NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL

PUBLIC TELECONFERENCE MEETING

WASHINGTON, DISTRICT OF COLUMBIA

AUGUST 19th & 20th

2020

PREFACE

The National Environmental Justice Advisory Council (NEJAC) is a federal advisory committee that was established by charter on September 30, 1993, to provide independent advice, consultation, and recommendations to the Administrator of the U.S. Environmental Protection Agency (EPA) on matters related to environmental justice.

As a federal advisory committee, NEJAC is governed by the Federal Advisory Committee Act (FACA). Enacted on October 6, 1972, FACA provisions include the following requirements:

- Members must be selected and appointed by EPA.
- Members must attend and participate fully in meetings.
- Meetings must be open to the public, except as specified by the EPA Administrator.
- All meetings must be announced in the Federal Register.
- Public participation must be allowed at all public meetings.
- The public must be provided access to materials distributed during the meeting.
- Meeting minutes must be kept and made available to the public.
- A designated federal official (DFO) must be present at all meetings.
- The advisory committee must provide independent judgment that is not influenced by special interest groups.

EPA's Office of Environmental Justice (OEJ) maintains summary reports of all NEJAC meetings, which are available on the NEJAC web site at *https://www.epa.gov/environmentaljustice/national-environmental-justice-advisory-council-meetings* . Copies of materials distributed during NEJAC meetings are also available to the public upon request. Comments or questions can be directed via e-mail to NEJAC@epa.gov.

NEJAC Executive Council – Members in Attendance

- Richard Moore, NEJAC Chair, Los Jardines Institute
- Sylvia Orduño, Vice-Chair, Michigan Welfare Rights Coalition
- Michael Tilchin, Jacobs Engineering
- Benjamin J. Pauli, PhD, Kettering University
- April Baptiste, Colgate University
- Jan Marie Fritz, University of Cincinnati, University of Johannesburg, University of South Florida
- Rita Harris, Sierra Club
- Cemelli De Aztlan, El Paso Equal Voice Network
- Melissa McGee-Collier, Mississippi Department of Environmental Equality
- Jeremy Orr, Natural Resources Defense Council
- Pamela Talley, Lewis Place Historical Preservation, Inc
- Joy Britt, Alaska Native Tribal Health Consortium
- Kelly C. Wright, Shoshone-Bannock Tribes
- Na'Taki Osborne Jelks, West Atlanta Watershed Alliance and Proctor Creek Stewardship Council
- Millicent Piazza, Washington State Department of Ecology
- Cheryl Johnson, People for Community Recovery (PCR)
- Dennis Randolph, City of Grandview, Missouri

- Jerome Shabazz, JASTECH Development Services and Overbrook Environmental Education Center
- Karen Sprayberry, South Carolina Department of Health and Environmental Control
- Hermila "Mily" Trevino-Sauceda, Alianza Nacional de Campesinas
- Jacqueline Shirley, Rural Community Assistance Corporation
- Pamela Talley, Lewis Place Historical Preservation, Inc
- Virginia King, Marathon Petroleum LP
- John Doyle, Little Big Horn College
- Sandra Whitehead, George Washington University
- Sacoby Wilson, Maryland Institute of Applied Environmental Health
- Deborah Markowitz, University of Vermont
- Ayako Nagano, JD, Common Vision

NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL
Public Teleconference
August 19 & 20, 2019

MEETING SUMMARY

The National Environmental Justice Advisory Council (NEJAC) convened by teleconference on Wednesday, August 19, 2020. This synopsis covers NEJAC members' deliberations during the teleconference meeting and the issues raised during the public comment period.

1.0 Welcome and Opening Remarks

Matthew Tejada, the Director of the Office of Environmental Justice, welcomed everyone and stated that we have a quorum. Mr. Tejada noted 193 members of the public on the call today. He explained the roll of the NEJAC members and introduced the chair Richard Moore and explained that we will hear from the administrator of the EPA, Administrator Wheeler.

Richard Moore, the NEJAC Chair, from Albuquerque, New Mexico welcomed everyone to the teleconference call. Mr. Moore welcomed NEJAC members and explained the agenda for the day, starting with comments by the Administrator and then moving into public comments. Mr. Moore thanked the Office of Environmental Justice, and the backup staff for supporting the session today. **Matthew Tejada** introduced Administrator Wheeler

1.1 Remarks from the EPA's Administrator

Andrew Wheeler *I want to thank you all for joining us, although we had to do this meeting virtually. I hope all of you are well and that you're staying safe. I was looking forward to meeting with NEJAC leadership in person back in March, but the pandemic kept that from*

happening. NEJAC plays a critical role advising the EPA on environmental justice. Many of you recall, the agency went through a review of all our federal advisory committees last year and reaffirmed the importance of NEJAC. In fact, this week, EPA is signing the NEJAC charter renewal. I want to thank you for your service on the Council and I'd also like to recognize Richard Moore for serving as the NEJAC's Chair. Thank you so much, Richard, I certainly appreciate your service. We continue to need your help to advance environmental justice and make measurable progress improving the health and welfare of overburdened communities. As you may know, I began my career at EPA's Office of Pollution Prevention and Toxics back in 1991. So, I have a longstanding passion for preventing pollution and helping rebuild communities. One of the first laws I worked on was the Community Right-to-Know Act. I grew up in the mid-west rust belt and I've seen firsthand our communities that lose their economic base have a limited ability to address environmental challenges. This is why I've made it a priority to make measurable progress improving our environment. This includes cleaning up Superfund sites at a record pace, returning many to productive use. This reduces exposure to hazards and creates economic activity that can rebuild and sustain communities. Over the last three years, EPA has fully or partially delisted 57 sites from the National Priorities List and last year, we deleted all or part of 27 Superfund sites, the largest number of deletions in a single year since fiscal year 2001. In fiscal year 2020, EPA announced the selection of 155 grants for communities and tribes totaling over $65 million in Brownfields funding through the agency's Assessment, Revolving Loan Fund and Cleanup. Of the communities selected this year, 118 clean up Brownfield sites within communities that have opportunity zones. We have taken aggressive action on lead exposure. Two years ago, the federal government released an action plan to ensure that our nation's children, especially those in vulnerable communities, will be protected from lead exposure. Since then, EPA has finalized stronger dust-lead hazard standards and increased enforcement and compliance efforts. We also proposed the first major update to the Lead and Copper Rule in over two decades. It requires systems to act faster to reduce lead, requires testing in schools and childcare facilities and mandates communication and transparency with the public. And we awarded over $69 million – excuse me – in the last two years to states, territories and tribes for lead testing in schools and childcare facilities located in low income and disadvantaged communities. In President Trump's 2020 budget, EPA is proposing a $50 million Healthy Schools Grant Program to expand protections on children where they learn and play. EPA has prioritized critical investment in water infrastructure. Through our various water financing programs, we have spent $38 billion on water infrastructure in the United States since the beginning of this administration and we will spend more in the future. EPA is also improving air quality in urban areas. Over the past three years, we've approved over 1,200 SIPs or State Implementation Plans both new and backlog and re-designated 49 non-attainment areas across the country back into attainment, recognizing the pollution controls that have taken place in a number of inner cities across the country. By 2022, working with state partners, we are on track to re-designate at least 65 of the 166 areas that were designated non-attainment by October 2022. And in the past three years under President Trump, air pollution has fallen seven percent. We have vastly increased our enforcement efforts, holding polluters accountable at a record rate. In 2019, we

reported increases in every criminal enforcement measure with 170 new cases opened, 141 defendants charged, and 123 defendants convicted with $48 million in fines and $60 million in restitution. From 2017 to 2019, there has been a 79 percent increase in self-disclosure violations by facilities leading to greater compliance by those facilities. And we continue to aggressively do civil and criminal cases during the pandemic. In response to COVID-19, EPA launched a new grant program to address the needs of communities is proportionately affected by the crisis. We are on track to award $1 million in funding to state, local and tribal governments disproportionately affected by the pandemic by this October. Within EPA, we have taken steps to strengthen environmental justice. In 2018, the Office of Environmental Justice was elevated into my immediate office to ensure your equities are considered at the highest levels of management and in development of policy. Previously, the Office of Environmental justice was located in the Enforcement Office. I believe firmly that we should not wait until enforcement in order to incorporate environmental justice in the programs of the EPA. By elevating it to the Administrator's Office, we are elevating environmental justice earlier in the process so that we can include environmental justice issues across the board in everything we do at the agency. Also, in 2018, President Trump's signed America's Water Infrastructure Act, the first bill ever, the first law ever to codify environmental justice, solidifying its existence in the EPA organization. This is the first time that a law mandates staff resources solely dedicated to serve as liaisons to minority, tribal and low-income communities in EPA's regional offices nationwide. To ensure our environmental justice and community revitalization efforts work cohesively, we launched the Environmental Justice and Community Revitalization Council, a senior level body to support and coordinate across the agency. And last year, with the regional realignment effort across all 10 of our regions, we elevated EJ staff in each of our 10 regional offices to the RA or the Regional Administrator's Office to better serve minority, tribal and low-income communities. While these may be internal-facing and would seem to go unnoticed, they are important in helping the agency address environmental challenges every single day. This administration has made some tremendous progress and, overall, EPA has done a remarkable job in cleaning up our air, water and land over the last 50 years. However, there is no disputing the fact that many challenges remain for many vulnerable communities. We cannot regulate our way out of these issues, for doing so could threaten the economic base which our communities need to survive, thrive and grow. Instead, we need to find new opportunities to collaborate and make progress together. Consequently, one of my top priorities moving forward in developing and implementing the community-based approach is environmental protection. This will require a major shift in the way we do business. One of the biggest challenges facing the EPA has been to tear down the silos in our program offices to address the suite of environmental threats facing communities. President Trump called me last spring to ask me to plan for the priorities for the second term. We have identified five key priorities for the second term. I might get ahead of my boss in announcing them, but one of the five is expanding our community-based outreach across the board and this is going to be good news for our environmental justice communities. I welcome your thoughts on ways that EPA can better address community environmental needs. We intend to do so in a more holistic manner and we certainly encourage your input and your thoughts

over the coming weeks and months. We must think creatively on how to make measurable and enduring improvements in overburdened communities, because if we don't, we will continue to fail those in the greatest need. And I believe EPA as an agency has a new focus in both protect the places we love and bring back the places that have been hurt by past pollution activities. If we focus our attention properly, we can help these places become the healthy communities they have been striving so long to be. I want to thank you all again for your service, for your willingness to serve on this very important committee. This committee is going to be vital as we move into the second term and plan our approach for the community-based approach to environmental protection. I'm looking forward to a read out from the staff on the discussions that you have today and tomorrow and in particular, on the NEJAC Superfund Taskforce work. I know we got started late, so I have a few brief moments for questions. So, I'll take as many as I can. I am sitting in a car outside the airport, so I have a very hard stop in order to get to my plane. Thank you.

Karen Martin, the Designated Federal Officer (DFO), thanked the Administrator for taking the time to join the call. The DFO indicated that a few NEJAC members have questions and Vice-Chair, Sylvia Orduno we will start with the first question.

Sylvia Orduno, the Vice-Chair of NEJAC, from Detroit, Michigan was pleased to know that the Administrator had experience growing up in the rust belt and the issues that they are facing. She noted that NEJAC was looking forward to hearing the public comments today, because of the crises that has been happening over the past several months across the country and in many environmental justice communities. She requested a copy of the statement that the Administrator read to NEJAC, noting that NEJAC would like to share statement with their stakeholders. Mrs. Orduno asked if the Administrator would come back again, so that they can follow-up regarding the issues they learn from today's meeting.

Andrew Wheeler stated that he was familiar with the problems in the rust belt. Mr. Wheeler said that the agency intended to finalize the Lead and Copper Rule next month, noting that it requires mandatory testing in all schools and day care centers across the country for lead-contaminated water.

Ayako Nagano, Board Member of Common Vision, a food school orchard program, which gives families medicine and food. Mrs. Nagano said she has read that a lot of EPA regulations are being rolled back. She then cited that the New York Times currently counts 100 EPA regulations that are being rolled back; 60 roll backs have been completed, 32 are in progress, that span everything, from roll backs for air pollution protection, drilling and extraction, infrastructure, water pollution, toxic substances, all of these laws have been rolled back under the current administration. She stated that she failed to understand how to make sense of how EPA has rolled back regulations and enforcements have increased. She asked the Administrator to make sense of these discrepancies.

Andrew Wheeler stated that over the last two years the administration has increased criminal enforcement statistics. Starting in 2011, they started going down and they reversed the trend this year. He said that every single criminal enforcement statistic went up. He said they are criticized because the number of inspections over the last 34 years have gone down. He said that the federal EPA was doing all inspections and all the enforcement actions, but the statutes were drafted to delegate programs to the states. Mr. Wheeler stated that more air programs have been delegated to 48 out of the 50 states, and in water, the states are now responsible for 96 to 97 percent of all water permits, including inspections. Mr. Wheeler stated that the civil side that conducts inspections and civil enforcement actions were states responsibility, to justify the steadily downward trend. Mr. Wheeler says that criminal enforcement is something that the federal EPA should be focused on. He says that he reversed the trend on criminal enforcement professionals at the agency, and the agency has been losing criminal inspectors, because of early retirement. Mr. Wheeler says the agency is hiring more criminal inspectors and roll backs are a bias created by the mainstream media. Mr. Wheeler says they created a new grant program to help schools replace their older diesel school buses with newer buses that were cleaner. People need to know about the existence of this new grant program, and he wanted the press to help amplify the message about the new grant program. He stated that the new regulation on diesel truck emissions were going to take off the books two or three guidance documents that's over 20 years old. He said that regulation did not follow the Clean Air Act, so they rescinded that regulation because of the Supreme Court's stay, and they replaced it with the Affordable Clean Energy Rule. The Affordable Clean Energy Rule replaced the Clean Power Plan citing that it will get emissions reductions for the electric power sector. Mr. Wheeler says the water criteria is the highest it's ever been and that they are getting more Superfund sites cleaned up since 2001. The EPA has been measuring the six criteria air pollutants for 50 years. Mr. Wheeler stated that air today is 77 percent cleaner than it was in 1970 and that he was proud of our environmental record, citing that they have 100 new regulations to replace the 100 rollbacks. Mr. Wheeler stated that he has spent too long on that answer, but he can take another quick question.

Karen Martin, the DFO, thanked the Administrator for taking the time and called on Melissa Collier with her question.

Melissa Collier, the Director of the Office of Community Engagement for the Mississippi Department of Environmental Quality, asked about the "compliance relief" that was granted to industries at the initiation or the start of the pandemic. Mrs. Collier said since COVID has lasted several months now, those industries have worked under this relief and have not been held to the same compliance standards that they would be held previously. Her question is when does the excuse of COVID no longer become used as a valid excuse? When do these industries have to go back to their normal way of operation and be held to the same standard that their permits require?

Andrew Wheeler stated that EPA issued the enforcement discretion memo back in March because so many facilities around the country were closed and each state has permits that require different reporting. Citing that some report annually, others bi-annually, monthly, even weekly depending upon the permit or the regulation. Mr. Wheeler said they offered discretion only in terms of reports and monitoring reports that were required to be sent to the EPA, and they can send it to the agency late, but they have to explain why COVID prevented them from sending the information and the data, as identified in the discretion memo and no one was allowed to increase emissions. Mr. Wheeler indicated that facilities still need to follow the emission requirements and violations were issued for emitting over the limits. The agency only allowed people to send in their paperwork late, if they could justify it having to do with COVID, and the discretion ended at the end of August. Mr. Wheeler noted that very few facilities took advantage of the discretion and the EPA is trying to figure out exactly which industries and which states were going to be late on submitting data. He also said that nobody could go above their permitted emissions levels. Mr. Wheeler stated that he was looking forward to hearing about what was discussed over the meeting, but he had to leave.

Karen Martin thanked Administrator and noted that the meeting will move forward, and that the next item on the agenda is the public comment period. She turned the meeting over to the Chair, Mr. Richard Moore to make some opening remarks before Mike Tilchin starts the public comment period.

Richard Moore stated that NEJAC will move onto the next agenda item, public comment. He reminded people that each person will be given three minutes to make public comment and acknowledge that it is challenging to keep comments within three minutes. He wanted to encourage people to stick to the three-minute piece, because over 50 people have signed up for public comment, so it is important to describe the issue, the impact of the issue and then additionally, what is the recommendation. Mr. Moore also noted that it is important to speak slowly because there is simultaneous interpretation taking place and to speak directly into the phone, and identify yourself, the name of the organization you're representing, and where you're calling in from. He also noted that this call is being taped and notes are being taken during this comment period, that this is a two-day session with public comments today, and a business discussion tomorrow. Mr. Moore stated that the NEJAC Council will review the comments made during public comment, discuss them during the business section of the NEJAC meeting, and then decide how to move those recommendations forward. Mr. Moore turned the meeting over to the DFO.

Karen Martin explained that the she would call the public commenter's name, the operator would unmute the line, they can begin their comment, and they would receive a one-minute warning to wind your comments up at that time.

Michael Tilchin, the Vice Chair of NEJAC, noted that the Council will hear pre-registered comments first today and there may not be an open call for public comments because of time limitations. He indicated that the public could submit comments in writing to NEJAC at the

email address: nejac@epa.gov and that the comments will go into the record and be considered in full by the NEJAC members. Mr. Tilchin reminded the NEJAC members with general questions to please hold them and they will address them at the business meeting tomorrow.

2.0 Public Comment Period

2.1 Joseph Hughes - NIEHS, National Institute of Environmental Health Sciences

Joseph Hughes, National Institute of Environmental Health Sciences (NIEHS), representing the Interagency Working Group on Environmental Justice. Mr. Hughes shared that the EJIWG is going to continue its work on natural disaster and environmental justice concerns and issues, especially important during the pandemic because of the impact on people of color communities. He proposed to the NEJAC that the group is planning to convene a series of virtual town hall meetings on EJ and disasters, during the months of September and October. Their plan is to have three sessions that would look at specific geographic areas of the United States and the Caribbean Basin. Mr. Hughes noted that the first session will look at the Southeastern United States, the Carolinas, Georgia, Florida, Alabama, Puerto Rico and the Caribbean Islands. The second town hall session will look at the Gulf Coast, Alabama, Mississippi, Texas, and Louisiana. And the third session will look at the Southwest and the West Coast, Arizona, New Mexico, California, Alaska. Mr. Hughes mentioned that he has spoken with the EJ office to coordinate with the NEJAC. He would like to sit down with the NEJAC and plan out these sessions, identify key community leaders to speak at the sessions and ensure all key stakeholders are included in the process. He wants to be sure to include state, local, federal, and tribal stakeholders. Mr. Hughes wanted to update NEJAC that their committee is in the middle of finishing up its report on the impact of EJ and Disasters. Mr. Hughes noted the committee is planning to conduct some community engagement with the communities before the release of the report and findings. He also stated that he and Marsha Minter will continue to follow up with NEJAC, making sure that the voices of the community are heard in the work.

Richard Moore commented that an exceptional session took place in Jacksonville and the work of the Interagency Working Group has been obviously crucial to environmental and economic justice issues in the communities being impacted.

Joseph Hughes thanked Mr. Moore and added that when he read the transcripts from Jacksonville, it was amazing to see what the words that were said, especially for Puerto Rico and the farmworkers in Florida.

April Baptiste asked if EJIWG had dates set for the planning phase? And when they set up the dates, will they be sent to public through the EPA's Listserv?

Joseph Hughes indicated they have not established the dates, but he wanted to ask the NEJAC if they would be part of the planning session, or on a planning call before each one to make

sure that they had engagement from NEJAC in the process. Mr. Hughes said they would send all the dates and all the information about the session to EPA to send out through the EJ Listserv.

2.2 Jill Witkowski Heaps - Roll backs to the National Environmental Policy Act or NEPA

Jill Witkowski Heaps, a former NEJAC member and Vice Chair, requested that the Council take a formal position opposing the current EPA Administration's rollback to the National Environmental Policy Act (NEPA). She indicated that she submitted a letter by 17 organizations detailing some of the main problems and asking NEJAC to weigh in. Mrs. Heaps noted that her comments opposing the regulations signed by hundreds of environmental groups and environmental justice groups and that 40 of those groups have sued and submitted a proposed resolution to consider instead of a letter that was promulgated by the White House Council on Environmental Quality, the CEQ is not the EPA. She indicated that if NEJAC weighs in on the fight against these rollbacks it could make a big difference, citing that in August of 2019, NEJAC submitted a letter to Administrator Wheeler recommending improvements to NEPA. CEQ proposed the rollbacks, only accepted public comment for 60 days, and only held two public meetings. In contrast, on the Waters of the United States Rule for the Clean Water Act, they had more than 200 days of public comment and had more than 400 public meetings. The CEQ points to its discussion with the NEJAC in February of 2020 as proof that they addressed environmental justice issues with the rollbacks, but this is not true and misleading. Mrs. Heaps stated that there was no analysis of environmental justice impacts pursuant to executive order 12898 and the rollbacks are terrible for all communities, especially, for communities of color and low-income communities. She further noted that the letter NEJAC submitted, detailed some of the problems with the rollback that the changes also allow private industry to prepare their own environmental reviews; making it more difficult for communities to challenge reviewed documents in court by recommending community groups submit a bond to the court before the court will hear the challenge.

Karen Martin indicated there were questions for Mrs. Heaps.

Karen Sprayberry from South Carolina Department of Health and Environmental Control (DHEC) wanted to know if NEJAC has a copy of the resolution and what is the resolution referring to?

Karen Martin indicated that it was shared as part of the pre-meeting materials.

Jacqueline Shirley asked if the commenter's organization or her group have a template letter or an action, call for action template for organizations to sign in on?

Jill Witkowski Heaps indicated that she submitted a copy of the proposed resolution for NEJAC to act before the regulations are finalized, because the only options for communities to act is by joining one of the three lawsuits. Mrs. Heaps indicated that the communities can always take the letter that they submitted and modify it and send it to the CEQ if they'd like to make their voices known.

Na'Taki Osborne Jelks asked that Mrs. Heaps clarify what is meant by check book court challenges to NEPA, that requires the community groups pay a bond amount before the court would pay attention to the complaints.

Jill Witkowski Heaps explained that the check book court in the new regulations limits community participation, that a bond must be posted, that communities would have to post a couple thousand dollars or more to the court before they determine the correct implementation of regulations of the agency. She noted that the practice protects companies and the government from frivolous lawsuits by the communities challenging the regulations that challenge a project.

Ayako Nagano asked that the council review it and discuss it.

Sylvia Orduno agreed that NEJAC should review the proposed resolution during the business meeting. Mrs. Orduno asked about any conditions under which the EPA can undo the White House CEQ action? Is there another way to confirm that protocols were violated, and can they be taken up for consideration as part of some injunction that by the communities or is there something that can be done administratively?

Jill Witkowski Heaps indicated that there is a quandary here, because these are CEQ regulations and NEJAC advises EPA, but there's a couple places where EPA can really have a big impact on them. She noted that the CEQ sets the overall regulations, but each agency that oversees projects and works with NEPA, have their own NEPA regulations. The EPA can be more protective of environmental justice communities than the CEQ regulations require. EPA should continue to provide leadership with the EJIWG to ensure that other agencies across the board like the Federal Highway Administration, the Army Corps, Housing and Urban Development and others have really strong success implementing NEPA regulations that do more to protect environmental justice communities.

2.3 Lakendra Barajas - EPA's implementation of the Toxic Substances Control Act or TSCA,

Lakendra Barajas, an attorney in the toxic health and exposure program in the New York office of Earthjustice, expressed her concerns about EPA's implementation of the Toxic Substances Control Act (TSCA) and its risk evaluation process. She wanted to draw attention to a letter regarding ethylene oxide, which had a positive impact on the miscellaneous organic chemical manufacturing rule. Her hope is that NEJAC can have a similar impact on the risk evaluation process which requires EPA to comprehensively evaluate a chemicals exposures and risks to determine whether the chemical substance presents is an unreasonable risk of injury without consideration of costs. Mrs. Barajas stated that the EPA must separately consider risk to potentially exposed or susceptible subpopulations, or groups that are susceptible to greater exposure and face greater risk of harm than the general population. TSCA also requires EPA to consider risks across the chemical's lifecycle, including all known or foreseeable conditions. EPA did not properly identify the subpopulations in its recent draft scope. She noted that the EPA

ignored the heightened exposure of the communities located in the geographic proximity to high volume chemical facilities, including the Greater Houston area; Port Arthur, Texas; Mossville, Louisiana and neighboring towns and in the area known as Cancer Alley. EPA found that methylene chloride does not present an unreasonable risk of injury to workers. Mrs. Barajas stated that this is due to unfounded assumptions that workers will have access to well-fitting personal protective equipment, or that a failure to consider the potential for an individual to be exposed to multiple conditions of use. Mrs. Barajas says that the EPA found no unreasonable risk when methylene chloride is manufactured and disposed of, ignoring the exposure to dangerous levels of the chemical that communities surrounding manufacturing and disposal sites such as Freeport, Texas and Geismar, Louisiana experience. Mrs. Barajas asks NEJAC to advise EPA to identify all potentially exposed and susceptible subpopulations and conduct separate analyses to determine if these chemicals pose an unreasonable risk to these groups, and to consider all conditions that are used and the exposure pathways to the chemicals must be evaluated. Finally, she states that EPA must refrain from excluding uses based on the theory that is regulated by other laws, and to stop considering workers' use of personal protective equipment at the risk evaluation stage.

Richard Moore wanted to remind the Council, in terms of TSCA, this isn't the first time that we've heard public comment around this issue and in Jacksonville, Florida, we heard constant and consistent testimony about this issue. Mr. Moore wants to encourage the Council to consider taking this up and discuss it during the business session.

Lakendra Barajas noted her contact information is in the written comments and she would be happy to help on any TSCA-related issue.

2.4 Juan Parras – Houston, Texas

Juan Parras wanted to call to the NEJAC's attention that even with the signing of the executive order on the environmental justice in 1994, major cities like Houston and other cities have no environmental justice policies. He felt the NEJAC needs to push back and make sure that environmental justice policies are in place to protect communities who are severely impacted by environmental justice. Mr. Parras notes that the executive order should be forced to address those issues like ozone standards for the City of Houston. The City of Houston has not met the ozone standards since they were created by OSHA. Procedures on how to bring those issues and environmental justice policies into implementation in major cities is needed. He indicated that the air standards with deadlines, should not be given the extensions because those extensions continue to expose communities to ozone and air toxins by industries, especially in the Houston area. He stated that if you are a community-based organization that helps EJ groups under this current administration, that they are unlikely to deal with environmental issues.

Richard Moore reminded the Council that some of the folks that are testifying for their organizations have been testifying in front of the NEJAC since 1994, these are not newcomers.

Mr. Moore indicated the one of the questions for the EPA Administrator from earlier about support for the NEJAC Charter and unanswered, so NEJAC needs an update from the EPA and the Administrator's office regarding the signing of the NEJAC charter.

2.5 Omar Muhammad – NEPA

Omar Muhammad spoke about the importance of NEPA and based on Administrator Wheeler's comments, there is a huge disconnect between the administration, the realities effecting environmental justice communities and the policy from this administration. He notes that NEPA is a bedrock environmental policy that requires several agencies to evaluate the impact of local decisions for identification of environmental concerns with impacts from economic, social and health. Mr. Muhammad stated that changes to NEPA under this current administration allow polluters to continue to pollute and it weakens the power of communities in the decision-making process for increasing the comment period, and how projects and documents shared. He continued to say it weakens transparency by allowing industry to conduct their own environmental reviews and that many of the projects in environmental justice community across the country trigger the NEPA process. He cites projects like highway construction and expansion, port and terminal constructions, expansion bridge construction, intermodal facility construction have a disproportionate impact in environmental justice communities particularly black and brown communities. He stated that projects are sited in low-wealth and black and brown communities that are impacted by multiple pollution burdens which cause high incidence of asthma, cancer, and premature death. Mr. Muhammad said that the CEQ changes to EPA eliminates consideration of cumulative impacts from past, present, and foreseeable future impacts from a proposed project. It also requires community groups to provide expert level comments and it doesn't list all possible impacts of a proposed project. The impacted community forfeits its (trial) for recourse. Improvements to NEPA must include an increase in the public comment period. The NEPA should require not just a risk assessment, but it should include a health impact assessment. Mr. Muhammad would like the EPA to strongly consider replicating and supporting an extension of the EPA Region 4 Environmental Justice Academy. Replicating that academy across the agency will allow communities to have the training, the technical support, and gain the experience to address concerns in their community.

Sacoby Wilson asked if Mr. Muhammad could give a little bit more background on how he would use NEPA in Charleston? And, how these changes will prevent communities, who've used NEPA as a way for mitigation, are going address it in the future?

Omar Muhammad indicated that the Low Country Alliance for Model Communities, is the very first grassroots organization, not only in South Carolina, but in the country to successfully use NEPA to mitigate adverse impact from two projects and what we have been able to do was negotiate a community-based mitigation agreement with the South Carolina State Ports Authority and Pan AM Railway. He noted that those two mitigations secured a total of $8 million under these negotiations, addressing systemic concerns in our community around housing, economic development, education, and environmental justice. Mr. Muhammad says

without NEPA, communities will not be able to secure the resources necessary to address concerns, not only from the impacts of the project, but systemic concerns over our quality of life of that community, particularly in low-wealth communities and black and brown communities who have struggled with for generations.

2.6 Olga Naidenko - Environmental Working Group

Olga Naidenko stated she is here on behalf of the Environmental Working Group; a nonprofit research and non-partisan organization. She has submitted written comments and peer reviewed articles that she and several other scientists recently published. She wanted to provide advice to the EPA about the reuse of contaminated sites and Superfund sites. She mentioned that it is important to look at all contaminants that are potentially present; not just those covered by previous statutes. Mrs. Naidenko mentioned that in her written comments and submitted paper, that it brings immediate attention to the PFOS chemicals. These fluorinated chemicals are found in many places like firefighting foams to food packaging, and as a result, they have become widely spread contaminants nationwide and in our bodies, but specifically for NEJAC, the difficulties of PFOS disposal now that communities across the country and government agencies know how harmful those chemicals are have finally decided to incinerate, so it may end up in landfills and this will have a particularly negative impact on certain communities near those waste disposal sites. Mrs. Naidenko said that her written comments provide specific recommendations, like requesting NEJAC to urge EPA to classify most toxic PFOS chemicals as hazardous substances, because communities and agencies across the country are looking at remediation and reuse of formerly contaminated sites. But it is important to make sure that PFOS are not remediated in this process, otherwise a site is cleared for reuse, and it turns out that remediation was incomplete, so these chemicals are present and still are harmful to the communities and their health.

John Doyle asked if PFOS is in burning garbage, and what the effects of the smoke are and have there been studies that looked at these effects?

Olga Naidenko said in the paper she submitted a group of scientists reviewed the available information, identifying data gaps, after comprehensive review of publicly available literature, and they did not find a single study that looked at the fate of PFOS compound in a real-life incinerator. This means all of the municipal solid waste and the hazardous waste, even sewage-like incinerators that the NEJAC members would know, that there is PFOS in all of the waste states. PFOS have not been classified up until now as hazardous substances. All these incinerator facilities have had no regulatory requirement to monitor what happens to PFOS. Does it go into the air? Does it go into the ash? If that ash sent to the land fill or does it end up going in groundwater? Our paper really brought the attention to the fact that regulators have to say that the EPA should investigate the ways that waste streams of PFOS have been going to those combustion facilities. It's not just a data gap, but a huge environmental justice oversight.

Sylvia Orduno expressed her support for the work that scientists have been doing, especially to pay more attention to where PFOS is located across the country and all of the different dangers associated with it, especially in our drinking water sources and as you mentioned in these other locations that we have to be aware of. Mrs. Orduño asked if there are any proposed language that EWG has that could help us with being able to start making some of the proposals that are missing in terms of the regulation? Are there studies that you think would be helpful if the EPA could comment on or develop on its own? Can you make some recommendations that will be helpful?

Olga Naidenko asked what is a good way to provide information to NEJAC? She stated that she would like to have a few days to compile those resources together, and then email the information to NEJAC coordinators or any other appropriate way to deliver those recommendations? She said she would provide them a week from now.

2.7 Delmer Bennett - Mossville, Louisiana

Delmer Bennett expressed his concerns about the environmental problems in Mossville and the continuing problem where the director's say that a lot of these things have been solved, but there are no differences and things have been the same since the '70s. Mr. Bennett indicated that he didn't know why a difference was determined because the plant never stopped doing anything different. He says they didn't get the report pertaining to our neighborhood. When Sasol came in, the NEJAC/EPA tried to address the environmental problems and the focus was taken away from the real problem of the buyout of our land. The buyout of land was the beginning of the injustice to the point that they treated us differently than how they treated other people, even though they said that it was a voluntary buyout. And what they did was to make it look like they did it right, because they got 80 percent of the people in our community to sell out, not realizing that they were being cheated. The others were getting 3 or 4 times more than what we were getting. There are records that show this, so we're looking at the injustice and how this buyout killed the environmental movement in our neighborhood. This is where we are now. Mr. Bennett said they are beginning to get representation from Tulane and there is still a conflict even with that. So, this is where Mossville stands now.

Richard Moore stated that there is probably representation from Region 6, on this line too, and he affirmed that the Mossville issue has been going on a long time. Mr. Moore noted that the Mossville folks have been testifying in front of NEJAC since the beginning of NEJAC and that the testimony is a reminder of the unjust relocation issue.

2.8 Stepford Frank - Mossville, Louisiana

Stepford Frank is a Mossville citizen in Calcasieu Parish. He stated that it was founded by former slaves over 150 years ago and it is about six miles northwest of Lake Charles, near Westlake. Mr. Frank expressed that the EPA defines fair treatment in its definition of environmental justice as no one group of people should bear a disproportional burden of environmental harms and risk. Mr. Frank commented that there are major concerns about air

pollution and the lack of air monitoring in Mossville, as well as concerns that the Louisiana Department of Environmental Quality LDEQ longstanding failures to address the issues. Satellite and EPA data indicates that Mossville is a toxic air hotspot that has disproportionately created suffering and negative consequences through decades of permits granted to the local petrochemical facilities by the LDEQ, as defined by EPA's own definition of fair treatment. The air in the area is the most toxic in Louisiana. It's in the top 1% of toxicity, and LDEQ has pursued a systematic elimination of air monitoring in this area while concurrently permitting massive increases in industrial emissions. In May 2014, LDEQ issued air permits that allowed Sasol, one of the largest polluters in the world, to massively increase air emissions for its Cracker Project expansion in Westlake. Westlake monitors measured ozone levels extremely close to the current limits before Sasol's expansion, LDEQ received EPA's approval to discontinue this monitor in October of 2014. The LDEQ justified the removal of the Westlake monitoring by claiming that the readings were consistently lower than Vinton and Carlyss monitors which are 15 miles away. The comparison between these two monitoring data sets do not support this conclusion. Mr. Frank believed that EPA should been made aware of this information, but the EPA approval should not have been granted. In contrast to other criteria polluters, there is no monitoring for carbon monoxide or CO anywhere in or near Lake Charles area. In fact, the only CO monitors in the state are located over 100 miles away in Baton Rouge and New Orleans. The lack of CO monitoring in Lake Charles area is very disturbing and shocking, given that Calcasieu Parish has the most industrial CO emissions of any parish in Louisiana. In 2014, LDEQ deactivated PM2.5 monitors at McNeese State University in Lake Charles, Louisiana, which is subsequently closer to major sources of industrial PM2.5 emissions as compared to the Vinton monitor site. Yet shockingly, in its approval to deactivate the McNeese monitor, the EPA concluded that it supported the continued operation of the PM2.5 monitor at the Vinton site; due to its proximity to the industrial sources in the area. Mr. Frank believes the EPA made a mistake, since the Vinton PM2.5 monitor is located nowhere near the area's major industrial sources, which is about 15 miles away. We request EPA's team provided oversight in this matter to ensure that the LDEQ amends their air quality monitoring plan to rectify errors in its 2020 annual network assessment. The agency should amend its monitoring plan to generate National Ambient Air Quality Standards comparable to data for PM2.5, ozone, and carbon monoxide monitors in the Westlake area, ideally in the town of Mossville, and maintain its Ambient Air Monitoring Network in accordance with 40 CFR Part 58.

2.9 Diana Burdette - Environmental racism - Lake County, Illinois.

Diana Burdette expressed that every morning they wake up to a layer of soot, oil, and grime on their cars from the coal plant down the street. Last year, a chemical plant exploded, and her community was told it was safe to breathe the air. Months later, they discovered that the state sued the company due to negligence of chemical storage and exposing community members to toxins. She indicated that the community has two facilities that emit ethylene oxide, a known carcinogen, mutagen and volatile explosive. The community is working-class citizens, that were unable to shelter when COVID 19 first began to spread, so sickness numbers spiked. The

community is surrounded by toxic industry, accounting for 91% of all cases in our county. What's more concerning is that 49 miles from us, another community that had been exposed to ethylene oxide received urgent attention and their facility was shut down for months after the news was exposed. What is the difference? The size of our bank accounts and the color of our skin. Environmental racism has created a population with great disparities, where the size of our bank accounts and the color of our skin dictates the urgency of our health. Mrs. Burdette says that a predominantly black and brown essential working-class community was told that they must endure, at reduced risk of cancer, so the more affluent communities can live comfortably, they fell prey to the racist disparities that created 91% burden of COVID 19 cases. She says they are surrounded by industry that destroys community health, making us more susceptible to disease, and they are forced to expose their children, and the elderly so as to ensure that others with affluence and born with the birthright to health can be comfortable. Mrs. Burdette asked that the NEJAC continue to fight against this environmental racism, because communities like ours, where the minority is the majority, must put up with the toxins that other communities with bigger bank accounts don't have to.

Cheryl Johnson, People for Community Recovery (PCR), in Illinois said they are seeing this type of pattern all the time and that they are fighting General Iron from moving from an affluent neighborhood called Lincoln Park all the way down into our neighborhood with a scrap metal yard. She says it is a discriminatory practice that it violates our civil rights. Mrs. Johnson wants to make this known to everyone and is just not right, because these affluent communities don't want the waste, they dump it in our community; this is a profile form of environmental racism.

Sylvia Orduno said that Mrs. Burdette is exactly the type of community resident that we need to hear from and that it is hard to get through to people that are powerbrokers and power makers. Mrs. Orduno said it would be helpful to know if Mrs. Burdette has reached out to Region 5 EPA with any of the issues? Is there an opportunity to really elevate this in better way on issues around environmental racism? Mrs. Orduno asks if they have had the chance to have that conversation with the regional folks and are there any specific proposals to help elevate it at NEJAC?

Diana Burdette responded that for 2 years they have been in direct communication with Region 5 EPA. They have been able to pass significant legislation regarding ethylene oxide and its emissions into our ambient air. They were told that they have hit a wall, while a more affluent community has had their facility shut down, and they were told that the current reduction levels will stay the same. Mrs. Burdette noted they have 2 facilities; a sterilization facility and a manufacturing facility that is used as a secondary component. Our sterilization facility, due to COVID, is being pushed forward to operate, and public relations are being pushed back on the community to accept a minimal rate of cancerous exposures. The EPA has not been forthcoming and said that they can only regulate what has been legislated and there is no new legislation insight.

Sylvia Orduno asked for any specific communications or legislation that they can point to, and if there's anything specific that would be helpful that NEJAC could do to help elevate the issue, please let us know.

2.10 Caroline Peters

Caroline Peters commented on the facts, which are not grievances, they are facts, is that President Trump, four weeks ago during a media statement said that he would sign an affidavit stating that no low-income housing will be built in suburbia. Now, you tell me if a president can make that kind of statement to put suburbia's mind at ease, yet he will allow industries to come and build a refinery next door to my house. It's inconceivable. Mrs. Peters noted it is the climate that we're in right now, where we find ourselves today, referring to Floyd, George Floyd and collectively from my community; we feel like industry has been leaning on our necks. Mrs. Peters is asking NEJAC and the EPA to please pay full attention to what's going on in our community and other low-income and indigent communities around the country, that they have been talking to you for years, but talk is just what it is, and now, it's time to take action.

Richard Moore remarked that it was said that there were no more people living in Mossville, but we know this is not true. He acknowledged that the community had been on these calls and at the NEJAC meetings consistently reminding us that there is a community in Mossville. Mr. Moore noted that we need to acknowledge the historically African American roots of Mossville. Mr. Moore reminded the council members and listeners of the gentleman that came in from South Africa and testified at the NEJAC Council about the facility, that folks have been testifying exactly to what has been happening in Mossville is the same that is happening in South Africa. He said that the NEJAC Council will do everything they can to continue to support Mossville.

Jacqueline Shirley noted that NEJAC talked about how systematic racism and other elements of our society have arisen because of COVID, and how NEJAC appreciates these citizens to share their stories of these terrible injustices, playing out in our communities of color and low-economic status for centuries and decades. COVID has brought to light these inadequacies and these disparities. She said that these issues validate how NEJAC can make this an opportunity to make real change and create action for communities find themselves in now with COVID and how it has enlightened many, and how Mr. Floyd's murder has enlightened many globally.

Karen Sprayberry asked why the Mossville community comes to us every public meeting? What has the EPA done within the community to assist them, knowing EPA has Technical Assistance Programs and collaborative problem-solving opportunities. Mrs. Sprayberry wanted to know if any of that has been used with the Mossville community and what has been done in the community by the state or the EPA?

Karen Martin noted that this is one of the action items to discuss from the February meeting and NEJAC will talk more about it in the business meeting.

2.11 Cemelli De Aztlan - El Paso Equal Voice Network

Cemelli De Aztlan stated she was speaking on behalf of El Paso Equal Voice Network and serves as the new Network Weaver dedicated to working with and directing the community. On July 10th, 2020, the D.C. Circuit Court of Appeals ordered that the U.S. Environmental Protection Agency take a closer look at ozone's malfunction in El Paso and if it exceeds safe levels. The decision was issued in a response to a petition filed nearly two years ago. Familias Unidas del Chamizal testified that the EPA had ignored clear evidence showing that El Paso was violating the public health standard and the people who live in El Paso know the air is not safe and getting worse over the years. Mrs. De Aztlan said last year that ozone levels show dangerous levels in our community on seven different occasions. The EPA will have no choice but to designate El Paso as violating the clean air standard and it will trigger a requirement for the State of Texas to develop a plan to reduce pollution. She noted that the plan should include a requirement to install additional emission controls for major polluters like Marathon Petroleum Refinery, El Paso Electric, and the El Paso Independent School District Bowie High School bus hub; which was recently built on campus. This campus serves the largest population of low-income Spanish speaking immigrant children and the massive bus hub built this year replaced a much-needed transportation opportunity in a community that deals with the worst air in the city. Mrs. De Aztlan says there is no oversight to understand how the bus hub impacts the community, and the school district refuses to evaluate the compound effects of buses that use gas and diesel, combined with the already preexisting dangerous air quality. The reality is that these buses do not reduce the toxins as they are compounded with the NAFTA, USMCA, and the increase of international truck traffic using diesel and asbestos lined brake pads. Between July and August, we have had 25 dangerous ozone days alone. This environment creates a highly toxic mixture that threatens our children and the community. Mrs. De Aztlan called on the EPA to pay attention to the importance of this environmental justice issue; air pollution disproportionally hurts the community. She continued to say the worse of it is that the kids are having trouble breathing and people are getting respiratory infections causing them to miss work. The community is facing COVID 19 and leaders are needed to fight for clean air. Research shows that ozone pollution causes 34 deaths in El Paso, 42 emergency room visits, and 46,000 missed workdays forcibly in El Paso every year. It is unacceptable that the communities are sickened with this pollution. Mrs. De Aztlan says it's time to phase out fossil fuel and embrace clean alternatives like solar powered public transportation and electric vehicles and it is unclear when the EPA will begin implementing the court's order. The court's ruling was a great first step towards cleaning up the air in the greater El Paso region, but we urgently ask NEJAC to move forward because the community continues to be bombarded by the polluting industry, exasperating an already dire situation and these industries have no accountability in our community. She noted that they will continue to organize stronger protections against dangerous air pollutions and the lack of oversight for toxic projects like the Bowie Bus Hub.

Richard Moore asked if there had been interaction with Region 6 on these issues that Mrs. De Aztlan is referred to? **Cemelli De Aztlan** said they have talked to Region 6 a number of times over the past few years and that they have notified them about the District Court of Appeals

outcome and they have had meetings once a season. **Richard Moore** said NEJAC members need to open up a dialogue with grassroots folks up and down the Mexico - US border, because it is very important and that's why he asked a question around Region 6 and its office in El Paso. **Cemelli De Aztlan** said her personal experience is as part of our research group, and not as a team, and they will make sure to keep them updated and informed as they move forward.

Karen Sprayberry asked what the state can do, because the state should be aware that you're getting ready to be in non-attainment. They should be bringing together some people and trying to come up with a plan about how they're going to address the issue. One of the ways that we've done in the past is to provide funding to help with school buses get retrofitted to meet standards. Is any of that going on in the community?

Cemelli De Aztlan says she can't remember if there was a 5 or 10-year plan, but there are a lot of health issues associated with the diesel and they're really pushing for green initiatives to move towards better alternatives. The fact is that diesel buses compounded with the already dire situation of the area makes thing worse, and nobody is evaluating the concerns between the particulate matter and the ozone.

Richard Moore noted that the state agencies mentioned is very crucial, not only in Texas but also in the New Mexico Environmental Department, because there is a point where Mexico, Texas, and New Mexico come together.

Karen Sprayberry said in South Carolina, they have coordinated air collisions and they have pulled together all the stakeholders, community people and EJ communities; trying to make a stay in attainment the best way we can. It impacts the industry if they're in non-attainment and it's going to cost them money down the road.

Cemelli De Aztlan said the air monitors are disappearing and many of the air monitors are gone at the TCEQ. These air monitors are very important for the area and they support having them.

Aya Nagano asked if the Administration counts these increases in pollution as part of the overall 7% drop in air pollution, especially since we have now heard several cases today about increase in pollution. Ms. Nagano asked if they are seeing some increases in the amount of pollutants that have been put out from industries during this time, because in LA County, they regularly had smog alerts, and they could not go out because it was too dangerous to run around because it led to exasperation or asthma problems. Communities of color are in danger of having asthma and COVID and it needs to be added to the priority issues, especially at the local level. Mrs. Nagano asked if they need to ask the local air quality regulators what they are doing to ensure that they are not increasing or exacerbating the risk of people with asthma. Can they get numbers from the Administration about what they are learning? Are they tracking the amount of air pollution from March 1st?

Cemelli De Aztlan said El Paso has been in non-attainment and has a plan that was successfully accomplished January of 2020, but, they continue move forward by adding more industry; it

was found that they skewed the numbers and now the EPA is admitting that those numbers were skewed and so they must retest. She said the issue she is concerned about is in retesting or reviewing, there's not enough air monitors and there is not enough accountability. El Paso is in the attainment plan, rather than creating a plan, an equitable plan for the community. It seems that they discarded data and hid data that was necessary for an equitable plan.

Sacoby Wilson said there is a fundamental problem with the comments and the comments from Wheeler around air quality and he thinks Ms. De Aztlan hit the issue on the head, that there is not enough monitoring to actually know what's happening at site-specific communities and at a very granular neighborhood level. The EPA monitoring network right now is inappropriate. The dataset to answer these questions are not appropriate. This speaks to a need for action, not just overhaul, but a more pointed approach. In the case of this pandemic, what should've happened was enhanced monitoring and implemented to bring in additional monitoring when you need to identify hotspots for asthma and COVID. Regulatory monitors cannot answer these questions. They don't have right kind of data. It is exposure to classification, so that's why you saw the Harvard study actually use county-level data to look at morbidity rates, because they couldn't get data down to a neighborhood level because we don't have monitors at the neighborhood level. Mr. Wilson says NEJAC must push back on Wheeler when he comments about 7% reductions, when he's talking about the criteria for air pollutants. NEJAC must ask him if the measuring criteria for air pollutants is in site-specific communities? The answer will be no. Has the EPA done enhanced monitoring during COVID in site-specific communities with hotspots of air pollution and COVID? The answer will be no. This is a huge gap and this is the place where we need to be talking about enhanced monitoring, the use of federal equipment at the monitors, low-cost sensors, more co-location, actually getting better space resolved data to answer the question around hotspots and around asthma, around COVID, and around those morbidity disparities. NEJAC must push back on Wheeler and the EPA needs to answer the questions about the human impacts. Mr. Wheeler needs to answer question about NEPA, and we need to ask these questions to Office of Civil Rights (OCR), especially, what the OCR is doing when it comes to Title VI.

Richard Moore said this is one of the most important roles that the Inter-Agency Working Group (EJIWG) needs to be involved in and in fact, we've heard testimony consistently around cumulative impact, health disparities and many other issues about impacted communities. The health agencies, the federal health agencies and their role with the IWG needs to be addressed and formalized for transparency and proof that these issues are being collaborated on.

Na'Taki Osborne Jelks asked if there was any reduction in air pollutants during this time, during this year and if any of it correlates to the short period of time that a lot of cities and states were shut down; where people were sheltering in place. School buses weren't driving, so how much of that is around a mobile source, coming from vehicles versus pollutants that may have be coming from industry, as some questions to add to list for the Administrator.

Karen Martin noted that they going to spend a few minutes seeing if we have any members of the public on the line that would make a public comment, I know some folks were not on the line when their name was called, so they are going to turn the call over to the operator and she will give you instructions on how to unmute your line to speak.

