OUTDOOR ALLIANCE

March 10, 2020

Mary B. Neumayr
Chairman, Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Changes to the Regulations Implementing the Procedural Provisions of the National Environmental Protection Act, 85 Fed. Reg. 1684 (Jan. 10, 2020)

Dear Chairman Neumayr:

Outdoor Alliance is concerned by the efforts by the Council on Environmental Quality ("CEQ") to alter the implementation of the National Environmental Policy Act ("NEPA" or the "Act"), one of the bedrock protections for our country's environment, and in particular, our public lands and waters. In the interest of "efficiency," CEQ's proposed rule considers changes that threatens to cut interested stakeholders—including Outdoor Alliance and our member organizations—out of agency decision-making processes that significantly affect the public lands and waters that support outdoor recreation. Outdoor Alliance acknowledges that there is room for improvement in the efficiency with which the NEPA process is implemented, but that search for efficiency must not come at the expense of NEPA's core values, including informed decision-making, sounds science, and public engagement. In many instances, however, the Proposed Rule clearly undercuts these core values and, while at times ambiguous, appears to do so in many more. Our specific concerns are outlined below.

Who We Are And How We Are Affected

Outdoor Alliance is the only organization in the U.S. that unites the voices of outdoor enthusiasts to conserve public lands and waters and ensure those lands and waters are managed to embrace the human-powered experience. Outdoor Alliance is a coalition of ten member-based organizations representing the human powered outdoor recreation community. The coalition includes Access Fund, American Canoe Association, American Whitewater, International Mountain Bicycling Association, Winter Wildlands Alliance, The Mountaineers, the American Alpine Club, the Mazamas, Colorado Mountain Club, and Surfrider Foundation and represents the interests of the millions of Americans who climb, paddle, mountain

bike, backcountry ski and snowshoe, and enjoy coastal recreation on our nation's public lands, waters, and snowscapes. The community we represent has a strong interest in ensuring that those vitally important places are protected and managed in a way that embraces the human-powered experience.

According to the Outdoor Industry Association, nearly half of all Americans participate in some form of outdoor recreation. That activity, in turn, accounts for 2.2 percent of GDP according to the most recent statistics from the Bureau of Economic Analysis, and the outdoor recreation economy is growing more than 50 percent faster than the economy overall.

Outdoor Alliance and our member organizations have extensive experience with the NEPA implementation process, particularly in the context of land management decision-making, including forest planning and BLM resource management plan development, river management, travel management, recreation management, and other decisions regarding the use of natural resources. We work at all levels of the NEPA process, from participating in collaborative groups, to submitting comments and meeting with agency decision makers, to participating on rare occasions as NEPA-related litigants. These experiences have provided us with an informed perspective on NEPA policies and practices.

More fundamentally, the outdoor recreation community has a unique relationship to the environment, our country's public lands and waters, and the public process by which these resources are intended to be managed. For all of the activities represented by Outdoor Alliance and our member organizations—from climbing mountains to surfing waves, from paddling rivers, to mountain biking single track—setting is primary. The members of our community develop unique and personal relationships with particular and varied landscapes, the overwhelming majority of which are either managed directly by the federal government or are significantly influenced by federal decisions implicating the NEPA process.

Beyond developing a personal relationship with the landscapes in which our varied pursuits occur, outdoor recreationists cultivate a stewardship ethic which manifests itself in various ways, many of which also touch upon the NEPA process. At a local level, outdoor recreationists are often engaged in direct, on-the-ground stewardship activities, from trail maintenance to river cleanups. Members of our community are often organized into local organizations based around a mutual interest in the landscapes in which recreational pursuits occur. Nationally,

recreationists are organized into sport-specific advocacy organizations, many of which are Outdoor Alliance members. These organizations are also deeply interested in representing their respective community's members in decision-making around public lands and waters management, decisions which often occur within the NEPA framework and where the opportunity for public engagement is protected by NEPA and its implementing regulations.

At a more nuts-and-bolts level, members of our community often have information, unavailable elsewhere, of distinct value to informed decision-making. Where people go, why people go there, and the values derived from particular experiences and landscapes are all fundamentally important inputs to land management decision-making processes. Very often, land managers' understanding of these data points is at best incomplete, and the NEPA process is an absolutely essential conduit for this information.

