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March 3, 2020

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CEQ/EOP
730 Jackson Place NW
Washington, DC 20503

Cc: Senator Kamala Harris
Senator Diane Feinstein
Representative Jared Huffman

Re: Docket CEQ-2019-0003 Proposed Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

Dear Mr. Boling,

We appreciate the opportunity to review and critique the proposed "update" to the National Environmental Policy Act (NEPA). We also appreciate the CEQ "Redline" incorporating the proposed revisions, without which we would not have recognized that the revised document had much to do with the original intent of the Act.

Preamble:

It is not in dispute that the current Administration is at war with environmental regulations – which they see as "burdensome" to commerce and extractive industries. We identified this in a letter to the Senate (in appendix) as the incoming Administration was selecting their cabinet – with over 75% of them coming from the fossil fuel sector.

We were warned about the possibility of this sort of maneuver in the Federalists Papers No. 10,[1] that a concentration of any one interest in the administration of government threatens the health of the State. James Madison warned us "When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens."

With 75% of the Executive Cabinet coming from one industry, it is abundantly clear that the public good and rights of other citizens are under severe threat. I would go so far as to say that we have had an industrial coup. So under this rubric, to allow this Administration

[1] Madison, J., A. (No. 10) "The Union as a Safeguard Against Domestic Faction and Insurrection" from *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federal Convention, September 17, 1787* by publishing firm J. & A. McLean, (1778).

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to modify the very framework of environmental regulation is not just unwise, it is suicidal.

While NEPA has served well to guide the stewardship of our public commons – resulting in cleaner waters and clearer air, and recovering natural habitats and their consequent recovery of wildlife in many habitats than we had prior to NEPA enactment, it has not brought enough force to bear on the filthy habits of industry. This is evidenced by the growing areas of marine hypoxia,[2] the prevalence of plastics in the ocean and across the lands,[3] the catastrophic population decreases in birds[4] and insects, and the catastrophic decline in bees, wasps, and other pollinators upon which our very food supply depends. [5]

It is also extremely evidenced by raging wildfires in California, Australia, and soon in Colorado, Montana, and Wyoming, extreme weather conditions globally, and bizarre over-heating of the Arctic and Antarctic brought on by catastrophic climate change – specifically caused by the burning and extraction of fossil fuels. So if NEPA should be modified at all, it should become even more precautionary, not less.

But this is apparently not the strategy behind this current effort to eviscerate NEPA. This current effort can only be categorized as "Corporate over-reach" and the entire effort should be scuttled if the survival of the planet is the regulatory objective.

The Document and Proposed Changes

If CEQ-2019-0003 is the agency's response to the public's input to CEQ-2018-0001 "twenty questions," you have missed many of the points we made in our August 2018 response (our comments to CEQ-2018-0001 in the appendix).

While the stated intention for the revisions is to "modernize and clarify the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action," it is quite clear from the outset that "modernizing and clarifying" has very little to do with this current effort. And given the current makeup of the Council on Environmental Quality, the Council is highly unqualified to take on this task.

Critique of Proposed Revisions:

[2] Ralph F. Keeling, Arne Körtzinger, and Nicolas Gruber (2010) *Ocean Deoxygenation in a Warming World* Annual Review of Marine Science Vol. 2:199-229

[3] Andrés Cózar et. al. (2014 *Plastic debris in the open ocean* Proceedings of the National Academy of Sciences v. 111 (28) 10239-10244

[4] Scott R Loss, Tom Will. Peter P Marra (2012), *Direct human-caused mortality of birds: improving quantification of magnitude and assessment of population impact* Frontiers in Ecology and the Environment. Volume10, Issue7

[5] Damian Carrington (2019) *'Insect apocalypse' poses risk to all life on Earth, conservationists warn* The Guardian

§ 1500.1 Purpose and policy.

CEQ's intent is immediately betrayed in the very first paragraph on the Purpose of the Act wherein CEQ has taken the original clear, descriptive paragraph composed of unambiguous declarative sentences:

> "The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals and provides means (section 102) for carrying out the policy. It contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to provide for informed decision making and foster excellent action."[6]

…and converted it to procedural blather loaded with questionable (and litigable) adjectives and value statements:

> "The National Environmental Policy Act (NEPA) is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process. Section 101 of NEPA establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Section 102(2) of NEPA establishes the procedural requirements to carry out the policy stated in section 101 of NEPA. In particular, it requires Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment. The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision making process. NEPA does not mandate particular results or substantive outcomes. NEPA's purpose is not to generate paperwork or litigation, but to provide for informed decision making and foster excellent action."[7]

What is exactly meant by "consider?" What value brackets will be used to implement the following contorted sentence?

> "…to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in

[6] Original text of 40 CFR 1500.1.a
[7] Proposed revision to 40 CFR 1500.1.a

> productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

What are "all practicable means and measures?" What is meant by "productive harmony?" What are the "social, economic and other requirements" referring to?

What is meant by "significantly affecting?" What is the "quality of the human environment?" What threshold will be used to establish "relevant environmental information?" Does "informing the public about the decision-making process" mean that the public will be told what the extractive industries have decided to do?

If the purpose of the revisions is to not "generate paperwork or *litigation*," then the proposed changes to CFR 40 1500 takes off on completely the wrong track. Far from providing clear guidance in an effort to avoid "unnecessary burdens and delays," the very first paragraph is an invitation to extensive litigation.

So under the rubric of this admonition, the following comments are intended as a critique of the proposed changes:

Removing the original wording in **§** 1500.1(b) is a bad idea. This paragraph really states one of the main intentions of the original document – assuring that the public has a clear stake in the management of our government by way of informed science, and that actions will not be taken until the proposed actions have been subjected to "accurate scientific analysis, expert agency comments, and public scrutiny."

> "(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail."[8]

Replacing this with more of the proposed blather again does little to assure us that any proposed action will not end up in a shoot-out between the NGOs and agency lawyers. It appears as if the intent of this proposed revision is to cut the public and science out of the decision-making process and replace it with decision-making by "Federal agencies."

For an Administration that is deeply perturbed by "government over-reach," one would suppose that handing all of this decision-making power over to "Federal agencies" would be anathema to their "antigovernment" sentiments – unless, of course the Executive branch continues to populate the management of these "Federal agencies" with industry shills and lobbyists.

❖ **Recommendation:** Do not revise **§** 1500.1(b)

[8] 40 CFR 1500.1.b

Striking out Section § 1500.1(c) is a bad idea. It states the clear intent of NEPA to "help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose." I can see absolutely no reason to strike this statement unless the intent of striking it is to allow for further muddying the waters of the Act. (I sense a theme here…)

❖ **Recommendation:** Do not strike § 1500.1(c)

Striking the entirety of Section §1500.2 "Policy" is a bad idea. This section frames the remit and dignity of the Act. It speaks of avoiding extraneous data, of assuring that Environmental Impact Statements are "…concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses. It "encourage(s) and facilitate(s) public involvement in decisions which affect the quality of the human environment." Why would CEQ want to strike these provisions? What is CEQ reserving this section for?

❖ **Recommendation:** Do not strike § 1500.2 Policy

§ 1500.3 NEPA compliance

§ 1500.3(a) should not include EO 13807. This Executive Order is specific to infrastructure projects and does not belong in an overarching policy document. My suspicion is that the inclusion of EO 13807 is a Trojan Horse that brings with it procedural anomalies not consistent with the original stated purpose of NEPA. If this is the case, then these proposed "procedures" should be directly written into the Act, not shoe-horned in on the back of an Executive Order.