2.12 Stephanie Herron – Air Monitoring

Stephanie Herron from the Environmental Justice Health Alliance for Chemical Policy Reform (EJHA) agreed with Mr. Sacoby Wilson's comment about air monitoring and noted that the EJHA along with all our partners have worked with some congressional champions on the Public Health Air Quality Act, which aims to do some of those things that were mentioned. Ms. Herron encourages NEJAC to check out the Public Health Air Quality Act and she wanted to echo the request for NEJAC to pass a resolution about the NEPA rollbacks. She says that what the Administrator says EPA's policy of non-enforcement during the height of the coronavirus pandemic and respiratory virus is disproportionately ravaging communities of color; showing it to be clearly environmental racism and it is outrageous. The Administrator said that no one was allowed to increase their emissions during the enforcement discretion, and his statement is extremely deceptive. EPA's non-enforcement policy was like the farmer telling the fox that the hen house guard is on vacation. We may never know the full effect of EPA's policy because of the lapse in monitoring, but the policy of giving polluters a free pass when there's an emergency or a time of crisis is a pattern that must be addressed. During times like a pandemic or a hurricane like Harvey, communities need more protection, but routinely receive less. Like the commenter who spoke about TSCA, Mrs. Herron wanted to thank the NEJAC for the excellent letter about ethylene oxide and to pass on the thanks of Mr. Williams from New Castle, Delaware. That letter was further echoed and valued by the March report from EPA's own Inspector General, and last week's letter which stated that EPA needed to take prompt action to inform residents living near ethylene oxide-emitting facilities about the cancer risk they face. Miss Dora asked me to pass on to you that cancer doesn't see black or white, but unfortunately, it feels like EPA policies and enforcement do. The cities that the MOCM rule, the Miscellaneous Organic Chemical Manufacturing Rule was significantly improved as a result of the extensive community input, including that NEJAC letter. Unfortunately, the MOCM rule and the ethylene production rule that EPA has published still includes exemptions for periods of non-function or force majeure events. These kinds of exemptions need to be eliminated from every rule because communities don't get to take a break from breathing when there is an incident. EPA should not take a break from enforcement.

2.13 Yvette Arellano

Yvette Arellano said that it is inappropriate and disrespectful that the EPA has not stepped up and supported the NEJAC in ways that other offices have, including state offices of a delay in information and this is a pattern that has happened with NEJAC for years. It's time for EPA to step up and provide those resources for advocates and communities. Mrs. Arellano noted that Poly-America plastic plant erupted and continues to burn in Grand Prairie, Texas, near Dallas.

The petrochemical oil and gas industry continued to expand in the state and throughout the Gulf Coast, investing in over $203 billion in over 343 new chemical facilities and projects. Therefore, we need to provide protections when it comes to NEPA. She is requesting support from the NEJAC and the EPA to support bill H.R. 5986, drafted along with the Break Free from Plastics Act, H.R. 5845. It is necessary that meetings get held and hosted by virtual platform providing proper language access for all in a growing population with diverse populations with a variety of languages.

2.14 Isabel Segarra Torino - Clean Air Act Section 179b waivers

Isabel Segarra Torino serves as Assistant County Attorney for Harris County, Texas. She offered four points for discussion for the NEJAC; 1) a recommendation that NEJAC look at the Clean Air Act Section 179b waivers, because the waivers allow states to blame their poor air quality on international emissions and say they can do nothing about them. These kinds of waivers are affecting Imperial County, California which is a migrant farmer community; San Antonio, Texas, and El Paso, Texas; even as far as Baltimore, Maryland, states have tried to claim these waivers; 2) the commenter from El Paso spoke about Gould High School bus depot, there is a Title VI complaint out and I encourage the NEJAC to find it, because it elaborates on the issues raised by that commenter, so NEJAC could work with Region 6 to see some action on that civil rights complaint; 3) the main obstacles for improving on the air quality monitoring network annual revisions is the EPA does not treat those revisions as a federal rulemaking; 4) EPA should be commended because they rejected TCEQ's faulty science on the ethylene oxide standard, in part stating that the proposed standard and measures that TCEQ encouraged EPA to take were not peer reviewed. Mrs. Torino noted that Harris County is the most populous county along the Gulf Coast; home to the Houston Ship Channel and the Port of Houston, both supporting the largest petrochemical complex in the nation. Harris County is also one of the most racially and ethnically diverse places in the nation with over 100 languages spoken and a half of our 4.7 million residents speak another language, according to the U.S. Census Bureau. She further explained that a fifth of the population identifies as black and two-fifths identify as Hispanic and Latino. In Harris County, they face unique challenges when trying to address environmental issues, both from industry and natural disasters. In 2019, the county responded to 2 explosions and a chemical fire at the Exxon Baytown Petrochemical Complex, an explosion and chemical fire at the KMCO Crosby facility and a multi-day chemical fire at the ITC Deer Park facility. Mrs. Torino said the community lack zoning laws, and it is not uncommon to find residential areas at the fence line of industrial facilities like in the East Harris County community of Manchester. Many other communities are within one mile of (TRX) facilities like Pleasantville where retired nurse Bridget Murray works with her group ACT, and Third Ward, where the late George Floyd called home. Harris County is also hurricane and flood prone. Hurricane Harvey brought devastation to many of our communities and our residents are still working to restore their lives and homes. The county seeks new approaches to meet these ever-growing challenges. We would like to hear from community-based groups and local governments that have successfully

implemented policies and programs to address environmental justice issues in their community.

2.15 Cynthia Peurifoy - COVID and Grants for Communities

Cynthia Peurifoy said she is pleased to see the competition come out for funding for states to have the opportunities to address COVID in their communities, but she would like to see a companion type of grant program for frontline communities who are struggling with understanding what is happening in terms of environmental issues, fresh foods, and understanding children's health issues. Ms. Peurifoy noted that NEJAC needs to look at something that could help the communities on frontline more.

Na'Taki Osborne Jelks said that she thinks many of us, when the announcement came out, got excited, until we read the fine print and found that the communities and community-based groups were not eligible. Communities could try to partner with states and municipalities, but she wants to echo the fact that direct support is needed in these communities.

Richard Moore wanted to note that Dr. McClain was unable to make it today but wanted to read brief comments from Dr. McClain. Mr. Moore says Dr. McClain expressed these sentiments, *"good morning, beloved, thank you so much for your prayers and support during my illness, and surgery last Friday. The surgery went well and because of your intensive lifting me up to our Creator and to our ancestors, a miracle is happening right in the midst of a powerful storm. I will always be grateful. I will always love with all my heart and soul. I am being renewed for the next level of our movement and for liberation, divine love and peaceful planet. I love you. Please continue to lift me up during my recovery as I would do for you all."*

Karen Martin indicated that before closing comments she wanted to just open the lines to see if any NEJAC members had any comments or reflections they wanted to share on what we've heard in the public comments today.

Matthew Tejada wanted to advise NEJAC of a few things; 1) we've had a number of folks from Mossville with us today and as Richard and Karen pointed out that we are going to be taking it up tomorrow, as we look at the action items from the Jacksonville meeting. He wanted to make sure folks are aware this past Friday in one of the information emails that Karen sent out we did have a letter that was detailed from our Region 6 folks to Mr. and Mrs. Bennett. If NEJAC is going to have that discussion tomorrow to please review the letter ahead of that discussion, because there's a lot of very important information and context in it. In terms of EPA's Civil Rights Office, which EPA has two Civil Rights offices now, to be clear. Mr. Tejada believes we are talking about our external Civil Rights compliance office that handles Title VI of the Civil Rights Act and I know that their leadership has already discussed with the office to come and engage with the NEJAC again. It has been a couple years since we've had our Title VI leadership come and engage with NEJAC, but there has been a lot of progress, and it is pretty brave thing to say about Title VI at the EPA, but there has been a lot of progress, some that progress has been referenced recently in publications regarding what has to happened with Title VI at the EPA.

Mr. Tejada committed to making sure next time NEJAC convenes in person that a healthy agenda item on it will engage with Lillian and Dorka and with other folks in the Title VI external Civil Rights Office regarding what they have been doing the last two to three years. Mr. Tejada suggested that a lot has happened that the NEJAC is not aware. Finally, when we get through the time, we could have a little conversation about what we are doing with grants. This would be a good time to do it. We did receive an addition to our budget in the Environmental Justice Program last spring. It happened halfway through the fiscal year. One of the things we did was to put out some money for states, tribes, local governments to work on Environmental Justice. Mr. Tejada is hoping to finalize the selections for that grant competition and award them in the next six to eight weeks. This is not the only thing we did and a lot of the decisions around the grant money we received this past year was made specifically because we knew that money was needed on the streets, and we chose the quickest way to get money out on the streets. A grant competition for states, tribes and local government was one of the quickest ways. Mr. Tejada said they doubled the amount of money that we are awarding this year to community-based organizations through our collaborative problem-solving grants which we haven't announced, we almost through the awarding process. We also went back to our small grant competition from last year and we are able to award some of the first and second-runner up from our small grant competition from last year, so we did push out more money to community-based organizations even quicker. A larger amount of money was pushed out to community organizations once we knew we had that budget. Of course we don't know for sure if we will have the same level of funding in this coming fiscal year, it would be good to have a conversation with the NEJAC on some of your thoughts about it because we need to start planning how to solicit for that money starting in the fall. Any thoughts from NEJAC in the short term would be helpful.

2.16 Christine Bennett – Mossville, LA

Christine Bennett from Mossville wanted to note that people are still living in Mossville, after the buyout happened, they said we won't have to worry about them anymore. That's how they made us feel because they took away the monitors. Mrs. Bennett says the EPA doesn’t want to have anything to do with the community, so they took our air monitors down and the EPA doesn’t want us to know about it. Mossville is a community were the people living there are just waiting to die. I think that's very unfair and the question that was asked, so we ask if anybody is doing anything about Mossville, because we are sitting ducks.

Richard Moore said this is disheartening to hear and I've got to give this Council its utmost respect and say to everyone that participated in public comment that we take this very, very serious. Mr. Moore said that environmental issue have become quite discouraging for a lot of people throughout the country. In our last meeting in Florida, the NEJAC heard from a delegation that came from Puerto Rico and talked about tensions in Puerto Rico. People throughout this country take seriously the role of the NEJAC. Region 6 has said in the past there

is nothing that they can do, but there's always something that somebody can do. He says that NEJAC takes the issues presented today to the Council very, very seriously.

Peggy Anthony requested to have a copy of the Region 6 letter concerning the Mossville community be shared with some of us from the Mossville community. Will you just share it with the rest of the Council or are you able to share it with us?

Matthew Tejada stated that the letter is addressed to the Bennetts, to Delmer and Christine. He wants to make sure that they approve, because it was addressed to them. I am 99% sure that they would say okay, but I just want to check with them before I forward a letter.

Christine Bennett said this is our first-time hearing about the letter, so whatever we have we will let the community know about it.

3.0 Closing Statements

Karen Martin thanked all the public commenters for taking their time to come and speak with us today. As Richard said earlier, we do not take this for granted and we do appreciate you taking the time to come today. I also want to thank the NEJAC members for joining and taking the time out of their schedules and from the busy work that they are doing to spend time with communities from around the country. Tomorrow we begin again, at 3:00 PM sharp we have a lot of items that we need to discuss. We have a few action items from the Jacksonville meeting to cover and then we will spend a little bit of time talking about this meeting to see if there are any action items from this meeting.

Sacoby Wilson expressed that revisiting the extra funding program will make sure that it's actually a community driven process, not for the development of the grant program, but to make sure that it is actually getting to the folks who need the funding and to include technical assistance. He noted that he talked about technical assistance before and increasing technical assistance resources. He thinks it could be a way to get to action, but I think what was done was a good idea. He doesn't think the process was beneficial to grassroots frontline events in the communities. If the money is there next time put it into technical assistance and bring the EJIWG help with facilitation.

Matthew Tejada said it would be a great idea to talk about this further and the EPA struggles with trying to make sure we follow all the rules around grants while trying to target those grants to hit the bulls-eye of the frontline community groups and the technical assistance side.

Sylvia Orduno thanked the communities that came forward and she is concerned about folks that come forward and making effort to make public comments but for some reason are not able to be on the call at this time. She thinks that they have found that even with folks with best intentions and beliefs have basic ability to contribute to the public comment period, and she thinks NEJAC we can do better to be more accessible and to make sure they can do better outreach with communities.

Mike Tilchin thanked all the members of NEJAC and he thinks this is a technically complicated call to pull off. There's certainly room for improvement but while that is true, the work of the OEJ staff, the operator, and the interpreter was good. I know when there was a problem, he could feel they were solving this problem, by making sure that we could communicate in very complex setting. NEJAC received substantive and thoughtful comments from the presenters and a very significant environment threat on environmental justice communities.

Karen Martin indicated that this concludes our meeting for today. We will see you all at 3:00 PM tomorrow. Thank you.

NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL
Public Teleconference
August 20, 2020

MEETING SUMMARY

1.0 Welcome and Opening Remarks

Karen Martin stated she works at the EPA as the designated federal officer for the National Environmental Justice Advisory Council and we're going to get our meeting started. She noted they do have quorum to start the meeting. She also reminded the NEJAC members to please state your name and your organization when you're making comments today and remember to speak slowly. A separate phone line for Spanish interpretation and (CART) services for the hearing impaired has been established. She asked NEJAC members to please keep your phones muted if you're not speaking to cut down on any background noise and turned the call over to the chair for opening remarks.

Richard Moore from Los Jardines Institute, The Gardens Institute in Albuquerque, New Mexico, and he wanted to thank the staff, Carmen the operator, the interpreters and all of those that joined the call yesterday, not only as the lines were opened, not only to make public comment, but those that were sitting in and listening to the NEJAC. He noted that quorum is required since we are Federal Advisory Committee under the FACA rules to the U.S. at the EPA. Mr. Moore noted that the public comments were exceptional from the public the day before. He also noted that there were grassroots environmental justice organizations from throughout the country along with EPA staff and other federal agencies joined the call yesterday. He knows that there were some questions that may come up today on this call-in regard to the presentation by the Administrator. He mentioned that he has discussed enforcement actions with EPA leadership in the past and those comments that were made particularly around the enforcement are important, particularly at this moment in history, as the virus is impacting our communities. Mr. Moore said that the discussions about voluntarily enforcement actions were

much of the comments they heard, not only from Jacksonville, Florida, but in previous NEJAC meetings are volunteer enforcement actions that many of the industries are voluntarily reporting. This Council is very aware that this isn't necessarily the case sometimes or from an environmental and economic justice standpoint.

Sylvia Orduno mentioned a special appreciation to folks who really worked hard to make sure we can get the Administrator on the call and she is interested in what we're going to be discussing relative to many of the points from Jacksonville and the public comments made.

Michael Tilchin; indicated that the Council will want to explore issues raised by the Administrator's speech, and that it is the foundation of a productive dialogue for the business meeting.

Matthew Tejada noted that NEJAC has a lot of important business to get to today and he knows folks are ready to dig in, and hear an update on the Superfund working group's progress, talk about some of the steps we heard yesterday, and also handle the business we have left over from our Jacksonville meeting a few months ago.

2.0 Superfund Task Force Update

Michael Tilchin presented an update report from the Superfund Task Force working group, it is an overview presentation, and part of that presentation, they looked forward to engaging dialogue with NEJAC. The co-chair, Kelly Wright, kicked-off the presentation, running through an overview of the levels of strategies and recommendations, and then Tai Lung wrapped up with the path forward.

Kelly Wright with the Shoshone-Bannock Tribes in Idaho, stated that in 2018 the NEJAC received the charge from the EPA Superfund Task Force to help integrate environmental justice into the cleanup and redevelopment of Superfund and other contaminated tribes across the U.S. The overall goal of the charge is to provide recommendations to the EPA administrator that will help identify barriers, solutions and best practices for improving our ability to achieve cleanups of Superfund sites quickly with better outcomes for local communities. The development of the NEJAC's strategy and recommendations for the program was guided by the vision of the future for the Superfund Program. EPA Superfund Program more effectively fulfilled its core mission of protecting human health and the environment by serving as a change agent, driving community engagement and asset creation. The foundation for success in this enhanced mission is to establish a community-driven in-state vision early on and throughout the Superfund process from planning, remediation to reuse and development. The EPA Superfund Program action to achieve this vision is dependent on EPA's approach to decision-making, guidance, training, community support through technical assistance, and financial resources, and adaptive innovative programming.

Michael Tilchin said at the overview level and looking at the process, that they have a diverse, energized, hard-working group from the kind of wide range of stakeholders who helped

develop the strategies and recommendations. One of the things that Tai is going to focus on is the case studies that are going to be a very substantive part of this report in its final form. He noted they are looking forward to releasing the next version of the report in a relatively short period of time and looking forward to getting a detailed input from other NEJAC members. Specifically, they want to hear from NEJAC on important aspects of the Superfund program and its impacts on environmental justice community that the workgroup may have missed. We assume that it is inevitable that constructive input can identify those areas and they are interested in hearing from NEJAC's perspective. Mr. Tilchin noted the recommendations run the gamut that EPA is currently part of in the Superfund Program, but there are issues related to both how they deeply penetrated the program, how consistently they are applied in the program, and if there are areas where they can be expanded productively. There are some recommendations that are significant innovations to the program that can be handled within the existing structure of the Superfund Program. All the resources are in place and all of the internal institutions within Superfund are in place, but there are things the Superfund can do to elevate the program. At the far end of the spectrum, there are several significant new programs that we would like for EPA to institute, whether it's something that happens at the Superfund level or agency-wide level that will benefit Superfund and raise EPA's game overall. From an implementation perspective, that's a bigger deal. Mr. Tilchin said they have got a clear direction to go to interpret that wasn't done artificially well, don't constrain yourself artificially or not within what the Superfund currently does, it's about ways to break those boundaries to really raise the level of performance of Superfund. You'll see several recommendations that focus in that area that have transformative impact on environmental justice communities and the Superfund Program as a whole. He said their first working strategy is to implement a more intensive community engagement practices at Superfund sites. This is something that Superfund does and some of the more transformative things they would like to see within that program is the establishment of an ombudsperson role at sites with a significant level of liaison responsibilities between the communities, helping them raise their voice in decision-making. Another thing we think has withered is a deeper productive engagement between EPA and the Agency for Toxic Substances and Disease Registry, so in Strategy 2, there is opportunity to elevate, update, and improve the guidance within the program to help with quality and consistency, because there are consistency issues. Some of the things that are under this guidance and sort of guidance-focused strategy are to look at the limitations by guidance. Speaking of breaking barriers under – one of the directors that says, "*Superfund can only go so far in terms of what its responsibilities are and can't really move beyond what's called betterment within communities."* Mr. Tilchin thinks this needs to be revisited, because it puts in a barrier on what Superfund can do in the community and we're going to explore ways to see if we can break those habits. Mr. Tilchin says another significant step forward is looking at the consistency issue, we think that there's a real opportunity to improve both quality and consistency and innovation by establishing formal communities of practice among the remedial project managers working on sites with similar issues. In Strategy 3, a focus on issues related to training, training both within the impacted communities and training within EPA, the level of

training within the program is to establish a formal kind of investment in specific professional trainers to elevate the way in which information is communicated, both in the content and delivery. This doesn't exist within the program now. The other recommendation is more community involvement on program initiatives and from the branches to be better involved. He said they have gotten outstanding feedback from branches on the report, very helpful and a great deal of interest. In Strategy 4, they get to the foundational aspects of the report by elevating the future and use planning as a core element of the Superfund process, getting back to expanding the role of Superfund, it is this strategy recommendation to establish new programs that were recognized. They are looking into a couple of different areas, one of them being essentially borrowing from something that exists within the Brownfield Program, and it's called the Brownfield Area-Wide Planning Program. They think the model can be implemented in Superfund and there are significant details in the gliding elements of that program, or what our vision is for that program can be. Mr. Tilchin noted they would like to see the Superfund redevelopment become successful. It's a program that can benefit from being expanded and really penetrate the program and on a larger number of sites. In Strategy 5, they refer to this as the culture shift within Superfund, leveraging the creation of assets for communities as an outcome of the cleanup, and having that become a catalyst for innovation and improving the cleanup program itself. Several of these new things are not being done within the program; establishing an innovation incubator, so remedial project managers have a group effort they can turn to when they're trying to promote this redevelopment and reuse at sites. A stronger connection to the technology expertise or remediation technology expertise through a direct link to the technology innovation and field services division, directly linking RPMs in that division; broad penetration on a large number of sites event of health impact assessments, and reinstituting the community action for renewed environment. This agency level program is very productive. In Strategy 6, a very critical strategy focuses on equity. It revolves around establishing a new program within EPA, first as a pilot, an equity pilot program for impacted communities. When you read the report, you'll see that the program is described in substantial detail. Taking that equity lens, filtering it through all aspects of delivery of the program, including where money the goes. We think if the community is given the opportunity to both deliver services and benefit from the services, which doesn’t happen anywhere near to the degree that it can and should within the program. It is important to reestablish some very clear expectations about what will be expected to be measured. In Strategy 7, you will see in terms of acreage, most of the pages of the report, Strategy 7 is a deep dive into both the specific needs and what resources are going to impacted communities. A lot of that has to with how the money flows and the coordination in the EPA, because there are multiple programs within EPA that have a community focus. Mr. Tilchin said they have several recommendations about how to improve the synergy across the federal family, there are multiple departments and agencies that are working on similar things, but they're not as coordinated as they need to be. He suggested that bringing the resources and the programs together in a much more coordinated manner; will benefit the environmental justice communities with Superfund sites in the process. There are several recommendations for EPA to take a more active role in

helping communities get access to funding outside of EPA, serving in an advisory capacity to help those impacted communities get access to philanthropic sources, other sources of funding that can help meet the defined needs of the community. Mr. Tilchin said this is where they are in terms of the recommendations, a broad mix and they have identified synergies that speak to the whole and then the sum of the individual parts through individual recommendations to really elevate the program particularly for EJ communities.

Tai Lung said the timeline for the final report planning was to have all of this completed by the fall, but the timeline has been pushed back to share it with the NEJAC to get more detailed comments. Mr. Lung said they would give it at least a month in advance to provide those more detailed comments and hope to get feedback back before the holidays sometime in December. The report will be revised based on the feedback received, and we hope to have a final version of the report at the next NEJAC public meeting.

Michael Tilchin said this completes a quick run-through from where they are and they eagerly awaiting any comments, questions, concerns about what they have done to date, and where they are going. He opens the floor for comments and questions.

Karen Martin noted that she gave the members instructions earlier on how to indicate that they wanted to speak, if they have a question or comment at this point. Are there any questions or comments for Mike, Tai and Kelly?

Sylvia Orduno expressed her admiration for the summary and recommendations. She asked for more in-depth information on the recommendations that are about specific barriers. She thinks that folks from the different communities see this structural injustice, the racial inequity, the longstanding environmental justice problems and other issues that are really calling for attention and for real change. She wanted to hear more about barriers specific to the structural injustice, so that they are being named in the report, but also so that no one is walking past them in these series of recommendations. Mrs. Orduno said it is important to call out problems; making sure that everything like basic communication gets down to the local level to impacted residents specifically, or technology barriers that continue to happen because of lack of active feedback. She thinks locally impacted communities say, “This is what we need,” because they don't always align with what it is that the state, or even local, or EPA people that are part of the strategy plan is doing for the remediation relief that is more equity-based. She thinks even with that, this is still one of the things that is irregular and requires immediate relief. Before folks even get started, what can you do right now, in terms of providing some immediate relief while the long-term cleanup takes place?

Kelly Wright; said the barriers in many EJ communities tie back to getting some consistency within EPA; this is based on personal experience, headquarters does one thing, they issue certain orders and then it's taken back to each of the different regional offices, and then they turn around and try to implement it themselves. What we are trying to do is to get one of our keywords “consistency,” implemented. They see that getting people involved in the process

upfront, at the very beginning, so that they're working through the entire process, improves consistency at Superfund sites. He said that some of the community members have educational barriers, so using terms like "cleanup," creates inconsistency and caused confusion in the community, because it has not been clearly defined. He said if they can get the community involved from the start to finish, it gives ownership in the process, it is one of the reasons he became part of the workgroup. Mr. Wright is not saying the EPA is all negative, they do have some positive things, but they must identify the strengths and the weaknesses, by focusing on weaknesses and finding ways to improve them.

Michael Tilchin said the report allows us to dig a little deeper and be more descriptive about the concerns because it is the equity pilot that is a significant shift in the criteria used for EPA grants; focusing on communities with the greatest need and actually bringing in a specific quantitative equity dimension to EPA budgeting, making sure that funds are reaching the communities with the greatest need. The immediate relief issue has not been fully explored in much detail, but we're certainly are going to give that additional consideration and make sure we capture the intent. **Sylvia Orduno** indicated a need to follow up on the written recommendations and drive home this point specific immediate actions or short-term actions are needed. They could be as simple as talking to local community who might say, "we need three new air monitors," than give them three new air monitors. When they say, "We need new plastic sheeting on our windows to keep out the air pollution," than give them new sheeting on the windows immediately. She noted that these are simple things to do, and while the rest of the remediation process takes place, then these needs should be met upfront, this shows that there is something demonstrably different, and that they are seriously being taken in as partners. **Mrs. Orduno** said it has to be part of how they get community support and buy-in, but it also demonstrates that this is not business as usual. **Michael Tilchin** said that one area they have tackled early is substantive meaningful engagement with the community that really influences the actions taken. He thinks that this is part of what **Mrs. Orduno** was talking about. **Mr. Tilchin** said he thinks this is extremely important in the immediacy, and it is a matter of urgency for our communities who been impacted for years by decades of contamination from these sites.

Hermila Trevino-Sauceda asked for more of an explanation about cleanup, not being just like what we do at home in terms of just taking care of whatever you see. She noted she hasn't had the opportunity to participate in the Superfund meetings and she is always going to be concerned about any Superfund, anywhere EPA or any federal agency or state agency were responding to situations like this. What really happens to the people when there is a whole process of bureaucracy whenever a complaint is filed? People need to get a response, if people are saying, "We need this," let's make sure that there's a quick response. Meanwhile, the bureaucracy finds that cleanup is real and not an artificial cleanup, so we need to follow up with how our community has lost so many human beings, because promises are made but not followed up immediately. And, if it is not going to happen right away, then what will happen in the meantime? She says we need to follow up on what is the "real" need in the community.

Michael Tilchin said the importance of taking immediate actions that are just solely and completely based in the needs and the concerns of the community is an oversimplification, but may not really be part of the significant or the long-term cleanup construction project, but still are related to quality of life. To reduce exposure to contaminants for the communities means immediate action needs to be taken and, in some cases, this is extraordinarily important, and it is simple and easy to do. They are going to examine the normal ways of doing businesses in the program.

Ayako Nagano asked to have recommendation 5.3, regarding health impact assessment, be explained more about what it entails, and what process we should go through to make that assessment. She asked if they are considering who is not at the table in this planning process and if they are able to talk to people on the ground at Superfund sites that have worked with this challenging situation to get their feedback? Who have you been able to get feedback from in general?

Michael Tilchin indicated that the workgroup has several members who are defining the process for health impact assessment. It has been implemented at some sites and it is not simply a risk assessment. It is a deeper dive engaging the community members on the whole range of threats to health that are taking place in a community. It is a quantitative assessment that looks at threats like exposure to toxic chemicals from the site and other discharges. It is a deep dive into the concerns from the community and then a preparation of the series of recommendations to address the environmental threats, it also addresses issues related to socio-economic well-being and impact on the community's health. Coming out with a structured report makes sure that the report's long-term actions are built into the report. All sites get a risk assessment, but a limited number of sites have health impact assessment which is a more comprehensive view of health issues impacting the communities, and then we take this comprehensive information in a structured format and use that as a tool to develop a long-term remedy.

Kelly Wright noted that they looked at risk assessments which has no standard protocol to utilize evenly across the board, so they look at things in different terms than what EPA does. The risk assessments are done on a 50 to 100-year basis. He says they must look at least seven generations. The other part of that risk assessment they value is the micro-organisms as equal in life and science doesn't always necessarily address that. Mr. Wright noted that it is a good area where many cultures have differences and we need some variability. There shouldn't be just a standard, off-the-shelf way to try to fit everything into one type of document.

Michael Tilchin; said they didn't go as deep in terms where the workgroup members were looking at specific sites' and the needs of community members from those specific sites on a workgroup. He said they have a lot of outstanding people on the workgroup, including several people that are involved in the grassroots environment including equity issues, to include membership from Superfund communities. He thinks it is helpful to provide a profile of who's

participating in the workgroup, because they have a broad range, including a lot of community activists working at the grassroots level.

Kelly Wright explained that they went and toured a Superfund site in Philadelphia and talked to the community members involved and Region 3 did a great job of putting that together for us. Mr. Wright said he comes from Region 10 and there were some major discrepancies or differences between the Region 10 and Region 3. Therefore, he will go back to his comment before, headquarters make the rules and regulations, but the actual implementation is done in the regional offices, and so they want to see better consistency.

Sandra Whitehead, from George Washington University Department of Planning, said a systematic tool used to work with communities to identify their concerns is in need. In the case of Superfund sites, it gives community members an opportunity to raise other health and safety concerns that can be addressed through this process. It's very collaborative and it is a way to give a voice to the community in the Superfund redevelopment process. She recommended this school thought because it addresses health and equity, and because there aren't a lot of other tools that have been used in this realm of Superfund redevelopment to accomplish it. The question of whether health impact assessments could address some of our PFOA contamination questions, certainly, this process can be used to work with the community to identify what the health impacts are of exposure both long term and short term, and to use the process as a way for the community to make recommendations for cleanup and to address their concerns. She thinks that it is a very flexible tool that is focused first and foremost on the health of the community and giving them voice to participate in the process more broadly. Dr. Wilson is raising another point that health impact assessments can be rapid, that can take as little as two weeks, or they can be comprehensive which can take about a year. Either way, what you come out with is a very good baseline of where your community is health-wise and a prediction of what the impact will be, given different scenarios for redevelopment. It is a great planning tool and it's a great collaborative tool.

Richard Moore said a risk analysis has never really worked for grassroots communities because of the risks that are taking place and the community has testified repeatedly at previous NEJAC meetings that they question the risk analysis concept. These reports are done while exchanging with other entities and are dealing with sovereign governments in terms of tribes and the question of sovereignty when it comes to native and indigenous folks. The equity analysis or an equity lens is crucial to this overall report and this sort of recommendation. He thinks the teams need to touch on it early, meaning not after the decisions have been made. It means bringing the community to the table in the beginning. If you are going to bring early and meaningful involvement, then it's not necessarily to operate in an advisory capacity on the part of the community, because the community should be heard and the recommendations that the community makes should be taken very seriously. There are several barriers, and these are just a few. The other barrier is the language barrier. It is connected to early and meaningful involvement. Language and the translation of materials must be looked at. Another barrier is

the technical assistance grants that were open to community members to apply for, that is also connected to the early and meaningful involvement. Many of the grassroots folks are extremely educated on the impacts that their community are facing from a health standpoint. Mr. Moore noted that he uses the word "community impact analysis," because from a community perspective, community impact analysis is better understood than solely using a risk analysis. There's a lot of mistrust for a lot of good reasons from the community, even what the EPA is doing by putting technical information on the table. There should be technical assistance grants given to grassroots folks. The last one is important in terms of the cleanup. The community gets concerned in many cases because EPA does not entail if the cleanup they are conducting is done in a healthy and safe way. The community worries if they are going to be further impacted outside of initial impacts. Lastly, an avenue around economic development and mechanisms should be in place, and include employment opportunities for young people, but there are no employment opportunities and training for community members to work on cleanup sites.

Michael Tilchin noted that Mr. Moore's comments are helpful to understand. In some cases, it was very uplifting, because we're attacking that issue in the report, but we can do more. And then in some cases, we may have missed the mark. What a great comment. So extremely constructive and helpful.

Tai Lung noted that the workgroup is happy to take any comments right now because if you give us comments earlier in the development of the plan, it's going to be easier for us to try to include them. He asked NEJAC to provide comments over the next couple of weeks, then we can incorporate that into the draft that you're going to see in October. October 1st is where you're going to have the full description of what that health impact assessment is rather than just this one-line summary of better incorporating HIAs into the work of Superfund. Mr. Lung noted that the reason he gave this initial list is so that you could see the direction that we're going, but if you see some big glaring issues that are missing from the report, please let us know now because that's going to help us build that in so that the next time you see this report it will have that those issues incorporated.

Karen Martin stated that the next agenda item is the NEJAC business meeting. NEJAC will spend the rest of the meeting discussing our business meeting action items from the meeting in Florida and then any other action items that may have come out of the discussion from yesterday.

3.0 Discussing the business meeting action items from meeting in Jacksonville, Florida

Sylvia Orduno indicated that the attachments of information from Karen is a summary of the action items list from February 2020 public meeting. You will see a list of items that are prioritized action items and next to that is potential actions for NEJAC to take, and then the previous NEJAC/EPA action on the topic. There are 20 items listed, but it's the first nine that

we're likely going to focus on. We wanted to make sure that we've got a list of the other items that have come up from different NEJAC members and public comments. She said she is going to read through the list of nine items, so everyone is familiar with them. The first item is farm worker concerns and pesticides. The next is the Yazoo River flooding issue. Number three, risk management/slash chemical disaster safety rule. Number four NEPA. Number five relocation, namely Mossville, Louisiana. Number six is water in Flint, Michigan, but also connected with the NEJAC water infrastructure report. Number seven Superfund Task Force. Number eight miscellaneous organic chemical manufacturing and ethylene oxide. And number nine is monitoring and screening. We wanted to see what NEJAC members are thinking in terms of how to proceed with next steps around these items. We need to discuss the type of actions that we would want to take and try to at least begin. These might look like initial drafts and letters, if that is one of the objectives that NEJAC members have, requesting additional information from EPA's staff or department, and also propose any kind of other future like group meetings or information gathering that we need to have from other sources. You will see that there are other things that are part of the list of 20, but these first nine are understood to be part of the prioritized actions. If there are anything folks believe that are not on this list, we can see about how to address that during this conversation. Aya also asked if there's any time to get feedback on the legal angle for the Superfund site in Jacksonville. We should add that to the list as something to discuss after we get to the nine.

3.1 Farmworkers

Sylvia Orduno addressed the farm worker concerns and pesticides, saying that some specific recommendations in terms of what they're asking from NEJAC and from the EPA, but they need to get some clarification and some feedback from NEJAC members about what it is that they want to do next. Currently, we are considering a request for an EPA briefing about the issues around pesticides effecting farm workers. Other actions to take range from writing a recommendation letter to the EPA on this topic about the necessary types of changes to protect farm workers against pesticides. The presentation from the farm workers had a list of flagged pesticides that they wanted to see be abandoned. She asked for feedback from NEJAC members about these two actions.

Hermila Trevino-Sauceda noted that a letter was sent in 2017, and a response a year later regarding the letter in terms of the request. The letter came from our counsel requesting the importance of the (WPS), the working protections numbers. The testimonies that these women provided in February is an example of thousands of workers are going through daily. California has many regulations, more than the federal government. And we still have many people exposed to poison. The issue is not clear if workers have a representative, and what can they do if they get poisoned? What can they do if they don't want to be poisoned? The workers are told constantly from many companies and crew leaders, “don't worry, it's medicine sprayed on the plants, so that there's no plague or there's no insects or no fungus.” When workers are told that it is medicine, then people don't think it's toxic. I'm just giving an example of things in

terms of going back to February. There were two powerful testimonies. It just brought back memories of how my family, the people that I've worked with, the people that I've known, the people that I personally work with in the fields and the people that we continuously worked for more than 40 years are going through the same situation. We were supposed to have a meeting with the Administrator, but because of COVID we've ended up not having it. The Administrator was not willing to have more than one hour of conversation. The issues needed more than five minutes of communication and sharing of how hard it is for people right now, because of COVID we are called essential workers. Farm workers have always been essential, because we know that if we don't plant and the harvesting doesn't get done, then all the fruits and vegetables will not get picked and the rest of the society will not be able to live. Farm workers lives are invisible, and we continue to be invisible to the rest of society. We're called essential because we need to work to make sure that people are going to have food on their tables, but problem is that they are not treated as essential workers. We have been getting calls not only from California, but from different states and we're represented in 11 different states in the United States, not only dealing with what's going on with COVID, that has increased the risks of our people in our communities, but we have been getting complaints from people worried about not being able to speak out because they might get fired. I want to reiterate how important it is that the NEJAC l keeps pushing for making sure that EPA brings more immediate attention to the farm worker issues. In 2017 a letter was sent and because there was a rollback, now little by little that has been given back. These workers don't even know about these regulations. Why? Because they are not written in the cultural context of the community. Why? Because we have no resources. I want to end by saying we need to continue to support farm workers. In February, I really felt that the Council was not only feeling it but understood how much harm there has been in our community. I don't know how much more I can say about how importance it is for us to keep bringing attention to this and making sure that EPA is aware. I know EPA is trying their best, but that local district offices are responding slowly and taking their time. We need the same kind of response as in any kind of poisoned communities that are right next to the fields or workers that are being pressured to work while the spraying is happening. We have women that are going blind. We have workers that are having a lot of different kind of health issues, because these pesticide poisonings keep happening.

Sylvia Orduno noted that these issues of structural injustice and racial inequity have allowed for no exemptions for generations of agricultural workers and how they're treated unfairly in this country. We should not continue to set aside pesticide issues. NEJAC can have a say as to not allowing them to be exempted from these health and safety protections. This is something NEJAC must prioritize. Another recommendation is that we create a work group and schedule meetings with the EPA program.

Richard Moore said this is another example of an issue that has been testified repeatedly from our farm worker communities in many NEJAC public comment sessions. The rollbacks and cutbacks that are taking place effect farm worker women and men on a day-to-day basis and it

is extremely important that this issue keeps getting brought up, because the rollbacks and cutbacks pertain to the specific pesticides that effect farm workers.

Sylvia Orduno asked the Council for consensus on what they want to do in terms of potential actions. What actions can we take for requesting an EPA briefing, creating a work group, or scheduling meeting with that EPA program? Should we draft a recommendation letter to the EPA on the topic? We have drafted a letter before, we've drafted a couple of letters, at least, in '17 and '18. And that might not be the avenue, in my opinion. I guess I'm trying to find out what it is that NEJAC members want to do in terms of making recommendations that we can move forward on next.

Karen Sprayberry thinks a good recommendation might be to ask the EPA to form a farm workers stakeholder group and pull together all the various groups together and start having a dialogue about some of the issues and how they can be addressed.

Karen Martin noted that all the information being discussed is in the meeting summary from the February meeting. And, she has shared the new link for that information in the e-mail sent out with the teleconference information. This is not new information, it's information that was raised during the February meeting. **Benjamin Paul** from Kettering University, Flint, Michigan, has a general question about the letters. He noticed that the responses are minimal and often do not address the specific concerns and recommendations. His question is how typical it is to get a more substantive response. And in the absence of such a response, what the value of writing this sort of a letter would be. **Karen Martin** noted that a couple comments about the EPA letter responses, that what happens is that the NEJAC develops a letter with recommendations and submits it to the Administrator. Then NEJAC typically gets a response back from the Administrator saying thank you for providing comments and the program office will provide a more detailed response on the issue. If you are looking at something that does not have a more detailed response, we need to go back to the program and get an update on where we are with those recommendations that were made to the program.

Benjamin Pauli indicated that is part of what I was wondering, but also he was wondering if there are cases where it just stops with that, sort of an acknowledgement on the part of the agency, and then it really doesn't go any further.

Sylvia Orduno noted that NEJAC has an hour and 20 minutes left for the rest of this discussion to consider, and what we heard yesterday in the public comments. They still have eight more items at least to move through. For this item we have got a recommendation, that when there is a lack of response from the EPA administration, there is an effort to go back to that program to seek more information. She says another recommendation that we could do in terms of potential action to create a work group and to schedule a meeting with the EPA program is to include investigating the creation of a farm worker stakeholders' group. Is this something that NEJAC members feel comfortable with and advancing as opposed to drafting another letter at this time?

Deborah Markowitz indicated her support for this important issue and moving forward on it.

Karen Sprayberry recommended bringing together the various stakeholders like OSHA into the process. Worker Protection Standards are also part of EPA. It was approved by EPA.

Sylvia Orduno noted that no abstentions voiced, and consensus has been reached, NEJAC will move forward with the recommendation.

3.2 Yazoo River Flooding

Sylvia Orduno started to address the Yazoo River flooding issue. A group presented some information, through the public comments in Jacksonville. One of the recommendations is that we table this action until current activities are concluded. There are actions taking place from the local to the federal level in terms of interveners. Another action is to request an EPA briefing. A third action is to draft a letter of recommendation to the EPA on the topic. And it didn't seem that we quite had consensus. Karen, if you can maybe give us the latest as you are aware.

Karen Martin indicated that she has shared a federal register notice for supplemental (EIS) with NEJAC members that was published since the last meeting. The Army Corps and the EPA are working on a new (EIS) for this particular project, so the recommendation to the Council is to not take any action on this item until the outcome from the new actions are in place.

Michael Tilchin said that many folks are feeling impassioned that the NEJAC needs to respond in some way to this, because one of the concerns was whether any type of response from NEJAC would add to the complications of what is happening with the variety of different actors who are participating in address the issue. He thinks immediate action will add complications, but in no way are we saying that NEJAC should not respond. He thinks we should try to figure out if NEJAC members are feeling if we should respond at this time or another time.

Ayako Nagano asked if it is customary to give the community an update before the EIS report? Are we going to wait until the (EIS) report or, at least, for the people who came to Jacksonville just to give them any kind of response at this point? Would that be hard to do or is that something you do? I'm not sure.

Karen Martin replied the NEJAC can definitely do a response letter back to the community just to let them know that NEJAC is paying attention to the issue and to let the community know what our plan is moving forward.

Virginia King said it is fine getting back to them. I'm sure that they would love to know what we've done since our meeting in Jacksonville. When the (EIS) statement comes out in October, at the very least the committee, the NEJAC, should review it and potentially submit comments to ensure that the environmental justice aspect of (EIS) is robust.

Sylvia Orduno said a review in October after the release and see what they have to say and, in the meantime, send something that says that we are paying attention and that NEJAC will table

this until we learn more it in October. Mrs. Orduno noted that no abstentions was voiced, and consensus has been reached, NEJAC will move forward with the recommendation.

3.3 NEPA

Sylvia Orduno stated that the group will return to item three later, but now continues with item four and there are four potential actions we could take. One, request an EPA briefing future agenda topic, create a work group, and scheduling meeting with the EPA program and a recommendation to the letter EPA on this topic. This has been something that has been flagged by several folks and we also had some public comments on it yesterday. Mrs. Orduno thinks NEJAC should pull in some of the public comments, in particular, there was a recommendation that NEJAC take up a resolution. I don't know if NEJAC members had a chance yet to read it, but I think we should include that in the discussion.

Karen Sprayberry asked how does the resolution work? Does that go through Congress? How does a resolution actually work? **Sylvia Orduno** said the resolution is from NEJAC. **Karen Sprayberry** indicated that a resolution was presented, so she was just curious how that would have worked, not saying we're going to do it, but just didn't know she has ever seen a resolution presented to NEJAC before.

Matthew Tejada explained that a resolution would be similar to expressing an opinion in one of the letters that the NEJAC votes to draft which is sent to the Administrator, but the NEJAC, by its charter is formed to provide advice and recommendations to the Administrator of the EPA, so that is who the NEJAC would be communicating to on NEPA.

Sylvia Orduno indicated that because the action that had been taken by the White House Council of Environmental Quality (CEQ), the resolution recommendation was trying to make the NEJAC aware of those changes, and our concerns about those changes need to be sent to EPA Administrator. We should at least get on the record about wanting to state concerns and make part of public record that shows our opposition.

Matthew Tejada stated that was part of the motivation for our colleague to come in and engage with the NEJAC in Jacksonville. The gentleman who attended from CEQ came because the letter that NEJAC had written on NEPA to the Administrator was sent to CEQ, and CEQ put it in their record as part of the NEPA rule making process. When we get something like that addressed to the Administrator, it speaks to issues that are not solely the purview of EPA, we do share that with other federal agencies or the CEQ at the White House.

Ayako Nagano stated that she would support NEJAC efforts and would support a work group if there are others that are interested.

Karen Sprayberry indicated that her other concern is about being in a time crunch to do something about this issue.

Matthew Tejada said he thinks the previous effort by the NEJAC was incredibly timely and received by CEQ during their deliberative process. We're now past that. He thinks what the NEJAC would be contemplating now would be is if the NEJAC is taking a public stance on making sure that publicly is known to those rule revisions and have they come out with the stance or position or opinion NEJAC wants to express about them, you would be doing that publicly, because we are past the time for the NEJAC to try to offer an opinion during a deliberative period.

Richard Moore suggested that CEQs comment period was very short and one of the things that was additionally testified to in Jacksonville was that the hearing in DC conflicted with the Florida NEJAC meeting. He thinks it would be important for the NEJAC to express its opposition to the NEPA rollback and it would be important to express opposition on the part of the NEJAC council. **Sylvia Orduno** asked if the NEJAC got a chance to review the resolution? What is the feeling about opposition to the rollback in the context of a resolution? Is the group thinking some other different form? **Richard Moore** said no, and he thinks it is not about looking at it in a different form, because things are moving very fast on this, so he thinks it's important that we move as the Council has said, we move on this issue and address that the rollback very clearly impacts EJ Communities.

Sacoby Wilson asked what do we need to do as it relates to the resolution or any edits, amendments to the resolution? Is it having strong language about the need for NEPA to do more, not less as it pertains to cumulative impacts, do more and not less as it pertains to looking at health or potential health impacts and do more and not less as pertains to benefits of these projects? Are we to highlight an example like in Charleston and how NEPA should help inform mitigation with dollars to help communities with those impacts?

Melissa McGee-Collier said that based on the column that talks about our potential actions, if you look at this legal issue and the issue of the agricultural workers and the issue of the chemical safety, then those response letters that came back to us from EPA Administrator, basically said nothing except that we got the letter, thank you for your time, we will investigate it. She believes that NEJAC should ask for a meeting with the people that run the programs. Ms. Collier noted that she wants to see what the intent is regarding our letter. She said NEJAC should ask, how far has EPA really looked and what does EPA plan to do to address the issues that have been raised in the letters; another letter is unnecessary unless it's a request meeting.

Sylvia Orduno suggested starting a workgroup. She noted that Ms. Nagano would like to see a recommendation of adopting a resolution. **Kelly Wright** stated that the problem with the resolution is his experience with it. He said they used it on a regular basis with a sovereign nation and it's no different than the deal. The other problem is with the NEPA process, we had very limited opportunity as did the citizens of the U.S., they had two hearings and that's more of a slap in the face in my opinion. **Sylvia Orduno** asked for a recommendation and what more can be done? She indicated that most are favoring a letter over a resolution, which might be more impactful. **Kelly Wright;** thinks NEJAC should do a letter, and a work group, because we

all have different areas impacted, and it all comes back to being united or stand divided and you fall. **Sylvia Orduno** said it sounds like NEJAC has folks that are recommending that we go forward with working group and providing support a letter that is extra explicit, making sure that we're conveying that we're not happy about what was done by the White House CEQ. NEJAC needs to show concerns with rollbacks that harm and by establishing a clear connection between chemical safety and the harms to agricultural workers. It feels like we can also address this in the context of a letter and a working group. Does that sound like where NEJAC should take actions? I will ask for a vote.

Melissa McGee-Collier asked if the letter will be requesting a meeting with the EPA program or is it just another letter?

Sylvia Orduno said she didn't mean that specifically, but that should be in it. **Karen Sprayberry** asked for clarification, the workgroup would just pull together all the points of concern that we have? She asked that the role of the workgroup would be to pull together key concerns of ours like the resolution and other concerns heard, and then compile it on one slide. That would be the role of the workgroup? To file the documents would be taken to the program staff, is this the role of the workgroup?

Sylvia Orduno said, yes, it would be the basis of it. She noted that she understands some of the concerns raised in public comments about the problems with the rollbacks. Someone made another comment about other concerns on how NEPA should be doing more, not less, and what that could look like. **Karen Martin** reminded the members to keep in mind that if you are considering writing a letter, it must be approved and finalized in a public meeting. If it is something we want to start working on quickly, that means we can start working and writing the letter, but it cannot be finalized until our next public meeting. **Melissa Collier** mentioned that some of these issues like getting updates and having further conversations with the program needs to happen quickly so we can schedule a meeting with the program office and start talking about some of these issues before we get to that point of saying you want to write a letter or resolution. She asked if NEJAC can develop the letter outside of a public meeting, and then when we are ready to make a final decision on that action we must do in a public form. **Sylvia Orduno** replied that it is important in getting the best sequence, so that NEJAC can move forward and work appropriately. This is what NEJAC members need to weigh in with a yay or nay or abstention. Should NEJAC seek a meeting with the program office and ask questions specific to NEPA? Is the information in the resolution enough to develop a letter, after which it will be presented at the next public meeting? If there is any opposition to what was stated, please let me know. Otherwise, we'll go forward to just getting a consensus vote.

Michael Tilchin; asked for clarification. This is a discussion about the sequence of actions? He noted that he understands the first action is to request a meeting with relevant responsible leaders related to whether the issue at hand whether it's NEPA or Worker Protection Standard, however those are separate actions and separate requests. If then, they are separate and then the first action is to request engagement with the responsible leaders within EPA working on

that topic prior to issuing? Our next step would be to request a meeting. Do I understand that correctly? **Sylvia Orduno** affirmed, Yes. Using the basis of the resolution as part of the reasons why we need urgency in the meetings with the program offices and using the content of the resolution as part of the objectives for the discussions. If there's no other discussion, then I'm going to call for the soft vote.

Sylvia Orduno affirmed that the members agreed, so the next item to discuss is relocation, and then the NEJAC water infrastructure report. Mrs. Orduno suggested that this discussion can be short. After that is the Superfund Task Force that should also be short. And then miscellaneous organic chemical manufacturing and ethylene oxide as well as number nine, monitoring and screening. So, we are going to move through those a little bit quicker. She wanted to highlight some of the things that have been flagged for us just so that NEJAC can note them. NEJAC is looking at number 10, the item would be hiring local contractors for remediation and disaster recovery; number 11, natural disasters/recovery; number 12, racism; number 13, administrators meeting discussion; 14, dialogue with office policy; number 15, dialogue with EPA Region IV; number 16, environmental justice IWG, Interagency Working Group and NIEHS. Number 17, public notice for future meetings; 18, translation/interpretation services; 19, agenda development; and 20, food security. A majority, of the items have potential action that NEJAC could address as future agenda topic for a NEJAC meetings. Mrs. Orduno said NEJAC will come back at the end to see if there's anything that we need to speak about immediately. Let us get back to the list of the nine. Next is Mossville relocation and the potential actions, they are requesting an EPA briefing and a recommendation letter to the EPA on this topic.