For the outdoor recreation community, public engagement in decision-making around public resources is a core value, a part of our community's identity. Through outdoor pursuits, individuals develop not only a sense of place and a stewardship ethic, but a sense of community that in turn fosters civic engagement around our mutual values. In the course of that engagement, our community at times experiences its own frustrations with the challenges of navigating the NEPA process or the pace of decision-making. We recognize that there may be times when a speedier process would work in our community's favor. On balance, however, our interest is overwhelmingly in ensuring the integrity of the public process and in fostering the informed decision-making protected under NEPA. Our community is not interested in creating new recreation opportunities at any cost or in advocating for non-sustainable use of our country's public lands and waters. At its best, the public input and thoughtful decision-making structured through a sound NEPA process fosters creative and collaborative problem solving that helps inform an optimal and sustainable resolution to challenging environmental and resource management issues.

As a community, we are not averse to careful, targeted updates to the NEPA process. Those changes, however, must proceed with the utmost respect for NEPA's core values.

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Concerns With CEQ's Proposed Rule

NEPA brought about a significant improvement in how lawmakers and regulators considered and handled human impacts on the natural world by requiring federal agencies to prepare Environmental Impact Statements for all major federal actions significantly affecting the environment. In addition, the 1978 regulations ("Regulations") adopted by CEQ have been a primary and essential source of procedural protections, including public participation, cumulative impacts assessment, and alternatives analysis.

Congress enacted NEPA "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . . ." 42 USCS § 4321. As the Supreme Court has explained, NEPA accomplishes this goal "by focusing Government and public attention on the environmental effects of proposed agency action. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371-372 (1989). Through its "action-forcing" requirements, NEPA ensures that agencies "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." *Robertson*, 490 U.S. at 348.

Thus, NEPA is a critically important way by which the public—including Outdoor Alliance and its members—is able to engage in public lands management. It was enacted to shine light on government decision-making processes, and it ensures that agencies make informed decisions. An integral component to informed decision-making is public involvement and participation, and NEPA is one of the most meaningful ways through which our constituents, and the public more broadly, participate in federal land management. Outdoor Alliance routinely asks the human-powered recreation community to comment on proposed actions in order to improve plans and protect public land and water resources. NEPA also improves the quality of the human environment by ensuring that agencies rely on sound science to reduce and mitigate harmful environmental impacts. In short, at

its core, NEPA puts the environment on an equal footing with economics and other factors. The importance of this principle cannot be overstated, and it must remain the bedrock upon which any changes to NEPA regulations are built.

Outdoor Alliance recognizes the desirability of creating greater efficiencies in the NEPA process, and we support certain efforts to modernize the Regulations—for example, by including consultation and coordination with Tribal governments as part of the process. But this must not come at the expense of the use of sound science and public involvement. In its current form, the Proposed Rule appears to prioritize "efficiency" over furthering NEPA's core goal of enacting environmentally sound policy through public participation. That is a false trade-off. The Proposed Rule would lead to inefficiencies *and* would harm the environment (and the public's ability to participate in environmental policy). While some strategic updates might be appropriate, NEPA's current framework of investing in careful, participatory decision-making produces results that are more likely to enjoy broad public support and better environmental and social outcomes than the Proposed Rule.

Below, we outline several of the proposed changes that are at best unclear and at worst flatly unacceptable. Where applicable, we highlight the Proposed Rule's potential ambiguities and problem areas where the Rule prioritizes "efficiencies" over the human environment and public participation in environmental policy-making. We also note instances where the Proposed Rule is expressly contrary to NEPA's plain text and core values, provisions which should not be adopted.

Barriers to Public Comment and Legal Action

The Proposed Rule would eliminate the current policy provision that requires federal agencies, to the fullest extent possible, to encourage and facilitate public involvement in decisions that affect the quality of the human environment [current § 1500.2(d)]. In many cases, NEPA is the primary law that provides the public, organizations such as Outdoor Alliance, and our members with the ability to provide input on federal projects that will have an impact on the places where our community members live, work, and recreate. The changes reflected in the Proposed Rule would, in turn, restrict the public's ability to do so.