❖ **Recommendation:** EO 13807 should not be referenced as a directive or a supplemental document; rather if text from EO 13807 is to be used, the subject text needs to be included in the text of NEPA

The final sentence of § 1500.3(a) "Agency NEPA procedures to implement these regulations shall not impose additional procedures or requirements beyond those set forth in these regulations, except as otherwise provided by law or for agency efficiency." Is yet another place where a clear paragraph is muddied up. What actually does this sentence mean? How does it clarify this "Mandate" paragraph?

❖ **Recommendation:** Do not revise § 1500.3(a)

§ 1500.3(b)(1) *Exhaustion* This text implies that "comments on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment" needs to be considered at the time of the Agency's notice of intent to prepare an EIS. This seems to infer that any objections, comments, studies, and analyses needs to be introduced into the

EIS. While this might make sense for the Agency, it is highly impractical to assume that stakeholders would have pre-assessed objections at the notice of intent.

❖ **Recommendation:** Do not revise **§** 1500.3(b)

§ 1500.3(b)(2) Who will "summarize" all public comments? I believe that all of the public comments which are not duplicates should be included in an appendix of the EIS and referenced to how the comments were considered and addressed. This has been how public comments have been handled in the past, and it has served reasonably well.

The Agencies under the current Administration have been known to meddle with public comments to bias their decision to their preferred outcomes. This bad habit needs to be prohibited. The public comment period needs to be transparent. All qualified and expert comments and opinions need to be referenced in an appendix and indexed to how and where the expert comments and opinions were addressed in the FEIS.

§ 1500.3(c) I find the proposed revisions to this section particularly troubling. Who would these "private parties" be? Industry representatives, perhaps? How would conditions on a 'stay' be determined? The requirement of a bond as a condition of a stay might preclude all but the most well-greased industry shills to meddle with an agency's decision. If the Agency was earnestly attempting to preserve the natural environment, any industry might impose a "stay" on the decision, conversely if the Agency's aim was to harm the natural environment, it is likely that any required "bond" would interfere with the public interest in conserving the environment.

❖ **Recommendation:** Do not revise **§** 1500.3(c)
§ 1500.5(d) *Remedies* section seems pretty detailed framework to absolve any agency from legal action in the event that by way of direct intention, or intentional avoidance, the NEPA guidelines are violated. This is quite an expansion on the original intent of the paragraph "It is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action."

❖ **Recommendation:** Do not revise **§** 1500.3(d)

§ 1500.5(g) How are unestablished time limits met?

❖ **Recommendation:** Do not revise **§** 1500.5(g)

PART 1501—NEPA AND AGENCY PLANNING

PART 1501 Authority: EO 13807 shows up again, which seems to have some verbiage that subordinates NEPA partially for the purpose of "One Federal Decision." NEPA should be the overarching procedural document not subordinate to Executive Orders.

❖ **Recommendation:** EO 13807 should not be referenced as a directive or a supplemental document; rather if text from EO 13807 is to be used, the subject text needs to be included in the text of NEPA

§ 1501.1 NEPA threshold applicability analysis

This section seems to be an invitation to litigate, given that there are a lot of determinations of applicability. This section muddies the intent of NEPA to provide procedural guidance. All of the struck text under the rubric of "Purpose" (also struck) are clear and concise. I find no need to strike the original text, or to include the proposed ambiguating text.

❖ **Recommendation:** Do not revise **§** 1501.1

§ 1501.2 Apply NEPA early in the process

(a) Striking "Shall" and replacing it with "Should" ambiguates the guidance. What is a "reasonable time?" What does it mean that agencies should "consider" environmental impacts? The original text (struck) more clearly adheres to the original intent of the Act.

§ 1501.2(b)(2) What is meant by "appropriately considered?"

❖ **Recommendation:** Do not revise **§** 1501.2

§ 1501.3 Determine the appropriate level of NEPA review

Given that the word "significant" is used eight times in this section (two struck), but the definition is removed from **§** 1508.27, what would this term now mean? Who will be determining what is "significant" and what the threshold is for "significance" and "significantly?"

§ 1501.3(b)(1) "must be analyzed" has been replaced with "may consider." Who will make the determination as to whether the action is worthy of consideration? We suggest that the replacement not be made, and that the original text not be struck.

❖ **Recommendation:** Do not revise **§** 1501.3 Do no replace "must be analyzed" with "may consider."

§ 1501.9 Scoping

§ 1501.9(e) *Determination of Scope*

§ 1501.9(e)(2) The following text in the original document is critically important to assure that repetitive assaults, synergistic impacts, and ongoing harassments are accounted for in any environmental document:

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

In some cases – for example in the course of marine seismic survey impacts, the cumulative impacts exacerbate the biological damages and are in sum significantly greater than the individual action impacts.

❖ **Recommendation:** The section on "cumulative impacts" should not be struck.

§ 1501.11 Tiering

This section seems to be one of the only potentially helpful revisions. We are used to environmental documents that may have pages and pages of repetitive text with important points buried within. Proper application of Tiering could eliminate this practice.

§ 1501.11.2 The word "assessment" should not replace "analysis." Assessment is a subjective action – and is applies under the previous addition of the term "environmental assessment." Analysis refers to an evaluation of the proposed actions and impacts prior to initiating or executing the action.

❖ **Recommendation: In §** 1501.11.2, Do not replace the word "analysis" with the word "assessment."

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Authority: EO 13807 shows up here again, and should not, as it infers instructions particular to infrastructure environmental approval procedures not contained in the NEPA document which may be used to supersede the act. Also 82 FR 40463 deals specifically with infrastructure development permitting procedure, so would be tangential to other policy actions governed by NEPA - another example of muddying the waters of NEPA. Both of these documents need to be pulled for all Authority sections of the proposed revisions.

❖ **Recommendation:** Neither EO 13807 and 83 FR 40463 should not be referenced as directive or supplemental documents, rather if text from either of these are to be used, the subject text needs to be included in the text of NEPA

§ 1502.1 –The original Purpose states:

> "The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government."

A simple, clear, declarative sentence. The proposal to revise this to:

> "The primary purpose of an environmental impact statement prepared pursuant to 102(2)(c) is to ensure agencies consider the environmental impacts of their actions in decision making"

More blather. "Consider" and then what? Go out and have some drinks with industry lobbyists?

Again, the last sentence has equally been muddied up. Changing the original text:

> "An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions."

To the proposed revised sentence:

> "An environmental impact statement is a document that informs. It shall be used by Federal agency decision makings"

Admittedly the proposed sentence is shorter, but much more vague. I see no useful reason to change this sentence. (By the way, "makings" used as a noun is a colloquial perversion of the verb "to make" and is not really found in proper English.)

❖ **Recommendation:** Do not revise **§** 1502.1

§ 1502.2(a) - Removing the clause "analytic rather than" from the sentence "Environmental impact statements shall not be encyclopedic…" serves no clear purpose except to infer that analysis is not preferred, and encyclopedic definitely not preferred. Moving "analytic" to paragraph (c) does not make this section more concise.

❖ **Recommendation:** Do not strike "analytic rather than." Maintain the original wording in **§** 1502.2

§ 1502.4(a) – Making a clear sentence muddy again, for no apparent reason.

❖ **Recommendation:** Do not revise § 1502.4(a)

§ 1502.4(c) – Replacing the word "shall" with "should" infers a "guideline" or a recommendation," inferring that it also "may not." "Shall" is used in law is a directive – it is an obligation. "Should" is a suggestion upon which a value judgement must be made. Who will make this judgment?