3.4 Relocation - Mossville

Karen Martin noted that the relocation issue with Mossville, Louisiana, heard in public comment yesterday; and at the meeting in Jacksonville is about the letter that EPA Region 6 wrote to the Bennett's. That is the information in the email you have. The Bennett's have attended several NEJAC meetings to try and bring their issues forward, and the letter that you have was in the minutes from 2018, and we need to decide what action we want to take on this issue moving forward.

Richard Moore spoke regarding the letter to the Bennett's and that they stated that they never received a copy of that letter in 2018. He thinks it would be out of place on the part of the NEJAC to send that letter out. The letter needs to be resent to the Bennett's. Mr. Moore mentioned the testimony regarding the lack of monitors and them not being replaced, were not actually located near the community. The EPA has been unresponsive to the community. My question is to Matt and to Karen, would it be important for us as a Council to open channels of engagement with Region 6? Those who testified said that the EPA Region 6 has been unresponsive to their concerns, and other comments about the relocation has already taken place. It is uncertain if the relocation just or an unjust relocation. This interaction has been very hard for the Mossville folks, who point out that the region has stated that they are finished with Mossville, that there's nothing that the region can do about it. Does the NEJAC make a

recommendation for further discussions to take place with Region 6 with the Office of Environmental Justice present. **Sylvia Orduno** asked Mr. Moore to clarify in terms of our recommendation, are you asking that the letter not be forwarded, is that right? And, are you asking that the action be a discussion with Region 6? **Richard Moore** said he thinks that the letter needs to be sent to Bennett's. That's number one. Number two that the NEJAC members do not share that letter with others. That's very important because I think we would be in violation of our first piece. And I'm asking if NEJAC should open some engagement with Region 6?

Matthew Tejada stated that EPA has already communicated with their colleagues in Region 6. They are going to resend the letter to the Bennett's and we also sent a digital copy to Ms. Bennett last night. Our colleagues in Region 6 made sure of that. As Richard said the NEJAC members have a copy of it, but please, just keep that to yourselves for now. Let's make sure that the Bennett's get a chance to have their letter and read it and take it in first. He said that NEJAC can and should have discussed Mossville at that meeting whether it's something on its own or part of a community voices panel like we would at any NEJAC meeting out across the United States. He noted that we're still hopeful that our next NEJAC meeting will be in Houston, we are going to be talking to some communities and colleagues in Houston about having a NEJAC in Houston as soon as we're back in a place where folks can travel and convene in person in 2021. He thinks it would be a good forum for us obviously to continue to engage Region 6 about Mossville, because it would obviously be featured in a meeting in Houston. And, we will work with our regional colleagues and community folks that would be participating.

Sylvia Orduno suggested that it will be a follow up step to connect with the community voices panel in Houston, to make sure that folks are following this. She says we can advance in terms of recommendations for action at this time or is there anymore? **Karen Sprayberry** asked what exactly has been done in the Mossville community. She thinks if we do go back and ask Region 6 to open this engagement, leading to more meaningful engagements. It feels like there hasn't been a lot of correspondence back and forth, so she doesn't know if there is really been any true engagement with the community. It seems like there is a lot of opportunities with technical assistance and opportunity to build the relationship with these people in the community that has not been taken. **Sylvia Orduno** asked what would the engagement look like? I think that you're right. What has the correspondence been in terms of some of the questions that residents have, even if they've been relocated? Are they asking what they want to see in terms of next steps for those ancestral lands? **Karen Sprayberry** sees that as one of the questions that needs to be asked. Can NEJAC negotiate something? She thinks they need more education and understanding about the outcome. She says NEJAC needs to address the comments about data that's being hidden, and get it out into the open, into other rooms so they can speak about it. **Sylvia Orduno** asked if the two recommendations are about additional context and asking Region 6 for more qualitative engagements?

Richard Moore stated it is substantive engagement. Some of the folks have moved out but there's still folks that are living there. The EPA still has responsibility to those people that are living there.

Dennis Randolph mentioned there needs to be some engagement with Region 6 to bring some closure to this issue. Relocating people from their property is something that goes to the heart of the problems we have with how people are treated. The problem with big infrastructure and building is taking people's property and sometimes, we just forget that if we don't do it correctly, there's a problem. He thinks this is a good opportunity to make a point, not only to Region 6, but to a lot of other agencies that environmental justice goes to taking people's property and how they pay it. It's speaks to how you talk to people and how Region 6 is speaking to people. But also, the folks on the end who you're talking to buying up property, and are doing it right now, they need to understand what the laws are. He thinks engaging with Region 6 forcibly is important.

Michael Tilchin said there have been a number of important statements made related to monitoring. He agreed that a good next step is an inquiry or request to Region 6. He would like us to frame a very clear question regarding the status of monitoring in the community. I would like to work on that question related to the status of monitoring who could help reframe that question compelling what we heard yesterday. He wants to make sure a solid set of facts on what is happening with respect to monitoring and to the extent that it's adequate.

Sylvia Orduno said that the NEJAC will request that reengagement include several things; an opportunity for their community voices panel in Houston, beyond the correspondence between the region and the community in a more qualitative way, which would include enhanced, meaningful and impactful engagement. She mentioned including better engagement with the academic community. She thinks it's important that there is clear questioning specific to the status of monitoring and ensuring that there is community-driven monitoring. **Richard Moore** commented that the interaction with the academic community be primarily directed towards local folks. **Sylvia Orduno** said it would be part of the invitation from Mossville and Region 6.

Matthew Tejada asked if NEJAC can go through one more time the things that the NEJAC is about to decide on? I just want to make sure that we know exactly what we're going to do. I will share though that the letter that you all have that is being sent back to the Bennett's was a follow up to the region engaging directly with the Bennett's and their neighbors in Mossville about their concerns. And the relocation, EPA was aware of it, it was not our relocation, we did not have oversight of it. I just wanted to make sure folks were aware of that context to the situation. I am asking that we go over exactly what we're about to decide on before we do.

Sylvia Orduno said what we are going to ask for reengagement with Region 6 and the Mossville community. She wants to make sure that the engagement is qualitative and enhanced, meaningful, and impactful engagement that is not based on informal correspondents. We are looking for a rebuilding and healing of the work. And there are some other areas in which we

want to encourage additional support, and that the academic community be engaged or reengaged. It must be done from the perspective of Region 6 taking direction from the community. We want to also make sure that in the process of trying to improve happens in the Mossville community communication, and there will be more community-driven monitoring and clarity in the kind of questions that are specific to the community about the status of monitoring they need. Lastly, we're hoping that Region 6 will also be able to participate in the community voices panel in Houston. We want to know the results from all improved communication and share it in Houston. Let's move forward with our vote. Members agreed to the items outlined.

3.5 Chemical Disaster Safety Rule

Sylvia Orduno stated that the third item is risk management plan/chemical disaster safety rule, and there are three similar actions that we can take, requesting an EPA briefing, creating the working group, and scheduling a meeting with EPA and the EPA program, accompanied with a recommendation letter to the EPA on this topic.

Karen Martin said this discussion was from a public commenter, Mr. Bradley Marshall, and his comment is focused around EPA rollback that happened earlier this year right before our meeting. We have some comments in that meeting and I think one of the things that we did was submit a letter to EPA on this issue back in May 2019. We have not had any substantial response from the program. We did get an acknowledgment. I think we need an update from EPA on the issue. Richard also mentioned that we need to review these recommendations and see if EPA has taken any action on those items in our recommendation letter and to see if there's anything further, we need to do or recommend.

Karen Sprayberry recommended to present that to us at our next meeting and give us a follow up to our letter and what actions they've done to follow up on the Chemical Disaster Safety Rule.

Melissa McGee-Collier said she is not recommending that we ask them to wait until the next meeting. She recommends that we schedule a meeting specifically to discuss with them the recommendations that we made and any action that we've taken. I would defer and object that point. I don't think there needs to be additional conversations, but I don't think we ought to wait to the next NEJAC meeting. **Sylvia Orduno** asked Mrs. Collier that we request a meeting with the EPA program on that. **Melissa McGee-Collier said** not just for that issue, but also the issue of the agriculture and the issue of the NEPA.

Sylvia Orduno noted we have strong support for this recommendation. In terms of actions for risk management and chemical disaster rule, what we will do is request a meeting with the EPA program office and seek an update on the letter that we sent last year and review the recommendations that were provided during public comment. All in favor, could you please say yay? Members agreed to move forward**.**

3.6 Water

Sylvia Orduno continued the discussion with item number six, water in Flint, Michigan and the NEJAC water infrastructure report. She mentioned that the NEJAC sent a letter to the EPA Administrator with concerns about the Flint water crisis and we haven't not gotten any response. This has now been a six-year crisis for Flint. We submitted a full infrastructure report to the EPA Administrator. We received acknowledgment of the report, but we have not received any follow up on the report. She believes it was mentioned that it can take a year or more to be able to get specific feedback on the recommendations in these types of charges or reports. It seems that the Office of Water is going to be seeking NEJAC feedback on their findings. There is an interest in having NEJAC members who want to be part of that discussion be a part of that follow up. It is important to have some sort of follow up response to the letter and report we sent. We know this crisis is still going on despite receiving congressional funding for several locked cities that have been struggling like the city of Flint. We are seeing that cities particularly urban communities of color that are east of the Mississippi have huge lead infrastructure problems that are surfacing because these lines are rupturing and leaching lead into drinking water system. She noted that an expansion of the Flint letter to talk more about the lead infrastructure crisis in the context of the water infrastructure report is necessary. Sylvia Orduno asked if NEJAC members would be okay with this and she would like to tie those two together in this work with the Office of Water. She wants to make sure the previous letter was mentioned to the current Administrator, making him aware of what NEJAC stated in the letter.

Karen Sprayberry noted that Austin water might engage with NEJAC at the next full meeting for discussion on the report and what they have done in response.

Benjamin Pauli from Kettering University Michigan, says he has served on NEJAC as a representative of the academic community, but he is also on the board of directors of a local environmental justice group here, the Environmental Transformation Movement of Flint. The group was not able to get its written public comments together in time for today's meeting, but they are in the works and they will be sent around shortly. **Sylvia Orduno** said that it was mentioned that there was a settlement in Flint and noted the New York Times reported about the $600 million in lawsuits. **Benjamin Pauli** said in some ways, this settlement is a victory for residents who been waiting around for compensation for injustice that they have suffered with in their bodies and property. He thinks it is important to people concerning environmental justice, that we take a step back and investigate what people on the ground in the affected community think. We should also ask to what extent does it improve a better understanding of justice, to what extent are they still trying to identify other kinds of injustices that haven't been remedied, and to what extent do they still need assistance.

Sylvia Orduno asked in terms of action items, let's go forward with what we are already learning from the Office of Water, seeking a meeting about some of the preliminary recommendations that they believe can be done from the NEJAC charge. We will combine that

discussion with the concerns that were outlined in the Flint letter. She recommended moving forward with resending the Flint letter to the current Administrator, indicating that we didn't receive a response from previous administration.

Melissa McGee-Collier wanted to comment that a lot of times, there are actions taken and they are praised and identified that they are doing and is accurate, but there is no record about what they act on. There is nobody really looking at whether actions have been taken that impacted the community. Are they really being made there? Are they being made whole? We must go forward and discuss what actions or agenda items NEJAC needs to put on the list, we need to be really looking at what kind of outcomes are really getting done. Is the community getting accomplished what the EPA is celebrating? There is a need to look at what's really happening?

Sylvia Orduno added that we've been looking at this at the criminal action level, there's still a number of criminal charges that have not been pursued, not to mention a whole restarting of the criminal investigation after we change attorney generals. There's a lot of frustration because there has been a lack of adequate regulatory response from the state agency. At that time, Michigan Department of Environmental Quality, now, Great Lakes and Environment, should be asked what it is that they're doing to ensure that there is not another Flint. Benton Harbor has emergency managers who believe that more action is needed in terms of the state and EPA through the state. This is in addition to the EJ issues around the contamination and the health violations and risks that residents are exposed to.

Benjamin Pauli suggested resending the letter and pressure the Administrator for a response. I just want to say that the 2017 letter has good asks in it, but some are not 100 percent relevant anymore, so it would be good to freshen up the content and make it a little more current.
Sylvia Orduno asked Mr. Pauli how NEJAC should proceed with this? OEJ can get a letter response for us so we don't need to resend the letter. She states that after so many years, are there things that are no longer relevant or appropriate to update on the status. Can you, Mr. Tejada, or Mrs. Martin give us insight into what we should do in this situation?

Karen Martin indicated that Mr. Tejada mentioned that the NEJAC does not have to resend the letter again, because we can go to the program and ask for a response to the letter. There is nothing wrong with creating a new letter, but it's just going to take time to do that and to finalize the letter. We will have to finalize the letter in a public meeting. We can start a workgroup and start working on it and gather information on the issue and finalize the letter at the next public meeting.

Matthew Tejada agreed with Mrs. Martin that it's kind of like the NEJAC is contemplating doing in some other areas, perhaps having an additional group of NEJAC folks that we can have engagement with Region 5 and actually discuss some of the concerns that are different from when they were back in 2017. He thinks that it would put NEJAC in a place to discuss it at future meetings. Engaging Region 5 and water leadership between now and the next meeting and then potentially crafting a new letter based upon will be more satisfying to you all as

members and also to actually crafting some sort of a position or a recommendation pertinent to the current status of Flint, rather than looking backwards at a 2017 letter. **Sylvia Orduno** asked if NEJAC wants to say anything else about the Office of Water? **Matthew Tejada** said he had an initial conversation with them yesterday and they are excited to engage with the NEJAC at our next in-person meeting. They have got several things that they've done just in the past year that are relevant to the recommendations that NEJAC made. They mentioned at least one other thing that they're currently working on that they think the NEJAC will be amazed with the responsive to the NEJAC's recommendations. The Office of Water did commit a couple of the folks who met with the NEJAC a little over a year ago plus some of the other leadership in the Office of Water to engaging with the NEJAC at the next upcoming meeting. And in the interim, Sylvia Orduno and I will reach out to some of you. We will put together a small meeting with the Office of Water leadership. They wanted to make sure that as they prepare to engage with the NEJAC at a future meeting about the water report, they want to understand the most important things in that report. He thinks we are shaping up for engagement with the NEJAC on the results of that water infrastructure report.

Sylvia Orduno indicated that OEJ will send out more communication to formalize that request and get more folks to engage in the discussion. We are going to be engaged with the Office of Water relative to the water infrastructure charge that we did and work with them to provide NEJAC's feedback ahead of the in-person meeting next year. We will be engaging with Region 5 regarding what has been done with Flint. This will include the infrastructure issues with Flint providing current status information and to revise the Flint letter that will be sent to the current Administrator, after we review it at the in-person meeting next year. Then let's go ahead and vote on this. Members agreed to move forward.

Sylvia Orduno said that the NEJAC is at the end of time that we have allocated for this meeting. She wanted to get a sense from OEJ's staff on how to proceed, because we still have a few items that were part of our priority action list that we have not had a chance to review. One of them is the Superfund Task Force and we had the list of strategies and recommendations in a summary form on that. And then we also must get to miscellaneous organic chemical manufacturing ethylene oxide and what kind of action we want to take on monitoring and screening. Mrs. Martin could you give us your recommendation about what we do in terms of next steps in time?

Karen Martin indicated that If members can stay on the line for another 15 or 20 minutes to finish these two topics, that would help us focus the agenda for the next meeting. There is nothing really for us to discuss around the Superfund Task Force because they've given us an update today. **Sylvia Orduno** noted we would need 16 members of NEJAC to remain on the line to have quorum. **Karen Martin** stated that there were 25 members on the lineand asked for a current count.

Sylvia Orduno noted that we have still need to get feedback on comments that were given from the public comment section of yesterday's very important meeting. I'm looking at them

and what was mentioned in Texas the possible violations of public health centers and air, ozone levels, emissions at the border, and the Clean Air Act waivers. There was also comments about coal plant, soot and grime and pollution in Illinois and lack of response from Region 5 and the comments about the frustration with our lack of digital communication. It is also important for NEJAC to address public comments and respond to public commenters. I know that we've tried to set aside time at our larger group gatherings like this to be able to respond or reflect on some of the things we heard and how we can integrate them and come up with new action items. We allow public commenters three minutes. I think in terms of the people who are stepping up in those very vulnerable and public ways, that it would be good to have at least one person from NEJAC offer response or appreciation or concern or something. I would like us to consider going forward that we not allow any public comment to not have some type of response. Every NEJAC member should make the effort at least once to respond to what public commenters are offering.

Karen Martin mentioned that there are currently23 members on the line. **Sylvia Orduno** said let's go forward then. She stated that she appreciated the NEJAC for taking the time and commitment. She wanted to make sure if there's anything else they have to say relative to the Superfund Task Force in terms of actions that were presented. Mike, did you want to say anything? You and Kelly? Anything more about that?

Michael Tilchin said from his perspective, that they we're set. We've got the feedback we're looking for at this point. We have described the path forward. He said personally he did not see any reason to revisit this currently.

Sylvia Orduno said let's go on to chemical manufacturing and ethylene oxide. The list of potential actions we are requesting is an EPA briefing, future agenda topic for NEJAC discussion, and creating the workgroup or schedule a meeting with the EPA program. Does anyone want to speak to this?

Richard Moore said it is very important for us to discuss the MON rule. One of the challenges that we've heard is that we need the EPA to remove the exemptions on the enforcement, what was being said was that these exemptions are providing a free pass to polluters during incidents or emergencies. He also mentioned that EPA emission standards on hazardous air pollution need continuous enforcement. Additionally, the EPA should require frontline monitoring at the Croda facility. There is also another issue in Wilmington, Delaware, where the EPA inspector general issued a follow up to their March report. It was referenced in the IG report briefly, that came out in 2019, the letter from the NEJAC about the ETO which was helpful in getting some of the improvements through the MON rule. The inspector general report says that EPA needs to take immediate action to inform communities near major sources of ETO that they have an evaluated as a cancer risk. We are talking about racial health disparities and the 25 worst chemical plants identified in the attorney general's investigative report, particularly around Sasol in Mossville, the Croda facility in New Castle, and the shale facility in Houston.

Sacoby Wilson said that the NEJAC needs to really focus more on site-specific monitoring at a neighborhood level. A lot of the current regulatory monitoring is not actually the best scientific approach to capturing the events in the neighborhoods particularly in the frontline communities. There are new technologies out there to capture some of the criteria for air pollutants and there needs to be a bigger push on the EPA to actually require these type of enhanced monitoring in areas where you have hotspots, frontline communities at risk because we are not getting the best data to inform policy as it relates to cumulative impacts and how it relates to permitting, to surveillance, and public health tracking and the interventions. Mr. Wilson mentioned that there should be an overhaul of the EPA's monitoring network. These specific communities need enhanced monitoring, particularly when we think about nonattainment zones and the prevention of significant deterioration, and the Clean Air Act. How can that be leveraged to ask for enhanced monitoring? Not monitoring in the right places, gives you bad data leading to bad policy.

Sylvia Orduno asked if there is feedback on this item? What does NEJAC think about a complete revamp? What are the next steps that NEJAC believes should be taken? Is this something we might need to have a meeting with the EPA program or is this something that we want to actually have a more in-depth discussion at a future NEJAC meeting? Is there something folks believe would be important at this time?

Matthew Tejada reminded the Council that we already have NEJAC pursuing four different engagements with potential letters, as a result of this meeting. This is a lot and NEJAC has a limit, a natural limit, to how much and how often we can pull everyone together to pursue things. So, I would urge folks to remember to think about what you already committed to accomplishing, and to prioritize the work that you all want to take on.

Sylvia Orduno mentioned that as the NEJAC is figuring out how to move on these priorities, it's still a very short list. She asked if there are ways that we can do some of the things that we've outlined with letters and meetings in a more coherent way? Does what Mr. Moore and Mr. Wilson outlined feel like it should be brought to a future NEJAC meeting? Do we want to try to weave it into some of the existing action items that we've identified earlier?

Richard Moore agreed with Mr. Tejada's comments and thinks there is a couple ways of doing it so we can move forward. One is to do a follow up letter, expanding on a NEJAC letter from 2019. I think it is better to focus on it at our next meeting, but also expand on our existing letter.

Sylvia Orduno addressed Mr. Wilson and asked if there is anything that he thinks is the next step as it relates to what Mr. Moore just offered? **Sacoby Wilson** said he would follow their lead and to just make sure what we're doing was not overburdening NEJAC. He indicated that he was happy to take the lead and make sure we're beneficial. **Sylvia Orduno** suggested moving forward with the recommendation that he is making. Should we do a follow up letter that

expands on the 2019 letter including specific items of concern that were outlined in this discussion and add this to a future NEJAC discussion?

Karen Sprayberry said that her organization has done a lot of work around community, and one of the things that we have a problem with is assessing the data collected in 2014. By the time they evaluate it and get it out, it's 2018. One of the questions I've been curious about is why it takes so long to get that data out? We went out with our own air sampling, and we worked with that community to identify their concerns, and what areas they fell in around the sampling of 2019, and several of those communities had elevated health risk. Then we did some background sampling and we determined they needed additional air monitoring, and additional equipment and funding to do additional sampling around these communities. A lot of states are taking more of a lead in some of these cases.

Sylvia Orduno asked if there is a national survey of the states that asks those kinds of questions? If they can conduct monitoring and the sampling, and does it require additional equipment?

Matthew Tejada said we would want to follow up with our colleagues in the office of air quality policy and standards. We have a whole team that is constantly working with states on different emission inventories and monitoring data. We would need to follow up with them. We can work with you or Mrs. Sprayberry to sharpen up that question and then we can get an answer to it.

Richard Moore asked if we can proceed with that agenda item? We've already sent a letter to the Administrator. Now we're talking about potentially adding some of the things that we've talked about to that letter. What would be the process that we would use? Do we have to come back to the NEJAC? Since it's not a brand-new letter, what would be the process if we wrote a letter for approval from the NEJAC council?

Matthew Tejada said if you just count it as adding to a letter, you would be adding new substantive content to a letter, so that’s something that needs to be deliberated upon and approved by the whole NEJAC in a public meeting.

Sylvia Orduno asked if we could get a group of NEJAC members working with the OEJ staff on an extended letter and include the additional things that have been raised? Can we have that ready for deliberation at the next in-person NEJAC meeting? Can we also look at where it may be possible to incorporate some of the issues related to the chemical manufacturing and ethylene oxide into letters that we've already agreed to do? That would be my recommendation for this action item. Is there anyone who wants to speak to any changes? Or object to that? Then, let's take a consensus vote. All in favor, please say aye. Members agreed to move forward.

Sylvia Orduno stated that the last of these action items are monitoring and screening. We are looking at this being a future item line in NEJAC's agenda, or do we need to look at requesting in EPA briefing on this? Can someone take the lead and start the discussion for this topic.

Michael Tilchin stated that this is a great issue for NEJAC to take on and it feels like a contribution that NEJAC could make a nationwide impact. He said he has a vision that NEJAC will develop a report, like the 2017 report. At risk to piling on, I don't think this is a short-term undertaking. He envisioned this as a 2021 maybe even 2022 initiative of preparing a white paper. The report could be something like designing and implementing a 21st century monitoring network to advance smart and effective environmental protection and environmental justice to communities. I'm not thinking of a research paper, but I'm sort of thinking we have the horsepower within our Council to prepare something that is really substantive and quite technical to promote that idea, and lead in that area within EPA

Sacoby Wilson said he was little confused because earlier in the list because the monitoring screen was the metrics discussions. The regulatory monitoring structure does not meet the exposure for the profile. It's not matching the exposure profile or the burden profile of the meetings that talked about. There is a lot of new technologies when it comes to particulate matter and some other criteria in air pollutants. There's also new work to look at that some companies are developing centers for compounds, not just total BOCs, but also individual BOCs like benzene. EPA's EJSCREEN has several reports that come up about screening tools, reports came out of Michigan. There's a 2017 study comparing the EJ screening tools. They're only currently four statewide EJ screening tools in the country. They are publicly accessible. Maryland's EJ screen needs to be more publicly accessible. Houston has Tox File, which is a city level tool. Minnesota MPCA has a tool. D.C.'s DOEE, has an internal EJ screen kind of tool, but not something that's publicly accessible. There needs to be a lot of investment and every state should have its own EJ screen tool to be required for use in decision making. Whether it is staffing, permitting, regulations, enforcement and settlements, or whether it'd be building stuff, where you want to target investments, where you want to target resources, where you want to be talking? Any EJSCREEN tool is about mapping hazards and the communities impacted. Compliance, who's been funded, who's out of compliance? Who's putting in permits? But where's all the money going? Not from the EPA programmatic resources for Clean Air Act, Clean Water Act, TSCA, Clean Water Act, but to and from other agencies, agency as DLT and HUD. Where are those funds going? Where are they going based on your screening scores to the communities that need the resources?

Sylvia Orduno said there's a lot of weight and a lot of depth to this issue around monitoring and screening. There are conversations we need to have, and we need ways to better approach the work and depoliticize some of the issues. It feels like it is a topic that needs further NEJAC discussion. Are folks that are looking at monitoring issues working with states and cities on development of EJ screening tools? Are some of the tribal governments looking at this? Is

there a way to start outlining some of the issues that could be brought to the focus for the discussion for the future NEJAC meeting? Does that sound like that could be workable?

Richard Moore asked if we could frame this issue up for our next NEJAC meeting? **Sylvia Orduno** asked for folks who are interested in helping Mike with that, if you will please reach out to him.

Sylvia Orduno wanted to go back to the public comments that were raised yesterday and if anyone wants to speak to anything that we heard. What public comments are we able to incorporate with some of the other action items? For instance, the issue around the Clean Air Act waivers at the border and monitoring can be incorporated in the last discussion. **Richard Moore** asked to have that restated. **Sylvia Orduno** said she wanted to make sure that monitoring and screening could be included with what was raised yesterday in terms of international mission (around) the border and Clean Air Act waivers that take place. Is there anything else that anyone is remembering from the public comments that they want to raise that we should also be flagging? She noted that she is looking for what happens in communities, where it's not just environment justice, but it's environmental racism, and then what needs to be done to undo and rectify it.

Jacqueline Shirley, from Rural Community Assistance Corporation, said she addressed the lady who was talking about the NEPA and asked her to have a template or a letter of call to action. She would like her organization to advocate with her organization on that. **Karen Martin** noted there were several documents that Jill submitted in her public comment, it was five or six documents and one of those documents is the draft resolution and we also have Jill's contact information. We can connect you with her directly if you want to ask further questions. **Jacqueline Shirley** asked if a public comment comes up and she sees something that my organization would like to do, could I bring it to my organization? **Karen Martin** indicated yes, but you would be acting in the capacity and role of your organization, not the NEJAC.

Sylvia Orduno asked if there are any other public comments items that NEJAC members want to respond to?

Millicent Piazza indicated that it was astounding by the repeated comments about the NEJAC being the only venue for folks to voice their concerns? She found that troubling.

Sylvia Orduno said she know right now travel is restricted, but when possible that we try to figure out how better to work regionally. She thinks what people are seeking is help from the EPA, indicated by the number of national calls with water activist from across the country. Whether or not folks within the EPA understand that community members think that the EPA is a source of relief from the problems that we can't get addressed at local or state levels. She thinks that NEJAC has got to find a way to create better communication mechanisms and improving some of the cultural challenges in terms of how engagement happens.

Millicent Piazza said EPA needs to use whatever discretion and influence they have on states and environmental regulatory agencies. She says she get calls from communities and other states, were she has no jurisdiction. She says she gets calls from other states, asking for her assistance because they feel like they have been shut out from their local state and environmental regulatory agencies. EPA regional offices need to put greater influence on state's accountability. She sees such an unevenness, and she wonders how other states and their regional offices have forward movement. **Sylvia Orduno** said that there are some regions that are good models for how this can be done better across the board.

Richard Moore noted in some cases, like permit hearings, folks are told that they can't make public comment, they can only submit written comment, particularly during these hard times. And some regional offices are much more proactive in their relationships with grassroots communities and others. He thinks it is part of the comments coming out of the NEJAC that this is the place that they feel that they can come to and people won't only just hear them, but that the NEJAC will move forward to help them figure out some of those issues.

Ayako Nagano commented that there would seem to be a disturbing pattern, identified yesterday by several testimonies, hotspots were identified, and she is not sure how to respond, but wanted the Council to address that issue. And, Administrator Wheeler's talk about delegation of environment enforcement duties to the states. They say they're going to delegate it, but the states are not funded to do the work. This means the work doesn't happen. She wants more clarification on what that looks like. Can we follow up on that issue with the Administrator? **Sylvia Orduno** asked Mrs. Nagano to explain her thinking, because other folks might have similar concerns, what might be the best way to continue that discussion and what the engagement could look like.

Sacoby Wilson stated he wanted to comment on meaningful engagement. This is a point that was brought up in this call and NEJAC must find a way to take NEJAC to the people. How can we work with the regional offices to help them organize, listen and respond virtually, and then make sure that the folks are getting information? NEJAC has got to put some money into mobile libraries and put some money into technical assistance to make sure that folks could be heard. How can we step up in that area? And, that gets back to our comment about enhanced technical assistance. People have limited access more than before. The access has been undermined more by the pandemic and some other stuff associated with the pandemic.

Richard Moore noted he was excited about working and being part of the NEJAC. It's an exciting moment for NEJAC, and he truly appreciates the commitment from the Council members. He expressed appreciation for the staff at the Office of Environmental Justice and the tremendous work that they've been doing.

4.0 Adjournment

Sylvia Orduno asked if there is anything else, we needed to know before we close out this meeting?

Karen Martin indicated that there is nothing additional. She said this time spent together was well spent. It is the kind of discussion and interaction we'd want to see in the public meetings. Of course, NEJAC never has enough time to focus on the things that come up in these meetings. She thinks NEJAC did a great job moving forward on some of these action items from last meeting and from this meeting as well.

Matthew Tejada thanked everybody and NEJAC covered a lot of ground. This has been a good meeting, with a lot of really good conversation. NEJAC had a lot of folks that hung in there and they're still paying attention because of the quality of the discussion and the substance of the issues that you all have been taking up. OEJ will be getting together and going over all the action items and the follow up and then we'll be communicating with the steering committee, and reaching out to folks to pull in for some of these other discussions and work items that we're going to be taking on over the next few months. Hopefully, in 2021, we will come together in person and seeing one another again in person.

Michael Tilchin indicated that it is an honor to be part of such an energized, informed, and inspiring group. Really, a great call today. He said he knows it went long but the time flew because we talked about really important issues with great engagement from all the members.

Karen Martin reminded the NEJAC they will be hearing from her, though e-mail, so look out for updates from our discussions this week.

Meeting adjourned.

APPENDIX A
AGENDA

WEDNESDAY AUGUST 19, 2020	
3:00 pm - 3:05 pm	**WELCOME, INTRODUCTIONS, & OPENING REMARKS** o **Karen L. Martin, *Designated Federal Officer*** – *U.S. EPA* o **Matthew Tejada, *Director, Office of Environmental Justice*** – *U.S. EPA* o **Richard Moore, *National Environmental Justice Advisory Council* Chair** – *Los Jardines Institute* o **Sylvia Orduño, *National Environmental Justice Advisory Council* Vice Chair** – *Michigan Welfare* Rights Organization o **Michael Tilchin, *National Environmental Justice Advisory Council* Vice Chair** – *Jacobs Engineering*
3:05 pm - 3:30 pm	**WELCOME, EPA Updates & DIALOGUE** o **Andrew Wheeler, Administrator** – U.S. *EPA (INVITED)*
3:30 pm – 5:00 pm	**PUBLIC COMMENT PERIOD** ***Members of the public will be given three (3) minutes to present comments on their issue or concern to the NEJAC.***
5:00 pm – 5:55 pm	**NEJAC BUSINESS MEETING REFLECTION AND CONVERSATION** ***The NEJAC will use this time to reflect on the meeting proceedings, public comment period, discuss and deliberate action items, and discuss new or emerging environmental justice issues across the United States and its territories.***
5:55 pm – 6:00 pm	**CLOSING REMARKS & ADJOURN**
DAY 2: WEDNESDAY AUGUST 20, 2020	
3:00 pm – 3:15 pm	**WELCOME, INTRODUCTIONS, DAY ONE RECAP & OPENING REMARKS** o **Karen L. Martin, *Designated Federal Officer*** – *U.S. EPA*

	○ **Matthew Tejada, *Director of the Office of Environmental Justice*** – *U.S. EPA* ○ **Richard Moore, *National Environmental Justice Advisory Council* Chair** – *Los Jardines Institute* ○ **Sylvia Orduño, *National Environmental Justice Advisory Council* Vice Chair** – *Michigan Welfare* Rights Organization ○ **Michael Tilchin, *National Environmental Justice Advisory Council* Vice Chair** – *Jacobs Engineering*
3:15 pm – 4:00 pm	**NEJAC SUPERFUND TASKFORCE WORKGROUP UPDATE** ○ **Tai Lung, *Workgroup Designated Federal Officer*** – *U.S. EPA* ○ **Michael Tilchin, National Environmental Justice Advisory Council Vice Chair** – Jacobs Engineering ○ **Kelly C. Wright, *National Environmental Justice Advisory Council Member*** – *Shoshone Bannock Tribes*
4:00 pm – 5:55 pm	**NEJAC BUSINESS MEETING REFLECTION AND CONVERSATION** ***The NEJAC will use this time to reflect on the meeting proceedings, public comment period, discuss and deliberate action items, and discuss new or emerging environmental justice issues across the United States and its territories.***
5:55 pm – 6:00 pm	**CLOSING REMARKS & ADJOURN**

APPENDIX B
MEETING ATTENDEES

First Name	Last Name	Company
Kendra	Abkowitz	Tennessee Department of Environment and Conservation
Gerardo	Acosta	EPA Region 6
David	Ailor	American Coke and Coal Chemicals Institute
Rodolfo	Alanis	Illinois Environmental Protection agency
Rosanne	Albright	City of Phoenix
Armando	Alfonso	New Jersey Department of Environmental Protection
Teena	Anderson	Eastside Environmental Council
Peggy	Anthony	Peggy Anthony (retired)
Deyadira	Arellano	Texas Environmental Justice Advocacy Services
Al	Armendariz	Sierra Club
Andrew	Baca	EPA
Alan	Bacock	USEPA Region 9
Mahtaab	Bagherzadeh	Kentucky Division of Water
Kim	Balassiano	United States Environmental Protection Agency
Alana	Ballagh	Student
Delia	Barajas	St. Frances of Rome Church
Heather	Bartlett	Washington State Dept. of Ecology
Tarshire	Battle	Roots 2Empower
M. Lynn	Battle	ADEM
Kathryn	Becker	NMED
Laura	Berkey-Ames	National Association of Manufacturers
Deanna	Berry	Denmark Citizens for Safe Water
Molly	Birman	BASF Corporation
Hans	Bjornson	FAA
Paul	Black	Conservation Voters of South Carolina
Jenny	Boone	Southside Community Land Trust
Terry	Bowers	Department of Defense
John	Brakeall	PA DEP
Christopher	Brancart	Brancart & Brancart
Evelyn	Britton	U.S. General Services Administration
Kimberly	Bryant	FEMA
Caitlin	Buchanan	WE ACT for Environmental Justice
Sharunda	Buchanan	CDC/ATSDR
Omari	Burrell	EPA, Region 6
Robert	Byron	Montana Health Professionals for a Healthy Climate
Lance	Caldwell	EPA- Region 2
Sylvia	Carignan	Bloomberg Environment
Maria	Clark	U.S. EPA
Stephanie	Coates	University of Houston
Teresa	Colon	NCDEQ-DAQ

Meredith	Comnes	US EPA
Kelly	Crain	FDEP
Rachel	Croy	EPA
Abigail	Cruz	U.S. Environmental Protection Agency
Emily	Dalgo	American Optometric Association
Valincia	Darby	DOI
Corbin	Darling	US EPA Region 8
Michelle	Davis	HHS
Viktoriia	De Las Casas	Troutman Pepper
Greg	Deangelo	Florida Department of Environmental Protection
Mike	Delaney	Mike Delaney Lab Consulting
Rafael	Deleon	US EPA
Latonya	Derrick	Stantec
Monica	Dick	AES
Amy	Dinn	Lone Star Legal Aid
Jessica	Dominguez	EPA - Region 1
Melinda	Downing	U.S. Department of Energy
A.	Edwards	EPA
Cynthia	Edwards	EPA
Natalie	Ellington	U. S. EPA Region 4
Alexandra	Ender	Dream in Green
Lena	Epps-Price	US EPA
Monica	Espinosa	EPA Region 7
Frank	Esposito	USCG
Terri	Fair	INDOT
Andrew	Farias	Carleton College
Ericka	Farrell	EPA
Sonja	Favors	ADEM
Gabby	Fekete	US EPA OIG
Cynthia	Ferguson	Department of Justice/ Environment & Natural Resources Division
Ashley	Fisseha	US EPA, Region 5 Superfund & Emergency Management Division
Mark	Fite	USEPA
Catharine	Fitzsimmons	Iowa Department of Natural Resources
Mary	Foley	Carlson Foley Enterprises LLC
Tasha	Frazier	USEPA
Tamara	Freeman	EPA R7
James	Fulcher	Fulcher Family Farms
Arlene	Galindo	Environmental Justice Coalition for Water
Justin	Garoutte	New Mexico Environment Department

Demi	Gary	Oak Ridge Intstitute
Andrea	Gelatt	MEA
Andrew	George	UNC
Bridget	Gilmore	Yale School of the Environment
Daniel	Gogal	US EPA
Kevin	Good	US EPA - OIG
Sheryl	Good	US EPA
Amelia	Goodingcheek	Illinois Environmental Regulatory Group
David	Graham	graham.david@epa.gov
Eve	Granatosky	Lewis-Burke Associates LLC
David	Gray	EPA
Kassandra	Grimes	University of Virginia
Liam	Gunn	Yale School of the Environment
Shauna	Hansen	Tacoma Environmental Services Dept
Dewayne	Harley	General Services Administration
Anita	Harrington	City of Detroit
Garry	Harris	Managing Director
Faith	Harris	Virginia Interfaith Power & Light
Lashan	Haynes	US Environmental Protection Agency
Anna	Hayward	Stony Brook University - School of Social Welfare
Cynthia	Herrera	NAACP
Allison	Herring	Kansas Department of Health and Environment
Tracy	Hester	University of Houston Law Center
Ariel	Hill-Davis	Industrial Minerals Association - North America
Marcus	Holmes	holmes.marcus@epa.gov
Brian	Holtzclaw	US EPA Region 4, EJ & Children's Health Program
Rebecca	Huff	EPA
Ben	Hughey	Individual
Diana	Hussey	N/A
Faith	Iseguede	Jackson State university
Juliette	Jackson	U.S. EPA
Hilary	Jacobs	Beveridge & Diamond
Kia	Johnson	FEMA
Dawn	Johnson	DCJ Global Management Solutions, LLC
Cassandra	Johnson	MDEQ
Bonita	Johnson	EPA Region 4
Jay	Jones	Dept. of Energy
Towana	Joseph	USEPA- Region 2
Kay	Jowers	Nicholas Institute, Duke University
Seigi	K	Ucb
Jorge	Kalil	Kearns & West

Harichandana	Karne	EPA
Sean	Kearns	Office of Representative Barragan
Gwendolyn	Keyes Fleming	Van Ness Feldman, LLP
Carolyn	Kilgore	EPA
Ashanti	Kincannon	Student
Marva	King	PALAX-498340
Arielle	King	Vermont Law School
Jane	Kloeckner	US EPA R7
Brianna	Knoppow	EPA
Sarah	Koeppel	Department of Homeland Security
Renee	Kramer	NC DEQ
Gena	Larson	WI DNR
Rochelle	Lee	Southside Community Land Trust
Heriberto	Leon	US EPA
Heidi	Lesane	USEPAR4
Stevie	Lewis	Public Lab
Evan	Lewis	U.S. Environmental Protection Agency
Stacey	Lobatos	EPA
Keisha	Long	SC DHEC
Elizabeth	Lopez	Groundwork Denver
Kathryn	Maccormick	Dominion Energy
Cecilia	Magos	Columbia University
Alyssa	Malcolm	EPA
Kristin	Marshall	Boeing
Marie	Martin	SCS
Vincent	Martin	V Martin EJ Consultant
Deitra	Matthews	Conservation Voters of South Carolina
Laurie	Matthews	Morgan Lewis & Bockius
Mark	Matulef	U.S. HUD
Sarah	Mazur	EPA/ORD
Amelia	Mccall	EPA
Ken	Mcqueen	EPA
Grant	Mckercher	IDEM
Ameesha	Mehta-Sampath	US EPA Region 2
Chad	Milando	BU
Sarah	Miller	Native Village of Kluti-Kaah
Amy	Minor	Southwest Research Institute
Ruben	Mojica Hernandez	U.S. EPA - Region 9
Emily	Monroe	Texas Water Resources Institute
Laura	Montoya	EPA
George	Moore	1962

Trayce	Moore-Thomas	MDEQ
Christina	Morgan	EPA
Jade	Morgan	EPA
Negin	Mostaghim	EPA
Naeema	Muhammad	NC Environmental Justice Network
Michelle	Muska	ASPPH/EPA
Julie	Narimatsu	US EPA
Thomas	Neff	City of Kansas City, Missouri
Erich	Nolan	Personal
Leanne	Nurse	US EPA
Chigo	Nwaogwugwu	Harris County Attorney's Office
Shawn	Obrien	Troutman Pepper
Yasmine	Outlaw	DePaul University
Rock	Owens	Harris County, Special Assistant County Attorney for Environmental Affairs
Alex	Owutaka	US EPA
Jeff	Pacelli	N/A
Karen	Parkhurst	Thurston Regional Planning Council
Michele	Paul	City of New Bedford, MA
Nicolette	Pavlovics	US Coast Guard
Dionicio	Pena	DP Consulting
Margot	Perez-Sullivan	EPA
Albert	Petrasek	US Department of Energy
Cynthia	Peurifoy	ReGenesis Community Development Cooperation
Victoria	Phaneuf	BOEM
Alli	Phillips	EPA
Samantha	Phillipsbeers	Usepa
Karen	Pierce	SF Department of Public Health
Remilando	Pinga	Michigan Department of Environment Great Lakes and Energy
Kenneth	Pinnix	PTW Associates LLC.
Gilly	Plog	Town of Frisco
Shela	Poke-Williams	EPA
Dana	Powell	Appalachian State University
Chris	Pressnall	Illinois EPA
Lisa	Prince	N/A
Reginald	REPA	PATCO
Elise	Rasmussen	State Board of Health
Lisa	Reynolds	Metropolitan Washington Council of Governments
Danielle	Ridley	EPA 's Office of Research and Development
Brendan	Rivers	WJCT

Marvin S.	Robinson II	QUINDARO RUINS/ Underground Railroad- Exercise 2021
Walter	Robles	Ketchikan Indian Community
Anna-marie	Romero	U.S. EPA Region 7
Brandan	Roneel	Intelligent Governance LLP
Zach	Rosenblatt	CUNY
Joi	Ross	APEX Direct Inc.
Carol	Rosskam	northeastern university
Enrique	Saenz	indiana environmental reporter
Kirstin	Safakas	USEPA R5
Rian	Sallee	WA State Dept. of Ecology
Kathleen	Salyer	US Environmental Protection Agency
Keenan	Sanderson	Ketchikan Indian Community
Adam	Saslow	asaslow@kearnswest.com
Leslie	Saucedo	FEMA
Tim	Schutz	UC Irvine
Celina	Scott-Buechler	Office of Senator Cory Booker
Yodit	Semu	UCLA- Labor Occupational Safety and Health
Dawud	Shabaka	Harambee House, Inc. . Citizens for Environmental Justice
Queen zakia	Shabazz	United Parents Against Lead & Other Environmental Hazards (UPAL)
Paul	Shoemaker	Boston Public Health Commission
Avery	Siler	Yale School of the Environment
Carl	Sivels	EPA
Katie	Slattery	EPA
Alex	Smith	Washington Department of Ecology
Thomas	Smith	US EPA
Brayndon	Stafford	EPA
Joyce	Stanley	US Department of the Interior
Katherine	Stewart	Rep. Alma Adams
Tasha	Stoiber	EWG
Eric	Stuart	Steel Manufacturers Association
Greg	Sullivan	US Environmental Protection Agency
Elyse	Sutkus	US EPA
Casey	Sweeney	Wisconsin Department of Natural Resources
Lisa	Tapia	ADOT
Joshua	Tapp	US EPA Region 7
Larry	Taylor	Kentucky Department for Environmental Protection
Valerie	Thomas	FEMA
Tami	Thomas	EPA
Rachael	Thompson	Glynn Environmental Coalition
Kristina	Torres	US EPA

Serenity	Trevino	The Harris County Attorney's Office
Kathy	Triantafillou	US EPA
Michael	Troyer	USEPA
Kim	Tucker-Billingslea	General Motors LLC
Robert	Tysor	Harris County Attorney's Office
Sarah	Utley	Harris County Attorney's Office
Gloria	Vaughn	Environmental Protection Agency
Lior	Vered	Toxic Free NC
Nicole	Vermillion	Georga EPD
Esperanza	Vielma	Environmental Justice Coalition for Water
Alan	Walts	US EPA Region 5
Kenneth	Warren	Warren Environmental Counsel LLC
Julie	Weisgerber	FEMA
Christian	Wells	University of South Florida
Shanika	Whitehurst	EPA
Chad	Whiteman	U.S. Chamber of Commerce
Holly	Wilson	US EPA
Say	Yang	Center for Earth, Energy and Democracy
Deeba	Yavrom	EPA
Carolyn	Yee	California Environmental Protection Agency, Department of Toxic Substances Contr
Victor	Zertuche	U.S. EPA

APPENDIX C
WRITTEN PUBLIC COMMENTS

August 19, 2020

By electronic filing

National Environmental Justice Advisory Council

U.S. Environmental Protection Agency

August 2020 Teleconference

Re: Transcript of Harris County, Texas public comment

Hello, my name is Isabel Segarra Treviño and I serve as Assistant County Attorney for Harris County, Texas. Harris County is the most populous county along the Gulf Coast and is home to the Houston Ship Channel and the Port of Houston, both supporting the largest petrochemical complex in the Nation. Harris County is also one of the most racially and ethnically diverse places in the Nation: over 100 languages are spoken here and nearly half of our 4.7 million residents speak a language other than English at home, according to the U.S. Census Bureau. A fifth of our population identifies as Black, while over two fifths identify as Hispanic and Latino. In Harris County, we face unique challenges when trying to address environmental issues, both from industrial sources and natural disasters.

For example, in 2019 alone, the County responded to two explosions and chemical fire at the Exxon Baytown petrochemical complex, an explosion and chemical fire at the KMCO Crosby facility, and a multi-day chemical fire at the ITC Deer Park facility.
These disasters resulted in lost lives, hospitalizations, pollution, and property damage.

Because we lack zoning laws, it is not uncommon to find residential areas at the fenceline of industrial facilities, like in the east Harris County community of Manchester. Many other communities are within one mile of TRI facilities, like Pleasantville and Third Ward, where the late George Floyd called home.

Harris County is also hurricane- and flood-prone. Hurricane Harvey brought devastation to many of our communities and our residents are still working to restore their lives and homes, for example, residents of the east Harris County community of Fifth Ward.

The County seeks new approaches to meet these ever-growing challenges. We would like to hear from community-based groups and local governments that have successfully implemented policies and programs to address environmental justice issues in their communities.

If you would like to share your policy or procedure, or set up a call with me, please email me at isabel.segarra@cao.hctx.net. Thank you.

Name: Jenna D'Ottavio

Name of Organization or Community: California Greenworks, Inc.
City and State: Los Angeles, California

Phone Number: 303-476-0390
Email: jenna@calgrnwks.org

Brief Description of Concern: California Greenworks, Inc. recognizes that many underserved and low-income communities are disproportionately exposed to a wide array of environmental pollutants and toxins. Residents living in neighborhoods with high levels of pollution are at an increased risk for developing respiratory diseases, such as, but not limited to, asthma and cardiovascular diseases. Tree canopy is directly linked to the quality of air we breathe. Here in south LA, trees are not as prevalent as in other parts of Los Angeles. California Greenworks, Inc. primarily serves Council Districts 8,9, and 10. Our neighborhoods on average have less than 2% tree canopy. According to the County of Los Angeles Public Health Series, CD8's Healthy Places Index (HPI) scores in the 2nd percentile; CD9 scores in the 0th percentile, and CD10 scores in the 22nd percentile. These numbers are calculated through 25 community characteristics, including social, economic, and environmental conditions. California Greenworks, Inc. bears witness to structural issues which have maintained the minimal access our communities have to healthy, green recreational spaces. CD8 has 0.53 acres per 1,000 residents, CD9 has 0.33 and CD10 has 0.57. The average for LA County is 8.10 acres.

What do you want the NEJAC to advise EPA to do: Tree canopy is directly related to Median Average Income. California Greenworks, Inc. requests that greening south LA neighborhoods be prioritized as it is in other Council Districts. CGWs requests that the EPA partner with community organizations to address the inequities which have resulted due to polluted air and lack of tree-canopy. An increase in south LA's tree canopy will drastically affect cooling and heating utilities across seasons, enabling our communities to have more capital. This is imperative for the communities we serve, as 29% of people in CD8 are living

below 100% the Federal Poverty Level (FPL) and 55% are below 200% FPL; in CD 9 39% are living below 100% FPL and 70% are below 200% FPL; and

23% of CD10 is living below 100% FPL and 48% is below 200% FPL. The Los Angeles Public Health Series reports do not provide what percentage of constituents are living below 300% FPL, but as it relates to food insecurities, which is also an environmental issue, the Series reports that 31% of CD 8 living below 300% FPL experience food insecurities, 29% of CD 9 living below 300% FPL and 23% of CD 10 living below 300% FPL report a prevalence of food insecurity in their household. California Greenworks, Inc. requests that emergency community advisory committees for each Council District be formed to strategize immediate and long-term remedies that can be implemented to meet dire needs as it relates to tree canopy, air quality, and water supply and water quality. It is necessary for these committees to be predominately made up of community members. California Greenworks, Inc. recommends that investing in community based solutions and ideas will ensure that no one in Los Angeles is living in the 0th percentile, nor the 2nd percentile, as it relates to a Healthy Place (HPI).