Shortened Time Limits for EIS and EA Documents and Undefined Terms. The Proposed Rule limits how and when the public will be given an opportunity to provide input by creating new, and arbitrary, deadlines for agencies and page limits

on review and public input. As it relates to page limits—and as CEQ itself has noted—the proposed page limits are significantly shorter than median and average number of pages of historical EA and EIS documents. The Proposed Rule provides no basis for these limits, which would arbitrarily cut off the analysis that is critical to policymaking under NEPA. Based on our experience, if an agency only has two years to complete an EIS, as proposed by CEQ [proposed § 1501.10(b)(2)], we see no way in which it will adequately respond to public comment or explore additional issues raised by the public. For example, the Inyo National Forest Plan Revision, finalized in 2019, took six years to thoughtfully respond to public concerns. This prolonged process, while seeming to be excessive from an outside perspective, is resulting in a strong Forest Plan Revision, with broad public support, which will result in sound action and tangible benefits on the ground. Upfront investment in public engagement and collaboration as intermediated by the NEPA process is what makes these benefits possible.

The Proposed Rule also allows agencies to disregard certain comments they deem to be not "specific" enough [proposed § 1500.3(b)]; which do not include reference to data sources and scientific methodologies [proposed § 1503.3(a)]; or which are not "substantive" [proposed § 1503.4]. But the Proposed Rule contains no definition for these ambiguous and subjective terms and nothing that would inform a decision on whether a comment is specific or technical. As a result, the decision is left to the individual line officer, which ensures that there will be inconsistencies across what types of information are considered in federal decisions.

To the extent the Proposed Rule would exclude values or experienced-based comments, this change is highly problematic. Many of Outdoor Alliance's members who comment on federal projects are not experts in natural resource management, wildlife biology, or other fields from a technical or educational perspective, but they do bring a deep subject matter expertise relevant to many NEPA decisions. Outdoor recreationists are deeply knowledgeable about places, conditions, and experiences on public lands and waters, and convey this information through their comments. They also share information gained from their experience in spending significant time outdoors, and outdoor recreationists are often, if not always, the best source of information for land managers on where people go, why people go there, and the values derived from these experiences. This information supports better, more informed decision-making by land managers and more broadly supported and

durable decisions. This information is essential for fully informed decision-making even if it is not deeply technical or does not involve scientific methodologies.

Additionally, from the standpoint of fostering an inclusive process that meets the needs of all Americans, including groups historically excluded from federal decision-making processes, establishing protocols aimed at winnowing out comments that may lack an arbitrary level of technical acumen is deeply problematic.

In sum, allowing agencies to disregard certain comments would significantly reduce the opportunity for many interested individuals—including Outdoor Alliance and its members who have deep experience recreating in affected lands—to participate in the decision-making process. Such a change runs afoul of agencies' well-established duty to "not act on incomplete information." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371-372 (1989).

Overly Strict Standards for Comment Periods. The Proposed Rule sets strict standards around comment periods [proposed §§ 1500.3(b), 1501.10, 1503.3(b), 1503.4] and provides that comments that are not submitted during official public comment periods are forfeited. Not only does this limit the public's ability to provide additional information as it becomes available during the decision-making process, it also provides no flexibility to accommodate individuals, organizations, and groups who may not be able to comment during an official public comment period but are clearly interested stakeholders. Under the current Regulations, individuals or groups in this situation could contact the agency ahead of time to alert the agency to their inability to comment during the comment period, submit comments after the official deadline, and that input could still be considered.

As an example, Access Fund, an Outdoor Alliance member organization, has more than 120 affiliates, or local climbing organizations, which advocate for climbers at the local level and frequently engage in NEPA processes such as planning revisions, parking additions, and trail improvements. Access Fund affiliates typically meet monthly, so a 30-day or shorter comment period is too short for those organizations to analyze proposed options, develop positions, and draft comments; 60 days is the minimum comment period that allows for well-developed stakeholder input from organized groups of local experts. NEPA processes greatly benefit from this type of public input.

Limits on Judicial Review. The Proposed Rule creates additional barriers to public participation by limiting judicial review. First, proposed § 1500.3(c) permits agencies to require the posting of bonds as part of seeking any stay of a final agency decision. Most members of the public cannot afford to post a bond prior to pursuing litigation, and this circumstance is entirely irrelevant to the validity of their claims and concerns. In addition, the Proposed Rule requires any potential litigant to meet exhaustion requirements prior to pursuing litigation [proposed § 1500.3(b)]. As discussed above, the Proposed Rule would give agencies the option to deem certain comments "forfeited," in which case the commenter will not meet the new exhaustion requirement, even after participating in the process and submitting comments. These barriers to litigation will reduce the public's opportunity to challenge agency decisions and to hold agencies accountable for those decisions.