❖ **Recommendation:** Don't remove "shall" from this paragraph.

§ 1502.5 Timing. In the preface paragraph, again, replacing the word "shall" with "should" infers a "guideline" or a "recommendation," inferring that it also "may not." Shall is used in law is a directive – it is an obligation. Should is a suggestion upon which

a value judgement must be made. Who will make this judgement? Don't remove "shall" from this paragraph.

❖ **Recommendation:** Don't remove "shall" from this paragraph.

§ 1502.5(b) Replacing this sentence:

> "Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies"

With:

> "Federal agencies should work with potential applicants and applicable State, Tribal, and local agencies prior to receipt of the application"

Again, this word "should" enters into the ambiguity of the proposed sentence.

The distinction between "encouraged" and "should" here is a matter of affirmation over a suggestion.

❖ **Recommendation:** Don't remove "shall" from this paragraph. If the sentence needs to be modified to reflect a more formal relationship with Tribal members, it should be changed to:

> "Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State, *Tribal and* local agencies."

§ 1502.7 Page limits. As a regular reader and commenter on EAs and EIS's, I appreciate the intent here, but clarity should not be sacrificed to brevity.

§ 1502.9(d)(4) In the sentence:

> "May find that changes to the proposed action or new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement."

Who determines "significant" here, given that the suggested revisions strike the definition (§ 1508.27)? The agency's idea of significance can clearly vary with what scientists and the public find "significant." This is clearly illustrated in the 2012 issuance of BOEM 2012-005 OCS EIS/EA[9] wherein the agency used the word "negligible" 954 times and "minor" 513 times. But scientists and the public found that assessment to be inadequate,

[9] 2012 Atlantic OCS Proposed Geological and Geophysical Activities Mid-Atlantic and South Atlantic Planning Areas Draft Programmatic Environmental Impact Statement.

ushering in a revised EIS in 2014,[10] and again in 2017,[11] which culminated in a "Finding of no significant impact" (FONSI) being issued in 2018 – but still the "finding" is so disputed that the stated action under the EIS has not commenced.

Setting these procedures under the revised 1507.3 does not clarify the proposed determination of the word "significant" (see comments on 1507.3 below). We suggest that if, after a preparation of a Final Environmental Impact Statement (FEIS) has been issued, that should the action be revised, that some review procedure *outside* of the lead agency be enlisted to determine if the changes require more analysis. This needn't be a full production, but there needs to be a traceable, and transparent review process to track revisions to an ongoing, permitted action.

❖ **Recommendation:** § 1502.9(d)(4) should not be added to the text.

§ 1502.12 Summary. The original reads:

> "Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives)."

Replacing "areas of controversy (including issues raised by agencies and the public)," with "areas of disputed issues raised by agencies and the public)," is just sloppy writing. What would be the "areas of disputed issues?" What makes this statement more concise than the original? And where might you place the open parenthesis?

❖ **Recommendation:** Do not revise § 1502.12

§ 1502.14 Alternatives including the proposed action.

The original opening paragraph seems to clearly say it all: "This section is the heart of the environmental impacts statement." It goes on to say "it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public."

Why would CEQ want to remove the "heart of the environmental impact statement" that sharply defines the issues that provide a clear basis for choice, and replace it with blather? Perhaps the proposed revisions to this paragraph and the elimination of the most focused statement in this section speaks for itself – and continues to substantiate our point that the current CEQ, with their singular focus on eviscerating the Act under the instruction of their industry pit-bosses, is not qualified to make these revisions.

[10] 79 Fed. Reg. 13074 and BOEM OCS EIS/EA - BOEM 2014-001
[11] 82 FR 26244 NOAA p. 26422

Removing clear declarations in sections (a) and (b) ("Rigorously explore and objectively evaluate," and "Devote substantial treatment to each alternative") with "Evaluations" and "Discussions" substantiates this. Who will be "evaluating and discussing?" Would this be agency career professionals, or the cabal of industry shills and their minions who are now directing the agencies?

❖ **Recommendation:** Do not revise § 1502.14

§ 1502.16 Environmental consequences.

§ 1502.16.4(a) "Direct effects and their significance," and (b) "Indirect effects and their significance" were both struck here and in § 1508.8 as well. How does this advance the purpose of the Act? Clearly it doesn't.

This is also the case for (d) "The environmental effects of alternatives including the proposed action." Which should not be struck.

❖ **Recommendation:** These clauses should not be struck from **§** 1502.16.4(a).

§ 1502.21 Incorporation by reference.
I find the following (struck) paragraph useful:

> "Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference."

What will be used in lieu of references? The actual documents? Or nothing?

❖ **Recommendation:** § 1502.21 should not be struck from the document

§ 1503.3 Specificity of comments and information

Paragraph (b) "Comments not provided within 30 days shall be considered exhausted and forfeited, consistent with § 1500.3(b)" should include the statement "unless extension is requested and granted per 1506.11."

❖ **Recommendation:** The statement "unless extension is requested and granted per 1506.11" should be included in § 1500.3(b)

§ 1503.3(d) is again another example where a clear directive is turned into mush. In order for a cooperating agency to specify mitigation measures, they would first need to express

reservations or objections. What is served by pulling this clause out of the paragraph? And as the cooperating agency has already entered into an agreement with the lead agency, it stands to reason that they have some statutory authority – at least in the context of the proposed action. We suggest that the original text remain without revision.

❖ **Recommendation:** Do not revise § 1503.3(d)

§ 1503.4 Response to comments

I find the proposed revisions to this section particularly troubling. One of the main purposes of NEPA is to provide the public and other stakeholders an opportunity to determine how our common national assets and their environments are managed. This is done by way of individuals, organizations, and experts taking our time to review the environmental document, analyze the proposals, and provide comments and critiques.

I have been reviewing and commenting on Federal environmental documents for 20 years and have found that the process has become increasingly opaque – specifically as a product of the Agencies' deference to industry and the military. The amount of what might be considered "non-helpful" comments is directly proportional to the opacity of the process, because the public does not want to be cut out of the decisions.

Unfortunately, this is being exploited by "special interest" groups – environmental, industry supporters, and libertarians to generate heaps of "boilerplate" that just tangle up the process. So getting three million comments – 95% of which are boilerplate written by special interests does not serve the process. In fact, it thwarts it, as this number of comments can't be read by humans, so qualified comments – which should get qualified responses, get buried in a thicket of garbage. I can understand how the agencies are reluctant to engage in the "comment rage," but making the process more opaque and less responsive will evoke even more rage, and consequently more useless comments.

By contrast; the 2001 NEPA review of the Surveillance Towed Array Sensor System – Low Frequency Active (SURTASS-LFA) Sonar was a completely transparent process garnered 1070 comments from Congressional leaders (1), Federal Agencies (4), State and Local Agencies and Officials (58), Organizations and Associations (58), and individuals (1000). There we two or three public hearings where people could line up and ask questions, and submit comments. This was NEPA in its most effective state – before agencies started building up ways to obstruct public input.

Oddly the agency – in this case the US Navy didn't want the level of public scrutiny they got (project manager Joe Johnson said "We'll never do that again…") and thus started the various ways the agencies made public comments on proposed actions more difficult.

§ 1503.4 (a) What is meant by "substantive comments?" Who will make that determination? Why will they only be "considered?" If the agency "may" respond, may they also not respond? That "may" needs to be replaced by "shall." In fact, none of the

proposed revisions are acceptable; they are just an invitation for litigation – which CEQ purportedly wants to avoid.

