Animal Welfare Institute

900 PENNSYLVANIA AVENUE, SE, WASHINGTON, DC 20003 · 202-337-2332 · AWIONLINE.ORG

March 27, 2025

Submitted via Federal eRulemaking Portal

Ms. Katherine Scarlett, Acting Chair
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Comments on Interim Final Rule on the Removal of National Environmental Policy Act Implementing Regulations, Docket Number CEQ–2025–0002

Dear Acting Chair Scarlett:

The Animal Welfare Institute ("AWI"), on behalf of our members and supporters nationwide, submits the following comments in strong opposition to the Council on Environmental Quality's ("CEQ") interim final rule that would rescind all versions of CEQ's regulations that implement the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq*. *See* 90 Fed. Reg. 10,610 (Feb. 25, 2025).

AWI is a nonprofit organization whose mission is to alleviate the suffering caused to animals by people. We seek to improve the welfare of animals everywhere: in agriculture, in commerce, in our homes and communities, in research, and in the wild. Since 1951, AWI has advanced its mission through strategically crafted policy and legal advocacy, educational programs, research and analysis, litigation, and engagement with policymakers, scientists, industry, educators, other NGOs, the media, and the public. We seek scientifically-grounded protections for animals in all settings, and robust enforcement of those protections.

Since they were issued in 1978, CEQ's regulations have provided a compliance framework for implementing NEPA upon which over 80 federal agencies, project sponsors, environmental consultants, non-governmental organizations, and impacted communities have relied for nearly fifty years. The complete revocation of CEQ's longstanding regulations introduces profound uncertainty into NEPA's environmental review process. Rather than improving project delivery times and increasing efficiency, requiring federal agencies to develop their own NEPA implementing regulations, with the added encouragement to rely on CEQ's flawed 2020 regulations,[1] will sow deep inconsistencies, inefficiencies, and confusion as

[1] CEQ's 2020 regulations, which were finalized on July 16, 2020, and went into effect on September 14, 2020, were subsequently revised in two phases. On October 7, 2021, CEQ issued a "Phase 1" proposed rule to restore three elements of the 1978 regulations, which CEQ finalized on April 20, 2022. 87 Fed.

agencies attempt to determine what the 2020 regulations require and whether, or to what extent, to incorporate those regulations into their own NEPA rules. This will undoubtedly result in higher levels of litigation, greater delays in project approvals, and lower likelihoods of environmental impacts being adequately assessed, which could have devastating impacts on wildlife, habitat, and frontline communities.

This comment contains five sections. Section I introduces the purpose of NEPA and the statute's legal framework. Section II addresses our concern that CEQ has violated the Administrative Procedure Act by improperly revoking the regulations through use of an interim final rule. Section III highlights problems with CEQ's resurrection of its flawed 2020 revisions to NEPA's implementing regulations, particularly in regard to elimination of the Cumulative Effects Analysis. Section IV establishes that CEQ has violated the Endangered Species Act by not meeting its obligation to engage in Section 7 consultation, which it is required to do. Lastly, Section V makes clear that CEQ must prepare a cost-benefit analysis to comply with Executive Order 12866, which it has not done.

I. Introduction

The changes CEQ is instituting in the interim final rule would undercut the goals and purposes of NEPA. NEPA, which Congress passed with overwhelming bipartisan support in 1969 and President Nixon signed into law on January 1, 1970, is one of the most important environmental laws in the United States. NEPA is our nation's "basic charter for protection of the environment." *Dept. of Transp. v. Pub Citizen*, 541 U.S. 752, 756 (2004); 40 C.F.R. § 1500.1(a). In enacting NEPA, Congress declared a national policy of "creat[ing] and maintain[ing] conditions under which man and nature can exist in productive harmony." *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.,* 531 F.3d 1114, 1120 (9th Cir. 2008) (quoting 42 U.S.C. § 4331(a)). NEPA was adopted to "promote efforts which will prevent or eliminate damage to the environment and biosphere" in order to "fulfill the responsibility of each generation as trustee of the environment for succeeding generations." 42 U.S.C. §§ 4321, 4331(b)(1). NEPA is critical to guiding federal decisions that impact human health and the environment, ensuring that "unquantified environmental amenities and values" are given "appropriate consideration in decision making." 42 U.S.C. § 4332(B). NEPA is intended to "ensure that [federal agencies] . . . will have detailed information concerning significant environmental impacts" and "guarantee[] that the relevant information will be made available to the larger [public] audience." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

The law establishes the foundation for a set of procedures that help ensure the federal government has thought through the consequences of its actions, explored alternative approaches to achieving its objectives, and involved the public in its decision making. Under NEPA, before a federal agency takes a major federal action that significantly affects the quality of the environment, the agency must prepare an Environmental Impact Statement ("EIS"). *Kern v. U.S.*

Reg. 23,453 (Apr. 20, 2022). On July 31, 2023, CEQ published the "Phase 2" notice of proposed rulemaking, initiating a broader rulemaking to revise, update, and modernize the NEPA implementing regulations. The "Phase 2" regulations were finalized on May 1, 2024. 89 Fed. Reg. 35,442 (May 1, 2024).

Bureau of Land Mgmt., 284 F.3d 1062, 1067 (9th Cir. 2002) (quoting 43 U.S.C. § 4332(2)(C)); 40 C.F.R. §1502.9. "An EIS is a thorough analysis of the potential environmental impact that 'provide[s] full and fair discussion of significant environmental impacts and . . . inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.'" *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (citing 40 C.F.R. § 1502.1). An EIS is NEPA's "chief tool" and is "designed as an 'action-forcing device to [e]nsure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.'" *Or. Natural Desert Ass'n*, 531 F.3d at 1121 (quoting 40 C.F.R. § 1502.1). An EIS must address the following: "(1) the environmental impact of the proposed action; (2) any adverse environmental effects which cannot be avoided should the proposal be implemented; (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 which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C); *see also Pub Citizen*, 541 U.S. at 757.

CEQ's implementing regulations are fundamental to meeting NEPA's statutory purpose, including by providing clear direction and parameters for how federal agencies must conduct environmental analyses. Broadly, CEQ's implementing regulations are designed to fulfill two core purposes: (1) ensuring that federal agencies take a "hard look" at the environmental impacts of their actions, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); and (2) requiring public participation in the decision-making process by requiring comment periods during which the public can respond to and rebut the agencies' data, proposed actions, and conclusions. *See, e.g., Cascadia Wildlands v. BIA*, 801 F.3d 1105, 1110-11 (9th Cir. 2015). More specifically, CEQ's implementing regulations clearly set forth the requirements that federal agencies must meet when conducting EISs and other environmental analyses pursuant to NEPA, including the specific types of environmental impacts that must be assessed, the parameters of alternatives that must be analyzed, and a variety of other considerations that federal agencies must weigh when evaluating major federal actions. *See, e.g.* 40 C.F.R. §§ 1502, 1508.