Perhaps even more troubling, § 1502.18 of the Proposed Rule allows the decision maker for the lead agency to certify the record of decision, which certification then entitles the agency to a conclusive presumption that the agency has considered the information included in the submitted alternatives, information, and analyses section. In short, agency self-certification leads to a conclusive presumption in favor of that agency. The exhaustion requirements and limits on when judicial review can occur, together with the provisions of proposed § 1502.18, are clearly intended to restrict and restrain the role of the courts role in enforcing the implementation of NEPA.

Taken together, these actions call into serious question whether the NEPA process will remain a robust consideration of public input related to potential environmental impacts—as the law requires. Courts have made clear that the EIS process gives the public the assurance that the agency "has indeed considered environmental concerns…and, *perhaps more significantly, provides a springboard for public comment*." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (emphasis added). If the strict limits imposed by the Proposed Rule are implemented, however, the springboard will lose its spring, and prevent the necessary input.

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Redefinition of "Major Federal Action" in Proposed § 1501.5

The Proposed Rule cuts right to the heart of NEPA by altering how agencies define a "major Federal action," the trigger for application of NEPA and its processes for determining whether proposed actions will significantly affect the quality of the human environment. This, in turn, dictates whether an agency needs to prepare a "detailed statement"—an EA or EIS—at all with respect to the proposed action, and thus is the first-level determination of whether the public will have an opportunity to influence the action under consideration.

The Proposed Rule re-defines this key term [proposed §§ 1501.1, 1507.3(c), and 1508.1(q)], and under this re-defined term, many decisions, which up until now would have required an environmental analysis, will be excluded from such analysis. Court decisions have long interpreted the existing term "major federal actions," and a change in the regulatory definition will inject confusion and uncertainty into how it should be applied. This, in turn, will result in litigation, and exactly the opposite outcome from the "streamlining" that the Proposed Rule aims for. Moreover, to the extent that the Proposed Rule narrows the scope of "major federal actions," it will accordingly narrow the scope of NEPA. This is problematic for several reasons.

First, CEQ's proposed categorical exclusion of "non-discretionary decisions," "activities that do not result in final agency action," and "minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project" do not assist in clarifying what *is* a major federal action. For example, if a federal agency contributes 10% of the project funds, but without the federal funding the project would not be started, does the agency "control the outcome of the project"? Under CEQ's apparent construction, the answer is no. Yet, such funding may still be a major undertaking by a federal agency if the funding constitutes a significant portion of the agency's budget or promotes federal policies. These categorical exclusions do not assist in guiding federal agencies to the application of NEPA.

Furthermore, this re-definition is contrary to the letter and spirit of NEPA. The decision to divorce the impact of an action from the consideration of whether the action is "major" is misguided. As recognized in the existing and the Proposed Rule, whether an action is "major" cannot be evaluated without looking at its impact. A

seemingly small action, such as granting a permit to operate helicopters in a preserved wildlife area, could have tremendous impact on the wildlife affected by the permit. In such a situation, the decision to grant such a permit is "major" because it has a significant impact on the environment. The Proposed Rule is therefore contrary to the Congressional declaration of national environmental policy to "create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331. As the First Circuit explained, NEPA "seeks to create a particular bureaucratic decision-making process, a process whereby administrators make important decisions with an informed awareness of *how the decision might significantly affect the environment*." *Sierra Club v. Marsh*, 872 F.2d 497, 497 (1st Cir. 1989). Thus, the analysis of the impact of an agency's action is crucial to determining whether the action is "major."

Second, an agency's decision to fund a project may be a "major" action. Under the Proposed Rule, an agency's decision to fund a project would not be subject to NEPA process if the Federal agency's contribution is small compared to the entire project. However, this does not lessen the agency's own control over the decision to fund that project in the first place. For example, the amount of funds may be significant, even if the funding is itself only a small part of a larger project. As the Fourth Circuit observed "[a] non-federal project is considered a 'federal action' if it cannot 'begin or continue without prior approval of a federal agency.'" *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (quoting *Biderman v. Morton*, 497 F.2d 1141, 1147 (2nd Cir. 1974)). The Proposed Rule would exclude such funding decisions from NEPA simply because of the relative contribution of the Federal agency, and thus run afoul of the congressional directive to consider environmental impacts of its decisions.

