal agencies prepare over 10,000 EAs each year.[79]

CEQ proposed to consolidate the requirements for EAs that are scattered throughout the 1978 regulations into a new § 1501.5, ''Environmental assessments.'' CEQ proposed to revise paragraph (a) to state when agencies are required to prepare EAs. CEQ proposed minor clarifying edits to paragraph (b), which states that agencies may prepare an EA to assist in agency planning and decision making. The NPRM proposed to move the operative language regarding the requirements for an EA from the definition of EA in 40 CFR 1508.9 to paragraph (c). CEQ makes these proposed changes in the final rule.

Under the final rule, the format for an EA is flexible and responsive to agency decision-making needs and the circumstances of the particular proposal for agency action. Requirements for documenting the proposed action and alternatives in an EA continue to be more limited than EIS requirements. An agency must briefly describe the need for the proposed action by describing the existing conditions, projected future conditions, and statutory obligations and authorities that may relate to the proposed agency action with cross-references to supporting documents. The final rule continues to require agencies to describe briefly the proposed action and any alternatives it is considering that would meet the need of the proposed agency action. For actions to protect or restore the environment, without unresolved conflicts concerning alternative uses of available resources, CEQ expects agencies to examine a narrower range of alternatives to the proposed action. When the action may have significant impacts, the agency should consider reasonable alternatives that would avoid those impacts or otherwise mitigate those impacts to less than significant levels.

An agency does not need to include a detailed discussion of each alternative in an EA, nor does it need to include any detailed discussion of alternatives that it eliminated from study. While agencies have discretion to include more information in their EAs than is required to determine whether to prepare an EIS or a FONSI, they should carefully consider their reasons and have a clear rationale for doing so. Agencies should focus on analyzing material effects and alternatives, rather than marginal details that may unnecessarily delay the environmental review process.

Under the final rule, an agency must describe the environmental impacts of its proposed action and alternatives, providing enough information to support a decision to prepare either a FONSI or an EIS. The EA should focus on whether the proposed action (including mitigation) would ''significantly'' affect the quality of the human environment and tailor the length of the discussion to the relevant effects. The agency may contrast the impacts of the proposed action and alternatives with the current and expected future conditions of the affected environment in the absence of the action, which constitutes consideration of a no-action alternative.

Under the final rule, agencies should continue to list persons, relevant agencies, and applicants involved in preparing the EA to document agency compliance with the requirement to involve the public in preparing EAs to the extent practicable, consistent with paragraph (e). This may include incorporation by reference of records related to compliance with other environmental laws such as the National Historic Preservation Act, Clean Water Act, Endangered Species Act, or Clean Air Act.

CEQ adds a new paragraph (d) to the final rule to move the language from 40 CFR 1502.5(b) regarding when to begin preparing an EA that is required for an application to the agency.[80] Agencies may specify in their NEPA procedures when an application is complete such that it can commence the NEPA process. While the NPRM did not propose this change, the move is consistent with CEQ's proposal to consolidate EA requirements in § 1501.5.

The final rule continues to provide that agencies may prepare EAs by and with other agencies, applicants, and the public. Modern information technology can help facilitate this collaborative EA preparation, allowing the agency to make a coordinated but independent evaluation of the environmental issues and assume responsibility for the scope and content of the EA. CEQ proposed to move the public involvement requirements for EAs from the current 40 CFR 1501.4(b) to § 1501.5 and change ''environmental'' to ''relevant'' agencies to include all agencies that may contribute information that is relevant to the development of an EA. CEQ makes these changes in paragraph (e) in the final rule. CEQ also adds to and reorders the list to ''the public, State, Tribal, and local governments, relevant agencies, and any applicants,'' to address some confusion by public commenters that interpreted relevant to modify the public and applicants. In addition, this revision acknowledges that there will not be an applicant in all instances. Consistent with the 1978 regulations, the final rule does not specifically require publication of a draft EA for public review and comment, but continues to require agencies to reasonably involve the public prior to completion of the EA, so that they may provide meaningful input on those subject areas that the agency must consider in preparing the EA. Depending on the circumstances, the agency could provide adequate information through public meetings or by a detailed scoping notice, for example. There is no single correct approach for public involvement. Rather, agencies should consider the circumstances and have discretion to conduct public involvement tailored to the interested public, to available means of communications to reach the interested and affected parties, and to

[79] *See, e.g.,* Council on Environmental Quality, Fourth Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, Attachment A (Oct. 4, 2016), *https://ceq.doe.gov/docs/ceq-reports/Attachment-A-Fourth-Cooperating-Agency-Report_Oct2016.pdf.*

[80] CEQ also retains the statement in § 1502.5(b), as proposed, with respect to EISs.

the particular circumstances of each proposed action.

The NPRM proposed to establish a presumptive 75-page limit for EAs, but allow a senior agency official to approve a longer length and establish a new page limit in writing. CEQ adds this new requirement at paragraph (f) in the final rule. As noted in the NPRM, while Question 36a of the Forty Questions, *supra* note 2, stated that EAs should be approximately 10 to 15 pages, in practice, such assessments are often longer to address compliance with other applicable laws, and to document the effects of mitigation to support a FONSI. To achieve the presumptive 75-page limit, agencies should write all NEPA environmental documents in plain language, follow a clear format, and emphasize important impact analyses and relevant information necessary for those analyses, rather than providing extensive background material. An EA should have clear and concise conclusions and may incorporate by reference data, survey results, inventories, and other information that support these conclusions, so long as this information is reasonably available to the public.

The presumptive EA page limit promotes more readable documents and provides agencies flexibility to prepare longer documents, where necessary, to support the agency's analysis. This presumptive page limit is consistent with CEQ's guidance on EAs, which advises agencies to avoid preparing lengthy EAs except in unusual cases where a proposal is so complex that a concise document cannot meet the goals of an EA and where it is extremely difficult to determine whether the proposal could cause significant effects. Page limits will encourage agencies to identify the relevant issues, focus on significant environmental impacts, and prepare concise readable documents that will inform decision makers as well as the public. Voluminous, unfocused environmental documents do not advance the goals of informed decision making or protection of the environment.

CEQ proposed to add a new paragraph (f) to § 1501.5 to clarify that agencies also may apply, as appropriate, certain provisions in part 1502 regarding incomplete or unavailable information, methodology and scientific accuracy, and environmental review and consultation requirements to EAs. CEQ includes this new paragraph at § 1501.5(g) in the final rule.

In addition to the new § 1501.5, CEQ incorporates reference to EAs in other sections of the regulations to codify existing agency practice where it would make the NEPA process more efficient and effective. As discussed in section II.C.9, CEQ makes a presumptive time limit applicable to EAs in § 1501.10. Further, for some agencies, it is a common practice to have lead and cooperating agencies coordinate in the preparation of EAs where more than one agency may have an action on a proposal; therefore, CEQ adds EAs to §§ 1501.7 and 1501.8, as discussed in section II.C.7. Finally, as discussed in section II.C.10, CEQ proposed to add EAs to § 1501.11, ''Tiering,'' to codify current agency practice of using EAs where the effects of a proposed agency action are not likely to be significant. These include program decisions that may facilitate later site-specific EISs as well as the typical use of EAs as a second-tier document tiered from an EIS. CEQ makes these changes in the final rule.

6. Findings of No Significant Impact (§ 1501.6)

When an agency determines in its EA that an EIS is not required, it typically prepares a FONSI. The FONSI reflects that the agency has engaged in the necessary review of environmental impacts under NEPA. The FONSI shows that the agency examined the relevant data and explained the agency findings by providing a rational connection between the facts presented in the EA and the conclusions drawn in the finding. Any finding should clearly identify the facts found and the conclusions drawn by the agency based on those facts.

In response to the ANPRM, CEQ received comments requesting that CEQ update its regulations to consolidate provisions and provide more detailed requirements for FONSIs. CEQ proposed to consolidate the operative language of 40 CFR 1508.13, ''Finding of no significant impact'' with 40 CFR 1501.4, ''Whether to prepare an environmental impact statement,'' in the proposed § 1501.6, ''Findings of no significant impact.'' CEQ proposed to strike paragraph (a) as the requirements in that paragraph are addressed in § 1507.3(d)(2) (§ 1507.3(e)(2) in the final rule). As noted in section II.C.5, CEQ proposed to move 40 CFR 1501.4(b) to § 1501.5, ''Environmental assessments.'' Similarly, CEQ proposed to strike 40 CFR 1501.4(d), because § 1501.9, ''Scoping,'' addresses this requirement. CEQ makes these changes in the final rule.

CEQ proposed to make 40 CFR 1501.4(e) the new § 1501.6(a), and revise the language to clarify that an agency must prepare a FONSI when it determines that a proposed action will not have significant effects based on the analysis in the EA, consistent with the definition of FONSI. The proposed rule had erroneously included the standard for preparing an EA—''is not likely to have significant effects.'' CEQ proposed to clarify in paragraph (a)(2) that the circumstances listed in paragraphs (a)(2)(i) and (ii) are the situations where the agency must make a FONSI available for public review. CEQ makes these changes in the final rule.

CEQ proposed to move the operative requirement that a FONSI include the EA or a summary from the definition of FONSI in 40 CFR 1508.13 to a new paragraph (b). CEQ also proposed to change the requirement that the FONSI include a summary of the EA to ''incorporate it by reference.'' Consistent with § 1501.12, in order to incorporate the EA by reference, the agency would need to briefly summarize it. Making this change ensures that the EA is available to the public. CEQ makes these changes in the final rule.

Finally, CEQ proposed a new paragraph (c) to address mitigation, which CEQ includes in the final rule. The first sentence addresses mitigation generally in a FONSI, requiring agencies to state the authority for any mitigation adopted and any applicable monitoring or enforcement provisions. This sentence applies to all FONSIs. CEQ omits the ''means of'' mitigation from the final rule because it is unnecessary and many commenters misunderstood its meaning or found it confusing. The second sentence codifies the practice of mitigated FONSIs, consistent with CEQ's Mitigation Guidance.[81] This provision requires the agency to identify the enforceable mitigation requirements and commitments, which are those mitigation requirements and commitments needed to reduce the effects below the level of significance.[82] When preparing an EA, many agencies develop, consider, and commit to mitigation measures to avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts that would otherwise require preparation of an EIS. An agency can commit to mitigation

[81] The Mitigation Guidance, *supra* note 29, amended and supplemented the Forty Questions, *supra* note 2, specifically withdrawing Question 39 insofar as it suggests that mitigation measures developed during scoping or in an EA ''[do] not obviate the need for an EIS.''

[82] As discussed in sections I.B.1 and II.B, NEPA is a procedural statute and does not require adoption of a mitigation plan. However, agencies may consider mitigation measures that would avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts and may require mitigation pursuant to substantive statutes.

measures for a mitigated FONSI when it can ensure that the mitigation will be performed, when the agency expects that resources will be available, and when the agency has sufficient legal authorities to ensure implementation of the proposed mitigation measures. CEQ does not intend this codification of CEQ guidance to create a different standard for analysis of mitigation for a ''mitigated FONSI,'' but to provide clarity regarding the use of FONSIs.

7. Lead and Cooperating Agencies (§§ 1501.7 and 1501.8)

The 1978 CEQ regulations created the roles of lead agency and cooperating agencies for NEPA reviews, which are critical for actions, such as non-Federal projects, requiring the approval or authorization of multiple agencies. Agencies need to coordinate and synchronize their NEPA processes to ensure an efficient environmental review that does not cause delays. In recent years, Congress and several administrations have worked to establish a more synchronized procedure for multi-agency NEPA reviews and related authorizations, including through the development of expedited procedures such as the section 139 process and FAST–41. In response to the ANPRM, CEQ received comments requesting that CEQ update its regulations to clarify the roles of lead and cooperating agencies.

CEQ proposed a number of modifications to § 1501.7, ''Lead agencies,'' and § 1501.8, ''Cooperating agencies,'' (40 CFR 1501.5 and 1501.6, respectively, in the 1978 regulations) to improve interagency coordination, make development of NEPA documents more efficient, and facilitate implementation of the OFD policy. As stated in the NPRM, CEQ intends these modifications to improve the efficiency and outcomes of the NEPA process—including cost reduction, improved relationships, and better outcomes that avoid litigation—by promoting environmental collaboration.[83] These modifications are consistent with Questions 14a and 14c of the Forty Questions, *supra* note 2. CEQ proposed to apply §§ 1501.7 and 1501.8 to EAs as well as EISs consistent with agency practice. CEQ makes these changes in the final rule, but clarifies that the provisions apply to ''complex'' EAs and not routine EAs where involving multiple agencies could slow down an already efficient and effective process.[84]

CEQ proposed to clarify in § 1501.7(d) that requests for lead agency designations should be sent in writing to the senior agency officials of the potential lead agencies. CEQ makes this change in the final rule. CEQ did not propose any changes to paragraphs (e) and (f) of § 1501.7, but makes clarifying edits by reorganizing phrases and changing the language to active voice in the final rule.

Consistent with the OFD policy to ensure coordinated and timely reviews, CEQ proposed to add a new paragraph (g) to § 1501.7 to require that Federal agencies evaluate proposals involving multiple Federal agencies in a single EIS and issue a joint ROD [85] or single EA and joint FONSI when practicable. CEQ adds this paragraph to the final rule with edits to the EA sentence to make the language consistent with the EIS sentence.

CEQ proposed to move language from the cooperating agency provision, 40 CFR 1501.6(a), that addresses the lead agency's responsibilities with respect to cooperating agencies to proposed paragraph (h) in § 1501.7 so that all of the lead agency's responsibilities are in a single section. CEQ also proposed to clarify in paragraph (h)(4) that the lead agency is responsible for determining the purpose and need, and alternatives in consultation with any cooperating agencies.[86] CEQ makes this move and addition in the final rule. In response to comments, the final rule eliminates the phrase ''consistent with its responsibility as lead agency'' in paragraph (h)(2) because it is non-specific and could cause agencies to reject germane and informative scientific research.

CEQ proposed new paragraphs (i) and (j) in § 1501.7, and (b)(6) and (7) in § 1501.8, to require development of and adherence to a schedule for the environmental review of and any authorizations required for a proposed action, and resolution of disputes and other issues that may cause delays in the schedule. CEQ includes these provisions in the final rule with minor edits for clarity. These provisions are consistent with current practices at agencies that have adopted elevation procedures pursuant to various statutes and directives, including 23 U.S.C. 139, FAST–41, and E.O. 13807. In response to comments, CEQ includes a new paragraph (b)(8) in § 1501.8 requiring cooperating agencies to jointly issue environmental documents with the lead agency, to the maximum extent practicable. This addition is consistent with the goal of interagency cooperation and efficiency.

CEQ proposed to move the operative language that State, Tribal, and local agencies may serve as cooperating agencies from the definition of cooperating agency (40 CFR 1508.5) to paragraph (a) of § 1501.8. Upon the request of the lead agency, non-Federal agencies should participate in the environmental review process to ensure early collaboration on proposed actions where such entities have jurisdiction by law or special expertise. CEQ also proposed in paragraph (a) to codify current practice to allow a Federal agency to appeal to CEQ a lead agency's denial of a request to serve as cooperating agency. Resolving disputes among agencies early in the process furthers the OFD policy and the goal of more efficient and timely NEPA reviews. CEQ makes these changes in the final rule with minor edits for clarity. Finally, CEQ proposed clarifications and grammatical edits throughout § 1501.8. CEQ makes these changes in the final rule.

8. Scoping (§ 1501.9)

In response to the ANPRM, CEQ received comments requesting that CEQ update its regulations related to scoping,

[83] *See, e.g.,* Federal Forum on Environmental Collaboration and Conflict Resolution, Environmental Collaboration and Conflict Resolution (ECCR): Enhancing Agency Efficiency and Making Government Accountable to the People (May 2, 2018), *https://ceq.doe.gov/docs/nepa-practice/ECCR_Benefits_Recommendations_Report_%205-02-018.pdf.*

[84] This is consistent with CEQ's reports on cooperating agencies, which have shown that use of cooperating agencies for EAs has remained low. Council on Environmental Quality, Attachment A, The Fourth Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (NEPA) 1 (Oct. 2016), *https://ceq.doe.gov/docs/ceq-reports/Attachment-A-Fourth-Cooperating-Agency-Report_Oct2016.pdf* (percentage of EAs with cooperating agencies was 6.8 percent for Fiscal Years 2012 through 2015); *see also* Council on Environmental Quality, Attachment A, The Second Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (NEPA) 2 (May 2012), *https://ceq.doe.gov/docs/ceq-reports/Cooperating_Agency_Report_2005-11_Attachment_23May2012.pdf* (percentage of EAs with cooperating agencies was 5.9 percent for Fiscal Years 2005 through 2011).

[85] A ''single ROD,'' as used in E.O. 13807, is the same as a ''joint ROD,'' which is a ROD addressing all Federal agency actions covered in the single EIS and necessary for a proposed project. 40 CFR 1508.25(a)(3). The regulations would provide flexibility for circumstances where a joint ROD is impracticable. Examples include the statutory directive to issue a combined final EIS and ROD for transportation actions and the FERC's adjudicatory process.

[86] *See* OFD Framework Guidance, *supra* note 30, sec. VIII.A.5 (''The lead agency is responsible for developing the Purpose and Need, identifying the range of alternatives to be analyzed, identifying the preferred alternative and determining whether to develop the preferred alternative to a higher level of detail.''); Connaughton Letter, *supra* note 29 (''[J]oint lead or cooperating agencies should afford substantial deference to the [ ] agency's articulation of purpose and need.'')

including comments requesting that agencies have greater flexibility in how to conduct scoping. CEQ proposed to reorganize in more chronological order, § 1501.9, ''Scoping,'' (40 CFR 1501.7 in the 1978 regulations), consolidate all the requirements for the NOI and the scoping process into the same section, and add paragraph headings to improve clarity. CEQ makes these changes in the final rule with minor edits as described further in this section.

Specifically, CEQ proposed to revise paragraph (a) to state the general requirement to use scoping for EISs. Rather than requiring publication of an NOI as a precondition to the scoping process, CEQ proposed to modify paragraph (a) so that agencies can begin the scoping process as soon as the proposed action is developed sufficiently for meaningful agency consideration. Some agencies refer to this as pre-scoping under the existing regulations to capture scoping work done before publication of the NOI. Rather than tying the start of scoping to the agency's decision to publish an NOI to prepare an EIS, the timing and content of the NOI would instead become an important step in the scoping process itself, thereby obviating the artificial distinction between scoping and pre-scoping. However, agencies should not unduly delay publication of the NOI and should be transparent about any work done prior to publication of the NOI. CEQ makes the changes as proposed in the final rule.

Paragraph (b) addresses the responsibility of the lead agency to invite cooperating and participating agencies as well as other likely affected or interested persons. CEQ proposed to add ''likely'' to this paragraph to capture the reality that, at the scoping stage, agencies may not know the identities of all affected parties and that one of the purposes of scoping is to identify affected parties. CEQ makes this change in the final rule. In the final rule, CEQ strikes ''on environmental grounds'' from the parenthetical noting that likely affected or interested persons include those who might not agree with the action because the clause is unnecessarily limiting. Agencies should invite the participation of those who do not agree with the action irrespective of whether it is on environmental grounds.

The NPRM proposed to move the existing (b)(4) to paragraph (c), ''Scoping outreach.'' CEQ proposed to broaden the types of activities agencies might hold during scoping, including meetings, publishing information, and other means of communication to provide agencies additional flexibility in how to reach interested or affected parties in the scoping process. CEQ finalizes this change as proposed.

Paragraph (d) proposed to address the NOI requirements. CEQ proposed a list of what agencies must include in an NOI to standardize NOI format, achieve greater consistency across agencies, provide the public with more information and transparency, and ensure that agencies conduct the scoping process in a manner that facilitates implementation of the OFD policy for multi-agency actions, including by proactively soliciting comments on alternatives, impacts, and relevant information to better inform agency decision making. CEQ makes these changes in the final rule with minor edits for clarity and edits to paragraph (d)(7) for consistency with §§ 1500.3 and 1502.17 and to correct the cross-reference.

CEQ proposed to move the criteria for determining scope from the definition of scope, 40 CFR 1508.25, to paragraph (e) and to strike the paragraph on ''cumulative actions'' for consistency with the proposed revisions to the definition of ''effects'' discussed below. CEQ makes this change in the final rule, but does not include the reference to ''similar actions'' in proposed paragraph (e)(1)(ii) because commenters expressed confusion regarding whether the determination of the scope of the environmental documentation, as discussed in proposed § 1501.9(e)(1)(i)(C) was directly related to the discussion of the ''effects of the action'' as effects are defined in § 1508.1(g). To eliminate this confusion, CEQ strikes the language in proposed § 1501.9(e)(1)(i)(C) (40 CFR 1508.25(a)(3)) regarding similar actions. Further, CEQ notes that, in cases where the question of the consideration of similar actions to determine the scope of the NEPA documentation was raised, courts noted the discretionary nature of the language (use of the word ''may'' and ''should'' in proposed § 1501.9(e)(1)(i)(C) (40 CFR 1508.25(a)(3)) and have held that determinations as to the scope of a NEPA document based on a consideration of similar actions was left to the agency's discretion. *See e.g., Klamath-Siskiyou Wildlands Ctr.* v. *Bureau of Land Mgmt.,* 387 F.3d 989, 1000–01 (9th Cir. 2004). CEQ also notes that the reference to ''other reasonable courses of action'' in paragraph (e)(2) are within the judgement of the agency. Agencies have discretion to address similar actions through a single analysis, pursuant to revised § 1502.4(b).

Finally, paragraph (f) addresses other scoping responsibilities, including identifying and eliminating from detailed study non-significant issues, allocating assignments among lead and cooperating agencies, indicating other related NEPA documents, identifying other environmental review requirements, and indicating the relationship between the environmental review and decision-making schedule. CEQ retains this paragraph in the final rule as proposed with minor grammatical edits.

9. Time Limits (§ 1501.10)

In response to the ANPRM, CEQ received many comments on the lengthy timelines and costs of environmental reviews, and many suggestions for more meaningful time limits for the completion of the NEPA process. Accordingly, and to promote timely reviews, CEQ proposed to establish presumptive time limits for EAs and EISs consistent with E.O. 13807 and prior CEQ guidance. In Question 35 of the Forty Questions, *supra* note 2, CEQ stated its expectation that ''even large complex energy projects would require only about 12 months for the completion of the entire EIS process'' and that, for most major actions, ''this period is well within the planning time that is needed in any event, apart from NEPA.'' CEQ also recognized that ''some projects will entail difficult long-term planning and/or the acquisition of certain data which of necessity will require more time for the preparation of the EIS.'' *Id.* Finally, Question 35 stated that an EA ''should take no more than 3 months, and in many cases substantially less as part of the normal analysis and approval process for the action.''

Based on agency experience with the implementation of the regulations, CEQ proposed in § 1501.10, ''Time limits,'' to change the introductory text to paragraph (a) and add a new paragraph (b) to establish a presumptive time limit for EAs of one year and a presumptive time limit for EISs of two years. However, the NPRM also proposed that a senior agency official could approve in writing a longer period. CEQ proposed to define the start and end dates of the period consistent with E.O. 13807. CEQ makes these changes in the final rule. CEQ eliminates the sentence regarding lead agency from paragraph (a) because it is no longer needed given the revisions to this section changing ''agency'' to ''senior agency official.'' In response to comments, the final rule also adds ''FONSI'' to paragraph (b)(1) to clarify that the time limit for EAs is measured from the date of decision to prepare to the publication of an EA or FONSI, since agencies may not publish

the EA separately. The final rule also clarifies that the time period is measured from the date the agency decides to prepare an EA, since applicants sometimes prepare EAs on behalf of agencies.

Consistent with CEQ and OMB guidance, agencies should begin scoping and development of a schedule for timely completion of an EIS prior to issuing an NOI and commit to cooperate, communicate, share information, and resolve conflicts that could prevent meeting milestones.[87] CEQ recognizes that agency capacity, including those of cooperating and participating agencies, may affect timing, and that agencies should schedule and prioritize their resources accordingly to ensure effective environmental analyses and public involvement. Further, agencies have flexibility in the management of their internal processes to set shorter time limits and to define the precise start and end times for measuring the completion time of an EA. Therefore, CEQ proposed to retain the factors for determining time limits in paragraph (c). CEQ proposed to revise paragraph (c)(6) for clarity and strike paragraph (c)(7) regarding controversial actions because it overlaps with numerous other factors, and because whether or not an action is controversial is not relevant to the analysis under NEPA. CEQ also proposed to retain with edits for clarity the list of parts of the NEPA process for which the senior agency official may set time limits in paragraph (d). CEQ retains paragraphs (c) and (d) in the final rule with the changes as proposed.

CEQ proposed conforming edits to § 1500.5(g) to change ''establishing'' to ''meeting'' time limits and add ''environmental assessment.'' CEQ makes these edits in the final rule.

10. Tiering (§ 1501.11)

CEQ proposed to move 40 CFR 1502.20, ''Tiering,'' to a new § 1501.11 and revise it to make clear that this provision is applicable to both EAs and EISs. CEQ proposed a number of revisions in § 1501.11 to clarify when agencies can use existing studies and environmental analyses in the NEPA process and when agencies would need to supplement such studies and analyses. The revisions clarify that agencies do not need to conduct site-specific analyses prior to an irretrievable commitment of resources, which in most cases will not be until the decision at the site-specific stage. CEQ makes these changes with additional updates in the final rule.

Specifically, the final rule splits proposed paragraph (a) into two paragraphs. In the new paragraph (a), CEQ changes ''are encouraged to'' to ''should'' and moves to the end of this paragraph the sentence stating that tiering may also be appropriate for different stages of actions. The new paragraph (b) addresses the relationship between the different levels of tiered documents, and CEQ makes additional edits to this paragraph for clarity.

CEQ also proposed to move the operative language addressing specific examples of when tiering is appropriate from the definition of tiering in 40 CFR 1508.28 to proposed paragraph (b). CEQ moves this language to paragraph (c) in the final rule with the edits as proposed.

11. Incorporation by Reference (§ 1501.12)

CEQ proposed to move 40 CFR 1502.21, ''Incorporation by reference,'' to a new § 1501.12 and change ''environmental impact statements'' to ''environmental documents'' because this provision is applicable generally, not just to EISs. CEQ makes this change in the final rule. CEQ makes additional changes in the final rule to revise sentences from passive to active voice. In response to comments, CEQ adds examples to the types of material that agencies may incorporate, including planning studies and analyses.

D. Revisions to Environmental Impact Statements (Part 1502)

As stated in the NPRM, the most extensive level of NEPA analysis is an EIS, which is the ''detailed statement'' required under section 102(2)(C) of NEPA. When an agency prepares an EIS, it typically issues a ROD at the conclusion of the NEPA review. Based on the Environmental Protection Agency (EPA) weekly Notices of Availability published in the **Federal Register** between 2010 and 2019, Federal agencies published approximately 176 final EISs per year. CEQ proposed to update the format, page length, and timeline to complete EISs to better achieve the purposes of NEPA. CEQ also proposed several changes to streamline, allow for flexibility in, and improve the preparation of EISs. CEQ includes provisions in part 1502 to promote informed decision making by agencies and to inform the public about the decision-making process. The final rule continues to encourage application of NEPA early in the process and early engagement with applicants for non-Federal projects.

1. Purpose of Environmental Impact Statement (§ 1502.1)

CEQ proposed to revise § 1502.1 for consistency with the statutory language of NEPA and make other non-substantive revisions for clarity. CEQ makes these changes in the final rule. The final rule also retitles this section.

2. Implementation (§ 1502.2)

CEQ proposed to strike the introductory text of § 1502.2 as unnecessary and revise the text in paragraphs (a) and (c) for clarity and consistency with the language in the rule and regulatory text generally. CEQ makes these changes in the final rule with minor clarifying edits. The final rule clarifies in paragraph (d) that, in preparing an EIS, agencies shall state how the alternatives considered in it and decisions based on it serve the purposes of the statute as interpreted in the CEQ regulations. The final rule strikes ''ultimate agency'' in paragraph (e) because there may be multiple individuals within certain departments or agencies that have decision-making responsibilities, including where subunits have developed agency procedures or NEPA compliance programs.

3. Statutory Requirements for Statements (§ 1502.3)

CEQ proposed to revise § 1502.3 to make it a single paragraph, remove cross-references to the definition, and make minor clarifying edits. CEQ makes these changes in the final rule.

4. Major Federal Actions Requiring the Preparation of Environmental Impact Statements (§ 1502.4)

CEQ proposed to revise § 1502.4 to clarify in paragraph (a) that a ''properly defined'' proposal is one that is based on the statutory authorities for the proposed action. CEQ proposed to change ''broad'' and ''program'' to ''programmatic'' in this section, as well as §§ 1500.4(k) and 1506.1(c), since ''programmatic'' is the term commonly used by NEPA practitioners. The NPRM proposed further revisions to paragraph (b), including eliminating reference to programmatic EISs that ''are sometimes required,'' to focus the provision on the discretionary use of programmatic EISs in support of clearly defined decision-making purposes. For consistency, CEQ proposed to change the mandatory language to be discretionary in proposed paragraph (c)(3) (paragraph (b)(1)(iii) in the final rule). As CEQ stated in its 2014 guidance, programmatic NEPA reviews

[87] *See* OFD Framework Guidance, *supra* note 30 (''[w]hile the actual schedule for any given project may vary based upon the circumstances of the project and applicable law, agencies should endeavor to meet the two-year goal.....'').

''should result in clearer and more transparent decision[ ]making, as well as provide a better defined and more expeditious path toward decisions on proposed actions.'' [88] Other statutes or regulations may grant discretion or otherwise identify circumstances for when to prepare a programmatic EIS. *See, e.g.,* National Forest Management Act, 16 U.S.C. 1604(g); 36 CFR 219.16. CEQ makes these changes in the final rule, and reorganizes proposed paragraphs (c) and (d) to be paragraphs (b)(1) and (2) since these paragraphs all address programmatic reviews. Finally, CEQ proposed to add a new sentence to proposed paragraph (d) (paragraph (b)(2) in the final rule) to clarify that when conducting programmatic reviews, agencies may tier their analyses to defer detailed analysis of specific program elements until they are ripe for decisions that would involve an irreversible or irretrievable commitment of resources. The final rule removes this latter clause and simplifies it to elements ''ripe for final agency action'' because NEPA review occurs pursuant to the APA and ''final agency action,'' as construed in *Bennett* v. *Spear,* is the test for when judicial review can commence. *See* 520 U.S. at 177–78.

5. Timing (§ 1502.5)

For the reasons discussed in section II.C.2 and consistent with the edits to § 1501.2, CEQ proposed to change ''shall'' to ''should'' in the introductory text so that agencies can exercise their best judgement about when to begin the preparation of an EIS. CEQ also proposed to revise paragraph (b) to clarify that agencies should work with potential applicants and applicable agencies before applicants submit applications. CEQ makes these changes in the final rule. Also, as noted in section II.C.7, CEQ revises paragraph (b) in the final rule to only address EISs in this section and move the discussion of EAs to § 1501.5. Finally, CEQ adds ''and governments'' to ''State, Tribal, and local agencies'' to be comprehensive and consistent with similar changes made throughout the rule.

6. Interdisciplinary Preparation (§ 1502.6)

CEQ proposed minor edits to § 1502.6 consistent with the global changes discussed in section II.A. CEQ includes these changes in the final rule and revises this provision from passive to active voice.

7. Page Limits (§ 1502.7)

In response to the ANPRM, CEQ received many comments on the length, complexity, and readability of environmental documents, and many suggestions for more meaningful page limits. As the President Carter noted in 1977 regarding issuance of E.O. 11991, ''to be more useful to decision[ ]makers and the public, [EISs] must be concise, readable, and based upon competent professional analysis. They must reflect a concern with quality, not quantity. We do not want [EISs] that are measured by the inch or weighed by the pound.'' [89] The core purpose of page limits from the original regulations remains—documents must be a reasonable length and in a readable format so that it is practicable for the decision maker to read and understand the document in a reasonable time period. If documents are unreasonable in their length or unwieldly, there is a risk that they will not inform the decision maker, thereby undermining the purposes of the Act. As the Supreme Court noted in *Metropolitan Edison Co.* v. *People Against Nuclear Energy,* ''[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of '[insuring] a fully informed and well-considered decision,' . . . is to be accomplished.'' 460 U.S. at 776 (quoting *Vt. Yankee,* 435 U.S. at 558). Therefore, CEQ proposed to reinforce the page limits for EISs set forth in § 1502.7, while allowing a senior agency official to approve a statement exceeding 300 pages when it is useful to the decision-making process. CEQ makes these changes in the final rule.