II. CEQ's Use of the Interim Final Rule Process Violates the APA

CEQ's reliance on an interim final rule to rescind nearly 50 years of NEPA implementing regulations violates the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, because CEQ has failed to demonstrate good cause to support the use of an interim final rule, as required by the APA. 5 U.S.C. § 553. CEQ must instead proceed with this rulemaking pursuant to notice-and-comment rulemaking.

CEQ's rationales for proceeding with an interim final rule fail to meet any established definition of "good cause" under 5 U.S.C. § 553(b)(B) and the case law that governs this exception. CEQ provided the following explanations in the interim final rule:

- "CEQ has also come to have serious concerns about its statutory authority to maintain its NEPA implementing regulations, at least in the absence of E.O. 11991;"[2]

- "(CEQ) is issuing this interim final rule . . . in response to Executive Order (E.O.) 14154, *Unleashing American Energy* . . . E.O. 14154 also directs CEQ to issue guidance on implementing NEPA and to propose rescinding the NEPA implementing regulations. This interim final rule carries out President Trump's latter instruction;" and

- "As discussed in Section III.A, the need to meet the deadlines in E.O. 14154 and to avoid agency confusion given the recent vacatur of CEQ's 2024 Rule makes proceeding through notice and comment before removal impracticable and unnecessary."

90 Fed. Reg. 10,610.

The APA contains specific provisions governing how agencies promulgate rules. 5 U.S.C. § 553. The APA defines a "rule" as "an agency statement of general or particular applicability and future effect." 5 U.S.C. § 551(4). The APA provides a broad definition of the term "rulemaking," which comprises the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). *See also Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 102 (4th Cir.2006), *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 765 (4th Cir. 2012).

The APA requires, among other things, publication in the Federal Register of notices of proposed rulemaking, hearings and other opportunities to be heard, statements regarding the basis and purpose of proposed rules, and the rule as adopted under 5 U.S.C. § 553. More specifically, "[g]eneral notice[s] of proposed rulemaking . . . published in the Federal Register . . . shall include--

> (b) (1) a statement of the time, place, and nature of public rule making proceedings;
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> (2) reference to the legal authority under which the rule is proposed;
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> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved; and
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> (4) the Internet address of a summary . . . .
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> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall

[2] The interim final rule also states: "As explained in Section II.B of this rule, CEQ has also concluded that it may lack authority to issue binding rules on agencies in the absence of the now-rescinded E.O. [11991]. CEQ cited E.O. 11991 as authority in 1978 when it first issued its NEPA regulations. However, that Executive Order has now been rescinded, and CEQ therefore has determined that it is appropriate to remove its regulations from the Code of Federal Regulations."

incorporate in the rules adopted a concise general statement of their basis and purpose . . .

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date . . .

5 U.S.C. §§ 553(b)-(d).

The APA clearly sets forth what is commonly referred to as notice-and-comment rulemaking.[3] To dispense with the notice-and-comment procedures using a general notice under 5 U.S.C. § 553, an agency must qualify for an exception. The "good cause" exception at issue here states:

(b) General notice of proposed rulemaking shall be published in the Federal Register . . . Except when notice or hearing is required by statute, this subsection does not apply-

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for **good cause finds** (**and incorporates the finding** and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are **impracticable, unnecessary, or contrary to the public interest.**

5 U.S.C. § 553(b)(B) (emphasis added).

A second "good cause" exception states:

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency **for good cause found and published with the rule**.

5 U.S.C. §§ 553(d) (emphasis added).

[3] Todd Garvey, A Brief Overview of Rulemaking and Judicial Review, Congressional Research Service (2017). Available at: https://www.congress.gov/crs-product/R41546.

Most interim final rules are adopted under the first of the APA's two good cause exceptions.[4] An agency is exempt from publishing a "general notice" if it invokes the (b)(B) good cause exception.

The good cause exception "is essentially an emergency procedure[.]" *United States v. Valverde*, 628 F.3d 1159, 1165 (9th Cir. 2010) (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)). Courts have established that the APA's good cause provision is to be narrowly construed. *Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005); *State of N. J., Dept. of Environmental Protection v. U.S. Environmental Protection Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) ("The exception also is 'narrowly construed' and 'reluctantly countenanced.'") (quoting *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984)). The U.S. Fifth Circuit has explained that "This exception should be read narrowly . . . . It is an important safety valve where delay would do real harm. It should not be used, however, to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979).[5]

To establish good cause under 5 U.S.C. § 553(b)(B), the agency must show, in the publication of the rule, that notice-and-comment proceedings are either "impracticable, unnecessary, or contrary to the public interest."[6] 5 U.S.C. § 553(b)(B). Because the statute uses the word "or," an agency must meet at least one of the three prongs to show "good cause," but does not need to demonstrate that all three prongs apply. *See, e.g., U.S. Steel Corp. v. U.S. E.P.A.*, 605 F.2d 283, 288 (7th Cir. 1979) (finding "good cause" based on the practicability prong without addressing the other prongs).

First, courts have found that notice-and-comment proceedings under a general notice are "impracticable" only when agency functions would be unavoidably prevented by undertaking this process. *Nat'l Nutritional Foods Ass'n v. Kennedy,* 572 F.2d 377, 384–85 (2d Cir. 1978) (Friendly, J.) (notice and comment on a rule may be found to be "impracticable" when "the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings") (quoting S.Rep. No. 752, at 200 (1945)); *see also Util. Solid Waste Activities Group v. U.S. E.P.A.*, 236 F.3d 749, 754–55 (D.C. Cir. 2001) (the "impracticable" basis for good cause applies "when an agency finds that due and timely execution of its functions would be impeded by the notice and comment otherwise required" under the APA) (quoting *United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act* 30–31 (1947)).

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[4] *See* Interim Final Rule (IFR), Practical Law Glossary Item 9-529-6285; Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704-12 & 719 (1999).

[5] *See also Comment: For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045 (2011); *Good cause for avoiding procedures*, 1 ADMIN. L. & PRAC. § 4:13 (3d ed.); Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 719 (1999).

[6] It does not appear here that CEQ is invoking the good cause clause in 5 U.S.C. § 553(d)(3). CEQ published its rule more than 30 days before its effective date, and CEQ does not appear to have any concerns with 5 U.S.C. § 553(d).