In addition, the decision to remove federal agencies' failures to act from the definition of "major federal action" similarly runs afoul of NEPA. An agency's *decision not to act*, if reviewable by courts under the APA, can be just as "major" as its decision to act. In such a situation, the agency's *decision* is "an action subject to Federal control and responsibility." The stated reasoning that "there is no proposed action and therefore no alternatives that the agency may consider" does not excuse an agency from considering the environmental impact of its decision to refrain from acting. Thus, the change in the scope of the rule does not fulfill Congress's policy to "foster and promote the general welfare, to 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." 42 U.S.C. § 4331(a).

Extraordinary Circumstances and Categorical Exclusions

The changes related to categorical exclusions and extraordinary circumstances [proposed §1501.4(b)(1)] are deeply problematic. Typically, mitigating circumstances that would reduce significant impacts of a proposed action are identified through an environmental assessment. But it appears that under the Proposed Rule, an agency could avoid analyzing a project under NEPA altogether by declaring that the mitigating factors qualify as "extraordinary circumstances," obviating any further analysis. We are concerned that such a process turns the environmental assessment procedure on its head and excludes public participation. In addition, these provisions do not include any requirement that the mitigating circumstances be included with the determination that the action falls into a categorical exclusion, further rendering this change suspect. (Compare with proposed § 1501.6(c), which requires that a finding of no significant impact state the means and authority for any mitigation and any applicable monitoring or enforcement provisions.)

As an example of how this change might affect our community, Outdoor Alliance identified several situations during the past year in which proposed oil and gas leasing would directly and negatively affect mountain biking trails and climbing sites on BLM lands in Utah and Nevada. The costs to recreation opportunities and recreation-driven economic development may far outweigh the benefits of the oil and gas development, but an analysis of the cumulative effects of the proposed action is necessary to identify the appropriate path forward. Relying on potential mitigation measures to avoid analysis outright would thwart opportunities for collaborative problem solving and consideration of important environmental and social impacts.

Equally concerning is proposed § 1506.3 which appears to allow one agency to adopt another agency's determination that a categorical exclusion ("CE") applies to a proposed action where the proposed projects are substantially the same. But CEs are created by individual agencies to meet the unique circumstances applicable to that agency and are developed through a public process that only considers how each CE would be applied by the implementing agency. Every agency is charged with and driven by a different mission, and a CE that may be appropriate for one

agency is not necessarily appropriate for another. Additionally, land management agencies often manage landscapes with distinctive geographic characteristics, and a CE developed appropriately by the BLM, based on a sound record of EA decisions made on arid landscapes in the interior West, might well be inappropriate on more temperate landscapes managed by the USDA Forest Service in, for example, the Pacific Northwest. To give just one example of why this proposed rule provision is completely inappropriate: the NEPA regulations promulgated by the Bureau of Land Management ("BLM") include CEs established by the Energy Policy Act of 2005, which do not require any analysis or documentation beyond a brief rationale explaining why the CE is being applied. Under this provision of the Proposed Rule, the Forest Service could rely on the BLM's Energy Policy Act of 2005 CEs to approve oil and gas wells or pipelines with absolutely no public involvement or environmental analysis, very little documentation of the decision, and on a landscape significantly different from what was contemplated in the creation of the original CE. As drafted, proposed § 1506.3 is manifestly too broad.

Introduction of New Rule "Proposals for Regulations" and "Functional Equivalents", 40 C.F.R. § 1506.9; 1507.3(b)(6)

Proposed § 1506.9 would replace NEPA with "functionally equivalent" procedures that are purportedly available elsewhere in the Federal Register. But the proposal does not add any clarity to the regulations, and the inherent ambiguity in "functional equivalents" invites litigation that will likely delay decision-making processes rather than create efficiencies. More to the point, the change to the application of CEQ's rules to make identified NEPA procedures a ceiling rather than a floor with regard to the level of required process requires any "functional equivalent" to provide less consideration to environmental concerns than the NEPA process, thereby allowing the Federal agencies to sidestep NEPA.

First, the Proposed Rule does not provide sufficient guidance to determine what procedures are "functional equivalent" to NEPA. § 1506.9 only states that a Federal agency shall find that "[t]here are substantive and procedural standards that ensure full and adequate consideration of environmental issues." Yet, the Proposed Rule does not address what constitutes "full and adequate consideration," or what "environmental issues" the agency needs to consider. Although the Proposed Rule states that such analyses "must address the detailed statement requirements" in § 102(2)(C) of NEPA, the regulation itself is silent as to how. Allowing agencies to

implement substitutes for NEPA procedures, with little guidance and only instruction that procedures do not constitute additional process, would complicate agencies' ability to conduct timely environmental reviews and generate confusion and litigation.