Works Cited:

Los Angeles County Department of Public Health (2018) *City and Community Health Profiles*. (Reports on Council Districts 8,9, and 10). Retrieved from http://publichealth.lacounty.gov/ohae/cchp/healthProfilePDF.htm

Thompson's Island Public Access Joan and Mike

Delaney, 8/19/20 jdelaneynp@msn.com,

mike@mikedelaney.org

How many of you have walked from Squaw Rock Park in Quincy, across the sand bar to Thompson's Island? Thompson's Island is in Boston Harbor, but for a few hours at low tide you can walk to the Island across a large sandbar.

Unfortunately, Thompson's Island Outward Bound Educational Center (TIOBEC) has posted "No Trespassing Signs." There is a Grant of Conservation Restriction on Thompson's Island (1). In 2002, Massachusetts residents paid four million dollars to Thompson's Island Outward Bound. In return TIOBEC agreed to allow people unescorted public access to the island ALL YEAR ROUND. Presently, this is not happening.

Almost all the Boston Harbor Islands are open, but only for rich white people who own a boat. The National Park Service (NPS) has also provided boat moorings for these rich boat owners. It is important to note that the National Park Service is one of the whitest federal agencies. About 83% of the NPS 21,000 employees are white (2). Racism has plagued the NPS since it started in 1916. Look at the history of Shenandoah National Park. It created a segregated area known as Lewis Mountain. Black people were not allowed anywhere else in the park. It wasn't until 2013, the NPS created the Office of Relevancy, Diversity, and Inclusion.

The closing of Thompson's Island is an overt act of racial/social injustice. We are all aware of injustices that happen every day. Thompson Island can be reached by bike, bus, baby stroller... by walking across the enormous sandbar. It has the best public access of a green area for poor, black, marginalized, people. Massachusetts paid millions of dollars to Thompson's Island for public access. And NPS and TIOBEC have not followed through with their responsibilities.

While rich white people enjoy the privileges of the Boston Harbor Islands, we know there is no substantive change to include everyone. The Boston harbor Islands have become a "white space."

Thompson Island Outward Bound should take down the "No Trespassing" signs. They should provide information about the Grant of Conservation Restriction areas on the Island that allow public access. They should encourage people to use Thompson's Island. Start the transformation. This is not someone else's problem. Don't go back to a blissful state of denial.

"Thompson Island", Trust for the Public Land. Downloaded 8/18/10. (https://www.tpl.org/our-work/thompson-island#:~:text=Thompson%20Island%20was%20the%20last,the%20public%20for%20recreational%20use.)

(1) "Racist roots, lack of diversity haunt national parks", Jeremy P. Jacobs and Rob Hotakainen, E&E News, June 25, 2020. Downloaded 8/18/20. (https://www.eenews.net/stories/1063447583)

To: Boston Harbor Islands Partnership

From: Joan Delaney (jdelaneynp@msn.com) Mike Delaney (mike@mikedelaney.org)

Date: July 21, 2020

RE: Thompson Island Conservation Restriction

My name is Joan Delaney. My husband, Mike Delaney, and I have been residents of Quincy for most of our lives and we grew up in Boston Harbor and on the Islands.

We have a significant concern regarding how Thompson Island is not providing public access and are bringing our concern to you today.

In 2002, Thompson Island accepted $4M from the State of Massachusetts and the National Park Service and entered into a Conservation Restriction (attached) that designated each end of the island as conservation space and detailed how the public can access the island year-round.

For at least the past five years, and probably much longer, Thompson Island hasn't been abiding by the specifics of this agreement, or even with its spirit. If the Island's staff sees anyone walking the beach, they immediately tell them it's a private island and they need to leave.

The 2002 "Grant of Conservation Restriction" defines a specific conservation area on each end of the island for unescorted recreation pursuits for the general public, such as "walking, hiking, trail use, beach-combing, nature observation, photography, picnicking, cross-country skiing" (4(d), p.11), and enjoyment of scenic views, in perpetuity.

The Restriction requires Thompson Island to allow "enjoyment of the natural environment of the conservation area by members of the public on an escorted and unescorted basis" (4(c), p.10). Unescorted public access is allowed year-round, for activities such as "cross-country skiing" (4(e), p. 12). Access to the island is allowed by ferry, pleasure boats, and by walking across the spit from Squantum.

"Unescorted public access is permitted to the entire conservation area on weekends…" (4(h), p. 13) and during "reasonable daylight hours on weekdays" (4(h), p. 13).

Thompson Island is required to "provide general public access by the Unescorted Public Access ferry" (4(j), p. 13). People without previously scheduled unescorted public access (UPA) are allowed to inform the ferry captain of their request and if space allows, they are allowed to take the ferry to the island "as would apply with a UPA Reservation" (Exhibit B.11(d), p 25).

Unfortunately, Thompson Island is not abiding by the letter or the spirit of the Conservation Restriction. They have posted numerous No Trespassing signs all over the island and beach. Thompson Island staff challenges any visitors tell them this is a private island and that they need to leave. The signs are posted so people feel they can't even be on the beach, even though this is specifically allowed in the agreement and in Massachusetts' laws.

If they can't have a ferry available year-round, as required in the agreement, they should encourage the public to access the island via the spit from Squantum and offer tours. They should boast about the history of the island, show off its natural beauty, and give homage to the Native Americans who first lived on the island.

Their web page should provide accurate information on access to the island. They need to have factually accurate signs. The staff should have proper employee identification and uniforms and should welcome visitors to the island and inform them of their rights to access the allowed portions of the Conservation Area and the beaches.

Thompson Island was paid a large amount of money; they are required to live up to the agreement.

We would be more than willing to work with Thompson Island to help them develop the public access that is allowed in the agreement. The island is a beautiful environmental and cultural resource and the public should be encouraged to enjoy it.

Here are a few actions that are needed to be in compliance with the Conservation Restriction:
There needs to be an immediate plan for UPA. (Unescorted Public Access) as document in the 2002 Grant of Conservation.
A copy of the 2002 Grant of Conservation Restriction should be readily accessible to the public. You should not need to request information through the Freedom of Information Act. These rules should be prominently posted at Thompson's Island and Squaw Rock. They should be prominently posted on Boston Harbor Now, and the National Park Service Website.

- The information on Thompson Island website should reflect truthful information. For instance, their website states if you are an "Islander" you can make a minimum donation of $1000 and you can visit the island
"anytime." Access should not be for rich people only.

The staff at Thompson's Island needs to be properly educated. They should engage the public. They should share this natural wonder and proudly pay homage to the American Indians who lived, worked and died on this land.

When Thompson's Island laid the new water pipe this past spring, they rode construction equipment onto Squaw Rock Park. They bulldozed hundreds of trees, plants, homes for animals… When this happened, we contacted David Murphy, Commissioner of Quincy Parks. He spoke to Josh Roy. We were told at that time there would be complete restoration of this destroyed area. That needs to happen. When is that planned? The sandbar has been destroyed and needs to be returned to its original condition. Squaw Rock Park is an Indian burial ground. They dug up Indian remains.

There are huge holes that have been dug on Thompson's Island. I don't know if these holes are a science experiment or maybe looking for broken pipes. Presently, these holes are dry and empty. The rest of the year they are full of water. Animals fall in, can't get out, and drown. And yes, I have photos. Some of these holes are several feet deep. There are no retaining walls in place. It would be easy for an adult or child to fall in and be covered with dirt. Certain injury or death. In addition, this is a burial ground for the Mosswetusset Indians. Stop digging up American Indians.

- The Thompson Island staff rides the Kubota across the sandbar at low tide to access Quincy for pizza, coffee, etc. If they are telling people they can't access the island by sandbar, they should not. They zip through people on the sandbar creating a dangerous situation. A few years ago, a Kubota got stuck in the sandbar. It could not be retrieved and was consumed by the ocean.

Massachusetts residents are allowed to walk between the low tide and high tide mark on any beach. The staff must be properly informed. Stop denying residents access to the beach.

Unescorted public access should start immediately. It costs nothing. According to the grant there does not need to be an orientation to the island.

- Please remove the misleading signs about no swimming or fishing.

Please remember, Thompson's Island was stolen from Indigenous People. It is a sacred burial ground. The earth isn't a dead thing you can claim. The animals and plants that live here have lives and spirits just like you and me. They have inherent worth, just like you and me. Start showing the solemn respect that is deserved.

Attached: Grant of Conservation Restriction, 2002.

Suffolk County - 20/20 Perfect Vision i2 Document Detail Report

Current datetime: 6/11/2020 2:55:07 PM

Doc#	Document Type	Town	Book/Page	File Date	Consideration
279	DEED		28699/304	06/10/2002	4000000.00

Property-Street Address and/or Description

EAST BOSTON

Grantors

THOMPSON ISLAND EDUCATION CENTER INC, THOMPSON ISLAND OUTWARD BOUND EDUCATION CNTR INC

Grantees

MASSACHUSETTS COMMONWEALTH OF, UNITED STATES OF AMERICA

References-Book/Pg Description Recorded Year

35502/269 LIEN 2004, 40828/168 ORD 2006, 50840/228 ORD 2013, 52267/196 ORD 2013, 60944/120 ORD 2019, 61036/46 ORD 2019, 61699/174 LIC 2019

Registered Land Certificate(s)-Cert# Book/Pg

GRANT OF CONSERVATION RESTRICTION

Thompson Island Education Center, Inc. a Massachusetts charitable corporation, having a usual place of business at Thompson Island, P.O. Box 127, Boston, MA, 02127, and its affiliate Thompson Island Outward Bound Education Center, Inc., and their successors and assigns (collectively referred to herein as the "Grantor" or "Thompson"), for consideration of Four Million Dollars ($4,000,000), hereby grants, with Quitclaim Covenants, in perpetuity and exclusively for conservation purposes, to the **Commonwealth of Massachusetts,** acting by and through its **Department of Environmental Management,** and its successors and assigns ("DEM"), and to the **United States of America,** and its successors and assigns, having an address c/o National Park Service (the "Park Service"), 1849 "C" Street, N.W., Room 2444, Washington, D.C., 20240, as tenants in common (each referred herein as the "Grantee" and collectively the "Grantees"), a Conservation Restriction pursuant to the provisions of Massachusetts General Laws Chapter 184, Sections 3133 as described below, for the purposes set forth in Article 97 of the Amendments to the Massachusetts Constitution ("Article 97"), with respect to interests in certain parcels of land containing approximately 240.51 acres, more or less, located in the City of Boston, Massachusetts and further described in Exhibit A attached hereto (referred to herein as the "Premises", "Thompson Island" or the "Island"). The Premises consist of a "Building Envelope" of approximately 45.09 acres, more or less, and the remainder of the Premises, 195.42 acres more or less, being referred to herein as the "Conservation Area", all as shown on a plan entitled "Plan of Land Thompson Island Boston Harbor, East Boston, MA 02128" prepared for MA Department of Environmental Management and the National Park Service, dated February 19, 2002, prepared by Coler & Colantonio, Inc., to be recorded herewith and made a part hereof and referred herein as the "Plan".

1. Purposes.

Whereas, the Omnibus Park and Public Land Management Act of 1996, Public Law 104-333, 110 Stat. 4233, 16 U.S.C. 460kkk as amended (the "Governing Legislation") establishes the Boston Harbor Islands National Recreation Area (the "Park Area") to preserve the land and waters which comprise the Park Area, to improve access to the Boston Harbor Islands, to provide education and visitor information programs, and to manage the Park Area in partnership with the private sector, the Commonwealth of Massachusetts, the municipalities surrounding Massachusetts and Cape Cod Bays, certain private entities owning one or more of the Harbor Islands, including the Grantor, and certain other historical, business, cultural, civic, recreational and tourism organizations (as defined in the Governing Legislation, the "Boston Harbor Islands Partnership" or the "Partnership"); and

Whereas, the Secretary of the Interior is authorized pursuant to the Governing Legislation to acquire, in partnership with others, a less than fee interest in Thompson Island within the Park Area, of which the Grantor is the sole owner; and

Whereas, the Premises possess significant scenic landscape values, framing the rural beauty of the Island's rounded hills, open fields, woodlands, salt marsh, and shoreline against the other Boston Harbor islands and the striking contrast of the Boston skyline to provide a unique and dramatic visual environment; and

Liam C. Floyd
Bourbeau & Floyd, LLP
50 Beacon Street
Boston, MA 02108

Whereas, the Conservation Area provides important opportunities for public access and recreation as part of the Boston Harbor Islands National Recreation Area, including appropriate passive recreational pursuits for the general public such as unescorted walking, trail use, beach-combing, nature observation, and enjoyment of scenic views; and

Whereas, the Premises constitute an outdoor classroom that afford the youth and adults of the Greater Boston area the opportunity for unusual learning experiences and educational programs through the continuation and further development of the educational programs of the Grantor as a part of the Boston Harbor Islands Partnership consistent with the terms and conditions of this Restriction, so as to provide to the citizens who utilize the Park Area the benefit of the active environmental and educational programs of the Grantor to complement the more traditional Park Area activities; and

Whereas, the Grantor is currently providing extensive educational programs through resident and non-resident activities available to the public on a free and substantially subsidized basis, focused on youth but also including adults, and such programs are educational mission programs of benefit to the public; and

Whereas, the Premises are located on Thompson Island, which is listed in the National Register of Historic Places in its entirety for the prehistoric archaeological resources located therein; and whereas, the island may contain significant historic period archaeological resources which may be eligible for listing in the National Register of Historic Places; and

Whereas, the Premises are an island drumlin that possess important habitat, including beach, saltmarsh, grasslands and woodlands, for native flora and fauna, particularly for bird species as the Premises include the largest functioning saltmarsh of any of the islands in Boston Harbor; and

Whereas, the purposes of this Restriction include retaining the Conservation Area predominantly in its natural, scenic, and open condition; protecting and promoting the conservation of forests, meadows, wetlands, soils, ponds, coastal resources, and wildlife; allowing public access for nature observation, walking, and enjoyment of the scenic and open space resources of the Conservation Area as specifically provided for herein; and consistent with the permitted uses as set forth herein, including without limitation, the continuing education programs of the Grantor, preventing any use of the Conservation Area that will significantly impair or interfere with the ecological, scenic, recreational, educational, scientific, archaeological, and open space values (collectively, "conservation values"); and

Whereas, to accomplish all of the foregoing purposes the Grantor and the Grantees have agreed upon the terms and conditions of this Restriction as constituting an appropriate balance between (i) the continued growth and development of the Grantor's educational programs as a part of its unique role in providing such active outdoor environmental education programs as a part of the Boston Harbor Islands Partnership, (ii) enjoyment of access to the natural environment of the Conservation Area by members of the public on both an escorted and unescorted basis, and (iii) protection of the natural environment of the Island from damage and overuse.

Now, therefore, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, the Grantor covenants for itself and its successors and assigns, that the Premises will at all times be held, used and conveyed subject to and not used in violation of the restrictions and prohibitions set forth in Section 2 below, which shall run with the Premises, in perpetuity, as said restrictions are limited or affected by the provisions of Section 3 ("Reserved Rights") or the provisions of Section 4 ("Public Access to the Conservation Area; Coordination with Grantor's Environmental Programs").

2. Prohibited Activities.

Subject to the Reserved Rights of the Grantor described in Section 3 below and the agreement of the parties to provide for Public Access to the Conservation Area in coordination with the Grantor's continuing environmental programs as described in Section 4 below, the following restrictions shall apply to the Premises:

(a) The Conservation Area (including, without limitation, any body of water thereon) shall be continued predominantly in its present undeveloped and natural condition and shall not be used for residential, industrial, or commercial use except as permitted by the terms of this Restriction, or any other use which is inconsistent with the intent of this Conservation Restriction, being the perpetual protection and preservation of the Conservation Area and its natural resources, except as expressly permitted in this Restriction.

(b) No residential dwelling or other building, mobile home, tennis court, artificial swimming pool, landing strip, asphalt or concrete driveway or road, billboard or other advertising display, utility pole, tower, conduit or line, equipment, fixture, trailer, antenna, dock, pier, boat landing, septic system or other temporary or permanent structure or improvement shall be constructed, placed or permitted to remain on the Conservation Area except such structures as are expressly permitted in this Restriction.

(c) No loam, peat, gravel, soil, sand, rock or other mineral resource, or natural deposit shall be mined, excavated, dredged, or removed from the Conservation Area, except to the extent necessary for excavation required to erect structures and facilities, construct trails, or conduct sound agricultural, silvicultural, or wildlife habitat management practices as allowed in Sections 3.2 or 4 hereof, and except for archaeological investigations pursuant to paragraph 3.2(h). No archaeological field investigation shall be conducted for any purpose, except the field surveys and subsurface investigations authorized by the State Archaeologist of the Massachusetts Historical Commission pursuant to paragraph 3.2(h).

(d) No soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste, low level radioactive or hazardous waste (except as permitted under the Massachusetts Contingency Plan) or other substance or material whatsoever shall be placed, stored, dumped or permitted to remain on the Conservation Area, excepting the temporary placement of soil to the extent necessary for excavation required to install and erect the structures or facilities allowed in Sections 3.2 or 4 hereof and any debris deposited on the beaches by wave action.

(e) No trees, shrubs or other vegetation on the Conservation Area shall be cut, removed or destroyed, except that the Grantor may perform such cutting, pruning, mowing, burning, and removal as shall be dictated by sound agricultural, silvicultural or wildlife habitat management practices, to preserve or provide vistas, and as otherwise expressly permitted in this Restriction.

(f) No activities shall be carried out which are detrimental to drainage, flood control, water conservation, water quality, erosion control, or soil conservation, except for any temporary impacts permitted by applicable laws and regulations as reasonably necessary for purposes of exercising any of the reserved rights in Sections 3 or 4.

(g) No activities shall be carried out which are detrimental to archaeological conservation.

(h) No use will be allowed on the Conservation Area of automobiles, trucks, motorcycles, motorized trail bikes, all-terrain vehicles, snowmobiles, or any other motorized or power-driven vehicles, excepting from this provision motorized wheelchairs and vehicles used by the Grantor and its employees and agents as reasonably necessary for purposes of exercising any of the reserved rights in Sections 3.2 or 4, or as required by police, firemen, or other governmental agents in carrying out their lawful duties.

(i) No commercial or industrial use of any kind shall be permitted on the Conservation Area, including but not limited to use as a commercial camping, hunting, trapping, fishing, or sporting club or facility, or any institutional use inconsistent with the purposes of this Restriction, except as expressly permitted in this Restriction.

(j) No planting of any invasive exotic plant species, identified as such on lists maintained by the Division of Fisheries and Wildlife's Natural Heritage and Endangered Species Program, shall be permitted.

(k) No use shall be made of the Premises, and no activity shall be permitted thereon, which is inconsistent with the terms of this Restriction. No activity (including, but not limited to, drainage or flood control activities) shall be carried on which is detrimental to the natural resources of the Premises or detrimental to water quality, soil conservation, wildlife conservation, the protection of natural plant communities, rare, endangered or threatened species, or proper agricultural and/or forestry management practices or which is otherwise wasteful of the natural resources of the Premises.

(l) No subdivision or division of the Premises, or any portion thereof, into two or more lots (as compared to conveyance of the Premises in its entirety, which shall be permitted), shall be permitted without the express written permission of the Grantees, except for any such subdivision of the Premises required for the purpose of complying with applicable legal requirements for the construction, modification, renovation, repair or financing of new or existing structures to the extent permitted in Section 3 below, in which case reasonable advance written notice shall be given to the Grantees, but the Grantees shall not have a right to disapprove such a subdivision. The Grantee may, at its discretion, approve such other division of land as it deems necessary and appropriate to further the purposes of this Restriction.

3. Reserved Rights.

The Grantor reserves to itself and its successors and assigns the right to conduct or permit the following acts and uses. The exercise of any right reserved by the Grantor under this Section 3 shall be in compliance with all applicable federal, state and local laws. The inclusion of any reserved right in this Section 3 requiring a permit from a public agency does not imply that the Grantees take any position on whether such permit should be issued, but the failure of the public agency to take a position on any such permit shall not be assumed to imply disapproval by such agency.

Notwithstanding any provisions of this instrument to the contrary, the Grantor hereby reserves to and for itself and its successors in title the right to conduct or permit the activities described in subsections 3.1 and 3.2 on the Premises, subject to the provisions of Section 4 below with respect to increased public access to the Conservation Area.

3.1 Building Envelope.

(a) The Grantor retains a Building Envelope within which the Grantor has already constructed a pier and associated floats, access roads and paths, an athletic field, ropes course and associated climbing tower, and 14 buildings with a total habitable area of 94,000 square feet. The maintenance, repair, replacement and use of the existing structures and facilities are permitted by this Restriction.

(b) The Grantor shall have the right to replace, construct, repair, rehabilitate, demolish, reconstruct, modify, move, use, own, and occupy existing and additional buildings and structures within the Building Envelope, subject to the restrictions herein, all in compliance with applicable laws and regulations. The Grantor shall notify the Grantee prior to commencing construction of any new building or structure. The total habitable building square footage of permanent structures within the Building Envelope (as opposed to temporary educational structures referred to in Section 3.2(c)) is limited to no more than 180,000 square feet.

(c) Within the Building Envelope, the Grantor retains the right of use, maintenance, repair, construction, installation, relocation, removal and replacement of wells, septic systems, underground utility lines, underground telephone lines, and other facilities in support of the existing and additional structures permitted under paragraph (b) above. The Grantor also retains the right to pave, improve and extend the system of roads and paths within the Building Envelope to serve the buildings and structures permitted under this Restriction.

(d) No buildings or structures shall be located within the area marked as the "Quad" as shown on the Plan. No buildings or structures, except those used for marine purposes or utilities, including storage, shall be located within the two portions of the Building Envelope marked as "buffer strips" as shown on the Plan, except for landscaping or other structures associated with visitor access located in the "Access Corridor" as shown on the Plan through the West buffer strip. The buffer strips between the beaches and the trails on the East and West sides of the Building Envelope as shown on the Plan shall be maintained as vegetated borders, allowing filtered views to and from the interior portions of the Building Envelope and the water.

(e) Repair, rehabilitation and restoration of the exterior of the Hughes (c.1902) and Lewis Gardner (c.1882) buildings, as shown on the Plan, shall conform to the Secretary of the Interior's Standards for Rehabilitation in force as of the date hereof, a copy of which is attached as Exhibit C.

(f) New construction within the Building Envelope in addition to the currently approved Program Building and new maintenance building in the location shown on the Plan, including new additions to existing buildings, shall be of high architectural quality and shall conform to the following criteria:

i. The siting, massing and spatial relationship of new construction shall complement the campus setting as expressed in building design derived from classical styles with buildings generally rectangular in form that enclose courtyards and quadrangles. Individual buildings isolated from the campus shall be allowed within the Building Envelope subject to the limitations of paragraph 3.1(b) above, provided their siting, massing, and proportionality does not materially intrude on or materially diminish the integrity of the campus setting of the Building Envelope.

ii. No building shall be taller than four stories or fifty (50) feet in height (as height is currently defined in the Boston Zoning Code, a copy of a portion of which is attached hereto as Exhibit D) which is the height of the roofline of the highest building existing at the time of this Restriction.

iii. New buildings shall be primarily composed of masonry materials or clad in wood, and all buildings and structures shall be designed, constructed, and reconstructed of compatible, relatively non-reflective building materials that blend into the surrounding landscape to the extent reasonably practicable

iv. Solar panels shall be permitted to be installed on new and existing buildings, provided that reasonable efforts are made to make them as consistent with the design environment of the Building Envelope as is reasonably possible within the then currently available designs of solar panels.

(g) The use, maintenance, modification and repair of the existing septic system, and the enlargement or replacement of the septic system within the Building Envelope as required to service the additional buildings permitted within the Building Envelope.

3.2 Other Reserved Rights.

Notwithstanding any provisions of this instrument to the contrary, the Grantor hereby reserves to and for itself and its successors in title the right to conduct or permit the following activities on the Premises, subject to the provisions of Section 4 below with respect to public access to the Conservation Area:

(a) The operation of schools, educational centers and other charitable or educational activities on the Premises consistent with the charitable and educational purposes of the Grantor, including,

without limitation, all of the traditional uses and activities of the Grantor, the continuation of which are recognized in the Governing Legislation and this Restriction as being of public benefit; and to use the Premises, including all existing and any new permanent structures, buildings and facilities permitted to be located on the Premises (as opposed to temporary educational structures referred to in Section 3.2(c) below), for commercial, residential, and institutional uses, activities, and purposes, as such use categories are defined under Article 8 of the Boston Zoning Code as of the date hereof (collectively the "Permitted Uses").

(b) Within the Conservation Area, subject to the provisions of paragraph 3.2(p) (below), the use, maintenance, modification and repair of underground utility lines, such as telephone, electric, and water mains, and the installation, use, maintenance, modification and repair of new utility lines, including without limitation a sewer line, generally within the line of the road/gravel path which runs from the location shown on the Plan as "Approximate Proposed Building & Location" within the Building Envelope to the southerly end of the Island to the boundary of the Premises at the Mean Low Water Line. Any relocation or installation of such utilities shall be subject to prior written approval of the Grantee, which shall not be unreasonably delayed or withheld, provided there is no more than reasonable short term detrimental impact on the scenic, ecological, and/or archaeological integrity of the Conservation Area. No other new infrastructure shall be allowed in the Conservation Area, except for those approved by the Grantees.

(c) The repair, maintenance, modification, replacement and use of educational structures within the Conservation Area, including climbing towers, lean-to's and camping platforms, including those currently existing and those authorized below in this paragraph ("temporary educational structures" as opposed to permanent structures referred to in Section 3.1(b)). Construction of not more than four (4) additional tent platforms, lean-to's or other similar temporary educational structures related to the Grantor's educational programs will be permitted, subject to prior written notification of the Grantees, in the general area of the eight (8) current Campsites shown on the Plan (the areas around the Campsites as shown on the Plan, the Ropes Course Areas as shown on the Plan and the Building Envelope are herein collectively called the "Activity Areas".) All camp sites shall be limited in size to an area within a seventy-five (75) foot radius measured from the center of the tent platform. Construction of one major additional educational structure, such as a climbing tower or ropes course, and one smaller non-permanent educational structure larger than a lean-to or camping platform, shall be allowed within the Building Envelope at the general location of the Potential Future Ropes Course defined on the Plan in addition to the buildings permitted pursuant to Section 3.1(b). Periodic relocation of all such temporary educational structures within the Activity Areas to avoid overuse and other detrimental impact on the scenic landscape or ecological integrity of the Premises shall be permitted, subject to prior written notification of the Grantees. Any further or other relocation of existing temporary educational structures, other than in the Building Envelope, shall be subject to prior written approval of the Grantees, which shall not be unreasonably delayed or withheld, in which event no more than reasonable short term detrimental impact on the scenic landscape or ecological integrity of the Premises shall be permitted. Prior to undertaking any new construction or relocation of structures permitted in this paragraph (c), Grantor shall comply with the provisions of paragraph 3.2(p) below.

(d) The reconstruction of the following two (2) historic structures on the Island, (i) the root cellar, and (ii) the weather station, shall be permitted in their historic locations as shown on the Plan, subject to prior written notification of the Grantees, in accordance with the Secretary of the Interior's Standards for Reconstruction and with the provisions of paragraph 3.2(p) below.

(e) Subject to the provisions of paragraph 3.2(p) (below) and to written approval of the Grantees, which shall not be unreasonably delayed or withheld, the installation of a wind turbine for alternative energy purposes, provided there is no significant and detrimental impact on the noise level, scenic landscape, archaeological or ecological integrity of the Premises.

(f) The construction, erection, use, and maintenance and use of trails, fences, observation blinds, boardwalks, benches, bridges, gates, stone walls, and other minor educational and recreational structures on the Premises, as reasonably necessary for the uses thereof or hereinafter permitted, or necessary and desirable in controlling unauthorized use or facilitating authorized use of the Premises. No new paved roads or paved trails shall be allowed in the Conservation Area.

(g) The construction, erection, use, replacement, and maintenance of signs or kiosks that are consistent with the Park Area standards, as indicated in the Access Plan, setting forth restrictions on the use of the Conservation Area, communicating information about trails, locations, natural features, flora and fauna or similar items.

(h) The conduct of archaeological activities, including without limitation survey, excavation and artifact retrieval, following submission of an archaeological field investigation plan and its approval by the Grantee and the State Archaeologist of the Massachusetts Historical Commission (or appropriate successor official).

(i) The conduct of sound agricultural and horticultural uses on the Premises existing at the time of this Restriction or which have historically been used for such purposes, including mowing and grazing of existing fields and meadows, the installation of fences, and the clearing of invasive woody growth. If said agricultural uses cause significant detrimental impact on the scenic, ecological, or geological integrity of the Premises, or unreasonably impede UPA within the Conservation Area, the Grantor shall immediately cease such activities at the written request of either Grantee. Said agricultural uses shall be consistent with the Park Area standards and in accordance with the Wetlands Protection Act, the standards and practices generally approved by the University of Massachusetts, Cooperative Extension Service, or any successor thereto, and the applicable requirements, if any, of the United States Department of Agriculture, Natural Resource Conservation Service, regarding erosion control, sedimentation, and non-point source pollution control. Animal husbandry uses shall be permitted only within the Building Envelope.

(j) The conduct of sound silvicultural uses of the Premises, including selective pruning, cutting, and replanting to prevent, control or remove hazards, disease or insect damage, fire, or to preserve the present condition of the Premises, including vistas, woods roads, and trails.

(k) The temporary stockpiling and composting of stumps, tree and brush limbs, and similar biodegradable materials originating on the Premises in locations where the presence of such materials will not have a deleterious effect on the purposes of this Restriction, including scenic

values, as well as the clearing and temporary stockpiling of debris originating from areas subject to tidal action.

(l) The management of the Conservation Area for the benefit of wildlife (including, without limitation, the planting and cultivation of wildlife cover) or cutting, mowing, pruning, burning, application of herbicide by a licensed applicator, or removal of vegetation to enhance and promote varied types of wildlife habitat consistent with sound wildlife management practices.

(m) The use and application within the Conservation Area and storage within the Building Envelope, of herbicides, pesticides, insecticides, fungicides, or other chemicals or materials to further the goals of this Restriction, subject to notification of the Grantee in accordance with the procedures set forth in Section 5 below. Such use shall be conducted in a safe and prudent manner, in conformity with existing federal and state law, the manufacturer's requirements, and the specific recommendations, if any, of the University of Massachusetts, Cooperative Extension Service.

(n) The installation of erosion control measures on the steep shoreline bluff in the northern portion of the Premises, subject to prior written approval of the Grantee, which shall not be unreasonably delayed or withheld, provided there is no significant detrimental impact on the scenic landscape, ecological, archaeological or geological integrity of the Premises except to the extent any such impact is offset by the benefits of said erosion control measures, in the reasonable judgment of the Park Project Manager in consultation with the DEM Manager, and in accordance with the provisions of paragraph 3.2(p) below.

(o) Consistent with the Grantor's obligations set forth in Section 4 below, allowing public access to the Conservation Area compatible with the conservation values protected by this Restriction, collecting fees for organized programs on the Premises, imposing restrictions on the uses, activities, and hours of operations consistent with the Access Plan, maintenance and use of the trails, roads, and pier on the Premises, and maintenance of the meadows and fields on the Premises.

(p) Prior to undertaking any construction that involves excavation or other ground disturbance as permitted by paragraphs 3.2 (b),(c),(d),(e) or (n), Grantor shall consult with the Massachusetts Historical Commission to determine whether an archaeological investigation is required and shall adopt prudent and feasible alternatives that avoid, minimize or mitigate harm to significant archaeological sites.

4. Public Access to the Conservation Area; Coordination with Grantor's Educational Programs.

(a) In addition to restrictions on structures, activities and uses as set forth in Sections 2 and 3 above, this Restriction is intended by the parties to provide for a long term, mutually advantageous sharing of activities, facilities and locations to advance the educational and environmental interests of the Park Area, the Partnership, the Grantor and the Grantees in a potentially synergistic relationship. The Grantor currently provides public access to the Premises through both its educational programs and through escorted tours of the Island

(currently provided by the Friends of the Harbor Islands). Previously, it has not been within either the charitable/educational purposes of the Grantor as an educational institution or within its constrained charitable/educational budget to safely administer additional public access by individual members of the public on an unescorted basis without unacceptable risk to the safety of the individuals, the sensitive natural environment of the Premises, or the natural open space values required for the success of its educational programs. By the mechanism of this Restriction, the Grantor is adding the component of Unescorted Public Access (defined below) to the public benefits the Grantor has historically provided to the community, on a basis which does not jeopardize the viability or vitality of the outdoor-environmental educational programs which constitute its core charitable mission. It is also anticipated, as the opportunities of the Park Area develop, that the Grantor will be able to make its outdoor environmental education programs available on other Harbor Islands, to further broaden the opportunities for public participation.

(b) The applicable principles and required definitions agreed upon between the Grantor and the Grantees with respect to such Unescorted Public Access and educational programs, which are expected to remain relatively constant over a period of years are set forth in this Section 4, and the current detailed agreement and procedures for the administration of such Unescorted Public Access in close coordination with the Grantor's ongoing educational programs, the details of which Unescorted Public Access the Grantor and Grantees agree may be revised from time to time by mutual agreement of the parties, are set forth in the Access Plan attached hereto as Exhibit B and made a part hereof (the "Access Plan"). Although it is expected that the provisions of this Section 4 shall remain relatively unchanged over a longer period of time than any current Access Plan (and may never be changed), the Grantor and the Grantees recognize and explicitly agree (and by his/her acceptance of this Restriction the Secretary of Environmental Affairs recognizes and agrees) that because of the perpetual duration of this Restriction and the detailed operational requirements of this Section 4 to implement public access in close coordination with ongoing educational programs, it may be necessary to the effective implementation of the conservation purposes for which this Restriction is granted for the Grantor and the Grantees to amend this Section 4 of this Restriction to more effectively describe the then-current agreement of the Grantor and the Grantees with the approval of the Secretary, in a manner which is no less protective of the conservation values for which this Restriction has been established, without any necessity or requirement for legislative approval in the context of M.G.L. c.184, s. 31-33 or Article 97.

(c) The Grantor and the Grantees agree that the provisions of this Restriction and the current Access Plan constitute an appropriate balance between (a) the continued growth and development of the Grantor's educational programs as a part of its unique role in providing such active outdoor environmental education programs as a part of the Boston Harbor Islands Partnership, (b) enjoyment of access to the natural environment of the Conservation Area by members of the public on both an escorted and unescorted basis, and (c) protection of the natural environment of the Island from damage and overuse (hereinafter the "Education/Access Balance" or the "Balance"). The Grantor and the Grantees agree that any modification of this Section 4 or the Access Plan proposed or adopted shall not materially adversely affect such continued growth and development of the Grantor's educational programs or the protection of the natural environment of the Island from damage and overuse.

(d) For purposes of this Restriction and the Access Plan, the following terms shall have the following meanings:

"Unescorted Public Access" (or "UPA") shall mean that members of the public who (1) have UPA Reservations, (2) enter the Premises from a scheduled UPA Ferry, (3) receive orientation from Thompson staff upon arrival and acknowledge agreement to follow applicable rules and practices, including limitations on areas of the Island open to UPA because of educational programs, hazards or overuse, and (4) conform to such rules and practices, shall have access to the portions of the Conservation Area designated pursuant to the Access Plan then in effect, either individually or in voluntary small groups without the requirement of an assigned guide or leader, for low-impact, non-motorized, non-commercial outdoor recreational use, including, but not limited to, walking, hiking, trail use, beach-combing, swimming, nature observation, photography, picnicking, cross-country skiing, educational walks, and other non-motorized outdoor recreational activities that do not materially alter the landscape nor degrade environmental quality. Unescorted Public Access includes access to the shoreline and beaches, but the number of persons counted as UPA does not include members of the public counted as Beach Access or Escorted Public Access.

"Beach Access" means access by members of the public from individually-owned private boats to, and only to, the beaches at the perimeter of the Premises, and not access to the interior of the Conservation Area or the Building Envelope beyond the beach itself. The number of people engaging in Beach Access is not included in Unescorted Public Access. No Unescorted Public Access shall be allowed over the so-called "spit" from Squantum in any event.

"Escorted Public Access" means organized groups of members of the public which are actively led and supervised during the duration of their stay on the Island by a leader with appropriate qualifications previously approved by the Grantor, which hold a Group Reservation.

"DEM Manager" means the person designated as such by the DEM Commissioner.

"Park Project Manager" has the meaning given to it in the Governing Legislation, which for purposes of this Restriction shall mean the Secretary's Designee.

"Secretary's Designee" shall mean the person designated as such by the Secretary of the Interior.

"Thompson Administrator" means the person designated as such by the Grantor in writing to the Park Project Manager, as such designation may be altered from time to time, in writing to the Park Project Manager, by Grantor, its successors or assigns.

"UPA Reservation" means a reservation for Unescorted Public Access for a specified time period on a specific day on which UPA is authorized, which is established and documented under a system which is the same or substantially similar to the system adopted for the small, sensitive public islands in the Park Area.

"Group Reservation" means a reservation for Escorted Public Access for a specified time period on a specific day for a specific group and led by a leader with appropriate qualifications previously approved by the Grantor.

"Summer Holidays" means Memorial Day, the July Fourth Holiday, and Labor Day.

"UPA Ferry" means any duly licensed boat authorized by the Thompson Administrator and the Park Project Manager in consultation with the DEM Manager to discharge and pickup UPA visitors holding UPA Reservations at the Thompson Island Pier. The designation of UPA Ferry may be revoked by the Thompson Administrator for cause if there is reasonable evidence that the operation of the Ferry poses a potential risk to the safety of persons or property.

(e) The Grantor agrees to permit Unescorted Public Access to the Conservation Area on any weekend day of the year or Summer Holiday (or portion of a weekend day or Summer Holiday served by the UPA Ferry schedule), as described herein, and in the Access Plan as it may be amended from time to time except on up to three (3) days in any twelve month period to facilitate the programming of large events by the Grantor. The Activity Areas will be off limits to Unescorted Public Access at all times for safety reasons. Unescorted Public Access is not permitted to the areas shown on the Plan as the Saltmarsh, the Icepond Area or the Pond Area (hereinafter the "Saltmarsh", the "Icepond Area" and the "Pond Area", respectively, and collectively the "Sensitive Areas"), except access to the Bird Blind as shown on the Plan (the "Bird Blind") via the trail shown on the Plan across the Building Envelope, which is permitted, and kayak access to the Saltmarsh originating outside the Saltmarsh around the time of high tide. Except in the case of unusual hazards, the beaches at the perimeter of the Premises shall be open to Unescorted Public Access, Escorted Public Access and Beach Access on days when each respective Access is authorized. The Thompson Administrator shall manage the scheduling of the Grantor's educational programs and both Escorted and Unescorted Public Access so as to achieve the Education/Access Balance as defined above in this Section 4, and subject to the requirements for Unescorted Public Access set forth in this paragraph and the current Access Plan. For each weekend day and Summer Holiday, depending upon the number and nature of the educational programs which are scheduled, the Thompson Administrator shall determine, in his/her reasonable judgment, the number of people who can be permitted Unescorted Public Access without materially interfering with the educational programs or requiring additional supervision. In determining this number, the Thompson Administrator shall take into account the reasonable level of staffing required to protect the resources, and the details of the educational values of each program scheduled to be conducted, distinguishing between those programs which place a premium on solitude or preserving the uninterrupted atmosphere of the natural environment, and those in which such values are less important. If sufficient demand does not exist during the off-season winter months to justify the expense of administration and supervision, after reasonable efforts by the Grantor, the Grantees and the Partnership to make known the availability of the Island for seasonal activities such as cross-country skiing through distribution of materials as described in the Access Plan, the availability of Unescorted Public Access on winter weekends may be reduced by mutual written agreement of the Grantor and Grantee.

(f) The Grantor agrees to permit Escorted Public Access to the Conservation Area, including the Activity Areas except Activity Areas which are in use, and the Sensitive Areas, on any day of the week, with advance approval, consistent with scheduled educational programs and Unescorted Public Access in the reasonable discretion of the Thompson Administrator.

(g) The Grantor reserves the right to post and close to all Escorted and Unescorted Public Access specific areas when such areas could constitute a public safety hazard, or such areas that require protection from foot traffic from all visitors and users of the Island, such as archeological sites or areas of compacted soil, or to close the entire Island to public access if necessary for safety reasons.

(h) In the event that the use of the Premises becomes primarily one or more of the Permitted Uses that does not include education of members of the public as a primary part of its purposes or mission such that the Conservation Area is no longer being used for educational programming, Unescorted Public Access shall be permitted to the entire Conservation Area on weekends, except the Sensitive Areas because of their environmental sensitivity and potential hazards, subject to reasonable limitations necessary to protect and conserve the natural beauty and ecological resources of the Conservation Area, as reasonably determined by the Thompson Administrator and the Park Project Manager in consultation with the DEM Manager. In such event, Unescorted Public Access may be permitted to any portion of the Conservation Area except the Sensitive Areas during reasonable daylight hours on weekdays subject to the provision of reasonable supervisory staffing by one or more of the Grantees or, if the Grantor, its successors or assigns so elects and Grantees agree, by the Grantor, it successors or assigns.

(i) Consistent with Massachusetts General Laws chapter 21, §17C, neither the Grantor nor the Grantees shall have any responsibility for providing active supervision of Unescorted Public Access. The Grantor has the right to provide appropriate management of public access and use, and the Grantor's staff shall have the right to terminate the UPA Reservation and status of any person who does not conform to established rules and practices for Unescorted Public Access, but the Grantor shall have no obligation to provide supervision beyond giving the orientation presentation described in the definition of Unescorted Public Access. The Grantees shall be under no obligation to provide such management or supervision. In connection with the operation of UPA Ferries to provide Unescorted Public Access to the Conservation Area, including any period when the Thompson ferry constitutes the sole UPA Ferry, the Grantor shall not have responsibility for, or any liability to, any person engaging in Unescorted Public Access who fails to timely board the last scheduled UPA Ferry departing Thompson Island on any day. The Grantor also has the right to maintain the natural beauty of the landscape by cleaning up and removing debris and elements unsightly to the natural landscape, but the Grantor shall have no obligation to do so in a manner which exceeds the needs and economic capabilities of its educational and charitable mission.

(j) The Grantor shall maintain the Premises' existing pier in a safe and serviceable condition consistent with the needs and economic capabilities of its educational and charitable mission, and which will provide for general public access by a UPA Ferry in accordance with the Access Plan.

(k) The Grantor shall maintain the existing open fields, as shown on the Plan, in a substantially similar condition as maintained at the time of the grant of this Restriction, to ensure maintenance of scenic vistas of the Premises, the mainland, and the other Boston Harbor Islands.

(l) The Grantor shall maintain the extent of, and keep in good condition, the trail network accessing the full Conservation Area. The current approximate location of the trail network is shown on the Plan. The Grantor shall maintain such trails in a reasonable manner so that they are reasonably free from debris, limbs and any unreasonable hazards consistent with M.G.L. chapter 21, §17C.

(m) The Grantor shall make reasonable efforts to prohibit any person from vandalizing, looting or otherwise disturbing archaeological resources, and shall promptly report any such disturbance to the Massachusetts Historical Commission.

5. Notification; Decisions.

(a) Unless otherwise provided herein or by law, the Grantor shall notify the Grantees in writing at least forty-five (45) days prior to undertaking or allowing any uses or activities on the Premises which require notification or approval of the Grantees under Sections 2, 3, or 4 above, or that are contrary to the express purposes of this Restriction, or that will adversely affect the conservation interests found within the Premises. The notice shall describe the nature, scope, design, location, time table and any other material aspect of the proposed activity in sufficient detail to permit the Grantees to make an informed judgment as to its consistency with the purposes of this Conservation Restriction. Whenever the Grantor's or Grantees' consent or approval is required under the terms of this Restriction, the recipient(s) of the notice shall respond within 45 days of receipt of such notice (and may, at its option, make a finding, in writing, that the proposed activity or use shall or shall not have a deleterious impact on the purposes of this Restriction). Failure to respond in writing within such 45 day period shall be deemed to constitute approval of the action proposed in the notice as submitted, so long as the notice sets forth the provisions of this paragraph relating to deemed approval after the passage of time. In all events in which a decision, approval, judgment or agreement (in this Section 5 referred to as an "approval") is to be made by both Grantees hereunder: (1) any required notice or request for such approval shall be given by notice as specified hereunder to both Grantees; (2) all further communications with the Grantor in connection with such requested approval shall be through and coordinated by the Park Project Manager, so as to avoid any duplicate, overlapping or inconsistent exchange of information; (3) in any situation in which any approval requested by the Grantor does not appear likely to be approved or has been determined by either of the Grantees on a preliminary basis will not be approved as requested by the Grantor, a representative of the Grantor shall be afforded at least one joint meeting with the ultimate decision maker(s) of both Grantees prior to the final decision; and (4) the formal approval or determination to approve or not to approve such request shall be given by the Park Project Manager in a form indicating that it is rendered on behalf of and is binding upon both of the Grantees.

(b) Any notices required by this Restriction shall be sent by registered or certified mail, return receipt requested, or by recognized overnight delivery service to the following address or such address hereafter as may be specified by notice in writing:

Grantee: Commissioner
Massachusetts Department of Environmental Management
251 Causeway Street
Boston, MA 02114-2104

Grantee: Superintendent
National Park Service
408 Atlantic Avenue, Suite 228
Boston, MA 02110

Grantor: President
Thompson Island Education Center, Inc.
Thompson Island, P.O. Box 127
Boston, MA 02127

Any such notice shall be deemed to be effective on the date received or on which delivery is refused during regular business hours.

6. Enforcement and Legal Remedies of Grantor and Grantee.

(a) The Grantee's duly designated officers, directors, employees, representatives, and agents shall have the right to enter the Premises at reasonable times and in a reasonable manner for the sole purpose of inspecting compliance with this Restriction, provided that persons conducting such activity shall immediately register with the Grantor's duly designated staff on site when entering the Premises.

(b) In the event of a violation of the terms of this Restriction by any party, except when such violation will cause immediate irreparable harm, in which event the party seeking to enforce the terms of this Restriction may seek injunctive relief in connection therewith, such party shall give notice of such alleged violation to the other party, and request the other party to remedy such violation, including such particulars as will reasonably permit the party against which enforcement is sought to respond. If the parties cannot agree within a reasonable period of time, the parties agree to negotiate in good faith to attempt to resolve any dispute, including representatives of each party empowered to finalize a binding resolution of the dispute making themselves available on a reasonable basis to permit at least two face-to-face meetings. If such dispute shall not be resolved by agreement within thirty days of the second such face to face meeting, then, upon request of either party by written notice to the other, such dispute shall be submitted to a mutually-acceptable mediator for a period of sixty days from the date of such notice in an effort to resolve such dispute by mediation. If the violation is not remedied within a reasonable time after such mediation is completed or abandoned, the party seeking enforcement of the terms of this Restriction may enforce this Restriction by appropriate legal proceedings, including, without limitation, obtaining injunctive or other equitable relief against any violations,

including without limitation relief requiring restoration of the Premises to its condition prior to any such violation (it being agreed that the Grantor or Grantee may have no adequate remedy at law), and shall be in addition to, and not in limitation of, any other rights and remedies available to either party. Enforcement of the terms of this Restriction shall be at the discretion of either party, and any forbearance by either party to exercise its rights under this Restriction shall not be deemed or construed to be a waiver.

(c) The Grantor agrees with the Grantees to continue to carry commercial general liability insurance covering its negligent acts and omissions in connection with its educational programs and other activities at such limits as it considers prudent for its then applicable programs and activities, and agrees to provide certificates of such insurance to the Grantees upon request. The Grantor further agrees to indemnify and hold harmless the Grantees for any loss, cost, damage, injury, claim, or liability within the scope of such insurance to the extent of the available proceeds of such insurance caused by the negligent acts or omissions of the Grantor, its employees, agents, contractors, clients, customers and its invitees which are related to the Grantor's activities, as opposed to members of the public engaging in public access to the Conservation Area pursuant to this Restriction who shall not be deemed to be invitees of the Grantor for purposes of this sentence. To the extent that the Grantor is reasonably able to (i) obtain insurance coverage covering the negligent acts or omissions of members of the public engaging in public access pursuant to this Restriction, and/or (ii) add each of the Grantees as additional named insureds on such policies, and/or (iii) obtain confirmation in the form of such policies or certificates thereof that the insurance company shall have no recourse against either of the Grantees for payment of any premium or assessment, in any such case without the payment of any additional premium or other modification of coverage, the Grantor agrees to make reasonable efforts to obtain and maintain such modifications of its insurance.

7. Immediate Vesting of Property Rights.

The Grantor and Grantee agree that the grant of this Restriction gives rise to a property right which vests immediately in the Grantee, and that the Grantor has retained fee title and use rights of substantial economic value. The Grantor and the Grantee are granting and paying for this Restriction, respectively, effective on the date this Restriction is executed and delivered, based upon their respective determinations as to the value of such grant and the consideration paid therefore.

8. Subsequent Transfers.

(a) The Grantor agrees to incorporate by reference the terms of this Conservation Restriction in any deed or other legal instrument by which it divests itself of any interest in all or a portion of the Premises.