As captured in CEQ's updated report on the length of final EISs, these documents average over 600 pages. *See* CEQ Length of EISs Report, *supra* note 38. While the length of an EIS will vary based on the complexity and significance of the proposed action and environmental effects the EIS considers, every EIS must be bounded by the practical limits of the decision maker's ability to consider detailed information. CEQ proposed this change to ensure that agencies develop EISs focused on significant effects and on the information useful to decision makers and the public to more successfully implement NEPA.

CEQ intends for senior agency officials to take responsibility for the quantity, quality, and timelines of environmental analyses developed in support of the decisions of their agencies. Therefore, the senior agency official approving an EA or EIS in excess of the page limits should ensure that the final environmental document meets the informational needs of the agency's decision maker. For example, the agency decision makers may have varying levels of capacity to consider the information presented in the environmental document. In ensuring that the agency provides the resources necessary to implement NEPA, in accordance with § 1507.2, senior agency officials should ensure that agency staff have the resources and competencies necessary to produce timely, concise, and effective environmental documents. Decisions as to page length for these documents are therefore closely related to an agency's decision as to how to structure its decision-making process, and for that reason must ultimately remain within the discretion of the agency.

8. Writing (§ 1502.8)

CEQ did not propose any changes to § 1502.8. In the final rule, CEQ revises this provision to correct grammatical errors, including revising it from passive to active voice.

9. Draft, Final and Supplemental Statements (§ 1502.9)

CEQ proposed to include headings for each of the paragraphs in § 1502.9, ''Draft, final, and supplemental statements,'' to improve readability. CEQ proposed edits to paragraph (b) for clarity, replacing ''revised draft'' with ''supplemental draft.'' CEQ makes these changes in the final rule and makes additional clarifying edits in § 1502.9, including to revise the language from passive to active voice.

CEQ also received many comments in response to the ANPRM requesting clarification regarding when supplemental statements are required. CEQ proposed revisions to paragraph (d)(1) to clarify that agencies need to update environmental documents when there is new information or a change in the proposed action only if a major Federal action remains to occur and other requirements are met. CEQ makes this change in the final rule. As noted in the NPRM, this revision is consistent with Supreme Court case law holding that a supplemental EIS is required only ''[i]f there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered.....'' *Marsh,* 490 U.S. at 374 (quoting 42 U.S.C. 4332(2)(C)); *see also Norton* v. *S. Utah Wilderness All.,* 542 U.S. 55, 73 (2004). For example, supplementation

[88] Programmatic Guidance, *supra* note 29, at 7.

[89] The Environment—Message to the Congress, 1977 Pub. Papers 967, 985 (May 23, 1977).

may be triggered after an agency executes a grant agreement but before construction is complete because the agency has yet to provide all of the funds under that grant agreement. On the other hand, when an agency issues a final rule establishing a regulatory scheme, there is no remaining action to occur, and therefore supplementation is not required. If there is no further agency action after the agency's decision, supplementation does not apply because the Federal agency action is complete. *S. Utah Wilderness All.,* 542 U.S. at 73 (''although the '*[a]pproval* of a [land use plan]' is a 'major Federal action' requiring an EIS . . . that action is completed when the plan is approved .....There is no ongoing 'major Federal action' that could require supplementation (though BLM *is* required to perform additional NEPA analyses if a plan is amended or revised . . . .)'') (emphasis in original).

In order to determine whether a supplemental analysis is required, CEQ proposed a new paragraph (d)(4) to provide that an agency may document its determination of whether a supplemental analysis is required consistent with its agency NEPA procedures or may, although it is not required, do so in an EA. CEQ adds this paragraph to the final rule, codifying the existing practice of several Federal agencies, such as the Department of Transportation's reevaluation provided for highway, transit, and railroad projects (23 CFR 771.129); the Bureau of Land Management's Determination of NEPA Adequacy (Department of the Interior Departmental Manual, Part 516, Chapter 11, § 11.6); and the Corps' Supplemental Information Report (section 13(d) of Engineering Regulation 200–2–2).

10. Recommended Format (§ 1502.10)

CEQ proposed to revise § 1502.10 to provide agencies with more flexibility in formatting an EIS given that most EISs are prepared and distributed electronically. Specifically, CEQ proposed to eliminate the requirement to have a list of agencies, organizations and persons to whom copies of the EIS are sent since EISs are published online, and an index, as this is no longer necessary when most documents are produced in an electronically searchable format. Proposed changes to this section would also allow agencies to use a different format so that they may customize EISs to address the particular proposed action and better integrate environmental considerations into agency decision-making processes. CEQ makes these changes in the final rule.

11. Cover (§ 1502.11)

CEQ proposed to retitle and amend § 1502.11 to remove the reference to a ''sheet'' since agencies prepare EISs electronically. CEQ also proposed to add a requirement to include the estimated cost of preparing the EIS to the cover in new paragraph (g) to provide transparency to the public on the costs of EIS-level NEPA reviews. To track costs, the NPRM proposed that agencies must prepare an estimate of environmental review costs, including costs of the agency's full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs related to the environmental review of the proposed action.[90] CEQ also proposed this amendment to address the concerns raised by the U.S. Government Accountability Office that agencies are not tracking the costs of NEPA analyses, as well as the many comments CEQ received from stakeholders regarding the costs associated with development of NEPA analyses.[91] CEQ noted in the NPRM that including such costs on the cover sheet would also be consistent with current OMB direction to Federal agencies to track costs of environmental reviews and authorizations for major infrastructure projects pursuant to E.O. 13807 and would provide the public with additional information regarding EIS-level NEPA documents.

CEQ adds this new paragraph (g) in the final rule with additional changes to clarify that agencies should provide the estimate on the final EIS, and that it should include the costs of preparing both the draft EIS and the final EIS. The final rule also adds a sentence to clarify that agencies should include the costs of cooperating and participating agencies if practicable. If not practicable, agencies must so indicate. For integrated documents where an agency is preparing a document pursuant to multiple environmental statutory requirements, it may indicate that the estimate reflects costs associated with NEPA compliance as well as compliance with other environmental review and authorization requirements. Agencies can develop methodologies for preparing these cost estimates and include them in their implementing procedures.

12. Summary (§ 1502.12)

CEQ proposed to change ''controversy'' to ''disputed'' in § 1502.12. CEQ makes this and grammatical changes in the final rule. This change will better align the second clause of the sentence, ''areas of disputed issues raised by agencies and the public,'' with the final clause of the sentence, ''and the issues to be resolved (including the choice among alternatives).''

13. Purpose and Need (§ 1502.13)

CEQ received a number of comments in response to the ANPRM recommending that CEQ better define the requirements for purpose and need statements. The focus of a purpose and need statement is the purpose and need for the proposed action, and agencies should develop it based on consideration of the relevant statutory authority for the proposed action. The purpose and need statement also provides the framework in which the agency will identify ''reasonable alternatives'' to the proposed action. CEQ has advised that this discussion of purpose and need should be concise (typically one or two paragraphs long) and that the lead agency is responsible for its definition. *See* Connaughton Letter, *supra* note 29 (''Thoughtful resolution of the purpose and need statement at the beginning of the process will contribute to a rational environmental review process and save considerable delay and frustration later in the decision[-]making process.''). ''In situations involving two or more agencies that have a decision to make for the same proposed action and responsibility to comply with NEPA or a similar statute, it is prudent to jointly develop a purpose and need statement that can be utilized by both agencies. An agreed-upon purpose and need statement at this stage can prevent problems later that may delay completion of the NEPA process.'' *Id.* The lead agency is responsible for developing the purpose and need, and cooperating agencies should give deference to the lead agency and identify any substantive concerns early in the process to ensure swift resolution. *See* OFD Framework Guidance, sec. VIII.A.5 and XII, *supra* note 30; Connaughton Letter, *supra* note 29.

[90] *See, e.g.,* U.S. Department of the Interior, Reporting Costs Associated with Developing Environmental Impact Statements (July 23, 2018), *https://www.doi.gov/sites/doi.gov/files/uploads/dep_sec_memo_07232018_-_reporting_costs_associated_w_developing_environmental_impact_statements.pdf.*

[91] In a 2014 report, the U.S. Government Accountability Office found that Federal agencies do not routinely track data on the cost of completing NEPA analyses, and that the cost can vary considerably, depending on the complexity and scope of the project. U.S. Gov't Accountability Office, GAO–14–370, National Environmental Policy Act: Little Information Exists on NEPA Analyses (Apr. 15, 2014) (''GAO NEPA Report''), *https://www.gao.gov/products/GAO-14-370.* The report referenced the 2003 CEQ task force analysis referenced above which estimated that a typical EIS costs from $250,000 to $2 million. *See* NEPA Task Force Report, *supra* note 28, at p. 65.

Agencies should tailor the purpose and need statement to meet the authorization requirements of both the lead and cooperating agencies.

Consistent with CEQ guidance and in response to the ANPRM comments, CEQ proposed to revise § 1502.13, ''Purpose and need,'' to clarify that the statement should focus on the purpose and need for the proposed action. In particular, CEQ proposed to strike ''to which the agency is responding in proposing the alternatives including'' to focus on the proposed action. CEQ further proposed, as discussed below, to address the relationship between the proposed action and alternatives in the definition of reasonable alternatives and other sections that refer to alternatives. Additionally, CEQ proposed to add a sentence to clarify that when an agency is responsible for reviewing applications for authorizations, the agency shall base the purpose and need on the applicant's goals and the agency's statutory authority. *See, e.g., Citizens Against Burlington, Inc.* v. *Busey,* 938 F.2d 190, 196 (D.C. Cir. 1991) (agencies must consider the relevant factors including the needs and goals of the applicants and Congress' views as expressed in the agency's statutory authorization). This addition is consistent with the definition of reasonable alternatives, which must meet the goals of the applicant, where applicable. CEQ revises § 1502.13 in the final rule consistent with the NPRM proposal.

14. Alternatives Including the Proposed Action (§ 1502.14)

CEQ also received many comments on the ANPRM requesting clarification regarding ''alternatives'' under the regulations. This section of an EIS describes the proposed action and alternatives in comparative form, including their environmental impacts, such that the decision maker and the public can understand the basis for choice. However, as explained in § 1502.16, this section of the EIS should not duplicate the affected environment and environmental consequences sections, and agencies have flexibility to combine these three sections in a manner that clearly sets forth the basis for decision making.

CEQ proposed changes to § 1502.14, ''Alternatives including the proposed action,'' to simplify and clarify the language and provide further clarity on the scope of the alternatives analysis in an EIS. Specifically, CEQ proposed to revise the introductory paragraph to remove the colloquial language, including ''heart of'' the EIS and ''sharply defining,'' and clarify that the alternatives section of the EIS should present the environmental impacts in comparative form. CEQ makes these changes in the final rule.

In paragraph (a), CEQ proposed to delete ''all'' before ''reasonable alternatives'' and add ''to the proposed action'' afterward for clarity because NEPA does not require consideration of all alternatives and does not provide specific guidance concerning the range of alternatives an agency must consider for each proposal. Section 102(2)(C) provides only that an agency should prepare a detailed statement addressing, among other things, ''alternatives to the proposed action.'' 42 U.S.C. 4332(2)(C). Section 102(2)(E) requires only that agencies ''study, develop, and describe appropriate alternatives to recommended courses of action.'' 42 U.S.C. 4332(2)(E). Implementing this limited statutory direction, CEQ has long advised that ''[w]hen there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS.'' Forty Questions, *supra* note 2, at Question 1b. CEQ makes this change in the final rule and rephrases paragraph (a) from passive to active voice.

As stated in the NPRM, it is CEQ's view that NEPA's policy goals are satisfied when an agency analyzes reasonable alternatives, and that an EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum. The reasonableness of the analysis of alternatives in a final EIS is resolved not by any particular number of alternatives considered, but by the nature of the underlying agency action and by the inherent practical limitations of the decision-making process. The discussion of environmental effects of alternatives need not be exhaustive, but must provide information sufficient to permit a reasoned choice of alternatives for the agency to evaluate available reasonable alternatives including significant alternatives that are called to its attention by other agencies, organizations, communities, or a member of the public.[92] As discussed in section II.C.8, to aid agencies in identification of alternatives, § 1501.9, ''Scoping,'' requires agencies to request identification of potential alternatives in the NOI. Analysis of alternatives also may serve purposes other than NEPA compliance, such as evaluation of the least environmentally damaging practicable alternative for the discharge of dredged or fill material under section 404(b)(1) of the Clean Water Act, 33 U.S.C. 1344(b)(1).

The number of alternatives that is appropriate for an agency to consider will vary. For some actions, such as where the Federal agency's authority to consider alternatives is limited by statute, the range of alternatives may be limited to the proposed action and the no action alternative. For actions where the Federal authority to consider a range of alternatives is broad, the final EIS itself should consider a broader range of reasonable alternatives. However, a process of narrowing alternatives is in accord with NEPA's ''rule of reason'' and common sense—agencies need not reanalyze alternatives previously rejected, particularly when an earlier analysis of numerous reasonable alternatives was incorporated into the final analysis and the agency has considered and responded to public comment favoring other alternatives. Furthermore, agencies should limit alternatives to those available to the decision maker at the time of decision.

For consistency with this change, CEQ proposed to strike ''the'' before ''reasonable alternatives'' in § 1502.1, and amend § 1502.16, ''Environmental consequences,'' to clarify in proposed paragraph (a)(1) that the discussion must include the environmental impacts of the ''proposed action and reasonable alternatives.'' CEQ makes these changes in the final rule.

In response to CEQ's ANPRM, some commenters urged that the regulations should not require agencies to account for impacts over which the agency has no control, including those resulting from alternatives outside its jurisdiction. CEQ proposed to strike 40 CFR 1502.14(c) requiring consideration of reasonable alternatives not within the jurisdiction of the lead agency for all EISs because it is not efficient or reasonable to require agencies to develop detailed analyses relating to alternatives outside the jurisdiction of the lead agency. CEQ removes this paragraph in the final rule. Further, the new definition of ''reasonable alternatives'' excludes alternatives outside the agency's jurisdiction when they would not be technically feasible due to the agency's lack of statutory authority to implement that alternative. However, an agency may discuss reasonable alternatives not within its jurisdiction when necessary for the agency's decision-making process such as when preparing an EIS to address

[92] Additionally, by crafting alternatives, agencies can ''bound'' different options and develop information on intermediate options that occupy the logical space in between different formal alternatives. *See, e.g.,* H.A. Simon, ''Bounded Rationality,'' in *Utility and Probability* (J. Eatwell, M. Milgate, & P. Newman P. eds. 1990).

legislative EIS requirements pursuant to § 1506.8 and to address specific congressional directives.

A concern raised by many ANPRM commenters is that agencies have limited resources and that it is important that agencies use those resources effectively. The provisions inviting commenters to identify potential alternatives will help to inform agencies as to how many alternatives are reasonable to consider, and allow agencies to assess whether any particular submitted alternative is reasonable to consider. Analyzing a large number of alternatives, particularly where it is clear that only a few alternatives would be economically and technically feasible and could be realistically implemented by the applicant, can divert limited agency resources. CEQ invited comment on whether the regulations should establish a presumptive maximum number of alternatives for evaluation of a proposed action, or alternatively for certain categories of proposed actions. CEQ sought comment on (1) specific categories of actions, if any, that should be identified for the presumption or for exceptions to the presumption; and (2) what the presumptive number of alternatives should be (*e.g.,* a maximum of three alternatives including the no action alternative). CEQ did not receive sufficient information to establish a minimum, but adds a new paragraph (f) to the final rule to state that agencies shall limit their consideration to a reasonable number of alternatives. The revisions to the regulations to promote earlier solicitation of information and identification of alternatives, and timely submission of comments, will assist agencies in establishing how many alternatives are reasonable to consider and assessing whether any particular submitted alternative is reasonable to consider.

15. Affected Environment (§ 1502.15)

CEQ proposed in § 1502.15, ''Affected environment,'' to explicitly allow for combining of affected environment and environmental consequences sections to adopt what has become a common practice in some agencies. This revision would ensure that the description of the affected environment focuses on those aspects of the environment that the proposed action affects. CEQ makes this change in the final rule. Additionally, the final rule adds a clause to emphasize that the affected environment includes reasonably foreseeable environmental trends and planned actions in the affected areas. This change responds to comments raising concerns that eliminating the definition of cumulative impact (40 CFR 1508.7) would result in less consideration of changes in the environment. To the extent environmental trends or planned actions in the area(s) are reasonably foreseeable, the agency should include them in the discussion of the affected environment. Consistent with current agency practice, this also may include non-Federal planned activities that are reasonably foreseeable.

In response to the NPRM, commenters expressed concerns that impacts of climate change on a proposed project would no longer be taken into account. Under the final rule, agencies will consider predictable environmental trends in the area in the baseline analysis of the affected environment. Trends 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. Discussion of the affected environment should be informative but should not be speculative.

16. Environmental Consequences (§ 1502.16)

CEQ proposed to reorganize § 1502.16, ''Environmental consequences.'' CEQ proposed to designate the introductory paragraph as paragraph (a), move up the sentence that it should not duplicate the alternatives discussion, and create subordinate paragraphs (a)(1) through (10) for clarity. In paragraph (a)(1), CEQ proposed to consolidate into one paragraph the requirements regarding effects scattered throughout 40 CFR 1502.16, including paragraphs (a), (b), and (d), to include a discussion of the effects of the proposed action and reasonable alternatives. Also consistent with the definition of effects, CEQ proposed to strike references to direct, indirect, and cumulative effects. The combined discussion should focus on those effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action, consistent with the proposed revised definition of effects addressed in § 1508.1(g). CEQ proposed to move 40 CFR 1502.16(c) and (e) through (h) to be paragraphs (a)(5) through (9). To align with the statute, CEQ also proposed to add a new paragraph (a)(10) to provide that discussion of environmental consequences should include, where applicable, economic and technical considerations consistent with section 102(2)(B) of NEPA. CEQ makes these changes in the final rule with minor edits to clarify that ''this section'' in paragraph (a) refers to the ''environmental consequences'' section; address the dangling modifier, ''their significance,'' in paragraph (a)(1); correct the usage of ''which'' and ''that'' throughout; and clarify the language in paragraph (b).

Further, CEQ proposed to move the operative language that addresses when agencies need to consider economic and social effects in EISs from the definition of human environment in 40 CFR 1508.14 to proposed § 1502.16(b). CEQ also proposed to amend the language for clarity, explain that the agency makes the determination of when consideration of economic and social effects is interrelated with consideration of natural or physical environmental effects at which point the agency should give appropriate consideration to those effects, and strike ''all of'' as unnecessary. CEQ makes these changes in the final rule.

17. Submitted Alternatives, Information, and Analyses (§ 1502.17)

To ensure agencies have considered the alternatives, information, and analyses submitted by the public, including State, Tribal, and local governments as well as individuals and organizations, CEQ proposed to add a new § 1502.17 to require a new ''submitted alternatives, information, and analyses'' section in draft and final EISs. CEQ includes this new provision in the final rule with some modifications to separate the requirements for draft and final EISs, as discussed in this section.

To ensure agencies receive and consider relevant information as early in the process as possible, § 1501.9, ''Scoping,'' requires agencies to specifically solicit such information in their notices of intent. Under § 1502.17, agencies must include a summary in the EIS identifying all alternatives, information, and analyses the agency received from State, Tribal, and local governments and other public commenters. In developing the summary, agencies may refer to other relevant sections of the EIS or to appendices. A new paragraph (a)(1) requires agencies to append to the draft EIS or otherwise publish the comments received during scoping and, consistent with the proposed rule, paragraph (a)(2) requires the lead agency to invite comment on the summary. Finally, paragraph (b) requires agencies to prepare a summary in the final EIS based on all comments received on the draft EIS.

CEQ proposed to require in a new § 1502.18, ''Certification of alternatives, information, and analyses section,'' that, informed by the alternatives, information, and analyses section

required under § 1502.17, the decision maker for the lead agency certify that the agency has considered such information and include the certification in the ROD under proposed § 1505.2(e). CEQ moves this provision to § 1505.2(b) in the final rule, as discussed in further detail in section II.G.2.

18. List of Preparers (§ 1502.18)

CEQ proposed to move ''List of preparers'' from § 1502.17 to § 1502.19 to accommodate the two new sections addressing submitted alternatives, information, and analyses. The final rule moves this section to § 1502.18 and makes minor revisions to change the language from passive to active voice and remove the erroneous cross-references.

19. Appendix (§ 1502.19)

CEQ proposed to move ''Appendix'' from § 1502.18 to § 1502.20 and revise the language for clarity. The final rule moves this provision to § 1502.19 with additional clarifying revisions. The final rule also adds a new paragraph (d) to reflect the potential appendix for scoping comments on alternatives, information, and analyses pursuant to § 1502.17(a)(1) and a new paragraph (e) for the potential appendix of draft EIS comments pursuant to §§ 1503.1 and 1503.4(b).

20. Publication of the Environmental Impact Statement (§ 1502.20)

CEQ proposed to move ''Circulation of the environmental impact statement'' from § 1502.19 to § 1502.21 and retitle it ''Publication of the environmental impact statement.'' CEQ moves this to § 1502.20 in the final rule. CEQ proposed to modernize this provision, changing circulate to publish and eliminating the option to circulate the summary of an EIS given that agencies electronically produce most EISs. CEQ proposed to require agencies to transmit the EIS electronically, but provide for paper copies by request. CEQ makes these changes in the final rule.

21. Incomplete or Unavailable Information (§ 1502.21)

CEQ proposed several revisions to proposed § 1502.22, ''Incomplete or unavailable information,'' which CEQ redesignates as § 1502.21 in the final rule. Specifically, CEQ proposed to further subdivide the paragraphs for clarity and strike the word ''always'' from paragraph (a) as unnecessarily limiting and inconsistent with the rule of reason, and replaced the term ''exorbitant'' with ''unreasonable'' in paragraphs (b) and (c), which is consistent with CEQ's description of ''overall cost'' considerations in its 1986 promulgation of amendments to this provision.[93] CEQ reiterates that the term ''overall cost'' as used in this section includes ''financial costs and other costs such as costs in terms of time (delay) and personnel.'' [94] CEQ invited comment on whether the ''overall costs'' of obtaining incomplete of unavailable information warrants further definition to address whether certain costs are or are not ''unreasonable.'' CEQ does not include any definition in the final rule.

For clarity and in response to comments, the final rule inserts ''but available'' in paragraph (b) to clarify that agencies will continue to be required to obtain available information essential to a reasoned choice between alternatives where the overall costs are not unreasonable and the means of obtaining that information are known.[95] New scientific or technical research is unavailable information and is addressed in § 1502.23. Where the overall costs are unreasonable or means of obtaining the information are not known, agencies will continue to be required to disclose in the EIS that information is incomplete or unavailable and provide additional information to assist in analyzing the reasonably foreseeable significant adverse impacts. However, § 1502.23 does not require agencies to undertake new scientific and technical research to inform their analyses.

Finally, CEQ proposed to eliminate 40 CFR 1502.22(c) addressing the applicability of the 1986 amendments to this section because this paragraph is obsolete. CEQ does not include this provision in the final rule.

22. Cost-Benefit Analysis (§ 1502.22)

CEQ did not propose changes to the cost-benefit analysis section other than an update to the citation. In the final rule, CEQ moves this provision from § 1502.23 to § 1502.22 and adds a parenthetical after ''section 102(2)(B) of NEPA'' that paraphrases the statutory text relating to considering unquantified environmental amenities and values along with economic and technical considerations. This is consistent with the policy established in section 101(a), which also refers to fulfilling the social, economic, and other requirements of present and future generations of Americans. Finally, CEQ revises the language for clarity, including changing from passive to active voice.

23. Methodology and Scientific Accuracy (§ 1502.23)

CEQ proposed revisions to update proposed § 1502.24, which CEQ redesigantes § 1502.23 in the final rule. The NPRM proposed to broaden this provision to environmental documents and CEQ makes this change in the final rule. CEQ proposed to clarify that agencies must make use of reliable existing data and resources when they are available and appropriate. CEQ also proposed to revise this section to allow agencies to draw on any source of information (such as remote sensing and statistical modeling) that the agency finds reliable and useful to the decision-making process. As noted in the NPRM, these changes will promote the use of reliable data, including information gathered using modern technologies. CEQ makes these changes in the final rule with minor changes. The final rule revises the sentence regarding placing the discussion of methodology in an appendix from singular to plural for consistency with the rest of the language in this section. In response to comments, CEQ moves the proposed sentence regarding new scientific and technical research to a new sentence at the end of the section and adds a sentence clarifying that nothing in this provision is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research. Agencies must continue to conduct surveys and collect data where required by other statutes.

24. Environmental Review and Consultation Requirements (§ 1502.24)

CEQ proposed to revise this section to clarify that agencies must integrate, to the fullest extent possible, their NEPA analysis with all other applicable Federal environmental review laws and Executive orders in furtherance of the OFD policy established by E.O. 13807 and to make the environmental review process more efficient.[96] CEQ redesignates this section in the final rule to § 1502.24, updates a statutory

[93] 51 FR at 15622 (Apr. 25, 1986).

[94] *Id.*

[95] *See, e.g. Pub. Citizen,* 541 U.S. at 767 (''Also, inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision[-]making process.''); *see also Marsh,* 490 U.S. at 373–74 (agencies should apply a ''rule of reason'').

[96] The Permitting Council has compiled a list of environmental laws and Executive orders that may apply to a proposed action. *See* Federal Environmental Review and Authorization Inventory, *https://www.permits.performance.gov/tools/federal-environmental-review-and-authorization-inventory.*

citation, and revises the text as proposed.

E. Revisions to Commenting on Environmental Impact Statements (Part 1503)

Section 102(2)(C) of NEPA requires that agencies obtain views of Federal agencies with jurisdiction by law or expertise with respect to any environmental impact, and also directs that agencies make copies of the EIS and the comments and views of appropriate Federal, State, and local agencies available to the President, CEQ and the public. 42 U.S.C. 4332(2)(C). Part 1503 of the CEQ regulations include provisions relating to inviting and responding to comments. CEQ proposed to modernize part 1503 given modern technologies not available at the time of the 1978 regulations. In particular, the proposed regulations encouraged agencies to use the current methods of electronic communication both to publish important environmental information and to structure public participation for greater efficiency and inclusion of interested persons. Additionally, CEQ proposed changes to encourage commenters to provide information early and to require comments to be as specific as possible to ensure agencies can consider them in their decision-making process. CEQ finalizes many of the proposed changes with modifications as this section discusses in further detail.

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

CEQ proposed to retitle and revise § 1503.1, ''Inviting comments and requesting information and analyses,'' to better reach interested and affected parties and ensure agencies receive the relevant information they need to complete their analyses. CEQ proposed to revise paragraphs (a)(2)(i) and (ii) to include State, Tribal and local agencies and governments to be comprehensive and consistent with the addition of ''Tribal'' as discussed in section II.A. CEQ proposed to eliminate the obsolete reference to OMB Circular A–95 from paragraph (a)(2)(iii) and move paragraphs (a)(3) and (4) to (a)(2)(iv) and (v), respectively, since these are additional parties from which agencies should request comments. CEQ also proposed in paragraph (a)(2)(v) to give agencies flexibility to tailor their public involvement process to more effectively reach interested and affected parties by soliciting comments ''in a manner designed to inform'' parties interested or affected ''by the proposed action.'' CEQ makes these changes in the final rule.

CEQ also proposed to add a new paragraph (a)(3) that requires agencies to specifically invite comment on the completeness of the submitted alternatives, information and analyses section (§ 1502.17). CEQ includes this new paragraph in the final rule with revisions to clarify that agencies should invite comments on the submitted alternatives, information, and analyses generally as well as the summary required under § 1502.17, rather than on the completeness of the summary, as proposed. Interested parties who may seek to challenge the agency's decision have an affirmative duty to comment during the public review period in order for the agency to consider their positions. *See Vt. Yankee,* 435 U.S. at 553.

In paragraph (b), CEQ proposed to require agencies to provide a 30-day comment period on the final EIS's submitted alternatives, information and analyses section. As noted in the discussion of § 1500.3(b) in section II.B.3, CEQ does not include this requirement in the final rule. However, the final rule adds language that if an agency requests comments on a final EIS before the final decision, the agency should set a deadline for such comments. This provides agencies the flexibility to request comments on a final EIS. Agencies may use this option where it would be helpful to inform the agency's decision making process.

Finally, CEQ proposed a new paragraph (c) to require agencies to provide for commenting using electronic means while ensuring accessibility to those who may not have such access to ensure adequate notice and opportunity to comment. CEQ includes this proposed paragraph in the final rule.

2. Duty To Comment (§ 1503.2)

Section 1503.2, ''Duty to comment,'' addresses the obligations of other agencies to comment on an EIS. CEQ proposed to clarify that this provision applies to cooperating agencies and agencies authorized to develop and enforce environmental standards. CEQ makes this change in the final rule and makes additional revisions to change the language from passive to active voice.

3. Specificity of Comments and Information (§ 1503.3)

CEQ proposed to revise paragraph (a) and retitle § 1503.3, ''Specificity of comments and information,'' to explain that the purposes of comments is to promote informed decision making and further clarify that comments should provide sufficient detail for the agency to consider the comment in its decision-making process. *See Pub. Citizen,* 541 U.S. at 764; *Vt. Yankee,* 435 U.S. at 553 (while ''NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon [parties] who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the [parties'] position ..... ''). CEQ also proposed in this paragraph that comments should explain why the issues raised are significant to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts, and other impacts affecting the quality of the human environment. In addition, CEQ proposed in this paragraph that comments should reference the section or page of the draft EIS, propose specific changes to those parts of the statement, where possible, and include or describe the data sources and methodologies supporting the proposed changes. *See Vt. Yankee,* 435 U.S. at 553 (''[Comments] must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes a concern. The comment cannot merely state that a particular mistake was made.....; it must show why the mistake was of possible significance in the results . . . .'' (quoting *Portland Cement Ass'n* v. *Ruckelshaus,* 486 F.2d 375, 394 (D.C. Cir. 1973)). CEQ includes these changes in the final rule to ensure that agencies are alerted to all interested and affected parties' concerns, but changes ''significant'' to ''important'' issues in the second sentence to avoid confusion with significant effects. Nothing in these revisions should be construed to limit public comment to those members of the public with scientific or technical expertise, and agencies should continue to solicit comment from all interested and affected members of the public. Consistent with the goal of promoting a manageable process and a meaningful focus on pertinent issues, CEQ also clarifies that commenters should submit information and raise issues as early in the process as possible, including during scoping to the extent practicable. Commenters should timely submit all comments and make their comments as specific as possible to promote informed and timely decision making.

CEQ also proposed a new paragraph (b) to emphasize that comments on the submitted alternatives, information, and analyses section should identify any additional alternatives, information, or

analyses not included in the draft EIS, and should be as specific as possible. The proposal required comments and objections to be raised within 30 days of publication of the notice of availability of the final EIS and noted that comments and objections not provided within those 30 days are considered exhausted and forfeited under § 1500.3(b). In the final rule, CEQ includes this paragraph with some changes. The final rule provides that comments should be on the submitted alternatives, information, and analyses themselves as well as the summary that § 1502.17 requires and be as specific as possible. It further provides that comments and objections on the draft EIS must be raised within the comment period provided by the agency, consistent with § 1506.11. The final rule does not include the 30-day comment period, as discussed in sections II.B.3 and II.E.1; however, it provides that if the agency requests comments on the final EIS, comments and objections must be raised within the comment period. The final rule also provides that comments and objections not provided within the relevant comment periods are considered unexhausted and forfeited under § 1500.3(b).

CEQ proposed to change ''commenting'' agency to ''participating'' agency in paragraph (c), and ''entitlements'' to ''authorizations'' in paragraph (d). CEQ makes these changes in the final rule. Finally, CEQ proposed to broaden paragraph (e) to require cooperating agencies with jurisdiction by law to specify the mitigation measures they consider necessary for permits, licenses, or related requirements, including the applicable statutory authority. CEQ includes this change in the final rule because it will provide greater transparency and clarity to the lead agency and the public when mitigation is required under another statute.