In § 1503.4(a)5: If the agency decides that the comment does not warrant agency response, an explanation needs to be substantiated, not just as an opinion by the agency. In the case of nuisance comments (aforementioned boiler plate), pointing out that boilerplate is useless may curb the generation of it.

§ 1504.2(g) "Economic and technical considerations, including the economic costs of delaying or impeding the decision making of the agencies involved in the action." The intent of the Act was not to place environmental concerns in an arbitrary economy. This clause smells of trouble, so it should be removed.

§ 1504.3(a).2 "Include such advice whenever practicable…" Who will determine what is "practicable?" What would be "impracticable" about including advice that would lead to an agency or entity from referring a matter to Council? I must be missing something here – or CEQ just has some contorted agenda they are attempting to thread through this section.

§ 1504.3(c).1 We advise not extracting the following:

> "and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section."

It would stand to reason that if a matter has been submitted to Council, that it is unresolved. Acting on something that is not resolved by Council smacks of "kangaroo court" procedures.

§ 1504.3(c).2(i) The distinction between "disputed" and "in controversy" would suggest that if there was a "controversy" about a matter or issue, that the fastest way to bring it into litigation would be to deny the opportunity to discuss and resolve the controversy. We suggest that the original phrase "in controversy" be retained, as opposed to "disputed."

§ 1504.3(c).2(iii) Replacing:

> "Present the reasons why the referring agency believes the matter is environmentally unsatisfactory."

With:

> "Present the reasons for the referral"

Here is again another example where a simple, declarative sentence turned into a useless appendage. One would expect that by the time that the process has worked through § 1504.3(c).2 that the reason for the referral would be pretty clear.

The indexing after § 1504.3(c).2(iii) is incorrect, as it repeats ii, iii, and goes on to iv.

§ 1504.3(d).2 "Be supported by evidence and explanations, as appropriate." Would explanations replace evidence, or would evidence be required along with explanations?

§ 1504.3(e) These is another place where input from stakeholder's who might have a stake in the referral and the response is struck. The NEPA process should always remain open to all stakeholders until the FEIS is issued.

§ 1504.3(f).3 as above. The public should not be excluded from the process. Where else might CEQ or the lead agency "obtain additional views?" The NEPA process should always remain open to all stakeholders until the FEIS is issued.

❖ **Recommendation:** Do not revise § 1503.4

PART 1505—NEPA AND AGENCY DECISION MAKING

"Authority." EO 13807 shows up here again, and should not, as it infers instructions particular to infrastructure environmental approval procedures not contained in the NEPA document which may be used to supersede the act. Also 82 FR 40463 deals specifically with infrastructure development permitting procedure, so would be tangential to other policy actions governed by NEPA - another example of muddying the waters of NEPA. Both of these documents need to be pulled for all Authority sections of the proposed revisions.

❖ **Recommendation:** Neither EO 13807 and 83 FR 40463 should not be referenced as directive or supplemental documents, rather if text from either of these are to be used, the subject text needs to be included in the text of NEPA

§ 1505.1 "Decision making procedures." These are important and as they are under the rubric of "Agency Decision Making," they should not be struck.

§ 1505.2(c). This looks like some convoluted legerdemain designed to get the word "enforceable" into the clause - tempered by "requirements or commitments." And yet again an example of a clear directive is muddied up by ambiguous, but probably pernicious intentions.

§ 1505.3(c) Commenting agencies, not just participating agencies, should be informed about progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

§ 1505.3(d) Does "publish" also mean "make available to the public?"

❖ **Recommendation:** Do not revise § 1505.3

PART 1506—OTHER REQUIREMENTS OF NEPA

"Authority." EO 13807 shows up here again, and should not, as it infers instructions particular to infrastructure environmental approval procedures not contained in the NEPA document which may be used to supersede the act. Also 82 FR 40463 deals specifically with infrastructure development permitting procedure, so would be tangential to other policy actions governed by NEPA - another example of muddying the waters of NEPA. Both of these documents need to be pulled for all Authority sections of the proposed revisions.

❖ **Recommendation:** Neither EO 13807 and 83 FR 40463 should not be referenced as directive or supplemental documents; rather if text from either of these are to be used, the subject text needs to be included in the text of NEPA.

§ 1506.5 Agency responsibility for environmental documents

§ 1506.5(c) We have seen EIS's and EA's prepared by contractors who have a tangential, although not a direct stake in the outcome. We have found these to be problematic, and commenting on them have taken a lot of extra work. To safeguard against this, we suggest that the following sentences not be struck:

> "It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project."

❖ **Recommendation:** Do not strike the paragraph cited above.

§ 1506.6 Public involvement.

As pubic involvement is one of the guiding lights of NEPA, this section is particularly sacrosanct.

§ 1506.6.(b)(2) While there are some provisions of public notice provided in 1506.6(b)(3), with the exception of notice "by mail," all stakeholders and interested organizations who have expressed that interest to rulemaking agencies should receive notice, this the clause should read:

> "In the case of an action with effects of national concern, notice shall include publication in the Federal Register notice by ~~mail~~ traceable communications to national organizations reasonably expected to be interested in the matter and may

include listing in the 102 Monitor. An agency engaged in rulemaking may provide notice ~~by mail~~ to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations."

§ 1506.6.(c). Added text is acceptable, but the struck text from the original should remain:

> (c) Hold or sponsor public hearings, or public meetings, or other opportunities for public engagement whenever appropriate or in accordance with statutory requirements applicable to the agency. Agencies may conduct public hearings and public meetings by means of electronic communication except where another format is required by law. Criteria shall include whether there is:
>
> (1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.
>
> (2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

§ 1506.7 Further guidance.

EO 13807 shows up again. As NEPA is the overarching document guiding the application of environmental regulations, it should not be subordinated to and external ruling, statute, or document. Provisions from EO13807 that the CEQ desires to include in NEPA should be clearly articulated in NEPA, and not referred to an external document.

❖ **Recommendation:** Neither EO 13807 should not be referenced as a directive or a supplemental document, if text from EO 13807 is to be used, the subject text needs to be included in the text of NEPA

❖ **Recommendation:** None of the guidance clauses under 1506.7 should be struck.

§ 1507.3 Agency NEPA procedures

§ 1507.3(b)(4) Who are the "decision makers" if they are not agency officials?

❖ **Recommendation:** The term "agency officials" should not be replaced.

PART 1508—DEFINITIONS (original numbering system retained in these comments)

§ 1508.4 Categorical exclusion.

As “Categorical exclusion” plays such an important role into whether an EIS or EA is required, it is imperative that this full definition be clearly defined in the document.

❖ **Recommendation:** Added text is acceptable, original text should remain.

§ 1508.7 Cumulative impact.

It is extremely important that the term “Cumulative Impact” should remain in NEPA. There are many places in the proposed changes to NEPA where consideration of cumulative impacts is excised. The problem with this is that increasingly proposed actions have complex interleaved, or concurrent stressors and impacts on the environment. To ignore these phenomena for the sake of industrial expediency is short-sighted, non-scientific, and ultimately suicidal.

❖ **Recommendation:** Do not remove the definition of “Cumulative Impacts” from the definitions, or from anywhere in the document.

§ 1508.8 Effects.