Examples of circumstances giving rise to good cause under the "impractical" prong include: (1) where an agency determined that new rules were needed "to address threats posing a possible imminent hazard to aircraft, persons, and property within the United States," *Jifry v. F.A.A*., 370 F.3d 1174, 1179 (D.C. Cir. 2004); (2) where agency rules were "of life-saving importance to mine workers in the event of a mine explosion," *Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981) (describing that circumstance as "a special, possibly unique, case"); (3) where agency rules were necessary to "stave off any imminent threat to the environment or safety or national security." *Mack Trucks, Inc. v. EPA,* 682 F.3d 87, 93 (D.C. Cir. 2012); *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (permitting the exception in the wake of several helicopter fatalities).

In contrast, a general notice of an amendment to the Environmental Protection Agency's rules regulating use of contaminated substances was not deemed to be impracticable, absent any indication that the pre-existing version of the regulation posed any threat to the environment or human health, or that some sort of emergency had arisen. *Util. Solid Waste*, 236 F.3d at 750. Moreover, COVID-19 did not provide good cause in support of a no-sail order for cruise ships, after the cruise industry had been shut down for seven months. *State v. Becerra*, 544 F. Supp. 3d 1241, 1297 (M.D. Fla. 2021).

CEQ has not provided *any* explanation in the interim final rule of how execution of its functions would be unavoidably prevented by publishing a general notice and notice-and-comment rulemaking. None of CEQ's "good cause" arguments meet the kind of imminent, emergency-based need present in the cases where courts allowed agencies to proceed without general notice and comment under the "impractical" standard.

Second, an agency may claim notice-and-comment rulemaking is "unnecessary" under 5 U.S.C. § 553(b)(B). This prong is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Util. Solid Waste*, 236 F.3d at 755. The temporary nature of an interim final rule cannot satisfy the "unnecessary" prong. If a rule's temporary nature were enough to satisfy the element of good cause, then "agencies could issue interim rules of limited effect for any plausible reason, irrespective of the degree of urgency," and "the good cause exception would soon swallow the notice and comment rule." *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145 (D.C. Cir. 1992); *see also Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94 (D.C. Cir. 2012).

The interim final rule does not present a case where notice-and-comment rulemaking is "unnecessary" under 5 U.S.C. § 553(b)(B). Just as in *Utility Solid Waste*, CEQ's interim final rule is a rule "about which [] members of the public [are] greatly interested," so notice-and-comment rulemaking is not "unnecessary." 236 F.3d at 755. Moreover, CEQ does not allege that the rule rescissions are temporary, but rather, has announced that the rule will be final 45 days after publication. As such, CEQ does not attempt to rely on an "interim nature" argument as a basis for good cause. *See* 90 Fed. Reg. 10,610.

Finally, an agency may invoke the good cause exception if providing notice and comment would be "contrary to the public interest." 5 U.S.C. § 553(b)(B). The public interest prong of the good cause exception is "met only in the rare circumstance when ordinary procedures—generally

presumed to serve the public interest—would in fact harm that interest. It is appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal—if, for example, 'announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent.'" *Util. Solid Waste*, 236 F.3d at 755; *see also Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94–95 (D.C. Cir. 2012). In such a circumstance, notice and comment could be dispensed with "in order to prevent the amended rule from being evaded." *Util. Solid Waste*, 236 F.3d at 755. Here, CEQ does not allege that notice and comment would harm the public interest, and therefore does not rely on this prong to justify its use of an interim final rule.

None of CEQ's rationales establish "good cause" under 5 U.S.C. § 553(b)(B) to avoid the general notice requirement in 5 U.S.C. § 553(b) or to otherwise shortcut notice-and-comment rulemaking. Thus, as explained in greater detail below, the interim final rule violates the APA.

A. CEQ, as an executive branch office, cannot rely on self-inflicted "concerns" or deadlines arising from an executive order

CEQ argues that it has serious concerns about its statutory authority to maintain its NEPA implementing regulations, "at least in the absence of E.O. 11991." "Serious concerns" about an agency's authority do not provide good cause under any of the three "good cause" prongs discussed above. CEQ bases the interim final rule on E.O. 14154, which revoked E.O. 11991. E.O. 14154 was issued by the President on January 20, 2025. E.O. 11991 was issued by President Carter in 1977. It ordered CEQ to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of" NEPA.

Because CEQ is an agency within the office of the President, CEQ's "concern" about the effect of this E.O. is a self-inflicted problem, and as such it does not provide a basis for good cause under 5 U.S.C. § 553. Going through notice-and-comment rulemaking is not "impractical, unnecessary, or contrary to the public interest" simply because an earlier E.O. was revoked. Moreover, actions taken when an E.O. was in effect are still valid if that E.O. is later rescinded. While the current President always has the right to rescind a prior E.O. issued by former Presidents,[7] such a removal does not vacate any rules passed based on an E.O. while it was active, because an E.O. cannot, by itself, rescind or modify a regulation.[8]

Additionally, since CEQ is an agency within the office of the President, and it was the President who created the deadlines set forth in E.O. 14154, this deadline is self-inflicted, and does not render notice-and-comment rulemaking impracticable, unnecessary, or contrary to the public interest. CEQ did not demonstrate in the interim final rule that it could not meet the

[7] *Bradford v. U.S. Dep't of Lab.*, 582 F. Supp. 3d 819, 844–45 (D. Colo. 2022), *aff'd*, 101 F.4th 707 (10th Cir. 2024) ("there is no question that a president may rescind his, or his predecessors', executive orders."); *Indigenous Env't Network v. Trump*, 428 F. Supp. 3d 296, 314 (D. Mont. 2019) ("Courts have reasoned that the President may withdraw "at any time for any or no reason" a prior executive order that the President issued solely pursuant to his inherent constitutional authority. *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965) ("The President does not possess the same liberty over a prior executive order that implemented certain statutory foundations.").

[8] *See Franklin v. Massachusetts*, 505 U.S. 788, 800, 112 S. Ct. 2767, 2775, 120 L. Ed. 2d 636 (1992).

deadlines in E.O. 14154 if it had used notice-and-comment rulemaking rather than an interim final rule. Furthermore, E.O. 14154 simply orders CEQ "to *propose* rescinding the NEPA implementing regulations," within 30 days (emphasis added). CEQ can propose rescinding the regulations through notice-and-comment rulemaking. In contrast, by using an interim final rule, CEQ is not merely proposing to rescind NEPA's implementing regulations; CEQ has in fact rescinded those regulations.

Regardless, AWI could find no case law that supports the idea that arbitrary deadlines in an E.O. could provide a basis for "good cause" under the APA, and CEQ cites to none. Instead, courts have repeatedly found that "the mere existence of deadlines for agency action . . . (can) not in itself constitute good cause for a s 553(b)(B) exception." *U.S. Steel Corp. v. U.S. Environmental Protection Agency*, 595 F.2d 207, 213 (5th Cir. 1979), quoted in *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981), and *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981).