(b) The Grantor agrees to provide a Right of First Offer by notice to the Commonwealth of Massachusetts, in the event that the Grantor chooses to divest itself of any permanent interest in all or a portion of the Premises. The foregoing shall not be deemed to include any transfer, lease, license or other arrangement to any other organization for the purpose of carrying out the educational or charitable purposes of the Grantor, its successors and assigns. If the Grantor has

received a bona fide offer from another party for such interest (an "Offer") the Right of First Offer shall be at the amount specified in such Offer. If the Grantor has not received an Offer, the Right of First Offer shall be at the fair market value as determined by appraisal as set forth below. Such appraisal may be performed by a single duly qualified appraiser mutually agreed upon by the Grantor and the Grantee, or if they cannot agree within thirty (30) days of the receipt of the Right of First Offer notice to the Commonwealth, then each party shall appoint a qualified appraiser within the following thirty (30) days. If the two appraisers appointed by the parties cannot agree on the fair market value of the permanent interest in the Premises proposed to be divested within sixty (60) days of the date of the appointment of the last of them, then such appraisers shall jointly appoint a third appraiser, who shall submit his appraisal within forty-five (45) days of his appointment. In such event, the fair market value for such interest shall be the average of the two appraised values which are closest to each other, and the third appraisal shall be disregarded. Following either (i) receipt of the Right of First Offer notice specifying the value for the interest set forth in an Offer, or (ii) the submission of the final appraised value by notice to the parties, as the case may be, the Commonwealth shall have a period of four (4) months from the date of receipt of such notice to accept the Right of First Offer at the value specified in the Offer or such final appraised value, as the case may be, by notice to the Grantor. If the Commonwealth fails to accept such Right of First Offer as provided above, then such Right and all rights under this Section 8(b) shall expire and be of no further force or effect. If the Commonwealth does accept such Offer or Right of First Offer, as the case may be, the closing of such purchase shall occur at 10:00 a.m. on the first business day which is sixth (60) days after the receipt by the Grantor of the Commonwealth's notice of acceptance, at the Suffolk County Registry of Deeds or other location in Boston that has been agreed upon by the parties in writing.

(c) In the event that the Grantor conveys any interest in the Premises to a party other than the Commonwealth of Massachusetts, the Grantor shall give written notice to the Grantees of the transfer of any interest at least thirty (30) days prior to the date of such transfer. Failure of the Grantor to do so shall not impair the validity of this Conservation Restriction or limit its enforceability in any way.

(d) The Grantor hereby agrees with the Grantees that by execution and delivery of this restriction, it has waived its right to build or develop additional structures on the Premises except as specifically reserved in Section 3 (Reserved Rights) that are now or hereafter allocated to, implied, reserved or inherent in the Premises, and the Grantor and Grantee agree that such rights are terminated and extinguished and may not be used on or transferred to any portion of the Premises as it now or hereafter may be bounded or described, or to any other Premises adjacent or otherwise, nor used for the purposes of calculating permissible lot yield of the Premises or any other premises (except to the extent reasonably required to permit the uses and activities reserved to the Grantor under the terms of this Restriction).

9. Assignment by the Grantee.

The benefits of this Conservation Restriction shall be deemed to be in gross and the Grantees and their successors and assigns shall have the right to assign their right, title and interest hereunder.

10. Binding Effect; Release; Recordation.

The burdens of this Conservation Restriction shall be deemed to run with the Premises, in perpetuity, shall be enforceable against the Grantor, the Grantor's successors in title to the Premises and assigns, and any person holding any interest therein, by either Grantee, its successors and assigns and its duly designated officers, employees or agents as holders of this Conservation Restriction. This Conservation Restriction shall be in addition to and not in lieu of any other restrictions or easements of record affecting the Premises. This Conservation Restriction may only be released, in whole or in part other than pursuant to Section 7, by a Grantee pursuant to the procedures established by chapter 184, section 32 of the General Laws, or any successor statute, rule or regulation and in accordance with Article 97 of the Amendments to the Massachusetts Constitution, and any other applicable law or regulation. Grantor and Grantees agree that Chapter 184, section 32 of the General laws and Article 97 do not apply to the sale, lease or transfer of the Grantor's retained interests, so long as said interests are conveyed subject to this Restriction. The Grantee is authorized to record or file any notices or instruments appropriate to assuring the perpetual enforceability of this Conservation Restriction; and the Grantor on behalf of itself and its successors and assigns agrees to execute, acknowledge and deliver any such instruments promptly upon request.

11. Costs and Taxes.

Grantor agrees to pay and discharge when and if due any and all real property taxes and any other betterment charges or assessments levied by applicable legal authority on the Premises.

12. Estoppel Certificates.

Upon request by the Grantor, the Grantee shall within thirty (30) days execute and deliver to the Grantor any document requested, including an estoppel certificate, which certifies the Grantors' compliance with any obligation of the Grantor contained in this Conservation Restriction, and which otherwise evidences the status of this Conservation Restriction.

13. Value of Uses; Severability; Counterparts

A. The fact that any of the uses prohibited herein, or other uses not mentioned, may become greatly more economically valuable than permitted uses, or that neighboring properties may in the future be put entirely to such non-permitted uses, has been considered by Grantor in granting this Restriction. It is the intention of both Grantor and Grantees that any such changes will increase the benefit to the public of the continuation of this Restriction, and that any such change should not be deemed to be changed conditions permitting termination or amendment of this Restriction. The inability to carry on any or all of the above non-permitted uses, or the absence of wildlife species, shall not impair the validity of this Restriction or be considered grounds to terminate it.

B. If any provisions of this Restriction or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Conservation

Restriction, and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid, shall not be affected thereby.

C. This Agreement may be executed in counterpart originals, each one of which shall be deemed an original for all purposes, and any one of which with the signature pages of the others affixed thereto, shall be deemed the entire original document for recording and for all other purposes.

14. Amendment.

If circumstances arise under which amendment to or modification of this Restriction would be appropriate, including, without limitation, as described in Section 4(b) above, Grantor and Grantee may by written agreement jointly amend this Restriction; provided that no amendment may be made that would be inconsistent with the purposes of this Restriction, affect its perpetual duration, or adversely affect any of the significant conservation values of the Premises. Any such amendment shall be recorded with the Suffolk County Registry of Deeds.

IN WITNESS WHEREOF, Thompson Island Education Center, Inc. and Thompson Island Outward Bound Education Center, Inc. have executed this instrument this 10 day of June 2002.

Thompson Island Education Center, Inc. *(Seal)*

By: _____
President

Thompson Island Outward Bound Education Center, Inc. *(Seal)*

By: _____
President
(Title)

Commonwealth of Massachusetts)
)ss.
County of Suffolk)

Date: June 10, 2002

Then personally appeared the above named George Armstrong, President of Thompson Island Education Center, Inc., duly authorized, and acknowledged the foregoing instrument to be the free act and deed of Thompson Island Education Center, Inc., before me.

NOTARY PUBLIC JOHN A. KESSLER, JR
My commission expires: 1/23/09

Commonwealth of Massachusetts)
)ss.
County of Suffolk)

Date: June 10, 2002

Then personally appeared the above named George Armstrong, President of Thompson Island Outward Bound Education Center, Inc., duly authorized, and acknowledged the foregoing instrument to be the free act and deed of Thompson Island Outward Bound Education Center, Inc., before me.

NOTARY PUBLIC JOHN A. KESSLER, JR.
My commission expires: 1/23/09

Exhibit A

Legal description of the Premises

All that land lying and being situated in Boston Harbor, City of Boston, Suffolk County, Commonwealth of Massachusetts known as Thompson Island as shown on a plan entitled "Plan of Land Thompson Island Boston Harbor, East Boston, MA 02128" prepared for MA Department of Environmental Management and the National Park Service, dated February 19, 2002 and prepared by Coler & Colantonio, Inc., referred to herein as the Plan, being the same island conveyed by George W. Beale to John Tappan, John D. Williams and Samuel T. Armstrong in a deed dated November 16, 1832 and recorded in Book 98, Page 246 in the Norfolk County Registry of Deeds with a confirming deed recorded in the Suffolk Registry of Deeds in Book 391, Page 275 on June 4, 1835.

Legal Description of the Building Envelope within the Premises

The Building Envelope shown on the Plan is bounded and described as follows:

Beginning at a point on the western side of Thompson Island, said point being five hundred feet more or less, as scaled from the Plan, southwesterly of the pier at the Mean Low Water line;

Thence northeasterly following said Mean Low Water line one thousand six hundred eighty-five (1,685) feet more or less to a point;

Thence S 52° 51' 52" E two hundred seventy-five (275) feet more or less to a stone bound to be set, said bound also being the northeast corner of the variable width buffer strip located on the western side of the island and shown on the Plan;

Thence continuing S 52° 51' 52" E three hundred fifty-nine and twenty-seven hundredths (359.27) feet to a stone bound to be set;

Thence N 33° 34' 22" E one hundred seventy-seven and twenty-one hundredths (177.21) feet to a point;

Thence by a curve to the left with a radius of eighty-four and no hundredths (84.00) feet and a length of one hundred twenty-two and no hundredths (122.00) feet to a point;

Thence by a curve to the right with a radius of twenty-two and no hundredths (22.00) feet and a length of fifty and seven hundredths (50.07) feet to a point;

Thence N 81° 04' 12" E for eighty-one and eighteen hundredths (81.18) feet to a point;

Thence by a curve to the left with a radius of one hundred sixteen and ninety-three hundredths (116.93) feet and a length of seventy and ninety-four hundredths (70.94) feet to a point;

Thence by a curve to the right with a radius of one hundred fifty and no hundredths (150.00) feet and a length of thirty-four and sixty-six hundredths (34.66) feet to a stone bound to be set;

Thence S 13° 54' 11" E two hundred eighty-seven and sixty-seven hundredths (287.67) feet to a stone bound to be set;

Thence S 24° 22' 58" E two hundred twenty-one and seventy eight hundredths (221.78) feet to a stone bound to be set; said bound also being the northwest corner of fifty foot buffer strip on the eastern side of the island as shown on the Plan;

Continuing S 24° 22' 58" E one hundred eighty-four (184) feet more or less to the Mean Low Waterline on the eastern side of the island;

Thence following said Mean Low Waterline southwesterly one thousand two hundred sixty (1260) feet more or less to a point;

Thence N 69° 31' 10" W two hundred sixty-one (261) feet more of less to a stone bound to be set; said bound also being the southwest corner of the fifty foot buffer strip on the eastern side of the island as shown on the Plan;

Thence N 88° 25' 25" W four hundred seventy-four and sixty-four hundredths (474.64) feet to a stone bound to be set;

Thence N 58° 00' 47" W four hundred thirty and sixty-six hundredths (430.66) feet to a stone bound to be set; said bound also being the southeast corner of the variable width buffer strip on the western side of the island as shown on the Plan;

Continuing N 58° 00' 47" W two hundred twenty (220) feet more or less to a point at the Mean Low Water line; said point being the point of beginning.

As shown on the Plan, the Building Envelope contains 45.09 acres more or less, calculated to Mean Low Water.

As shown on the Plan, the total Island contains 240.51 acres, more or less, calculated to Mean Low Water.

The above described island is designated as Tract 101-01 of the Boston Harbor Islands National Recreation Area.

Exhibit B
Thompson Island Access Plan

1. This 10 day of June, 2002, the Commonwealth of Massachusetts acting through the Department of Environmental Management (DEM), the United States of America acting through the National Park Service (NPS), and Thompson Island Education Center, Inc. (TIEC) hereby enter into this cooperative management agreement and Access Plan to manage general public access to Thompson Island within the Park Area.

2. This Access Plan is incorporated into and made a part of the Conservation Restriction on Thompson Island conveyed by TIEC to DEM and NPS dated June 10, 2002 (herein the "Restriction") (All defined terms used herein shall have the meanings given to them in the Restriction.) The Restriction establishes key parameters and principles with respect to Escorted and Unescorted Public Access which are expected to remain relatively constant over a period of years; this Access Plan describes the current detailed agreement and procedures for the administration of Escorted and Unescorted Public Access in close coordination with the Grantor's ongoing educational programs, which current details contained in this Access Plan shall remain in effect until modified by an amendment of this Access Plan.

3. This Access Plan may be refined and amended from time to time by mutual agreement of the Grantor and Grantees in writing, consistent with the applicable provisions of the Restriction, including, without limitation, the Education/Access Balance. It shall be reviewed annually or as otherwise agreed by the parties, with ongoing input from and coordination with the Operations and Education Committees of the Partnership.

4. It is recognized that patterns of visitation to the individual islands and the Park Area as a whole are evolving. The Grantor and Grantee have agreed to restrict Unescorted Public Access to both weekend days throughout the year and Summer Holidays (or portion of a weekend day or Summer Holiday served by the UPA Ferry schedule) except on up to three (3) days in any twelve month period to facilitate the programming of large events by the Grantor in accordance with paragraph 9 below in order to minimize conflicts with ongoing educational programming. If sufficient demand does not exist during the off-season winter months to justify the expense of administration and supervision, after reasonable efforts by the Grantor, the Grantees and the Partnership to make known the availability of the Island for seasonal activities such as cross-country skiing through distribution of materials as described in paragraph 16 below, the availability of Unescorted Public Access on winter weekends may be reduced by mutual written agreement of the Grantor and Grantee.

5. The Premises may remain closed to Unescorted Public Access for a reasonable period of time after the execution of the Restriction, not to exceed six months, in order to allow for appropriate planning, staffing, or construction of any needed improvements.

6. (a) The Thompson Administrator shall manage the scheduling of the Grantor's educational programs and both Escorted and Unescorted Public Access so as to achieve the Education/Access Balance as defined in Section 4 of the Restriction, and subject to the

requirements for Unescorted Public Access set forth in Section 4 of the Restriction and the current Access Plan.

(b) For each weekend day and Summer Holiday, depending upon the number and nature of the educational programs which are scheduled, the Thompson Administrator shall determine, in his/her reasonable judgment, the number of people, who can be permitted Unescorted Public Access without materially interfering with the educational programs or requiring additional supervision. In determining this number, the Thompson Administrator shall take into account the reasonable level of staffing required to protect the resources, and the details of the educational values of each program scheduled to be conducted, distinguishing between those programs which place a premium on solitude or preserving the uninterrupted atmosphere of the natural environment, and those in which such values are less important.

(c) The Activity Areas will be off limits to Unescorted Public Access at all times for safety reasons. Unescorted Public Access is not permitted to the Sensitive Areas, except access to the Bird Blind via the trial shown on the Plan across the Building Envelope, which is permitted, and kayak access to the Saltmarsh originating outside the Saltmarsh around the time of high tide. Except in the case of unusual hazards, the shoreline and beaches shall always be open to Unescorted Public Access, Escorted Public Access and to Beach Access. Escorted Public Access to the Conservation Area, including the Activity Areas except Activity Areas which are in use, and the Sensitive Areas, will be permitted on any day of the week, with advance approval, consistent with scheduled educational programs and Unescorted Public Access in the reasonable discretion of the Thompson Administrator. The Grantor reserves the right to post and close to all Escorted and Unescorted Public Access to specific areas when conditions in such areas could constitute a public safety hazard, or such areas that require protection from foot traffic from all visitors and users of the Island, such as archeological sites or areas of compacted soil, or to close the entire Island to public access if necessary for safety reasons.

7. The Grantor may designate staff to register UPA visitors upon entering the Premises, and provide a brief orientation on the Island's education programs, history of ownership, rules, history, and points of interest and a description of the portions of the Conservation Area open to UPA on such date and the conditions of such use. Boaters engaging in Beach Access shall not be required to register or attend the orientation unless they hold a UPA Reservation, but they shall not be permitted to access the Conservation Area other than the shoreline beaches unless they hold a UPA Reservation. No Unescorted Public Access shall be allowed over the so-called spit from Squantum at any time. The Grantor may only charge fees to cover transportation costs, and for elective programs above and beyond Unescorted Public Access.

8. Subject to the exceptions set forth above, UPA Reservations up to fifty (50) persons per weekend day may be made substantially in advance, but UPA Reservations in excess of fifty (50) shall be permitted only within ten (10) days in advance, based on the plans for educational programs.

9. The Grantor reserves the right to prohibit Unescorted Public Access to the entire Conservation Area on days when UPA would otherwise be permitted, to facilitate programming for large events which shall not exceed a total of three one-day events in any twelve-month period. The

Grantor shall notify the Grantee no less than ten (10) days prior to such events. The Grantor agrees to make reasonable efforts to accommodate the scheduling of up to three (3) major Park-wide events in any twelve month period, subject to arrangements for adequate staffing.

10. (a) The Grantor currently provides reliable, year-round, and regular means of ferry service to the Island, including a scheduled boat on Saturdays in the summer from the Federal Courthouse at the Fan Pier. The Grantor hereby agrees to supplement this Saturday service to provide UPA Ferry service by adding service on Sundays during the summer and on Summer Holidays from such Fan Pier dock or a similarly accessible dock in the same general vicinity, subject to required legal rights to use any such facility. The Grantor agrees to include this UPA Ferry service in the Park Area's water transportation schedule by publishing such UPA Ferry schedule and making it available for inclusion in promotional materials concerning the Park Area to be prepared by the Partnership, the Grantor and the Grantees. Until any other arrangement is agreed to in writing between the Grantor and the Grantees in accordance with the following provisions of this paragraph 10, the Thompson ferry shall constitute the sole approved UPA Ferry, which will permit Thompson to ensure that only members of the public holding UPA Reservations or Group Reservations may embark upon the UPA Ferry. The Grantor (or any contractor as the agent of the Grantor) may charge reasonable fees for such service consistent with the Park Area's transportation fees, recognizing that the Grantor's ferry is not subsidized by public funds and that other ferry services may be so subsidized.

(b) In the event that Thompson's UPA Ferry service is inadequate to accommodate the number of persons holding UPA Reservations, the Grantor and the Grantee agree to work in good faith towards permitting one or more other ferries serving the Harbor Islands to be qualified as UPA Ferries, subject to the development of a mutually agreeable system that ensures that only holders of UPA Reservations on Thompson Island will be permitted to (i) board any ferry bound for Thompson Island or (ii) disembark at Thompson Island, and subject to the condition of the pier to safely accommodate any other ferry with differing characteristics and capabilities.

(c) The Thompson ferry currently makes regular runs to the EDIC berth adjacent to the Black Falcon Terminal to pick up and discharge staff and participants in educational programs. Although that location is not intended as a primary point of embarkation for Unescorted Public Access, the Grantor agrees, subject to the availability of space after staff and program participants for both the trip to the Island and the return trip, to pick up and discharge persons holding UPA Reservations at the EDIC berth adjacent to the Black Falcon Terminal, with the understanding that such persons may not be returned to the point of embarkation.

(d) In the event that members of the public identify themselves to the captain of any Thompson ferry authorized to transport persons holding UPA Reservations, requesting transportation to the Island to engage in Unescorted Public Access but without a UPA Reservation made in advance, then provided that (i) such ferry captain can reasonably verify that providing access to such persons will not cause the number of persons permitted UPA during that time period to be exceeded, (ii) such persons agree to be bound by all other conditions applicable to Unescorted Public Access, and (iii) space is available on the applicable ferry and any required return ferry, then in the reasonable discretion of the ferry captain, such persons may be permitted access for Unescorted Public Access on all the same conditions as would apply with a UPA Reservation.

11. The Grantor shall maintain the Premises' existing pier in a safe and serviceable condition consistent with the needs and economic capabilities of its educational and charitable mission, and which will provide for general public access by a UPA Ferry as provided in paragraph 10 above, but the Grantor shall not be obligated to expend its own funds to modify the existing pier to accommodate any other ferry with differing characteristics and capabilities.

12. The Grantor shall provide a minimum of three (3) publicly available moorings for private boats and charge a reasonable fee, or provide the service as a Park Area concession. Any additional publicly available moorings shall be determined by mutual agreement of the Grantor and Grantee.

13. The Grantor has the right to provide appropriate management of public access and use, and the Thompson staff shall have the right to terminate the UPA Reservation and status of any person who does not conform to established rules and practices for Unescorted Public Access, but the Grantor shall have no obligation to provide supervision beyond giving the orientation presentation described in the definition of Unescorted Public Access. The Grantees shall be under no obligation to provide such management or supervision. The Grantor agrees to cooperate with the Grantees in the event that the Grantees wish to provide staffing in connection with the management and supervision of Unescorted Public Access.

14. The Grantor shall provide toilet facilities accessible to UPA visitors within the Conservation Area substantially as presently provided at both the reception area and at the south end of the Island.

15. The Grantor shall install appropriate signage, including an orientation kiosk or other facility and interpretive waysides, consistent with the Park Area standards and in a welcoming spirit for visitors.

16. The Grantor will cooperate with the Grantees and the Partnership in public information and marketing to increase public visitation and utilization of education programs. The Grantor shall provide to the Grantees copies of any materials intended for public dissemination pertaining to the public's use of the Conservation Area. The Park Area logo and other similar and reasonable marketing protocols adopted by the Park Area or the Partnership of which notice is given to the Grantor will be incorporated with reasonable promptness into all materials primarily related to Unescorted and Escorted Public Access and Thompson's role in the Park Area, taking into account the reasonable utilization of existing materials.

17. As the Grantor maintains and expands its existing educational programming, the Grantor and the Grantees shall attempt to include other Boston Harbor islands in the Grantor's activities and programs, as appropriate, in order to reinforce the connections between the islands of the Park Area.

18. In addition to the periodic review under paragraph 3 above, this Access Plan shall also be reviewed and revised, as appropriate, if the Grantor ceases to operate the Premises primarily for educational programming, or if the Grantor conveys the Premises to a party other than one or both of the Grantees, or in the event of other material changes in circumstances. In the event

that the use of the Premises becomes primarily one or more of the Permitted Uses that does not include education of members of the as a primary part of its purposes and mission such that the Conservation Area is no longer being used for educational programming, Unescorted Public Access shall be permitted to the entire Conservation Area on weekends, except the Sensitive Areas because of their environmental sensitivity and potential hazards, subject to reasonable limitations necessary to protect and conserve the natural beauty and ecological resources of the Conservation Area, as reasonably determined by the Thompson Administrator and the Park Project Manager in consultation with the DEM Manager. In such event, Unescorted Public Access may be permitted to any portion of the Conservation Area except the Sensitive Areas on weekdays subject to the provision of reasonable supervisory staffing by the Grantees. In such event, Unescorted Public Access may be permitted to any portion of the Conservation Area except the Sensitive Areas on weekdays subject to the provision of reasonable supervisory staffing by one or more of the Grantees or, if the Grantor, its successors or assigns so elects and Grantees agree, by the Grantor, it successors or assigns

Exhibit C – 1 of 2

The Secretary of the Interior's Standards for the Treatment of Historic Properties
Kay D. Weeks and Anne E Grimmer

U.S. Department of the Interior
National Park Service
Cultural Resource Stewardship and Partnerships
Heritage Preservation Services
Washington, D.C.
1995

Page 62, Standards for Rehabilitation

1. A property will be used as it was historically or be given a new use that requires minimal change to its distinctive materials, features, spaces, and spatial relationships.

2. The historic character of a property will be retained and preserved. The removal of distinctive materials or alteration of features, spaces and spatial relationships that characterize a property will be avoided.

3. Each property will be recognized as a physical record of its time, place and use. Changes that create a false sense of historical development, such as adding conjectural features or elements from other historic properties, will not be undertaken.

4. Changes to a property that has acquired historic significance in its own right will be retained and preserved.

5. Distinctive materials, features, finishes and construction techniques or examples of craftsmanship that characterize a property will be preserved.

6. Deteriorated historic features will be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture, and, where possible, materials. Replacement of missing features will be substantiated by documentary and physical evidence.

7. Chemical of physical treatments, if appropriate, will be undertaken using the gentlest means possible. Treatments that cause damage to historic materials will not be used.

8. Archeological resources will be protected and preserved in place. If such resources must be disturbed, mitigation measures will be undertaken.

9. New Additions, exterior alterations, or related new construction will not destroy historic materials, features and spatial relationships that characterize the property. The new work shall be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion and massing to protect the integrity of the property and it environment.

10. New additions and adjacent or related new construction will be undertaken in such a manner that, if removed in the future, the essential form and integrity of the historic property and it environment would be unimpaired.

Exhibit C – 2 of 2

The Secretary of the Interior's Standards for the Treatment of Historic Properties
Kay D. Weeks and Anne E Grimmer

U.S. Department of the Interior
National Park Service
Cultural Resource Stewardship and Partnerships
Heritage Preservation Services
Washington, D.C.
1995

Page 166, Standards for Reconstruction

1. Reconstruction will be used to depict vanished or non-surviving portions of a property when documentary and physical evidence is available to permit accurate reconstruction with minimal conjecture and such reconstruction is essential to the public understanding of the property.

2. Reconstruction of a landscape, building, structure, or object in its historic location will be preceded by a thorough archeological investigation to identify and evaluate those features and artifacts, which are essential to an accurate reconstruction. If such resources must be disturbed, mitigation measures will be undertaken.

3. Reconstruction will include measures to preserve any remaining historic materials, features and spatial relationships.

4. Reconstruction will be based on the accurate duplication of historic features and elements substantiated by documentary or physical evidence rather than on conjectural designs or the availability of different features from other historic properties. A reconstructed property will re-create the appearance of the non-surviving historic property in materials, design, color and texture.

5. A reconstruction will be clearly identified as a contemporary re-creation.

6. Designs that were never executed historically will not be constructed.

Exhibit D:

"Height of building" as defined in Article 2, Section 1, Definition #23 of The Boston Zoning Code and Enabling Act, as amended through December 31, 1997.

Height of Building, the vertical distance from grade to the top of the highest point of the roof beams of a flat roof, or the mean level of the highest gable or of the slope of a hip roof, excluding roof structures and penthouses normally built above the roof and not used or designed to be used for human occupancy, provided that the total area of such roof structures and penthouses does not exceed 33-1/3 percent of the roof area; except that, for any proposed Project that (a) is subject to Article 31 and (b) is within a downtown district established under Section 3-1C, "height of building" means the vertical distance from grade to the top of the structure of the last occupied floor. A mansard roof shall be considered a flat roof.

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Kimi Wei
13-08 Sperber Road #B
P O Box 626
Fair Lawn, NJ 07410

Public comment submitted to the National Environmental Justice Advisory Council (NEJAC) public meeting, August 19-20, 2020:

Environmental Justice is a topic important to me personally, as a mother and as a US resident. It is important to clean up pollution for everyone, but especially lower-income families, and families of color, like mine who are exposed to more of the impacts of environmental pollution than whiter and/or more affluent community members.

I did not have asthma as a child, but began to experience it in my early twenties as the world, and my home state of New Jersey, became more polluted. My younger son also has asthma. I have no doubt that this is a consequence of being exposed to heavy air pollution. New Jersey is one of the most densely populated states, with enormous transportation traffic due to containing and being near several ports, having a very robust highway system and being in the path of traffic moving along the East Coast corridor as well as traffic moving in and out of New York City and to a lesser extent, Philadelphia. I have lived within 10 miles of New York City and about half an hour's highway driving distance from Newark and Elizabeth, most of my life.

I suffer with health issues that are indirectly related to the body stressors of pollution and also the terrible dual impact of mold and extreme heat in the apartment in which I raised my family and still live, where the landlord is not legally obliged to correct either black mold conditions in our apartment or to provide electrical current sufficient to modern living or enough to power air conditioning strong enough to comfortably cool our apartment. Our apartment has only 2 fuses of 15 and 20 amps – with the 20 amps powering the kitchen and the 15 amps powering the entire balance of our apartment. Situated in a very warm pocket geographically, temperatures on hot days hover around 90º even with our one 6500 BTU air conditioner and 2 fans to circulate the cooling it puts out, operating at full speed. Sometimes the temperature in our apartment has risen over 100º – even with the air conditioner running. We found out the hard way that we lack enough amperage to power a second air conditioner when we purchased one and blew out our fuses several times when both were running. In our apartment, we cannot even run the microwave and toaster oven at the same time. And we must turn off our one air conditioner before using either kitchen appliance in order to avoid blowing the fuses – and also damaging our electrical appliances which are subject to damage when attempting to run on electrical current that is insufficient.

In order to use our laser printer, we must also turn off the air conditioner to avoid overloading the fuses.

For years, we had horrible recurring incidents of black mold invading our apartment. It grew through the electrical receptacles, up walls and ate away at the bathtub grout and tiling to the point that the wall collapsed one day. The inner wall behind the tiles was solid black from the amount of mold covering its surface. Two plumbers and a phone line installer told my family that there was a standing pool of water several inches deep in our basement – which is not accessible to tenants – and one plumber said that pipes were broken within our walls so waste bathwater was not being carried to the outside of our building, but was being dumped on the basement floor.

My landlord did not attempt to stop the moisture issues that led to us having so much mold for many years during which my two sons and I were repeatedly sick. Whenever a big mold breakout occured, I would develop bronchitis which often led to pneumonia, my older son would become debilitated and my younger son would experience overall health problems and difficulty breathing. Eventually, I complained to so many town officials and administrators about this problem that my landlord felt embarrassed enough to fix the main sources of moisture. We still have mold and still have moisture, but our mold situation is much better than it used to be.

Although I tried for many years to force our landlord to upgrade our electrical current to support adequate air conditioning and to resolve the moisture problems that led to mold, I was only partly successful with the latter. And I stirred up a tsunami of hostile repercussions from my landlord that almost broke me as a person, and that robbed my family of the possibility of having a peaceful and secure home life. Over one two-year period, our landlord sued us for eviction 11 times, and was able to collect extra fees of over $250 every time he did. So, on top of excessive heat and black mold exposure, not being able to cook nutritious meals for several months a year and our entire family suffering health problems due to our living conditions, we were also constantly threatened with eviction and made to pay extra rent if we were even a few days late with payments. We have suffered through this nightmare for many years and only moving to a living situation with a caring and responsible landlord, in an area with less air pollution, will bring it to an end.

As far as ongoing health problems:

I have been exposed to so much heat in our apartment that I now develop heat stroke whenever I am exposed to temperatures over 85º for extended periods of time. I always experience bouts of heat stroke in the summer, which can last for up to several weeks.

Without cooking, the temperatures and air quality in our apartment are barely tolerable, meaning that it becomes impossible to cook healthy food during periods of high heat. Adding even a few degrees of heat, and the moisture from cooking, has an enormous, negative impact on our family members' health. I have been a professional chef and am able to cook extremely nutritious meals at a cost low enough for my single parent family to afford. It is grossly unfair that I am denied the ability to produce nutritious meals every summer because of our extreme heat condition.

I learned last year that I suffer from osteoarthritis in my knees, a condition which is partially caused by inflammation to the body over time. Asthma, mold and heat have caused me to be subjected to ongoing inflammation. I was forced to seek physical therapy when the weakening of my knee ligaments crippled me. The impact on my health of being barely unable to walk and move around has had a phenomenal negative effect:

I have been unable to regulate my blood sugar and along with the long exposure to high blood sugars, I developed a heart condition which required emergency surgery last year and I have now developed temporary blindness in one eye. I hope this can be resolved through treatment I am receiving from a retinopathy practice.

The illness that my sons have experienced, the lack of nutritious food during summers all their lives, and the terrible despair of watching their mother's health deteriorate due to our substandard living conditions and fear over what will happen to me next, have been a traumatic burden for them.

In summary, the severe health issues my family members have suffered have largely been visited upon us because we are poor and live in sub-standard housing that is maintained to the bare minimum standards for the landlord and his agents to avoid legal penalties.

Exposure to extreme heat is an environmental justice issue. Asthma, bronchitis and pneumonia that are related to housing and geography are environmental justice issues. Health problems related to black mold caused by unrelenting moisture which is left untreated because the law does not require remediation – are environmental justice problems. The larger environmental problems of living in a suburb of Paterson, NJ and New York City and in northern New Jersey near several major highways where the air quality is poor, and adjacent to the heavily polluted Passaic River, have added insult to our housing related health injuries.

It is essential that landlords and polluters be made to clean up the local and regional messes they make out of both housing and neighborhoods. Legislation must be enacted that provides for legal consequences to be assessed against polluters and negligent landlords that create hazardous living conditions that are damaging and dangerous to the health of people forced to live with them. The consequences must make it imperative for the people behind the companies that cause the damage, to stop doing so by imposing penalties so severe, including heavy fines and jail time for the individuals causing or allowing violations to occur, that they will want to stop the pollution and negligence and monitor carefully to make sure they never happen again.

People’s lives should not be destroyed because of conditions arising from either environmental pollution or administrative negligence.

Respectfully submitted,

Kimi Wei

EARTHJUSTICE

August 14, 2020

1 Submitted electronically to *nejac@epa.gov*

Chairman Richard Moore

National Environmental Justice Advisory Council

Office of Environmental Justice

U.S. Environmental Protection Agency [Mail Code 2201A]

1200 Pennsylvania Avenue, NW Washington, DC
20460

Dear Chairman Moore and Members of the National Environmental Justice Advisory Council:

This letter details concerns regarding EPA's implementation of the risk evaluation process under the Toxic Substances Control Act ("TSCA"). In 2016, Congress amended a largely ineffective TSCA and established a new mandatory process to systematically evaluate and manage chemical risks. We believe that if the new statute were implemented correctly, it could provide important benefits for communities and populations that are most exposed or most susceptible to toxic chemicals. However, current implementation of the risk evaluation process violates the letter and spirit of the law. **For this reason, we ask the National Environmental Justice Advisory Council ("NEJAC") to issue a statement urging EPA to identify, and consider the impact of chemicals on *all* potentially exposed and susceptible subpopulations, consider all "conditions of use" and exposure pathways for the chemicals evaluated, and refrain from considering workers' use of personal protective equipment at the risk evaluation stage.**

1. TSCA mandates a comprehensive review of a chemical's exposures and risks.

The risk evaluation process has three steps. Step one, prioritization, where EPA chooses batches of "high-priority" chemicals. 15 U.S.C. § 2605(b)(1)(B)(i). Step two, risk evaluation, during which EPA comprehensively evaluates a chemical's exposures and risks and determines whether the chemical substance presents or will present an unreasonable risk of injury, without consideration of costs. 15 U.S.C. § 2605(b)(4)(A). The final step, risk management, which requires EPA to impose restrictions to eliminate unreasonable risk. 15 U.S.C. § 2605(c).

EPA was required to skip over the lengthy prioritization phase for the first ten chemicals, which the Agency selected without a transparent process. Of the first ten chemicals, two risk evaluations have been completed, and the remaining eight will likely be completed by the end of the year. EPA is also in the early stages of "step two," risk evaluation, for twenty high-priority chemicals it selected in late 2019.

For each chemical evaluated, TSCA requires EPA to consider risks across the chemical's life cycle. This includes all known or foreseeable conditions of use, including manufacture, processing, distribution, use, disposal, and *even after initial disposal* if the chemical is still

NORTHEAST 48WALLSTREET,15TH FLOOR NEWYORK,NY10005

T:212.845.7376 F:212.918.1556 NEOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

resulting in exposure. This lifecycle-based review reflects TSCA's comprehensive approach to chemical risk management that considers the full extent of human or environmental exposure, including risks from chemical exposures that are or could be regulated under other laws. Further, EPA must separately consider risks to "potentially exposed or susceptible subpopulations," or groups that "due to either greater susceptibility or greater exposure" may face greater risks of harm than the general population from chemical exposures. 15 U.S.C. § 2605(b)(1)(A); § 2602(12). If these subpopulations face unreasonable risk, EPA must regulate those risks, even if the risk to the general population is not unreasonable.

2. Current TSCA implementation ignores chemically-overburdened communities.

These factors all bear greatly on environmental justice. Unfortunately, recent EPA determinations highlight that the agency is not living up to the mandates of TSCA, to the detriment of communities and groups who experience high exposure to toxic chemicals. As required by TSCA, EPA recently released "draft scopes" for the twenty chemicals it designated as high-priority. These draft scopes are required to outline the factors EPA intends to consider when conducting risk evaluations. 15 U.S.C. § 2605(b)(4)(D). However, EPA did not properly identify the potentially exposed or susceptible subpopulations it expects to consider. Instead, EPA ignored the heightened exposure of the communities located in geographic proximity to high-volume chemical facilities, particularly communities in highly industrial regions, including: the Greater Houston area; Port Arthur, Texas; Mossville, Louisiana and neighboring towns; and communities along the Mississippi River between Baton Rouge and New Orleans in the area known as Cancer Alley. Further information about how this lack of analysis is a detriment to these communities can be found at "Comments on Draft Scopes of the Risk Evaluations for the First Twenty High-Priority Substances under the Toxic Substances Control Act."[1]

3. The methylene chloride risk evaluation ignores highly exposed communities, underestimates worker exposures, and misapplies assumptions about worker personal protective equipment.

EPA has also recently completed its first risk evaluation under the new law – for methylene chloride, a toxic solvent that causes cancer, and is also so acutely toxic that users can die instantaneously when using the chemical without proper ventilation. EPA found that methylene chloride does not present an unreasonable risk of injury to workers, due primarily to unfounded assumptions that workers will have access to, and will perfectly use, well-fitting personal protective equipment, and a failure to consider the potential for an individual to be exposed to multiple conditions of use. Additionally, EPA found no unreasonable risk when methylene chloride is manufactured and

[1] Earthjustice et al., *Comments on Draft Scopes of the Risk Evaluations for the First Twenty High-Priority Substances under the Toxic Substances Control Act* (2019), https://earthjustice.org/sites/default/files/files/20_05_26_tx_la_tsca_first_20_hp_appx_rfs.pdf.

disposed of, ignoring the exposures to dangerous levels of the chemical that communities surrounding manufacturing and disposal sites, such as Freeport, Texas and Geismar, Louisiana, experience.

The NEJAC should support chemically overburdened communities and workers by urging proper implementation of TSCA.

EPA continues to make determinations under TSCA that are not protective of human health, or the communities most greatly affected by toxic chemicals. We are asking that NEJAC work with us to make sure that EPA lives up to the mandates of TSCA. We ask that NEJAC advise EPA to:

1) identify *all* potentially exposed and susceptible subpopulations and conduct separate analyses to determine if these chemicals pose an unreasonable risk to these groups;
2) consider all "conditions of use" and exposure pathways for the chemicals evaluated, and refrain from excluding uses based on the theory that they might be regulated by other laws; and
3) stop considering workers' use of personal protective equipment at the risk evaluation stage.

We also offer our team as a resource to the NEJAC related to any TSCA risk evaluation issues.

Respectfully submitted,

Lakendra S. Barajas
Earthjustice
New York, New York
(212) 284-8025
lbarajas@earthjustice.org

ENVIRONMENTAL
TRANSFORMATION
MOVEMENT OF FLINT

www.etmflint.org
etmflint@gmail.com
@ETMFlint

August 21, 2020

Chairman Richard Moore

National Environmental Justice Advisory Council

Office of Environmental Justice

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Dear Chairman Moore and Members of the National Environmental Justice Advisory Council (NEJAC):

This letter is in reference to NEJAC's March 2019 report, *EPA's Role in Addressing the Urgent Water Infrastructure Needs of Environmental Justice Communities*, and the council's earlier letter to EPA Administrator Andrew Wheeler about the Flint water crisis. We first wish to express our thanks to the council for bringing attention to Flint in both the report and the letter. As you are well aware, the EPA's failure to act expeditiously when evidence of water contamination began to emerge in Flint was a significant factor in prolonging the water crisis, leading to avoidable harms to infrastructure and public health, and exacerbating the injustice suffered by residents. We hope that NEJAC can be part of the ongoing process of repairing residents' broken trust in the EPA and other federal agencies.

We are also grateful that NEJAC is lifting up broader issues of infrastructural breakdown, water contamination, and water affordability. We wish to affirm our support for the aforementioned report's central recommendations, especially its calls to treat water as a human right, provide more federal funding for water infrastructure, promote water affordability, discontinue water shutoffs and tax liens, develop sustainable alternatives to large-scale bottled water provision in cases of contamination, and encourage community participation in planning, policymaking, and water monitoring. As for the EPA's general attitude toward environmental enforcement, we agree with the report that the agency must be proactive, especially when public health is at risk. In the case of Flint, the EPA did not issue a Safe Drinking Water Act Emergency Order until January 21, 2016, despite almost a year's worth of indications of serious water contamination and despite receiving a petition to do so from the Natural Resources Defense Council and ACLU in partnership with local activists in October 2015. We believe it is better for the EPA to overstep on occasion than it is to leave affected communities to seek redress from state enforcement agencies that have proven to be unreliable and nonresponsive, particularly when appeals for federal help are coming directly from residents.

In some respects, the water situation in Flint has improved considerably since NEJAC's letter to the

Administrator in July of 2017, thanks in no small part to the efforts of EPA staff on the ground in Flint to restore water quality. Nevertheless, Flint continues to experience major challenges in the provision of clean, safe, and affordable water, as well as lingering health impacts that will last for decades. In many ways, the Flint water crisis is not over. To help summarize where things stand today, we take this opportunity to return to the recommendations made in NEJAC's letter— recommendations which, we note with disappointment, do not seem to have garnered an official response.

1. Close monitoring by EPA Region 5 of Michigan's use of Drinking Water State Revolving Funds received in the aftermath of the Flint crisis to ensure that resources are spent effectively to eliminate lead throughout its public water system.

In late 2016, Congress appropriated $100 million through the Water Infrastructure Improvements for the Nation (WIIN) Act to address Flint's urgent water needs, money that was to be administered through the State of Michigan's Drinking Water State Revolving Fund (DWSRF). The plan the City of Flint submitted for these funds proposed to use $20 million of the appropriation to cover the cost of service line replacement, with another $20 million provided as matching funds by the state. The same month this money became available (March 2017), the state and city reached a settlement agreement in a lawsuit brought by residents, *Concerned Pastors for Social Action v. Khouri*, which required the state to allocate another $47 million of non-WIIN money for service line replacement. This settlement continues to determine what funds are spent on pipes and provides the main framework of accountability around the replacement program. Regrettably, it has proven necessary more than once to use the legal leverage it offers to pressure the city to manage this program more efficiently and responsibly, and work that should have been completed by now is still ongoing (see #4 below). Furthermore, with respect to eliminating lead "throughout [Flint's] public water system," it is important to remember that lead service lines are not the only sources of lead within that system. Other potential sources of lead exposure within internal plumbing remain unaddressed by the infrastructural work completed or planned so far in Flint.

It is also important to realize that the City of Flint has proposed to use the vast majority of available DWSRF funds for projects which, while important, are not directly related to lead elimination. Due to factors ranging from mismanagement, to lack of capacity, to the COVID-19 pandemic, many of these other projects have been delayed. As of February 2020, the city had submitted reimbursement requests for less than $13 million of the $100 million WIIN appropriation. While the EPA has asked repeatedly that the city speed up the implementation of its proposed projects, and has encouraged the state Department of Environment, Great Lakes, and Energy (EGLE) to exercise similar oversight, to date this pressure has not been adequate. There are some indications that the current city administration is redoubling efforts to move water projects forward, but serious concerns about the non-usage of federal funds remain.

2. Reviewing MDEQ's tests of Flint resident water samples to determine if (non-lead and non-copper) water-borne bacterial contaminants and water treatment chemicals are contributing to new or emerging individual and public health concerns.

NEJAC was right to suggest in its letter that water quality concerns in Flint extend beyond lead—indeed, the framing of the Flint water crisis as a "lead-in-water" crisis has had the effect of marginalizing and obscuring many of the issues that led to public outcry about the water in the first place. While the bulk of the EPA's water quality work in Flint has focused on reducing lead levels through optimized corrosion control treatment, the agency has done at least some work on other kinds of water quality issues. In 2016, it participated in a unified coordination group (UCG) comprised of federal, state, and county agencies formed to evaluate the prevalence and causes of water-related rashes in Flint. The UCG's research was not able to establish a clear connection between the water and rashes, but the data it generated had some significant limitations, and the UCG did speculate that some rashes developed prior to 2016 may have been related to high

levels of chlorine in the water. The EPA has also provided support around sampling for total trihalomethanes and coliform bacteria, with special attention to the presence of contaminants that may be related to skin irritation.

Insights into other contaminants of note have had to come from elsewhere, however. With respect to bacteria, the State of Michigan funded a major study of the presence of legionella contamination in the water system in 2016 and 2017, but the team conducting this research ultimately experienced severe pushback from the state itself, hampering its work and leading to criminal charges being filed against two of the state officials involved. Some Flint residents continue to feel that the prevalence and potential health effects of legionella and other contaminants beyond lead have not been fully investigated, and the EPA's decision to award multiple grants to Dr. Marc Edwards of Virginia Tech, who has aggressively attacked scientists, Flint residents, and others who have conducted research into or raised concerns about these contaminants, has contributed to the impression that the agency is on the wrong side of this issue.

3. Funding by the EPA of a multi-year grant to Flint health agencies to evaluate blood-lead levels in Flint residents to assess if lead exposure from public water is decreasing at a rate consistent with required improvements in public drinking water quality.

We are not aware of any such grant being awarded. Available data suggests that on average child blood-lead levels in Flint reached historic lows as early as 2016, although it may be that the population-wide rush to get tested at the time was partly responsible for the decline, since bloodlead testing is usually administered primarily to children in higher-risk categories. It is also important to remember that blood-lead data are inherently limited by the fact that not all ages of children are consistently tested for lead, as well as the fact that lead leaves the blood within a month's time. Furthermore, the harms done by lead do not go away just because lead exposure has ceased. The generation of children that was exposed to leaded water in Flint has already begun to evidence signs of behavioral issues and learning disabilities, emphasizing how great the need is for ongoing educational, nutritional, and medical assistance to residents.

4. Investigating how the State of Michigan and City of Flint can expedite the pace of lead pipe replacement so as to occur sooner than 2020.

While Flint has made great strides in this area, having replaced at the time of this writing more than 90% of its known lead and galvanized steel service lines, the replacement process has been plagued by much unnecessary delay and inefficiency. From a logistical perspective, there is no good reason why the process was not complete by the end of 2018. Instead, at least 2500 properties still remain to be excavated. Although the city is now promising it will finish replacements by the end of November, concerns remain about residents falling through the cracks: some whose homes are eligible for pipe replacement have not been reached by outreach efforts, some have opted out of the replacement program due to misunderstandings and mistrust, and some who consented to excavation years ago have yet to be taken care of. Furthermore, we worry about properties without active water accounts (one of the criteria for replacement) and homes that are currently vacant but may become occupied sometime in the future. While the EPA has at times offered some general advice about service line replacements and has asked that the city speed up its work, as far as we know it has not played a substantive role in ensuring that the work is done competently and efficiently. Instead, this role has been taken on primarily by parties to the legal settlement—principally the Natural Resources Defense Council—by academics working on service line identification, and by residents themselves.

5. Encouraging the State of Michigan to continue assisting Flint residents with water affordability through water bill credits and operation of water-bottle stations.

By the time NEJAC sent its letter, the State of Michigan had stopped providing the 65% water bill credit it offered residents through February 2017, and it did not resume the practice at any point thereafter. It also began to scale back its support for water bottle point-of-distribution sites (PODS), before finally withdrawing that support completely in April 2018, despite the fact that many residents continue to rely on bottled water. Private, charitable, water provision—primarily by the Nestlé corporation, ironically, which at the same time is extracting Michigan groundwater virtually for free at an aggressive pace—was all that was left to fill at least some of the gap left behind by government. With the availability of free point-of-use filters and cartridges also waning, the significance of ready access to bottled water is only magnified for many residents. We are not sure what kind of EPA "encouragement" to keep the PODS open may have taken place behind closed doors, but on the surface residents received little support from the EPA when the state began withdrawing this kind of assistance.

6. Assessing state water agency funding mechanisms, operations and maintenance processes, and procedures to ensure they are prepared to monitor and support large water infrastructure projects.

(See #7 below)

7. Requiring state water regulators to provide corrective action recommendations, coordinated plans, schedules, and budgets detailing how they will resolve public health and affordability concerns, including an assessment of effective and timely resolution of these concerns – all of which should be factors in EPA decisions to continue or approve future State Drinking Water Revolving Funds to the state from the federal government.

The EPA's emergency order of January 21, 2016 reflected the agency's conclusion that neither the city nor the state were taking the necessary steps to protect public health in Flint and that both were in need of technical assistance and oversight. The order put into place numerous reporting requirements, stipulations about how water was to be treated and distributed in Flint, and a mandate that the state establish an independent advisory council comprised of water experts and members of the community to make recommendations relating to the management of Flint's water system. To the EPA's credit, it has remained in ongoing communication with the state and city about their compliance with the terms of the order and their progress toward implementing infrastructure projects and ensuring public health. Nevertheless, as indicated above, this oversight has not always translated into effective planning and implementation.

More generally, the community is still in need of assurances that the state department of environmental quality (now called EGLE) is being run in a manner that reflects principles of environmental justice. In January 2017, the EPA's External Civil Rights Compliance Office (ECRCO) released a historic ruling on a 1992 civil rights complaint brought against the

MDEQ/EGLE's predecessor department, finding that the department had engaged in racial discrimination during its permitting process for the Genesee Power Plant, a waste incinerator on the border of the city of Flint. The ECRCO found that the discriminatory treatment stemmed from deep-seated structural shortcomings within the department, including a lack of "procedural safeguards" and a defined plan for public participation—shortcomings, said the office, that were passed down across different incarnations of the department and that may have contributed to the Flint water crisis.

Indeed, the water crisis spawned its own civil rights complaint that raised similar issues around discrimination and participation. This complaint resulted not in any specific ruling but in an Informal Resolution Agreement between the EPA and EGLE in December 2019. In this agreement, EGLE points to a number of reforms to state government and initiatives coming out of the water crisis which, while not necessarily inspired by the complaint, it claims will mitigate the concerns raised therein. These include the creation, under Governor Rick Snyder, of an Environmental Justice Work Group, an Environmental Justice Ombudsman, and an Environmental Justice Interagency Workgroup, as well as implementation of environmental justice training for state and local employees. EGLE also points to reforms within the department itself under current Governor Gretchen Whitmer, including the creation of an Interagency Environmental Justice Response Team, an Office of the Clean Water Public Advocate, and an Office of the Environmental Justice Public Advocate, all of which are supposed to promote environmental justice planning and facilitate

receiving and acting upon complaints and concerns from the public around drinking water and other environmental issues.

The ECRCO is continuing to monitor EGLE for compliance with the agreement. Ironically, however, given the agreement's emphasis on transparency and participation, we are not aware of any reporting out to Flint residents about the resolution of the civil rights complaint, nor is it clear how the ECRCO's assessment of EGLE's compliance will be communicated to residents moving forward. The ECRCO should take concrete and timely steps to follow up with residents about this matter and outline how it intends to enforce the agreement.