4. Response to Comments (§ 1503.4)

In practice, the processing of comments can require substantial time and resources. CEQ proposed to amend § 1503.4, ''Response to comments,'' to simplify and clarify in paragraph (a) that agencies are required to consider substantive comments timely submitted during the public comment period. CEQ also proposed to clarify that an agency may respond to comments individually or collectively. Consistent with this revision, CEQ proposed to clarify that, in the final EIS, agencies may respond by a variety of means, and to strike the detailed language in paragraph (a)(5) relating to comments that do not warrant further agency response. CEQ includes these changes with some modifications in the final rule. Specifically, CEQ changes ''individually'' to ''individual'' and ''collectively'' to ''groups of comments'' to clarify that agencies may respond to individual comments or group and respond once to a group of comments addressing the same issue. CEQ also modifies paragraph (a) introductory text to make clear that the list in paragraphs (a)(1) through (5) is how the agency may respond to comments. Finally, CEQ adds a clause to paragraph (a)(5) to reinforce that agencies do not have to respond to each comment individually. Under the 1978 regulations, agencies have had flexibility in how they structure their responses to comments, and CEQ does not consider this clarification to be a change in position.

CEQ proposed to clarify in paragraph (b) that agencies must append comments and responses to EISs rather than including them in the body of the EIS, or otherwise publish them. Under current practice, some agencies include these comment responses in the EISs themselves, which can contribute to excessive length. *See* CEQ Length of EISs Report, *supra* note 38. CEQ makes this change in the final rule. As noted in the NPRM, these changes do not preclude an agency from summarizing or discussing specific comments in the EIS as well.

Finally, CEQ proposed to amend paragraph (c) for clarity. CEQ makes the proposed changes and additional clarifying edits in the final rule.

F. Revisions to Pre-Decisional Referrals to the Council of Proposed Federal Actions Determined To Be Environmentally Unsatisfactory (Part 1504)

CEQ proposed edits to part 1504, ''Pre-decisional Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory,'' to improve clarity, including grammatical corrections. CEQ also proposed to reference specifically EAs in this part. Although infrequent, agencies have made referrals to CEQ on EAs. CEQ also proposed a minor revision to the title of part 1504, striking ''Predecision'' and inserting ''Pre-decisional.'' CEQ makes these changes in the final rule.

1. Purpose (§ 1504.1)

Section 1504.1, ''Purpose,'' addresses the purpose of part 1504, including CEQ referrals by the EPA. Section 309 of the Clean Air Act (42 U.S.C. 7609) requires EPA to review and comment on certain proposed actions of other Federal agencies and to make those comments public. Where appropriate, EPA may exercise its authority under section 309(b) of the Clean Air Act and refer the matter to CEQ, as stated in paragraph (b). The final rule revises this paragraph for clarity, changing it from passive to active voice. Paragraph (c) provides that other Federal agencies also may prepare such reviews. In the NPRM, CEQ proposed to change ''may make'' to ''may produce'' in this paragraph. The final rule changes this phrase to ''may prepare'' since ''prepare'' is the commonly used verb in these regulations.

2. Criterial for Referral (§ 1504.2)

CEQ proposed to change ''possible'' to ''practicable'' in the introductory paragraph of § 1504.2, ''Criteria for referral.'' CEQ makes this change in the final rule as discussed in section II.A. Consistent with the NEPA statute, CEQ proposed to add economic and technical considerations to paragraph (g) of § 1504.2, ''Criteria for referrals.'' CEQ includes this change in the final rule.

3. Procedure for Referrals and Response (§ 1504.3)

In § 1504.3, ''Procedure for referrals and response,'' CEQ proposed changes to simplify and modernize the referral process to ensure it is timely and efficient. CEQ proposed to change the language in this section from passive to active voice and make other clarifying edits to the language. CEQ includes these changes with some additional clarifying edits in the final rule. Specifically, in paragraphs (a)(1) and (2), CEQ changes ''advise'' and ''such advice'' to ''notify'' and ''a notification'' respectively. CEQ proposed to eliminate the exception in paragraph (a)(2) for statements that do not contain adequate information to permit an assessment of the matter's environmental acceptability. CEQ removes this clause in the final rule. The referring agency should provide the lead agency and CEQ with as much information as possible, including identification of when the information is inadequate to permit an assessment. In paragraph (a)(4), CEQ changes ''such advice'' to ''the referring agency's views'' in the final rule to clarify what the referring agency is sending to CEQ.

In paragraph (b), CEQ proposed to change ''commenting agencies'' to ''participating agencies,'' a change CEQ proposed throughout the rule, and to add a timeframe for referrals of EAs. CEQ makes these changes in the final rule. CEQ proposed to strike from paragraph (c)(1) the clause requiring the referral request that no action be taken to implement the matter until CEQ takes

action. CEQ removes this clause in the final rule because it is unnecessarily limiting. Agencies should have the flexibility to determine what they are requesting of the lead agency when making a referral, which may include a request not to take any action on the matter.

CEQ proposed to change ''material facts in controversy'' to ''disputed material facts'' in paragraph (c)(2)(i) for clarity and to simplify paragraph (c)(2)(iii) to focus on the reasons for the referral, which may include that the matter is environmentally unsatisfactory. CEQ proposed to revise paragraph (d)(2) to emphasize that the lead agency's response should include both evidence and explanations, as appropriate. CEQ proposed to revise paragraph (e) to simplify the process and to provide direction to applicants regarding the submittal of their views to the CEQ. CEQ proposed to strike the reference to public meetings or hearings in paragraph (f)(3) to provide more flexibility to CEQ in how it obtains additional views and information, which could include a public meeting or hearing. However, there may be other, more effective mechanisms to collect such information, including through use of current technologies. CEQ makes these changes in the final rule.

Finally, CEQ proposed to modify paragraph (h) to clarify that the referral process is not a final agency action that is judicially reviewable and to remove the requirement that referrals be conducted consistent with the APA where a statute requires that an action be determined on the record after an opportunity for a hearing. Where other statutes govern the referral process, those statutes continue to apply, and these regulations do not need to speculate about what process might be required. Therefore, CEQ eliminates this language in the final rule and replaces it with the clarification that the referral process does not create a private right of action because, among other considerations, there is no final agency action.

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

1. Remove and Reserve Agency Decisionmaking Procedures (§ 1505.1)

In the NPRM, CEQ proposed to move the text of 40 CFR 1505.1, ''Agency decisionmaking procedures,'' to § 1507.3(b). As discussed further in section II.I.3, CEQ makes this change in the final rule and reserves § 1505.1 for future use.

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

CEQ proposed to redesignate the introductory paragraph of § 1505.2, ''Record of decision in cases requiring environmental impact statements,'' as paragraph (a) and revise it to require agencies to ''timely publish'' a ROD. CEQ also proposed to clarify that the CEQ regulations allow for ''joint'' RODs by two or more Federal agencies; this change is also consistent with the OFD policy and E.O. 13807. Finally, CEQ proposed to remove references to OMB Circular A–95 as noted previously in section II.A.

CEQ proposed clarifying edits to proposed paragraphs (a) and (c) (paragraphs (a)(1) and (3) in the final rule) to change from passive to active voice for clarity. The final rule makes these changes in paragraphs (a)(1), (2), and (3) in the final rule. The final rule also removes ''all'' before ''alternatives'' in paragraph (a)(2) for consistency with the same change in § 1502.14(a).

CEQ proposed to include a requirement in proposed paragraph (d) to require agencies to respond to any comments on the submitted alternatives, information, and analyses section in the final EIS. As discussed in sections II.B.3 and II.E.1, CEQ does not include the proposed 30-day comment period in the final rule; therefore, CEQ is not including proposed § 1505.2(d) in the final rule.

In the NPRM, proposed paragraph (e) would require the ROD to include the decision maker's certification regarding consideration of the submitted alternatives, information, and analyses section, which proposed § 1502.18 required. The final rule replaces what was proposed paragraph (e) with the language moved from proposed § 1502.18, ''Certification of alternatives, information, and analyses section,'' in paragraph (b). In the NPRM, § 1502.18 stated that, based on the alternatives, information, and analyses section required under § 1502.17, the decision maker for the lead agency must certify that the agency has considered such information and include the certification in the ROD under § 1505.2(d) (as proposed). This provision also proposed a conclusive presumption that the agency has considered information summarized in that section because it is reasonable to presume the agency has considered such information based on the process to request and summarize public comments on the submitted alternatives, information, and analyses.

CEQ modifies the proposed text of § 1502.18 in the final rule and in paragraph (b) of § 1505.2 to clarify that the decision maker's certification in the ROD is informed by the summary of submitted alternatives, information, and analyses in the final EIS and any other material in the record that the decision maker determines to be relevant. This includes both the draft and final EIS as well as any supporting materials incorporated by reference or appended to the document. The final rule also changes ''conclusive presumption'' to a ''presumption'' and clarifies that the agency is entitled to a presumption that it has considered the submitted alternatives, information, and analyses, including the summary thereof in the final EIS. Establishing a rebuttable presumption will give appropriate weight to the process that culminates in the certification, while also allowing some flexibility in situations where essential information may have been inadvertently overlooked. The presumption and associated exhaustion requirement also will encourage commenters to provide the agency with all available information prior to the agency's decision, rather than disclosing information after the decision is made or in subsequent litigation. This is important for the decision-making process and efficient management of agency resources.

3. Implementing the Decision (§ 1505.3)

CEQ proposed minor edits to § 1505.3, ''Implementing the decision'' to change ''commenting'' agencies to ''participating'' in paragraph (c) and ''make available to the public'' to ''publish'' in paragraph (d). CEQ makes these changes in the final rule.

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

CEQ proposed a number of edits to part 1506 to improve the NEPA process to make it more efficient and flexible, especially where actions involve third-party applicants. CEQ also proposed several edits for clarity. CEQ finalizes many of these proposed changes in the final rule with some additional clarifying edits.

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

CEQ proposed to add FONSIs to paragraph (a) of § 1506.1, ''Limitations on actions during NEPA process,'' to clarify existing practice and judicial determinations that the limitation on actions applies when an agency is preparing an EA as well as an EIS. CEQ proposed to consolidate paragraph (d) with paragraph (b) and revise the

language to provide additional clarity on what activities are allowable during the NEPA process. Specifically, CEQ proposed to eliminate reference to one specific agency, broadening the provision to all agencies and providing that this section does not preclude certain activities by an applicant to support an application of Federal, State, Tribal, or local permits or assistance. As an example of activities an applicant may undertake, CEQ proposed to add ''acquisition of interests in land,'' which includes acquisitions of rights-of-way and conservation easements. CEQ invited comment on whether it should make any additional changes to § 1506.1, including whether there are circumstances under which an agency may authorize irreversible and irretrievable commitments of resources. CEQ finalizes this provision as proposed with minor grammatical changes, and simplifying the references in paragraphs (c) introductory text and (c)(2) from programmatic environmental impact ''statement'' to ''review.''

2. Elimination of Duplication With State, Tribal, and Local Procedures (§ 1506.2)

CEQ proposed revisions to § 1506.2, ''Elimination of duplication with State, Tribal, and local procedures'' to promote efficiency and reduce duplication between Federal and State, Tribal, and local requirements. These changes are consistent with the President's directive in E.O. 13807 to provide for agency use, to the maximum extent permitted by law, of environmental studies, analysis, and decisions in support of earlier Federal, State, Tribal, or local environmental reviews or authorization decisions. E.O. 13807, sec. 5(e)(i)(C). CEQ proposed to revise paragraph (a) to acknowledge the increasing number of State, Tribal, and local governments conducting NEPA reviews pursuant to assignment from Federal agencies. *See, e.g.,* 23 U.S.C. 327, and 25 U.S.C. 4115 and 5389(a). CEQ makes this change in the final rule. The revision in paragraph (a) clarifies that Federal agencies are authorized to cooperate with such State, Tribal, and local agencies, and paragraph (b) requires cooperation to reduce duplication.

CEQ proposed to add examples to paragraph (b) to encourage use of prior reviews and decisions and modify paragraph (c) to give agencies flexibility to determine whether to cooperate in fulfilling State, Tribal, or local EIS or similar requirements. CEQ includes these proposed changes in the final rule and reorders the language to provide additional clarity. Additionally, the final rule makes further changes to paragraph (b) to remove potential impediments for agency use of studies, analysis, and decisions developed by State, Tribal, and local government agencies. Some commenters stated that CEQ proposed to limit agency use to only environmental studies, analysis, and decisions and exclude socio-economic and other information. The final rule clarifies that agencies should make broad use of studies, analysis, and decisions prepared by State, Tribal, and local agencies, as appropriate based on other requirements including § 1502.23. Finally, CEQ proposed to clarify in paragraph (d) that NEPA does not require reconciliation of inconsistencies between the proposed action and State, Tribal, or local plans or laws, although the EIS should discuss the inconsistencies. CEQ makes these revisions in the final rule.

3. Adoption (§ 1506.3)

CEQ proposed to expand adoption to EAs, consistent with current practice by many agencies, and CE determinations and clarify the process for documenting the decision to adopt. CEQ includes these proposed changes in the final rule with additional revisions to align the language for consistency in each paragraph and better organize § 1506.3 by grouping the provisions relating to EISs into paragraph (b), EAs in paragraph (c), and CE determinations in paragraph (d).

Paragraph (a) includes the general requirement for adoption, which is that any adoption must meet the standard for an adequate EIS, EA, or CE determination, as appropriate, under the CEQ regulations. CEQ proposed to reference EAs in this paragraph. The final rule includes CE determinations as well as EAs and reorders the documents for consistency with the ordering of paragraphs (b) through (d)—EISs, EAs (including portions of EISs or EAs), and CE determinations.

CEQ proposed clarifying edits in paragraph (b) and changed references from recirculation to republication consistent with this change throughout the rule. In the final rule, CEQ subdivides paragraph (b) into subordinate paragraphs (b)(1) and (2). Paragraph (b)(1) addresses EISs where the adopting agency is not a cooperating agency. CEQ moves the cooperating agency exception to republication to paragraph (b)(2). Consistent with the proposed rule, this paragraph also clarifies that the cooperating agency adopts such an EIS by issuing its own ROD.

In the NPRM, proposed paragraph (f) would allow an agency to adopt another agency's determination that its CE applies to an action if the adopting agency's proposed action is substantially the same. CEQ includes this provision in paragraph (d) of the final rule with clarifying edits. The final rule provides agencies the flexibility to adopt another agency's determination that a CE applies to an action when the actions are substantially the same to address situations where a proposed action would result in a CE determination by one agency and an EA and FONSI by another agency. For example, this would be the case when two agencies are engaging in similar activities in similar areas like small-scale prescribed burns, ecological restoration, and small-scale land management practices. Another example is when one agency's action may be a funding decision for a proposed project, and another agency's action is to consider a permit for the same project.

To allow agencies to use one another's CEs without the agency that promulgated the CE having to take an action, CEQ also proposed a new § 1507.3(e)(5), which would allow agencies to establish a process in their NEPA procedures to apply another agency's CE. CEQ notes that there was some confusion among commenters regarding the difference between the adoption of CEs under § 1506.3 and the provision in § 1507.3(f)(5) (proposed § 1507.3(e)(5)).[97] CEQ has made clarifying edits to address this confusion.

The adoption process in § 1506.3(d) first requires that an agency has applied a CE listed in its agency NEPA procedures. Then, the adopting agency must verify that its proposed action is substantially the same as the action for which it is adopting the CE determination. CEQ adds a sentence in § 1507.3(f)(5) of the final rule to clarify that agencies may establish a separate process for using another agency's listed CE and applying the CE to its proposed actions. The final rule also requires the adopting agency to document the adoption. Agencies may publish, where appropriate, such documentation or other information relating to the adoption.

4. Combining Documents (§ 1506.4)

CEQ proposed to amend § 1506.4, ''Combining documents,'' to encourage agencies ''to the fullest extent practicable'' to combine their environmental documents with other

[97] For a discussion of the differences between these two provisions, see section I.3 of the Final Rule Response to Comments.

agency documents to reduce duplication and paperwork. For example, the Corps routinely combines EISs with feasibility reports, and agencies may use their NEPA documents to satisfy compliance with section 106 of the National Historic Preservation Act under 36 CFR 800.8. CEQ includes the proposed revisions in the final rule with no changes.

5. Agency Responsibility for Environmental Documents (§ 1506.5)

As discussed in the NPRM, CEQ proposed to revise § 1506.5, ''Agency responsibility for environmental documents,'' in response to ANPRM comments urging CEQ to allow greater flexibility for the project sponsor (including private entities) to participate in the preparation of NEPA documents under the supervision of the lead agency. CEQ proposed updates to give agencies more flexibility with respect to the preparation of environmental documents while continuing to require agencies to independently evaluate and take responsibility for those documents. Under the proposal, applicants and contractors would be able to assume a greater role in contributing information and material to the preparation of environmental documents, subject to the supervision of the agency. However, agencies would remain responsible for taking reasonable steps to ensure the accuracy of information prepared by applicants and contractors. If a contractor or applicant prepares the document, proposed paragraph (c)(1) would require the decision-making agency official to provide guidance, participate in the preparation, independently evaluate the statement, and take responsibility for its content.

In the final rule, CEQ retains these concepts, but reorganizes § 1506.5 to better communicate the requirements. Specifically, paragraph (a) contains a clear statement that the Federal agency is ultimately responsible for the environmental document irrespective of who prepares it. While this is consistent with the 1978 regulations, CEQ provides this direct statement at the beginning of the section to respond to comments that suggested agencies would be handing over their responsibilities to project sponsors under the proposed rule.

Paragraph (b) introductory text and its subordinate paragraphs capture the requirements when a project sponsor or contractor prepares an environmental document, consolidating requirements for EISs and EAs into one because there is no longer a distinction between the requirements for each document in this context. Paragraph (b) allows an agency to require an applicant to submit environmental information for the agency's use in preparing an environmental document or to direct an applicant or authorize a contractor to prepare an environmental document under the agency's supervision. As noted in the NPRM, CEQ intends these changes to improve communication between proponents of a proposal for agency action and the officials tasked with evaluating the effects of the action and reasonable alternatives, to improve the quality of NEPA documents and efficiency of the NEPA process.

Paragraph (b)(1) requires agencies to provide guidance to the applicant or contractor and participate in the preparation of the NEPA document. Paragraph (b)(2) continues to require the agency to independently evaluate the information or environmental document and take responsibility for its accuracy, scope, and contents. Paragraph (b)(3) requires the agency to include the names and qualifications of the persons who prepared the environmental document. Adding ''qualifications'' is consistent with § 1502.18 and is important for transparency. For an EIS, this information would be included in the list of preparers as required by § 1502.18, but agencies have flexibility on where to include such information in an EA. Paragraph (b)(4) requires contractors or applicants preparing EAs or EISs to submit a disclosure statement to the lead agency specifying any financial or other interest in the outcome of the action, but it need not include privileged or confidential trade secrets or other confidential business information. In the NPRM, CEQ had proposed to remove the requirement for a disclosure statement. In response to comments, CEQ is retaining this concept in the final rule, recognizing that most applicants will have such a financial interest. However, as discussed above, CEQ finds that it is appropriate to allow applicants to prepare documents for the sake of efficiency and because agencies retain responsibility to oversee and take responsibility for the final environmental document.

6. Public Involvement (§ 1506.6)

CEQ proposed to update § 1506.6, ''Public involvement,'' to give agencies greater flexibility to design and customize public involvement to best meet the specific circumstances of their proposed actions. The NPRM proposed revisions to paragraphs (b) and (c) to add ''other opportunities for public engagement'' to recognize that there are other ways to engage with interested and affected parties besides hearings and meetings. CEQ finalizes these changes in the final rule but changes ''engagement'' to ''involvement'' consistent with the title of the section. Additionally, the final rule adds a sentence to these paragraphs to require agencies to consider interested and affected parties' access to electronic media, such as in rural locations or economically distressed areas. CEQ had proposed to state in a new paragraph (b)(3)(x) that notice may not be limited solely to electronic methods for actions occurring in an area with limited access to high-speed internet. However, CEQ is including this more general statement in paragraph (b) as it is a consideration for notice generally. In paragraph (b)(1), CEQ proposed to change the requirement to mail notice in paragraphs (b)(1) and (2) to the more general requirement to ''notify'' to give agencies the flexibility to use email or other mechanisms to provide such notice. CEQ makes this change in the final rule. CEQ also eliminates the requirement in paragraph (b)(2) to maintain a list of organizations reasonably expected to be interested in actions with effects of national concern because such a requirement is unnecessarily prescriptive given that agencies may collect and organize contact information for organizations that have requested regular notice in another format given advances in technology. In the proposed rule, CEQ proposed to change paragraph (b)(3)(i) to modify State clearinghouses to State and local agencies, and change paragraph (b)(3)(ii) to affected Tribal governments. In the final rule, CEQ modifies paragraph (b)(3)(i) to include notice to State, Tribal, and local agencies, and paragraph (b)(3)(ii) to include notice to interested or affected State, Tribal, and local governments for consistency with § 1501.9 and part 1503. CEQ proposed a new paragraph (b)(3)(x) to allow for notice through electronic media. CEQ includes this provision in the final rule, moving the language regarding consideration of access to paragraph (b), as noted previously.

In addition to the changes described above, CEQ proposed to strike the mandatory criteria in paragraph (c) for consideration of when to hold or sponsor public hearings or meetings. CEQ is removing this language in the final rule because such criteria are unnecessarily limiting. Agencies consider many factors in determining the most appropriate mechanism for promoting public involvement, including the particular location of the proposed action (if one exists), the types of effects it may have, and the needs of interested and affected parties, and may design their outreach in a manner that

best engages with those parties. The flexibility to consider relevant factors is critical especially in light of unexpected circumstances, such as the COVID–19 pandemic, which may require agencies to adapt their outreach as required by State, Tribal, and local authorities and conditions.

Finally, CEQ proposed to simplify paragraph (f) to require agencies to make EISs, comments and underlying documents available to the public consistent with the Freedom of Information Act (FOIA), removing the provisos regarding interagency memoranda and fees. Congress has amended FOIA numerous times since the enactment of NEPA, mostly recently by the FOIA Improvement Act of 2016, Public Law 114–185, 130 Stat. 538. Additionally, the revised paragraph (f) is consistent with the text of section 102(2)(C) of NEPA, including with regard to fees. CEQ makes these changes as proposed in the final rule.

7. Further Guidance (§ 1506.7)

CEQ proposed to update and modernize § 1506.7, ''Further guidance,'' to remove the specific references to handbooks, memoranda, and the 102 monitor, and replace it with a statement that CEQ may provide further guidance concerning NEPA and its procedures consistent with E.O. 13807 and E.O. 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' [98] CEQ makes these changes in paragraph (a) in the final rule. This rule supersedes preexisting CEQ guidance and materials in many respects. CEQ intends to publish a separate notice in the **Federal Register** listing guidance it is withdrawing. CEQ will issue new guidance, as needed, consistent with the final rule and Presidential directives. In the interim, in any instances where an interpretation of the 1978 regulations is inconsistent with the new regulations or this preamble's interpretation of the new regulations, the new regulations and interpretations shall apply, and CEQ includes a new paragraph (b) in the final rule to provide this clarification. CEQ notes that guidance does not have the force and effect of law and is meant to provide clarity regarding existing law and policy.

8. Proposals for Legislation (§ 1506.8)

CEQ proposed to move the legislative EIS requirements from the definition of legislation in 40 CFR 1508.17 to paragraph (a) of § 1506.8, ''Proposals for legislation,'' and revise the section for clarity. As noted in the NPRM, agencies prepare legislative EISs for Congress when they are proposing specific actions. CEQ also invited comment on whether the legislative EIS requirement should be eliminated or modified because the President proposes legislation, and therefore it is inconsistent with the Recommendations Clause of the U.S. Constitution, which provides the President shall recommend for Congress' consideration ''such [m]easures as he shall judge necessary and expedient .....'' U.S. Const., art. II, § 3. The President is not a Federal agency, 40 CFR 1508.12, and the proposal of legislation by the President is not an agency action. *Franklin* v. *Mass.,* 505 U.S. 788, 800–01 (1992).

In the final rule, CEQ retains the provision, but removes the reference to providing ''significant cooperation and support in the development'' of legislation and the test for significant cooperation to more closely align this provision with the statute. The final rule clarifies that technical drafting assistance is not a legislative proposal under these regulations. Consistent with these edits, CEQ strikes the reference to the Wilderness Act. The mandate has expired.[99] Under the Wilderness Act, a study was required to make a recommendation to the President. If the President agreed with the recommendation, the President then provided ''advice'' to Congress about making a wilderness determination. The President is not subject to NEPA in his direct recommendations to Congress, but agencies subject to the APA are subject to NEPA, as appropriate, concerning legislative proposals they develop. This avoids the constitutional issue. *See Ashwander* v. *Tenn. Valley Auth.,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Rescue Army* v. *Mun. Court of L.A.,* 331 U.S. 549, 569 (1947).

9. Proposals for Regulations (§ 1506.9)

CEQ proposed to add a new § 1506.9, ''Proposals for regulations,'' to address the analyses required for rulemakings and to promote efficiency and reduce duplication in the assessment of regulatory proposals. CEQ proposed criteria for agencies to identify analyses that could serve as the functional equivalent of the EIS. In response to comments, CEQ revises this section in the final rule. This section clarifies that one or more procedures and documentation prepared pursuant to other statutory or Executive order requirements may satisfy one or more requirements of the CEQ regulations. When a procedure or document satisfies one or more requirements of this subchapter, the agency may substitute it for the corresponding requirements in this subchapter and need not carry out duplicative procedures or documentation. Agencies must identify which corresponding requirements in this subchapter are satisfied and consult with CEQ to confirm such determinations.

CEQ invited comments on analyses agencies are already conducting that, in whole or when aggregated, can serve as the functional equivalent of the EIS. Aspects of the cost-benefit analysis prepared pursuant to E.O. 12866, ''Regulatory Planning and Review,'' the Regulatory Flexibility Act, or the Unfunded Mandates Reform Act, may overlap with aspects of the CEQ regulations. Further, an agency may rely on the procedures implementing the requirements of a variety of statutes and Executive orders that could meet some or all of the requirements of this subchapter. CEQ does not expressly include specific analyses in the final rule that satisfy the requirements of the CEQ regulations. In all instances, agencies should clearly identify how and which specific parts of the analyses serve the purpose of NEPA compliance, including which requirements in the CEQ regulations are satisfied.

10. Filing Requirements (§ 1506.10)

CEQ proposed to update § 1506.10, ''Filing requirements,'' to remove the obsolete process for filing paper copies of EISs with EPA and EPA's delivery of a copy to CEQ, and instead provide for electronic filing, consistent with EPA's procedures. CEQ proposed this change to provide flexibility to adapt as EPA changes its processes. CEQ revises this section in the final rule, making the proposed changes as well as phrasing the language in active voice.

11. Timing of Agency Action (§ 1506.11)

CEQ proposed to revise paragraph (a) of § 1506.11, ''Timing of agency action,'' to clarify the timing of EPA's notices of availability of EISs. In paragraph (b), CEQ proposed to add a clause to acknowledge statutory authorities that provide for the issuance of a combined final EIS and ROD. *See* 23 U.S.C. 139(n)(2); 49 U.S.C. 304a(b). CEQ makes these changes in the final rule.

In proposed paragraph (c), CEQ proposed to add introductory text and create subordinate paragraphs to address those situations where agencies may make an exception to the time provisions in paragraph (b). Specifically, paragraph (c)(1) addresses agencies with formal appeals processes. Paragraph (c)(2) provides exceptions for

[98] 84 FR 55235 (Oct. 15, 2019).

[99] 16 U.S.C. 1132(b)–(c).

rulemaking to protect public health or safety. Paragraph (d) addresses timing when an agency files the final EIS within 90 days of the draft EIS. Finally, paragraph (e) addresses when agencies may extend or reduce the time periods. The proposed rule made edits to clarify the language in these paragraphs without changing the substance of the provisions. CEQ includes these changes in the final rule and makes additional clarifying revisions.

12. Emergencies (§ 1506.12)

Section 1506.12, ''Emergencies,'' addresses agency compliance with NEPA when an agency has to take an action with significant environmental effects during emergency circumstances. Over the last 40 years, CEQ has developed significant experience with NEPA in the context of emergencies and disaster recoveries. Actions following Hurricanes Katrina, Harvey, and Michael, and other natural disasters, have given CEQ the opportunity to respond to a variety of circumstances where alternative arrangements for complying with NEPA are necessary. CEQ has approved alternative arrangements to allow a wide range of proposed actions in emergency circumstances including catastrophic wildfires, threats to species and their habitat, economic crisis, infectious disease outbreaks, potential dam failures, and insect infestations.[100] CEQ proposed to amend § 1506.12, ''Emergencies,'' to clarify that alternative arrangements are still meant to comply with section 102(2)(C)'s requirement for a ''detailed statement.'' This amendment is consistent with CEQ's longstanding position that it has no authority to exempt Federal agencies from compliance with NEPA, but that CEQ can appropriately provide for exceptions to specific requirements of CEQ's regulations to address extraordinary circumstances that are not addressed by agency implementing procedures previously approved by CEQ. *See* Emergencies Guidance, *supra* note 29. CEQ maintains a public description of all pending and completed alternative arrangements on its website.[101] CEQ makes this change in the final rule.

13. Effective Date (§ 1506.13)

Finally, CEQ proposed to modify § 1506.13, ''Effective date,'' to clarify that these regulations would apply to all NEPA processes begun after the effective date, but agencies have the discretion to apply them to ongoing NEPA processes. CEQ also proposed to remove the 1979 effective date from the introductory paragraph, and strike 40 CFR 1506.13(a) referencing the 1973 guidance and 40 CFR 1506.13(b) regarding actions begun before January 1, 1970 because they are obsolete. This final rule makes these changes.

I. Revisions to Agency Compliance (Part 1507)

CEQ proposed modifications to part 1507, which addresses agency compliance with NEPA, to consolidate provisions relating to agency procedures from elsewhere in the CEQ regulations, and add a new section to address the dissemination of information about agency NEPA programs. CEQ makes these changes in the final rule with some modifications to the proposed rule as discussed in the following sections.

1. Compliance (§ 1507.1)

CEQ proposed a change to § 1507.1, ''Compliance,'' to strike the second sentence regarding agency flexibility in adapting its implementing procedures to the requirements of other applicable laws for consistency with changes to paragraphs (a) and (b) of § 1507.3, ''Agency NEPA procedures.'' This change is also consistent with the direction of the President to Federal agencies to ''comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.'' E.O. 11514, as amended by E.O. 11991, sec. 2(g). CEQ makes this change in the final rule. Under the final rule, § 1507.1 requires all Federal agencies to comply with the CEQ regulations as set forth in parts 1500 through 1508.

2. Agency Capability To Comply (§ 1507.2)

CEQ proposed edits to the introductory paragraph of § 1507.2, ''Agency capability to comply,'' to clarify its meaning, which is to allow agencies to use the resources (including personnel and financial resources) of other parties, including agencies and applicants, and to specifically require agencies to account for the contributions of these other parties in complying with NEPA. This section also requires agencies to have their own capacity to comply with NEPA and the implementing regulations. This includes staff with the expertise to independently evaluate environmental documents, including those prepared by applicants and contractors. CEQ makes these clarifying edits in the final rule.

Additionally, CEQ proposed to revise paragraph (a) to make the senior agency official responsible for overall agency compliance with NEPA, including coordination, communication, and resolution of implementation issues. CEQ is finalizing this change. Under the final rule, the senior agency official is an official of assistant secretary rank or higher (or equivalent) with responsibilities consistent with the responsibilities of senior agency officials in E.O. 13807 to whom agencies elevate anticipated missed or extended permitting timetable milestones. The senior agency official is responsible for addressing disputes among lead and cooperating agencies and enforcing page and time limits. The senior agency official also is responsible for ensuring all environmental documents—even exceptionally lengthy ones—are provided to Federal agency decision makers in a timely, readable, and useful format. *See* §§ 1501.5(f), 1501.7(d), 1501.8(b)(6) and (c), 1501.10, 1502.7, 1507.2, 1508.1(dd).