As such, CEQ's argument does not establish good cause under the "impractical" prong. And despite its conclusory statement that a general notice and comment is "unnecessary," CEQ makes no showing that this is "a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public" as required under the "unnecessary" prong. *Util. Solid Waste*, 236 F.3d at 755.

B. One district court decision vacating only the most recent revisions to NEPA's implementing regulations does not provide good cause

CEQ argues that its desire "to avoid agency confusion given the recent vacatur of CEQ's 2024 Rule makes proceeding through notice and comment before removal impracticable and unnecessary." But this conclusory statement fails to provide good cause for at least three reasons. First, while a North Dakota District Court ruled in *Iowa v. CEQ*[9] that CEQ lacked authority to promulgate the 2024 amendments, that court did not rule on the rest of the NEPA regulations that CEQ is seeking to rescind with this interim final rule. CEQ has gone far beyond simply implementing the *Iowa v. CEQ* vacatur; it has provided notification of a far more extensive rule rescinding the entire body of regulations that agencies have relied upon for nearly 50 years. This move is inexplicable, as a decision vacating only the 2024 amendments would not be confusing for agencies. Amendments to rules are periodically struck down by district courts. Agencies have dealt with such limited decisions in the past, and CEQ can and should deal with the limited holding in *Iowa v. CEQ* without sweeping away the entire regulatory framework that has existed since 1978, which will sow the very chaos and confusion that CEQ allegedly seeks to avoid. This interim final rule would have a profound effect on agencies trying to comply with NEPA, causing far more confusion than the *Iowa v. CEQ* holding rescinding only the 2024 amendments ever could.

[9] *Iowa v. Council on Envtl. Quality*, 1:24-cv-089 (D.N.D. Feb. 3, 2025), vacating the Biden administration's Phase 2 National Environmental Policy Act (NEPA) rule on the grounds that the Council on Environmental Quality (CEQ) overstepped its authority when it first promulgated NEPA regulations in 1978.

Finally, while the courts in *Marin Audubon*[10] and *Iowa v. CEQ*[11] have recently questioned the CEQ's authority to issue regulations, neither court ruled that the entirety of CEQ's NEPA regulations are invalid. While the D.C. Circuit stated in dicta in *Marin Audubon*[12] that CEQ may not have the authority to issue regulations at all, this was not part of the Court's holding or orders in the case. Rather than taking the drastic, immediate action of rescinding a body of rules that has stood for almost 50 years, and upon which multiple agencies rely to undertake mandatory statutory duties, if CEQ really wants to "avoid agency confusion" it would make more sense to issue a general notice and proceed with notice-and-comment rulemaking. This would allow agencies to simultaneously prepare for their rulemaking responsibilities and regulatory changes without creating a sudden vacuum in the regulatory scheme.

C. Contrary to CEQ's "good cause" statement, the interim final rule creates more agency confusion, inconsistency, and inefficiency

Although CEQ purportedly seeks to "avoid agency confusion," through use of the interim final rule, rescission of its longstanding regulations will have the opposite effect, generating *more* confusion, uncertainty, and inefficiency by creating a regulatory vacuum. Every agency that has NEPA responsibilities has relied on the NEPA regulations that CEQ is rescinding. Some agencies have their own supplemental regulations, while others do not. Most agencies have incorporated CEQ rules into their own rules to varying extents, and some have not passed their own rules at all, in reliance on the CEQ regulations.

For example, the Department of the Interior *incorporates by reference* the CEQ regulations at 43 C.F.R. § 46.10-46.450 and supplements them with agency-specific rules, as does the State Department at 22 C.F.R. § 161.1-161.12, the Department of Agriculture at 7 C.F.R. § 1b.1-1b.4, and the Federal Trade Commission at 16 C.F.R. § 1.81. While the Department of the Interior does not simply incorporate by reference the CEQ NEPA rules in one fell swoop, it expressly relies on specific CEQ rules by reference for standards or explanations that are incorporated into its own rules at 43 C.F.R. § 46.100-46.170. The Department of Commerce, which includes NOAA, does not have its own NEPA regulations. It instead relies on CEQ's regulations to perform its NEPA functions, although NOAA does incorporate the CEQ regulations by reference for purposes of performing natural resources damages assessments under the Oil Pollution Act at 15 C.F.R. § 990.23.

Each of these agencies cite to, rely on, or incorporate by reference the NEPA regulations that will be rescinded in a matter of days if CEQ proceeds as announced. The legal effect of rescinding CEQ's NEPA implementing regulations when so many agencies incorporate them by reference or rely on them in their entirety is uncertain, generating confusion, inefficiency, and

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[10] *Marin Audubon Soc'y v. Fed. Aviation Admin*., 121 F.4th 902 (D.C. Cir. Nov. 12, 2024).
[11] *Iowa v. Council on Envtl. Quality*, 1:24-cv-089 (D.N.D. Feb. 3, 2025).
[12] *Marin Audubon Soc'y v. Fed. Aviation Admin*., 121 F.4th 902 (D.C. Cir. Nov. 12, 2024), pertaining to a challenge under NEPA of air tour management over national parks in the San Francisco Bay Area. Though the case was decided on other grounds, the majority stated in its decision that CEQ has no statutory basis to issue binding regulations, that CEQ was intended by Congress to be an advisory body, and that presidential actions could not convert CEQ from an advisory body to a regulatory agency. The court found that the CEQ regulations are *ultra vires*.

chaos. Furthermore, this rescission could not come at a worse time, as many executive departments and agencies are undergoing massive funding and staffing cuts, which will make it even more difficult for them to write and promulgate sufficient NEPA regulations of their own.

III. The February 19 Memorandum's Reliance on the 2020 NEPA Regulations is Flawed

AWI is deeply concerned by the administration's resurrection of CEQ's flawed 2020 revisions to its NEPA implementing regulations. On February 19, 2025, in tandem with the pre-publication of CEQ's interim final rule, CEQ issued a memorandum to the heads of all federal departments and agencies on NEPA implementation (attached as Exhibit A).[13] This memorandum was issued to advance the directives set forth in E.O. 14154, Unleashing American Energy, 90 Fed. Reg. 8,353 (Jan. 29, 2025). Through this memorandum, CEQ required "federal agencies [to] revise or establish their NEPA implementing procedures (or establish such procedures if they do not yet have any) to expedite permitting approvals and for consistency with NEPA as amended by the FRA [Fiscal Responsibility Act of 2023 (Public Law 118-5)]." Feb. 19 Memorandum at 1. Moreover, "CEQ encourage[d] agencies to use the final 2020 rule 'Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act' as an initial framework for the development of revisions to their NEPA implementing procedures . . . to the extent permitted by applicable law." *Id.* at 1-2.