8. Convening a multi-stakeholder working group to develop water policies that ensure water affordability for every household and income group in the community, including impacted community members, local utility representatives, experts on utility law structure, state agency employees, and EPA representation from both regional offices and headquarters.

The EPA did not, to our knowledge, convene such a group. The closest example of this sort of thing was the Water Rates Subcommittee of the Flint Water Interagency Coordinating Committee (FWICC), a group of experts set up by Governor Rick Snyder in January 2016, and the main group advising the state on its crisis response. (Incidentally, FWICC—which included representatives from the city but not from the "community," per se—did not, in our view, fulfil the stipulation of the EPA emergency order about forming an inclusive advisory council, and reflected technocratic thinking about whose views mattered most within the crisis response.) In its final report, released in July 2017, FWICC's rates subcommittee called for "a comprehensive and independent review of the state's approach to regulating the water sector, including a focus on water rates and affordability," and recommended among other things the creation of a statewide water bill-payment assistance program. As NEJAC members are no doubt aware, however, there is a difference between assistance and affordability. Activists in Flint (along with allies in Detroit) have been calling for many years for affordability plans like the one described in the council's infrastructure report. Conversations about the future possibility of such a plan have been arranged at the local level by the C.S. Mott Foundation and by local activists, but residents still await substantive policy change. Decisions around water rates, as well as other aspects of water management, continue to be obscure to the average resident, and many residents still have trouble paying their water bills.

While Flint is in some ways better off now than it was in 2017, it still has many needs that have not been adequately addressed by the EPA or any other government agency. In addition to the challenges mentioned above, Flint's water system and water utility are in desperate need of further investment and support. Flint's wastewater infrastructure is in even worse shape than its drinking water infrastructure: according to Flint's Director of Public Works, it is on the verge of "catastrophic failure" (which would, quite possibly, impact drinking water quality in turn). Moreover, despite the EPA's repeated expressions of concern about the staffing of Flint's water utility, the city is still having great difficulty attracting and retaining experienced and competent personnel, and those who do work for the utility often come in from outside the community. Communication between residents and the water department is hardly any better now than it was at the peak of the water crisis, and the city has yet to establish the water system advisory council now mandated by state law. With respect to funding Flint's

water system sufficiently, training water staff (ideally from within the community), and providing support for public participation, there is still much to be done.

For all of these reasons, we welcome the EPA's support, and we hope that NEJAC will continue to lift up Flint's struggle and hold the EPA accountable for acknowledging and following through on any recommendations. We hope it will also encourage the agency to consult with Flint residents on an ongoing basis about their needs and concerns. Flint residents have consistently shown that they are ready and willing to work with those government agencies that operate in good faith, listen carefully to resident perspectives, and commit to transparent and inclusive approaches to communication and decision-making. With NEJAC's help, we hope we can continue to build that kind of relationship with federal partners moving forward.

Sincerely,

Mona Munroe-Younis

Executive Director

Environmental Transformation Movement of Flint

Benjamin J. Pauli

President of the Board of Directors

Environmental Transformation Movement of Flint

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Discussion

Disposal of products and materials containing per- and polyfluoroalkyl substances (PFAS): A cyclical problem

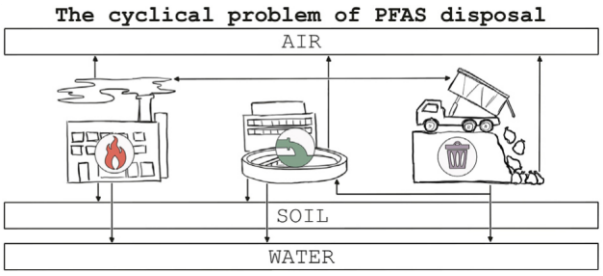
Tasha Stoiber*, Sydney Evans, Olga V. Naidenko

Environmental Working Group, 1436 U Street NW Suite 100, Washington, DC, 20009, USA

highlights

graphicalabstract

- Disposal of PFAS-containing wastes creates repeated cycles of contamination.
- Consumer products and various materials discarded in landfills leach PFAS over time.
- Wastewater treatment can transform PFAS and increase measurable PFAS concentration.
- Incineration of PFAS wastes can release toxic air pollutants and greenhouse gases.
- Monitoring and eliminating all PFAS releases into the environment are essential.



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abstract

Per- and polyfluoroalkyl substances (PFAS), highly stable and persistent chemicals used in numerous industrial applications and consumer goods, pose an exceptionally difficult challenge for disposal. Three approaches are currently available for PFAS wastes: landfilling, wastewater treatment and incineration. Each disposal approach can return either the original PFAS or their degradation products back to the environment, illustrating that the PFAS problem is cyclical. Landfilling and wastewater treatment do not destroy PFAS and simply move PFAS loads between sites. Consumer products and various materials discarded in landfills leach PFAS over time, and landfill leachate is commonly sent to wastewater treatment plants. From wastewater treatment plants, PFAS are carried over to sludge and effluent. Sewage sludge can be landfilled, incinerated, or applied on agricultural fields, and PFAS from treated sludge (biosolids) can contaminate soil, water, and crops. Incineration of PFAS-containing wastes can emit harmful air pollutants, such as fluorinated greenhouse gases and products of incomplete combustion, and some PFAS may remain in the incinerator ash. Volatile PFAS are emitted into the air from landfills and wastewater treatment plants, and research is urgently needed on the potential presence of PFAS compounds in air emissions from commercially run incinerators. Monitoring of waste streams for PFAS, stopping PFAS discharges into water, soil and air and protecting the health of fence-line communities close to the waste disposal sites are essential to mitigate the impacts of PFAS pollution on human health.

Abbreviations: PFAS, per- and polyfluoroalkyl substances; PFOA, perfluorooctanoic acid; PFOS, perfluoroctanesulfonate.

* Corresponding author.

E-mail addresses: tstoiber@ewg.org, tstoiber@ewg.org (T. Stoiber), sydney. evans@ewg.org (S. Evans), olga@ewg.org (O.V. Naidenko).

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1. Introduction

Discovery of widespread environmental contamination with per- and polyfluoroalkyl substances (PFAS), particularly in drinking water, brought urgency to the issue of PFAS removal and disposal. There are thousands of various per- and polyfluoroalkyl substances, with more than 600 compounds in commercial use in the United States (United States Environmental Protection Agency, 2020a). PFAS are highly persistent and stable substances that have been used for decades. The types of PFAS-containing products are extremely diverse. Consumer products like stain- and water-resistant carpets, textiles, clothing, packaging, food wares, and even cleaning products and personal care products contain PFAS (Danish Environmental Protection Agency, 2018; Kotthoff et al., 2015; Lang et al., 2016; Schaider et al., 2017). Many industrial materials are manufactured with PFAS, such as PFAS-based aqueous film forming firefighting foam and aerospace, automotive and medical products (Cousins et al., 2019; Houtz et al., 2018; Zhu and Kannan, 2020). These products and materials end up in landfills, wastewater treatment plants or incinerators e or might be directly discarded or discharged into the environment. In addition to PFAS in consumer waste, there are industrial discharges of PFAS into waterways and industrial PFAS air emissions (Becker et al., 2008; Sunderland et al., 2019). The PFAS pollution in rivers and oceans is a source of constant, harmful exposure for wildlife (Guillette et al., 2020).

Extensive research demonstrates that exposure to PFAS can harm human health (Agency for Toxic Substances and Disease Registry, 2018; Grandjean, 2018; Sunderland et al., 2019; Temkin et al., 2020). Complex mixtures of PFAS occur in water, soil, and air and accumulate in people and other living organisms. In epidemiological studies, exposure to PFAS, particularly perfluorooctanoic acid (PFOA) and perfluoroctanesulfonate (PFOS), is associated with changes in hormonal balance and thyroid function, weakened immune response, increased cholesterol and harm to the developing fetus (Agency for Toxic Substances and Disease Registry, 2019). In human and animal studies, exposure to PFAS increases the risk of cancer. The most-researched PFAS, and possibly the entire PFAS class, exhibit key characteristics of carcinogens such as induction of oxidative stress, immunosuppressive effects, alterations in hormonal receptor-mediated signaling as well as epigenetic alterations and increased cell proliferation (Temkin et al., 2020).

Waste management researchers in the U.S. and in other countries are starting to investigate the fate and transport of PFAS in various disposal processes (Toskos et al., 2019; United States Environmental Protection Agency, 2020b). In landfills, wastewater treatment processes, and the environment generally, PFAS precursors such as fluorotelomer-based coatings on carpet, clothing and food wrappers can be biologically transformed to smaller, more mobile PFAS (Arvaniti and Stasinakis, 2015; Hamid et al., 2020; Lang et al., 2016). These smaller compounds such as PFOA, PFOS, perfluorohexanoic acid, perfluorobutyric acid and many other shortand long-chain PFAS resist further breakdown and are environmentally persistent. As of July 2020, there are no national-level regulations governing PFAS disposal in the United States, except for military applications. PFAS-containing wastes have not been classified as hazardous in the U.S. and enter the waste cycle without special consideration for the persistence, mobility, and toxicity of this family of chemicals.

With the availability of more sensitive analytical methods, testing conducted by government agencies and independent scientists revealed that PFAS contamination in drinking water is more common than what was previously estimated (Stoiber et al., 2020). The contamination of drinking water with PFAS

illustrates the persistent and repetitive problem of PFAS disposal, as the current or former waste disposal sites themselves can become sources of water contamination (Fig. 1).

At different locations, distinct sources of PFAS pollution can impact drinking water, alone or in combination (Galloway et al., 2020). PFAS contamination may be due to current discharges of industrial or municipal wastewater (Arvaniti and Stasinakis, 2015; Coggan et al., 2019; Letcher et al., 2020; Masoner et al., 2020), or due to previous industrial discharges and landfilling of industrial wastes (Eggen et al., 2010; Hepburn et al., 2019; Lang et al., 2017; Wei et al., 2019; Yan et al., 2015). States such as Michigan are starting to identify old, inactive landfills that may release PFAS from materials and wastes discarded decades ago, beginning when PFAS were first manufactured in the 1940s (Michigan Waste & Recycling Association, 2019). Systematic testing is necessary to identify all historical landfilling sites that might leach PFAS. Past use of PFASbased firefighting foam at airports and military installations is another source of water contamination. Finally, several studies reported the presence of PFAS in snow and rain and documented the contribution of atmospheric transfer to global PFAS contamination (Chen et al., 2019; Muir et al., 2019; Wang et al., 2019; Xie et al., 2015). The ubiquitous detection of PFAS in soils across the world illustrates the long-range transport of PFAS (Brusseau et al., 2020).

Communities whose water supplies were contaminated with PFAS turn to PFAS removal technologies such as granular activated carbon, ion exchange, or reverse osmosis (Appleman et al., 2014; Franke et al., 2019). Every treatment option produces PFAS-laden wastes, such as carbon or ion exchange media with absorbed PFAS or reverse osmosis concentrate (also called reverse osmosis “reject water”) with elevated PFAS levels (Stoiber et al., 2020). With that, drinking water systems must dispose of spent treatment media and reject water containing concentrated PFAS waste. Installation of PFAS-removing technologies for drinking water cleanup would likely become more common as government agencies in different countries and U.S. states adopt health-based guidelines and regulatory standards for PFAS in drinking water. New Jersey’s drinking water standards, the first stringent standards set in the U.S., were set at 13 ng/L each for PFNA and PFOS, and 14 ng/L for PFOA (New Jersey Department of Environmental

Protection, 2020). California, Michigan, Massachusetts, Vermont, New Hampshire, and New York have proposed or implemented state regulatory limits that are more stringent than the U.S. Environmental Protection Agency’s lifetime health advisory level of 70 ng/L for PFOA and PFOS.

In sum, the PFAS disposal problem is not just a waste management issue; it is a consequence of the social and industrial choices that are the cause of PFAS discharges to the environment. The complex issue of PFAS disposal points to the necessity of managing all PFAS as a class (Cousins et al., 2020; Kwiatkowski et al., 2020), as well as of limiting PFAS production overall to prevent

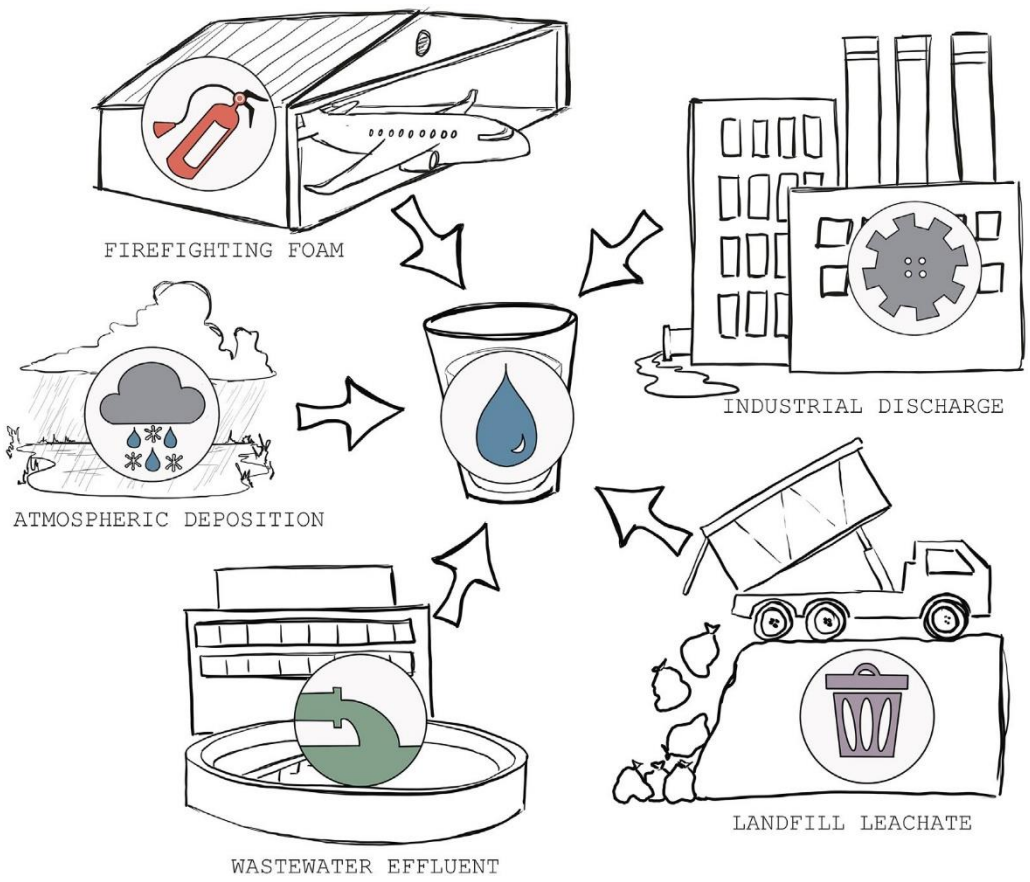

Fig. 1. Examples of sources that can contribute to the PFAS pollution of drinking water.

environmental contamination and protect public health (Cousins et al., 2019).

2. The cyclical problem of PFAS disposal

In this discussion paper, we review recent studies on the fate and transport of PFAS following disposal and highlight the cyclical problem of PFAS generation and disposal. The three disposal pathways for PFAS materials e landfilling, wastewater treatment, and incineration e are interconnected, transferring PFAS, PFAS degradation products, or, in the case of incineration, products of incomplete combustion, from one site to another. Both active and old landfills store decades of consumer wastes with a mixture of PFAS chemicals (Masoner et al., 2020; Michigan Department of Environment Great Lakes and Energy, 2020b). The long-term safety of landfill disposal for PFAS is uncertain, as PFAS polymers can break down over time into smaller, more mobile species (Washington and Jenkins, 2015; Washington et al., 2015, 2019). There are also concerns about landfill stability in the potential future scenarios of greater annual precipitation and heavier storms due to climate change (United States Environmental Protection Agency, 2014).

Landfill leachate is often transferred to wastewater treatment plants (Masoner et al., 2020; Michigan Waste & Recycling Association, 2019), while sewage sludge from wastewater treatment may be transferred to landfills or incinerated. Wastewater effluent can have higher levels of detectable PFAS compared to influent, suggesting that, in the course of wastewater treatment, PFAS are transformed into smaller, more mobile species (Coggan et al., 2019). Treated sewage sludge (commonly called

"biosolids" in the U.S. (United States Environmental Protection Agency, 1994)) also carries high levels of PFAS (Letcher et al., 2020; Venkatesan and Halden, 2013). Heat treatment and composting further increase the concentration of measured, mobile PFAS (Kim Lazcano et al., 2019). If applied on fields, PFAS from treated sewage sludge can contaminate soil and water and contribute to PFAS pollution in the local ecosystem. Finally, various types of incinerators de facto burn PFAScontaining wastes, and the ash ends up in landfills (Solo-Gabriele et al., 2020). Incineration of PFAS-containing materials can release products of incomplete combustion (Toskos et al., 2019; United States Environmental Protection Agency, 2020b), posing a risk of air, water, and soil contamination for nearby communities.

New technologies are under development for remediating PFAS contamination in aqueous media, such as groundwater, drinking water sources, and landfill leachate. Existing studies describe the application of electrochemical oxidation (Niu et al., 2016; Schaefer et al., 2017; Yang et al., 2019); advanced reduction processes (Cui et al., 2020); plasma-based technology (Lewis et al., 2020; Singh et al., 2019a,b); ultrasound-based sonolysis technologies (Campbell and Hoffmann, 2015; Campbell et al., 2009; Gole et al., 2018; Laramay and Crimi, 2019; Vecitis et al., 2008) and UVbased treatment (Vecitis et al., 2009) for the destruction of PFAS. While these advanced treatments successfully degrade PFAS in pilot studies, their effectiveness for complex wastes and other types of media such as contaminated soils, sediments, and sewage sludge needs further research (Pillai et al., 2019; Ross et al., 2018; Wei et al., 2019). We direct the readers to excellent reviews on these advanced treatment technologies (Cui et al., 2020; Lu et al., 2020; Merino et al., 2016; Nzeribe et al., 2019; Ross et al., 2018; Wei et al., 2019) and, for the rest of this discussion, focus on the data for the three disposal processes currently applied for PFAS: landfilling, incineration, and passage through wastewater treatments.

3. Landfill disposal

Around 140 million tons of municipal solid waste is discarded in landfills annually in the United States (United States Environmental Protection Agency, 2017). Municipal waste includes a mixture of PFAS-containing consumer items such as PFAS-coated food packaging material and food wares as well as stain- and water-resistant upholstery, textiles, clothes and carpets either treated with PFAS or manufactured with PFAS-containing materials (California Department of Toxic Substances Control, 2019; Lang et al., 2016; Schaider et al., 2017). Some PFAS-based products sent to landfills, such as PFAS-containing paints, varnishes, and sealants, originate from both residential settings and industrial applications. In addition to post-consumer waste, landfills also accept wastewater sludge that can serve as a reservoir for PFAS release (Letcher et al., 2020; Venkatesan and Halden, 2013).

3.1. PFAS in landfill leachate

Landfill leachate is a heterogenous mixture of compounds that must be captured and treated to avoid groundwater pollution (Masoner et al., 2014, 2016; Renou et al., 2008). In the United States, landfills constructed since 1993 must have a liner and leachate collection system (United States Environmental Protection Agency, 1993). PFAS presence in landfill leachate has been documented in studies conducted in the United States and other countries

(Table 1).

A 2017 study of 18 U.S. landfills reported that total measured PFAS concentrations in leachate reached up to 66 mg/L (Lang et al., 2017). The study found climate may affect leachate concentrations through changes in both biological activity and physical leaching in landfills (Lang et al., 2017). Similar concentration ranges for individual PFAS were reported in other U.S. studies of landfill leachate (Allred et al., 2015; Huset et al., 2011; Michigan Waste & Recycling Association, 2019). A 2015 study from China reported that the total concentration of perfluoroalkyl acids in leachate from five municipal landfills ranged from 7 to 292 mg/L (Yan et al., 2015). A 2020 study from China reported measured PFAS levels of 22e46 mg/L for leachate from municipal solid waste landfills and transfer stations, while leachate from municipal solid waste stored at incinerator sites had PFAS concentrations of 86e98 mg/L (Wang et al., 2020).

A study in Australia reported differences in PFAS leaching from landfills of different age as well as higher mean concentrations of PFAS in leachate from landfills that contained construction and demolition debris compared to municipal solid waste landfills (Gallen et al., 2017). Similarly, a study in the U.S. reported differences in PFAS content in leachate from distinct landfill types such as municipal solid waste, construction and demolition, and ash

Table 1
Studies reporting PFAS measurements in landfill leachate.

landfills for ash from municipal solid waste incinerators (SoloGabriele et al., 2020). Leachate collected from construction and demolition landfills had higher levels of perfluorohexanesulfonate (compound with 6 fluorinated carbons), which could be due to its use in sealants and water repellants in building materials (SoloGabriele et al., 2020). In contrast, leachate from ash landfills had lower PFAS concentrations, possibly due to PFAS destruction and volatilization during the incineration process (Solo-Gabriele et al., 2020). PFAS concentrations were the lowest in leachate from landfills which accepted the ash from incineration facilities that, among facilties in the study, operated at the highest temperatures (Solo-Gabriele et al., 2020).

In a recent review of leachate studies, Wei et al. (2019) reported that perfluorinated carboxylic acids and perfluorinated sulfonic acids are the most frequently detected PFAS (Wei et al., 2019). Shorter chain PFAS with 4e7 fluorinated carbons are more abundant in landfill leachate compared to longer-chain PFAS (Busch et al., 2010; Fuertes et al., 2017; Huset et al., 2011; Yan et al., 2015). Biological degradation, a process that occurs in landfills, during wastewater treatment and in the environment generally, can convert PFAS precursors into short-chain compounds (Hamid et al., 2020; Rhoads et al., 2008). In a 2010 study in Germany, 4carbon fluorinated compounds perfluorobutyric acid and perfluorobutane sulfonate accounted for more than half of the sum of PFAS measured (Busch et al., 2010). Two U.S. landfill leachate studies reported the prevalence of 5:3 fluorotelomer carboxylic acid, which is an intermediate degradation product between fluorotelomer substances and perfluoroalkyl acids (Lang et al., 2017; Solo-Gabriele et al., 2020). Following aeration treatment of leachate, the concentration of 5:3 fluorotelomer carboxylic acid decreased while the concentration of perfluoropentanoic acid (compound with 5 fluorinated carbons) increased (Solo-Gabriele et al., 2020).

With the phase-out of the 8-carbon fluorinated compounds PFOA and PFOS, manufacturers are switching to shorter chain PFAS alternatives, and these compounds increasingly contribute to the waste stream. While less studied, toxicity risks of short-chain PFAS remain a concern (Kabadi et al., 2020; Rice et al., 2020). Short-chain PFAS have higher aqueous solubility and mobility and are harder

to remove from water compared to longer chain PFAS due to weaker adsorption of short-chain PFAS to GAC and ion exchange resins (Khan et al., 2020; Li et al., 2020). Additionally, the increased solubility of short-chain PFAS will result in increased mobility in waste streams.

3.2. Concerns about groundwater contamination

Landfill leachate collection systems should, by design, prevent groundwater contamination. Nevertheless, landfill runoff and leakage remain a concern, especially for mixed landfills that had received industrial waste in the past. In the United States, PFAS groundwater contamination from older landfills has been reported in the states of Michigan, Minnesota, and Vermont. Investigations of groundwater in Vermont near landfills revealed detections of PFAS at all sites sampled, and PFAS were detected in drinking water sources near two unlined closed landfills (Vermont Department of Environmental Conservation, 2018; 2019). The state of Michigan investigated over 20 landfill and dump sites where groundwater levels exceed 70 ng/L for PFOA and PFOS (Michigan Department of Environment Great Lakes and Energy, 2020a). PFAS contamination has been documented in groundwater near landfills in Minnesota, with the highest levels near unlined municipal landfills that had received industrial waste (Minnesota Pollution Control Agency, 2010; Oliaei et al., 2006). In the Minnesota study, elevated levels of PFOA were measured in groundwater downgradient from both unlined and lined landfills, demonstrating groundwater transport of PFOA regardless of landfill type. A study in Australia suggested that a high ratio of PFOA to total perfluoroalkyl acids may be an indicator of groundwater contamination with PFAS due to leaching from municipal landfills (Hepburn et al., 2019).

Country	Number of landfills in the study	Number of PFAS tested	Sum of PFAS concentrations reported, untreated leachate (rounded)
Australia (Gallen et al., 2017)	27	9	0.2e46 mg/L
China (Yan et al., 2015)	5	14	7.3e292 mg/L
China (Wang et al., 2020)[a]	3	29	22e39 mg/L
Germany (Busch et al., 2010)	22	43	0.03e13 mg/L
U.S. (Lang et al., 2017)	18	70	0.3e66 mg/L
U.S. (Solo-Gabriele et al., 2020)[b]	5	11	2.8e18 mg/L

[a] This study also reported PFAS levels in leachate from two municipal solid waste transfer stations and two incinerators. [b] This study analyzed leachate from different landfill types: construction and demolition; municipal solid waste; waste incineration ash; combined construction and demolition and municipal solid waste; and combined municipal solid waste and waste incineration ash landfills.

In response to concerns about PFAS and other emergent contaminants in landfill leachate, landfill operators are exploring options for on-site advanced treatment of leachate (Eggen et al., 2010; Wei et al., 2019). The use of separation technologies such as activated carbon, ultrafiltration and reverse osmosis have been reported for landfill leachate (Busch et al., 2010; Yan et al., 2015), although matrix effects due to the complex nature of leachate may reduce the effectiveness of treatment processes (Wei et al., 2019). After landfill leachate treatment, PFAS-loaded carbon media or filtration concentrate with elevated PFAS levels require disposal or destruction. Some landfills dispose of leachate via injection to wells located near the landfill or elsewhere (Michigan Waste & Recycling Association, 2019; Solo-Gabriele et al., 2020). More research and greater transparency about this disposal practice are urgently needed given that injection of PFAS wastes is already happening for landfill leachate (Markley, 2019; Michigan Waste & Recycling Association, 2019; Texas Molecular,

2020) and for industrial wastewater from fluorochemical production facilities (Markley, 2019; Michigan Waste & Recycling Association, 2019; Texas Molecular, 2020).

3.3. PFAS air emissions from landfills

In addition to the release of PFAS into landfill leachate, PFAS also volatilize into the air above the landfill. Studies in Canada, Germany and China reported the presence of PFAS in the air over landfills (Table 2). In the existing studies, 8:2 fluorotelomer alcohol was the predominant airborne PFAS reported (Ahrens et al., 2011; Tian et al., 2018; Wang et al., 2020; Weinberg, 2011). The prevalence of neutral PFAS such as fluorotelomer alcohols in air emissions is consistent with their greater volatility compared to perfluoroalkyl acids (Ahrens et al., 2011; Tian et al., 2018).

Overall, the detection of PFAS in air emissions indicate that landfills, especially currently operating landfills, act as a source of atmospheric PFAS pollution (Tian et al., 2018). More research is needed to address PFAS air emissions from historical landfills that no longer operate, as well as from different landfills types.

Table 2
Summary of studies reporting PFAS detections in air above landfills.

Country	Number of landfills in the study	Number of PFAS tested	Total PFAS concentration reported (rounded)
Canada (Ahrens et al., 2011)	2	22	2.8e26 ng/m^3
China (Tian et al., 2018)	2	23	up to 9.5 ng/m^3
China (Wang et al., 2020)	3	29	1.6e33 ng/m^3
Germany (Weinberg, 2011)	2	30	0.08e0.7 ng/m^3

4. PFAS in wastewater

Wastewater treatment plants receive liquid PFAS-laden waste from several sources, including municipal wastewater, leachate from landfills, and industrial wastes. Conventional wastewater treatment processes cannot remove PFAS (Chen et al., 2018; Schultz et al., 2006). Over the course of wastewater treatment, biological and physical processes can transform precursor PFAS compounds into smaller, more mobile PFAS (Arvaniti and Stasinakis, 2015). A study in Germany found that wastewater treatment plants, especially those accepting industrial waste, were major sources of PFAS pollution to rivers (Becker et al., 2008). A U.S. study found the number of municipal wastewater treatment plants in source watersheds is one of the predicting factors for the detection of PFAS in drinking water (Hu et al., 2016), although another study did not detect such correlation (Boone et al., 2019).

Comparing the results of two recent studies conducted in the U.S (Masoner et al., 2020) and in Australia (Coggan et al., 2019), we note that the reported concentrations of total PFAS were higher both in influent and in effluent in the U.S. study (Table 3). While the U.S. study monitored a greater number of PFAS than the study in Australia, there also might be country-specific differences in PFAS load sent to wastewater treatment systems. In a European study of 90 wastewater treatment plants, PFOA was the most frequently detected PFAS in effluent, with a median concentration of 255 ng/L and a maximum of 15,900 ng/L (Loos et al., 2013).

4.1. PFAS transformation and air emissions from wastewatertreatment

Several studies have reported elevated levels of PFAS following wastewater treatment. A study conducted in the U.S. reported that concentrations of PFOA and 6 other measured PFAS were greater in

effluent compared to influent (Masoner et al., 2020). Similarly, a study in Australia reported significant increases in measured PFAS concentrations between influent and effluent (Coggan et al., 2019). The increase in the concentrations of small, mobile PFAS following the passage through wastewater treatment plants is likely due to the biodegradation of precursor compounds into perfluorinated carboxylic acids and perfluorinated sulfonic acids (Schultz et al., 2006).

Like landfills, wastewater treatment plants are also a source of PFAS air emissions, especially during aeration treatment (Table 4). A study conducted in Canada estimated that total mass of PFAS discharged in wastewater effluent was 2e10 times greater compared to air emissions released from wastewater treatment plants (Ahrens et al., 2011). Nevertheless, air emissions from wastewater treatment sites likely play a role in long-range transport of perfluorinated carboxylic acids from the emission of fluorotelomer alcohols (Ahrens et al., 2011). Another study found that the treatment type and duration may increase the percentage of perfluoralkyl acids in the total PFAS in air emissions by increasing the degradation of precursors (Shoeib et al., 2016). Vierke et al. reported that PFAS air emissions were higher over aeration tanks compared to secondary clarifiers due to the greater aerosolization caused by turbulence within the aeration tank (Vierke et al., 2011).

Table 3
Studies reporting PFAS measurements in wastewater.

Country	Number of wastewater facilities in the study	Number of wastewater facilities tested (rounded)	Number of PFAS (rounded)	Sum of PFAS concentration in the influent	Sum of PFAS concentration in the effluent
Australia (Coggan et al., 2019)	19	21	9e412 ng/L		34e517 ng/L
Australia (Nguyen et al., 2019)	2	17	31e219 ng/L		not analyzed
China (Zhang et al., 2013)	28	16	0.04e91 ng/L		0.01e107 ng/L
European Union (Loos et al., 2013)	90	7	not analyzed		50,107 ng/L [a] 812 ng/L [b]
Sweden (Eriksson et al., 2017)	3	44	41e97 ng/L		31e78 ng/L
U.S. (Schultz et al., 2006)	1	15	39e132 ng/L		38e124 ng/L
U.S. (Masoner et al., 2020)	5	73	1030e3360 ng/L		330e2110 ng/L

[a] The sum of maximum measurements for 7 individual PFAS in the study.
[b] The sum of average measurements for 7 individual PFAS in the study.

Table 4
Summary of studies reporting PFAS detections in air above wastewater treatment plants.

Country	Number of wastewater facilities in the study	Number of PFAS tested	Total PFAS concentration reported (rounded)
Canada (Vierke et al., 2011, 2013)	1	23	3.3e33 ng/m^3 [a]
Canada (Shoeib et al., 2016)	8	21	0.04e4.6 ng/m^3 [b]
Germany (Weinberg et al., 2011)	2	30	0.1e1 ng/m^3

[a] Range reported for high volume air samples of gas-phase taken over aeration tank.
[b] Range reported for summer and winter measurements on-site at urban and rural facilities.

PFAS air emissions also correlate with the size of the population served by the wastewater treatment plant (Shoeib et al., 2016). This finding makes sense given that a larger population uses and disposes of a greater quantity of PFAS-based products and materials.

4.2. Landfill leachate discharge to wastewater treatment plants

Landfill leachate can contain higher concentrations of PFAS compared to wastewater (Table 1, Table 3). However, municipal wastewater releases, due to their large volume, may release an overall greater mass

of PFAS into the environment. A study of five wastewater treatment facilities in the U.S. reported that PFAS levels in effluent from wastewater treatment facilities receiving landfill leachate were similar to those that did not receive landfill leachate (Masoner et al., 2020). Total PFAS levels in leachate were ten times higher than wastewater influent or effluent samples, but the landfill leachate transferred to the wastewater treatment plants in the study only represented around 18% of daily mass of measured PFAS in those plants (Masoner et al., 2020).

Similarly, a study in Australia reported the contribution of PFAS from leachate was small compared to the PFAS load from domestic wastewater (Gallen et al., 2017). A study in Germany reported that leachate represented only approximately 1% of mass flow of PFAS to wastewater treatment plants (Busch et al., 2010). However, the same study noted that high PFAS concentrations at landfill sites could be a potential source of local PFAS pollution (Busch et al., 2010).

4.3. PFAS release from wastewater treatment: biosolids andwastewater effluent

In the United States, millions of dry tons of treated sewage sludge, commonly called biosolids, are applied on agricultural fields every year (Baptista and Perovich, 2019; California Department of Toxic Substances Control, 2019; National Research Council, 2000; United States Environmental Protection Agency, 1999). While biosolids transfers nutrients such as nitrogen and phosphorus to the fields, this practice also transfers PFAS contamination to soils, water, and the crops (Washington et al., 2010; Yoo et al., 2009, 2011). Alternatives to the agricultural application of biosolids e landfilling or incineration of wastewater sludge e also have significant environmental drawbacks (Fig. 2).

Partitioning of PFAS to solids/sludge in the wastewater treatment plant increases with increasing chain length (Coggan et al., 2019). A study in Germany reported that about one-tenth of the load of PFOA and about half of PFOS arriving with the influent to the wastewater treatment plant ended up in sludge (Becker et al., 2008). A U.S. survey based on biosolids collected in 2001 reported that, in that time frame, PFOS was the most commonly detected of 13 PFAS measured with an average of 403 ng/g dry weight (Venkatesan and Halden, 2013). A study in Australia measured 9 PFAS in biosolids from 14 different wastewater treatment plants reporting total PFAS concentrations in the range of 5.2e150 ng/g (Gallen et al., 2018). With the concern about PFAS contaminants in sewage sludge, some states in the U.S. are requiring PFAS testing of biosolids (Vermont Department of Environmental Conservation, 2019) or have suspended agricultural application (Maine Department of Environmental Protection, 2019).

PFAS have been shown to accumulate in plants grown in biosolid-amended soils (Yoo et al., 2011). A 2013 study conducted in the U.S. reported that perfluorobutanoic acid and perfluoropentanoic acid accumulated in lettuce and tomatoes grown in soil amended with biosolids (Blaine et al., 2013). In 2019, the U.S. Food and Drug Administration reported detections of PFAS in seafood, meat and vegetables, especially leafy greens (United States Food and Drug Administration, 2019). PFAS chemicals were detected in milk from a dairy farm in Maine that had historically applied biosolids to fields (Maine PFAS Task Force, 2020). The application of PFAS-contaminated biosolids on the fields leads to contamination to crops and livestock, as well as polluted runoff that transfers PFAS pollution further afield (Lasier et al., 2011). In addition to PFAS, other toxic contaminants may be present in biosolids, such as metals and persistent organic pollutants (Kinney et al., 2006).

In addition to land application, biosolids may also be incinerated

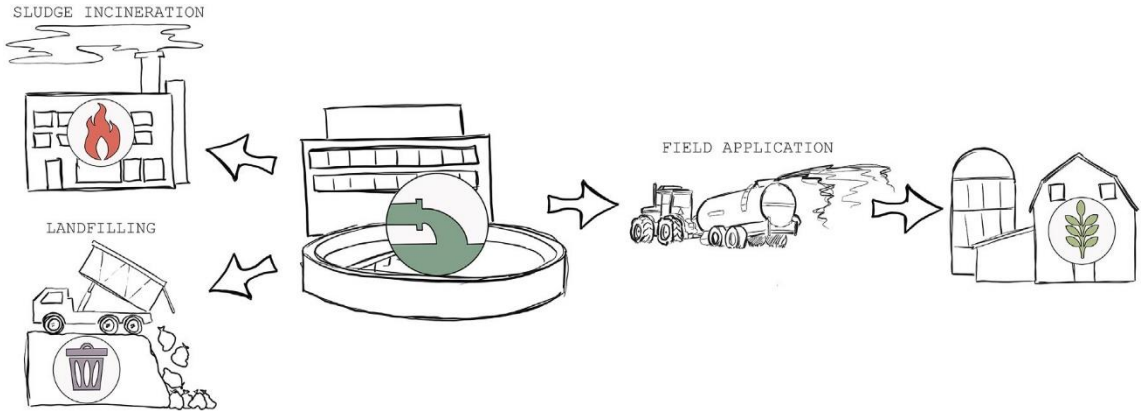

Fig. 2. Transfer of PFAS-laden sewage sludge from wastewater treatment plants to landfills, incinerators, as well as agricultural land and crops.

or sent to landfills for disposal, typically a mixed use landfill that accepts municipal solid waste as well (Environmental Protection Agency, 2003). Landfilled biosolids likely release PFAS into landfill leachate, which may be sent back to the wastewater, creating a circular transfer pathway for PFAS moving between landfills and wastewater treatment plant. For the incineration route, as discussed in Section 5, questions remain regarding the incomplete combustion of PFAS and ash disposal.

Under the current circumstances whereby wastewater influent carries PFAS, treatment of wastewater effluent to decrease PFAS concentrations and/or remove PFAS all together may be necessary before the effluent can be recycled for irrigation or groundwater recharge (Page et al., 2019; Szabo et al., 2018). Wastewater sludge, due to its complex nature, is difficult to treat. Heat treatment, commonly applied to sewage sludge to inactivate pathogenic organisms, increases perfluoroalkyl acid concentrations (Kim Lazcano et al., 2019; Yu et al., 2009). Much more research is needed on the methods for PFAS sequestration in wastewater treatment. For example, research is ongoing on the potential use of polymer coagulants that may bind PFAS to sludge and remove it from effluent (Simcik, 2019). Ultimately, reduction of PFAS in wastewater effluent and in biosolids requires reducing both direct and indirect entry of PFAS materials into the wastewater from all sources, including industrial discharges (Michigan Department of Environment Great Lakes and Energy, 2020b; Simcik, 2019).

5. Incineration of PFAS-containing materials

The chemical stability of the carbon-fluorine bond poses a challenge for PFAS destruction via incineration approaches (Tsang et al., 1998). Around 12%, or 34 million tons, of the municipal solid waste in the United States is incinerated annually at about 75 municipal solid waste incinerators, operating primarily in the northeastern part of the U.S. (United States Environmental Protection Agency, 2017; 2019). In addition to municipal waste incineration, there are over 200 dedicated facilities for sewage sludge incineration (United States Environmental Protection Agency, 2003), as well as facilities for hazardous waste and medical waste incineration (Kemsley, 2017; National Research Council, 2000). As the U.S. EPA noted in a technical brief published in February 2020, the fate and transport of PFAS during incineration are not yet well understood (United States Environmental Protection Agency, 2020b).

PFAS incineration or thermal treatment is de facto happening, either directly for PFAS-based materials such as firefighting foam (Hogue, 2020), or indirectly through incineration of waste containing PFAS

such as textiles or biosolids (California Department of Toxic Substances Control, 2019; Huber et al., 2009; Khan et al., 2020; Solo-Gabriele et al., 2020; Taylor et al., 2014). Thus, a better understanding of the fate and transport of PFAS in the incineration process is urgently needed.

Similar to other PFAS studies, incineration studies monitor a limited number of compounds, leaving the question of "unmonitored" PFAS unanswered (Ellis et al., 2003). Most existing studies are limited to highly controlled laboratory conditions and report on a specific number or subset of analytes. Several of these studies report that PFAS incineration under controlled conditions does not release the most-studied PFAS such as PFOA (Aleksandrov et al., 2019; Taylor et al., 2014; Yamada et al., 2005). There are also reports that specific PFAS, like PFOA, PFOS, and related compounds can be broken down with incineration (Khan et al., 2020; Krusic and Roe, 2004; Vecitis et al., 2009).

Laboratory experiments have not addressed the full scope of potential PFAS byproducts that could form during the combustion of PFAS wastes in commercial or municipal incinerators. Both academic studies and government agency reports have raised concerns that PFAS incineration can release ozone-depleting chlorofluorocarbons, fluorinated greenhouse gases such as tetrafluoromethane, hexafluoroethane, fluoro-dioxins, fluoro-benzofurans, fluorinated aromatic compounds and perfluorinated carboxylic acids (California Department of Toxic Substances Control, 2019; Ellis et al., 2001; Feng et al., 2015; Huber et al., 2009; Merino et al., 2016). In 2003, a study from Canada noted that incineration of fluoropolymers can release a "plethora of unidentified and previously unreported materials, thermolysis products that await characterization" (Ellis et al., 2003). A study in Japan investigated the fate of PFAS during thermal reactivation of granular activated carbon with absorbed PFOA, PFOS and 6-carbon perfluorohexanoic acid, reporting that after treatment at 700 C, a significant portion of the original compounds was converted to volatile species that escaped the final analysis (Watanabe et al., 2018). The specific profiles of fluorinated organic compounds released depend on incineration temperatures and operating conditions (García et al., 2007; Wang et al., 2013). Thus, while thermal treatment at temperatures of 1000 C and higher can destroy PFAS, data from full-scale, actively operating incinerator facilities are needed to assess the impacts of PFAS incineration on human and environmental health.

We identified three studies that considered PFAS incineration in full-scale, operating facilities: two studies in the U.S. (Loganathan et al., 2007; Solo-Gabriele et al., 2020) and a study in China (Wang et al., 2020). Loganathan et al. (2007) tested dewatered sewage sludge before incineration and the resulting ash following incineration at a wastewater treatment facility. Of the PFAS measured, PFOA, PFOS, and PFDA were present at the highest concentrations in sludge (Loganathan et al., 2007). The levels of detected PFAS in incinerator ash were significantly lower compared to PFAS levels in sludge, in some cases by over 10-fold. However, measurable PFAS remained in the ash after incineration (Loganathan et al., 2007). Similarly, a 2020 study reported that the levels of 11 PFAS measured were lower in leachate from landfills that accept incinerator ash compared to PFAS in leachate from construction and demolition and municipal solid waste landfills, yet PFAS concentrations did not decrease to non-detectable levels (Solo-Gabriele et al., 2020). Wang et al. tested for PFAS in air at two municipal solid waste incinerator facilities, reporting that higher concentrations of PFOA were detected in air at the incinerator sites compared to an upwind site, while fluorotelomer concentrations were comparable across all samples (Wang et al., 2020).

Much more research is needed on the PFAS breakdown species that could form as a result of incomplete combustion (United States Environmental Protection Agency, 2020b). A significant barrier to this research is the limitation of emission sampling and analytical methods for measuring PFAS in air. To address this question, robust emission sampling and analytical methods for measuring PFAS in air should be developed. A survey of actual operating conditions at commercially run incinerator facilities, once conducted and published, would help assess how often operating temperatures around 1000 C, identified as optimal for PFAS destruction in pilot studies, occur in different types of incinerators (Baptista and Perovich, 2019; California Department of Toxic Substances Control, 2019; National Research Council, 2000). The U.S. National Defense Authorization Act for fiscal year 2020 required incineration for the disposal of PFAS firefighting foam to be conducted in accordance with the Clean Air Act ("National Defense Authorization Act for Fiscal Year, 2020," 2019). Yet, both practical and policy questions remain regarding the disposal of old PFAS-based foams. There are also environmental justice concerns about the impacts of incinerator pollution on nearby communities. In the United States, incinerators are often located in low-income, socially disadvantaged communities (Baptista and Perovich, 2019; California Department of Toxic Substances Control, 2019; National Research Council, 2000). Protecting the health of residents in who live near incinerators and other waste disposal sites must become a policy priority.

6. PFAS disposal and risks to the fence-line communities nearlandfills and incinerators

PFAS waste streams disproportionately affect people and communities located near the waste disposal sites. Martuzzi et al. reviewed studies from the U.S. and Europe and reported that waste facilities such as incinerators and landfills are more frequently located in disadvantaged communities, causing pollution and health inequalities in addition to economic and social injustices (Martuzzi et al., 2010). A study in North Carolina reported that solid waste facilities were located 2.8 times more often in census areas where more than 50% of residents were people of color compared to areas with less than 10% of people of color (Norton et al., 2007).

Mohai and Saha analyzed the data on the locations of hazardous waste treatment, storage, and disposal facilities in the U.S from 1966 to 1995 and found strong evidence of racial and socioeconomic disparities (Mohai and Saha, 2015). The study reported evidence that these waste facilities are more often sited in communities that have more people of color and high poverty rates (Mohai and Saha, 2015). The mean property values in these areas were not significant factors for the siting of waste facilities. In contrast, racial composition was found to be a strong and independent predictor of waste facility siting, even after other socioeconomic characteristics were considered.

Saha and Mohai concluded that racial discrimination and racial inequality are the factors behind this disparate exposure to pollution from waste facilities (Mohai and Saha, 2007; Saha and Mohai, 2005). Past racial discrimination in land use and zoning likely contributed to this disparity. Even today, these communities face the barriers of structural injustice when opposing the placement of a new waste site. Consequently, communities of color and lowincome communities face greater exposure to PFAS and other toxic chemicals that are transferred to, stored, incinerated, or landfilled at municipal and commercial waste disposal facilities. In addressing human health impacts of PFAS disposal, it is essential to protect the most vulnerable fence-line communities who face a greater and disproportionate pollution burden relative to the general population.

7. PFAS not measured: uncertainties around estimates of total PFAS concentrations

Questions remain concerning the number and mass of PFAS that could not be identified or measured with methods available at the time of each study. Comprehensive monitoring for total PFAS, mobile perfluoroalkyl compounds and other degradation byproducts is essential in order to obtain a complete and reliable estimate of PFAS in a disposal pathway such as landfill leachate (Hamid et al., 2018). Analytical capabilities are constantly improving, detecting a larger spectrum of PFAS at ever lower concentrations. Still, current detection methodologies are far behind the wide range of PFAS chemistries in commerce. Approaches such as the total oxidizable precursor assay have been proposed in order to assess the PFAS content in environmental samples that could not be measured with existing methods for individual PFAS analytes (Wang et al., 2020; Zhang et al., 2019).

We present two illustrations that show how methodological limitations may underestimate the total PFAS passing through a disposal pathway. In one example, we note that there is a wide range of estimates of the sum of PFAS in landfill leachate (Table 1). A study in China estimated that, across China, 3110 kg of perfluoroalkyl acid compounds leach into groundwater annually (Yan et al., 2015). A 2017 study in the U.S. estimated that the total release of PFAS in landfill leachate sent to wastewater treatment plants in the U.S. is around 600 kg/year (Lang et al., 2017). A 2010 study in Germany reported that approximately 90 kg per year for 43 PFAS leach from landfills (Busch et al., 2010), and a 2017 study in Australia reported a national estimate of 31 kg per year for perfluorohexanoate, the PFAS that was predominantly detected in landfill leachate in that study (Gallen et al., 2017). While these estimates may reflect real differences in PFAS content in landfills in different countries as well as potential differences in use and disposal of PFAS-containing products in those countries, those distinct estimates could also be related to the specific subsets of PFAS monitored.

In a second example, laboratory studies of PFAS incineration under controlled conditions have reported the complete or nearly complete destruction of PFAS e as monitored by the absence of specific PFAS such as PFOA (Aleksandrov et al., 2019). On the other hand, two studies of incineration described in section 5 reported appreciable levels of PFAS (Loganathan et al., 2007; Solo-Gabriele et al., 2020). Loganathan et al. (2007) noted that residual PFAS remained in the ash, and Solo-Gabriele et al. (2020) reported that PFAS were detectable in leachate from landfills accepting incinerator ash. While Solo-Gabriele et al. (2020) did not measure PFAS levels in the ash itself, the presence of PFAS in leachate from these landfills suggests that some PFAS may have remained following incineration.

In the disposal pathways, PFAS are being partitioned between different media as well as transformed to a variety of degradants, making the total flow of PFAS hard to monitor and quantify. Based on our review of studies in the peer-reviewed literature, we believe that testing for a limited number of PFAS compounds likely underestimated the total volume of PFAS and breakdown products that pass through the disposal pathways and eventually transfer into the environment, food and sources of drinking water.

8. Conclusions and recommendations

The persistence and mobility of PFAS means that all existing disposal options for PFAS-based materials have drawbacks. In actual practice in the United States and likely across the world, each disposal

pathway can pass either PFAS or PFAS breakdown products to other waste streams or to the environment as air, water or soil pollution, unless special treatment is installed to stop such releases (Fig. 3). Currently, direct costs and liability considerations drive disposal choices for PFAS-containing wastes. We hope that, with a better scientific understanding of the fate of PFAS in different disposal pathways, the full PFAS cycle as well as health and economic costs borne by the fence-line communities will be considered in order to identify disposal options with the lowest impact on human health and the environmental.

We posit that the solution to PFAS contamination does not reside in solving the disposal problem alone. If PFAS continue to be manufactured and used in products, treatment and removal of wastes will be necessary. In addition to PFAS releases from municipal solid waste disposal processes, there are ongoing direct PFAS discharges from industrial facilities that manufacture or use PFAS-containing products, and these releases must be addressed as well. For drinking water, communities will need to incorporate considerations of PFAS disposal pathways in water treatment planning to minimize and eliminate the return of PFAS back into the environment. A systemic approach to limiting PFAS discharges and managing all PFAS as a class (Kwiatkowski et al., 2020) is essential and will be a necessary part of long-term mitigation of the PFAS pollution globally.