Second, the "functional equivalents" requirement is inconsistent with the amendment to § 1500.3(a), which creates a new ceiling to federal agencies ability to impose additional procedures or requirements beyond those set forth by the regulations. This gives rise to a host of questions, such as: Are procedures enacted by other federal agencies "functional equivalents" to the Regulations if they impose procedures or requirements beyond CEQ regulations? What happens to such agency regulations? These are questions that will necessarily require significant litigation—undermining CEQ's stated efficiency goal.

Finally, CEQ cannot simply allow other agencies to determine what is a "functionally equivalent" process. The NEPA statute charges all agencies of the Federal Government to "identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making." 42 U.S.C. § 4332. However, under the new rule, CEQ would have no input into the procedures that an agency would consider "functionally equivalent" to CEQ regulations. CEQ is required by statute to provide input into the other agency's rules. This will lead to further inefficiencies while fracturing the regulatory rulemaking process.

Additionally, Outdoor Alliance and its member organizations frequently participate in land management planning processes (such as Forest Planning under the USDA Forest Service's 2012 Planning Rule) across varied federal agencies. These processes–which we are concerned might be of the type contemplated by CEQ as functional equivalents of NEPA– are intended to work procedurally in tandem with the NEPA process, and removing or radically altering the role of NEPA in land management planning is certain to result in less thoughtful, less broadly supported land management plans. While these processes might conclude more rapidly under the changes envisioned in the Proposed Rule, this haste would come at the cost of public engagement and sound science and result in less optimal plans from the perspective of nearly all relevant stakeholders.

Changing Critical Language

Another problematic change comes in the preamble to the Proposed Rule, in the form of the seemingly innocuous change from the use of the term "possible" to "practicable." The Proposed Rule suggests that this is nothing more than a stylistic change—noting that practicable "is the more commonly used term in regulation." 45 Fed. Reg. at 1700-01. While that may be true, courts and individuals interpreting and participating in the NEPA process have been able to successfully distinguish between those two words for 40 years. *See, e.g.,* § 1500.6 (recognizing that "[t]he phrase 'to the fullest extent possible' … means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible"); *see also Citizens for Balanced Environment & Transp., Inc. v. Volpe*, 503 F.2d 601, 606-07 (1973) (Winter, J., dissenting) (interpreting "to the fullest extent possible" in the NEPA context). Again, this change to critical language threatens to remove clarity about the Regulations and upends 50 years of administrative and judicial interpretation of them. And, to the extent that further litigation and time will be required to interpret the new language, it undercuts the overarching purpose of "streamlining" that CEQ has proposed.

Viewing these changes in context helps to illustrate exactly how a seemingly innocuous language change can drastically reduce the effectiveness of the NEPA process. For example, in proposed § 1502.0(b), the language regarding draft EISs has been changed from "The draft statement must fulfill and satisfy to the fullest extent *possible* the requirements established for final statements …", to "The draft statement must meet, to the fullest extent *practicable*, the requirements established for final statements…". Practicable, unlike possible, contains limitations. *Compare* Black's Law Dictionary, Practicable (11th ed. 2019) ("(Of a thing) reasonably capable of being accomplished; feasible in a particular situation"), *with* Ballentine's Law Dictionary, Possible (2010 ed.) ("Liable to happen or come to pass; capable of existing or of being conceived or thought of; capable of being done; not contrary to the nature of things."). The difference is subtle, but important. Practicable gives agencies an out by emphasizing things that are "reasonably capable" of being accomplished, while possible, by contrast, contains no such limitation. This change could mean the difference between a full and robust draft EIS and one that falls short of the requirements that such documents have historically contained—merely because it was determined that something was not "reasonably capable" of

being included. The net result, once again, is a loss of details and input that are necessary to effectuate NEPA's underlying purpose.

Shifting Responsibility and Conflicts of Interest

There are several instances where the Proposed Rule will shift responsibility for certain aspects of the NEPA process away from agencies and onto, for example, private companies. This, too, opens the door to ambiguity and the potential that NEPA protections will be weakened by the improper delegation of responsibilities.