CEQ's 2020 changes to its NEPA implementing regulations were unprecedented in their significance and scope. The majority of the changes severely undermined informed agency decision making, reduced transparency, and limited public involvement in the NEPA process. The 2020 regulations instituted changes that were inconsistent with both the letter and spirit of NEPA. Far from achieving the stated purpose of "streamlining" NEPA, the changes instead sowed greater uncertainty, upended established case law, policies and procedure, and created confusion for the regulated community and the public. The 2020 regulations were the subject of multiple lawsuits[14] before ultimately being rewritten in two phases by the Biden Administration.[15] Agencies that rely on the 2020 regulations as a framework for the development of or revisions to their own NEPA implementing procedures risk further legal challenges, and project proponents face significant uncertainty and delay.

AWI also highlights with particular concern the language in the memorandum that implies agencies are not required to consider cumulative effects. Feb. 19 Memorandum at 2. This language mirrors the 2020 regulations, which removed the Cumulative Effects Analysis ("CEA")

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[13] Memorandum from Katherine Scarlett, Chief of Staff, Council on Envtl. Quality, to Heads of Federal Dep'ts and Agencies (Feb. 19, 2025) (hereinafter "Feb. 19 Memorandum"). Available at: https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf.

[14] *Wild Va.* v. *Council on Env't Quality,* No. 3:20cv45 (W.D. Va. 2020); *Env't Justice Health All.* v. *Council on Env't Quality,* No. 1:20cv06143 (S.D.N.Y. 2020); *Alaska Cmty. Action on Toxics* v. *Council on Env't Quality,* No. 3:20cv5199 (N.D. Cal. 2020); *California* v. *Council on Env't Quality,* No. 3:20cv06057 (N.D. Cal. 2020); *Iowa Citizens for Cmty. Improvement* v. *Council on Env't Quality,* No. 1:20cv02715 (D.D.C. 2020).

[15] 87 Fed. Reg. 23,453 (Apr. 20, 2022); 89 Fed. Reg. 35,442 (May 1, 2024). *See also* footnote 1, herein.

from consideration of a federal project's environmental impact. 85 Fed. Reg. 43,304 (July 16, 2020). Prior to the 2020 regulations, CEA had been a required aspect of environmental impact analyses under NEPA.[16] The relevant regulation, 40 C.F.R. § 1508.25(c), directed agencies to consider in their environmental impact analyses three types of impacts: direct, indirect, and cumulative. Cumulative impact was defined as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. Fortunately, CEA was restored to CEQ's NEPA implementing regulations in 2022. 87 Fed. Reg. 23,453 (Apr. 20, 2022).

The regulation on CEA has its basis in the statutory text of NEPA, as well as long-standing judicial precedent. NEPA requires agencies to assess "major Federal actions significantly affecting the quality of the human environment" and consider "reasonably foreseeable environmental effects." 42 U.S.C. § 4332(C). As one in-depth analysis of NEPA legislative history explains:

> CEA is a critical aspect of NEPA analysis in that it requires federal agencies to look beyond the incremental impacts of a single decision, which may be individually insignificant but may cumulatively contribute to significant environmental change. The legislative history of NEPA's passage indicates that cumulative impacts were always intended to be one of the central aspects of NEPA analysis."[17] "[T]he legislative history of NEPA indicates Congress's desire to improve upon the mistakes of the past by looking beyond incremental decision-making by independent government agencies to consider long-term and cumulative effects. Part of the intent of NEPA . . . was to force federal agencies to look beyond the immediate effects of their projects and their own jurisdictional boundaries and provide a larger-scale analysis of their contribution to the state of the environment."[18]
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> Moreover, "[t]he notion of CEA also follows from other language in the Act itself. Under Section 102 of NEPA, agencies must report on 'the environmental impact of the proposed action' and 'any adverse environmental effects which cannot be avoided should the proposal be implemented.'"[19] Indeed, "[t]he Act also specifies that the EIS should discuss 'the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.' It is implied that the scope of an EIS is meant not only to consider the immediate effects of a project but also how it might impact the

[16] Courtney A. Schultz, History of the Cumulative Effects Analysis Requirement Under NEPA and Its Interpretation in U.S. Forest Service Case Law, 27 J. Envtl. Law and Litigation 125, 126 n7 (2012). Available at: https://mylaw.uoregon.edu/org/jell/docs/271/Schultz.pdf.
[17] *Id.* at 127.
[18] *Id.* at 132.
[19] *Id.* at 133 (citing 42 U.S.C. § 4332(C)(i)–(ii) (2006).

> environment in the long-term through indirect or cumulative effects with other projects."[20]
>
> "The precise terminology of "cumulative impacts" is not found in the legislative hearings that preceded NEPA's passage. However, the cumulative effects requirement represents some of the core goals of NEPA: to consider long-term environmental effects, to look beyond incremental decision-making, and to consider the effects of the actions of multiple actors. When seen in concert with the sweeping environmental goals articulated in the statement of purpose and Section 101 of NEPA, the language in Section 102, and the legislative history of NEPA, CEA is a logical interpretation of the Act itself. Furthermore, the CEA requirement was a codification of NEPA common law that had been established during the 1970s[.] CEQ guidelines also emphasized the importance of cumulative impacts as early as 1973. Therefore, when the CEA requirement was included in the 1978 regulations, it was nothing new or novel."[21]

This legislative history provides a clear foundation for the CEA in CEQ's 1978 NEPA regulations.

The 2020 regulatory changes to the CEA were clearly designed to restrict agencies' ability to consider a project's climate impacts, and CEQ's present memorandum perpetuates this. Yet courts have held that "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1217 (9th Cir. 2008). "[T]he fact that climate change is largely a global phenomenon that includes actions that are outside of [the agency's] control . . . does not release the agency from the duty of assessing the effects of its actions on global warming within the context of other actions that also affect global warming." *Id.* (quotations and citations omitted); *see also Border Power Plant Working Grp. v. U.S. Dep't of Energy*, 260 F. Supp. 2d 997, 1028-29 (S.D. Cal. 2003) (finding agency failure to disclose project's indirect carbon dioxide emissions violates NEPA).