We close this discussion paper with six recommendations for addressing the PFAS waste and disposal problem:

Limiting industrial discharges. Reducing the total amount of PFAS produced and discharged and limiting the use of PFAS-based materials to essential applications is the most efficient strategy to deal with PFAS disposal and contamination issues.

Protecting the health of fence-line communities. Waste disposal sites and toxic chemicals emitted from these sites disproportionately affect people of color and low-income communities. Strong, pro-active policies, such as extensive monitoring, data transparency and waste stream elimination, must be developed to protect the health of residents in areas adjacent to landfills and incinerators from toxic contaminants.

Capturing and treating landfill leachate directly on site. The practice of transferring landfill leachate to wastewater treatment facilities cycles PFAS from one location to another and does not solve the contamination problem. Capturing, treating, and retaining PFAS at the landfill site stops the problem from moving further afield. The same approach should be used for all other liquid sources of PFAS pollution.

Monitoring of PFAS in all media at and near disposal sites. Monitoring should include both precursor compounds and various degradation byproducts and address air and water emissions as well as PFAS in soil. Monitoring should also address the fate and transport of PFAS in contexts where PFAS has not yet been studied, such as deep well injection, and for in situ stabilization approaches that are currently under investigation.

Research on PFAS incineration. The fate of PFAS under the current operating conditions of commercial incinerators is largely unknown. This data gap must be addressed, and studies should be done on combustion of PFAS in various types of incinerator facilities, from municipal solid waste to biosolid incineration and hazardous waste incineration. Research is essential on the optimal temperatures and incinerator residence times for complete PFAS destruction in commercially run incinerators.

Research on advanced remediation technologies. PFAS in various hard-to-treat media such as groundwater, contaminated soils, and sewage sludge pose challenges that are not effectively addressed with current disposal options. It is our hope that future research will bring new solutions for cleaning up these reservoirs of PFAS contamination.

Credit author statement

Tasha Stoiber: Conceptualization, Formal analysis, Resources, Writing - original draft, writing -review and editing, Olga V. Naidenko: Conceptualization, Formal analysis, Resources, Writing original draft, writing -review and editing, supervision, Sydney Evans: Conceptualization, Formal analysis, Resources, Writing original draft, writing -review and editing, Visualization

Declaration of competing interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper. Acknowledgements

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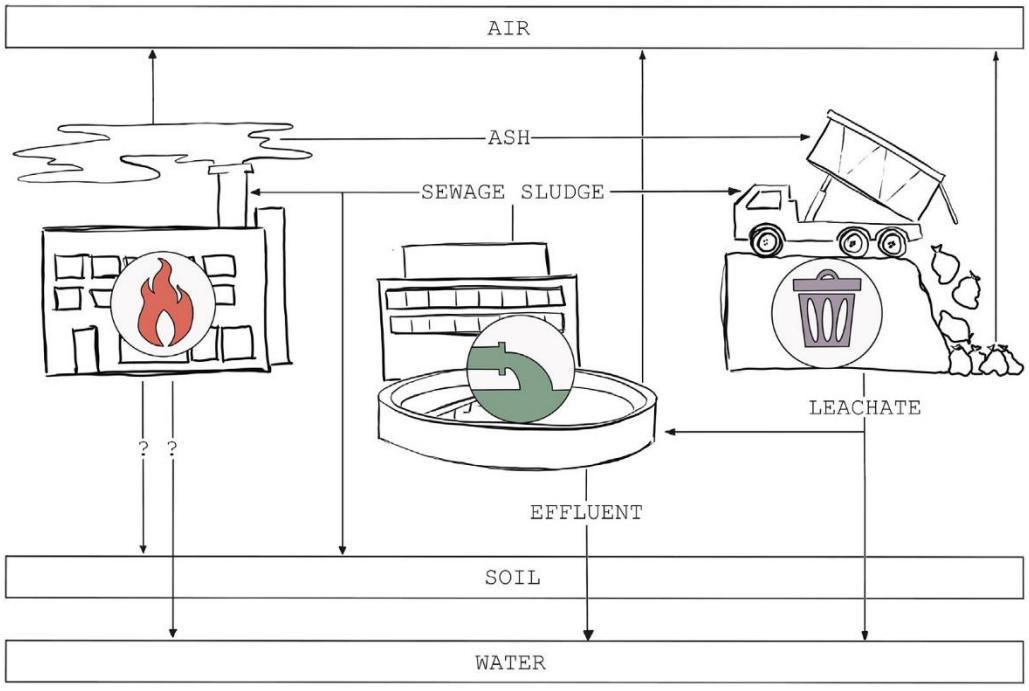

Fig. 3. PFAS emissions into air, water, and soil from different disposal pathways.

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Zhu, H., Kannan, K., 2020. A pilot study of per- and polyfluoroalkyl substances in automotive lubricant oils from the United States. Environ. Technol. Innov. 19, 100943. https://doi.org/10.1016/j.eti.2020.100943.

Comments submitted to the National Environmental Justice Advisory Council (NEJAC)

Sent via email to Nejac@epa.gov on August 27, 2020

These written comments are submitted on behalf of the Environmental Working Group (EWG), a nonprofit research and advocacy organization based in Washington, D.C. These comments are provided in response to a request made by NEJAC following the discussion of EWG public comments presented during the August 19, 2020, NEJAC public meeting.

EWG applauds the NEJAC leadership for advocating for environmental justice for communities, and for your 2019 recommendations to the EPA to strengthen the Agency's PFAS Action Plan.[2] The extent of American communities' confirmed contamination with the highly toxic fluorinated compounds known as PFAS continues to grow at an alarming rate. EWG's analysis documented that as of July 2020, 2,230 locations in 49 states are known to have PFAS contamination.[2] As alarming as this information is, the full extent of PFAS contamination has yet to be revealed, and tests continue to identify new locations where PFAS pollution affects water, soil, air – and the people who live in those locations.

With this letter, we would like to bring to NEJAC's attention a recent peer-reviewed article on the "Scientific Basis for Managing PFAS as a Chemical Class," published in the journal Environmental Science & Technology Letters.[3] In this study, a group of U.S.
and international scientists emphasized that the current approach to regulating and managing PFAS has failed to protect public health. The study recommended a new approach that classifies all PFAS as concerning and provided a scientific rationale for businesses and governments to eliminate non-essential uses of PFAS-based materials and develop new products that avoid PFAS altogether.

PFAS chemicals affect human health at all stages of life but pose unique risks to infants and children. A peer-reviewed study co-authored by scientists at EWG and Indiana University found that 26 different PFAS compounds for which toxicological data could be identified in peer-reviewed scientific literature all displayed at least one characteristic

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of known human carcinogens.[4] The study concluded there is strong evidence that multiple PFAS induce oxidative stress, suppress the immune system, and modulate receptor-mediated effects, as well as

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[2] *NEJAC Letter Regarding the PFAS Action Plan. August 14, 2019. https://www.epa.gov/environmentaljustice/nejac-letter-regarding-pfas-action-plan* [2] *Environmental Working Group. PFAS Contamination in the U.S. (July 20, 2020). https://www.ewg.org/interactive-maps/pfas_contamination/map/*

[3] *Kwiatkowski C.F., Andrews D.Q., Birnbaum L.S., Bruton T.A., DeWitt J.C., Knappe D.R.U., Maffini M.V., Miller M.F., Pelch K.E., Reade A., Soehl A., Trier X., Venier M., Wagner C.C., Wang Z., Blum A. Environmental Science & Technology Letters 2020 7 (8), 532-543. https://doi.org/10.1021/acs.estlett.0c00255*

[4] *Temkin A.M., Hocevar B.A., Andrews D.Q., Naidenko O.V., Kamendulis L.M. Application of the Key Characteristics of Carcinogens to Per and Polyfluoroalkyl Substances. Int J Environ Res Public Health. 2020;17(5):1668. https://doi.org/10.3390/ijerph17051668*

suggestive evidence indicating that some PFAS can induce epigenetic alterations and influence cell proliferation. Jointly, these chemical and toxicological features of the PFAS family of chemicals make them very harmful to human health.

With the phaseout of the 8-carbon fluorinated compounds PFOA and PFOS from use in the U.S., manufacturers are switching to shorter-chain PFAS alternatives, and these compounds are increasingly found in the environment – and in drinking water.[5] The toxicity risks of short-chain PFAS remain a concern. Further, short-chain PFAS have higher aqueous solubility and mobility and are harder to remove from water, compared with longer-chain PFAS.[6]

PFAS contamination in the U.S. has become a public health and environmental justice crisis that must be urgently addressed. In EWG's assessment, in order to address the PFAS contamination crisis, the EPA should shut off ongoing sources of PFAS contamination, fully investigate the scope of existing PFAS contamination, promptly notify communities harmed by PFAS contamination, and dramatically accelerate cleanup efforts.

EWG requests NEJAC to provide the following recommendations to the EPA:

- Designate PFOA and PFOS as hazardous substances under CERCLA, and consider this designation for additional PFAS substances, as proposed by H.R. 535
- Regulate PFOA and PFOS as hazardous air pollutants under the Clean Air Act, and consider regulating additional PFAS substances, as proposed by H.R. 535
- Create water quality criteria, effluent limitation guidelines, and pretreatment standards for PFAS chemicals, as proposed by H.R. 535
- Revise and strengthen EPA's interim guidance on groundwater cleanup of PFOA and PFOS
- Finalize guidance for disposal of PFAS waste that ensures the protection of vulnerable communities from additional contamination
- Create regulations implementing section 330 of the FY 2020 National Defense Authorization Act, which required that military PFAS waste be properly stored and that incineration of military PFAS waste complies with all Clean Air Act requirements, completely breaks down the PFAS, and takes place at facilities permitted under subtitle C of RCRA, as proposed by the House-passed version of the FY 2021 NDAA
- Create drinking water standards for PFOA and PFOS, and consider regulating additional PFAS under the Safe Drinking Water Act, as proposed by H.R. 535
- Update the sludge rule under the Clean Water Act to require mandatory tests for PFAS chemicals in wastewater treatment sludge

[5] *Stoiber, T., Evans, S., Temkin, A.M., Andrews, D.Q., Naidenko, O.V., 2020. PFAS in Drinking Water: an Emergent Water Quality Threat. Water Solutions 1:40.*

[6] *Li F, Duan J, Tian S, Ji H, Zhu Y, Wei Z, Zhao D. (2019). Short-chain Per- and Polyfluoroalkyl Substances in Aquatic Systems: Occurrence, Impacts and Treatment. Chemical Engineering Journal. 380. 122506. https://doi.org/10.1016/j.cej.2019.122506*

- EPA should use its data collection authorities under sections 4 and 8 of the Toxic Substances Control Act to generate more data on PFAS chemicals. In particular,
  EPA should quickly finalize the section 8 data call-in required by the FY 2020
  NDAA
- Issue a moratorium on new PFAS chemicals under TSCA, as proposed by H.R. 535
- EPA should review its existing 5(e) orders for PFAS chemicals under TSCA to ensure they comply with the new TSCA requirements and protect vulnerable populations
- EPA should ensure that PFAS chemicals are exempt from *de minimis* reporting exemptions under the Toxics Release Inventory, as proposed by the House-passed FY 2021 NDAA. EPA should also add additional PFAS to the Toxics Release Inventory.
- Develop new analytical test methods for PFAS to expand the number that can be tested for in drinking water, as well as methods that can measure total PFAS or total organic fluorine. EPA should also develop methods to measure PFAS in other environmental media, like air and soil.
- EPA should establish final benchmark values for GenX and PFBS, and quickly produce draft toxicity values for the five PFAS currently undergoing risk assessment: PFDA, PFNA, PFHxA, PFHxS, and PFBA.

Thank you for this opportunity to provide written comments,

With best regards

Olga Naidenko,

V.P. of Science Investigations, Environmental Working Group

TULANE LAW SCHOOL

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June 17, 2020

By e-mail to: DEQ.PUBLICNOTICES@LA.GOV
Louisiana Department of Environmental Quality
Public Participation Group
P.O. Box 4313, Baton Rouge, LA 70821

EPA Region 6 Main Office
1201 Elm Street, Suite 500
Dallas, Texas 75270

Re: Comments on 2020 Louisiana Annual Monitoring Network Plan

Dear LDEQ Public Participation Group,

On behalf of Patricia Charles, Raphael Sias, Ronald Carrier, Larry Allison, Karl Prater, McKeever Edwards, Carolyn Peters, Stafford Frank, and Peggy Anthony ("Mossville community members"), we respectfully submit these comments concerning Louisiana's proposed 2020 Annual Air Monitor Network Plan ("Plan"). These comments raise major concerns about air pollution and the lack of air monitoring in Mossville, Louisiana, as well as concerns over the Louisiana Department of Environmental Quality's ("LDEQ's") longstanding failure to address these issues. As detailed below, multiple data sources indicate that Mossville and neighboring communities are burdened with hotspots of air pollution that are among the most severe in Louisiana. Yet LDEQ has sought to systematically eliminate air monitors in this area, while concurrently permitting massive increases in industrial emissions. These actions have resulted in disproportionate harm to Mossville – a culturally rich, rural community, with deep roots in African American history (Fig. 1)[7]. The 2020 Plan provides an opportunity to begin to address the disproportionate risk that the remaining

[7] *Mossville History Project.* https://www.lib.lsu.edu/oralhistory/collections/mossville

Mossville residents experience from air pollution, and LDEQ should revise this plan accordingly.

Mossville community members are black Americans who have been severely overburdened with industrial air pollution. Residents of Mossville fear for their health, wellbeing, loss of community, and property devaluation given the exceptionally high levels of harmful air pollutants emitted from the 14 surrounding industrial facilities. Mossville represents the most heavily industrialized area of Calcasieu Parish, which has **higher emissions of nearly**

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every criteria pollutant than any other parish in Louisiana (with the exception of PM_{10} and lead).[2] This disproportionate impact of industrial permitting is reflected in the fact that Mossville is a hotspot of extreme air toxicity, representing the top 1% most toxic air in Louisiana, according to Environmental Protection Agency (EPA) data (Fig. 2).[3] Mossville community members are alarmed by the recent and ongoing industrial buildouts like those at Sasol's Lake Charles Chemical Complex, which was recently ranked as the #2 "super polluter" in the nation.[4] These members are also concerned by the track record of serious permit violations at the industrial facilities near this historic black community. According to EPA data, two facilities located adjacent to Mossville (i.e. Phillips 66 and Georgia Gulf) have had "high priority violations" of their air permits within the last 3 years, resulting in multiple enforcement actions at each facility.[5]

On behalf of the Mossville community members, we respectfully request that the LDEQ amend the air quality monitoring plan to include reliable air monitors for $PM_{2.5}$, NO_x, VOCs, and ozone in Mossville, Louisiana. This information is essential to the health, wellbeing, and economic viability of the Mossville community.

Figure 1. Satellite imagery from Google Earth Pro, illustrating the industrialization and destruction of Mossville from 2013 to 2018. Yellow lines indicate the approximate boundaries of historic Mossville.

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[2] Based on LDEQ 2018 reported emissions, accessed via ERIC Emissions by Parish Report. https://business.deq.louisiana.gov/Eric/EricReports/ParishReportSelector?.

Calcasieu Parish 2018 emissions include: $PM_{2.5}$ (2,769 tons), NOx (17,173 tons), total VOCs (6,224 tons), CO (9,980 tons), and SO_2 (29,649 tons). Calcasieu Parish's 2018 PM_{10} emissions are the second highest in the state. *Id.*

[3] 2018 EPA RSEI microdata. https://www.epa.gov/rsei/rsei-geographic-microdata-rsei-gm

[4] Apr. 8, 2020, "Breath to the People, Sacred Air and Toxic Pollution," Environmental Integrity Project for the United Church of Christ, p. 7, available at: https://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchist/pages/24840/attachments/original/1582721312/FINAL_BreathToThePeople_2.26.2020.pdf?1582721312

[5] Data accessed from EPA's ECHO database on June 16, 2020. *See* https://echo.epa.gov/detailedfacility-report?fid=110002054482. *See also* https://echo.epa.gov/detailed-facilityreport?fid=110000539757#pane3110000539757.

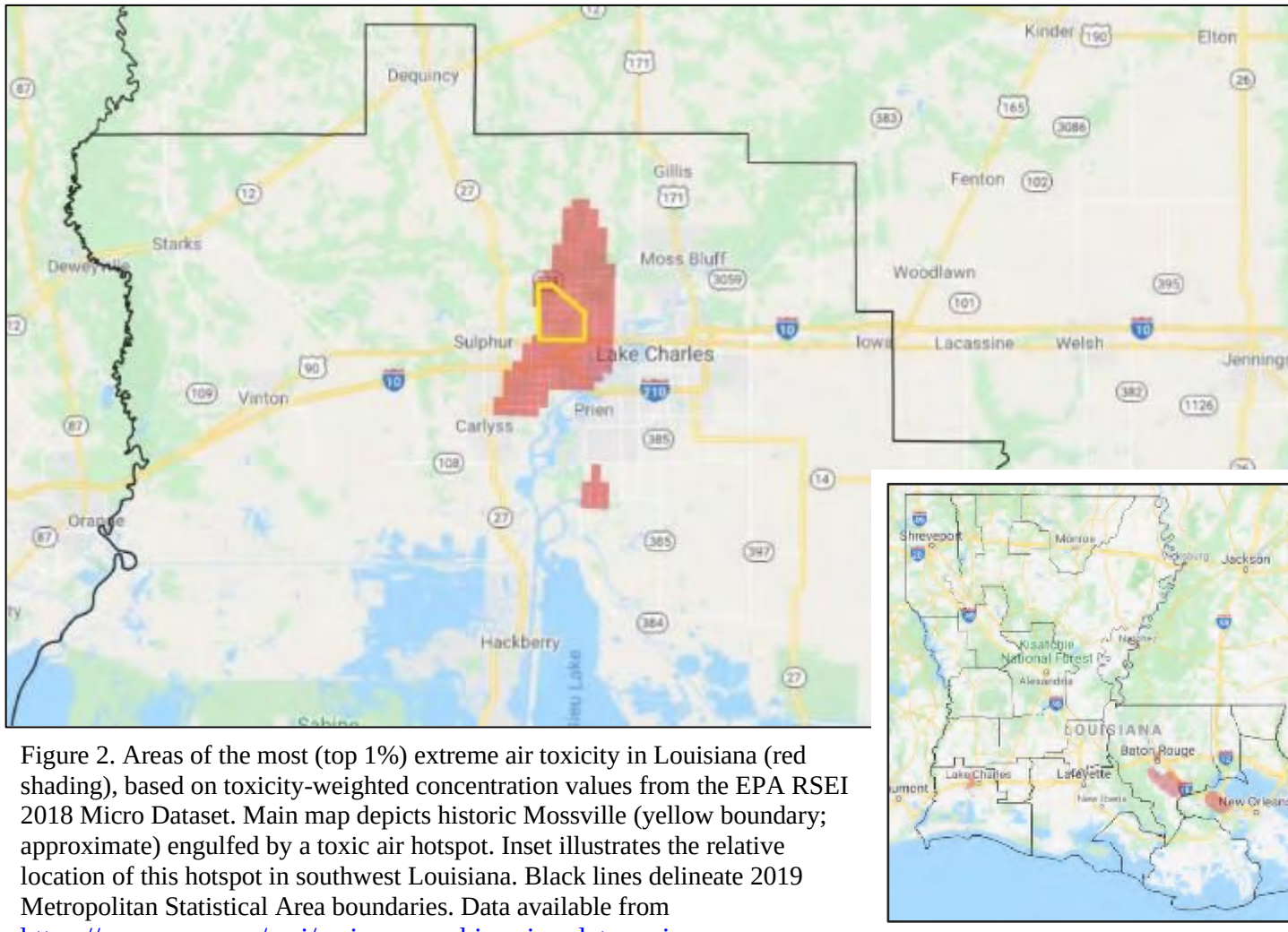

Figure 2. Areas of the most (top 1%) extreme air toxicity in Louisiana (red shading), based on toxicity-weighted concentration values from the EPA RSEI 2018 Micro Dataset. Main map depicts historic Mossville (yellow boundary; approximate) engulfed by a toxic air hotspot. Inset illustrates the relative location of this hotspot in southwest Louisiana. Black lines delineate 2019 Metropolitan Statistical Area boundaries. Data available from https://www.epa.gov/rsei/rsei-geographic-microdata-rsei-gm

Tulane Environmental Law Clinic

1.2 6329 Freret St., Ste. 130, New Orleans, LA 70118-6248 *tel* 504.865.5789 *fax* 504.862.8721 https://law.tulane.edu/clinics/environmental

I. BACKGROUND

Mossville, an unincorporated town in Calcasieu Parish, Louisiana, was founded by formerly enslaved African people in the 1790s.[6] The town is wedged between Westlake and Sulphur, about 6 miles northwest of Lake Charles. Despite its small size, Mossville has a rich cultural heritage and deep genealogical roots that represent an important contribution to black American history. Many members of the community are descendants of the emancipated settlers

of Mossville.[7] Over the course of the past 60 years, residents of Mossville have struggled, to the point of oppression, with air pollution, groundwater contamination, and the corresponding health impacts.[8] Community members watched their ancestral home be dismantled piece-by-piece, as petrochemical companies continued to build and expand along their fencelines (Fig. 1).[9]

The EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulation, and policies."[10] According to the EPA, fair treatment means that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies."[11] Based on EPA and satellite data, it is clear that Mossville disproportionately suffers the negative consequences of decades of permits granted to nearby petrochemical facilities by LDEQ (Figs. 1&2). Much of this historic community has been demolished, literally, to advance the economic interests of petrochemical companies, particularly Sasol (a foreign company). Yet poverty rates for Calcasieu Parish have not improved over the last two decades, while median household income in the parish has fallen relative to U.S. median household income (Fig. 3).[8]

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[6] https://www.nola.com/news/business/article_f478381c-ff36-57b3-adc2-2116c35982d9.html.
[7] https://www.lib.lsu.edu/oralhistory/collections/mossville
[8] https://www.cnn.com/2010/HEALTH/02/26/toxic.town.mossville.epa/index.html
[9] https://www.nola.com/news/business/article_f478381c-ff36-57b3-adc2-2116c35982d9.html
[10] https://www.epa.gov/environmentaljustice
[11] EPA, Plan EJ 2014 at 3, available at https://nepis.epa.gov/Exe/ZyPDF.cgi/P100DFCQ.PDF?Dockey=P100DFCQ.PDF; *see also* Basis for Decision for FG LA Complex, EDMS Doc. No. 11998452 (AI No. 198351), Part IX: Environmental Justice/Civil Rights Title VI Issues, at pdf p.
35 (in which LDEQ endorses this definition).

[8] *census.gov/data-tools/demo/saipe/#/?map_geoSelector=aa_c&s_state=22&s_county=22019*

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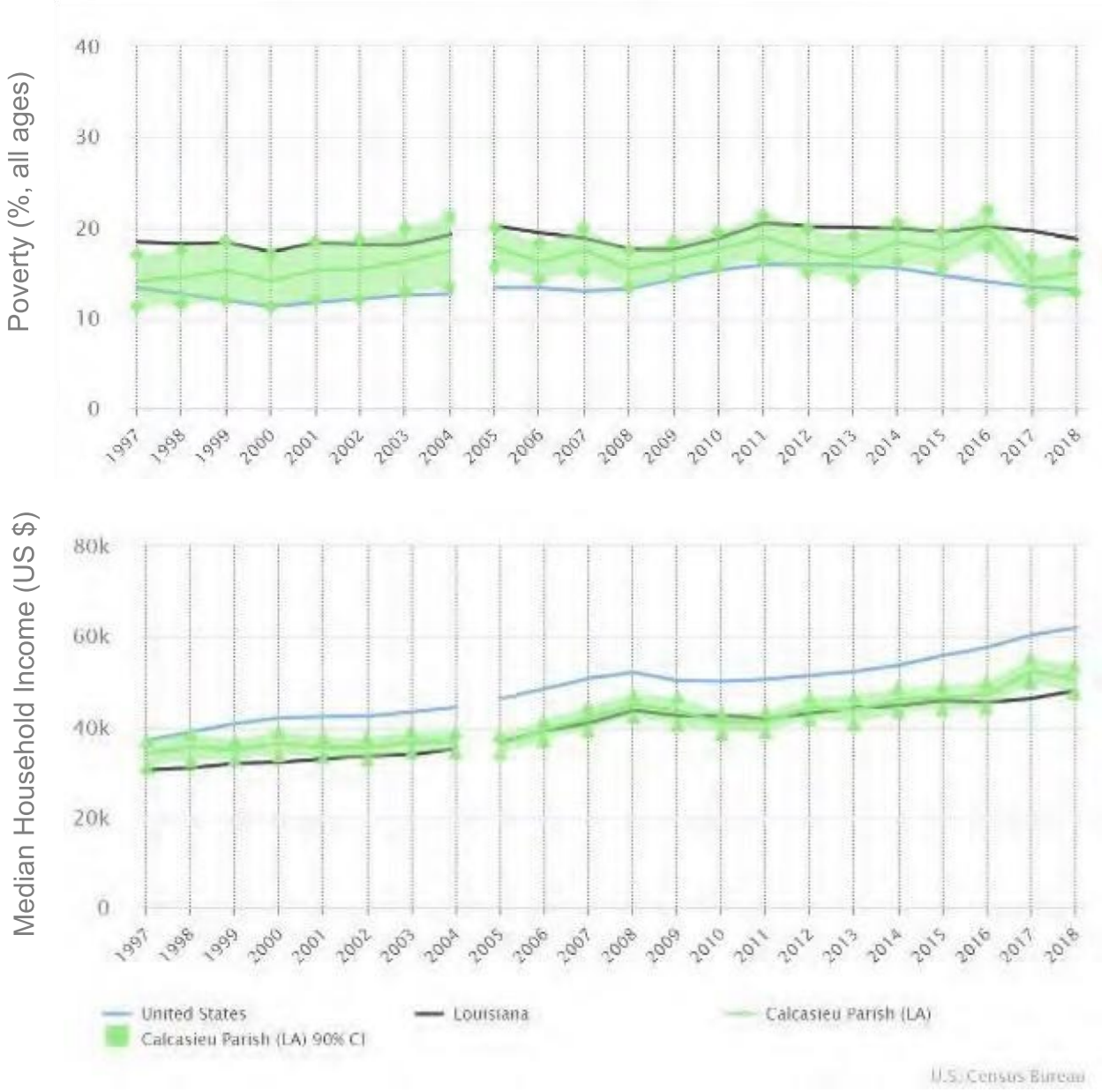

Figure 3. Economic indicators for Calcasieu Parish (green line, shading indicates 90% confidence interval), relative to Louisiana (black line), and the U.S. overall (blue line). Note that poverty rates (top panel) in Calcasieu Parish have not significantly improved overall during the last 5, 10, or 20 years. Median household income (bottom panel) has increased over the last 20 years, but has fallen relative to the U.S. overall. Data from: census.gov/datatools/demo/saipe/#/?map_geoSelector=aa_c&s_state=22&s_county=22019.

Ozone (O_3)

Calcasieu Parish has the highest emissions of ozone precursors[13] of any parish in Louisiana, with over 17,000 tons of nitrogen oxides (NO_x), more than 6,000 tons of volatile organic compounds (VOCs), and nearly 10,000 tons of carbon monoxide (CO) emitted in 2018, according to LDEQ data.[14] This environmental impact is clearly disproportionate; Calcasieu Parish represents only 2% of the land area of Louisiana,[9] yet it is overburdened with 10% or more of statewide emissions for each of these three pollutants.[10]

While Mossville has been overburdened by industrial pollution for decades, this disparity was recently exacerbated by a major expansion of Sasol's Lake Charles Chemical Complex. In May 2014, LDEQ issued air permits that allowed Sasol to massively increase emissions at this complex for its Cracker Project.[11] This included drastic increases in ozone precursors: 2,673 tpy of CO, 2,623 tpy of total VOCs, and 923 tpy of NO_x.[12] In addition to their direct health effects, these pollutants cause respiratory disease and other health problems by contributing to the formation of ground-level ozone.[13] Air modeling conducted by Sasol indicated that the Cracker Project would increase ambient ozone concentrations across a vast area, with impacts extending to Houston, TX.[20] Ozone concentrations at the Westlake monitor were expected to increase by 0.2 ppb (0.002 ppm) as a result of Sasol's Cracker Project, while ozone concentrations in nearby

[13] https://www.eea.europa.eu/themes/air/air-quality/resources/glossary/ozone-precursor [14] NO_x emissions (2018): Calcasieu Parish, 17,173 tons; Louisiana, 138,433 tons. Total VOC emissions (2018): Calcasieu Parish, 6,224 tons; Louisiana, 57,287 tons. CO emissions (2018): Calcasieu Parish, 9,980 tons; Louisiana, 97,553 tons. Data from LDEQ ERIC database. 2018 Emissions by Parish Report. Statewide totals calculated as the sum of all parishes. https://business.deq.louisiana.gov/Eric/EricReports/ParishReportSelector?

[9] *Land area: Calcasieu Parish, 1,064 mi^2; Louisiana, 43,204 mi^2. Data from the U.S. Census Bureau Quick Facts, accessed June 13, 2020.*
https://www.census.gov/quickfacts/fact/table/calcasieuparishlouisiana,LA/PST045219
[10] *Data from LDEQ ERIC database. 2018 Emissions by Parish Report. See footnote 12.*
[11] *LDEQ. Basis for Decision. Lake Charles Cracker Project, Part 70 Operating Permits. Page 26. EDMS # 9317311. May 23, 2014.*
[12] *Id. at page 3.*
[13] *See https://www.epa.gov/no2-pollution/basic-information-about-no2#Effects; see also https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics#formation and https://toxtown.nlm.nih.gov/chemicals-and-contaminants/volatile-organic-compounds-vocs and https://earthobservatory.nasa.gov/images/7033/carbon-monoxide-fires-and-air-pollution and https://www.eea.europa.eu/themes/air/air-quality/resources/glossary/ozone-precursor* [20] *LDEQ. Statement of Basis. Lake Charles Cracker Project, Proposed Part 70 Operating Permits. Page 26. EDMS # 9317309. May 23, 2014.*

(unspecified) areas would increase by 0.5 ppb (0.005 ppm).[14] Neither LDEQ nor Sasol has informed the Mossville community about the level of expected ozone increase in their town, despite extensive company outreach related to the Cracker Project and the company's expressed commitment to "be a good corporate citizen and communicate forthrightly with our neighbors."[15]

Before it was deactivated, the Westlake monitor measured ozone levels extremely close to the current NAAQS threshold (implemented in 2015) of 0.07 ppm[16]; the value for 2010-2012 at the Westlake monitor was 0.069 ppm. Thus, the projected 0.002 ppm ozone increase from Sasol's Cracker Plant warrants continued monitoring at this currently-inactive site. The potential for an ozone NAAQS violation is further evidenced by LDEQ reported "actual emissions" data, which indicates a **20-fold increase in VOC emissions** (34.1 tons versus 713.7 tons) and a **110fold increase in NO_x emissions** (4.1 tons versus 454.3 tons) within 1 km of the Westlake monitoring site (30.262347, -93.284906) from 2015 to 2019.[17]

Despite the clear potential for an ozone NAAQS violation at the Westlake monitor, LDEQ received EPA approval to discontinue this monitor in October 2014.[18] The LDEQ justified the removal of the Westlake ozone monitor by claiming that its readings were "consistently lower" than the Vinton and Carlyss monitors.[19] However, the monitoring data do not support this conclusion (Fig. 4). In fact, the highest ozone levels recorded by the Westlake monitor in 2013 and 2014 were above the highest values recorded by the Vinton monitor (Fig. 5).[20]

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[14] *Id.*

[15] *Sasol Property Purchase Program Handbook. Jul 18, 2013. (Exhibit A)*

[16] *The .07 ppm limit is calculated as the annual fourth-highest daily maximum 8-hour concentration, averaged over 3 years.*

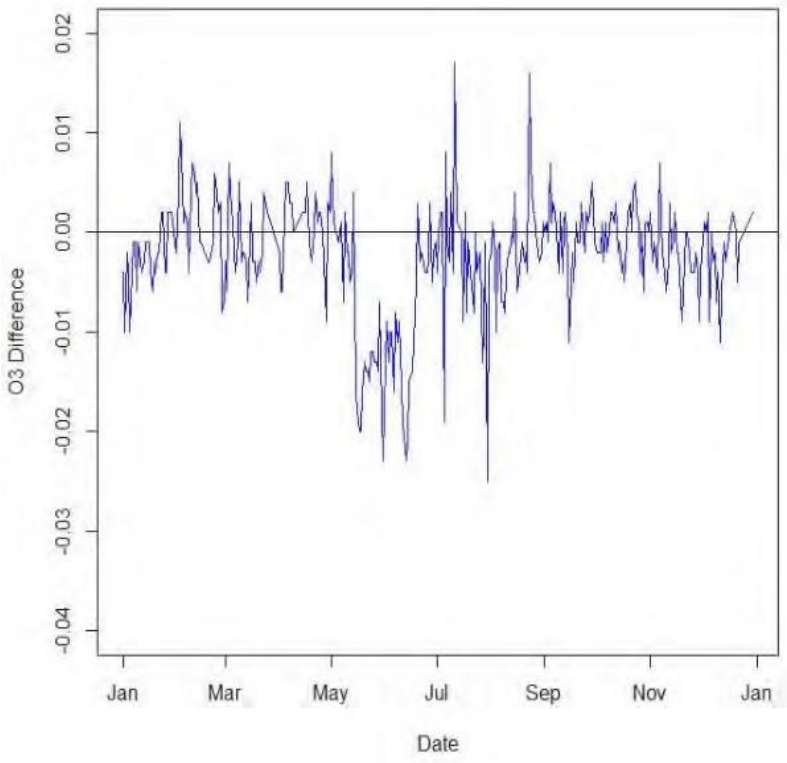
[17] *Data accessed May 2020 from https://business.deq.louisiana.gov/Eric/EricReports using a 1,000 m radius and coordinates: 30.262347, -93.284906.*

[18] *2014 Louisiana Annual Network Assessment, LDEQ, 4, available at https://deq.louisiana.gov/assets/docs/Air/Ambient_Air_Data/2014/FINAL_2014_LANA_with_E PA_response_letter.pdf.*

[19] *Id. at 4 of 20.*

[20] *See LDEQ Ambient Air Monitoring Data. https://www.deq.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=ambient-airmonitoring-data-reports Accessed April 2020.*

Figure 4. Difference in ambient ozone concentrations between the Westlake and Vinton monitor locations. Positive values indicate higher Tulane Environmental Law Clinic



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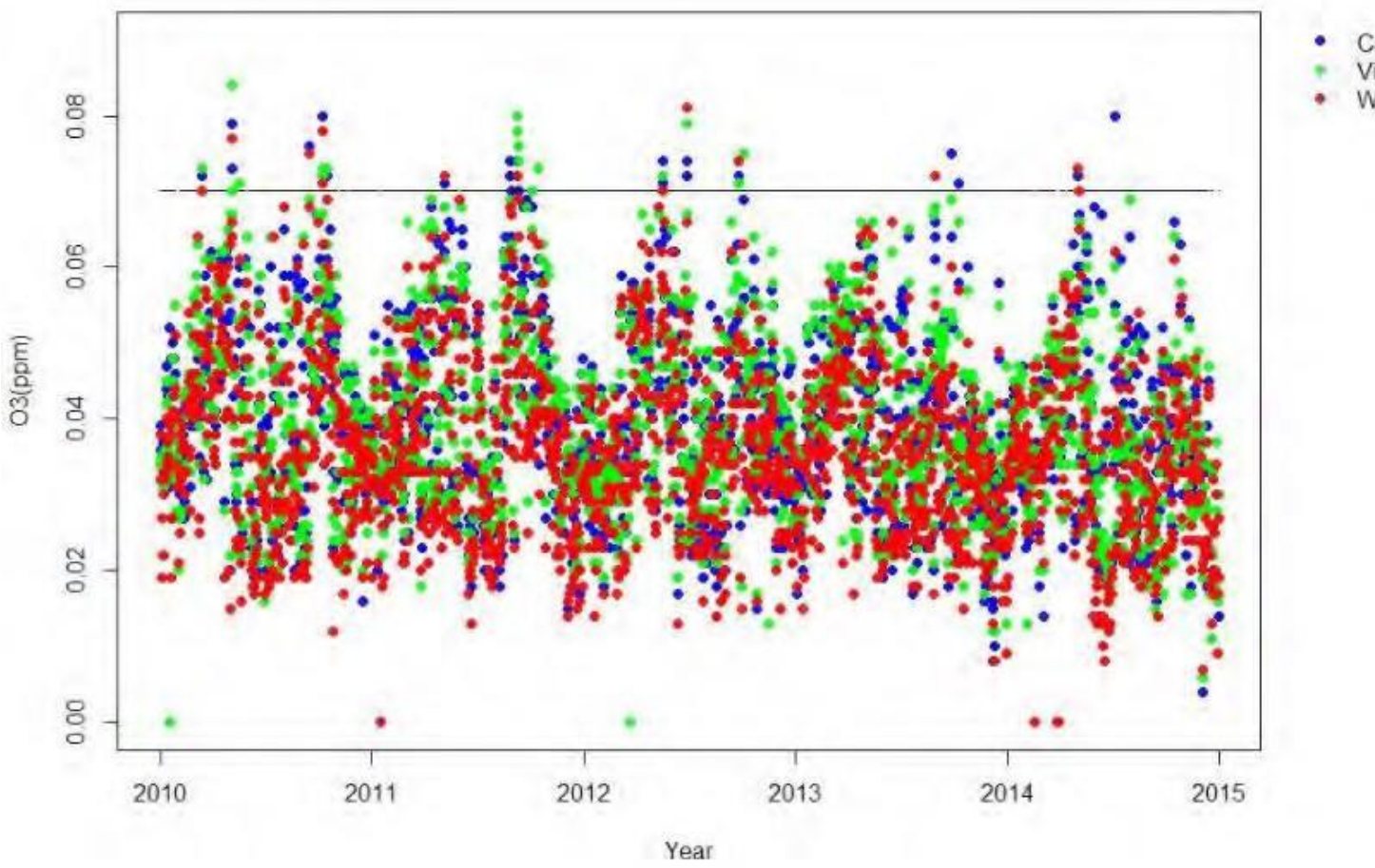

Figure 5. Ozone concentrations (8-hour averages) from LDEQ air monitors in the Lake Charles Metropolitan Statistical Area from 2010 through 2014.

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Fine Particulate Matter ($PM_{2.5}$)

Calcasieu Parish has the highest $PM_{2.5}$ emissions in Louisiana by a wide margin, with 53% higher emissions than the next highest parish (East Baton Rouge Parish).[28] Calcasieu Parish

is clearly overburdened with $PM_{2.5}$, representing 2% of the land area in Louisiana, but 15% of the state's $PM_{2.5}$ emissions.[29] Exposure to $PM_{2.5}$ is a well-established cause of respiratory disease, cardiovascular disease, and increased susceptibility to respiratory viruses.[21] Yet, LDEQ has systemically sought to eliminate most of the $PM_{2.5}$ monitoring in the Lake Charles Metropolitan Statistical Area (MSA), while concurrently permitting drastic increases in $PM_{2.5}$ emissions.

In 2014, LDEQ deactivated the FRM $PM_{2.5}$ monitor at McNeese State University,[22] a public institution that predominantly serves Louisiana residents.[23] This university is substantially closer to major sources of industrial $PM_{2.5}$ emissions compared to the Vinton monitoring site, which represents the only other FRM $PM_{2.5}$ monitor in the Parish. Yet, paradoxically, in its approval to deactivate the McNeese monitor, the EPA concluded that it "supports the continued operation of the $PM_{2.5}$ FRM at the Vinton site due to the proximity of industrial sources in the area." The LDEQ reaffirmed this purpose in its 2016 Monitoring Plan, stating that the agency would continue operating the Vinton $PM_{2.5}$ monitor "due to the proximity of industry in the area to provide oversight of ambient air conditions in this industrial area."[24] However, these statements ignore the fact that the Vinton $PM_{2.5}$ monitor is located nowhere near the area's major industrial sources of $PM_{2.5}$ emissions (i.e. about 15 km away; Fig. 6). In fact, the monitor is

[28] 2018 $PM_{2.5}$ emissions: Calcasieu Parish, 2,769 tons; East Baton Rouge Parish, 1,814 tons; Louisiana, 18,442 tons. Data from LDEQ ERIC database. 2018 Emissions by Parish Report. https://business.deq.louisiana.gov/Eric/EricReports/ParishReportSelector?

[29] *Id.* Land area: Calcasieu Parish, 1,064 mi^2; Louisiana, 43,204 mi^2. Data from the U.S. Census Bureau Quick Facts, accessed June 13, 2020.

[21] *See Ciencewicki, Jonathan, and Ilona Jaspers. "Air Pollution and Respiratory Viral Infection." Inhalation Toxicology 19, no. 14 (November 2007): 1135–46; and references therein. See also Wu, X, R. C. Nethery, B.M. Sabath, D. Braun, and F. Dominici. "Exposure to Air Pollution and COVID-19 Mortality in the United States. MedRxiv 2020.04.05.20054502; Doi: Https://Doi.Org/10.1101/2020.04.05.20054502." Harvard University, April 24, 2020; and references therein.*

[22] *2014 Louisiana Annual Network Assessment, LDEQ, 4, available at https://deq.louisiana.gov/assets/docs/Air/Ambient_Air_Data/2014/FINAL_2014_LANA_with_EPA_response_letter.pdf*

[23] *https://www.collegefactual.com/colleges/mcneese-state-university/student-life/diversity/*

[24] *2016 Louisiana Annual Network Assessment, LDEQ, 6 of 19, available at https://www.epa.gov/sites/production/files/2017-09/documents/laplan2016.pdf*

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https://www.census.gov/quickfacts/fact/table/calcasieuparishlouisiana,LA/PST045219 located so far west that it provides more relevant information for Forest Hills, TX than for Mossville or Lake Charles, LA.[34] Thus, it is not surprising that ambient $PM_{2.5}$ concentrations at the Vinton site are among the lowest in the Lake Charles MSA, based on modeled satellite data (Fig. 7).[35] In contrast to Vinton, the McNeese site was relatively close to major industrial sources of $PM_{2.5}$ (i.e., ~5 km; Fig. 6) and was located at the edge of a $PM_{2.5}$ hotspot (Fig. 7). Further, in the three years prior to its deactivation, annual mean $PM_{2.5}$ concentrations from the McNeese monitor were consistently higher than those from the Vinton monitor (Table 1).[36] Not only did the McNeese site provide a better opportunity for industry oversight, it was relevant to a far larger population; based on 2010 Census data, the population density around the McNeese site was nearly 20-fold higher than that around the Vinton site.[25]

In July 2014, less than two months after permitting a **606 tons per year** (tpy) increase in $PM_{2.5}$ emissions for Sasol's Lake Charles Chemical Complex,[26] LDEQ requested EPA approval to discontinue the Westlake $PM_{2.5}$ monitor, located at the complex's fenceline.[27] The LDEQ claimed that the sole remaining $PM_{2.5}$ monitor in the Lake Charles MSA, located ~15 km west (far closer to Texas than to Sasol), would provide "sufficient PM2.5 monitoring coverage in the region."[28] The data from the Westlake monitor itself refute this claim; the following year (2015), annual mean $PM_{2.5}$ increased 19% at the Westlake monitor (compared to 2014), but only 6% at

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[34] In other words, the Vinton monitoring site is located only 16 km from Forest Hills, TX, but 27 km from Mossville and 35 km from Lake Charles, LA.

[35] Modeled satellite data from Van Donkelaar et al., North American Regional Estimates. Available at http://fizz.phys.dal.ca/~atmos/martin/?page_id=140.

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[25] *Based on 2010 Census Data for the 3-mile buffer around each point location, accessed via EJScreen. McNeese (30.176386, -93.214058): 2,110 people per mi^2. Vinton (30.227567, 93.579778): 109 people per mi^2.*

[26] *The 606 tpy increase includes 364 tpy for the Cracker Project and 242 tpy for the failed Gasto-Liquids Project. See: LDEQ. Statement of Basis. Lake Charles Cracker Project. Page 25. EDMS # 9317309. May 23, 2014. See also: LDEQ. Statement of Basis. Gas to Liquids Project. 2 of 32. EDMS 9317335. May 23, 2014.*

[27] *2014 Louisiana Annual Network Assessment, LDEQ, 4 of 20, available at https://deq.louisiana.gov/assets/docs/Air/Ambient_Air_Data/2014/FINAL_2014_LANA_with_EPA_response_letter.pdf*

[28] *2014 Louisiana Annual Network Assessment, LDEQ, 4 of 20, available at https://deq.louisiana.gov/assets/docs/Air/Ambient_Air_Data/2014/FINAL_2014_LANA_with_E PA_response_letter.pdf*

[36] McNeese and Vinton $PM_{2.5}$ data from LDEQ Ambient Air Monitoring Data, available at https://deq.louisiana.gov/page/ambient-air-monitoring-data-reports. Westlake $PM_{2.5}$ data obtained from LDEQ by Public Records Request in April 2020 (Exhibit B).

the Vinton monitor (Table 1).[29] In fact, annual mean $PM_{2.5}$ concentrations have increased every year at the Westlake site since LDEQ requested its deactivation in 2014 and have been consistently higher than those values for Vinton (Table 1).[30] Mossville community members sincerely commend EPA for recognizing the critical need for $PM_{2.5}$ data from the Westlake site and denying LDEQ's ill-conceived request to decommission this monitor.[31]

One of the more alarming aspects of the 2020 Plan is that, in it, LDEQ claims that the Westlake $PM_{2.5}$ monitor data are not comparable to NAAQS, based on a 2013 letter from EPA.[32] However, the cited letter does not appear to support this statement and does not appear to reflect EPA approval of exclusion of the Westlake $PM_{2.5}$ monitor data.[33] And we are unaware of any legitimate justification for excluding the Westlake $PM_{2.5}$ data from NAAQS comparison. In fact, the LDEQ relied heavily on the Westlake $PM_{2.5}$ monitoring data to determine NAAQS compliance in permitting Sasol's 606 tpy $PM_{2.5}$ increase described above, claiming that "due to the proximity of LDEQ's Westlake monitor to Sasol, LDEQ determined that nearby industrial emissions of $PM_{2.5}$, SO_2, and NO_x have been accounted for in the observed background concentrations, thus precluding the need to model an offsite inventory to characterize such impacts."[34] This claim is physically impossible; information obtained from a single point location (i.e. the Westlake monitor) cannot account for the combined effects of more than a dozen major industrial facilities on multiple communities spread across a relatively broad geographic area (and located in opposite directions from the monitor). It is critical that the question of NAAQS comparability be resolved, because the Westlake monitoring data indicate that ambient $PM_{2.5}$ concentrations have consistently increased since 2014 (Table 1), concurrent with the massive, ongoing expansion of industrial activity near the monitoring site.

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[29] Vinton: 6.9 µg/m³ in 2014 and 7.3 µg/m³ in 2015. Westlake: 8.9 µg/m³ in 2014 and 10.6 µg/m³ in 2015. Vinton and McNeese data are available at https://deq.louisiana.gov/page/ambient-air-monitoring-data-reports. See Exhibit B for Westlake PM2.5 data.

[30] Id.

[31] 2014 Louisiana Annual Network Assessment, LDEQ, 4 of 20, available at https://deq.louisiana.gov/assets/docs/Air/Ambient_Air_Data/2014/FINAL_2014_LANA_with_EPA_response_letter.pdf

[32] 2020 Louisiana Annual Network Assessment, LDEQ, 16 of 17. EDMS #12170694.

[33] See Exhibit C, in globo.

[34] LDEQ. Statement of Basis. Lake Charles Cracker Project. Activity No. PER20130017 through PER20130025. Page 25. EDMS # 9317309. May 23, 2014.