For example, the Proposed Rule would allow agencies to delegate work that NEPA expressly assigns them. *See, e.g.,* proposed § 1506.5(c) (providing that "the lead agency, a contractor or applicant under the direction of the lead agency … may prepare any [EIS]…"). NEPA, as it is currently written, however, requires that "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, *a detailed statement by the responsible official*." 42 USC § 4332(2)(C) (emphasis added). Nothing in the statute allows agencies to pass off their drafting responsibilities—particularly to the applicants that they are charged with regulating. Nevertheless, the Proposed Rule does exactly that, while offering no safeguards against the bias that is likely to taint the process.

Similarly, the Proposed Rule would allow private companies to define the "purpose and need" for an EIS. *See* § 1502.13. But the "purpose and need" statement is a significant part of the EIS statement that must be defined by the agency. §§ 1502.14, 1508.1(z). Allowing applicants to draft their own purpose and need statement will improperly and arbitrarily limit the Federal agencies' analysis of the alternatives to the proposed actions.

Likewise, the Proposed Rule seeks to re-define "reasonable alternative" to require that alternatives be "technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant" § 1508.1(z). This bounds the limits of an agency's analysis, not by what is possible or desired by the broader public, but by what applicants deem to be feasible and desirable. This again improperly and arbitrarily limits federal agencies' analyses of environmental effects.

At bottom, to satisfy NEPA an agency must take a "hard look" at the environmental consequences of its action and ensure that its decision is "founded on a reasoned evaluation of the relevant factors." *Greenpeace Action v. Franklin*, 982 F.2d 1342, 1350 (9th Cir. 1992) (quoting *Marsh*, 490 U.S. at 378). Allowing applicants to create the purpose and need statement, and to set the bounds of the alternatives considered, arbitrarily limits the scope of agencies' review and thus prevents agencies from taking a "hard look" at the environmental consequences of their actions.

Cumulative Effects

Under NEPA, federal agencies are now—and for the last fifty years have been—required to study a proposed action's direct, indirect, and cumulative impacts, including those connected to climate change. *See e.g.*, CEQ, Considering Cumulative Effects Under the National Environmental Policy Act (1997). But with little explanation, the Proposed Rule redefines "the environmental impact" to mean only "direct impact" and eliminates consideration of cumulative effects. These changes violate NEPA and are wholly unacceptable.

First, the impacts of climate change, which are incredibly harmful to the environment and biosphere, would be eliminated from consideration under the proposed rulemaking. Proposed Rule §1508.1(g). But simply ignoring how projects will contribute to climate change does not make the issue go away. Climate change is the defining environmental issue of our time, changing fundamental ecological systems in ways we do not yet fully understand. Agencies cannot consider the environmental impact of a project or its effects on the human environment without considering indirect and cumulative effects, especially those related to climate change.

Beyond climate change, a project's other indirect or cumulative effects often have the most severe impact on outdoor recreation and Outdoor Alliance's interests–and analysis of these effects presents opportunities for Outdoor Alliance, our member organizations, and our community to add value to the process. These effects include, but are not limited to, human health; public safety; wildlife impacts; soil, water, and air quality; and many other factors. *See Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356, 367; *Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 869 *45-46 (9th Cir. 2004) (finding agency did not follow NEPA when it ignored increased traffic associated with the project, which

was an important indirect effect). As one example, indirect and cumulative impacts are critical in the context of Federal Energy Regulatory Commission (FERC) review of hydropower licensing, where even a relatively small project can combine with other factors to degrade environmental quality in a large watershed. Analyzing these effects is fundamental to NEPA's goal of promoting science-based, environmentally-focused land and water use policy.

As another example, Access Fund, an OA member organization, is engaging in an upcoming NEPA process to determine a climbing management strategy at Bitterroot National Forest. Access Fund will advocate for allowance to establish new climbing routes, some with permanent protection hardware. An opposing option is to prohibit new climbing development. Climbing participation is increasing exponentially, and an indirect effect of not allowing conditional, additional recreation access is a diminishment of recreation experience due to crowding as well as future environmental degradation due to overloading the carrying capacity at existing climbing sites. Recreation management needs a long-term view of the cascading repercussions associated with a particular decision in order to maintain the quality of the recreation experience and the integrity of the recreation resource.