The need to evaluate such impacts is bolstered by the fact that "[t]he harms associated with climate change are serious and well recognized," and environmental changes caused by climate change "have already inflicted significant harms" to many resources around the globe. *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007); *see also id.* at 525 (recognizing "the enormity

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[20] *Id.*

[21] *Id.* (citing Terence L. Thatcher, Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act, 20 ENVTL. L. 611 (1990) and 38 Fed. Reg. 20,550 (Aug. 1, 1973)). Prior to the issuance of the 1978 CEQ NEPA regulations, courts had already consistently held that NEPA's mandate includes considering cumulative effects. *See, e.g.*, *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972); *Sierra Club v. Morton*, 510 F.2d 813, 824 (5th Cir. 1975); *Henry v. Federal Power Commission*, 513 F.2d 395, 406 (D.C. Cir. 1975); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (when actions with "cumulative or synergistic environmental impacts upon a region are pending concurrently before an agency, their environmental consequences *must be considered together*. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action") *Swain v. Brinegar*, 542 F.2d 364, 369-70 (7th Cir. 1976).

of the potential consequences associated with manmade climate change."). For a non-exhaustive list of cases in which courts have held that climate change impacts must be considered as part of the NEPA analysis see, e.g., *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), *High Country Conservation Advocates v. United States Forest Serv*., 52 F.Supp.3d 1174 (D. Colo 2014), *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transp.*, 713 F.Supp.2d 491 (M.D.N.C. 2010), *San Juan Citizens Alliance v. U.S. Bureau of Land Mgmt*., 326 F.Supp.3d 1227 (D.N.M. 2018), *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F.Supp.3d 1074 (D. Mont. 2017).

Prior to finalizing the 2020 regulations, CEQ had recognized the importance of analyzing climate change impacts, as demonstrated by its adoption of Revised Draft Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews in December 2014 (hereinafter "Climate Change Guidance").[22]As the Climate Change Guidance explained, although "[c]limate change is a particularly complex challenge given its global nature and inherent interrelationships among its sources, causation, mechanisms of action, and impacts," it is a "fundamental environmental issue, and the relation of Federal actions to it falls squarely within NEPA's focus."[23] The Guidance stated that "analyzing the proposed action's climate impacts and the effects of climate change relevant to the proposed action's environmental outcomes can provide useful information to decision-makers and the public and should be very similar to considering the impacts of other environmental stressors under NEPA."[24] This was consistent with CEQ's Guidance on Considering Cumulative Effects under NEPA ("Cumulative Impacts Guidance"), which directed agencies to consider impacts on the "global atmosphere." Cumulative Impacts Guidance at 15; *see also id.* at 13 (describing "release of greenhouse gases" as a cumulative effect to be considered in NEPA analyses).

The CEQ Climate Change Guidance outlined a framework of analysis for these issues. Regarding the potential of the proposed action and action alternatives to impact the climate, the Climate Change Guidance provided that agencies should "account for greenhouse gas emissions from the proposed action and any connected actions," and that the emissions considered should include all those that have "a reasonably close causal relationship to the Federal action, such as those that may occur as a predicate for the agency action (often referred to as upstream emissions) and as a consequence of the agency action (often referred to as downstream emissions)[.]"[25] The Climate Change Guidance directed agencies to consider two specific impact areas relating to climate change: "(1) the potential effects of a proposed action on climate change as indicated by its GHG Emissions; and (2) the implications of climate change for the environmental effects of a proposed action." The Climate Change Guidance also took into account the difficulties in attributing specific climate impacts to individual projects. To address this, CEQ recommended that agencies use the projected GHG emissions and, when appropriate,

[22] CEQ finalized this Climate Change Guidance in August 2016. The Guidance was subsequently withdrawn in April 2017. In June 2019, a new Draft NEPA Guidance on Consideration of Greenhouse Gas Emission was released. 85 Fed. Reg. 30,097 (June 26, 2019). A final version has not been published.
[23] CEQ Revised Draft Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews at 2. Dec. 2014.
[24] *Id.*
[25] *Id.* at 11.

potential changes in carbon sequestration and storage, as a proxy for assessing a proposed action's potential climate change impacts.[26]

In removing the CEA from CEQ regulations in 2020 and prohibiting consideration of a project's impacts on climate change, CEQ effectuated a striking reversal of prior agency policy that was not adequately explained, which rendered that aspect of the 2020 rulemaking arbitrary and capricious. It is a well-settled principle of administrative law that a federal agency may not adopt a position that abruptly changes direction from prior agency regulations without providing a reasoned explanation for the change. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*. ("*State Farm*"), 463 U.S. 29, 42 (1983); *see also Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("adjudication is subject to the requirement of reasoned decisionmaking"), *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (an agency has a duty to "explain its departure from prior norms"). Courts reviewing abrupt agency changes of direction apply this principle when an agency formally rescinds or revises an existing regulation, *id*. at 42, 46, 57, and when it alters a prior interpretation of its own rules or governing statute. *See, e.g.*, *N.Y. Pub. Interest Research Group v. Johnson*, 427 F.3d 172, 182–83 (2d Cir. 2005); *Lal v. INS*, 255 F.3d 998, 1008–09 (9th Cir. 2001) (invalidating an agency interpretation of a regulation because the agency changed course from its settled policies).

As the Supreme Court has held, when changing a policy, "the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (*citing FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009)). "In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* (citation omitted). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations,* 556 U.S. at 515–16. "It follows that an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars*, 136 S. Ct. at 2126 (*citing Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). Therefore, any agency that relies upon the 2020 regulations to circumvent incorporating CEA into its NEPA regulations opens itself and project proponents proceeding before the agency to considerable legal risk.

IV. The Interim Final Rule Constitutes an Agency Action that Triggers Section 7 Consultation Under the Endangered Species Act

The Endangered Species Act ("ESA"), 15 U.S.C. §§ 1531, *et seq*., was passed in 1973 to address the ongoing extinction of certain plant and animal species due to economic development and inadequate conservation measures. Congress recognized that these species were "of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," 16 U.S.C. § 1531(a)(3), and set about to elevate the value of species in decision-making processes. The ESA "provide[s] a means whereby the ecosystems upon which endangered

[26] *Id.* at 8.

species and threatened species depend may be conserved, [and also] provide[s] a program for the conservation of such endangered species and threatened species . . . ." 16 U.S.C. § 1531(b). "Conservation" is defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532. The Act's ultimate goal is to achieve recovery of listed species, such that protections are no longer necessary.

Under Section 7 of the ESA, Congress charged every federal agency with the duty to conserve imperiled species, which the ESA explicitly elevates over the primary missions of federal agencies. 16 U.S.C. § 1536(a). In furtherance of this duty, Section 7 of the Act imposes both procedural and substantive obligations on federal agencies. Under ESA Section 7(a)(2), federal agencies must consult with the U.S. Fish and Wildlife Service ("USFWS") and/or the National Marine Fisheries Service ("NMFS") (collectively the "Services") to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). "Jeopardize the continued existence" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

The Supreme Court has held that Section 7 consultation is required for each discretionary agency action that "may affect listed species or critical habitat." *See Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); 50 C.F.R. § 402.14. Agency "action" is broadly defined in the ESA's implementing regulations as:

> [A]ll activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: "(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."