CEQ proposed to amend paragraph (c) to emphasize agency cooperation, which includes commenting on environmental documents on which an agency is cooperating. CEQ makes this change in the final rule. CEQ revises paragraph (d) in response to comments to strike the second sentence, which created confusion regarding the reach of section 102(2)(E) of NEPA. Finally, CEQ proposed to add references to E.O. 11991, which amended E.O. 11514, and E.O. 13807 in paragraph (f) to codify agencies' responsibility to comply with the orders. CEQ makes both of these changes in the final rule.

3. Agency NEPA Procedures (§ 1507.3)

Agency NEPA procedures set forth the process by which agencies comply with NEPA and the CEQ regulations in the context of their particular programs and processes. In developing their procedures, agencies should strive to identify and apply efficiencies, such as use of applicable CEs, adoption of prior NEPA analyses, and incorporation by reference to prior relevant Federal, State, Tribal, and local analyses wherever practicable. To facilitate effective and efficient procedures, CEQ

[100] In response to the economic crisis associated with the coronavirus outbreak, Executive Order 13927, titled ''Accelerating the Nation's Economic Recovery From the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities,'' was issued on June 4, 2020. 85 FR 35165. This Executive order directs agencies to identify planned or potential actions to facilitate the Nation's economic recovery, including identification of actions that may be subject to emergency treatment as alternative arrangements.

[101] *https://ceq.doe.gov/nepa-practice/alternative_arrangements.html.*

proposed to consolidate all of the requirements for agency NEPA procedures in § 1507.3, as discussed in detail below.

In the final rule, CEQ adds a new paragraph (a) to clarify the applicability of these regulations in the interim period between the effective date of the final rule and when the agencies complete updates to their agency NEPA procedures for consistency with these regulations. Consistent with § 1506.13, ''Effective date,'' which makes the regulations applicable to NEPA reviews begun after the effective date of the final rule, paragraph (a) of § 1507.3 requires agencies to apply these regulations to new reviews unless there is a clear and fundamental conflict with an applicable statute. For NEPA reviews in process that agencies began before the final rule's effective date, agencies may choose whether to apply the revised regulations or proceed under the 1978 regulations and their existing agency NEPA procedures. Agencies should clearly indicate to interested and affected parties which procedures it is applying for each proposed action. The final rule does not require agencies to withdraw their existing agency NEPA procedures upon the effective date, but agencies should conduct a consistency review of their procedures in order to proceed appropriately on new proposed actions.

Paragraph (a) also provides that agencies' existing CEs are consistent with the subchapter. CEQ adds this language to ensure CEs remain available for agencies' use to ensure a smooth transition period while they work to update their existing agency procedures, including their CEs, as necessary. This change allows agencies to continue to use their existing CEs for ongoing activities as well as proposed actions that begin after the effective date of the CEQ final rule, and clarifies that revisions to existing CEs are not required within 12 months of the publication date of the final rule. Agencies must still consider whether extraordinary circumstances are present and should rely upon any extraordinary circumstances listed in their agency NEPA procedures as an integral part of an agency's process for applying CEs.

In paragraph (b) (proposed paragraph (a)), CEQ proposed to provide agencies the later of one year after publication of the final rule or nine months after the establishment of an agency to develop or revise proposed agency NEPA procedures, as necessary, to implement the CEQ regulations and eliminate any inconsistencies with the revised regulations. CEQ includes this sentence in the final rule with a correction to the deadline—the deadline is calculated from the effective date, not the publication date. CEQ notes that this provision references ''proposed procedures,'' and agencies need not finalize them by this date. The final rule strikes a balance between minimizing the disruption to ongoing environmental reviews while also requiring agencies to revise their procedures in a timely manner to ensure future reviews are consistent with the final rule. Agencies have the flexibility to address the requirements of the CEQ regulations as they relate to their programs and need not state them verbatim in their procedures. In addition, CEQ proposed to clarify that, except as otherwise provided by law or for agency efficiency, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the CEQ regulations. CEQ includes this language in the final rule, changing the order of the phrases, changing ''provided by law'' to ''required by law'' to enhance clarity, and adding a cross-reference to paragraph (c), which references efficiencies. This change is consistent with the direction of the President to Federal agencies in E.O. 11514 to comply with the CEQ regulations issued except where such compliance would be inconsistent with statutory requirements. E.O. 11514, as amended by E.O. 11991, sec. 2(g). Finally, the final rule eliminates the sentence from 40 CFR 1507.3(a) prohibiting agencies from paraphrasing the CEQ regulations because it is unnecessarily limiting on agencies. Agencies have the flexibility to address the requirements of the CEQ regulations as they relate to their programs and need not state them verbatim in their procedures.

Consistent with its proposal, the final rule requires agencies to develop or revise, as necessary, proposed procedures to implement these regulations. In the NPRM, CEQ proposed to subdivide 40 CFR 1507.3(a) into subordinate paragraphs (a)(1) and (2) for additional clarity because each of these paragraphs have an independent requirement. CEQ finalizes this change as paragraphs (b)(1) and (2) in the final rule. Paragraph (b)(1) addresses the requirement for agencies to consult with CEQ when developing or revising proposed procedures. Paragraph (b)(2) requires agencies to publish proposed agency NEPA procedures for public review and comment. After agencies address these comments, CEQ must determine that the agency NEPA procedures conform to and are consistent with NEPA and the CEQ regulations. CEQ proposed to eliminate the recommendation to agencies to issue explanatory guidance and the requirement to review their policies and procedures. CEQ makes this change in the final rule because it is redundant to the proposed language in paragraph (b) requiring agencies to update their procedures to implement the final rule.

The NPRM proposed to move the provisions in § 1505.1, ''Agency decision making procedures,'' to proposed § 1507.3(b). The final rule moves these provisions to paragraph (c). As stated in the NPRM, consistent with the proposed edits to § 1500.1, CEQ proposed to revise this paragraph to clarify that agencies should ensure decisions are made in accordance with the Act's procedural requirements and policy of integrating NEPA with other environmental reviews to promote efficient and timely decision making. CEQ includes these edits in the final rule, along with an additional edit to change passive to active voice. CEQ does not include proposed paragraph (b)(1) (40 CFR 1505.1(a)) in the final rule because the phrase ''[i]mplementing procedures under section 102(2) of NEPA to achieve the requirements of section 101 and 102(1)'' could be read to suggest that agencies could interpret NEPA in a manner that would impose more burdens than the requirements of the final rule. Including this provision in the final rule would be inconsistent with the language in paragraph (b) that limits agency NEPA procedures to the requirements in these regulations unless otherwise required by law or for agency efficiency. Finally, CEQ corrects the reference in paragraph (c)(4) to EIS, changing it to ''environmental documents'' consistent with the rest of the paragraph.

CEQ proposed a new paragraph (b)(6) to direct agencies to set forth in their NEPA procedures requirements to combine their NEPA documents with other agency documents, especially where the same or similar analyses are required for compliance with other requirements. As stated in the NPRM, many agencies implement statutes that call for consideration of alternatives to the agency proposal, including the no action alternative, the effects of the agencies' proposal and alternatives, and public involvement. Agencies can use their NEPA procedures to align compliance with NEPA and these other statutory authorities to integrate NEPA's goals for informed decision making with agencies' specific statutory requirements. This approach is consistent with some agency practice. *See, e.g.,* 36 CFR part 220; Forest Service Handbook 1909.15 (U.S.

Department of Agriculture Forest Service NEPA procedures). More agencies could use it to achieve greater efficiency and reduce unnecessary duplication. Additionally the NPRM proposed to allow agencies to designate analyses or processes that serve as the functional equivalent of NEPA compliance.

CEQ includes this provision in the final rule at paragraph (c)(5) with revisions to clarify that agencies may designate and rely on one or more procedures or documents under other statutes or Executive orders as satisfying some or all of the requirements in the CEQ regulations. While courts have held that agencies do not need to conduct NEPA analyses under a number of statutes that are ''functionally equivalent,'' including the Clean Air Act, the Ocean Dumping Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act,[102] the final rule recognizes that agencies may substitute processes or documentation prepared pursuant to other statutes or Executive orders to satisfy one or more requirements in the CEQ regulations to reduce duplication. Agencies must identify the respective requirements in this subchapter that are satisfied by other statutes or Executive orders.

Furthermore, CEQ proposed to add a new paragraph to allow agencies to identify activities or decisions that are not subject to NEPA, consistent with § 1501.1, in their agency NEPA procedures. CEQ adds this provision to paragraph (d) in the final rule. The final rule uses ''should'' instead of ''may'' to encourage agencies to make these identifications in their agency NEPA procedures. The final rule also replaces ''actions'' with ''activities or decisions'' to avoid confusion with the definition of ''action'' in § 1508.1(q). CEQ includes this list in the final rule consistent with the changes in § 1501.1 as discussed in section II.C.1, with minor revisions to improve readability and a reordering of the provisions consistent with the reordering of the provisions in § 1501.1.

Paragraph (e) (proposed paragraph (d)) maintains much of the language from 40 CFR 1507.3(b). CEQ proposed to add parenthetical descriptions of the cross-references in proposed paragraph (d)(1), and CEQ includes these in the final rule at paragraph (e)(1). CEQ proposed to revise paragraph (d)(2)(ii), which requires agencies to identify CEs in their agency NEPA procedures, move the requirement for extraordinary circumstances from the definition of CEs in 40 CFR 1508.4, and require agencies to identify in their procedures when documentation of a CE determination is required. CEQ also proposed to add language to proposed paragraph (e) to codify existing agency practice to publish notices when an agency pauses an EIS or withdraws an NOI. CEQ includes this provision with the proposed revisions in the final rule at paragraph (f)(3). Finally, CEQ proposed to move from 40 CFR 1502.9(c)(3) to proposed paragraph (d)(3) the requirement to include procedures for introducing a supplement into its formal administrative record and clarify that this includes EAs and EISs. CEQ includes this provision in the final rule at paragraph (e)(3).

Paragraphs (f)(1) through (3) (proposed paragraphs (e)(1) through (3)) maintain much of the language from 40 CFR 1507.3(c) through (e). In proposed paragraph (e)(1), CEQ proposed to revise the language to active voice and encourage, rather than just allow, agencies to organize environmental documents in such a way as to make unclassified portions of environmental documents available to the public. CEQ makes these revisions in the final rule in paragraph (f)(1). CEQ also modifies paragraph (f)(2) to add a reference to the requirements of lead and cooperating agencies. CEQ adds this example consistent with the addition to § 1506.11(b) referencing statutory provisions for combining a final EIS and ROD. This is also consistent with CEQ's goal of improving coordination between lead and cooperating agencies and providing efficient processes to allow for integration of the NEPA review with reviews conducted under other statutes. This allows for altering time periods to facilitate issuance of a combined FEIS and ROD. Additionally, CEQ proposed to move the language allowing agencies to adopt procedures to combine their EA process with their scoping process from 40 CFR 1501.7(b)(3) to paragraph (e)(4). CEQ makes this change in the final rule at paragraph (f)(4).

Finally, CEQ proposed in paragraph (e)(5) to allow agencies to establish a process in their agency NEPA procedures to apply the CEs of other agencies. CEQ also invited comment on whether to set forth this process in these regulations. In the final rule, CEQ includes the provision to allow agencies to establish a process in paragraph (f)(5) with some changes. CEQ includes clarifying language to address the confusion commenters had as to differences between this section and adoption of a CE determination under § 1506.3. An agency's process must provide for consultation with the agency that listed the CE in its NEPA procedures to ensure that the planned use of the CE is consistent with the originating agency's intent and practice.[103] The process should ensure documentation of the consultation and identify to the public those CEs the agency may use for its proposed actions. Consistent with § 1507.4, agencies could post such information on their websites. Then, an agency may apply the CE to its proposed actions, including proposed projects or activities or groups of proposed projects or activities.

4. Agency NEPA Program Information (§ 1507.4)

CEQ proposed to add a new § 1507.4, ''Agency NEPA program information,'' to provide the means of publishing information on ongoing NEPA reviews and agency records relating to NEPA reviews. CEQ is finalizing this provision as proposed with no changes. As stated in the NPRM, this provision requires agencies in their NEPA procedures to provide for a website or other means of publishing certain information on ongoing NEPA reviews and maintaining and permitting public access to agency records relating to NEPA reviews.

Section 1507.4 promotes transparency and efficiency in the NEPA process, and improves interagency coordination by

[102] *See Portland Cement Ass'n,* 486 F.2d at 387 (finding an exemption from NEPA for Clean Air Act section 111); *see also Envtl. Def. Fund, Inc,* 489 F.2d at 1254–56 (concluding that the standards of FIFRA provide the functional equivalent of NEPA); *Cellular Phone Taskforce,* 205 F.3d at 94–95 (concluding that the procedures followed by the Federal Communications Commission were functionally compliant with NEPA's EA and FONSI requirements); *W. Neb. Res. Council,* 943 F.2d at 871–72 (concluding that EPA's procedures and analysis under the Safe Drinking Water Act were functionally equivalent to NEPA); *Wyo.* v. *Hathaway,* 525 F.2d 66, 71–72 (10th Cir. 1975) (concluding that EPA need not prepare an EIS before cancelling or suspending registrations of three chemical toxins used to control coyotes under FIFRA); *State of Ala. ex rel. Siegelman* v. *U.S. EPA,* 911 F.2d 499, 504–05 (11th Cir. 1990) (holding that EPA did not need to comply with NEPA when issuing a final operating permit under the Resource Conservation and Recovery Act); *Envtl. Def. Fund, Inc.* v. *Blum,* 458 F. Supp. 650, 661–62 (D.D.C. 1978) (EPA need not prepare an EIS before granting an emergency exemption to a state to use an unregistered pesticide); *State of Md.* v. *Train,* 415 F. Supp. 116, 121–22 (D. Md. 1976) (Ocean Dumping Act functional equivalent of NEPA). For further discussion, see section J.3 of the Final Rule Response to Comments.

[103] The use of another agency's CE under a process in the agency's NEPA procedures is an option separate from the adoption, under § 1506.3(f), of another agency's determination that its CE applies to a particular action that is substantially the same as the adopting agency's proposed action. An agency may adopt another agency's CE determination for a particular action regardless of whether its procedures provide a process for application of other agencies' CEs.

ensuring that information is more readily available to other agencies and the public. As discussed in the NPRM, opportunities exist for agencies to combine existing geospatial data, including remotely sensed images, and analyses to streamline environmental review and better coordinate development of environmental documents for multi-agency projects, consistent with the OFD policy. One option involves creating a single NEPA application that facilitates consolidation of existing datasets and can run several relevant geographic information system (GIS) analyses to help standardize the production of robust analytical results. This application could have a public-facing component modeled along the lines of EPA's NEPAssist,[104] which would aid prospective project sponsors with site selection and project design and increase public transparency. The application could link to the Permitting Dashboard to help facilitate project tracking and flexibilities under §§ 1506.5 and 1506.6. CEQ invited comment on this proposal, including comment on whether additional regulatory changes could help facilitate streamlined GIS analysis to help agencies comply with NEPA. While some commenters supported the development of a single NEPA application, others identified challenges to ensuring databases are useful, as well as privacy and security concerns. CEQ did not receive sufficient comment to lead CEQ to make additional regulatory changes to facilitate streamlined GIS analysis to help agencies comply with NEPA, and the final rule does not contain any changes from the proposal.

J. Revisions to Definitions (Part 1508)

NEPA does not itself include a set of definitions provided by Congress. CEQ, in the 1978 regulations, established a set of definitions for NEPA and the CEQ regulations. In this final rule, CEQ has clarified or supplemented the definitions as discussed below and further described in the Final Rule Response to Comments at section K. As noted above, *see Public Citizen,* 541 U.S. at 757; *Methow Valley,* 490 U.S. at 355 (citing *Andrus,* 442 U.S. at 358); *Brand X,* 545 U.S. at 980–86; and *Mead Corp.,* 533 U.S. at 227–30, CEQ has the authority to interpret NEPA. *See, e.g., Barnhart* v. *Walton,* 535 U.S. 212, 218 (2002) (''[S]ilence, after all, normally creates ambiguity. It does not resolve it.''). Existing NEPA case law inevitably rests directly on interpretive choices made in the 1978 regulations or on cases that themselves through some chain of prior cases also trace to the 1978 regulations. Yet consistent with *Chevron,* CEQ's NEPA regulations are subject to change. *See also Brand X,* 545 U.S. 967.

CEQ's intention to make use of its interpretive authority under *Chevron* is particularly applicable as to part 1508 where CEQ defines or revises key terms in the NEPA statute and the CEQ regulations. As a result, this confers on CEQ an even greater degree of latitude to elucidate the meaning of the statute's terms in these regulations—the same basic authority exercised by CEQ back in 1978 in the original form of the NEPA regulations. *See, e.g., Demski* v. *U.S. Dep't of Labor,* 419 F.3d 488, 491 (6th Cir. 2005) (''In the absence of a congressional definition or an explicit delegation of congressional authority to the agency, we determine how the agency responsible for implementing the statute . . . understands the term, and, under *Chevron* . . . we determine whether such an understanding is a 'reasonable interpretation' of the statute.'' (citing *Chevron,* 467 U.S. at 844)); *London* v. *Polishook,* 189 F.3d 196, 200 (2d Cir. 1999) (''[J]udicial deference does apply to the guidelines that [the] Department's Office of Labor–Management Standards Enforcement has developed and set out in its LMRDA Interpretive Manual § 030.425—guidelines to which [the D.C. Circuit in *Martoche*] deferred in the absence of a clear definition of 'political subdivision' in the Act or in its legislative history.''); *Hawaii Gov't Employees Ass'n, Am. Fed'n of State, Cty. & Mun. Employees, Local 152* v. *Martoche,* 915 F.2d 718, 721 (D.C. Cir. 1990) (''With some imprecision in the statutory text [as to an undefined term] and a nearly total lack of elucidation in the legislative history, the situation is squarely one in which Congress implicitly left a gap for the agency to fill.'') (internal citation and quotation marks omitted). *See also Perez* v. *Commissioner,* 144 T.C. 51, 59 (2015); *Saha Thai Steel Pipe (Pub.) Co.* v. *United States,* 33 C.I.T. 1541, 1547 (Ct. of Int'l Trade 2009).[105] In promulgating new or revised definitions and other changes to the NEPA regulations, CEQ has considered the ordinary meaning of the terms used by Congress in the statute.

As discussed in the NPRM, CEQ proposed significant revisions to part 1508. CEQ proposed to move the operative language, which is regulatory language that provides instruction or guidance, included throughout the regulations in this section to the relevant substantive sections of the regulations. Consistent with this change, CEQ proposed to retitle part 1508 from ''Terminology and Index'' to ''Definitions.'' [106] CEQ also proposed to clarify the definitions of a number of key NEPA terms in order to reduce ambiguity, both through modification of existing definitions and the addition of new definitions. CEQ proposed to eliminate individual section numbers for each term in favor of a single section of defined terms in the revised § 1508.1. Finally, CEQ proposed to remove citations to the specific definition sections throughout the rule. CEQ makes these changes in the final rule.

1. Clarifying the Meaning of ''Act''

CEQ proposed in paragraph (a) to add ''NEPA'' as a defined term with the same meaning as ''Act.'' CEQ makes this change in the final rule.

2. Definition of ''Affecting''

CEQ did not propose to make any change to the defined term ''affecting'' in paragraph (b). CEQ does not make any changes to this definition in the final rule.

3. New Definition of ''Authorization''

CEQ proposed to define the term ''authorization'' in paragraph (c) to refer to the types of activities that might be required for permitting a proposed action, in particular infrastructure projects. This definition is consistent with the definition included in FAST–41 and E.O. 13807. CEQ proposed to replace the word ''entitlement'' with ''authorization'' throughout the rule. CEQ adds this definition and makes these changes in the final rule.

4. Clarifying the Meaning of ''Categorical Exclusion''

CEQ proposed to revise the definition of ''categorical exclusion'' in paragraph (d) by inserting ''normally'' to clarify that there may be situations where an action may have significant effects on account of extraordinary circumstances.

[104] *https://nepassisttool.epa.gov/nepassist/nepamap.aspx. See also* the Marine Cadastre, which provides consolidated GIS information for offshore actions, *https://marinecadastre.gov/.*

[105] ''Although NEPA's statutory text specifies *when* an agency must comply with NEPA's procedural mandate; it is the Council on Environmental Quality Regulations ('CEQ') regulations which dictate the *how,* providing the framework by which all [F]ederal agencies comply with NEPA.'' *Dine' Citizens Against Ruining Our Environment* v. *Klein,* 747 F. Supp. 2d 1234, 1248 (D. Colo. 2010) (emphasis in original).

[106] CEQ has maintained an index in the Code of Federal Regulations, but this is not a part of the regulations. CEQ does not intend to continue to maintain such an index because it is no longer necessary given that the regulations are typically accessed electronically and the regulations' organization has been significantly improved.

CEQ also proposed to strike ''individually or cumulatively'' for consistency with the proposed revisions to the definition of ''effects'' as discussed in this section. CEQ proposed conforming edits in §§ 1500.4(a) and 1500.5(a). As noted in section II.I.3, CEQ proposed to move the requirement to provide for extraordinary circumstances in agency procedures to §1507.3(d)(2)(ii) (§1507.3(e)(2)(ii) in the final rule). CEQ makes these changes in the final rule. CEQ notes that the definition of ''categorical exclusion'' only applies to those CEs created by an agency in its agency NEPA procedures and does not apply to ''legislative'' CEs created by Congress, which are governed by the terms of the specific statute and statutory interpretation of the agency charged with the implementation of the statute.

5. Clarifying the Meaning of ''Cooperating Agency''

CEQ proposed to amend the definition of ''cooperating agency'' in paragraph (e) to make clear that a State, Tribal, or local agency may be a cooperating agency when the lead agency agrees, and to move the corresponding operative language allowing a State, Tribal, or local agency to become a cooperating agency with the lead agency's agreement to paragraph (a) of § 1501.8, ''Cooperating agencies.'' CEQ also proposed to remove the sentence cross-referencing the cooperating agency section in part 1501 and stating that the selection and responsibilities of a cooperating agency are described there because it is unnecessary and does not define the term. CEQ makes these changes in the final rule.

6. Definition of ''Council''

CEQ did not propose any changes to the definition of ''Council'' in paragraph (f). CEQ also invited comment on whether to update references to ''Council'' in the regulations to ''CEQ'' throughout the rule. CEQ did not receive sufficient comments on this proposal; therefore, CEQ does not make this change in the final rule.

7. Definition of ''Cumulative Impact'' and Clarifying the Meaning of ''Effects''

CEQ proposed to remove the definition of ''cumulative impact'' and revise the definition of ''effects'' in paragraph (g). As noted in the NPRM, many commenters to the ANPRM urged CEQ to refine the definition based on concerns that it creates confusion, and that the terms ''indirect'' and ''cumulative'' have been interpreted expansively resulting in excessive documentation about speculative effects and leading to frequent litigation. Commenters also raised concerns that this has expanded the scope of NEPA analysis without serving NEPA's purpose of informed decision making. Commenters stressed that the focus of the effects analysis should be on those effects that are reasonably foreseeable, related to the proposed action under consideration, and subject to the agency's jurisdiction and control. Commenters also noted that NEPA practitioners often struggle with describing cumulative impacts despite a number of publications that address the topic.

While NEPA refers to environmental impacts and environmental effects, it does not subdivide the terms into direct, indirect, or cumulative. Nor are the terms ''direct,'' ''indirect,'' or ''cumulative'' included in the text of the statute. CEQ created those concepts and included them in the 1978 regulations.

To address commenters' concerns and reduce confusion and unnecessary litigation, CEQ proposed to simplify the definition of effects by striking the specific references to direct, indirect, and cumulative effects and providing clarity on the bounds of effects consistent with the Supreme Court's holding in *Public Citizen,* 541 U.S. at 767–68. Under the proposed definition, effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives; a ''but for'' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. This close causal relationship is analogous to proximate cause in tort law. *Id.* at 767; *see also Metro. Edison Co.,* 460 U.S. at 774 (interpreting section 102 of NEPA to require ''a reasonably close causal relationship between a change in the physical environment and the effect at issue'' and stating ''[t]his requirement is like the familiar doctrine of proximate cause from tort law.''). CEQ sought comment on whether to include in the definition of effects the concept that the close causal relationship is ''analogous to proximate cause in tort law,'' and if so, how CEQ could provide additional clarity regarding the meaning of this phrase.

In the final rule, CEQ revises the definition of effects consistent with the proposal, with some additional edits. First, to eliminate the circularity in the definition, CEQ changes the beginning of the definition from ''means effects of'' to ''means changes to the human environment from'' the proposed action or alternatives. This change also associates the definition of effects with the definition of human environment, which continues to cross-reference to the definition of effects in the final rule. It also makes clear that, when the regulations use the term ''effects,'' it means effects on the human environment. This responds to comments suggesting CEQ add ''on the human environment'' after ''effects'' in various sections of the rule.

The final rule also consolidates the first two sentences of the definition to clarify that, for purposes of this definition, ''effects that occur'' at the ''same time and place as the proposed action or alternatives,'' or that ''are later in time or farther removed in distance'' must nevertheless be reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. As a separate sentence that only referenced reasonable foreseeability, there was ambiguity as to whether a reasonably close causal relationship was required. Additionally, the final rule adds a clause to clarify that the consideration of time and place or distance are relative to the proposed action or alternatives.

CEQ proposed to strike the definition of ''cumulative impact'' and the terms ''direct'' and ''indirect'' in order to focus agency time and resources on considering whether the proposed action causes an effect rather than on categorizing the type of effect. As stated in the NPRM, CEQ intends the revisions to simplify the definition to focus agencies on consideration of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. In practice, agencies have devoted substantial resources to categorizing effects as direct, indirect, or cumulative, which, as noted above, are not terms referenced in the NEPA statute. CEQ eliminates these references in the final rule.

To further assist agencies in their assessment of significant effects, CEQ also proposed to clarify that agencies should not consider effects significant if they are remote in time, geographically remote, or the result of a lengthy causal chain. *See, e.g., Pub. Citizen,* 541 U.S. at 767–68 (''In particular, 'courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.' '' (quoting *Metro. Edison Co.,* 460 U.S. at 774 n.7)); *Metro. Edison Co.,* 460 U.S. at 774 (noting effects may not fall within section 102 of NEPA because ''the causal chain is too attenuated''). CEQ revises this sentence in the final rule to add ''generally'' to reflect the fact that there may occasionally be a

circumstance where an effect that is remote in time, geographically remote, or the product of a lengthy causal chain is reasonably foreseeable and has a reasonably close causal relationship to the proposed action.

Further, CEQ proposed to codify a key holding of *Public Citizen* relating to the definition of effects to make clear that effects do not include effects that the agency has no authority to prevent or that would happen even without the agency action, because they would not have a sufficiently close causal connection to the proposed action. For example, this would include effects that would constitute an intervening and superseding cause under familiar principles of tort law. *See, e.g., Sierra Club* v. *FERC,* 827 F.3d 36, 47–48 (D.C. Cir. 2016) (NEPA case incorporating these principles) (''[C]ritical to triggering that chain of events is the intervening action of the Department of Energy in granting an export license. The Department's independent decision to allow exports—a decision over which the Commission has no regulatory authority—breaks the NEPA causal chain and absolves the Commission of responsibility to include in its NEPA analysis considerations that it 'could not act on' and for which it cannot be 'the legally relevant cause.''' (quoting *Pub. Citizen,* 541 U.S. at 769)). As discussed in the NPRM, this clarification will help agencies better understand what effects they need to analyze and discuss, helping to reduce delays and paperwork with unnecessary analyses. CEQ includes this language in the final rule as proposed.

In addition, CEQ proposed a change in position to state that analysis of cumulative effects, as defined in the 1978 regulations, is not required under NEPA. Categorizing and determining the geographic and temporal scope of such effects has been difficult and can divert agencies from focusing their time and resources on the most significant effects. Past CEQ guidance has not been successful in dispelling ambiguity. Excessively lengthy documentation that does not focus on the most meaningful issues for the decision maker's consideration can lead to encyclopedic documents that include information that is irrelevant or inconsequential to the decision-making process. Instead, agencies should focus their efforts on analyzing effects that are most likely to be potentially significant and effects that would occur as a result of the agency's decision, rather than effects that would be the result of intervening and superseding causes. Agencies are not expected to conduct exhaustive research on identifying and categorizing actions beyond the agency's control.

CEQ intended the proposed elimination of the definition of cumulative impact to focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. Cumulative effects analysis has been interpreted so expansively as to undermine informed decision making, and led agencies to conduct analyses to include effects that are not reasonably foreseeable or do not have a reasonably close causal relationship to the proposed action or alternatives. CEQ also invited comment on whether to include an affirmative statement that consideration of indirect effects is not required; the final rule does not include additional direction to agencies specific to indirect effects.

CEQ received many comments on cumulative effects. In the final rule, to provide further clarification, CEQ includes a new provision at paragraph (g)(3) that states that the analysis of effects shall be consistent with the definition of effects, and that cumulative impact, defined in 40 CFR 1508.7 (1978), is repealed. This language explains how agencies should apply the definition of effects with respect to environmental documents and other provisions in the final rule. Specifically, analyses are bound by the definition of effects as set forth in § 1508.1(g)(1) and (2) and should not go beyond the definition of effects set forth in those two paragraphs. The final rule provides considerable flexibility to agencies to structure the analysis of effects based on the circumstances of their programs.

In response to the NPRM, commenters stated that agencies would no longer consider the impacts of a proposed action on climate change. The rule does not preclude consideration of the impacts of a proposed action on any particular aspect of the human environment. The analysis of the impacts on climate change will depend on the specific circumstances of the proposed action. As discussed above, under the final rule, agencies will consider predictable trends in the area in the baseline analysis of the affected environment.

8. Clarifying the Meaning of ''Environmental Assessment''

CEQ proposed to revise the definition of ''environmental assessment'' in paragraph (h), describing the purpose for the document and moving all of the operative language setting forth the requirements for an EA from the definition to proposed § 1501.5. CEQ makes this change in the final rule.

9. Clarifying the Meaning of ''Environmental Document''

CEQ proposed to remove the cross-references from the definition of ''environmental document'' in paragraph (i). CEQ makes this change in the final rule.

10. Clarifying the Meaning of ''Environmental Impact Statement''

CEQ proposed to change ''the Act'' to ''NEPA'' in the definition of ''environmental impact statement'' in paragraph (j). CEQ makes this change in the final rule.

11. Clarifying the Meaning of ''Federal Agency''

CEQ proposed to amend the definition of ''Federal agency'' in paragraph (k) to broaden it to include States, Tribes, and units of local government to the extent that they have assumed NEPA responsibilities from a Federal agency pursuant to statute. As stated in the NPRM, since the issuance of the CEQ regulations, Congress has authorized assumption of NEPA responsibilities in other contexts besides the Housing and Community Development Act of 1974, Public Law 93–383, sec. 104(h), 88 Stat. 633, 640, 42 U.S.C. 5304. *See, e.g.,* Surface Transportation Project Delivery Program, 23 U.S.C. 327. This change acknowledges these programs and helps clarify roles and responsibilities. CEQ makes this change and minor clarifying edits in the final rule.

12. Clarifying the Meaning of ''Finding of No Significant Impact''

CEQ proposed to revise the definition of ''finding of no significant impact'' in paragraph (l) to insert the word ''categorically'' into the phrase ''not otherwise excluded,'' change the cross-reference to the new section addressing CEs at § 1501.4, and move the operative language requiring a FONSI to include an EA or a summary of it and allowing incorporation by reference of the EA to § 1501.6, which addresses the requirements of a FONSI. CEQ makes these revisions in the final rule.

13. Clarifying the Meaning of ''Human Environment''

CEQ proposed to change ''people'' to ''present and future generations of Americans'' consistent with section 101(a) of NEPA to the definition of human environment in paragraph (m). CEQ also proposed to move the operative language stating that economic or social effects by themselves

do not require preparation of an EIS to § 1502.16(b), which is the section of the regulations that addresses when agencies should consider economic or social effects in an EIS. CEQ makes these changes in the final rule to assist agencies in understanding and implementing the statute and regulations.

14. Definition of ''Jurisdiction by Law''

The NPRM did not propose any changes to the definition of jurisdiction by law in paragraph (n). CEQ did not revise this definition in the final rule.

15. Clarifying the Meaning of ''Lead Agency''

CEQ proposed to amend the definition of lead agency in paragraph (o) to clarify that this term includes joint lead agencies, which are an acceptable practice. CEQ makes this change in the final rule.