These proposed changes will fundamentally change NEPA in at least two profound ways, each of which provides independent grounds for withdrawing the Proposed Rule. First, the Proposed Rule prevents agencies from analyzing cumulative and indirect effects when determining whether a project has "significant" effects on the human environment, such that a NEPA analysis may not be required at all. *See* Proposed Rule §1501.3. If cumulative and indirect effects are not considered at this threshold stage, even a project with massive impacts on the human environment may not be subject to any NEPA review whatsoever. Second, even if a project qualifies for NEPA review under the proposed rule, the agency's analysis or impact statement will be necessarily incomplete if it excludes cumulative and indirect impacts as the Proposed Rule presently contemplates. Proposed Rule §§1502.14, 1502.16. Thus, many of a project's most significant and lasting environmental impacts will be totally absent from an agency's analysis and mitigation planning.

Not only is ignoring cumulative and indirect effects bad policy, it also is contrary to NEPA's plain text. "NEPA requires an agency to consider cumulative effects, which result from the incremental impact of the action when added to other past, present and reasonably foreseeable actions regardless of what agency . . . or person undertakes such other actions." *Ctr. for Envtl. Law & Policy v. United States Bureau of*

Reclamation, 655 F.3d 1000, 1007 (9th Cir. 2011). Further, the requirement to consider cumulative effects was recognized prior to CEQ's regulations—demonstrating that this requirement derives from the statute itself. *Kleppe v. Sierra* Club, 427 U.S. 390, 410 (1976) (explaining that under NEPA, the agency was required to consider a project's "cumulative or synergistic environmental impact on a region" with an eye towards other projects); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2nd Cir. 1975) (reversing agency action under NEPA because it did not consider the project's "cumulative environmental impact"). Courts have also made clear that, under NEPA, agencies may not avoid indirect impacts simply because analyzing these issues is difficult. *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 156 U.S. App. D.C. 395, 481 F.2d 1079, 1092 (D.C. Cir. 1973) ("We must reject any attempt by agencies to shirk their responsibility under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry'"). Indeed, analyzing indirect and cumulative effects is critical to the NEPA process, because, "[f]or many projects, these secondary or induced effects may be more significant than the project's primary effects" and must be addressed "[i]f impact statements are to be useful." *Davis v. Coleman*, 521 F.2d 661, 675-677 (9th Cir. 1975).

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As discussed above, there are many aspects of the Proposed Rule that undercut the purposes animating NEPA. In many instances, the Proposed Rule also creates deeply problematic ambiguity, cuts needed voices out of the NEPA process, and—in some instances—is outright contrary to law. While Outdoor Alliance and its member organizations recognize the desirability of some NEPA modernizations, those efforts cannot come at the expense of robust public input about the effects—direct, indirect, and cumulative—of proposed federal projects. Indeed, we, along with all Americans, count on NEPA as an important bulwark against lasting environmental harm. If, as discussed above, the proposed "streamlining" weakens those protections and injects ambiguity into the NEPA process, then it is inconsistent with what the law requires, and should not be adopted. We believe that CEQ should withdraw the proposed rule and consider a more modest and tailored rulemaking that protects the core values of the National Environmental Policy Act.

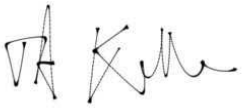
OUTDOOR ALLIANCE

Best regards,

Louis Geltman
Policy Director
Outdoor Alliance

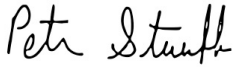
Bob Nasdor
Northeast Stewardship & Legal Director
American Whitewater

Erik Murdock
Policy Director
Access Fund



Todd Keller
Director of Government Affairs
International Mountain Bicycling Association

Taylor Luneau
Policy Manager
American Alpine Club



Pete Stauffer
Environmental Director
Surfrider Foundation

Hilary Eisen
Policy Director
Winter Wildlands Alliance

cc: Adam Cramer, Executive Director, Outdoor Alliance
Chris Winter, Executive Director, Access Fund
Beth Spilman, Interim Executive Director, American Canoe Association
Mark Singleton, Executive Director, American Whitewater
Kent McNeill, CEO, International Mountain Bicycling Association
Todd Walton, Executive Director, Winter Wildlands Alliance

OUTDOOR ALLIANCE

Tom Vogl, Chief Executive Officer, The Mountaineers
Phil Powers, Chief Executive Officer, American Alpine Club
Mitsu Iwasaki, Executive Director, the Mazamas
Keegan Young, Executive Director, Colorado Mountain Club
Chad Nelson, Chief Executive Officer, Surfrider Foundation