50 C.F.R. § 402.02.

The "may affect" threshold for triggering the consultation duty under Section 7(a)(2) is low. 50 C.F.R. § 402.14(a). "May affect" encompasses "any possible effect, whether beneficial, benign, adverse or of an undetermined character." 51 Fed. Reg. 19,926 (Jun. 3, 1986); *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) ("actions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA"). In analyzing an action's effects, the agencies must consider "all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action." 50 C.F.R. § 402.02. The analysis must examine not only future agency action, but also "future State or private activities, . . . that are

reasonably certain to occur within the action area of the Federal action subject to consultation." *Id.*

The consultation requirement is waived only if the federal agency action truly will have "no effect" on any threatened or endangered species or critical habitat, and the action agency makes such a finding. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 475 (D.C. Cir. 2009) ("If the agency determines that its action will not affect any listed species or critical habitat, . . . then it is not required to consult with NMFS or Fish and Wildlife."); *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 598 (D.C. Cir. 2019). If the USFWS or NMFS determines that an action will not jeopardize listed species, but may result in "take" of such species, then consulting agency must issue an incidental take statement specifying the amount or extent of incidental taking that may occur due to the action. 50 C.F.R. § 402.14(i)(1)(i). An incidental take statement authorizes the action agency to "take" listed species without facing ESA Section 9 liability, as long as the action is in compliance with the terms and conditions of the incidental take statement. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012). The statement must also specify the permissible level of take, meaning the incidental take statement also "serves as a check on the agency's original decision that the incidental take of listed species resulting from the proposed action will not violate section 7(a)(2) of the ESA." *Nat. Res. Def. Council, Inc. v. Evans*, 279 F. Supp. 2d 1129, 1182 (N.D. Cal. 2003).

First, CEQ's decision to rescind nearly 50 years of NEPA implementing regulations clearly represents an "agency action" for purposes of Section 7 consultation. *See* 50 50 C.F.R. § 402.02. Courts have repeatedly held that the term "agency action," in the context of the ESA's consultation requirements, is to be construed broadly. *See, e.g.*, *Karuk Tribe*, 681 F.3d at 1021, *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994) ("there is little doubt that Congress intended to enact a broad definition of agency action in the ESA"). Courts have held that "[t]he dispositive issue is whether there was any 'action authorized, funded, or carried out' by a federal agency[.]" *See, e.g.*, *California Sportfishing Prot. Alliance v. FERC*, 472 F.3d 593, 594 (9th Cir. 2006) (quoting 16 U.S.C. § 1536(a)(2)). In this instance, the interim final rule rescinding CEQ's NEPA regulations clearly constitutes an "action" for purposes of ESA Section 7 consultation because the interim final rule was "authorized" by CEQ and will be "carried out" by CEQ on April 11, 2025. 90 Fed. Reg. 10,610 (Feb. 25, 2025). Moreover, because the interim final rule will go into effect at a future date, and will have "ongoing and long-lasting effect even after adoption," CEQ cannot claim that the relevant agency action has been completed, which obviates the consultation requirements of section 7. *See California Sportfishing*, 472 F.3d at 598.

Second, CEQ's decision to rescind nearly 50 years of NEPA implementing regulations, combined with the Feb. 19 memorandum's encouragement that agencies rely on the flawed 2020 regulations, satisfies the "may affect" standard articulated above. CEQ is therefore required to consult with USFWS and NFMS about the impacts of the interim final rule on listed species and critical habitat. The clearest demonstration as to how the interim final rule and Feb. 19 memorandum may affect listed species is the 2020 regulatory removal of CEA, and the Feb. 19 memorandum's implication that agencies are not required to consider cumulative effects, discussed above. *See* Section III herein. By allowing federal agencies to ignore cumulative impacts, agencies will no longer be required to evaluate how a proposed action may, in

conjunction with other actions affecting a species outside the immediate action area of the proposed project, have potentially devastating effects on a species and/or its designated critical habitat.

The elimination of CEA is particularly harmful to imperiled species because CEA conducted under NEPA works synergistically with assessments conducted under the ESA. Courts have held that "the ESA Section 7 consultation process differs from the cumulative impacts analysis required by NEPA in a number of important ways." *See, e.g*., *Fund for Animals v. Hall*, 448 F. Supp. 2 127, 136 (D.D.C. 2006). In particular, the ESA Section 7 regulations "require agencies to consider the cumulative impacts of non-federal actions" on endangered and threatened species, while "NEPA requires agencies to consider the cumulative impacts of all actions." *Id*. Because the Section 7 ESA consultation process evaluates a more limited range of impacts than CEA under NEPA, CEQ's unlawful elimination of CEA will reduce the scope of impacts on threatened and endangered species that federal agencies can consider, leading to a less thorough understanding how a project will impact imperiled species.

The Feb. 19 memorandum's reliance on the 2020 regulations may also adversely affect listed species by eliminating, as one of the explicit criteria for determining whether an action will have significant adverse impacts (thus necessitating an EIS), the "degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under [the ESA]." 40 C.F.R. § 1508.27(b)(9). In other words, under the 2020 regulatory framework, harm to species no longer triggers preparation of a mandatory EIS, as it did under the longstanding CEQ regulations prior to 2020, and as restored by the Biden Administration. *See, e.g*., *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1261 (10th Cir. 2019) (the "obligation to conduct an EIS can be triggered by an effect on one of those significance factors"); *see also Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 20 (D.D.C. 2007) (explaining that "courts have found that the presence of one or more of [the CEQ significance] factors should result in an agency decision to prepare an EIS") (citations omitted); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 218 (D.D.C. 2003) (same). Consideration of this factor is based upon CEQ's longstanding framework to determine what constitutes a "significant adverse impact" as defined within the statute. [27] The elimination of this factor could have the effect of encouraging federal agencies and private project proponents to ignore or discount the consideration of impacts on listed species and critical habitats in their NEPA analysis, to the detriment of species and habitats.

These examples of ways in which the interim final rule and Feb. 19 memorandum could impact endangered and threatened species and designated critical habitats are more than sufficient to meet the "may affect" standard articulated above. 51 Fed. Reg. 19,926 (Jun. 3,

[27] NEPA's implementing regulations determine "significance" by evaluating both context and intensity. 40 C.F.R. § 1508.27. "Context" refers to the scope of the activity, including the affected region, interests, and locality, which varies with the setting of the action, and includes both short and long-term effects. 40 C.F.R. 1508.27(a) (2018). "Intensity" refers to the severity of impact, as determined by consideration of ten factors, one of which evaluates impacts on ESA listed species and designated critical habitat. 40 C.F.R. § 1508.27(b); *see also Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

1986); *Karuk Tribe*, 681 F.3d at 1027. CEQ therefore must conduct formal Section 7 consultation in connection with the interim final rule.