16. Clarifying the Meaning of ''Legislation''

CEQ proposed to move the operative language regarding the test for significant cooperation and the principle that only the agency with primary responsibility will prepare a legislative EIS to § 1506.8. CEQ also proposed to strike the example of treaties, because the President is not a Federal agency, and therefore a request for ratification of a treaty would not be subject to NEPA. CEQ makes these changes in the final rule, striking the references to ''significant cooperation and support,'' in paragraph (p) to narrow the definition to comport with the NEPA statute, as discussed in section II.H.8.

17. Clarifying the Meaning of ''Major Federal Action''

CEQ received many comments on the ANPRM requesting clarification of the definition of major Federal action. For example, CEQ received comments proposing that non-Federal projects should not be considered major Federal actions based on a very minor Federal role. Commenters also recommended that CEQ clarify the definition to exclude decisions where agencies do not have discretion to consider and potentially modify their actions based on the environmental review.

CEQ proposed to amend the first sentence of the definition in paragraph (q) to clarify that an action meets the definition if it is subject to Federal control and responsibility, and it has effects that may be significant. CEQ proposed to replace ''major'' effects with ''significant'' in this sentence to align with the NEPA statute. In the final rule, CEQ revises the definition to remove reference to significance. CEQ also revises the definition to remove the circularity in the definition, changing ''means an action'' to ''means an activity or decision'' that is subject to Federal control and responsibility.

i. Independent Meaning of ''Major''

CEQ proposed to strike the second sentence of the definition, which provides ''Major reinforces but does not have a meaning independent of significantly.'' CEQ makes this change in the final rule. This is a change in position as compared to CEQ's earlier interpretation of NEPA and, in finalizing this change, CEQ intends to correct this longstanding misconstruction of the NEPA statute. The statutory aim of NEPA is to focus on ''major Federal actions significantly affecting the quality of the human environment,'' 42 U.S.C. 4332(2)(C), rather than on non-major Federal actions that simply have some degree of Federal involvement. Under the 1978 regulations, however, the word ''major'' was rendered virtually meaningless.

CEQ makes this change because all words of a statute must be given meaning consistent with longstanding principles of statutory interpretation. *See, e.g., Bennett,* 520 U.S. at 173 (''It is the cardinal principle of statutory construction . . . that it is our duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section.'') (internal quotations and citations omitted) (quoting *United States* v. *Menasche,* 348 U.S. 528, 538 (1955)). Although the 1978 regulations treated the terms ''major'' and ''significantly'' as interchangeable, there is an important distinction between the two terms and how they apply in the NEPA process. ''Major'' refers to the type of action, including the role of the Federal agency and its control over any environmental impacts. ''Significant'' relates to the effects stemming from the action, including consideration of the affected area, resources, and the degree of the effects. In the statute, ''major'' occurs twice, and in both instances is a modifier of ''Federal action''—in section 102(2)(C) in the phrase ''other major Federal actions significantly affecting the quality of the human environment,'' and section 102(2)(D) in the phrase, ''any major Federal action funded under a program of grants to States.'' NEPA also uses ''significant'' or ''significantly'' twice as a modifier of the similar words ''affecting'' in section 102(2)(C) and ''impacts'' in section 102(2)(D)(iv).

The legislative history of NEPA also reflects that Congress used the term ''major'' independent of ''significantly,'' and provided that, for major actions, agencies should make a determination as to whether the proposal would have a significant environmental impact. Specifically, the Senate Report for the National Environmental Policy Act of 1969 (Senate Report) states, ''*Each agency which proposes any major actions,* such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs, *shall make a determination as to whether the proposal would have a significant effect upon the quality of the human environment.*'' S. Rep. No. 91–296, at 20 (1969) (emphasis added).[107] Further, the Senate Report shows that OMB's predecessor, the Bureau of the Budget, submitted comments on the legislation to provide the views of the Executive Office of the President and recommended that Congress revise the text of the bill to include two separate modifiers: ''major'' before Federal actions and ''significantly'' before affecting the quality of the human environment. *See id.* at 30 (Bureau of the Budget's markup returned to the Senate on July 7, 1969). The enacted legislation included these revisions. While CEQ followed the Eight Circuit's approach in *Minnesota Public Interest Research Group* v. *Butz,* 498 F.2d 1314, 1321–22 (8th Cir. 1974), in the 1978 regulations, other courts had interpreted ''major'' and ''significantly'' as having independent meaning before CEQ issued its 1978 regulations. *See NAACP* v. *Med. Ctr., Inc.,* 584 F.2d 619, 629 (3d Cir. 1978) (analyzing the Secretary's ministerial approval of a capital expenditure under a framework that first considered whether there had been agency action, and then whether that action was ''major''); *Hanly* v. *Mitchell,* 460 F.2d 640, 644–45 (2d Cir. 1972) (''There is no doubt that the Act contemplates some agency action that does not require an impact statement because the action is minor and has so little effect on the environment as to be insignificant.'' (internal citations omitted)); *Scherr* v. *Volpe,* 466 F.2d 1027, 1033 (7th Cir. 1972) (finding that a highway project qualifies as major before turning to the second step of whether the project would have a significant effect); *Julius* v. *City of Cedar Rapids,* 349 F. Supp. 88, 90 (N.D. Iowa 1972) (finding that a lane widening project was not a major Federal action); *Goose Hollow Foothills League* v. *Romney,* 334 F. Supp. 877, 879 (D. Or. 1971) (discussing whether a proposed

[107] *https://ceq.doe.gov/docs/laws-regulations/Senate-Report-on-NEPA.pdf.*

building project was ''major''); *SW Neighborhood Assembly* v. *Eckard,* 445 F. Supp. 1195, 1199 (D.D.C. 1978)(''The phrase 'major Federal action' has been construed by the Courts to require an inquiry into such questions as the amount of federal funds expended by the action, the number of people affected, the length of time consumed, and the extent of government planning involved.'' (citing *Hanly,* 460 F.2d at 644)); *Nat. Res. Def. Council* v. *Grant,* 341 F. Supp. 356, 366 (E.D.N.C. 1972) (''Certainly, an administrative agency [such] as the Soil Conservation Service may make a decision that a particular project is not major, or that it does not significantly affect the quality of the human environment, and, that, therefore, the agency is not required to file an impact statement.''). Moreover, as discussed further below, over the past four decades, in a number of cases, courts have determined that NEPA does not apply to actions with minimal Federal involvement or funding. Under the revised definition, these would be non-major Federal actions.

In the final rule, CEQ reorganizes the remainder of the definition of major Federal action into subordinate paragraphs. Paragraph (q)(1) provides a list of activities or decisions that are not included within the definition.

ii. Extraterritoriality

In the NPRM, CEQ requested comment on whether to clarify that major Federal action does not include extraterritorial actions because NEPA does not apply extraterritorially, consistent with *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U.S. 108, 115–16 (2013), in light of the ordinary presumption against extraterritorial application when a statute does not clearly indicate that extraterritorial application is intended by Congress. In the final rule, CEQ revises the definition of ''Major Federal action'' in a new paragraph (q)(1)(i) to exclude extraterritorial activities or decisions, which mean activities or decisions with effects located entirely outside the jurisdiction of the United States.[108]

The Supreme Court has stated that ''[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' '' *EEOC* v. *Arabian Am. Oil Co. (Aramco),* 499 U.S. 244, 248 (1991) (quoting *Foley Bros.* v. *Filardo, Inc.,* 336 U.S. 281, 285 (1949)). During the past decade, the Supreme Court has considered the application of the presumption to a variety of Federal statutes.[109] As the Supreme Court has stated, the presumption ''rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.'' *Morrison,* 561 U.S. at 255 (citing *Smith* v. *United States,* 507 U.S. 197, 204 n.5 (1993)). ''Thus, 'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.' '' *Morrison,* 561 U.S. at 255 (citing *Aramco,* 499 U.S. at 248). The Supreme Court has held, including in more recent decisions, that the presumption applies regardless of whether there is a risk of conflict between the U.S. statute and a foreign law. *Morrison,* 561 U.S. at 255 (citing *Sale* v. *Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 173–74 (1993)); *RJR Nabisco,* 136 S. Ct. at 2100; *see also Smith,* 507 U.S. at 204 n.5.

The Supreme Court has established a two-step framework for analyzing whether the presumption against extraterritoriality applies to a Federal statute.[110] Under this framework, the first step is to ask whether the presumption against extraterritoriality has been rebutted because ''the statute gives a clear, affirmative indication that it applies extraterritorially.'' *RJR Nabisco,* 136 S. Ct. at 2101. If the presumption has not been rebutted, the second step is to determine whether the case involves a domestic application of the statute, and courts have done this by looking to the statute's ''focus.'' [111]

Under the two-step framework, CEQ has determined that because the legislative history and statutory text of section 102(2)(C) gives no clear indication that it applies extraterritorially, the presumption against extraterritoriality has not been rebutted. The plain language of section 102(2)(C) does not require it to be applied to actions occurring outside the jurisdiction of the United States.[112] The only reference in the Act to international considerations is in section 102(2)(F), which refers to ''international cooperation'' and the ''worldwide and long-range character of environmental problems,'' and directs agencies to ''where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation'' to protect the environment. 42 U.S.C. 4332(2)(F). International cooperation is inherently voluntary and not part of the mandatory analysis required under the statute, and this provision does not indicate in any way that the requirements of section 102(2)(C) to prepare detailed statements applies outside of U.S. territorial jurisdiction. The limited legislative history of section 102(2)(C) similarly does not include discussion of application of the requirements of section 102(2)(C) to extraterritorial actions.[113]

Under the two-step framework, CEQ has also considered the purpose of section 102(2)(C), which is to ensure that a Federal agency, as part of its decision making process, considers the potential environmental impacts of proposed actions. The focus of congressional concern is the proposed action and its potential environmental effects. The effects of a proposed action may occur both within U.S. territorial jurisdiction as well as outside that jurisdiction. To the extent effects of a proposed action occur entirely outside the territorial jurisdiction of the United States, the application of section 102(2)(C) would not be permissible, consistent with the Supreme Court's holding that where the conduct relevant to the statute's focus occurred in the United States, then ''the case involves a

[108] The Restatement of Foreign Relations Law provides that the areas within the territorial jurisdiction of the United States include ''its land, internal waters, territorial sea, the adjacent airspace, and other places over which the United States has sovereignty or some measure of legislative control.'' Restatement (Fourth) of Foreign Relations Law sec. 404 (2018).

[109] *See RJR Nabisco, Inc.* v. *European Cmty.,* 136 S. Ct. 2090 (2016) (Racketeer Influenced and Corrupt Organizations Act); *Kiobel,* 569 U.S. at 115–16 (Alien Tort Statute); *Morrison* v. *Nat'l Austl. Bank Ltd.,* 561 U.S. 247, 255 (2010) (Securities and Exchange Act of 1934); *WesternGeco LLC* v. *ION Geophysical Corp.,* 138 S. Ct. 2129 (2018) (Patent Act).

[110] *See RJR Nabisco,* 136 S. Ct. at 2101 (citing *Morrison,* 561 U.S. at 267 n.9; *Kiobel,* 569 U.S. 108); *see also WesternGeco LLC,* 138 S. Ct. 2129.

[111] *Id.* (''If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.''). This two-step framework for analyzing extraterritoriality issues is also reflected in the Restatement of Foreign Relations Law. *See* Restatement (Fourth) of Foreign Relations Law sec. 404 (2018).

[112] Section 102(2)(C) directs Federal agencies to provide a detailed statement for major Federal actions significantly affecting the quality of the human environment, and requires the responsible official to consult with and obtain the comments of Federal agencies with jurisdiction or special expertise, as well as to make copies of the statement and comments and views of Federal, state and local agencies available to the President, CEQ and the public. 42 U.S.C. 4332(2)(C). Nothing in the text states that this section was intended to require the preparation of detailed statements for actions located outside the United States.

[113] *See also Nat. Res. Def. Council* v. *Nuclear Regulatory Comm'n,* 647 F. 2d 1345, 1367 (D.C. Cir. 1981) (''NEPA's legislative history illuminates nothing in regard to extraterritorial application.'').

permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.'' *RJR Nabisco,* 136 S. Ct. at 2101. Therefore, CEQ provides in paragraph (q)(1)(i) of the final rule that NEPA does not apply to ''agency activities or decisions with effects located entirely outside of the jurisdiction of the United States.''

iii. Non-Discretionary Activities or Decisions

In the NPRM, CEQ proposed to clarify that the definition does not include non-discretionary activities or decisions made in accordance with the agency's statutory authority. The Supreme Court has held that analysis of a proposed action's effects under NEPA is not required where an agency has limited statutory authority and ''simply lacks the power to act on whatever information might be contained in the EIS.'' *Pub. Citizen,* 541 U.S. at 768; *see also South Dakota,* 614 F.2d at 1193 (holding that the Department of the Interior's issuance of a mineral patent that was a ministerial act did not come within NEPA); *Milo Cmty. Hosp.* v. *Weinberger,* 525 F.2d 144, 148 (1st Cir. 1975) (NEPA analysis of impacts not required when agency was under a statutory duty to take the proposed action of terminating a hospital). CEQ includes this clarification in paragraph (q)(1)(ii).

iv. Final Agency Action and Failure To Act

CEQ proposed to strike the statement that major Federal action includes a failure to act and instead clarify that the definition excludes activities or decisions that do not result in final agency action under the APA. The basis for including only final agency actions is the statutory text of the APA, which provides a right to judicial review of all ''final agency action[s] for which there is no other adequate remedy in a court.'' 5 U.S.C. 704. CEQ includes this clarification in paragraph (q)(1)(iii) of the final rule and includes ''or other statute that also includes a finality requirement'' because CEQ recognizes that other statutes may also contain finality requirements beyond those of the APA. As the NPRM noted, NEPA applies when agencies are considering a proposal for decision. In the case of a ''failure to act,'' there is no proposed action and therefore there are no alternatives that the agency may consider. *S. Utah Wilderness All.,* 542 U.S. at 70–73. Judicial review is available only when an agency fails to take a discrete action it is required to take. *Id.* In omitting the reference to a failure to act from the definition of ''major Federal action,'' CEQ does not contradict the definition of ''agency action'' under the APA at 5 U.S.C. 551(13), and recognizes that the APA may compel agency action that is required but has been unreasonably withheld. If an agency is compelled to take such agency action, it should prepare a NEPA analysis at that time, as appropriate.

v. Enforcement Actions

In the final rule, CEQ moves the exclusion of judicial or administrative civil or criminal enforcement actions from 40 CFR 1508.18(a) to paragraph (q)(1)(iv) of § 1508.1. CEQ did not propose changes to this language in the NPRM. In the final rule, CEQ moves this language and revises it consistent with the format of the list in paragraph (q)(1).

vi. General Revenue Sharing Funds

CEQ proposed to strike the specific reference to the State and Local Fiscal Assistance Act of 1972 from 40 CFR 1508.18(a) and clarify that general revenue sharing funds do not meet the definition of major Federal action because the agency has no discretion. CEQ includes this change in paragraph (q)(1)(v) in the final rule.

vii. Minimal Federal Funding or Involvement

CEQ proposed to clarify that non-Federal projects with minimal Federal funding or minimal Federal involvement such that the agency cannot control the outcome of the project are not major Federal actions. The language in paragraph (q)(1)(vi) of the final rule is consistent with the holdings of relevant circuit court cases that have addressed this issue. *See Rattlesnake Coal.* v. *U.S. EPA,* 509 F.3d 1095, 1101 (9th Cir. 2007) (Federal funding comprising six percent of the estimated implementation budget not enough to federalize implementation of entire project); *New Jersey Dep't of Envtl. Prot. & Energy* v. *Long Island Power Auth.,* 30 F.3d 403, 417 (3d Cir. 1994) (''Federal approval of a private party's project, where that approval is not required for the project to go forward, does not constitute a major Federal action.''); *United States* v. *S. Fla. Water Mgmt. Dist.,* 28 F.3d 1563, 1572 (11th Cir. 1994) (''The touchstone of major [F]ederal activity constitutes a [F]ederal agency's authority to influence nonfederal activity. 'The [F]ederal agency must possess actual power to control the nonfederal activity.' '' (quoting *Sierra Club* v. *Hodel,* 848 F.2d 1068, 1089 (10th Cir. 1988), *overruled on other grounds by Vill. of Los Ranchos de Albuquerque* v. *Marsh,* 956 F.2d 970 (10th Cir. 1992)); *Sugarloaf Citizens Ass'n* v. *FERC,* 959 F.2d 508, 512 (4th Cir. 1992); *Save Barton Creek Ass'n* v. *Fed. Highway Admin.,* 950 F.2d 1129, 1134–35 (5th Cir. 1992); *Macht* v. *Skinner,* 916 F.2d 13, 20 (D.C. Cir. 1990) (funding for planning and studies not enough to federalize a project); *Vill. of Los Ranchos de Albuquerque* v. *Barnhart,* 906 F.2d 1477, 1482 (10th Cir. 1990); *Sierra Club* v. *Penfold,* 857 F.2d 1307, 1314 (9th Cir. 1998) (finding that the Bureau of Land Management's review of Notice mines, which do not require agency approval before commencement of mining, is ''only a marginal [F]ederal action rather than a major action''); *Winnebago Tribe of Neb.* v. *Ray,* 621 F. 2d 269, 272 (8th Cir. 1980) (''Factual or veto control, however, must be distinguished from legal control or 'enablement''' (citing *Med. Ctr., Inc.,* 584 F.2d 619)); *Atlanta Coal. on the Transp. Crisis* v. *Atlanta Reg'l Comm'n,* 599 F.2d 1333, 1347 (5th Cir. 1979); *Ctr. for Biological Diversity* v. *HUD,* 541 F. Supp. 2d 1091, 1099 (D. Ariz. 2008), *aff'd, Ctr. for Biological Diversity* v. *HUD,* No. 09–16400, 359 Fed. Appx. 781, 2009 WL 4912592 (9th Cir. Nov. 25, 2009) (unreported); *see also Touret* v. *NASA,* 485 F. Supp. 2d 38 (D.R.I. 2007).

As discussed in the NPRM, in these circumstances, there is no practical reason for an agency to conduct a NEPA analysis because the agency could not influence the outcome of its action to address the effects of the project. For example, this might include a very small percentage of Federal funding provided only to help design an infrastructure project that is otherwise funded through private or local funds. This change would help to reduce costs and delays by more clearly defining the kinds of actions that are appropriately within the scope of NEPA. The final rule includes these criteria in paragraph (q)(1)(vi) to make clear that these projects are ones where the agency does not exercise sufficient control and responsibility over the outcome of the project.

CEQ expects that agencies will further define these non-major actions, for which the agency does not exercise sufficient control and responsibility over the outcome of the project, in their agency NEPA procedures pursuant to § 1507.3(d)(4). For example, agencies that exercise trust responsibilities over activities or decisions that occur on or involve land held in trust by the United

States for the benefit of an Indian Tribe, or are held in fee subject to a restriction against alienation, may define those activities or decisions that involve minimal Federal funding or involvement. In such circumstances, the Federal Government does not exercise sufficient control and responsibility over the effects of actions on Indian lands, and a ''but for'' causal relationship of requiring Federal approval for such actions is insufficient to make an agency responsible for any particular effects from such actions.

In the NPRM, CEQ also invited comment on whether there should be a threshold (percentage or dollar figure) for ''minimal Federal funding,'' and if so, what would be an appropriate threshold and the basis for such a threshold. CEQ did not receive sufficient information to establish such a threshold in the final rule.

viii. Loans and Loan Guarantees

CEQ also proposed to exclude loans, loan guarantees, and other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of the action. CEQ includes this in the final rule in paragraph (q)(1)(vii), changing ''action'' to ''such assistance'' to remove the ambiguity with the use of the defined term in the definition. CEQ proposed to also exclude the farm ownership and operating loan guarantees provided by the Farm Service Agency (FSA) of the U.S. Department of Agriculture pursuant to 7 U.S.C. 1925 and 1941 through 1949, and the business loan guarantee programs of the Small Business Administration (SBA), 15 U.S.C. 636(a), 636(m), and 695 through 697f. CEQ includes these as examples of loan guarantees in paragraph (q)(1)(vii) and makes one correction to the citation to SBA's business loan guarantee programs, changing the final section cited from 697f to 697g.

By guaranteeing loans, FSA is not lending Federal funds; a ''guaranteed loan'' under FSA regulations is defined in 7 CFR 761.2(b) as a ''loan made and serviced by a lender for which the Agency has entered into a Lender's Agreement and for which the Agency has issued a Loan Guarantee.'' The FSA loan guarantees are limited statutorily to an amount not to exceed $1.75 million (with allowance for inflation). *See* 7 U.S.C. 1925 and 1943. For fiscal year 2019, the average loan amount for a guaranteed operating loan is $289,393; and the average for a guaranteed farm ownership loan is $516,859.[114] The relatively modest amounts of these loan guarantees suggest that these are not ''major'' within the meaning of the NEPA statute and for that reason CEQ makes this result clear in a specific application of its definition of ''major Federal action.'' In determining whether Federal funding federalizes a non-Federal action, courts have considered whether the proportion of Federal funds in relation to funds from other sources is ''significant.'' *See, e.g., Ka Makani 'O Kohala Ohana Inc.* v. *Dep't of Water Supply,* 295 F.3d 955, 960 (9th Cir. 2002) (''While significant [F]ederal funding can turn what would otherwise be a [S]tate or local project into a major Federal action, consideration must be given to a great disparity in the expenditures forecast for the [S]tate [and county] and [F]ederal portions of the entire program .....In the present case, the sum total of all of the [F]ederal funding that was ever offered..... is less than two percent of the estimated total project cost.'' (alteration in original) (internal quotation marks and citation omitted)); *Friends of the Earth, Inc.* v. *Coleman,* 518 F.2d 323, 329 (9th Cir. 1975) (holding Federal funding amounting to 10 percent of the total project cost not adequate to federalize project under NEPA); *Sancho* v. *Dep't of Energy,* 578 F. Supp. 2d 1258, 1266–68 (D. Haw. 2008) (Federal provision of less than 10 percent of project costs not sufficient to federalize project); *Landmark West!* v. *U.S. Postal Serv.,* 840 F. Supp. 994, 1009 (S.D.N.Y. 1993), *aff'd,* 41 F.3d 1500 (2d Cir. 1994) (holding U.S. Postal Service's role in private development of new skyscraper was not sufficient to federalize the project).

Furthermore, FSA loan guarantee programs do not provide any Federal funding to the participating borrower. Rather, FSA's role is limited to providing a guaranty to the private lender; no Federal funds are expended unless the borrower defaults on the private third-party loan, and the lender is unable to recover its debt through foreclosure of its collateral. In the event of default, the guarantee is paid to the lender, not to lender's borrower. FSA rarely makes guaranteed loan loss claim payments because delinquency rates are very low, ranging from between 0.98 and 1.87 percent from 2005 to 2019, and 1.62 percent in 2019.[115] The FSA guaranteed loan loss rates have ranged between 0.2 and 0.6 percent during the same time period.[116]

For purposes of triggering NEPA, ''[t]he mere possibility of [F]ederal funding in the future is too tenuous to convert a local project into [F]ederal action.'' *Pres. Pittsburgh* v. *Conturo,* 2011 U.S. Dist. LEXIS 101756, at *13 (W.D. Pa. 2011). Indeed, in *Sancho,* the court observed that ''analysis of the 'major Federal action' requirement in NEPA must focus upon [F]ederal funds that have already been distributed. Federal funds that have only been budgeted or allocated toward a project cannot be considered because they are not an 'irreversible and irretrievable commitment of resources.' '' *Sancho,* 578 F. Supp. 2d at 1267 (internal citation omitted). The court further stated that ''[t]he expectation of receiving future funds will not transform a local or state project into a federal project ..... Regardless of the percentage, consideration of the budgeted future federal funds is not ripe for consideration in the 'major Federal action' analysis.'' *Id.* Other district courts have also found that, to federalize a project, the Federal funding must be more than ''the passive deferral of a payment'' and must be provided ''primarily to directly further a policy goal of the funding agency.'' *Hamrick* v. *GSA,* 107 F. Supp. 3d 910, 926 (C.D. Ill. 2015) (citing *Landmark West!,* 840 F. Supp. at 1007).

FSA's role is to protect the financial interests of the United States, and its relationship is with the lender not the borrower. 7 CFR 762.103(a). FSA's involvement is primarily to ensure the financial stability of the loan and ensure proper loan servicing by the lender. Therefore, the context of these FSA regulations does not involve NEPA and is not compliance-driven but only meant to ensure that, in the event of a default, the loan proceeds are disbursed by the lender, used properly, and that the project is completed and operating so as to produce income necessary for the loan to be repaid.

If a lender violates one of FSA's regulations, FSA's only remedy is not to pay the loss claim in the event of a liquidation. FSA does not possess control or actual decision-making authority over the lender's issuance of the loan, the funded facility, or operations of the borrower. Courts have

[114] *See* Executive Summary for Farm Loan Programs in Fiscal Year 2019, *https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/Farm-Loan-Programs/pdfs/program-data/FY2019_Executive_Summary.pdf. See generally https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/program-data/index.*

[115] *See* Guaranteed Loan Executive Summary, as of FY 2019, *https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/Farm-Loan-Programs/pdfs/program-data/FLP_Guaranteed_Loan_Servicing_Executive_Summary.pdf.*

[116] *Id.*

recognized Federal agencies do not have sufficient control over loan guarantees to trigger NEPA. *See, e.g., Ctr. for Biological Diversity,* 541 F. Supp. 2d 1091, *aff'd, Ctr. for Biological Diversity,* No. 08–16400, 359 F. Appx. 781 (''The agencies guarantee loans issued by private lenders to qualified borrowers, but do not approve or undertake any of the development projects at issue. The agencies' loan guarantees have such a remote and indirect relationship to the watershed problems allegedly stemming from the urban development that they cannot be held to be a legal cause of any effects on the protected species for purposes of either the ESA or the NEPA.'' *Ctr. for Biological Diversity,* No. 08–16400, 359 F. Appx. at 783). ''The [F]ederal agency must possess actual power to control the nonfederal activity.'' *Hodel*, 848 F.2d at 1089, *overruled on other grounds by Vill. of Los Ranchos de Albuquerque* v. *Marsh,* 956 F.2d 970.

SBA's business loan programs include general business loan programs (7(a) Program), authorized by section 7(a) of the Small Business Act, 15 U.S.C. 636(a); the microloan demonstration loan program (Microloan Program), authorized by section 7(m) of the Small Business Act, 15 U.S.C. 636(m); and the development company program (504 Program), which is a jobs-creation program, authorized by Title V of the Small Business Investment Act of 1958, 15 U.S.C. 695–697g. Under all of these programs, SBA does not recruit or work with the borrower, or service the loan unless, following a default in payment, the lender has collected all that it can under the loan.

Under the 7(a) Program, SBA guarantees a percentage of the loan amount extended by a commercial lender to encourage such lenders to make loans to eligible small businesses. The lender seeks and receives the guaranty, not the applicant small business. In over 80 percent of loans stemming from the 7(a) Program, the lender approves the loan without SBA's prior review and approval through the 7(a) Program's Preferred Lender Program (''PLP program'').[117] Further, SBA does not expend Federal funds unless there is a default by the borrower in paying the loan; in such cases, SBA reimburses the lender in accordance with SBA's guarantee percentage. The maximum amount for a standard loan under the 7(a) program is $5 million, while various 7(a) loans have lesser maximum amounts of $500,000 or less.[118]

Under the Microloan Program, recipient entities can obtain loans, up to $50,000, for certain, limited purposes. SBA provides funds to designated intermediary lenders, which are non-profit, community-based organizations. Each of the lenders has its own lending and credit requirements, and the lenders extend the microloan financing. Recipients only may use the funds for working capital, inventory or supplies, furniture or fixtures, or machinery or equipment. They cannot purchase real estate or pay existing debt.

Under the 504 Program, small businesses can obtain long-term, fixed-rate financing to acquire or improve capital assets. Certified Development Companies (CDCs), which are private, mostly non-profit, corporations certified by SBA to promote local and community economic development, implement the program. Typically, a 504 Program project is funded by three sources: (1) A loan, secured with a senior lien, from a private-sector lender for 50 percent of the project costs; (2) an equity contribution from the borrower of at least 10 percent of the project costs; and (3) a loan covering up to 40 percent of the total costs, which is funded by proceeds from the sale to investors of an SBA-guaranteed debenture issued by a CDC.[119] The 504's Premier Certified Lender Program (''PCLP program'') provides for only limited SBA review of eligibility, and SBA delegates the responsibility to CDCs to issue an SBA guarantee of debenture for eligible loans without prior approval by SBA. 15 U.S.C. 697e.[120] Under the 504 program, the maximum loan amount is $5 million, although small manufacturers or certain energy projects, including energy efficiency or renewable generation projects, may qualify for a $5.5 million debenture.[121] SBA does not expend Federal funds unless there is a default by the borrower in paying the debenture-funded loan, in which case SBA pays the outstanding balance owed on the debenture to the investors. SBA expends Federal funds on its loan guarantee programs only when expected losses from defaults exceed expected fee collections. Section 7(a) and 504 loan program delinquency rates are 0.8 percent and 0.7 percent as of July 2019 respectively.[122]

CEQ has determined that FSA and SBA do not have sufficient control and responsibility over the underlying activities to meet the definition of major Federal action. The issuance of loan guarantees to a non-Federal lender to back a percentage of a loan that the lender decides to make to a private, third-party borrower is insufficient control or authority over the underlying project. *See Rattlesnake Coal.,* 509 F.3d at 1102 (''The United States must maintain decision making authority over the local plan in order for it to become a major [F]ederal action.''); *Ka Makani,* 295 F.3d at 961 (''Because the final decision-making power remained at all times with [the State agency], we conclude that the [Federal agency] involvement was not sufficient to constitute 'major [F]ederal action.' '' (quoting *Barnhart,* 906 F.2d at 1482)); *S. Fla. Water Mgmt. Dist.,* 28 F.3d at 1572 (''The [F]ederal agency must possess actual power to control the nonfederal activity.'' (citation omitted)).

CEQ also invited comment on whether any other types of financial instruments should be considered non-major Federal actions and the basis for such exclusion. CEQ did not receive sufficient comments to make any additional changes to the definition of major Federal action with respect to other financial instruments.

ix. Other Changes to Major Federal Action

In the final rule, paragraphs (q)(2) and (3) include the examples of activities and decisions that are in 40 CFR 1508.18(a) and (b). CEQ invited comment on whether it should change ''partly'' to ''predominantly'' in paragraph (q)(2) for consistency with the edits to the introductory text regarding ''minimal Federal funding.'' CEQ does not make this change in the final rule. CEQ notes that ''continuing'' activities in paragraph (q)(2) refers to situations where a major Federal action remains to occur, consistent with § 1502.9(d) and *Norton* v. *Southern Utah Wilderness Alliance.* 542 U.S. at 73.

[117] Pursuant to the Small Business Act, under the PLP program, SBA delegates responsibility to experienced and qualified lenders to issue an SBA guarantee on a loan without prior approval by SBA. The PLP program is defined as a ''program established by the Administrator . . . under which a written agreement between the lender and the Administration delegates to the lender . . . complete authority to make and close loans with a guarantee from the Administration without obtaining the prior specific approval of the Administration.....'' 15 U.S.C. 636(a)(2)(C)(iii). Thus, PLP program lenders have delegated authority to make SBA-guaranteed loans without any approval from SBA.

[118] 15 U.S.C. 636(a).

[119] In the 504 program, SBA guarantees payments of debentures, which are bonds sold to investors. The proceeds from the sale of the debentures are used to fund the underlying loans to borrowers.

[120] Congress has mandated that guaranteed loans made by PCLPs shall not include SBA ''review of decisions by the lender involving creditworthiness, loan closing, or compliance with legal requirements imposed by law or regulation.'' 15 U.S.C. 697e(e)(2).

[121] 15 U.S.C. 696(2)(A).

[122] *See* SBA Fiscal Year 2019 Agency Financial Report at 22, *available at https://www.sba.gov/document/report--agency-financial-report.*

CEQ proposed to insert ''implementation of'' before ''treaties'' in proposed paragraph (q)(2)(i) to clarify that the major Federal action is not the treaty itself, but rather an agency's action to implement that treaty. CEQ makes this change in § 1508.1(q)(3)(i) of the final rule and clarifies that this includes an agency's action to implement a treaty pursuant to statute or regulation. CEQ also changes ''pursuant to'' to ''under'' the APA and adds a reference to ''other statutes'' after the APA. While agencies conduct the rulemaking process pursuant to the APA, they also may do so under the authority of the specific statutes.