Condensing the entire “Effects” section dos not serve clarity, rather it ambiguates the term. Additionally, the addition of Section 2 contradicts the condensed definition, and suspiciously includes the directive “Analysis of cumulative effects is not required.” This entire paragraph should be removed from the definition.

❖ **Recommendation:** Do not condense § 1508.8 Effects. Remove proposed new paragraph (g). Remove proposed text from § 1508.8(g)(2)

§ 1508.13 Finding of no significant impact.

Finding of no significant impact should be substantiated as it is by the struck text. Given the remit of the proposed revisions include avoiding redundancy, the following struck text should be included:

> “If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.”

❖ **Recommendation:** Do not strike text from § 1508.13

§ 1508.14 Human environment.

The proposed revisions are grammatically incorrect: something does not “mean comprehensively.” It could mean “the natural environment…”

As the term “Human Environment” is used extensively throughout NEPA to include humans and their relationship with the natural environment (including the economic

relationships), clarification is important under this term and the following text should not be struck:

> "This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment."

❖ **Recommendation:** Do not strike the text above from § 1508.14

§ 1508.20 Mitigation.

The added preamble to the five definitions of "mitigation" is just blather – and it further reduces the clarity of the definition with a clause that is not germane to the definition ("While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation.").

❖ **Recommendation:** The five original declarative sentences define mitigation well and should not be prefaced or modified.

§ 1508.22 Notice of intent.

This definition includes a description of actions that are germane to the notice. These are:

> (a) Describe the proposed action and possible alternatives.
>
> (b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.
>
> (c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

❖ **Recommendation:** The clear directives a, b, and c should not be struck from § 1508.22

§ 1508.25 Scope.

CEQ is proposing striking a lot of important clarifying text such that the term "Scope" is rendered pretty meaningless. What is the intent of this following clause?

> "The scope of an individual statement may depend on its relationships to other statements."

Are these "other statements" Environmental Impact Statements or Environmental Assessments, or are they just "statements."

❖ **Recommendation:** No test should be struck from § 1508.25

§ 1508.27 Significantly

As the term "significant" appears 104 time in the NEPA document, it doesn't make sense to delete the definition. Left undefined, this important term is left up to the vagaries of agency officials and back-room discussions.

Additionally, the struck text actually makes a very clear set of arguments for what is "significant."

❖ **Recommendation:** Do not strike the term "Significantly," "Significance," or "Significant" from the document.

One of the stated rationales of eviscerating or debilitating NEPA is that the environmental precautions are "too costly" for the economic return, and that conservation practices somehow hobbles "the economy." This is certainly not evidenced by the "continuous economic growth" of the economy since the crash of 2008 – wherein even under the "draconian environmental constraints," industry has still managed to profit.

Even the fossil fuel industry in the US, which has for some reason taken to over-production in the past decade (making the US a net exporter of hydrocarbons), has not suffered much; rather they have not grown as rapidly as they had hoped.

But I find it ironic that just as I am completing our critique and comments of the proposed NEPA revisions, the economy is beginning to retract again, largely due to a lousy relationship between human economies and Nature.[12] As we are fond of saying in our industry "nature bats last."

Sincerely,

Michael Stocker
Director
Ocean Conservation Research

[12] Chuin-Wei Yap, Jon Emont *World Economy Shudders as Coronavirus Threatens Global Supply Chains* Wall Street Journal, Feb 23, 2020

Post Script:

As I was finishing up these comments, the Whitehouse orchestrated a "Briefing Call" on the Notice of Proposed Rulemaking on the proposed NEPA revisions. It was in this call that it finally became clear to me as to why EO 13807 is so liberally woven into the proposed revisions; the Administration really wants to get their universally reviled transportation infrastructure plan in place.

This is a plan that will entirely hinge on rebuilding freeways and bridges for fossil-fuel propelled cars and trucks – obligating all of us to continue down this disastrous energy strategy for the next 30 years; a strategy that will ostensibly kill the planet we live on. Thus is the consequence of the Fossil Fuel Factions in the Executive Branch that I identified in the preamble of this critique.

It is also a plan that would sell off (privatize) any infrastructure assets that are not nailed down by the Department of Defense (the Interstate Freeways). All bridges would become toll bridges; all freeway rest areas would become toll rest areas; all roads would become toll roads. It is a plan that is so distasteful to the American Public that CEQ had to hide it in the NPRM while defecating all over NEPA. What despicable cowards!

But in my humble mind the truckers just shot a hole in CEQ's foot when, on the Whitehouse "Briefing Call," Bill Sullivan with the American Truckers Association let us know that "$120 billion lost due to congestion because of projects not approved. Millions of tons of CO2 wasted. 10% of fuel wasted in traffic."

It seems to me that if we took all the cars off the major highways and replaced them with High Speed Rail (the Oilmen's worst nightmare), the truckers would have all the pavement to themselves. This would be a compromise I might support.

Sincerely,

Michael Stocker
Director
Ocean Conservation Research

Appendix

Sign-on letter to the Senate about factions in the Executive branch

OCR Responses to CEQ-2018-0001

Dear Legislative Assistant,

We are coalition of concerned human services and conservation public service organizations. Please let your boss know that we are concerned that the incoming administration is concentrating industrial interests within his cabinet – which is contrary to the designs of the Framers of the Constitution as outlined in The Federalists Papers No. 76 (regarding Presidential appointments). Please convey our concerns to the Senator as expressed in the following letter:

Dear Hon. Senator,

Through this last presidential election our nation has arrived at an unprecedented situation; having two candidates on the ballot of whom fewer than half of the American Electorate respected. This left us with a winning candidate who is not respected by a majority of American citizens. The President-elect doesn't even have a full-throated endorsement from Congressional leaders of his own party

While his campaign hinged on "making America great again," and "bringing jobs back to America," none of us – even those in his own party, were given much of a sense of how this was actually going to be accomplished. So any policy components of his campaign promises have remained largely ambiguous.

This has been the case until recently with the arriving selection of his cabinet, which appears to be monotonically weighted toward the hydrocarbon industry – both domestically, and internationally. It is clear from his selection for the State Department, along with his nominations for Environmental Protection Agency and the Department of Energy, as well as his selection for the Department of Interior are all focused on advancing the agenda of one industry – Fossil Fuels.

We, the undersigned organizations, don't believe that a cabinet selection which props up the hegemony of one industry is what the Framers had in mind when they forged the Constitution of this Great Nation. If the voice and priorities of one industry are allowed to dominate the discussion on national and international policy it will naturally do so at the expense of other energy industries, the natural environment, and governing policies that assure economic stability, security, and quality of life for the greater body of citizens of our nation.

Fortunately, the Framers did foresee the possibility that a President may be unduly influenced by focused interests not aligned with the welfare of the majority of the electorate - and thus provided for the wisdom of the Senate to moderate these selections.

With this in mind, our organizations, representing many voting American citizens throughout the country respectfully request that you do not approve of cabinet nominations of the President-elect who are from, or are active proponents of the fossil fuel industry.

