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Ms. Brenda Mallory, Chair
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Docket ID No. CEQ-2021-0002

Re: COMMENTS ON PROPOSED RULE: NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING REGULATIONS REVISIONS, 86 FED REG 55,757, (OCT. 7, 2021)

Dear Chair Mallory:

The Emmett Environmental Law & Policy Clinic at Harvard Law School respectfully submits these comments regarding the proposed National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757 (Oct. 7, 2021) (hereinafter, the "Proposed Regulation" or "Proposal").[1] For the reasons discussed herein, we urge the Council on Environmental Quality ("CEQ") to finalize the Proposal, which is necessary to correct provisions in the existing regulations that are impermissible under, and inconsistent with, the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, as well as over forty years of judicial interpretation of NEPA.

In particular, these comments address two of the topics in the Proposal: (1) the importance of fixing the regulatory provisions regarding the consideration of cumulative and indirect effects and (2) the "ceiling" provisions, which impermissibly limit agencies' discretion to provide additional procedures beyond the minimum standards identified by CEQ.

[1] The Emmett Environmental Law & Policy Clinic at Harvard Law School works with scientists, medical professionals, nonprofit organizations, and state, tribal, and local government clients on environmental and energy issues at international, federal, state, and local levels. In March 2020, the Clinic submitted comments regarding the proposed Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (Jan. 10, 2020).

I. THE PROPOSAL PROPERLY RETURNS THE CONSIDERATION OF CUMULATIVE AND INDIRECT IMPACTS TO ITS PRE-2020 SCOPE

A. NEPA Requires that Agencies Consider Cumulative Effects

Under NEPA, agencies must consider the environmental impacts of "major Federal actions significantly affecting the quality of the human environment" "to the fullest extent possible." 42 U.S.C. § 4332. Although the words "direct," "indirect," and "cumulative" do not appear in the text of NEPA, the requirement to consider such impacts originates in the statute. NEPA is clear on its face: agencies must consider environmental impacts "to the fullest extent possible." As the case law interpreting NEPA makes clear, this duty includes consideration of both indirect and cumulative effects. The Proposal's explicit requirement that agencies consider the cumulative impacts of a proposed action brings this aspect of the regulations back in line with the statute.

A driving force behind NEPA's enactment was Congress's recognition of "the profound impact of man's activity on the *interrelationship* of *all* components of the natural environment." 42 U.S.C. § 4331(a) (emphasis added). Congress intended for NEPA to counteract a trend in which environmentally harmful agency decisions "continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, at 5. Similarly, Congress sought to end the pattern of letting environmental issues "accumulate in slow attrition" by requiring that agencies pay attention to "quiet, creeping, environmental decline." Senate Comm. on Interior & Insular Affairs, 90th Cong., 2d Session, A National Policy for the Environment: A Special Report 7–8 (Comm. Print 1968).

Congress, through NEPA, therefore required agencies to analyze "*any* adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii) (emphasis added). In addition, agencies must "recognize the worldwide and *long-range* character of environmental problems." *Id.* § 4332(2)(F) (emphasis added). Agencies must fulfill these duties "to the fullest extent possible." *Id.* § 4332. The requirement that agencies consider cumulative effects in their NEPA analyses ensures that they do not overlook the "small but steady" and "quiet, creeping" effects of their projects that Congress intended to be key considerations in an Environmental Impact Statement ("EIS").

Consideration of cumulative impacts is also crucial to promoting other congressional purposes behind NEPA, which include using "all practicable means and measures" to "foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony," 42 U.S.C. § 4331(a), and to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surrounding," *id.* § 4331(b)(2).[2]

As a long line of cases makes clear, consideration of cumulative impacts is relevant both when (i) determining if a project has significant impacts, such that an EIS is required, and (ii)

[2] Other purposes and directives that also require consideration of cumulative impacts include the objective of attaining "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences," 42 U.S.C. § 4331(b)(3), and the requirement for agencies to identify "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," *id.* § 4332(2)(C)(iv).