CEQ proposed to strike ''guide'' from proposed paragraph (q)(2)(ii) because guidance is non-binding. CEQ makes this change in the final rule in § 1508.1(q)(3)(ii).

Finally, CEQ invited comment in the NPRM on whether CEQ should further revise the definition of ''major Federal action'' to exclude other *per se* categories of activities or to further address what NEPA analysts have called ''the small handle problem.'' [123] CEQ did not receive sufficient information to make any additional changes.

18. Definition of ''Matter''

The NPRM did not propose any changes to the definition of matter in paragraph (r). CEQ did not revise this definition in the final rule.

19. Clarifying the Meaning of ''Mitigation''

CEQ proposed to amend the definition of ''mitigation'' to define the term and clarify that NEPA does not require adoption of any particular mitigation measure, consistent with *Methow Valley,* 490 U.S. at 352–53. In *Methow Valley,* the Supreme Court held that NEPA and the CEQ regulations require ''that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated,'' but do not establish ''a substantive requirement that a complete mitigation plan be actually formulated and adopted'' before the agency can make its decision. *Id.* at 352.

CEQ also proposed to amend the definition of ''mitigation'' to make clear that mitigation must have a nexus to the effects of the proposed action, is limited to those actions that have an effect on the environment, and does not include actions that do not have an effect on the environment. This change will make the NEPA process more effective by clarifying that mitigation measures must actually be designed to mitigate the effects of the proposed action. This amended definition is consistent with CEQ's Mitigation Guidance, *supra* note 29.

Under that guidance, if an agency believes that the proposed action will provide net environmental benefits through use of compensatory mitigation, the agency should incorporate by reference the documents that demonstrate that the proposed mitigation will be new or in addition to actions that would occur under the no-action alternative, and the financial, legal, and management commitments for the mitigation. Use of well-established mitigation banks and similar compensatory mitigation legal structures should provide the necessary substantiation for the agency's findings on the effectiveness (nexus to effects of the action, proportionality, and durability) of the mitigation. Other actions may be effectively mitigated through use of environmental management systems that provide a structure of procedures and policies to systematically identify, evaluate, and manage environmental impacts of an action during its implementation.[124]

CEQ makes the proposed changes in the final rule with minor edits to improve clarity. Specifically, CEQ replaces ''reasonably foreseeable impacts to the human environment'' with ''effects'' to more precisely refer to the defined term ''effects.'' In response to comments, CEQ also adds ''or alternatives'' after ''proposed action'' to clarify that mitigation measures mean measures to avoid, minimize, or compensate for effects caused by a proposed action or its alternatives. CEQ also replaces ''the effects of a proposed action'' with ''those effects'' to reduce wordiness and provide additional clarity.

20. Definition of ''NEPA Process''

The NPRM did not propose any changes to the definition of NEPA process in paragraph (t). CEQ did not revise this definition in the final rule.

21. Clarifying the Meaning of ''Notice of Intent''

CEQ proposed to revise the definition of ''notice of intent'' in paragraph (u) to move the operative requirements for what agencies must include in the notices to § 1501.9(d) and add the word ''public'' to clarify that the NOI is a public notice. CEQ makes these changes in the final rule.

22. New Definition of ''Page''

CEQ proposed a new definition of ''page'' in paragraph (v) to provide a word count (500 words) for a more standard functional definition of ''page'' for page count and other NEPA purposes. CEQ adds this definition as proposed to the final rule. As discussed in the NPRM, this change updates NEPA for modern electronic publishing and internet formatting, in which the number of words per page can vary widely depending on format. It also ensures some uniformity in document length while allowing unrestricted use of the graphic display of quantitative information, tables, photos, maps, and other geographic information that can provide a much more effective means of conveying information about environmental effects. This change supports the original CEQ page limits as a means of ensuring that environmental documents are readable and useful to decision makers.

23. New Definition of ''Participating Agency''

CEQ proposed to add the concept of a participating agency to the CEQ regulations in paragraph (w). CEQ proposed to define participating agency consistent with the definition in FAST–41 and 23 U.S.C. 139. CEQ proposed to add participating agencies to § 1501.7(i) regarding the schedule and replace the term ''commenting'' agencies with ''participating'' agencies throughout. CEQ adds this definition as proposed to the final rule.

24. Clarifying the Meaning of ''Proposal''

CEQ proposed clarifying edits to the definition of proposal in paragraph (x) and to strike the operative language regarding timing of an EIS because it is already addressed in § 1502.5. CEQ makes these changes in the final rule.

25. New Definition of ''Publish and Publication''

CEQ proposed to define publish and publication in paragraph (y) to provide agencies with the flexibility to make environmental reviews and information available to the public by electronic means. The 1978 regulations predate personal computers and a wide range of technologies now used by agencies such as the modern internet and GIS mapping tools. To ensure that agencies do not exclude the affected public from the NEPA process due to a lack of resources (often referred to as the ''digital

[123] *See* Daniel R. Mandelker et al., NEPA Law and Litigation, sec. 8:20 (2d ed. 2019) (''This problem is sometimes called the 'small handle' problem because [F]ederal action may be only be a 'small handle' on a non[-F]ederal project.'').

[124] *See* Council on Environmental Quality, Aligning National Environmental Policy Act Processes with Environmental Management Systems (Apr. 2007), *https://ceq.doe.gov/docs/ceq-publications/NEPA_EMS_Guide_final_Apr2007.pdf.*

divide''), the definition retains a provision for printed environmental documents where necessary for effective public participation. CEQ adds this definition as proposed in the final rule.

26. New Definition of ''Reasonable Alternatives''

Several ANPRM commenters asked CEQ to include a new definition of ''reasonable alternatives'' in the regulations with emphasis on how technical and economic feasibility should be evaluated. CEQ proposed a new definition of ''reasonable alternatives'' in paragraph (z) to provide that reasonable alternatives must be technically and economically feasible and meet the purpose and need of the proposed action. *See, e.g., Vt. Yankee,* 435 U.S. at 551 (''alternatives must be bounded by some notion of feasibility''). CEQ also proposed to define reasonable alternatives as ''a reasonable range of alternatives'' to codify Questions 1a and 1b in the Forty Questions, *supra* note 2. Agencies are not required to give detailed consideration to alternatives that are unlikely to be implemented because they are infeasible, ineffective, or inconsistent with the purpose and need for agency action.

Finally, CEQ proposed to clarify that a reasonable alternative must also consider the goals of the applicant when the agency's action involves a non-Federal entity. These changes will help reduce paperwork and delays by helping to clarify the range of alternatives that agencies must consider. Where the agency action is in response to an application for permit or other authorization, the agency should consider the applicant's goals based on the agency's statutory authorization to act, as well as other congressional directives, in defining the proposed action's purpose and need. CEQ adds this definition as proposed in the final rule.

27. New Definition of ''Reasonably Foreseeable''

CEQ received comments on the ANPRM requesting that the regulations provide a definition of ''reasonably foreseeable.'' CEQ proposed to define ''reasonably foreseeable'' in paragraph (aa) consistent with the ordinary person standard—that is what a person of ordinary prudence in the position of the agency decision maker would consider in reaching a decision. *Sierra Club* v. *Marsh,* 976 F.2d 763, 767 (1st Cir. 1992). CEQ adds this definition as proposed in the final rule.

28. Definition of ''Referring Agency''

CEQ proposed a grammatical edit to the definition of referring agency in paragraph (bb). CEQ makes this change in the final rule.

29. Definition of ''Scope''

CEQ proposed to move the operative language from paragraph (cc), which tells agencies how to determine the scope of an EIS, to § 1501.9(e). CEQ makes this change in the final rule.

30. New Definition of ''Senior Agency Official''

CEQ proposed to define the new term ''senior agency official'' in paragraph (dd) to provide for agency officials that are responsible for the agency's NEPA compliance. As reflected in comments, implementation of NEPA can require significant agency resources. Without senior agency official leadership and effective management of NEPA reviews, the process can be lengthy, costly, and subject to uncertainty and delays. CEQ seeks to advance efficiencies to ensure that agencies use their limited resources to effectively consider environmental impacts and support timely and informed decision making by the Federal Government. CEQ adds this definition with some changes in the final rule. Specifically, CEQ does not include the phrase ''and representing agency analysis of the effects of agency actions on the human environmental in agency decision-making processes'' because the duties and responsibilities of the ''senior agency official,'' including representing the agency, are discussed in various provisions of the subchapter. *See* §§ 1501.5(f), 1501.7(d), 1501.8(b)(6) and (c), 1501.10, 1502.7, 1507.2.

31. Definition of ''Special Expertise''

The NPRM did not propose any changes to the definition of special expertise in paragraph (ee). CEQ did not revise this definition in the final rule.

32. Striking the Definition of ''Significantly''

Because 40 CFR 1508.27 did not define ''significantly,'' but rather set out factors for agencies to consider in assessing whether a particular effect is significant, CEQ proposed to strike this definition and discuss significance in § 1501.3(b), as described in section II.C.3. CEQ makes this change in the final rule.

33. Clarifying the Meaning of ''Tiering''

CEQ proposed to amend the definition of ''tiering'' in paragraph (ff) to make clear that agencies may use EAs at the programmatic stage as well as the subsequent stages. This clarifies that agencies have flexibility in structuring programmatic NEPA reviews and associated tiering. CEQ proposed to move the operative language describing how any agency determines when and how to tier from 40 CFR 1508.28 to § 1501.11(b). CEQ makes these changes in the final rule.

K. CEQ Guidance Documents

In the proposed rule, CEQ stated that if the proposal was adopted as a final rule, it would supersede any previous CEQ NEPA guidance and handbooks. With this final rule, CEQ clarifies that it will provide notice in the **Federal Register** listing withdrawn guidance. CEQ will issue updated or new guidance consistent with Presidential directives. CEQ also intends to update the Citizen's Guide to NEPA.[125]

III. Rulemaking Analyses and Notices

A. Executive Order 12866, Regulatory Planning and Review and Executive Order 13563, Improving Regulation and Regulatory Review

E.O. 12866 [126] directs agencies to assess all costs and benefits of available regulatory alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity. E.O. 13563 [127] reaffirms E.O. 12866, and directs agencies to use a process that provides for public participation in developing rules; promotes coordination, simplification, and harmonization; and reduces burdens and maintains flexibility.

Section 3(f) of E.O. 12866 sets forth the four categories of regulatory action that meet the definition of a significant regulatory action. The first category includes rules that have an annual effect on the economy of $100 million or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, Tribal, or local governments or communities. Some commenters stated that this rulemaking would have such an effect, and therefore CEQ should have prepared a regulatory impact statement. Commenters noted, for example, proposed changes to the definition of effects, alternatives analysis, and overall effect on the number of Federal actions subject to NEPA as examples of impacts

[125] *Supra* note 29.

[126] 58 FR 51735 (Oct. 4, 1993).

[127] 76 FR 3821 (Jan. 21, 2011).

contributing to an impact of over $100 million on the public.

CEQ agrees that this an economically significant action. However, many of the changes made in this rule codify long-standing practices and case law that have developed since CEQ issued the 1978 regulations. Under OMB Circular A–4, ''Regulatory Analysis'' (Sept. 17, 2003),[128] the ''no action'' baseline is ''what the world will be like if the proposed rule is not adopted.'' Changes to the regulations based on long-standing guidance and Supreme Court case law would be included in the baseline for the rule; therefore, their codification would generate marginal cost savings. Similarly, changes that clarify or otherwise improve the ability to interpret and implement the regulations would have little to no quantifiable impact. The appendix to the Regulatory Impact Analysis for the Final Rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act [129] (''RIA Appendix'') provides a summary of the anticipated economic and environmental impacts associated with the changes in the final rule. In evaluating economic and environmental impacts, CEQ has considered the statute and Supreme Court case law, and the 1978 regulations. As discussed throughout Section II and the Final Rule Response to Comments, CEQ has made revisions to better align the regulations with the statute, codify Supreme Court case law and current agency practice, improve the timeliness and efficiency of the NEPA process, and make other changes to improve the clarity and readability of the regulations.

The revisions to CEQ's regulations are anticipated to significantly lower administrative costs as a result of changes to reduce unnecessary paperwork. Government-wide, the average number of pages for a final EIS is approximately 661 pages. The final rule includes numerous changes to reduce the duplication of paperwork and establishes presumptive page limits for EAs of 75 pages, and for EISs of 150 pages (or 300 pages for proposals of unusual scope or complexity).[130] However, agencies may request longer page limits with approval from a senior agency official and include additional material as appendices. The final rule also makes numerous changes to improve the efficiency of the NEPA process and establishes presumptive time limits for EAs of one year and for EISs of two years, which may be extended with approval of a senior agency official. CEQ expects the final rule to reduce the length of EAs and EISs, and the time for completing and these analyses, and to lower administrative costs government-wide.

A total of 1,276 EISs were completed from 2010 through 2018, and the median EIS completion time was 3.5 years with only 257 EISs completed in 2 years or less.[131] Based on the efficiencies and presumptive time limit for EISs in the final rule, the length of time to complete the 1019 EISs that took longer than 2 years could be reduced by 58 percent, assuming a 2-year completion time for all of those actions. Applying this potential time savings to the total administrative cost to prepare those EISs taking in excess of 2 years could result in roughly $744 million in savings over the 9-year time period for an annualized savings of roughly $83 million (2016 adjusted dollars).[132] The amount of time required to prepare an EIS does not necessarily correlate with the total cost. However, for those EISs taking over two years to prepare, comparing the anticipated time savings with the respective administrative costs provides insight into the potential cost savings that an agency may generate under the final rule. Additionally, CEQ notes that there may be cost savings related to the preparation of EAs and application of CEs. While the cost of these actions is significantly lower, agencies conduct such reviews in much larger numbers than EISs.

Agencies have not routinely tracked costs of completing NEPA analyses.[133] With implementation of this final rule, in particular § 1502.11(g), agencies will be required to provide the estimated total cost of preparing an EIS. CEQ expects this will begin to address the data gap that currently exists relating to the administrative costs of NEPA compliance.

CEQ expects these and other changes in the final rule to catalyze economic benefits by expediting some reviews, including through improved coordination and management and less focus on non-significant impacts. Commenters from industry on both the ANPRM and proposed rule frequently discussed that delays under the 1978 regulations resulted in higher costs; however, these costs are difficult to quantify. One estimate in 2015 found that the cost of a 6-year delay in infrastructure projects across the electricity transmission, power generation, inland waterways, roads and bridges, rail, and water (both drinking and wastewater) sectors is $3.7 trillion,[134] which was subsequently updated to $3.9 trillion in 2018.[135] There may be underlying permits and consultations (*e.g.,* the Endangered Species Act) and other issues that contribute to a delay and therefore allocating a portion of the cost to the NEPA process would be challenging.

NEPA is a procedural statute requiring agencies to disclose and consider potential environmental effects in their decision-making processes. The final rule does not alter any substantive environmental law or regulation such as the Clean Air Act, the Clean Water Act, and the Endangered Species Act. Under the final rule, agencies will continue to consider all significant impacts to the environment. Although some may view the changes in the final rule as reducing the number or scope of analyses, CEQ has determined that, using a baseline of the statutory requirements of NEPA and Supreme Court case law, there are no adverse environmental impacts (see RIA Appendix).

OMB has determined that this final rule is an economically significant regulatory action because it may have an annual effect on the economy of $100 million or more associated with lower administrative costs and reduced paperwork and delays in the environmental review process. This rule sets forth the government-wide process for implementing NEPA in a consistent and coordinated manner. The rule will also require agencies to update their existing NEPA procedures for

[128] 68 FR 58366 (Oct. 10, 2003).

[129] The Regulatory Impact Analysis for the Final Rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act is available under ''Supporting Documents'' in the docket on *regulations.gov* under docket ID CEQ–2019–0003.

[130] The 1978 regulations recommended the same page limits for EISs but did not include provisions requiring agencies to meet those page limits. 40 CFR 1502.7.

[131] *See* Council on Environmental Quality, *EIS Timeline Data Excel Workbook,* (June 12, 2020), *https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Data_2020-6-12.xlsx.*

[132] This calculation uses the mid-point ($1.125 million) of the $250,000 to $2 million cost range found in the NEPA Task Force report and assumes a 58 percent reduction in costs for those EISs taking longer than 2 years. NEPA Task Force Report, *supra,* note 28. This number is similar to the cost data from the Department of Energy, which found a median EIS cost of $1.4 million. GAO NEPA Report, *supra,* note 91.

[133] As noted above, a 2014 U.S. Government Accountability Office report found that Federal agencies do not routinely track data on the cost of completing NEPA analyses, and that the cost can vary considerably, depending on the complexity and scope of the project. GAO NEPA Report, *supra* note 91.

[134] Two Years, Not Ten, *supra* note 4.

[135] Press Release, Common Good, Common Good Updates the Cost of US Infrastructure Delays Costs Have Risen $200 Billion Over Five Years to Nearly $3.9 Trillion (May 2018), *https://www.commongood.org/wp-content/uploads/2018/05/Two-Years-Update.pdf.*

consistency with the changes set forth in this final rule.

B. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

Under E.O. 13771,[136] agencies must identify for elimination two prior regulations for every one regulation issued, and promulgate regulations consistent with a regulatory budget. This rule is a deregulatory action under E.O. 13771 and OMB's guidance implementing E.O. 13771, titled ''Reducing Regulation and Controlling Regulatory Costs'' (April 5, 2017).[137] CEQ anticipates that the changes made in this rule will reduce unnecessary paperwork and expedite some reviews through improved coordination and management.

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

The Regulatory Flexibility Act, as amended, (RFA), 5 U.S.C. 601 *et seq.,* and E.O. 13272 [138] require agencies to assess the impacts of proposed and final rules on small entities. Under the RFA, small entities include small businesses, small organizations, and small governmental jurisdictions. An agency must prepare a regulatory flexibility analysis at the proposed and final rule stages unless it determines and certifies that the rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). An agency need not perform an analysis of small entity impacts when a rule does not directly regulate small entities. *See Mid-Tex Electric Coop., Inc.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985). This rule does not directly regulate small entities. Rather, it applies to Federal agencies and sets forth the process for their compliance with NEPA. As noted above, NEPA is a procedural statute requiring agencies to disclose and consider potential environmental effects in their decision-making processes, and does not alter any substantive environmental law or regulation. Under the final rule, agencies will continue to consider all significant impacts to the environment.

A few commenters asserted that the rule would impact small entities, including small businesses that provide services relating to the preparation of NEPA documents, outdoor recreation businesses, and other related small businesses. To the extent that the rule may affect small entities, this rulemaking will make the NEPA process more efficient and consistent and clarify the procedural requirements, which CEQ expects to directly benefit Federal agencies and indirectly benefit all other entities engaged in the process, including applicants seeking a Federal permit and those engaged in NEPA compliance activities. In addition, CEQ expects that small businesses and farmers seeking SBA or FSA guaranteed loans will indirectly benefit from the clarifying revisions in the final rule to the definition of major Federal action. Accordingly, CEQ hereby certifies that the rule will not have a significant economic impact on a substantial number of small entities.

D. Congressional Review Act

Before a rule can take effect, the Congressional Review Act (CRA) requires agencies to submit to the House of Representatives, Senate, and Comptroller General a report containing a copy of the rule and a statement identifying whether it is a ''major rule.'' 5 U.S.C. 801. OMB determines if a final rule constitutes a major rule. The CRA defines a major rule as any rule that the Administrator of OMB's Office of Information and Regulatory Affairs finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. 804(2).

OMB has determined that this final rule is a major rule for purposes of the Congressional Review Act. CEQ will submit a report, including the final rule, to both houses of Congress and the Government Accountability Office for review.

E. National Environmental Policy Act

Under the CEQ regulations, major Federal actions may include regulations. When CEQ issued regulations in 1978, it prepared a ''special environmental assessment'' for illustrative purposes pursuant to E.O. 11991. 43 FR at 25232. The NPRM for the 1978 regulations stated ''the impacts of procedural regulations of this kind are not susceptible to detailed analysis beyond that set out in the assessment.'' *Id.* Similarly, in 1986, while CEQ stated in the final rule that there were ''substantial legal questions as to whether entities within the Executive Office of the President are required to prepare environmental assessments,'' it also prepared a special environmental assessment. 51 FR at 15619. The special environmental assessment issued in 1986 made a finding of no significant environmental impact, and there was no finding made for the assessment of the 1978 regulations.

Some commenters expressed the view that CEQ failed to comply with NEPA when publishing the proposed rule that precedes this final rule, and CEQ should have prepared an EA or EIS. The commenters stated that section 102(2)(C) of NEPA requires environmental review of major Federal actions. By not conducting an environmental review under NEPA, commenters stated that CEQ violated its own regulations and past practices in prior regulations. Other commenters stated that NEPA review was required if the proposed rule ''created the possibility'' of significant impacts on the environment. They asserted that the proposed rule was a ''sweeping re-write'' of the 1978 regulations that would alter Federal agencies' consideration of environmental effects of proposed projects. Aspects of the proposed rule that were referenced in this regard include expanded use of CEs, narrow definitions of significance and effects, weakened alternatives analysis, and reduced public participation and agency accountability. Commenters asserted that the consequence of these changes is truncated analysis, a less informed public, and less mitigation.

CEQ disagrees with commenters. CEQ prepared a special assessment on its prior rules for illustrative purposes. Those long-prior voluntary decisions do not forever establish that CEQ has an obligation to apply the CEQ's regulations to changes to those regulations. As noted above, CEQ has the authority to promulgate and revise its regulations consistent with *Chevron* and other applicable case law.

This rule would not authorize any activity or commit resources to a project that may affect the environment. Similar to the 1978 regulations, these regulations do not concern any particular environmental media, nor are the regulations tied to a specific environmental setting. Rather, these regulations apply generally to Federal actions affecting the environment. No action under the regulations or specific issue or problem is singled out for special consideration. *See* Council on Environmental Quality, Special

[136] 82 FR 9339 (Feb. 3, 2017).

[137] *Available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.*

[138] 67 FR 53461 (Aug. 16, 2002).

Environmental Assessment of Regulations Proposed Under E.O. 11991 to Implement the Procedural Provisions of the National Environmental Policy Act, p. 6 (1978). Further, as stated by CEQ when it proposed the regulations in 1978, procedural rules of this kind are not susceptible to detailed analysis. 43 FR at 25232.

Even if CEQ were required to prepare an EA, it likely would result in a FONSI. CEQ has reviewed the changes made in this final rule and determined that they would not result in environmental impacts. *See* RIA Appendix. For reasons explained in the respective areas of this preamble and further summarized in the RIA Appendix, CEQ disagrees that the clarifications and changes to the processes that Federal agencies follow when relying on CEs, analyzing alternatives, and engaging the public will themselves result in any environmental impacts, let alone potentially significant impacts. This thorough review, in combination with the aforementioned circumstances of the special environmental assessments prepared for the 1978 and 1986 regulations, and the procedural nature of these regulations, reinforces CEQ's view that an EA is neither required nor necessary.

Moreover, preparing an EA for the final rule would not meaningfully inform CEQ or the public. The clarifications and changes in the final rule are entirely procedural and will help to inform the processes used by Federal agencies to evaluate the environmental effects of their proposed actions in the future.

For reasons explained in the respective areas of this preamble and further summarized in the RIA Appendix, CEQ disagrees that changes relating to CEs, analysis of alternatives, public participation, and agency responsibilities will have environmental impacts, let alone potentially significant ones.

In addition, commenters referenced several court opinions in support of their view that an agency's interpretation of a statute can be subject to NEPA review when that interpretation can lead to subsequent, significant effects on the environment, including *Citizens for Better Forestry* v. *U.S. Dep't of Agric.,* 481 F. Supp. 2d 1059 (N.D. Cal. 2007) and *Sierra Club* v. *Bosworth,* 510 F. 3d 1016 (9th Cir. 2007). Commenters stated that CEQ was required to request comment on the appropriate scope of the environmental review of the proposed rule and then prepare, and notice for public comment, an EIS before or in tandem with its publication.

The circumstances in this rule are distinctly different from the case law referenced by commenters. *Citizens for Better Forestry* pertains to the misapplication of an existing CE, where the court found that the agency improperly expanded the scope of an existing CE when applying it to a National Forest Management Act rulemaking. 481 F. Supp. at 1086. In *Sierra Club* v. *Bosworth,* the court agreed with previous cases finding that the promulgation of agency NEPA procedures, including the establishment of new CEs, did not itself require preparation of an EA or EIS, but that agencies need only comply with CEQ regulations setting forth procedural requirements, including consultation with CEQ, and **Federal Register** publication for public comment (40 CFR 1507.3). 510 F.3d at 1022. The court, however, found that the record relied on by the U.S. Forest Service to develop and justify a CE was deficient. *Id.* at 1026–30. Neither of the circumstances in those cases is comparable to the circumstances of this rule. Further, in another relevant case, *Heartwood* v. *U.S. Forest Service,* the court found that neither NEPA nor the CEQ regulations required the agency to conduct an EA or an EIS prior to the promulgation of its procedures creating a CE. 230 F.3d 947, 954–55 (7th Cir. 2000).

This rule serves as the primary regulation from which agencies develop procedures to implement the statute. To prepare an EIS, as some commenters had requested, would necessitate that CEQ apply the 1978 regulations to a rule that revises those same regulations. There is no indication that the statute contemplated such circumstances, and CEQ is not aware of other examples in law where the revisions to procedural rules were subject to the requirements of the rule that those same rules replaced. Further, the 1978 regulations do not require agencies to prepare a NEPA analysis before establishing or updating agency procedures for implementing NEPA. Since this rule would not authorize any activity or commit resources to a project that may affect the environment, preparation of an environmental review is not required.

F. Endangered Species Act

Under the ESA, the promulgation of regulations can be a discretionary agency action subject to section 7 of the ESA. CEQ has determined that updating its regulations implementing the procedural provisions of NEPA has ''no effect'' on listed species and critical habitat. Therefore, ESA section 7 consultation is not required.

Commenters stated that consultation with the Fish and Wildlife Service and the National Marine Fisheries Service is required because the rule may affect or may adversely affect species listed under the ESA. In support of this point, commenters referenced proposed changes to the definition of ''effects'' and ''significantly,'' development of alternatives, and obligations for agencies to obtain information. Commenters noted that a programmatic consultation may be appropriate where an agency promulgates regulations that may affect endangered species. Other commenters believe that the rule is contrary to section 7(a)(1) of ESA, which imposes a specific obligation upon all federal agencies to carry out programs to conserve endangered and threatened species. Commenters stated that the proposed changes eliminate or otherwise weaken requirements pertaining to the assessment of impacts and, in doing so, CEQ fails to satisfy responsibilities under section 7(a)(1).

CEQ disagrees that the aforementioned regulatory changes ''may affect'' listed species or critical habitat. Initially, it is important to note that commenters are conflating ESA and NEPA. As courts have stated numerous times, these are two different statutes with different standards and definitions and, in fact, different underlying policies. As discussed in section II.B.1, the Supreme Court has stated that NEPA is a procedural statute. In contrast, the ESA is principally focused on imposing substantive duties on Federal agencies and the public. Regardless of how definitions or other procedures under NEPA are changed under this regulation or any other regulatory process, it will not change the requirements for Federal agencies under the ESA or its implementing regulations.

This rulemaking is procedural in nature, and therefore does not make any final determination regarding the level of NEPA analysis required for particular actions. CEQ's approach is consistent with the approach taken by other Federal agencies that similarly make determinations of no effect on listed species and critical habitat when establishing or updating agency NEPA procedures. CEQ also notes that neither the 1978 regulations nor the 1986 amendments indicate that CEQ consulted under ESA section 7(a)(2). Setting aside the procedural nature of this rule, CEQ reviewed it to determine if it ''may affect'' listed species or their designated critical habitat. CEQ has closely reviewed the impacts of all the changes made to the 1978 regulations, as summarized in the RIA Appendix and described in greater detail in the

respective responses to comments. None of the changes to the 1978 regulations are anticipated to have environmental impacts, including potential effects to listed species and critical habitat. For example, under § 1501.3 of the final rule, agencies should continue to consider listed species and designated habitat when making a determination of significance with respect to the level of NEPA review.

Contrary to several comments, the final rule does not ignore cumulative effects on listed species. Rather, the final rule includes a definition of effects that comports with Supreme Court case law to encompass all effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. In general, the changes improve the timeliness and efficiency of the NEPA process while retaining requirements to analyze all activities and environmental impacts covered within the scope of the statute. To the extent the rule modifies the 1978 regulations, the changes do not diminish the quality and depth of environmental review relative to the baseline, which is defined as how NEPA is conducted under applicable Supreme Court case law.

Neither the ESA regulations nor the ESA Section 7 Consultation Handbook (1998) require the action agency to request concurrence from the Fish and Wildlife Service and National Marine Fisheries Service for determinations that an action will have no effect on listed species or their critical habitat. The final rule does not change the obligations of Federal agencies under the ESA; as noted above, importantly, all of the requirements under section 7 and associated implementing regulations and policies continue to apply regardless of whether NEPA analysis is triggered or the form of the NEPA documentation. For the aforementioned reasons, CEQ has determined that the final rule will have no effect on ESA listed species and designated critical habitat.

To the extent commenters imply that, under the authority of ESA section 7(a)(1), CEQ can regulate Federal action agencies with regard to the ESA, this is not accurate. For example, CEQ does not have the authority, under the guise of NEPA, to dictate to Federal action agencies that they may only choose an alternative that has the most conservation value for listed species or designated critical habitat.

All Federal agencies continue to be subject to the ESA and its requirements. Further, as described in detail in the RIA Appendix and in Final Rule Response to Comments on specific changes, none of the changes to the 1978 regulations are anticipated to have environmental impacts, including potential effects to listed species and critical habitat. In general, the changes improve the timeliness and efficiency of the NEPA process while retaining requirements to analyze all environmental impacts covered within the ambit of the statute. CEQ notes that the rulemaking is procedural in nature, and therefore does not make any final determination regarding the level of NEPA analysis required for particular actions.

G. Executive Order 13132, Federalism

E.O. 13132 requires agencies to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.[139] Policies that have federalism implications include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule does not have federalism implications because it applies to Federal agencies, not States. However, CEQ notes that States may elect to assume NEPA responsibilities under Federal statutes. CEQ received comments in response to the NPRM from a number of States, including those that have assumed NEPA responsibilities, and considered these comments in development of the final rule.

H. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

E.O. 13175 requires agencies to have a process to ensure meaningful and timely input by Tribal officials in the development of policies that have Tribal implications.[140] Such policies include regulations that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. While the rule is not a regulatory policy that has Tribal implications, the rule does, in part, respond to Tribal government comments concerning Tribal sovereign rights, interests, and the expertise of Tribes in the NEPA process and the CEQ regulations implementing NEPA.

Several commenters stated that it is inaccurate for CEQ to conclude that the rule ''is not a regulatory policy that has Tribal implications,'' under E.O. 13175. Commenters noted that NEPA uniquely and substantially impacts Tribes, and Tribal lands are ordinarily held in Federal trust. Commenters also stated that through NEPA and its implementing regulations, Tribes often engage with the Federal agency on projects located within the Tribes' ancestral lands, including on projects that may affect cultural resources, sacred sites, and other resources. Commenters noted Tribal nations routinely participate in the NEPA process as participating, cooperating, or sometimes lead agencies. Further, the proposed regulations specifically contain provisions that explicitly reference Tribal nations.

Commenters stated that consultation is required by the Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation dated November 5, 2009,[141] which supplements E.O. 13175 and requested formal consultation and additional meetings in their region with CEQ on the proposed rule. Commenters stated that the Tribal meetings CEQ held were insufficient in number or capacity for meaningful consultation. Other commenters stated that consultation should start at the outset of the process, and some reference comments provided on the need for consultation during the ANPRM process. Some commenters stated that CEQ should withdraw the proposed rule, and others asked that CEQ postpone or extend the comment period for the rulemaking in order to engage in consultation with Tribal governments in order to make the regulatory framework more responsive to Tribal needs.