Sincerely,

Michel Stocker
Director
Ocean Conservation Research

Fred Wahpepah
Founding Elder
Seven Circles Foundation

Paige Jenkins
Director
The Bridge Home

Carol Hoover
Executive Director
Eyak Preservation Council

Wallace 'J.' Nichols, PhD
Independent Scientist

Giacomo Abrusci
Executive Director
SEVENSEAS

Nora. M. Nash, OSF
Director, Corporate Social Responsibility · Sisters of St Francis of Philadelphia

Dede Shelton
Executive Director
Hands Across the Sand

Todd Steiner
Executive Director
Turtle Island Restoration Network

Mary Pendergast
Sisters of Mercy Rhode Island

Mary Gutierrez
Executive Director
Earth Ethics · Earth Action

Laura Bridgeman
Director
Sonar

Sally Ann Brickner, OSF
Congregation of Sisters of St. Agnes

Alicia Cooke
Director
350 Louisiana - New Orleans

Linda Hunter
Director
Wild Oyster Project

Gail Musante,
Official Signer
Sanford-Oquaga Association of Concerned Citizens

Yvonne Taylor
Co-Founder, Vice President.
Gas Free Seneca · Seneca Lake Guardian

Greg Pace
Columbus Community Bill of Rights ·Guernsey County Citizens Support

Anita Mentzer
Director
Unitarian Universalist Pennsylvania Legislative Advocacy Network

OCEAN CONSERVATION RESEARCH

Science and technology serving the sea

August 10, 2018

Edward A. Boling,
Associate Director for the National Environmental Policy Act,
Council on Environmental Quality,
730 Jackson Place NW,
Washington, DC 20503

Re: Docket No. CEQ-2018-0001.

Dear Sir,

We appreciate the opportunity to weigh in on the proposal to revise the National Environmental Policy Act (hereinafter NEPA) – a guiding policy which has served the American people and our environmental commons for decades. In any deliberations about the effectiveness of this guidance, we must review the intent of the original Act, and compare this intent with the outcomes – i.e. the current environment for which the Act was crafted to protect.

It states in the preamble that the intent of NEPA was…

> To declare 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; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[1]

It should be noted here that there is no reference to "economic values" in this statement of intent, although in practice, economic considerations do weigh into decisions made under NEPA.

I have been engaged in reviews and critiques of Environmental Impact Statements since 1992. Over the ensuing 25+ years I have seen a few changes in how Environmental Assessments (EA), and Environmental Impact Statements (EIS) have been implemented, and changes in how the various agencies implement the act - most particularly the Department of the Navy, the Department of the Interior (DOI), the National Oceanographic and Atmospheric Administration (NOAA), The National Marine Fisheries Service (NOAA Fisheries), and the Bureau of Ocean Energy Management (DOI-BOEM).

[1] United States. National Environmental Policy Act of 1969. Pub.L. 91–190, Approved January 1, 1970. 42 U.S.C. § 4321 *et seq.*

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While there has been some room for shenanigans in the drafting of Environmental Assessments and Environmental Impact Statements, the public engagement process of NEPA has by-and-large served us well in addressing the occasional misapplications of NEPA to sidestep and skirt environmental laws, or conceal or ignore actual environmental impacts and costs of a described action.

In terms of the environmental outcomes, it is abundantly clear that in many cases the environment is in much better shape than it was in 1970. Bodies of water – rivers, lakes, streams, and the ocean, are no longer being used as toilets for industrial waste, for example. But in other cases, as in exemptions for "military readiness," hastily applied Incidental Harassment Authorizations, and rubber-stamping of "boilerplate" authorizations that have little or nothing to do with a proposed action,[2] the process has fallen short.

Additionally, it is often found that preparers of Draft Environmental Impact Statements (DEIS) will "front load" the documents with unsubstantiated determinations of "Findings of no significant impact" (FONSI)[3] or assessments of "Negligible Impacts,"[4] tainting the review process with apparent "foregone conclusions."

So whether it is due to these common "oversights" and poorly-applied guidance, the lack of resources to review the hundreds to thousands of permit applications that float through the agencies throughout the years, or deliberate obfuscation; unforeseen or un-monitored environmental compromise has been steadily eroding the habitat quality of most of the public commons administered by the Agencies since the adoption of NEPA. This is most particularly the case with habitats managed by the Department of the Interior[5].

So in this context, should NEPA be revised, it would make sense to revise it with an eye toward greater precaution and more agency accountability. Although my suspicions are that NEPA, within the short seven-and-a-half-page Act (as currently amended) probably has all the guidance necessary to successfully apply the Act;[6] rather the Act's weakness may be more of a lack of Federal resources to review the EAs, DEISs, EISs and the subsequent public comments to most effectively apply NEPA.

[2] Probably more notoriously, in reviewing the permits to the BP Deepwater Horizon-Macondo field, a "impact mitigation plan" for walrus was found.

[3] E.g. Supplemental Exploration Plan OCS-G-32303 & OCS-G-24062 Mississippi Canyon Blocks 208/253 contained numerous characterizations of habitat, animal populations, and operating conditions that were patently not true, but because this plan was among the hundreds that get systematically submitted in the Gulf of Mexico, DOI just rubber-stamped it and let the operator proceed without oversight.

[4] In OCS EIS/EA BOEM 2012-005 "Atlantic OCS - Proposed Geological and Geophysical Activities Mid-Atlantic and South Atlantic Planning Areas Draft Programmatic Environmental Impact Statement," the term "negligible impact" appeared 957 times in a 550-page document.

[5] See: George Wuerthner and Mollie Matteson 2002 *Welfare Ranching: The Subsidized Destruction of the American West* pub. Foundation for Deep Ecology

[6] See CFR Title 40, Chapter V

When I first began critiquing DEISs under NEPA the public comments were synthesized, addressed, and published in a final EIS. And while there was often "batch processing" of comments by a team of readers, it was clear from the final EIS that the public comments were being read, and synthesized by humans. The comments were clearly linked to where in the FEIS the concern had been addressed or dismissed. But as the public becomes more concerned and engaged in the NEPA process, having the agencies respond to thousands – or even millions of comments is just not practical. If humans spent one minute each synthesizing the ~3 million public comments on the review of the Public Parks and Monuments[7], it would take about 50,000 person/work/hours to synthesize. So it is probable that DOI is now using machine-reading software to sort through the comments, categorize them, and supposedly respond.

But it is not clear how this process is set up. Who sets the filters that bin the comments? How are they prioritized? What happens to the technical comments submitted by professional research and conservation organizations like ourselves, with a deeper and more nuanced understanding of a proposed action? What happens to the mathematical models we submit to substantiate our case and contribute to the usefulness of the final document?

If NEPA needs revision, it would be in opening up public access to this filtering process so that we, the public, understand clearly the priorities of the reviewing agency and how they may bias the inclusion or exclusion of public comments and input.

It is clear that this process recently ran afoul in the Parks and Monuments Review[8], because of the 3 million comments, 97% of which expressed the need to keep the monuments intact, the Department of the Interior under Secretary Ryan Zinke accidentally released a partially redacted draft of their synthesis of the public comments, excising any references to the economic benefits advanced by the public substantiating why the DOI should not diminish or tamper with any Parks and Monuments boundaries.[9]

This probably gets to the point of why there is a call for a review and revision of NEPA: the current administration, under the leadership of the Koch Brothers and the Fossil Fuel interests find the NEPA process burdensome – likely because it gets in the way of their commandeering our public assets for their private gain.

So it is likely, given the performance of the DOI in the Parks and Monuments review, that the Council of Environmental Quality (CEQ) is as equally polluted with vested industrial interests who really have no interest in managing our public commons for anything but their short-term gains.

So there is little reason to trust this particular review process, because we suspect it has little to do with "streamlining" NEPA, and everything to do with the disingenuous

[7] Review of Certain National Monuments Established Since 1996: DOI-2017-0002
[8] Ibid.
[9] Rebecca Worbly, July 24, 2018 *Public Lands Advocates Respond to New Revelations from the DOI's 'Sham Review' of National Monuments* Pacific Standard

attempts of the current leadership to dismantle our public commons and interfere with the participatory democratic process that made this nation great. We will, none-the-less enter into this process in the good faith that either through honest synthesis of our comments, or through legal procedures, our comments will be considered and will contribute to improving the NEPA process.