preparing an EIS so that agencies can make informed decisions. Many of these decisions pre-date the 1978 CEQ regulations, grounding their holdings in the statutory text itself. *See, e.g.*, *Cross-Sound Ferry Services, Inc. v. United States*, 573 F.2d 725, 731 (2d Cir. 1978); *Swain v. Brinegar*, 517 F.2d 766, 775 (7th Cir. 1975) (NEPA "recognizes that each 'limited' federal project is part of a large mosaic of thousands of similar projects and that cumulative effects can and must be considered on an ongoing basis."). As described by the Second Circuit in *Hanly v. Kleindienst*:

> It must be recognized that even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel. Hence the absolute, as well as comparative, effects of a major federal action must be considered.

471 F.2d 823, 831 (2d Cir. 1972). Environmental impacts do not occur in isolation, and the significance of a project must be understood in the context of related actions. Otherwise, agencies could underestimate the environmental effects of major federal actions by ignoring the ways in which the actions incrementally exacerbate existing environmental problems. The Proposal's explicit requirement that agencies consider the cumulative effects of proposed projects ensures agencies' compliance with NEPA's mandate that they prepare EISs for projects whose impacts appear insignificant in isolation but are in fact significant in context.

B. NEPA Requires that Agencies Consider Indirect Effects

NEPA's mandate to consider environmental impacts "to the fullest extent possible," 42 U.S.C. § 4332, also requires that agencies consider indirect impacts. Like cumulative impacts, consideration of indirect impacts is required as a logical consequence of the statutory language of NEPA itself.

The Proposal's mandate that agencies consider indirect effects brings these portions of CEQ's regulations back into alignment with the requirements of NEPA and decades of caselaw. From the earliest years of NEPA's implementation, courts have widely recognized that allowing agencies to overlook indirect impacts would frustrate NEPA's central purposes. For example, the Eighth Circuit recognized in 1978 that "[u]nder NEPA, indirect, as well as direct, costs and consequences of the proposed action must be considered." *Jackson County, Mo. v. Jones*, 571 F.2d 1004, 1013 (8th Cir. 1978); *see also City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) ("[C]onsideration of secondary impacts may often be more important than consideration of primary impacts."); *Minnesota Pub. Int. Rsch. Grp. v. Butz*, 498 F.2d 1314, 1322 (8th Cir. 1974) ("We think NEPA is concerned with indirect effects as well as direct effects.").

Many environmental impacts are not immediate and easily observable direct consequences of agency actions; rather, they may be removed in time or space. These effects may nevertheless be severe in magnitude and foreseeable at the time the agency is evaluating project alternatives. For example, a major construction project may indirectly impact the environment by changing traffic patterns, which may drastically increase air pollution. *See*, *e.g.*, *City of Rochester v. U.S. Postal Service*, 541 F.2d 967, 974 (2d Cir. 1976) (recognizing that NEPA required an agency to

consider the less immediate, indirect impacts of its construction project like urban decay, unemployment, and increased traffic). Indeed, an action's contributions to significant, large-scale environmental problems may be mostly indirect. If an agency does not consider potentially severe indirect environmental impacts, it will drastically underestimate the environmental significance of federal actions, which would frustrate NEPA's central mandates to incorporate environmental considerations into federal decision-making "to the fullest extent possible" and to consider "*any* adverse environmental effects." 42 U.S.C. § 4332.

Additionally, as the Proposal notes, factoring in cumulative and indirect effects will give agencies and the public a better sense of a project's true costs and benefits. *See* 86 Fed. Reg. at 55,763. It has always been the case that agency actions have multiple effects that occur on different spatial and time scales. Some projects may contribute to long-term changes in land use and local economies, *see City of Rochester*, 541 F.2d at 974, while others may impact larger trends in climate change, *see Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) (holding that FERC failed to comply with NEPA when it ignored "downstream carbon emissions"). Mandating that agencies analyze cumulative and indirect effects ensures that they arrive at a complete accounting of the effects of a proposed action.