The final rule does not meet the criteria in E.O. 13175 that require government-to-government consultation. This rule does not impose substantial direct compliance costs on Tribal governments (section 5(b)) and does not preempt Tribal law (section 5(c)). However, CEQ solicited and received numerous Tribal governmental and organizational public comments during the rulemaking process. The comments received through the ANPRM informed the development of CEQ's proposed rule. For the proposed rule, CEQ provided for a 60-day public comment period, which is consistent with the length of the comment period provided by CEQ for the original 1978 proposed regulations, as well as the APA and E.O. 12866. CEQ notified all

[139] *Supra* note 75.

[140] *Supra* note 69.

[141] 74 FR 57881 (Nov. 9, 2009).

Tribal leaders of federally recognized Tribes by email or mail of the proposed rule and invited comments. CEQ conducted additional Tribal outreach to solicit comments from Tribal leaders and members through three listening sessions held in Denver, Colorado, Anchorage, Alaska, and Washington, DC. CEQ made information to aid the Tribes and the public's review available on its websites at *www.whitehouse.gov/ceq* and *www.nepa.gov,* including a redline version of the proposed changes, a presentation on the proposed rule, and other background information.

One commenter argued that CEQ made a ''substantive'' decision to forego Tribal consultation that it must support with substantial evidence in the administrative record under the APA. While compliance with E.O. 13175 is not subject to judicial review, the final rule explains how CEQ received meaningful and timely input from Tribal leaders and members.

In its ANPRM, CEQ included a specific question regarding the representation of Tribal governments in the NEPA process. *See* ANPRM Question 18 (''Are there ways in which the role of [T]ribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?''). More generally, CEQ's ANPRM sought the views of Tribal governments and others on regulatory revisions that CEQ could propose to improve Tribal participation in Federal NEPA processes. *See* ANPRM Question 2 (''Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, Tribal or local environmental reviews or authorization decisions, and if so, how?''). As discussed in section II.A, CEQ is amending its regulations in the final rule to further support coordination with Tribal governments and agencies and analysis of a proposed action's potential effects on Tribal lands, resources, or areas of historic significance as an important part of Federal agency decision making.

I. Executive Order 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

E.O. 12898 requires agencies to make achieving environmental justice part of their missions by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.[142] CEQ has analyzed this final rule and determined that it would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations. This rule would set forth implementing regulations for NEPA; it is in the agency implementation of NEPA when conducting reviews of proposed agency actions where agencies can consider, as needed, environmental justice issues.

Several commenters disagreed with CEQ's determination that the proposed rule would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations. Commenters stated NEPA's mandate to consider environmental effects, E.O. 12898, agency guidance, and case law establish that agencies cannot ignore the impacts of their actions on low-income and minority communities, and that CEQ is relinquishing its responsibility to oversee compliance with E.O. 12898 and NEPA. Further, commenters contended that CEQ's failure to analyze how the proposed rule and its implementation would affect E.O. 12898's mandates would render the regulations arbitrary and capricious, and exceed the agency's statutory authority.

Commenters stated that CEQ provided no explanation or analysis of how the development and implementation of this rule would affect implementation of E.O. 12898 and, consequently, environmental justice communities. Commenters noted the fundamental proposed changes to nearly every step of the NEPA review process will disproportionately impact environmental justice communities and will reduce or limit opportunities for such communities to understand the effects of proposed projects and to participate in the NEPA review process.

NEPA is a procedural statute that does not presuppose any particular substantive outcomes. In addition, CEQ has reviewed the changes in this final rule and has determined that they would not result in environmental impacts. *See* RIA Appendix. CEQ disagrees that the final rule will have disproportionately high and adverse human health or environmental effects on minority populations and low-income population. Rather, the final rule modernizes and clarifies the procedures that NEPA contemplates. Among other things, this will give agencies greater flexibility to design and customize public involvement to best address the specific circumstances of their proposed actions. The final rule expands the already wide range of tools agencies may use when providing notice to potentially affected communities and inviting public involvement. CEQ has made further changes to § 1506.6 in the final rule to clarify that agencies should consider the public's access to electronic media when selecting appropriate methods for providing public notice and involvement. The final rule also better informs the public by extending the scoping period so that it may occur prior to publication of the NOI, where appropriate, and increasing the specificity of the NOI.

Commenters also raised concerns that CEQ did not follow the E.O. 12898 directive to ensure that environmental justice communities can meaningfully participate in public processes and Federal agency decision making, including making public information and hearings ''readily accessible.'' Commenters stated that CEQ failed to follow this directive in designing its rulemaking process, and in fact, excluded environmental justice communities from the process. Further, commenters stated that, over 20 years ago, CEQ acknowledged that traditional notice and comment procedures may be insufficient to engage environmental justice communities. These barriers may range from agency failure to provide translation of documents to the scheduling of meetings at times and in places that are not convenient to working families. Commenters stated that CEQ failed to mention environmental justice communities in its opening statement during the Washington, DC hearing.

Commenters also stated that CEQ failed to take note of the thousands of comments submitted in response to the ANPRM raising concerns about the health and environment of environmental justice communities that could come from limiting opportunities to gain access to information about projects and to comment. Commenters stated that if CEQ's rulemaking process was more inclusive and expansive it would enable some valuable clarifications in the regulations of how environmental justice impacts should be taken more definitively into account in NEPA reviews. Commenters also stated that the proposed rule changes show no particular interest in better clarifying this important aspect of environmental review, and show no evidence of interest in bettering environmental justice impact assessment.

In response to the ANPRM, CEQ received over 12,500 comments, including from those representing

[142] 59 FR 7629 (Feb. 16, 1994).

environmental justice organizations. The diverse range of public comments informed CEQ's development of the proposed rule to improve interagency coordination in the environmental review process, promote earlier public involvement, increase transparency, and enhance the participation of States, Tribes, and localities.

In issuing the NPRM, CEQ took a number of further actions to hear from the public and to encourage all interested stakeholders to submit comments. These actions included notifying and inviting comment from all federally recognized Tribes and over 400 interested groups, including States, localities, environmental organizations, trade associations, NEPA practitioners, and other interested members of the public, representing a broad range of diverse views. Additionally, CEQ made information to aid the public's review available on its websites at *www.whitehouse.gov/ceq* and *www.nepa.gov,* including a redline version of the proposed changes to the regulations, along with a presentation on the proposed rule and other background information.

CEQ engaged in extensive public outreach with the benefit of modern technologies and rulemaking procedures. CEQ held two public hearings each with morning, afternoon, and evening sessions, in Denver, Colorado on February 11, 2020, and in Washington, DC on February 25, 2020. Both hearings had diverse representation from stakeholders, including many speaking on behalf of environmental justice communities or about their concerns. CEQ also attended the National Environmental Justice Advisory Committee (NEJAC) meeting in Jacksonville, Florida to brief NEJAC members and the public on the proposed rule and to answer questions. CEQ also conducted additional public outreach to solicit comments and receive input, including Tribal engagement in Denver, Colorado, Anchorage, Alaska and Washington, DC.

J. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Agencies must prepare a Statement of Energy Effects for significant energy actions under E.O. 13211.[143] This final rule is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

K. Executive Order 12988, Civil Justice Reform

Under section 3(a) E.O. 12988,[144] agencies must review their proposed regulations to eliminate drafting errors and ambiguities, draft them to minimize litigation, and provide a clear legal standard for affected conduct. Section 3(b) provides a list of specific issues for review to conduct the reviews required by section 3(a). CEQ has conducted this review and determined that this final rule complies with the requirements of E.O. 12988.

L. Unfunded Mandates Reform Act

Section 201 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) requires Federal agencies to assess the effects of their regulatory actions on State, Tribal, and local governments, and the private sector to the extent that such regulations incorporate requirements specifically set forth in law. Before promulgating a rule that may result in the expenditure by a State, Tribal, or local government, in the aggregate, or by the private sector of $100 million, adjusted annually for inflation, in any one year, an agency must prepare a written statement that assesses the effects on State, Tribal, and local governments and the private sector. 2 U.S.C. 1532. This final rule applies to Federal agencies and would not result in expenditures of $100 million or more for State, Tribal, and local governments, in the aggregate, or the private sector in any 1 year. This action also does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of 2 U.S.C. 1531–38.

M. Paperwork Reduction Act

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

List of Subjects

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

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

40 CFR Part 1515

Freedom of information.

40 CFR Part 1516

Privacy.

40 CFR Part 1517

Sunshine Act.

40 CFR Part 1518

Accounting, Administrative practice and procedure, Environmental impact statements.

Mary B. Neumayr,

Chairman.

For the reasons stated in the preamble, and under the authority of 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369, the Council on Environmental Quality amends chapter V in title 40 of the Code of Federal Regulations as follows:

PARTS 1500 THROUGH 1508 [DESIGNATED AS SUBCHAPTER A]

■ 1. Designate parts 1500 through 1508 as subchapter A and add a heading for newly designated subchapter A to read as follows:

Subchapter A—National Environmental Policy Act Implementing Regulations

■ 2. Revise part 1500 to read as follows:

PART 1500—PURPOSE AND POLICY

Sec.
1500.1 Purpose and policy.
1500.2 [Reserved].
1500.3 NEPA compliance.
1500.4 Reducing paperwork.
1500.5 Reducing delay.
1500.6 Agency authority.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

§ 1500.1 Purpose and policy.

(a) The National Environmental Policy Act (NEPA) is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process. Section 101 of NEPA establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Section 102(2) of NEPA establishes the procedural requirements to carry out the policy stated in section 101 of NEPA. In

[143] 66 FR 28355 (May 22, 2001).

[144] 61 FR 4729 (Feb. 7, 1996).

particular, it requires Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment. The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information, and the public has been informed regarding the decision-making process. NEPA does not mandate particular results or substantive outcomes. NEPA's purpose is not to generate paperwork or litigation, but to provide for informed decision making and foster excellent action.

(b) The regulations in this subchapter implement section 102(2) of NEPA. They provide direction to Federal agencies to determine what actions are subject to NEPA's procedural requirements and the level of NEPA review where applicable. The regulations in this subchapter are intended to ensure that relevant environmental information is identified and considered early in the process in order to ensure informed decision making by Federal agencies. The regulations in this subchapter are also intended to ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable and timely manner, and to reduce unnecessary burdens and delays. Finally, the regulations in this subchapter promote concurrent environmental reviews to ensure timely and efficient decision making.

§ 1500.2 [Reserved]

§ 1500.3 NEPA compliance.

(a) *Mandate.* This subchapter is applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act), except where compliance would be inconsistent with other statutory requirements. The regulations in this subchapter are issued pursuant to NEPA; the Environmental Quality Improvement Act of 1970, as amended (Pub. L. 91–224, 42 U.S.C. 4371 *et seq.*); section 309 of the Clean Air Act, as amended (42 U.S.C. 7609); Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970), as amended by Executive Order 11991, Relating to the Protection and Enhancement of Environmental Quality (May 24, 1977); and Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (August 15, 2017). The regulations in this subchapter apply to the whole of section 102(2) of NEPA. The provisions of the Act and the regulations in this subchapter must be read together as a whole to comply with the law.

(b) *Exhaustion.* (1) To ensure informed decision making and reduce delays, agencies shall include a request for comments on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment in the notice of intent to prepare an environmental impact statement (§ 1501.9(d)(7) of this chapter).

(2) The draft and final environmental impact statements shall include a summary of all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the draft and final environmental impact statements (§ 1502.17 of this chapter).

(3) For consideration by the lead and cooperating agencies, State, Tribal, and local governments and other public commenters must submit comments within the comment periods provided, and comments shall be as specific as possible (§§ 1503.1 and 1503.3 of this chapter). Comments or objections of any kind not submitted, including those based on submitted alternatives, information, and analyses, shall be forfeited as unexhausted.

(4) Informed by the submitted alternatives, information, and analyses, including the summary in the final environmental impact statement (§ 1502.17 of this chapter) and the agency's response to comments in the final environmental impact statement (§ 1503.4 of this chapter), together with any other material in the record that he or she determines relevant, the decision maker shall certify in the record of decision that the agency considered all of the alternatives, information, and analyses, and objections submitted by States, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement (§ 1505.2(b) of this chapter).

(c) *Review of NEPA compliance.* It is the Council's intention that judicial review of agency compliance with the regulations in this subchapter not occur before an agency has issued the record of decision or taken other final agency action. It is the Council's intention that any allegation of noncompliance with NEPA and the regulations in this subchapter should be resolved as expeditiously as possible. Consistent with their organic statutes, and as part of implementing the exhaustion provisions in paragraph (b) of this section, agencies may structure their procedures to include an appropriate bond or other security requirement.

(d) *Remedies.* Harm from the failure to comply with NEPA can be remedied by compliance with NEPA's procedural requirements as interpreted in the regulations in this subchapter. It is the Council's intention that the regulations in this subchapter create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm. The regulations in this subchapter do not create a cause of action or right of action for violation of NEPA, which contains no such cause of action or right of action. It is the Council's intention that any actions to review, enjoin, stay, vacate, or otherwise alter an agency decision on the basis of an alleged NEPA violation be raised as soon as practicable after final agency action to avoid or minimize any costs to agencies, applicants, or any affected third parties. It is also the Council's intention that minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action.

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

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

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

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

(c) Reducing the length of environmental documents by means such as meeting appropriate page limits (§§ 1501.5(f) and 1502.7 of this chapter).

(d) Preparing analytic and concise environmental impact statements (§ 1502.2 of this chapter).

(e) Discussing only briefly issues other than significant ones (§ 1502.2(b) of this chapter).

(f) Writing environmental impact statements in plain language (§ 1502.8 of this chapter).

(g) Following a clear format for environmental impact statements (§ 1502.10 of this chapter).

(h) Emphasizing the portions of the environmental impact statement that are useful to decision makers and the public (*e.g.,* §§ 1502.14 and 1502.15 of this chapter) and reducing emphasis on background material (§ 1502.1 of this chapter).

(i) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.9 of this chapter).

(j) Summarizing the environmental impact statement (§ 1502.12 of this chapter).

(k) Using programmatic, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1501.11 and 1502.4 of this chapter).

(l) Incorporating by reference (§ 1501.12 of this chapter).

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

(n) Requiring comments to be as specific as possible (§ 1503.3 of this chapter).

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

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

(q) Combining environmental documents with other documents (§ 1506.4 of this chapter).

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

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

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

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

(d) Engaging in interagency cooperation before or as the environmental assessment or environmental impact statement is prepared, rather than awaiting submission of comments on a completed document (§§ 1501.7 and 1501.8 of this chapter).

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

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

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

(h) Preparing environmental impact statements early in the process (§ 1502.5 of this chapter).

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

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

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

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

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view policies and missions in the light of the Act's national environmental objectives, to the extent consistent with its existing authority. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to ensure full compliance with the purposes and provisions of the Act as interpreted by the regulations in this subchapter. The phrase ''to the fullest extent possible'' in section 102 of NEPA means that each agency of the Federal Government shall comply with that section, consistent with § 1501.1 of this chapter. Nothing contained in the regulations in this subchapter is intended or should be construed to limit an agency's other authorities or legal responsibilities.

■ 3. Revise part 1501 to read as follows:

PART 1501—NEPA AND AGENCY PLANNING

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

§ 1501.1 NEPA thresholds.

(a) In assessing whether NEPA applies or is otherwise fulfilled, Federal agencies should determine:

(1) Whether the proposed activity or decision is expressly exempt from NEPA under another statute;

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

(3) Whether compliance with NEPA would be inconsistent with Congressional intent expressed in another statute;

(4) Whether the proposed activity or decision is a major Federal action;

(5) Whether the proposed activity or decision, in whole or in part, is a non-discretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process; and

(6) Whether the proposed action is an action for which another statute's requirements serve the function of agency compliance with the Act.

(b) Federal agencies may make determinations under this section in their agency NEPA procedures (§ 1507.3(d) of this chapter) or on an individual basis, as appropriate.

(1) Federal agencies may seek the Council's assistance in making an individual determination under this section.

(2) An agency shall consult with other Federal agencies concerning their concurrence in statutory determinations made under this section where more than one Federal agency administers the statute.

§ 1501.2 Apply NEPA early in the process.

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

(b) Each agency shall:

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

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

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

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

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

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

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

§ 1501.3 Determine the appropriate level of NEPA review.

(a) In assessing the appropriate level of NEPA review, Federal agencies should determine whether the proposed action:

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

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

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

(b) In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action. Agencies should consider connected actions consistent with § 1501.9(e)(1).

(1) In considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area (national, regional, or local) and its resources, such as listed species and designated critical habitat under the Endangered Species Act. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend only upon the effects in the local area.

(2) In considering the degree of the effects, agencies should consider the following, as appropriate to the specific action:

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

(ii) Both beneficial and adverse effects.

(iii) Effects on public health and safety.

(iv) Effects that would violate Federal, State, Tribal, or local law protecting the environment.

§ 1501.4 Categorical exclusions.

(a) For efficiency, agencies shall identify in their agency NEPA procedures (§ 1507.3(e)(2)(ii) of this chapter) categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.

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

(1) If an extraordinary circumstance is present, the agency nevertheless may categorically exclude the proposed action if the agency determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects.

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

§ 1501.5 Environmental assessments.

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

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

(c) An environmental assessment shall:

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

(2) Briefly discuss the purpose and need for the proposed action, alternatives as required by section 102(2)(E) of NEPA, and the environmental impacts of the proposed action and alternatives, and include a listing of agencies and persons consulted.

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

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

(f) The text of an environmental assessment shall be no more than 75 pages, not including appendices, unless a senior agency official approves in writing an assessment to exceed 75 pages and establishes a new page limit.

(g) Agencies may apply the following provisions to environmental assessments:

(1) Section 1502.21 of this chapter—Incomplete or unavailable information;

(2) Section 1502.23 of this chapter—Methodology and scientific accuracy; and

(3) Section 1502.24 of this chapter—Environmental review and consultation requirements.

§ 1501.6 Findings of no significant impact.

(a) An agency shall prepare a finding of no significant impact if the agency

determines, based on the environmental assessment, not to prepare an environmental impact statement because the proposed action will not have significant effects.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6(b) of this chapter.

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

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

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

(b) The finding of no significant impact shall include the environmental assessment or incorporate it by reference and shall note any other environmental documents related to it (§ 1501.9(f)(3)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

(c) The finding of no significant impact shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.

§ 1501.7 Lead agencies.

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

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, Tribal, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement or environmental assessment (§ 1506.2 of this chapter).

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

(1) Magnitude of agency's involvement.

(2) Project approval or disapproval authority.

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

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State, Tribal, or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the senior agency officials of the potential lead agencies that a lead agency be designated.

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

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

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

(f) Any potential lead agency may file a response within 20 days after a request is filed with the Council. As soon as possible, but not later than 20 days after receiving the request and all responses to it, the Council shall determine which Federal agency will be the lead agency and which other Federal agencies will be cooperating agencies.

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

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

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

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent practicable.

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

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

(i) The lead agency shall develop a schedule, setting milestones for all environmental reviews and authorizations required for implementation of the action, in consultation with any applicant and all joint lead, cooperating, and participating agencies, as soon as practicable.

(j) If the lead agency anticipates that a milestone will be missed, it shall notify appropriate officials at the responsible agencies. As soon as practicable, the responsible agencies shall elevate the issue to the appropriate officials of the responsible agencies for timely resolution.

§ 1501.8 Cooperating agencies.

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

(b) Each cooperating agency shall:

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

(2) Participate in the scoping process (described in § 1501.9).

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

(4) On request of the lead agency, make available staff support to enhance

the lead agency's interdisciplinary capability.

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

(6) Consult with the lead agency in developing the schedule (§ 1501.7(i)), meet the schedule, and elevate, as soon as practicable, to the senior agency official of the lead agency any issues relating to purpose and need, alternatives, or other issues that may affect any agencies' ability to meet the schedule.

(7) Meet the lead agency's schedule for providing comments and limit its comments to those matters for which it has jurisdiction by law or special expertise with respect to any environmental issue consistent with § 1503.2 of this chapter.

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

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

§ 1501.9 Scoping.

(a) *Generally.* Agencies shall use an early and open process to determine the scope of issues for analysis in an environmental impact statement, including identifying the significant issues and eliminating from further study non-significant issues. Scoping may begin as soon as practicable after the proposal for action is sufficiently developed for agency consideration. Scoping may include appropriate pre-application procedures or work conducted prior to publication of the notice of intent.

(b) *Invite cooperating and participating agencies.* As part of the scoping process, the lead agency shall invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and other likely affected or interested persons (including those who might not be in accord with the action), unless there is a limited exception under § 1507.3(f)(1) of this chapter.

(c) *Scoping outreach.* As part of the scoping process the lead agency may hold a scoping meeting or meetings, publish scoping information, or use other means to communicate with those persons or agencies who may be interested or affected, which the agency may integrate with any other early planning meeting. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(d) *Notice of intent.* As soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an environmental impact statement, the lead agency shall publish a notice of intent to prepare an environmental impact statement in the **Federal Register**, except as provided in § 1507.3(f)(3) of this chapter. An agency also may publish notice in accordance with § 1506.6 of this chapter. The notice shall include, as appropriate:

(1) The purpose and need for the proposed action;

(2) A preliminary description of the proposed action and alternatives the environmental impact statement will consider;

(3) A brief summary of expected impacts;

(4) Anticipated permits and other authorizations;

(5) A schedule for the decision-making process;

(6) A description of the public scoping process, including any scoping meeting(s);

(7) A request for identification of potential alternatives, information, and analyses relevant to the proposed action (*see* § 1502.17 of this chapter); and

(8) Contact information for a person within the agency who can answer questions about the proposed action and the environmental impact statement.

(e) *Determination of scope.* As part of the scoping process, the lead agency shall determine the scope and the significant issues to be analyzed in depth in the environmental impact statement. To determine the scope of environmental impact statements, agencies shall consider:

(1) Actions (other than unconnected single actions) that may be connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions that may require environmental impact statements;

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

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

(2) Alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action).

(3) Impacts.

(f) *Additional scoping responsibilities.* As part of the scoping process, the lead agency shall:

(1) Identify and eliminate from detailed study the issues that are not significant or have been covered by prior environmental review(s) (§ 1506.3 of this chapter), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(2) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(3) Indicate any public environmental assessments and other environmental impact statements that are being or will be prepared and are related to but are not part of the scope of the impact statement under consideration.

(4) Identify other environmental review, authorization, and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently and integrated with the environmental impact statement, as provided in § 1502.24 of this chapter.

(5) Indicate the relationship between the timing of the preparation of environmental analyses and the agencies' tentative planning and decision-making schedule.

(g) *Revisions.* An agency shall revise the determinations made under paragraphs (b), (c), (e), and (f) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.10 Time limits.

(a) To ensure that agencies conduct NEPA reviews as efficiently and expeditiously as practicable, Federal agencies should set time limits appropriate to individual actions or types of actions (consistent with the time intervals required by § 1506.11 of this chapter).

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

(1) Environmental assessments within 1 year unless a senior agency official of the lead agency approves a longer

period in writing and establishes a new time limit. One year is measured from the date of agency decision to prepare an environmental assessment to the publication of an environmental assessment or a finding of no significant impact.

(2) Environmental impact statements within 2 years unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. Two years is measured from the date of the issuance of the notice of intent to the date a record of decision is signed.

(c) The senior agency official may consider the following factors in determining time limits:

(1) Potential for environmental harm.

(2) Size of the proposed action.

(3) State of the art of analytic techniques.

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

(5) Number of persons and agencies affected.

(6) Availability of relevant information.

(7) Other time limits imposed on the agency by law, regulations, or Executive order.

(d) The senior agency official may set overall time limits or limits for each constituent part of the NEPA process, which may include:

(1) Decision on whether to prepare an environmental impact statement (if not already decided).

(2) Determination of the scope of the environmental impact statement.

(3) Preparation of the draft environmental impact statement.

(4) Review of any comments on the draft environmental impact statement from the public and agencies.

(5) Preparation of the final environmental impact statement.

(6) Review of any comments on the final environmental impact statement.

(7) Decision on the action based in part on the environmental impact statement.

(e) The agency may designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(f) State, Tribal, or local agencies or members of the public may request a Federal agency to set time limits.

§ 1501.11 Tiering.

(a) Agencies should tier their environmental impact statements and environmental assessments when it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe at each level of environmental review. Tiering may also be appropriate for different stages of actions.

(b) When an agency has prepared an environmental impact statement or environmental assessment for a program or policy and then prepares a subsequent statement or assessment on an action included within the entire program or policy (such as a project- or site-specific action), the tiered document needs only to summarize and incorporate by reference the issues discussed in the broader document. The tiered document shall concentrate on the issues specific to the subsequent action. The tiered document shall state where the earlier document is available.

(c) Tiering is appropriate when the sequence from an environmental impact statement or environmental assessment is:

(1) From a programmatic, plan, or policy environmental impact statement or environmental assessment to a program, plan, or policy statement or assessment of lesser or narrower scope or to a site-specific statement or assessment.

(2) From an environmental impact statement or environmental assessment on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or assessment at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues that are ripe for decision and exclude from consideration issues already decided or not yet ripe.

§ 1501.12 Incorporation by reference.

Agencies shall incorporate material, such as planning studies, analyses, or other relevant information, into environmental documents by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. Agencies shall cite the incorporated material in the document and briefly describe its content. Agencies may not incorporate material by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Agencies shall not incorporate by reference material based on proprietary data that is not available for review and comment.

■ 4. Revise part 1502 to read as follows:

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

§ 1502.1 Purpose of environmental impact statement.

The primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA is to ensure agencies consider the environmental impacts of their actions in decision making. It shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is a document that informs Federal agency decision making and the public.

§ 1502.2 Implementation.

(a) Environmental impact statements shall not be encyclopedic.

(b) Environmental impact statements shall discuss impacts in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be analytic, concise, and no longer than necessary to comply with NEPA and with the regulations in this subchapter. Length should be proportional to potential environmental effects and project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of NEPA as interpreted in the regulations in this subchapter and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the decision maker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (*see also* § 1506.1 of this chapter).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by section 102(2)(C) of NEPA, environmental impact statements are to be included in every Federal agency recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall define the proposal that is the subject of an environmental impact statement based on the statutory authorities for the proposed action. Agencies shall use the criteria for scope (§ 1501.9(e) of this chapter) to determine which proposal(s) shall be the subject of a particular statement. Agencies shall evaluate in a single environmental impact statement proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action.

(b) Environmental impact statements may be prepared for programmatic Federal actions, such as the adoption of new agency programs. When agencies prepare such statements, they should be relevant to the program decision and timed to coincide with meaningful points in agency planning and decision making.

(1) When preparing statements on programmatic actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(i) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(ii) Generically, including actions that have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(iii) By stage of technological development including Federal or federally assisted research, development or demonstration programs for new technologies that, if applied, could significantly affect the quality of the human environment. Statements on such programs should be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(2) Agencies shall as appropriate employ scoping (§ 1501.9 of this chapter), tiering (§ 1501.11 of this chapter), and other methods listed in §§ 1500.4 and 1500.5 of this chapter to relate programmatic and narrow actions and to avoid duplication and delay. Agencies may tier their environmental analyses to defer detailed analysis of environmental impacts of specific program elements until such program elements are ripe for final agency action.

§ 1502.5 Timing.

An agency should commence preparation of an environmental impact statement as close as practicable to the time the agency is developing or receives a proposal so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made (§§ 1501.2 of this chapter and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies, the agency shall prepare the environmental impact statement at the feasibility analysis (go/no-go) stage and may supplement it at a later stage, if necessary.

(b) For applications to the agency requiring an environmental impact statement, the agency shall commence the statement as soon as practicable after receiving the application. Federal agencies should work with potential applicants and applicable State, Tribal, and local agencies and governments prior to receipt of the application.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances, the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking, the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Agencies shall prepare environmental impact statements using an interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of NEPA). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.9 of this chapter).

§ 1502.7 Page limits.

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

§ 1502.8 Writing.

Agencies shall write environmental impact statements in plain language and may use appropriate graphics so that decision makers and the public can readily understand such statements. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which shall be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

(a) *Generally.* Except for proposals for legislation as provided in § 1506.8 of this chapter, agencies shall prepare environmental impact statements in two stages and, where necessary,

supplement them, as provided in paragraph (d)(1) of this section.

(b) *Draft environmental impact statements.* Agencies shall prepare draft environmental impact statements in accordance with the scope decided upon in the scoping process (§ 1501.9 of this chapter). The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. To the fullest extent practicable, the draft statement must meet the requirements established for final statements in section 102(2)(C) of NEPA as interpreted in the regulations in this subchapter. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish a supplemental draft of the appropriate portion. At appropriate points in the draft statement, the agency shall discuss all major points of view on the environmental impacts of the alternatives including the proposed action.

(c) Final environmental impact statements. Final environmental impact statements shall address comments as required in part 1503 of this chapter. At appropriate points in the final statement, the agency shall discuss any responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(d) *Supplemental environmental impact statements.* Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and:

(i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall prepare, publish, and file a supplement to a statement (exclusive of scoping (§ 1501.9 of this chapter)) as a draft and final statement, as is appropriate to the stage of the statement involved, unless the Council approves alternative procedures (§ 1506.12 of this chapter).

(4) May find that changes to the proposed action or new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement. The agency should document the finding consistent with its agency NEPA procedures (§ 1507.3 of this chapter), or, if necessary, in a finding of no significant impact supported by an environmental assessment.

§ 1502.10 Recommended format.

(a) Agencies shall use a format for environmental impact statements that will encourage good analysis and clear presentation of the alternatives including the proposed action. Agencies should use the following standard format for environmental impact statements unless the agency determines that there is a more effective format for communication:

(1) Cover.

(2) Summary.

(3) Table of contents.

(4) Purpose of and need for action.

(5) Alternatives including the proposed action (sections 102(2)(C)(iii) and 102(2)(E) of NEPA).

(6) Affected environment and environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA).

(7) Submitted alternatives, information, and analyses.

(8) List of preparers.

(9) Appendices (if any).

(b) If an agency uses a different format, it shall include paragraphs (a)(1) through (8) of this section, as further described in §§ 1502.11 through 1502.19, in any appropriate format.

§ 1502.11 Cover.

The cover shall not exceed one page and include:

(a) A list of the responsible agencies, including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and, if appropriate, the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction(s), if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one-paragraph abstract of the statement.

(f) The date by which the agency must receive comments (computed in cooperation with EPA under § 1506.11 of this chapter).

(g) For the final environmental impact statement, the estimated total cost to prepare both the draft and final environmental impact statement, including the costs of agency full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs. If practicable and noted where not practicable, agencies also should include costs incurred by cooperating and participating agencies, applicants, and contractors.

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary that adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of disputed issues raised by agencies and the public, and the issues to be resolved (including the choice among alternatives). The summary normally will not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need for the proposed action. When an agency's statutory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency's authority.

§ 1502.14 Alternatives including the proposed action.

The alternatives section should present the environmental impacts of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16). In this section, agencies shall:

(a) Evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination.

(b) Discuss each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.

(c) Include the no action alternative.

(d) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(e) Include appropriate mitigation measures not already included in the proposed action or alternatives.

(f) Limit their consideration to a reasonable number of alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s). The environmental impact statement may

combine the description with evaluation of the environmental consequences (§ 1502.16), and it shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

(a) The environmental consequences section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA that are within the scope of the statement and as much of section 102(2)(C)(iii) of NEPA as is necessary to support the comparisons. This section should not duplicate discussions in § 1502.14. The discussion shall include:

(1) The environmental impacts of the proposed action and reasonable alternatives to the proposed action and the significance of those impacts. The comparison of the proposed action and reasonable alternatives shall be based on this discussion of the impacts.

(2) Any adverse environmental effects that cannot be avoided should the proposal be implemented.

(3) The relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

(4) Any irreversible or irretrievable commitments of resources that would be involved in the proposal should it be implemented.

(5) Possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local land use plans, policies and controls for the area concerned. (§ 1506.2(d) of this chapter)

(6) Energy requirements and conservation potential of various alternatives and mitigation measures.

(7) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(8) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(9) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(e)).

(10) Where applicable, economic and technical considerations, including the economic benefits of the proposed action.

(b) Economic or social effects by themselves do not require preparation of an environmental impact statement. However, when the agency determines that economic or social and natural or physical environmental effects are interrelated, the environmental impact statement shall discuss and give appropriate consideration to these effects on the human environment.

§ 1502.17 Summary of submitted alternatives, information, and analyses.

(a) The draft environmental impact statement shall include a summary that identifies all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters during the scoping process for consideration by the lead and cooperating agencies in developing the environmental impact statement.