My input is informed by over 25 years of critiquing DEISs as a citizen, science advisor for various conservation NGOs, and most recently (in the last decade) as a director of a scientific research and policy development NGO focused specifically on the acoustical impacts of human-generated noise on marine habitat. As such, our organizational comments on internal NEPA processes (questions 1 – 3) are in response to how the processes appear from "outside." Our response to the balance of the "scope" questions (4 – 20) are pertinent to how we interface with and review EAs and DEISs.

As a matter of process, it would have been helpful to locate or link the review questions to where they reside in the statute. For example; question 4 "Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?" would be much easier to critique if the question was actually linked – or at least referenced to the format and page length guidelines of EAs and EIS's [10]. As it is, we needed to excavate those guidelines in order to make an informed statement about this question. And given that the stated objective behind this "proposed revision" exercise is to "streamline the process," the proposal is already at odds with the stated intent of the review.

This is just the sort of "shenanigan" we've encountered over the years; when critical components of a DEISs are concealed in pages and pages of repetitive boilerplate text; or when an DEIS with a 30-day comment period is released on December 20 – effectively eating up 15 days of review time in the year-end holiday season. Or in this particular case, where critical references to a proposal are not included in the review document

Regarding this specific call for public review, we feel that the Administration has called for documents to be "revised or rescinded" on principle alone, without having proved an actual need.[11] This review has all of the earmarks of a process that has been executed merely to disrupt something that has been operating successfully for years which industry perceives as an impediment to profiteering; and in revising the documents, they may find ways of eviscerating clauses and definitions to weaken the effectiveness of the Act.

So if CEQ proceeds with the rulemaking, we request that further analysis of each of the clauses be done to substantiate a real need.

---

[10] CFR: Title 40 : Chapter V : Part 1502

[11] EO 13975 called for the NOAA Acoustical Exposure Guideline to be "revised or rescinded" without understanding that these guidelines had been in development for ten years, and everybody had their hands on them – industry, the Navy, conservation NGOs, and academics. There would be nobody available to do these revisions, and rescinding them would then defer to outdated guidelines not substantiated by the "best available science." In the end, after a lot of stakeholder engagement, the guidelines remained unchanged. Much effort would have been saved had the interests dictating this clause to EO19375 took a moment to think it through.

The Questions:

NEPA Process:

1. Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?

This is a sensible proposal. Not knowing how interagency coordination has been done to date, perhaps it would be advisable to have a coordinator assigned to a document from each of the concerned agencies. These coordinators would serve as "document shepherds," and prior to submitting a the first DEIS, they would block out the entire document with the purpose of identifying where agency remits or priorities intersect or conflict. These intersection points could be linked to a workspace where the particulars of the intersection could be detailed by the specialists within the agencies with an understanding of the intersections.

This may sound complicated in terms of assigning live staff for the task. But I presume the question is being advanced because the disparate priorities of the agencies – such as the department of the Navy, and NOAA, or NMFS and the DOI, have run afoul of their conflicting agency remits, necessitating costly revisions to the DEIS.

But this is a surprising question in light of the recent revision of the National Ocean Policy Act[12] removing key provisions to Federally coordinate agencies with ocean jurisdiction.

2. Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?

If earlier studies, analysis, and decisions are not superseded by the most current science, more detailed analysis, or non-conflicted, working decisions, then by all means these data should be used as to avoid replicating efforts to establish the data points. But this provision should not be used as an excuse to rely on incomplete data where and when better, or more current data are available.

In cases where NEPA environmental provisions are met or exceeded by state or local guidelines, the more rigorous guidelines should prevail, so as to not run afoul of state or local laws, and not require the applicant to respond to (or defend) Federal, State, and Local guidelines.

3. Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

[12] Executive Order 13547

This process dovetails into our recommended solution for process question #1. If Agency "document shepherds" are assigned before the EIS or EA is released for public review, the agencies could establish a landing path to navigate the document around agency intersections.

NEPA Scope:

4. Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?

As the specifics of this question are not referenced to the defining document, I presume it is referring to CFR Title 40 Ch. V Pert 1502 "Environmental Impact Statements." If this is the case, the guidelines on form and page length don't need to be revised, rather they need to be followed. It has been increasingly the practice of the agencies to put out ever-larger documents to the point of their becoming cumbersome and an "unreasonable burden" on the public, stakeholders, and NGOs to review. It is not uncommon to have a 2000 page EIS to review. And given the 30-day review window – often aggravated by a "holiday release" (for the US Navy) or the apparent habit of DOI to release two DEISs concurrently, cutting down the size of these documents would be a worth-while endeavor.

The Federal Aviation Agency webpage on EIS Best Practices[13] states that "Susan Smillie and Lucinda Swartz identified three reasons Federal agencies fail to meet or even approach the page limits established by CEQ in a paper presented to the convention of the National Association of Environmental Professionals in May 1997. The reasons are (1.) A requirement by counsel to "beef up" EIS's in the hope that volume will deter potential litigants or in the event the deterrence fails that the agency can argue "it's in there somewhere;" (2.) Failure to properly scope the document; and (3.) In the case of EA's, preparation of "mini-EIS's" rather than an appropriate assessment."

We have found this to be the case as the practice of shoveling in gobs of repetitive boilerplate into a DEIS to apparently conceal minor, but critical data within the gobs of text, which has required us to pour over pages and pages of redundant verbiage to find the novel text. This was inferred ('it's in there somewhere…") but not mentioned in the Smille and Swartz comment. The practice of "Tiering[14]" would significantly reduce this particular burden.

I do believe that 150 pages per simple DEIS, and 300 Pages for complex DEIS page-count criteria may need to be tailored to the scope of particular projects, and appendices for complicated data like animal population density tables, references for time-area exclusions, particulars on equipment specifications and deployment, and supporting citations should not be included in the page count limitations, as these are data and not description of proposed actions. But it has been my experience that clear, succinct writing benefits everyone.

[13] https://www.faa.gov/airports/environmental/eis_best_practices/?sect=documents
[14] 40 CFR Ch. V Pert 1502.20

The time to review and revise the document should be dependent on how many comments need to be considered, responded to, and incorporated into the final document. It should also be dependent on how many technical critiques, how many unique, but less complex critiques, and how many "public sentiment" statements are submitted. I believe that these differing sorts of critiques need to be segregated and responded to in kind, and weighted in consideration of how much individual effort has gone the submission.

We spend a lot of time critiquing the DEISs we take up. It is both annoying and disrespectful of our time – and a missed opportunity of the part pf the Agencies to lump our well-considered critiques into an "opinion bin" without a measured response. On the other hand, it is a waste of time to do much more than tally "mass responses" that clearly come through one organization's efforts. e.g.: in parsing the public comments to this very request for comment, a couple of organization had their members paste prepared text into the comments: (e.g. "My comment relates to the CEQ's Question 5 "Should CEQ's NEPA regulations be revised to provide greater clarity to..." and "As an advocate and supporter of our national parks, I am writing in opposition to the proposed updates to…").

This comment is ideological in nature and doesn't inform the discussion, but it seems to comprise as much as 50% of the "public comments." Aside from tallying these into one bin, not much more should be done with them. On the other hand, unique comments in support or objecting to a proposed action could be binned in "yea" or "nay" columns, but should be qualified as an individual source, with a greater weight than a mass response from some advocacy organization.