Below is a list of questions that are vital to a better understanding of how CEQ intends to comply with its Section 7 consultation requirements:

1. Why did the interim final rule fail to identify ESA Section 7 consultation as a requirement that must be complied with?

2. Does CEQ consider the interim final rule to constitute an "agency action" for purposes of ESA Section 7 consultation? If not, please explain the underlying rationale.

3. Does CEQ assert that the interim final rule does not satisfy the "may affect" standard as defined in 51 Fed. Reg. 19,926 (Jun. 3, 1986) and *Karuk Tribe*? If so, please explain the underlying rationale.

4. Has CEQ elected to complete an informal consultation with the Services? If so, did CEQ determine its action is "not likely to adversely affect" a listed species or is "likely to adversely affect" a listed species,[28] and what was the outcome of the informal consultation?

5. What impacts does CEQ anticipate the interim final rule and CEQ's 2020 NEPA implementing regulations will have on threatened and endangered species and critical habitat?

V. CEQ Must Prepare a Cost-Benefit Analysis Pursuant to Executive Order 12866

CEQ's interim final rule constitutes a "significant regulatory action" as defined in Executive Order 12866. CEQ must therefore prepare a cost-benefit analysis and submit the rule to the Office of Information and Regulatory Affairs ("OIRA") for review. President Clinton issued Executive Order 12866 to establish procedures for "Regulatory Planning and Review." E.O. 12866 (Sep. 30, 1993); 58 Fed. Reg. 51,735 (Oct. 4, 1993). Pursuant to this order, the Office of Management and Budget ("OMB") is responsible for coordinating reviews of agency rulemakings. E.O. 12866, § 2(b). Within OMB, OIRA "is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order [E.O. 12866], and the President's regulatory policies." *Id.* OIRA's duty to review a rule hinges in part on whether the rule constitutes a "significant regulatory action." E.O. 12866 defines "significant regulatory action" as any regulatory action that is likely to result in a rule that may:

(1) "Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity,

[28] *See* U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*.

competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;"

(2) "Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;"

(3) "Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof;" or

(4) "Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

E.O. 12866, § 3(f).

The determination that a rulemaking is a "significant regulatory action" triggers a number of agency duties, including the responsibility that the agency prepare "[a]n assessment of the potential costs and benefits of the regulatory action," for the rule and submit it to OIRA, which OIRA must review within 120 days. E.O. 12866, §§ 6(a)(3)(B) & 6(b). For those rulemakings determined to have more than $100 million per year in impact to the economy or to "adversely affect in a material way" the environment or tribal communities, the order requires a more rigorously-defined cost-benefit analysis taking into account "[a]n assessment, including the underlying analysis, of benefits [and costs] . . . together with, to the extent feasible, a quantification of those benefits [and costs]," and "[a]n assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation." E.O. 12866, § 6(a)(3)(C).

E.O. 12866 applies to agencies, which is defined as "any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1)." E.O. 12866, § 3(b). That statute defines "agency" to include: "any executive department . . . or other establishment in the executive branch of the Government (including the Executive Office of the President)." 44 U.S.C. § 3502(1). The Order defines "rules" to which it applies as "an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." E.O. 12866, § 3(d).

CEQ has recognized that the interim final rule constitutes a "significant regulatory action" for purposes of E.O. 12866. The interim final rule's regulatory analyses and notices section states:

> E.O. 12866 provides that OIRA will review all significant rules. E.O. 13563[29] reaffirms the principles of E.O. 12866, calling for improvements in the Federal Government's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory objectives. **OMB determined that this final rule is a significant regulatory action under E.O. 12866**, as supplemented by E.O. 13563.

[29] E.O. 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011).

90 Fed. Reg.10,610 (emphasis added).

Due to OMB's determination that the interim final rule qualifies as a "significant regulatory action," CEQ must prepare for OIRA—and for the public—either a rigorous cost-benefit analysis as required by E.O. 12866, § 6(a)(3)(C), or, at a minimum, the cost-benefit analysis required by section 6(a)(3)(B). CEQ and/or OIRA, however, have declined to provide any documentation concerning the basis for such a determination. Moreover, CEQ makes no mention of what steps it has taken or will take to comply with this requirement. Below is a list of questions that are vital to a better understanding of how CEQ intends to comply with the cost-benefit analysis requirement of E.O. 12866:

1. Does CEQ intend to prepare a cost-benefit analysis in conformance with E.O. 12866?

2. If not, what is CEQ rationale for not preparing a cost-benefit analysis?

3. If so, will CEQ prepare a cost-benefit analysis under section 6(a)(3)(C) or section 6(a)(3)(B)?

4. If proceeding under section 6(a)(3)(C), please explain the rationale for preparing a cost-benefit analysis pursuant to this section.

5. If proceeding under section 6(a)(3)(B), please explain the rationale for preparing a cost-benefit analysis pursuant to this section.

6. When does CEQ intend to submit any draft cost-benefit analysis to OIRA?

7. Does CEQ intend to comply with all requirements of section 6(a)(3)(E)(i)-(iii) regarding making information available to the public?

8. If not, what is CEQ's rationale for failing to comply with section 6(a)(3)(E)(i)-(iii)?

9. If so, what is CEQ's anticipated timeframe for disclosing the information identified in section 6(a)(3)(E)(i)-(iii) to the public?

10. When evaluating the costs associated with the interim final rule, how will CEQ evaluate and account for the following:
    a. Climate pollution impacts.
    b. Local and state government pollution mitigation costs.
    c. Public health impacts.
    d. Impacts on the outdoor recreation economy.
    e. Impacts on wildlife, including threatened and endangered species.

Conclusion

CEQ's interim final rule fundamentally undermines the purpose and intent of NEPA, and sows profound uncertainty in the environmental review process. We request that you rescind the flawed interim final rule and the Feb. 19 memorandum. Thank you for your consideration of these comments. We look forward to CEQ providing detailed responses to the questions posed herein. If you have any questions or if there is any additional information we can provide, please do not hesitate to contact Johanna Hamburger at the email address or phone number listed below.

Sincerely,

Johanna Hamburger
Director and Senior Attorney
Phone: 202-446-2136
Email: johanna@awionline.org

Machelle R.L. Hall
Senior Attorney
Phone: 202.446.2146
Email: mhall@awionline.org