(1) The agency shall append to the draft environmental impact statement or otherwise publish all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process that identified alternatives, information, and analyses for the agency's consideration.

(2) Consistent with § 1503.1(a)(3) of this chapter, the lead agency shall invite comment on the summary identifying all submitted alternatives, information, and analyses in the draft environmental impact statement.

(b) The final environmental impact statement shall include a summary that identifies all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the final environmental impact statement.

§ 1502.18 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement. Where possible, the environmental impact statement shall identify the persons who are responsible for a particular analysis, including analyses in background papers. Normally the list will not exceed two pages.

§ 1502.19 Appendix.

If an agency prepares an appendix, the agency shall publish it with the environmental impact statement, and it shall consist of:

(a) Material prepared in connection with an environmental impact statement (as distinct from material that is not so prepared and is incorporated by reference (§ 1501.12 of this chapter)).

(b) Material substantiating any analysis fundamental to the impact statement.

(c) Material relevant to the decision to be made.

(d) For draft environmental impact statements, all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process that identified alternatives, information, and analyses for the agency's consideration.

(e) For final environmental impact statements, the comment summaries and responses consistent with § 1503.4 of this chapter.

§ 1502.20 Publication of the environmental impact statement.

Agencies shall publish the entire draft and final environmental impact statements and unchanged statements as provided in § 1503.4(c) of this chapter. The agency shall transmit the entire statement electronically (or in paper copy, if so requested due to economic or other hardship) to:

(a) Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State, Tribal, or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement, any person, organization, or agency that submitted substantive comments on the draft.

§ 1502.21 Incomplete or unavailable information.

(a) When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement, and there is incomplete or unavailable information, the agency shall make clear that such information is lacking.

(b) If the incomplete but available information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency shall include the information in the environmental impact statement.

(c) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable;

(2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;

(3) A summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and

(4) The agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

(d) For the purposes of this section, ''reasonably foreseeable'' includes impacts that have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

§ 1502.22 Cost-benefit analysis.

If the agency is considering a cost-benefit analysis for the proposed action relevant to the choice among alternatives with different environmental effects, the agency shall incorporate the cost-benefit analysis by reference or append it to the statement as an aid in evaluating the environmental consequences. In such cases, to assess the adequacy of compliance with section 102(2)(B) of NEPA (ensuring appropriate consideration of unquantified environmental amenities and values in decision making, along with economical and technical considerations), the statement shall discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, agencies need not display the weighing of the merits and drawbacks of the various alternatives in a monetary cost-benefit analysis and should not do so when there are important qualitative considerations. However, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, that are likely to be relevant and important to a decision.

§ 1502.23 Methodology and scientific accuracy.

Agencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents. Agencies shall make use of reliable existing data and resources. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models. They shall identify any methodologies used and shall make explicit reference to the scientific and other sources relied upon for conclusions in the statement. Agencies may place discussion of methodology in an appendix. Agencies are not required to undertake new scientific and technical research to inform their analyses. Nothing in this section is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research.

§ 1502.24 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive orders applicable to the proposed action, including the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*), and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other authorizations that must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other authorization is necessary, the draft environmental impact statement shall so indicate.

■ 5. Revise part 1503 to read as follows:

PART 1503—COMMENTING ON ENVIRONMENTAL IMPACT STATEMENTS

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

§ 1503.1 Inviting comments and requesting information and analyses.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State, Tribal, and local agencies that are authorized to develop and enforce environmental standards;

(ii) State, Tribal, or local governments that may be affected by the proposed action;

(iii) Any agency that has requested it receive statements on actions of the kind proposed;

(iv) The applicant, if any; and

(v) The public, affirmatively soliciting comments in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action.

(3) Invite comment specifically on the submitted alternatives, information, and analyses and the summary thereof (§ 1502.17 of this chapter).

(b) An agency may request comments on a final environmental impact statement before the final decision and set a deadline for providing such comments. Other agencies or persons may make comments consistent with the time periods under § 1506.11 of this chapter.

(c) An agency shall provide for electronic submission of public comments, with reasonable measures to ensure the comment process is accessible to affected persons.

§ 1503.2 Duty to comment.

Cooperating agencies and agencies that are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority within the time period specified for comment in § 1506.11 of this chapter. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that the environmental impact statement adequately reflects its views, it should reply that it has no comment.

§ 1503.3 Specificity of comments and information.

(a) To promote informed decision making, comments on an environmental impact statement or on a proposed action shall be as specific as possible, may address either the adequacy of the statement or the merits of the alternatives discussed or both, and shall

provide as much detail as necessary to meaningfully participate and fully inform the agency of the commenter's position. Comments should explain why the issues raised are important to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts, and other impacts affecting the quality of the human environment. Comments should reference the corresponding section or page number of the draft environmental impact statement, propose specific changes to those parts of the statement, where possible, and include or describe the data sources and methodologies supporting the proposed changes.

(b) Comments on the submitted alternatives, information, and analyses and summary thereof (§ 1502.17 of this chapter) should be as specific as possible. Comments and objections of any kind shall be raised within the comment period on the draft environmental impact statement provided by the agency, consistent with § 1506.11 of this chapter. 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.

(c) When a participating agency criticizes a lead agency's predictive methodology, the participating agency should describe the alternative methodology that it prefers and why.

(d) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or authorizations.

(e) When a cooperating agency with jurisdiction by law specifies mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences, the cooperating agency shall cite to its applicable statutory authority.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall consider substantive comments timely submitted during the public comment period. The agency may respond to individual comments or groups of comments. In the final environmental impact statement, the agency may respond by:

(1) Modifying alternatives including the proposed action.

(2) Developing and evaluating alternatives not previously given serious consideration by the agency.

(3) Supplementing, improving, or modifying its analyses.

(4) Making factual corrections.

(5) Explaining why the comments do not warrant further agency response, recognizing that agencies are not required to respond to each comment.

(b) An agency shall append or otherwise publish all substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous).

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, an agency may write any changes on errata sheets and attach the responses to the statement instead of rewriting the draft statement. In such cases, only the comments, the responses, and the changes and not the final statement need be published (§ 1502.20 of this chapter). The agency shall file the entire document with a new cover sheet with the Environmental Protection Agency as the final statement (§ 1506.10 of this chapter).

■ 6. Revise part 1504 to read as follows:

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

Sec.
1504.1 Purpose.
1504.2 Criteria for referral.
1504.3 Procedure for referrals and response.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Section 309 of the Clean Air Act (42 U.S.C. 7609) directs the Administrator of the Environmental Protection Agency to review and comment publicly on the environmental impacts of Federal activities, including actions for which agencies prepare environmental impact statements. If, after this review, the Administrator determines that the matter is ''unsatisfactory from the standpoint of public health or welfare or environmental quality,'' section 309 directs that the matter be referred to the Council (hereafter ''environmental referrals'').

(c) Under section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)), other Federal agencies may prepare similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council, and the public.

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as practicable in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies;

(b) Severity;

(c) Geographical scope;

(d) Duration;

(e) Importance as precedents;

(f) Availability of environmentally preferable alternatives; and

(g) Economic and technical considerations, including the economic costs of delaying or impeding the decision making of the agencies involved in the action.

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Notify the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached;

(2) Include such a notification whenever practicable in the referring agency's comments on the environmental assessment or draft environmental impact statement;

(3) Identify any essential information that is lacking and request that the lead agency make it available at the earliest possible time; and

(4) Send copies of the referring agency's views to the Council.

(b) The referring agency shall deliver its referral to the Council no later than 25 days after the lead agency has made the final environmental impact statement available to the Environmental Protection Agency, participating agencies, and the public, and in the case of an environmental assessment, no later than 25 days after the lead agency makes it available. Except when the lead agency grants an extension of this period, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it; and

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any disputed material facts and incorporate (by reference if appropriate) agreed upon facts;

(ii) Identify any existing environmental requirements or policies that would be violated by the matter;

(iii) Present the reasons for the referral;

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason;

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time; and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) No later than 25 days after the referral to the Council, the lead agency may deliver a response to the Council and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral;

(2) Be supported by evidence and explanations, as appropriate; and

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Applicants may provide views in writing to the Council no later than the response.

(f) No later than 25 days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the referring and lead agencies should further negotiate the issue, and the issue is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including, where appropriate, a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) The referral process is not intended to create any private rights of action or to be judicially reviewable because any voluntary resolutions by the agency parties do not represent final agency action and instead are only provisional and dependent on later consistent action by the action agencies.

■ 7. Revise part 1505 to read as follows:

PART 1505—NEPA AND AGENCY DECISION MAKING

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

§ 1505.1 [Reserved]

§ 1505.2 Record of decision in cases requiring environmental impact statements.

(a) At the time of its decision (§ 1506.11 of this chapter) or, if appropriate, its recommendation to Congress, each agency shall prepare and timely publish a concise public record of decision or joint record of decision. The record, which each agency may integrate into any other record it prepares, shall:

(1) State the decision.

(2) Identify alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives considered environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors, including any essential considerations of national policy, that the agency balanced in making its decision and state how those considerations entered into its decision.

(3) State whether the agency has adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and if not, why the agency did not. The agency shall adopt and summarize, where applicable, a monitoring and enforcement program for any enforceable mitigation requirements or commitments.

(b) Informed by the summary of the submitted alternatives, information, and analyses in the final environmental impact statement (§ 1502.17(b) of this chapter), together with any other material in the record that he or she determines to be relevant, the decision maker shall certify in the record of decision that the agency has considered all of the alternatives, information, analyses, and objections submitted by State, Tribal, and local governments and public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement. Agency environmental impact statements certified in accordance with this section are entitled to a presumption that the agency has considered the submitted alternatives, information, and analyses, including the summary thereof, in the final environmental impact statement (§ 1502.17(b)).

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(a)(3)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits, or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or participating agencies on progress in carrying out mitigation measures that they have proposed and were adopted by the agency making the decision.

(d) Upon request, publish the results of relevant monitoring.

■ 8. Revise part 1506 to read as follows:

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

§ 1506.1 Limitations on actions during NEPA process.

(a) Except as provided in paragraphs (b) and (c) of this section, until an agency issues a finding of no significant impact, as provided in § 1501.6 of this chapter, or record of decision, as provided in § 1505.2 of this chapter, no action concerning the proposal may be taken that would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to ensure that the objectives and procedures of NEPA are achieved. This section does not preclude development by applicants of plans or designs or performance of other activities necessary to support an application for Federal, State, Tribal, or local permits or assistance. An agency considering a proposed action for Federal funding may authorize such activities, including, but not limited to, acquisition of interests in land (*e.g.,* fee simple, rights-of-way, and conservation easements), purchase of long lead-time equipment, and purchase options made by applicants.

(c) While work on a required programmatic environmental review is in progress and the action is not covered by an existing programmatic review, agencies shall not undertake in the interim any major Federal action covered by the program that may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental review; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

§ 1506.2 Elimination of duplication with State, Tribal, and local procedures.

(a) Federal agencies are authorized to cooperate with State, Tribal, and local agencies that are responsible for preparing environmental documents, including those prepared pursuant to section 102(2)(D) of NEPA.

(b) To the fullest extent practicable unless specifically prohibited by law, agencies shall cooperate with State, Tribal, and local agencies to reduce duplication between NEPA and State, Tribal, and local requirements, including through use of studies, analysis, and decisions developed by State, Tribal, or local agencies. Except for cases covered by paragraph (a) of this section, such cooperation shall include, to the fullest extent practicable:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) To the fullest extent practicable unless specifically prohibited by law, agencies shall cooperate with State, Tribal, and local agencies to reduce duplication between NEPA and comparable State, Tribal, and local requirements. Such cooperation shall include, to the fullest extent practicable, joint environmental impact statements. In such cases, one or more Federal agencies and one or more State, Tribal, or local agencies shall be joint lead agencies. Where State or Tribal laws or local ordinances have environmental impact statement or similar requirements in addition to but not in conflict with those in NEPA, Federal agencies may cooperate in fulfilling these requirements, as well as those of Federal laws, so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State, Tribal, or local planning processes, environmental impact statements shall discuss any inconsistency of a proposed action with any approved State, Tribal, or local plan or law (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law. While the statement should discuss any inconsistencies, NEPA does not require reconciliation.

§ 1506.3 Adoption.

(a) *Generally.* An agency may adopt a Federal draft or final environmental impact statement, environmental assessment, or portion thereof, or categorical exclusion determination provided that the statement, assessment, portion thereof, or determination meets the standards for an adequate statement, assessment, or determination under the regulations in this subchapter.

(b) Environmental impact statements. (1) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the adopting agency shall republish it as a final statement consistent with § 1506.10. If the actions are not substantially the same, the adopting agency shall treat the statement as a draft and republish it, consistent with § 1506.10.

(2) Notwithstanding paragraph (b)(1) of this section, a cooperating agency may adopt in its record of decision without republishing the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(c) *Environmental assessments.* If the actions covered by the original environmental assessment and the proposed action are substantially the same, the adopting agency may adopt the environmental assessment in its finding of no significant impact and provide notice consistent with § 1501.6 of this chapter.

(d) *Categorical exclusions.* An agency may adopt another agency's determination that a categorical exclusion applies to a proposed action if the action covered by the original categorical exclusion determination and the adopting agency's proposed action are substantially the same. The agency shall document the adoption.

(e) Identification of certain circumstances. The adopting agency

shall specify if one of the following circumstances is present:

(1) The agency is adopting an assessment or statement that is not final within the agency that prepared it.

(2) The action assessed in the assessment or statement is the subject of a referral under part 1504 of this chapter.

(3) The assessment or statement's adequacy is the subject of a judicial action that is not final.

§ 1506.4 Combining documents.

Agencies should combine, to the fullest extent practicable, any environmental document with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility for environmental documents.

(a) *Responsibility.* The agency is responsible for the accuracy, scope (§ 1501.9(e) of this chapter), and content of environmental documents prepared by the agency or by an applicant or contractor under the supervision of the agency.

(b) *Information.* An agency may require an applicant to submit environmental information for possible use by the agency in preparing an environmental document. An agency also may direct an applicant or authorize a contractor to prepare an environmental document under the supervision of the agency.

(1) The agency should assist the applicant by outlining the types of information required or, for the preparation of environmental documents, shall provide guidance to the applicant or contractor and participate in their preparation.

(2) The agency shall independently evaluate the information submitted or the environmental document and shall be responsible for its accuracy, scope, and contents.

(3) The agency shall include in the environmental document the names and qualifications of the persons preparing environmental documents, and conducting the independent evaluation of any information submitted or environmental documents prepared by an applicant or contractor, such as in the list of preparers for environmental impact statements (§ 1502.18 of this chapter). It is the intent of this paragraph (b)(3) that acceptable work not be redone, but that it be verified by the agency.

(4) Contractors or applicants preparing environmental assessments or environmental impact statements shall submit a disclosure statement to the lead agency that specifies any financial or other interest in the outcome of the action. Such statement need not include privileged or confidential trade secrets or other confidential business information.

(5) Nothing in this section is intended to prohibit any agency from requesting any person, including the applicant, to submit information to it or to prohibit any person from submitting information to any agency for use in preparing environmental documents.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures (§ 1507.3 of this chapter).

(b) Provide public notice of NEPA-related hearings, public meetings, and other opportunities for public involvement, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected by their proposed actions. When selecting appropriate methods for providing public notice, agencies shall consider the ability of affected persons and agencies to access electronic media.

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

(2) In the case of an action with effects of national concern, notice shall include publication in the **Federal Register**. An agency may notify organizations that have requested regular notice.

(3) In the case of an action with effects primarily of local concern, the notice may include:

(i) Notice to State, Tribal, and local agencies that may be interested or affected by the proposed action.

(ii) Notice to interested or affected State, Tribal, and local governments.

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

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

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

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

(ix) Posting of notice on and off site in the area where the action is to be located.

(x) Notice through electronic media (*e.g.,* a project or agency website, email, or social media).

(c) Hold or sponsor public hearings, public meetings, or other opportunities for public involvement whenever appropriate or in accordance with statutory requirements applicable to the agency. Agencies may conduct public hearings and public meetings by means of electronic communication except where another format is required by law. When selecting appropriate methods for public involvement, agencies shall consider the ability of affected entities to access electronic media.

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

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

§ 1506.7 Further guidance.

(a) The Council may provide further guidance concerning NEPA and its procedures consistent with Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (August 5, 2017), Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (October 9, 2019), and any other applicable Executive orders.

(b) To the extent that Council guidance issued prior to September 14, 2020 is in conflict with this subchapter, the provisions of this subchapter apply.

§ 1506.8 Proposals for legislation.

(a) When developing legislation, agencies shall integrate the NEPA process for proposals for legislation significantly affecting the quality of the human environment with the legislative process of the Congress. Technical drafting assistance does not by itself constitute a legislative proposal. Only the agency that has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

(b) A legislative environmental impact statement is the detailed statement required by law to be included in an agency's recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days

later in order to allow time for completion of an accurate statement that can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(c) Preparation of a legislative environmental impact statement shall conform to the requirements of the regulations in this subchapter, except as follows:

(1) There need not be a scoping process.

(2) Agencies shall prepare the legislative statement in the same manner as a draft environmental impact statement and need not prepare a final statement unless any of the following conditions exist. In such cases, the agency shall prepare and publish the statements consistent with §§ 1503.1 of this chapter and 1506.11:

(i) A Congressional committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects that the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(d) Comments on the legislative statement shall be given to the lead agency, which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Proposals for regulations.

Where the proposed action is the promulgation of a rule or regulation, procedures and documentation pursuant to other statutory or Executive order requirements may satisfy one or more requirements of this subchapter. When a procedure or document satisfies one or more requirements of this subchapter, the agency may substitute it for the corresponding requirements in this subchapter and need not carry out duplicative procedures or documentation. Agencies shall identify which corresponding requirements in this subchapter are satisfied and consult with the Council to confirm such determinations.

§ 1506.10 Filing requirements.

(a) Agencies shall file environmental impact statements together with comments and responses with the Environmental Protection Agency (EPA), Office of Federal Activities, consistent with EPA's procedures.

(b) Agencies shall file statements with the EPA no earlier than they are also transmitted to participating agencies and made available to the public. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.11.

§ 1506.11 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the **Federal Register** each week of the environmental impact statements filed since its prior notice. The minimum time periods set forth in this section are calculated from the date of publication of this notice.

(b) Unless otherwise provided by law, including statutory provisions for combining a final environmental impact statement and record of decision, Federal agencies may not make or issue a record of decision under § 1505.2 of this chapter for the proposed action until the later of the following dates:

(1) 90 days after publication of the notice described in paragraph (a) of this section for a draft environmental impact statement.

(2) 30 days after publication of the notice described in paragraph (a) of this section for a final environmental impact statement.

(c) An agency may make an exception to the rule on timing set forth in paragraph (b) of this section for a proposed action in the following circumstances:

(1) Some agencies have a formally established appeal process after publication of the final environmental impact statement that allows other agencies or the public to take appeals on a decision and make their views known. In such cases where a real opportunity exists to alter the decision, the agency may make and record the decision at the same time it publishes the environmental impact statement. This means that the period for appeal of the decision and the 30-day period set forth in paragraph (b)(2) of this section may run concurrently. In such cases, the environmental impact statement shall explain the timing and the public's right of appeal and provide notification consistent with § 1506.10; or

(2) An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety may waive the time period in paragraph (b)(2) of this section, publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement, and provide notification consistent with § 1506.10, as described in paragraph (a) of this section.

(d) If an agency files the final environmental impact statement within 90 days of the filing of the draft environmental impact statement with the Environmental Protection Agency, the decision-making period and the 90-day period may run concurrently. However, subject to paragraph (e) of this section, agencies shall allow at least 45 days for comments on draft statements.

(e) The lead agency may extend the minimum periods in paragraph (b) of this section and provide notification consistent with § 1506.10. Upon a showing by the lead agency of compelling reasons of national policy, the Environmental Protection Agency may reduce the minimum periods and, upon a showing by any other Federal agency of compelling reasons of national policy, also may extend the minimum periods, but only after consultation with the lead agency. The lead agency may modify the minimum periods when necessary to comply with other specific statutory requirements. (§ 1507.3(f)(2) of this chapter) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

§ 1506.12 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of the regulations in this subchapter, the Federal agency taking the action should consult with the Council about alternative arrangements for compliance with section 102(2)(C) of NEPA. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.13 Effective date.

The regulations in this subchapter apply to any NEPA process begun after September 14, 2020. An agency may apply the regulations in this subchapter to ongoing activities and environmental

documents begun before September 14, 2020.

■ 9. Revise part 1507 to read as follows:

PART 1507—AGENCY COMPLIANCE

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

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with the regulations in this subchapter.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements of NEPA and the regulations in this subchapter. Such compliance may include use of the resources of other agencies, applicants, and other participants in the NEPA process, but the agency using the resources shall itself have sufficient capability to evaluate what others do for it and account for the contributions of others. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making that may have an impact on the human environment. Agencies shall designate a senior agency official to be responsible for overall review of agency NEPA compliance, including resolving implementation issues.

(b) Identify methods and procedures required by section 102(2)(B) of NEPA to ensure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) of NEPA and cooperate on the development of statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources, consistent with section 102(2)(E) of NEPA.

(e) Comply with the requirements of section 102(2)(H) of NEPA that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of NEPA, Executive Order 11514, Protection and Enhancement of Environmental Quality, section 2, as amended by Executive Order 11991, Relating to Protection and Enhancement of Environmental Quality, and Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting for Infrastructure Projects.

§ 1507.3 Agency NEPA procedures.

(a) Where existing agency NEPA procedures are inconsistent with the regulations in this subchapter, the regulations in this subchapter shall apply, consistent with § 1506.13 of this chapter, unless there is a clear and fundamental conflict with the requirements of another statute. The Council has determined that the categorical exclusions contained in agency NEPA procedures as of September 14, 2020 are consistent with this subchapter.

(b) No more than 12 months after September 14, 2020, or 9 months after the establishment of an agency, whichever comes later, each agency shall develop or revise, as necessary, proposed procedures to implement the regulations in this subchapter, including to eliminate any inconsistencies with the regulations in this subchapter. When the agency is a department, it may be efficient for major subunits (with the consent of the department) to adopt their own procedures. Except for agency efficiency (see paragraph (c) of this section) or as otherwise required by law, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the regulations in this subchapter.

(1) Each agency shall consult with the Council while developing or revising its proposed procedures and before publishing them in the **Federal Register** for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants.

(2) Agencies shall provide an opportunity for public review and review by the Council for conformity with the Act and the regulations in this subchapter before adopting their final procedures. The Council shall complete its review within 30 days of the receipt of the proposed final procedures. Once in effect, the agency shall publish its NEPA procedures and ensure that they are readily available to the public.

(c) Agencies shall adopt, as necessary, agency NEPA procedures to improve agency efficiency and ensure that agencies make decisions in accordance with the Act's procedural requirements. Such procedures shall include:

(1) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process begins at the earliest reasonable time, consistent with § 1501.2 of this chapter, and aligns with the corresponding decision points.

(2) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(3) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that decision makers use the statement in making decisions.

(4) Requiring that the alternatives considered by the decision maker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decision maker consider the alternatives described in the environmental documents. If another decision document accompanies the relevant environmental documents to the decision maker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

(5) Requiring the combination of environmental documents with other agency documents. Agencies may designate and rely on one or more procedures or documents under other statutes or Executive orders as satisfying some or all of the requirements in this subchapter, and substitute such procedures and documentation to reduce duplication. When an agency substitutes one or more procedures or documents for the requirements in this subchapter, the agency shall identify the respective requirements that are satisfied.

(d) Agency procedures should identify those activities or decisions that are not subject to NEPA, including:

(1) Activities or decisions expressly exempt from NEPA under another statute;

(2) Activities or decisions where compliance with NEPA would clearly

and fundamentally conflict with the requirements of another statute;

(3) Activities or decisions where compliance with NEPA would be inconsistent with Congressional intent expressed in another statute;

(4) Activities or decisions that are non-major Federal actions;

(5) Activities or decisions that are non-discretionary actions, in whole or in part, for which the agency lacks authority to consider environmental effects as part of its decision-making process; and

(6) Actions where the agency has determined that another statute's requirements serve the function of agency compliance with the Act.

(e) Agency procedures shall comply with the regulations in this subchapter except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(b)(4) (assistance to applicants) and 1506.6(e) of this chapter (status information).

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment and do not have a significant effect on the human environment (categorical exclusions (§ 1501.4 of this chapter)). Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Agency NEPA procedures shall identify when documentation of a categorical exclusion determination is required.

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(3) Procedures for introducing a supplement to an environmental assessment or environmental impact statement into its formal administrative record, if such a record exists.

(f) Agency procedures may:

(1) Include specific criteria for providing limited exceptions to the provisions of the regulations in this subchapter for classified proposals. These are proposed actions that are specifically authorized under criteria established by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order or statute. Agencies may safeguard and restrict from public dissemination environmental assessments and environmental impact statements that address classified proposals in accordance with agencies' own regulations applicable to classified information. Agencies should organize these documents so that classified portions are included as annexes, so that the agencies can make the unclassified portions available to the public.

(2) Provide for periods of time other than those presented in § 1506.11 of this chapter when necessary to comply with other specific statutory requirements, including requirements of lead or cooperating agencies.

(3) Provide that, where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the agency may publish the notice of intent required by § 1501.9(d) of this chapter at a reasonable time in advance of preparation of the draft statement. Agency procedures shall provide for publication of supplemental notices to inform the public of a pause in its preparation of an environmental impact statement and for any agency decision to withdraw its notice of intent to prepare an environmental impact statement.

(4) Adopt procedures to combine its environmental assessment process with its scoping process.

(5) Establish a process that allows the agency to use a categorical exclusion listed in another agency's NEPA procedures after consulting with that agency to ensure the use of the categorical exclusion is appropriate. The process should ensure documentation of the consultation and identify to the public those categorical exclusions the agency may use for its proposed actions. Then, the agency may apply the categorical exclusion to its proposed actions.

§ 1507.4 Agency NEPA program information.

(a) To allow agencies and the public to efficiently and effectively access information about NEPA reviews, agencies shall provide for agency websites or other means to make available environmental documents, relevant notices, and other relevant information for use by agencies, applicants, and interested persons. Such means of publication may include:

(1) Agency planning and environmental documents that guide agency management and provide for public involvement in agency planning processes;

(2) A directory of pending and final environmental documents;

(3) Agency policy documents, orders, terminology, and explanatory materials regarding agency decision-making processes;

(4) Agency planning program information, plans, and planning tools; and

(5) A database searchable by geographic information, document status, document type, and project type.

(b) Agencies shall provide for efficient and effective interagency coordination of their environmental program websites, including use of shared databases or application programming interface, in their implementation of NEPA and related authorities.

■ 10. Revise part 1508 to read as follows:

PART 1508—DEFINITIONS

Sec.
1508.1 Definitions.
1508.2 [Reserved]

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

§ 1508.1 Definitions.

The following definitions apply to the regulations in this subchapter. Federal agencies shall use these terms uniformly throughout the Federal Government.

(a) *Act* or *NEPA* means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*).

(b) *Affecting* means will or may have an effect on.

(c) *Authorization* means any license, permit, approval, finding, determination, or other administrative decision issued by an agency that is required or authorized under Federal law in order to implement a proposed action.

(d) *Categorical exclusion* means a category of actions that the agency has determined, in its agency NEPA procedures (§ 1507.3 of this chapter), normally do not have a significant effect on the human environment.

(e) *Cooperating agency* means any Federal agency (and a State, Tribal, or local agency with agreement of the lead agency) other than a lead agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action that may significantly affect the quality of the human environment.

(f) *Council* means the Council on Environmental Quality established by title II of the Act.

(g) *Effects* or *impacts* means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives.

(1) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment), social, or health effects. Effects may also include those resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

(2) A ''but for'' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

(3) An agency's analysis of effects shall be consistent with this paragraph (g). Cumulative impact, defined in 40 CFR 1508.7 (1978), is repealed.

(h) *Environmental assessment* means a concise public document prepared by a Federal agency to aid an agency's compliance with the Act and support its determination of whether to prepare an environmental impact statement or a finding of no significant impact, as provided in § 1501.6 of this chapter.

(i) *Environmental document* means an environmental assessment, environmental impact statement, finding of no significant impact, or notice of intent.

(j) Environmental impact statement means a detailed written statement as required by section 102(2)(C) of NEPA.

(k) *Federal agency* means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. For the purposes of the regulations in this subchapter, Federal agency also includes States, units of general local government, and Tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute.

(l) Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise categorically excluded (§ 1501.4 of this chapter), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.

(m) *Human environment* means comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment. (*See also* the definition of ''effects'' in paragraph (g) of this section.)

(n) *Jurisdiction by law* means agency authority to approve, veto, or finance all or part of the proposal.

(o) *Lead agency* means the agency or agencies, in the case of joint lead agencies, preparing or having taken primary responsibility for preparing the environmental impact statement.

(p) *Legislation* means a bill or legislative proposal to Congress developed by a Federal agency, but does not include requests for appropriations or legislation recommended by the President.

(q) Major Federal action or *action* means an activity or decision subject to Federal control and responsibility subject to the following:

(1) Major Federal action does not include the following activities or decisions:

(i) Extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States;

(ii) Activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority;

(iii) Activities or decisions that do not result in final agency action under the Administrative Procedure Act or other statute that also includes a finality requirement;

(iv) Judicial or administrative civil or criminal enforcement actions;

(v) Funding assistance solely in the form of general revenue sharing funds with no Federal agency control over the subsequent use of such funds;

(vi) Non-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; and

(vii) Loans, 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 (for example, action does not include farm ownership and operating loan guarantees by the Farm Service Agency pursuant to 7 U.S.C. 1925 and 1941 through 1949 and business loan guarantees by the Small Business Administration pursuant to 15 U.S.C. 636(a), 636(m), and 695 through 697g).

(2) Major Federal actions may include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§ 1506.8 of this chapter).

(3) Major Federal actions tend to fall within one of the following categories:

(i) Adoption of official policy, such as rules, regulations, and interpretations adopted under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* or other statutes; implementation of treaties and international conventions or agreements, including those implemented pursuant to statute or regulation; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(ii) Adoption of formal plans, such as official documents prepared or approved by Federal agencies, which prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(iii) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(iv) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as Federal and federally assisted activities.

(r) *Matter* includes for purposes of part 1504 of this chapter:

(1) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(2) With respect to all other agencies, any proposed major Federal action to which section 102(2)(C) of NEPA applies.

(s) *Mitigation* means measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document or record of decision and that have a nexus to those effects. While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation. Mitigation includes:

(1) Avoiding the impact altogether by not taking a certain action or parts of an action.

(2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(5) Compensating for the impact by replacing or providing substitute resources or environments.

(t) *NEPA process* means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

(u) *Notice of intent* means a public notice that an agency will prepare and consider an environmental impact statement.

(v) *Page* means 500 words and does not include explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information.

(w) *Participating agency* means a Federal, State, Tribal, or local agency participating in an environmental review or authorization of an action.

(x) *Proposal* means a proposed action at a stage when an agency has a goal, is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and can meaningfully evaluate its effects. A proposal may exist in fact as well as by agency declaration that one exists.

(y) *Publish* and *publication* mean methods found by the agency to efficiently and effectively make environmental documents and information available for review by interested persons, including electronic publication, and adopted by agency NEPA procedures pursuant to § 1507.3 of this chapter.

(z) *Reasonable alternatives* means a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant.

(aa) *Reasonably foreseeable* means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.

(bb) *Referring agency* means the Federal agency that has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

(cc) *Scope* consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§ 1501.11 of this chapter).

(dd) *Senior agency official* means an official of assistant secretary rank or higher (or equivalent) that is designated for overall agency NEPA compliance, including resolving implementation issues.

(ee) *Special expertise* means statutory responsibility, agency mission, or related program experience.

(ff) *Tiering* refers to the coverage of general matters in broader environmental impact statements or environmental assessments (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin-wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

§ 1508.2 [Reserved]

PARTS 1515 THROUGH 1518 [DESIGNATED AS SUBCHAPTER B]

■ 11. Designate parts 1515 through 1518 as subchapter B and add a heading for newly designated subchapter B to read as follows:

Subchapter B—Administrative Procedures and Operations

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