So these differing levels of response take various amounts of time to process. Putting a time limit on the review and revision of a document would potentially scuttle earnest consideration of individual comments and meaningful revisions informed by technical critiques.

5. Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decision makers and the public, and if so, how?

This sounds like a reasonable inquiry, but the gist of it assumes that heretofore there has been less clarity, and that any DEIS did not focus on "significant issues that [were] relevant and useful to decision makers and the public." This has not been my experience. What concerns me about this inquiry is who would be defining "significant issues," "relevant," and "usefulness?"

Up to now these terms have been defined in terms of "environmental quality." And while socio-economic considerations have also been included, given the current Administration's focus on "economic productivity," I would not welcome a DEIS where economists and businessmen replace the scientists and engineers who are currently writing the DEISs.

6, Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?

While there does not seem to be any specific exclusionary language in the Code of Federal Regulations[15] it has become almost predictable for agencies to issue DEISs for public comment under strained time constraints – such as opening up a 30-day comment period on DEISs that are a thousand pages or more; issue two or more large DEISs concurrently; and issue them over traditional holidays – the second week of December, for example.

There should be a correlation between review time and document complexity. There should be some coordination between agencies which safeguards against the issuance of concurrent, large DEISs. This should particularly be the case when it is known that the DEISs will garner a lot of public attention. Coordination could be set up under provisions of the first question in this review about coordinating agencies.

Additionally, agencies should avoid issuing any DEISs in the month of December when citizens of many religions and creeds traditionally take extended holidays.

7. Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?

The terms “Major Federal Action,” “Effects,” “Cumulative Impact,” “Significantly,” and “Scope” have all been defined under CFR Title 40, Chapter V – 1508 and these definitions have proved serviceable, so I don’t see any reason to revise them.

8. Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?

As “Alternatives,” “Purpose and Need,” “Reasonably Foreseeable,” and “Trivial Violation” are not currently defined under CFR 40 ChapterV:1508, it would be useful to define them.

Additional terms needing definition:

- Negligible impacts
- Concurrent exposure impacts
- Direct impacts
- Indirect impacts.
- Duplicative efforts

9. Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?

[15] 40 CFR Ch. V-1503.1-4

The terms “Notice of Intent,” “Categorical Exclusions Documentation,” “Environmental Assessments,” “Findings of No Significant Impact,” and “Environmental Impact Statements” as defined under CFR 40 Chapter V:1508 and supporting documents have served reasonably well, so I see no reason to revise them.

The “Records of Decision” process is appropriately transparent, but should include supporting documentation referring to the public comments and how the comments were addressed in the decision. Finding no guiding text on “Supplements,” I do not know how to respond to this.

10. Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?

Per the previous comments; any Environmental Assessment, Draft Environmental Impact Statement, Incidental Harassment Authorization, Record of Decision or other documents made available for public review and comment needs to be made available at such a time that the review and comment period does not fall across holidays or coincident with other comment periods where equal public interest would interfere with a thorough assessment of the document.

11. Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?

This inquiry is another case where the particular text in question should be explicitly referenced in the inquiry. I suspect that CFR has a lot of text relating to agency responsibilities in the preparation of NEPA documents. I also suspect that the people who were drafting these provision would not have had the honed interest of the current Administration to thwart the effectiveness of NEPA. So these provisions probably don’t need revising, and they certainly should not be revised under the current anti-environmental climate of the current Administration.

We have seen DEISs prepared by contractors that include “boilerplate” text that in some cases did not refer to the proposed action, and in some cases seemed to be placed in the document as “filler.” The preparer or contractor should be held responsible for drafting a clear and concise document, un-cluttered by superfluous boilerplate. This also intersects the following question on “Tiering.”

12. Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?

When done appropriately, tiering can save a document from a lot of superfluous text, and should figure into the structure of any DEIS. It seems to have been somewhat ignored of late and it should really figure into the draft requirements.

13. Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

It clearly states in 40 CFR 1502.14 - Alternatives including the proposed action: "This section is the heart of the environmental impact statement."[16] If the originators of these regulations felt that this provision was so important, why would someone want to revise it?

But for clarity sake, the "No Action Alternative" should always be included. The deliberations on what constitutes "reasonable alternatives" and "practicable alternatives" is often left up to the discretion of the applicant. The deliberations on "practicable" and "reasonable" should be open for public review – or at least to informed stakeholders, so that what constitutes these assessments do not solely hinge on maximizing corporate profitability. And on occasion unlikely "alternatives" are inserted seemingly just for the purpose of having a "range of alternatives," even while the inserted alternatives may not make much sense in the context of what action the applicant seeks.

The application of "Least Environmentally Damaging Practicable Alternative (LEDPA)" should always be included as well, because implicit in the issuance of a DEIS or EA is the assumption that the environment will be compromised in some manner.

General

14. Are any provisions of the CEQ's NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.

As our engagement with NEPA is through issued DEISs, EAs, and IHAs we are only dealing with provisions which are in play, and thus not obsolete. And while it may make sense to go through the document to clean up any dross, more publicly open analysis of this question would be required before CEQ eliminates what someone perceives a "obsolete provisions."

This analysis might be served by other reviewer's responses to this question – which should be available for public review prior to making any revisions.

15. Which provisions of the CEQ's NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?

Probably most meaningful would be the use of "machine reading" of the comments. But as mentioned above, this process - particularly the definitions of the machine filters, needs to be crafted in full daylight. This might require an intermediary stage wherein after the close of a comment period a panel of experts and stakeholders from all sides of

[16] 40 CFR Chapter V 1503.14

the proposal come together and establish meaningful filters and thresholds for what constitutes a "position comment" (an opinion), and what constitutes an informative and qualified input that should be addressed and included in the revisions of the DEIS to arrive at a Final EIS.

16. Are there additional ways CEQ's NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?

I believe that the EISs, EAs, IHAs, and other documents such as 404(b)1[17] need to remain autonomous. Building these documents and reviewing them are very different processes. Folding them all under the rubric of one DEIS (for example) would more likely scatter review and comments efforts rather than consolidate them.

17. Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

As our engagement with NEPA is through reviewing issued DEISs, EAs, and IHAs we are not aware of how these revisions might look. And as I am suspicious of this Administration's definitions of "efficiency" I would like to see the recommendations from other reviewers before commenting on this clause.

18. Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?

Many native tribes are also sovereign nations. Deliberations between sovereign nations may not be subject to US transparency laws. The distinction between tribal councils and native corporation boards need to be distinguished in the consultation process, and transparency to stakeholders outside of the Sovereign Nations need to be exercised to the fullest extent.

19. Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?

"Unnecessary burdens and delays" is a phrase fraught with subjective implications. It has been our experience that what might be construed as "burdens" or "delays" are actually evidence that the process is working. As such we don't feel that the process should be revised to short-circuit the efforts merely to "unburden" or expedite decisions.

20. Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?

[17] 40 CFR Ch. I Pt. 230

This would need to be reviewed on a per-case basis. We have no suggestions other than to maintain enough flexibility in the process to not force an action due to time limits or page counts, and to openly defer to the environmental conservation purpose of NEPA with the application of the Precautionary Principle.[18]

Sincerely,

Michael Stocker
Director
Ocean Conservation Research

[18] Raffensperger, C., and Tickner, J. (eds.) (1999) Protecting Public Health and the Environment: Implementing the Precautionary Principle. Island Press, Washington, DC.