By reinstating the explicit requirement to consider indirect effects, the Proposed Regulation does not impose undue administrative burdens on agencies. Much like consideration of cumulative impacts, consideration of indirect effects is neither impractical nor unreasonable. Even in the earliest years following NEPA's enactment, courts recognized that this mandate does not require agencies to predict overly speculative or remote impacts that the agency could not reasonably ascertain. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974) (holding that "an environmental impact statement need not discuss remote and highly speculative consequences").

The Proposal's provision regarding indirect effects brings the regulations back in line with the requirements and purpose of NEPA as well as judicial interpretations of the statute, and ensures that agencies do not underestimate the environmental impacts of major federal actions.

II. THE PROPOSAL PROPERLY REMOVES THE ILLEGAL "CEILING" PROVISIONS THAT LIMIT AGENCIES' ABILITY TO COMPLY WITH NEPA "TO THE FULLEST EXTENT POSSIBLE"

We support the Proposal's changes to the existing "ceiling" provisions that impermissibly limit the ability of agencies to comply with NEPA's mandates. As CEQ notes, restoring agency discretion in this area will decrease confusion and increase efficiency by allowing agencies to fulfill their "unique statutory mandates" more directly. *See* 86 Fed. Reg. at 55,761. Furthermore, these changes are legally required. CEQ never had the authority to limit other agencies' NEPA compliance, and its attempt to do so would have put those agencies in a difficult legal position.

Each federal agency is responsible for its own NEPA compliance, and last year CEQ acted outside of its authority when it attempted to insert itself into that process. NEPA requires that *all* federal agencies comply with its mandates "to the fullest extent possible." 42 U.S.C. § 4332. This "fullest extent possible" compliance can only be limited by a direct conflict with the agency's statutory obligations. *See Sierra Club v. Froehkle*, 534 F.2d 1289, 1299 (8th Cir. 1976); *see also Stand Up for Cal.! v. U.S. Dep't of the Interior*, 959 F.3d 1154, 1163-64 (9th Cir. 2020)

(noting the "only" circumstances—both involving interaction with statutes—in which an agency can avoid completing an EIS); *Atlanta Gas Light Co. v. Federal Power Comm'n*, 476 F.2d 142, 150 (5th Cir. 1973) ("[T]he legislative history of the NEPA interprets 'to the fullest extent possible' to mean compliance unless compliance would give rise to a violation of statutory obligations."). CEQ does not have the authority to limit agencies' ability to fulfill their NEPA duties. *Cf. Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 148 (1981) (Blackmun, J., concurring) (arguing that CEQ's regulations "could not, consistently with the statute" create an exemption that did not otherwise exist).

Limiting agency discretion would also have created significant legal exposure for federal agencies, which are held to the "high standard" of complying with NEPA "to the fullest extent possible." *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971). Since NEPA's inception, courts have been clear that this language does not create "an escape hatch" or make compliance "discretionary." *Id.* Thus, the 2020 regulations' limitations on an agency's tools for complying with NEPA would likely have led to increased litigation for the implementing agencies. Fixing these "ceiling" provisions empowers agencies to avoid this costly, inefficient litigation.

Furthermore, agencies are best positioned to understand their own NEPA responsibilities. They are the most familiar with their own organic statutes and their own procedures and thus best able to identify when compliance "to the fullest extent possible" has been achieved. *See, e.g.*, *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2010) (upholding agency decision to interpret its organic statute to impose environmental conditions and ensure NEPA compliance). Rather than decrease costs and increase efficiency, as the previous regulations claimed, enforcing CEQ's regulations as a ceiling would have created decisional gridlock and prevented agencies from utilizing their own experience. Establishing CEQ regulations as a floor returns discretion to the agencies best able to use it.

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CEQ's 2020 NEPA regulations were arbitrary and unlawful. We appreciate that CEQ is taking this important first step to reverse those regulatory changes and urge you to finalize the Proposal as written. Thank you for your consideration of these comments.

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