Table 1. Annual Mean $PM_{2.5}$ Concentrations at LDEQ Monitoring Sites in the Lake Charles MSA

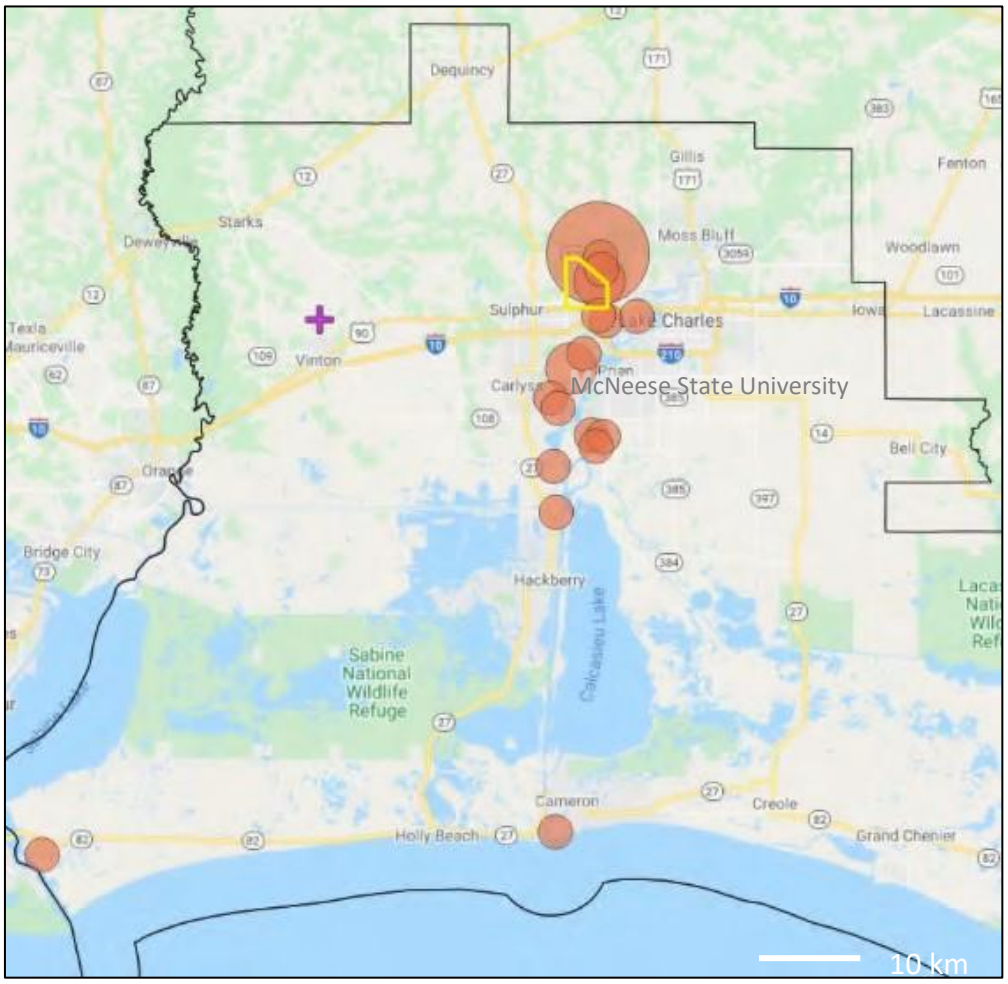
Year	Vinton	McNeese	Westlake
2012	8.0	8.3	9.2
2013	7.4	8.0	9.9
2014	6.9	7.4	8.9
2015	7.3	NA	10.6
2016	7.6	NA	10.9
2017	7.7	NA	11.1
2018	8.7	NA	11.3

Carbon Monoxide (CO)

In contrast to other NAAQS criteria pollutants, there is no monitoring for carbon monoxide (CO) anywhere in or near the Lake Charles MSA. In fact, the only CO monitors in the state are located over 100 miles away, in Baton Rouge and New Orleans.[35] This lack of CO

[35] *Louisiana Ambient Air Monitoring Sites. Updated May 2017. Accessed June 13, 2020. https://www.deq.louisiana.gov/assets/docs/Air/LouisianaAmbientAirMonitoringSites.pdf* [48] *CO emissions (2018): Calcasieu Parish, 9,980 tons; Louisiana, 97,553 tons. Data from LDEQ ERIC database. 2018 Emissions by Parish Report.*

itoring in the Lake Charles MSA is concerning, given that Calcasieu Parish has the most industrial CO emissions of any parish in Louisiana.[48]



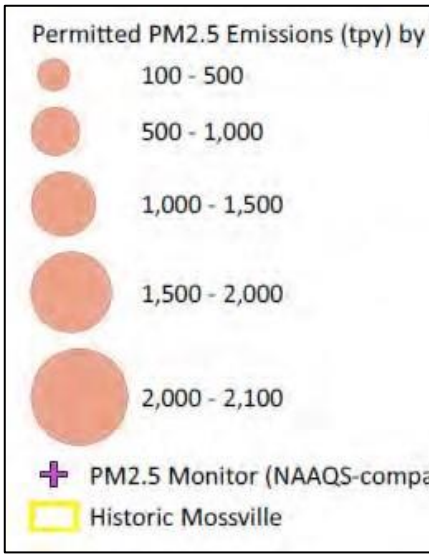


Figure 6. Graduated symbol map o
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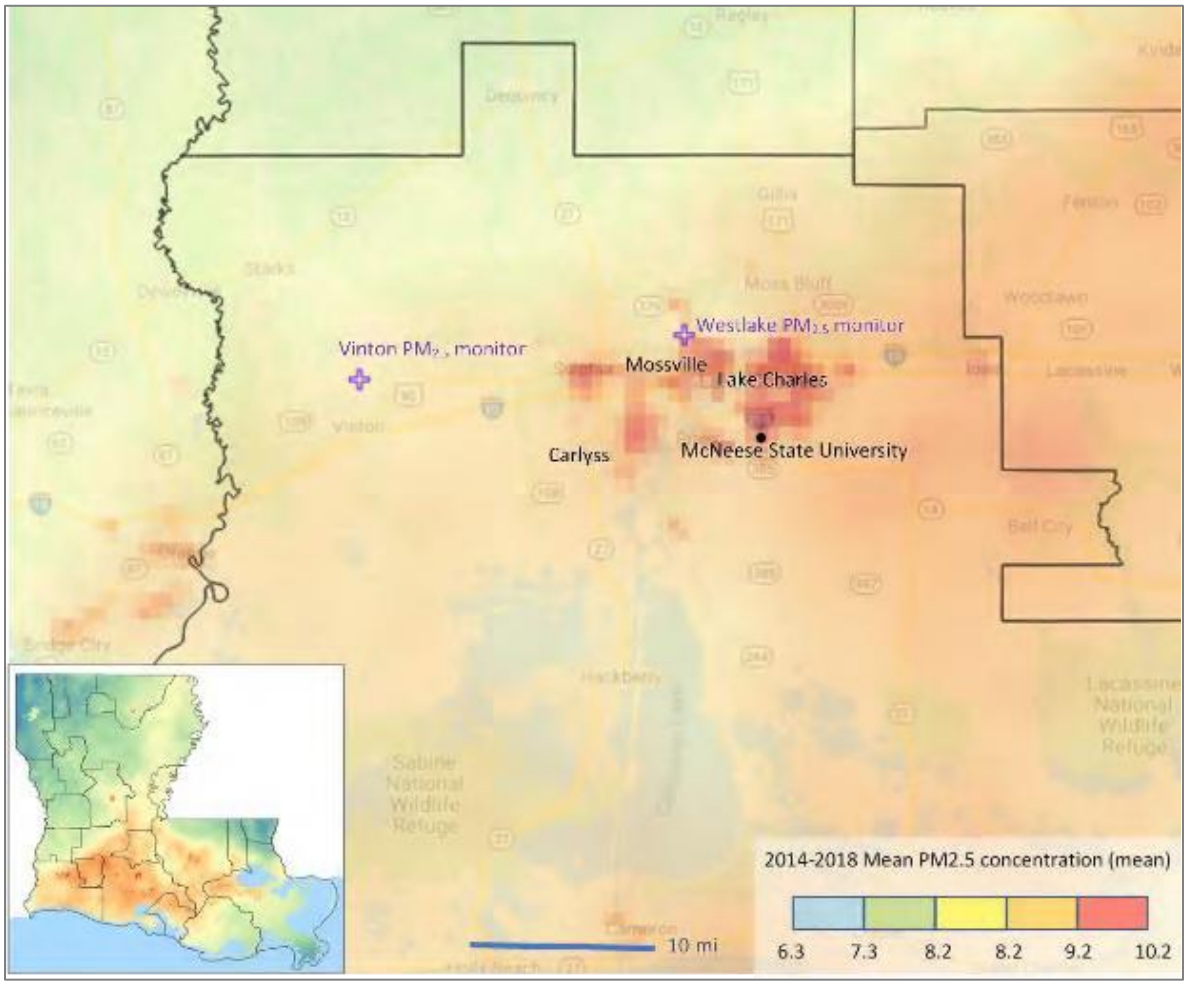

Figure 7. Map of m
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LDEQ Failure to Consider Planned Emissions Increases The LDEQ's July 2013 request to exclude Westlake $PM_{2.5}$ data and its July 2014 request to discontinue the Westlake ozone monitor both failed to acknowledge the massive emissions increases planned by Sasol and reflected in April 2013 permit applications for its Cracker Project.[49] While reviewing and approving these drastic emissions increases for $PM_{2.5}$ (364 tpy) and ozone precursors (i.e., NO_x [923 tpy], VOCs [2,623 tpy], and CO [2,673 tpy]), LDEQ concurrently worked to eliminate monitoring $PM_{2.5}$ and ozone at the monitoring site closest to the project area (i.e. Westlake).[50] LDEQ missed a long overdue opportunity to rectify the above errors in its 2020 Annual Network Assessment. The agency should amend its monitoring plan to generate NAAQScomparable data for $PM_{2.5}$, ozone, and carbon monoxide monitors in the Westlake area, ideally in the town of Mossville, and maintain its ambient air monitoring network in accordance with 40 CFR Part 58.

[49] Sasol Initial Part 70 and PSD Permit Application, Lake Charles Cracker Project. AI 3271. Apr 30, 2013. EDMS # 8819331. See also: 2014 Louisiana Annual Network Assessment, LDEQ, 4, available at https://deq.louisiana.gov/assets/docs/Air/Ambient_Air_Data/2014/FINAL_2014_LANA_with_EPA_response_letter.pdf ; and Letter from Paul D. Miller, P.E., Administrator LDEQ, to Thomas Diggs, Associate Director for Air, USEPA Region 6. RE: Request to remove $PM_{2.5}$ BAM data from comparison to NAAQS standards. July 1, 2013.

[50] LDEQ. Statement of Basis. Lake Charles Cracker Project. Activity No. PER20130017 through PER20130025. Page 23. EDMS # 9317309. May 23, 2014.
See also: Letter from Paul D. Miller, P.E., Administrator LDEQ, to Thomas Diggs, Associate Director for Air, USEPA Region 6. RE: Request to remove $PM_{2.5}$ BAM data from comparison to NAAQS standards. July 1, 2013.
See also: 2014 Louisiana Annual Network Assessment, LDEQ, 4, available at https://deq.louisiana.gov/assets/docs/Air/Ambient_Air_Data/2014/FINAL_2014_LANA_with_EPA_response_letter.pdf

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II. LDEQ Must Locate Ozone, Particulate Matter, and Carbon Monoxide Monitors in Mossville to Best Comply with 40 CFR Part 58.

The LDEQ asserts that it maintains its ambient air monitoring network in accordance with the quality assurance requirements of 40 CFR Part 58, Appendix A and B, utilizes the methodology provided for each monitor in accordance with Appendix C, designs its network in accordance with Appendix D, and locates its sites to meet all requirements of Appendix E.[51] 40 CFR Part 58 and its appendices guide states in the placement and maintenance of monitors. A monitoring site may be chosen for several reasons. Appendix D lists six general site types:[52]

(a) Sites located to determine the highest concentration expected to occur in the area covered by the network.
(b) Sites located to measure typical concentrations in areas of high population density.
(c) Sites located to determine the impact of significant sources or source categories on air quality.
(d) Sites located to determine general background concentration levels.
(e) Sites located to determine the extent of regional pollutant transport among populated areas; and in support of secondary standards.

(f) Sites located to measure air pollution impacts on visibility, vegetation damage, or other welfare-based impacts.

Further, EPA regulations on air monitor network assessments require that states "must consider the ability of existing and proposed sites to support air quality characterization for areas with relatively high populations of susceptible individuals (e.g., children with asthma) . . . ."[53]

Mossville's population density, proximity to major emissions sources, and long-term environmental health concerns make it a higher priority site for monitors for ozone and $PM_{2.5}$ compared to Vinton and Carlyss (Table 2; Figs. 2,6&7). The Westlake ozone monitor, which was deactivated at the end of 2014, was located in an area of higher population density, NATA Respiratory Hazard, and NATA Air Toxics Cancer Risk compared to the remaining ozone sites (i.e. Vinton and Carlyss) and the sole remaining NAAQS-comparable $PM_{2.5}$ monitoring site (i.e.

[51] *See* 2020 Louisiana Annual Monitoring Network Plan, p. 2.

[52] 40 CFR Part 58, Appendix D 1.1.1 (a)-(f).

[53] 40 CFR 58.10(d). Though we have seen no public notice or draft, LDEQ's 5-year network assessment is due this year. *See id.* ("The state . . . Agency shall perform and submit to the EPA
[RA] an assessment of the air quality surveillance system every 5 years. . . .") and https://www.epa.gov/amtic/louisiana-network-assessments (reflecting DEQ's last 5-year assessment in 2015).

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Vinton, Table 2). Thus, LDEQ's arbitrary decision to deactivate the Westlake ozone monitor and McNeese $PM_{2.5}$ monitor while retaining these monitors in Vinton (and an ozone monitor in Carlyss) reflects a disregard for environmental justice and public health. Further, according to EJScreen, the Westlake monitoring site is far closer to areas with high EJ Indices compared to the Vinton and Carlyss monitors (Fig. 8). In other words, the communities near the Westlake monitor are comparatively more vulnerable and therefore warrant more robust monitoring.

As described above, Mossville community members are surrounded by a large number of industrial plants and facilities that emit exceptionally high levels of harmful air pollutants, including thousands of tons per year of ozone precursors.[54] In 2018, Sasol's Lake Charles Chemical Complex (constructed on top of Mossville; Fig. 1) reported emitting 283 tons of $PM_{2.5}$, 1,253 tons of NO_x, 839 tons of VOCs, and 637 tons of CO.[55] These emissions will inevitably increase, because the Cracker Project was not fully operational in 2018.[56] Yet, already, the Cracker Project has earned Sasol's Lake Charles Chemical Complex the status of #2 "super

polluter" in the nation, based on 2018 reported emissions.[57] Sasol and the numerous other facilities near Mossville can reasonably considered "significant sources" and their impact on air quality should thus be determined by locating a monitor in Mossville in accordance with Appendix D 1.1.1 (c). Appendix D also lists the appropriate siting scale for a source impact monitor site as "micro, middle, or neighborhood."[58]

The community's long-term public health concerns, location next to significant sources of air pollution, and significant history of environmental injustice make the placement of $PM_{2.5}$, ozone, and carbon dioxide monitors essential. Accordingly, we request that LDEQ amend its 2020 Annual Monitoring Network Plan to include SLAMS monitors for ozone, PM2.5, and carbon monoxide in the Westlake area, ideally in the town of Mossville, to determine the impact of significant sources of air pollutants on the air quality in this heavily industrialized area.

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[54] https://www.eea.europa.eu/themes/air/air-quality/resources/glossary/ozone-precursor

[55] Based on LDEQ ERIC 2018 Air Monitoring Data. Accessed June 14, 2020.

[56] https://inspectioneering.com/news/2019-12-18/8926/sasol-successfully-completes-ethanecracker-project-at-lake-charles-plant.

[57] Apr. 8, 2020, "Breath to the People, Sacred Air and Toxic Pollution," Environmental Integrity Project for the United Church of Christ, p. 7, available at: https://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/pages/24840/attachments/original/1582721312/FINAL_BreathToThePeople_2.26.2020.pdf?1582721312

[58] 40 CFR Part 58, Appendix D, Table D-1 "Relationship Between Site Types and Scales of Representativeness."

Table 2. Relevant characteristics for the 3-mile buffer around Ozone Monitors in Calcasieu Parish, compared to Mossville.[*]

Location	O_3 Monitor Status	N	W	Population Density[*]	Ozone (ppb) [**]	Respiratory Hazard[†]	
						State %tile	EPA Region %tile
Mossville[††]	**None**	-	-	**243**	34.0	96	95-100
Westlake	**Inactive**	30.262347	-93.284906	**416**	34.0	98	95-100
Carlyss	Active	30.140031	-93.368268	90	34.0	96	95-100
Vinton	Active	30.227567	-93.579778	109	33.7	94	95-100

[*]Relatively higher population density and air toxic risk of non-monitored areas emphasized with bold text.

[**]Data from 2010 U.S. Census, accessed via EJScreen.

[†]Data from the 2014 National Air Toxics Assessment, accessed via EJScreen.

[††]See Figs. 1&2 for approximate Mossville geographic boundary.

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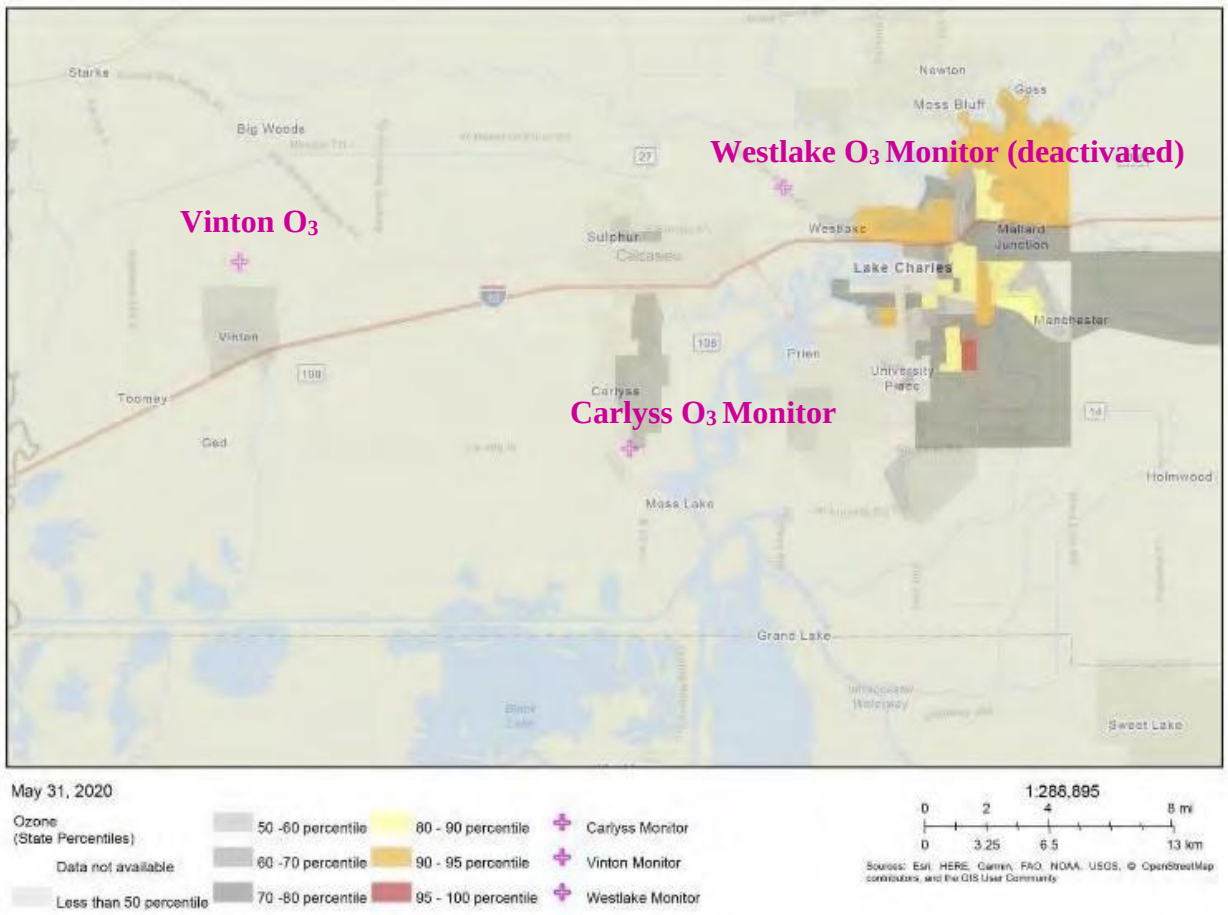

Figure 8. Ozone EJ Index (state percentiles) from the U.S. EPA's 2014 National Air Toxics Assessment relative to the locations of LDEQ ozone monitors (Westlake ozone monitor deactivated in 2014). Map created in EJScreen in May 2020.

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II. LDEQ Must Conduct Air Monitoring in Mossville In Order to Comply with EPA Environmental Justice Standards.

The Environmental Protection Agency (EPA) defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulation, and policies."[36] According to the EPA, fair treatment means that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies."[60] Further, EPA noted in guidance on air monitoring that "monitors located in areas that have large low income and/or minority populations may be of particular use for assessing environmental justice issues."[37] Mossville is a historic community with a rich African-American heritage, and many of its residents trace their roots to the freed slaves who first settled this area.[38]

Mossville residents are clearly overburdened with industrial pollution, having a Respiratory Hazard and Air Toxics Cancer Risk in the top 5% for both Louisiana and the country as a whole. (Table 2). Further, EPA's Risk Screening Environmental Indicators (RSEI) microdata indicate that Mossville has the most extreme toxic air pollution in Louisiana, with the top 1% for toxicity-weighted concentration of industrial pollutants (Fig. 1).

In order to ensure facility compliance with their permits and statewide compliance with NAAQS, LDEQ collects a variety of air quality data from both air monitoring stations positioned throughout the state and facilities that emit pollutants. EPA uses the air monitoring data to

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[36] https://www.epa.gov/environmentaljustice [60] *EPA, Plan EJ 2014 at 3, available at* https://nepis.epa.gov/Exe/ZyPDF.cgi/P100DFCQ.PDF?Dockey=P100DFCQ.PDF. *See also Basis for Decision for FG LA Complex, EDMS Doc. No. 11998452 (AI No. 198351), Part IX: Environmental Justice/Civil Rights Title VI Issues, at pdf p. 35 (in which LDEQ endorses this definition).*

[37] *EPA Ambient Air Monitoring Network Assessment Guidance, 2-3 (Feb. 2007), https://www3.epa.gov/ttnamti1/files/ambient/pm25/datamang/network-assessment-guidance.pdf.*

[38] *David S. Martin, Toxic Towns: People of Mossville 'are like experiment.' CNN, (Feb. 26, 2010)),* https://www.cnn.com/2010/HEALTH/02/26/toxic.town.mossville.epa/index.html. *Tulane Environmental Law Clinic*

determine whether Louisiana meets federal and state air quality standards and health benchmarks, to forecast and report daily air quality through the Air Quality Index, and to track

trends in air pollution over time.[63] Although these data provide valuable insight into regional air quality, the National Environmental Justice Advisory Council has questioned the adequacy of states' air quality monitoring network because of the distance between air monitoring stations and the fact that these monitors do not reflect the air quality in environmental justice communities.[39] Mossville community members likewise believe the current air monitoring network is inadequate and seek air quality information representative of pollution concentrations in the community of Mossville, not just data at a regional scale.

The number of monitors in a given location typically reflects the population density of the area with a minimum number of monitors prescribed by regulation; however, EPA regulations indicate that state agencies may and should consider other factors when choosing monitor locations.[40] For ozone, a Metropolitan Statistical Area (MSA) of 50,000-350,000 people will require between zero and one ozone monitors, depending on concentrations of O_3 in the past three years.[41] The Lake Charles MSA requires a minimum of one ozone monitor, according to LDEQ.[42] However, EPA notes: "The total number of O_3 sites needed to support the basic monitoring objectives of public data reporting, air quality mapping, compliance, and understanding O_3-related atmospheric processes will include more sites than these minimum numbers required in Table D–2 of this appendix."[43] According to LDEQ, there are currently two ozone monitors in operation for Lake Charles MSA,[44] which according to a 2019 U.S. Census Bureau estimate has a population of 203,046.[45]

[39] *Id.*
[40] *See 40 C.F.R. 58 appendix D.4.1(b).*
[41] *Id.*
[42] *2020 Louisiana Annual Network Assessment, LDEQ, 7 of 17. EDMS #12170694.*
[43] *Id. at D.4.1(a).*
[44] *In the Lake Charles MSA, LDEQ operates a SLAMS monitor for ozone at Carlyss, La., and a special purpose monitor (SPMS) at Vinton, La. http://www.deq.louisiana.gov/page/carlyss; https://www.deq.louisiana.gov/page/vinton (last visited June 17, 2020); see also 2020 Louisiana Annual Network Assessment, LDEQ, 9, 16 of 17.*
[45] *United States Census Bureau, Quick Facts, Calcasieu Parish, Population Estimates, July 1, 2019, https://www.census.gov/quickfacts/fact/table/calcasieuparishlouisiana,lakecharlescitylouisiana#.*

While Calcasieu Parish is in compliance for the number of ozone monitors, Mossville residents rank high on EJScreen's respiratory hazard index, implicating the need for robust monitoring of ozone and particulate matter (Table 2). These two pollutants are especially

[63] National Environmental Justice Advisory Council, *Recommendations and Guidance for EPA to Develop Monitoring Programs in Communities*, 26 (August 2017); https://www.epa.gov/sites/production/files/2018-01/documents/monitoring-final-10-6-17.pdf.

relevant for evaluating human health impacts, as they have been linked to adverse health outcomes, even at low concentration levels.[46] The EPA concluded in 2013 that ozone pollution poses serious health threats, including respiratory harm, increased likelihood of early death, cardiovascular harm, harm to the central nervous system, and reproductive and developmental harm.[72]

Ozone is formed from the emissions of the facilities surrounding Mossville. Ozone is not emitted by sources but is formed in the atmosphere by a series of complex chemical reactions between oxides of nitrogen (NO_x), volatile organic compounds (VOC), and other compounds. Because ozone is more likely to form in areas with major sources of both NO_x and VOCs, EPA guidance recommends that monitors be located in areas of maximum precursor emissions in order to be most useful for modeling and control strategy design.[47] EPA guidance also notes that the "dominant activity for producing NO_x is combustion processes, including industrial and electrical generation processes," and the chemical industry is a major producer of VOC emissions.[48] The community of Mossville is surrounded on all sides by major emitters of both NO_x and VOCs, increasing the likelihood of ozone formation. Such permitted emissions include:

1. Conoco Philips, Lake Charles Refinery – Area A, 2623-V17, AI 2538, located at 2200 Old Spanish Trail, Westlake, LA 70669. According to the Air Permit Briefing Sheet for the facility's Title V regular permit modification,[49] the permit allows the following emissions of NOx and VOC:

[46] Brunekreef, B.; Holgate, S.T. Air pollution and health. Lancet 2002, 360, 1233-1242. [72] U.S. EPA, Integrated Science Assessment for Ozone and Related Photochemical Oxidants, 2013. EPA/600/R-10/076F.
[47] EPA ambient air monitoring network assessment guidance, 2-2 (2007), https://www3.epa.gov/ttnamti1/files/ambient/pm25/datamang/network-assessment-guidance.pdf.
[48] EPA Guideline on Ozone Monitoring Site Selection, 2-5 (1998), https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000D45M.TXT.
[49] Title V Regular Permit Modification, Air Permit Briefing Sheet, Air Permits Division, LDEQ, (Jan. 22, 2020), EDMS DocID: 12037107.

Pollutant	Permitted Emissions in Tons per Year
NOx	592.86
VOC	332.97

2. Entergy, Roy S. Nelson Electric Generating Plant, AI 19588, located at 3500 Houston River Road, Westlake, LA 70669. According to the Air Permit Briefing Sheet for the facility's Title V regular permit modification,[50] the permit allows the following emissions of NOx and VOC:

Pollutant	Permitted Emissions in Tons per Year
NOx	19,368.67
VOC	347.35

3. Sasol Chemicals (USA) LLC — Ethylene Unit, AI 3271. LDEQ is currently reviewing Sasol Chemicals (USA) LLC's Part 70 operating permit renewal and modification for its Ethylene Unit within its Lake Charles Chemical Complex.[51] Potential emissions of NOx and VOC include:

Pollutant	Permitted Emissions in Tons per Year
NOx	582.62
VOC	405.02

Mossville is an environmental justice community struggling for every breath. Placing $PM_{2.5}$, ozone, and CO monitors within the community would provide LDEQ and EPA with data representative of the citizen's lived experience, helping both agencies tailor policies and initiatives in furtherance of environmental justice.

IV. Conclusion

[50] *Title V Regular Permit Modification, Air Permit Briefing Sheet, Air Permits Division, LDEQ, (May 23, 2016), Page 4. DocID: 10204451.*
[51] *See LDEQ Permit Approval Letter, January 21, 2017 (12014011), Air Permit Briefing Sheet, p. 1.*

For the foregoing reasons, community members of Mossville respectfully request that LDEQ amend its 2020 Annual Monitoring Network Plan to include SLAMS $PM_{2.5}$, ozone, and carbon monoxide monitors in Mossville to determine the impact of significant sources of air pollutants on the air quality in Mossville.

Sincerely,

/s/_Lisa Jordan_____
Lisa W. Jordan, Director
Devin Lowell, Supervising Attorney
TULANE ENVIRONMENTAL LAW CLINIC
6329 Freret Street
New Orleans, LA 70118
504-865-5789

Counsel for Mossville community members

Substantially Prepared by,

K. Blair Johnson, Law Student
Mark Allain, Law Student
TULANE ENVIRONMENTAL LAW CLINIC
6329 Freret Street
New Orleans, LA 70118
504-865-5789

Kimberly Terrell, Ph.D., Staff Scientist
TULANE ENVIRONMENTAL LAW CLINIC
6329 Freret Street
New Orleans, LA 70118
504-865-5789

voluntary property purchase program

Sasol North America Inc.

For more information:
Visit www.sasolvppp.com or contact Community Interaction Consulting, Inc. (CIC) at (337) 310-8200 or visit the Information Center at the former Mossville Elementary School located at 3301 Old Spanish Trail Westlake, LA 70669

1.10 Content

The information contained in this Handbook provides a description of the voluntary property purchase program (Program) sponsored by Sasol North America Inc. (Sasol). It is not an offer to buy property. Sasol may at any time, at its sole discretion, suspend or terminate the Program or expand, reduce or modify the Program Area.

2 Letter from Sasol

July 18, 2013

Dear Neighbor,

You may be aware that Sasol North America Inc. (Sasol) has plans to expand our petrochemical plant near your community.

In late 2012, Sasol announced its plan to start the front-end engineering and design work for a world-scale ethane cracker and gas-to-liquids (GTL) facility at our existing site in Westlake, Louisiana. These projects will use natural gas to make a variety of chemical products and transportation fuels, including GTL diesel. The projects are expected to have a significant positive effect on job creation and tax revenue for both the local region and the State of Louisiana.

We recognize that our growth plans and related property acquisitions will result in the expansion of our facility toward our neighbors to the west and northwest of our existing facility. Although a final investment decision on whether to start construction on the ethane cracker and GTL facility will not be made until 2014 and 2016, respectively, we are taking steps now to address the concerns of our neighbors.

Sasol continuously strives to be a good corporate citizen and to communicate forthrightly with our neighbors. In the spirit of being a good neighbor to those residents that will be affected by our growth plans, we are pleased to offer our residential neighbors to the west and northwest of our existing operations an opportunity to sell their properties to Sasol through a voluntary property purchase program (Program).

The Program is entirely voluntary. It is designed to give you the option to sell your property and move to a residential area of your choosing. The Program will furthermore provide relocation support if you rent your home, but only if your landlord also participates in the Program.

The Program will start in early August with the opening of a neighborhood Information Center at the former Mossville
Elementary School located at 3301 Old Spanish Trail Westlake, LA 70669. Sasol selected Community Interaction Consulting, Inc. (CIC), our real estate consultants, to manage the Program on our behalf. Starting in early August, CIC staff will be available between 9am and 5pm Mondays through Fridays to discuss the Program with you and answer any questions you may have.

We understand that relocating can be a difficult decision, and that you will want to take time to consider the advantages of the Program being offered. This Handbook contains more information about the Program. We encourage you to read it thoroughly and contact CIC if you are interested in participating in the Program and/ or if you have any questions about the Program.

Sincerely,

MIKE THOMAS
VICE PRESIDENT: US OPERATIONS

3 Introduction

The Program definitions on pages 27 to 30 of this Handbook apply to all sections of the Handbook.

The Program sponsored by Sasol gives you an opportunity to sell your Property and relocate to a Property outside of the Program Area. Participation in the Program is entirely voluntary. The details of the Program are contained in this Handbook.

Easy access to the Program is provided through our Information Center, staffed by CIC and located at the former Mossville Elementary School at 3301 Old Spanish Trail Westlake, LA 70669. CIC staff is available to meet with you privately to go over all the features of the Program and assist you in understanding the potential and applicable Program options available to you.

The Program will be available to you if you, as of July 12, 2013, owned and held good title to residential Property in the Program Area (Property Owner, as defined) or are a tenant occupying a residential Property in the Program Area (Tenant, as defined) **and** your landlord participates in the Program. The Program Area is described on page 7 and 8 of the Handbook.

Commercial property and places of worship **do not** form a part of the Program. However, commercial property owners and religious leaders may approach Sasol outside of the Program to request Sasol to consider the purchase of their properties by contacting a CIC representative at the Information Center. Sasol will consider such requests from commercial property owners or religious leaders on a case-by-case basis.

In order to determine if you are eligible for the Program Benefits, you must first register your interest in the Program by completing and submitting:
(i) an Appraisal Request and Authorization Form, if you are a Property Owner; or (ii) a Renters Benefits Request Form, if you are a Tenant of a residential Property.

There is no cost to you in registering your interest in the Program. **Sasol will pay for all costs associated with any appraisals performed under the Program.** Appraisal Request and Authorization Forms and Renters Benefits Request Forms can be submitted in person to CIC at the Information Center between Monday, August 12, 2013 and Wednesday, December 4, 2013.

Please note, if you are a Tenant as of July 12, 2013, you will only be eligible to receive benefits under the Program if your landlord has entered into a Purchase and Sale Agreement with Sasol, demonstrated that he/she has insurable title, and has confirmed that all matters between you and the landlord have been resolved (lease terminated, rent payments current, etc.).

The Information Center will be open Mondays to Fridays from 9:00 a.m. to 5:00 p.m. and evenings and weekends by appointment. You can contact the Information Center at (337) 310-8200 to schedule an appointment. **The support services provided by the Information Center are available at no cost to you and meeting with a CIC representative does not in any way obligate you to sell your Property.**

T**he Program is entirely voluntary. Requesting an appraisal does not commit you to sell your Property.** Having an appraisal completed simply allows Sasol to present you with an Offer to purchase your Property. Once you have received an Offer, you can choose whether or not to accept it.

The determination of your eligibility to participate in the Program, and the Program Benefits to which you may be entitled, shall be made by Sasol in its sole and absolute discretion.

Sasol may at any time, at its sole discretion, suspend or terminate the Program or expand, reduce or modify the Program Area, without liability. Of course, Sasol will honor the terms of any signed Purchase and Sale Agreements and outstanding Offers made by Sasol prior to any such change.

Note: You should consider obtaining professional advice from your attorney and financial advisor regarding your participation in the Program.

4 Program Area

The Program Area consists of the Improved and Unimproved Properties on, or abutting to any of the streets below, which streets are also depicted on the aerial map on page 8.

Commercial property and places of worship within the Program Area do not form part of the Program. Commercial property owners and religious leaders may approach Sasol outside of the Program to request Sasol to consider the purchase of their properties by contacting a CIC representative at the Information Center. Sasol will consider such requests from commercial property owners or religious leaders on a case-by-case basis.

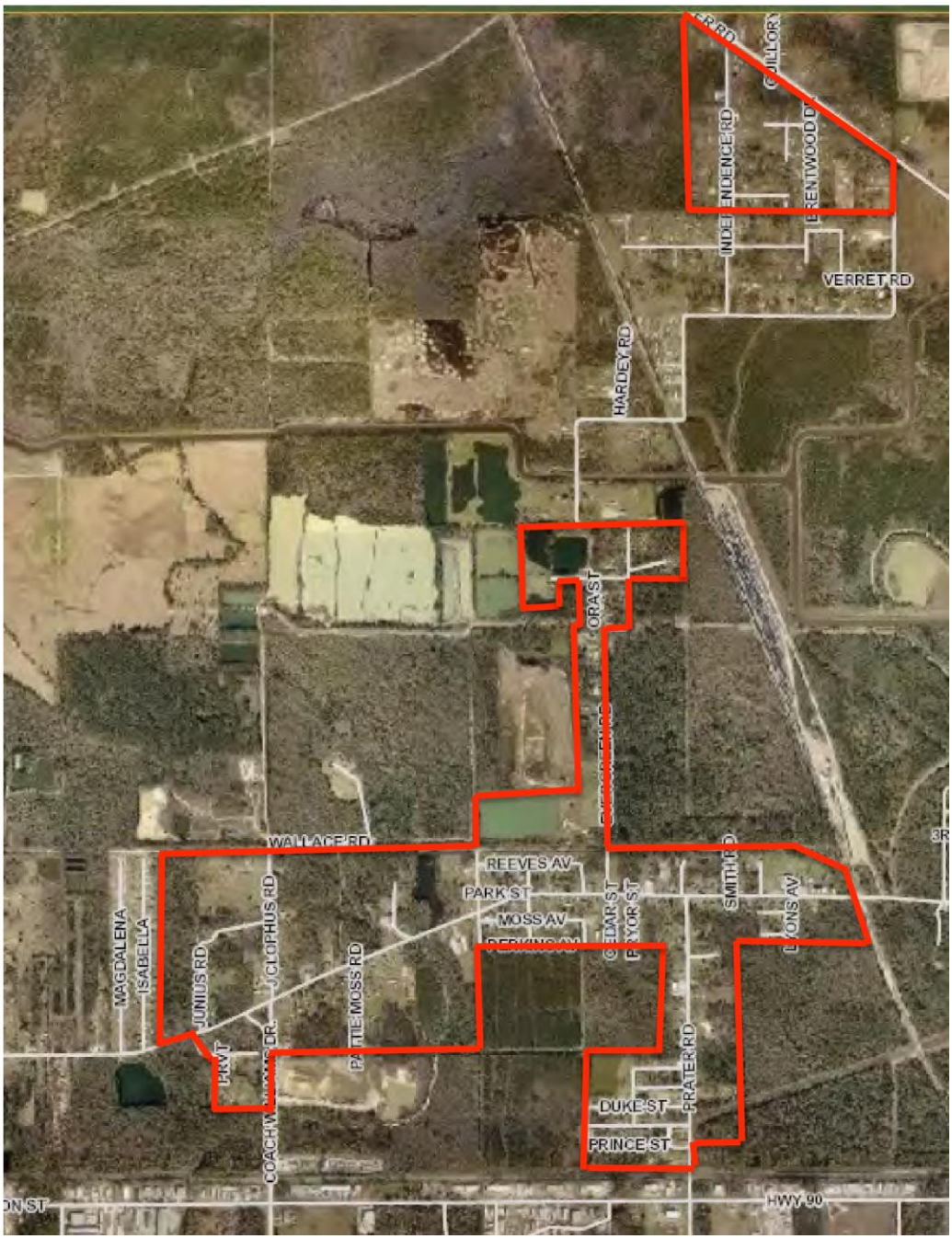
Properties on, or abutting to, the streets below form part of the Program Area:

- **all of**

Benjamin Street;
Braxton Lane;
Brentwood Drive;
Cedar Street;
Charles Avenue;
Church Street;
Duke Street;
Duchess Street;
Earl Street;
Edna Hardy Lane;
Edwards Street;
Fairmont Drive;
Ferndale Drive;
Fisher Street;
Harvey Miller Road;
J Clophus (Reynaud Road);
Junius Road;
King Street;
Lyons Avenue;
Mary Street;
Moss Avenue;
Murrell Road;
Ora Street;
Park Street;
Pattie Moss Road;
Perkins Avenue;
Prince Street;
Princess Street;
Pryor Street;
Queen Street;
Reeves Avenue;
Smith Road;
Venable Drive;
Wallace Road; and
Water Tower Road.

- **all of Prater Road** from the Union Pacific Rail Road going north to Old Spanish Trail;
- all of the south side of **Old Spanish Trail** from Goodley Road to 3702 Old Spanish Trail. All of the north side of Old Spanish Trail from 3345 Old Spanish Trail to 3701 Old Spanish Trail;
- all of **Evergreen Road** from Old Spanish Trail to 2282 Evergreen Road and then from 2732 to 2788 Evergreen Road;
- **Independence Road** from 2705 Independence Road to Houston River Road;
- the **south side of Houston River Road** from 3919 Houston River Road to, and including, the west side of Evergreen Road;
- **Coach Williams Drive** north of 905 Coach Williams Road; • **Goodley Road** from 3408 to the end of the road; and
- the east side of **Bryant Street**.

The Program Area as described on page 7 is also depicted on the aerial map below:



Sasol may at any time, at its sole discretion, suspend or terminate the Program or expand, reduce or modify the Program Area, without liability. Of course, Sasol will honor the terms of any signed Purchase and Sale Agreements and outstanding Offers made by Sasol prior to such change.

5 Property Owners – steps for participating in the Program

Participation in the Program is entirely voluntary. The Program for Property Owners is explained in the five steps described in figure 1 below. If you have any questions regarding these steps or what is required from you to participate in the Program, please contact a CIC representative at

the Information Center and/or refer to the Clarification Questions and Answers (Q&A) in the Handbook on pages 21 to 26.

Figure 1: Steps available to Property Owners for participating in the Program

step 1: Determining if you are eligible

First, you need to determine whether you are eligible to participate in the Program. You are eligible to participate in the Program if you, **as of July 12, 2013**, owned and had title to either an Improved Property or an Unimproved Property in the Program Area, and you continue to own and hold good title to such Property. You **must sell all of your Property** in the Program Area to Sasol and relocate to a new property outside the Program Area in order to receive Program Benefits.

There are three (3) types of Property Owners, namely:

- Owner Occupant, if you own, hold good title to and occupy an Improved Property;
- Rental Property Owner, if you own, hold good title to and lease an Improved Property to a third party or if such Improved Property is vacant; or
- Unimproved Property Owner if you own and hold good title to an Unimproved Property.

The Program Benefits that are applicable to you are described on pages 16 to 20 of this Handbook.

step 2: Registering your interest in the Program

The second step to participating in the Program is to contact a CIC representative at the Information Center and register your interest in participating in the Program by completing and submitting the Appraisal Request and Authorization Form on page 32 of the Handbook **before December 4, 2013**. Only one of the Property Owners for a Property has to sign the Appraisal Request and Authorization Form, but **all** Property Owners must sign the deed that transfers the Property to Sasol.

Signing an Appraisal Request and Authorization Form does not commit you to sell your Property in the Program Area to Sasol. It simply authorizes CIC to arrange to have all of your Property located in the Program Area appraised, surveyed, and to obtain a preliminary title search from a local law firm.

If you register your interest in participating in the Program and complete and submit an Appraisal Request and Authorization Form **before October 4, 2013 you will qualify for an Early Sign-Up Bonus of $1,000** that is payable to you upon Closing.

You will be required to provide the following documentation as part of your Appraisal Request:

- some form of government issued picture identification such as a current driver's license, passport, or Louisiana State Identification Card; and

- deed and/or an abstract for the Property verifying ownership and residency **as of July 12, 2013** or other documentation verifying ownership and residency such as a last will and testament or tax statement; and/ or
- information on any Tenants residing in, or on your Improved Properties, including a lease agreement or similar documentation to verify that such Tenants were Tenants on **July 12, 2013**.

In completing the Appraisal Request and Authorization Form you will be required to choose three (3) appraisers from a list of approved local, actively practicing appraisers that are licensed by the State of Louisiana. The three (3) appraisers will consist of two (2) primary appraisers and one (1) reserve appraiser. The reserve appraiser will be used only if the difference between the appraised prices from the two (2) primary appraisers is not equal to, or less than 10% of the higher appraisal.

You do not have to choose an appraiser from the list of approved local appraisers. You may nominate an appraiser that is not on the list, and the nominated appraiser will be accepted by Sasol so long as the nominated appraiser meets **all** of the following requirements:

- full-time real estate appraiser that is licensed by the State of Louisiana; and
- holding either a Certified General Appraiser License or a Certified Residential Appraiser License; and
- member of the local Multiple Listing Service and has additional access to recent comparable sales; and
- willing to prepare the appraisal of your residential Property in accordance with the appraiser instructions, as described in this Handbook.

step 3: Determining the Average Appraised Price

The third step of the Program for Property Owners comprises the determination of the Average Appraised Price for your Property and any improvements on it as of **July 12, 2013.** A CIC representative will order appraisals of your Property using the two (2) primary appraisers you selected **at no cost to you**. Each appraiser will independently develop an appraised price for your Property using a standard format (Appraisal Institute form AI.100). **Only appraisals ordered by CIC will be paid for by Sasol and used in determining the Average Appraised Price.**

Improvements to the Property made after July 12, 2013 will not be considered in the appraisal of the Property.

Where a Property Owner owns two (2) Properties that are contiguous of which one (1) is defined as an Unimproved Property, such Unimproved Property will be included in the appraisal of the Improved Property.

You are encouraged to provide the appraiser with **all** information that you believe is relevant to determine the appraised price of your Property.

If the difference between the two appraisals requested by CIC is:

- equal to, or less than 10% of the higher appraisal, then the average of the two appraisals will be equal to the Average Appraised Price for purposes of determining the Offer for the Property; or
- greater than 10% of the higher appraisal, the CIC representative will arrange for an appraisal by the third (reserve) appraiser of your choice. The two highest appraised prices will then be averaged to establish the Average Appraised Price for purposes of determining the Offer for the Property.

Copies of the appraisals will be made available to you and Sasol at the end of the appraisal process. Appraisers must follow the Uniform Standards of Professional Appraisal Practice (USPAP). Under USPAP's Confidentiality Clause of the Ethics Rule, the appraiser may not disclose (1) confidential information; or (2) assignment results to anyone other than the client (which in this case is CIC). Accordingly, any questions or comments you may have about an appraisal **must** be sent to the CIC representative and the CIC representative will then forward your questions and comments to the appraiser for review and consideration. In the event that, as a result of your questions or further information provided regarding the appraisal, the appraiser changes his/ her appraised price, Sasol's Offer will change accordingly, subject, however, to the process to determine the Average Appraised Price as described above.

step 4: Accepting Sasol's Offer

Once the appraisal process is completed, the fourth step is for Sasol to make an Offer to you for your consideration. The Offer will be in the form of a proposed Purchase and Sale Agreement prepared by Sasol. Should Sasol make you an Offer, you will have **ninety (90) days from the date of the Offer to sign and accept the Purchase and Sale Agreement.** Acceptance will be indicated by returning the original and unaltered copy of the signed Purchase and Sale Agreement to a CIC representative at the Information Center. The Effective Date of the Purchase and Sale Agreement will be the last day that the buyer and/ or seller signs the Purchase and Sale Agreement. **All Property Owners are required to sign the deed that transfers the Property to Sasol.**

The proposed Purchase and Sale Agreement will include the Purchase Price, qualifying Program Benefits and the terms and conditions relating to the purchase and sale of your residential Property. More details on the determination of the Purchase Price and qualifying Program Benefits applicable to different ownership categories are provided as part of the Q & A on pages 21 to 26.

The Offer will contain conditions that are normal and customary for real estate transactions, including but not limited to you having legal, marketable and insurable title to the Property. **Furthermore, your participation in the Program and receipt of any Program Benefits will require you to release Sasol from any and all past, present or future property claims against Sasol relating to your Property at Closing.**

The Offer made by Sasol and the contractual terms and conditions of the Purchase and Sale Agreement are non-negotiable. A Purchase and Sale Agreement that has been altered by you or your representative will not be accepted or signed by Sasol and will not be a legally binding contract obliging Sasol to purchase the Property in accordance with such amended Purchase and Sale Agreement.

Note: You are encouraged to obtain legal and other professional advice (including, but not limited to financial and tax advice) on the Offer.

step 5: Vacating the Property and Closing

Closing will take place when all of the conditions of the sale process are fulfilled to the satisfaction of Sasol. Provided, that Closing will not be later than six (6) months from the Effective Date of the Purchase and Sale Agreement. However, a Property Owner may request an extension beyond the original six (6) months from the Effective Date and Sasol may, at its sole discretion, extend the period to

Closing by giving written notice of such extension to the Property Owner. **All Property Owners must sign a deed transferring the Property to Sasol before the sale will be closed.**

Sasol will pay all Normal Seller Closing Costs directly attributable to the sale of your Property, except for the costs for, or related to mortgages, real estate broker commissions, prorated real estate taxes, liens and judgments. These exceptions must be paid by you and cleared from the title before Closing can take place.

All Properties must be vacated on, or before Closing. You must remove all possessions and leave the Property "Broom Clean" and in a "Neat and Safe Condition". The requirements to qualify for the Clear Site Bonus, in addition to the "Neat and Safe Condition" will be included in the Purchase and Sale Agreement that Sasol submits to you.

"Broom Clean" means that all possessions from any structures on the Property including, but not limited to, furnishings, automobiles, trucks recreational vehicles, recreational equipment, lawn maintenance equipment, tractors, trailers, tires, paints, household chemicals, automobile and motor maintenance products, fertilizers, and weed and pest control products must be removed.

"Neat and Safe Condition" means that all utilities including water, sewer, electric, gas, telephone and cable service must be disconnected from the Property at the street (or at the main) so that all improvements on the Property may be safely removed in accordance with the utility providers' guidelines. Above ground swimming pools must be drained and modified such that they will not hold water. The location of septic tanks and wells must be clearly marked.

An authorized representative of Sasol or CIC will inspect the Property at Closing, to ensure that the Property complies with the requirements described above and to determine if you qualify for the Clear Site Bonus.

The Program Benefits that you qualify for will be paid to you at Closing.

6 Tenants – steps for participating in the Program

Participation in the Program is entirely voluntary. The Program available for a Tenant is explained in the three steps described in figure 2 below. If you have any questions regarding these steps or what is required from you to participate in the Program, please contact a CIC representative at the Information Center and/ or refer to the Q & A in the Handbook on pages 21 to 26.

Figure 2: Steps available to Tenants for participating in the Program

step 1: Determining if you are eligible

First, you need to determine whether you are eligible to participate in the Program. You are eligible to participate in the Program if you, **as of July 12, 2013**, were a Tenant and you continue to be a Tenant of the Property **and** your landlord participates in the Program.

A Tenant is defined as "a person or persons named as (a) Tenant(s) in a lease that actively and consistently rent(s) and reside(s) in a Rental Property and for whom the said residence is his/her or their primary residence as of July 12, 2013, and does not include any persons or family members occupying the Property who are not named as a Tenant in the lease."

The Program Benefits that are applicable to Tenants are described on pages 16 to 20 of the Handbook.

step 2: Registering your interest in the Program

If you are a Tenant, the second step to participating in the Program is to contact a CIC representative at the
Information Office and register your interest in participating in the Program by completing and submitting the Renters Benefits Request Form on page 33 of the Handbook **before December 4, 2013.**

Submitting a Renters Benefits Request Form does not guarantee that you will qualify for the Program Benefits available to Tenants under the Program. Your landlord, as Property Owner must have committed to sell the Property you are renting in the Program Area to Sasol before you will be eligible to participate in the Program and/ or receive any of the Program Benefits applicable to Tenants.

If you register your interest in participating in the Program and submit the Renter Benefits Request Form **before**
October 4, 2013 you will be in a position to qualify for an Early Sign-Up Bonus of $1,000 that will be payable upon Closing. If a Closing between Sasol and your landlord (the Property Owner) is not achieved for any reason, the Early Sign-Up Bonus will not be paid out.

You will be required to provide the following documentation as part of your request to qualify for the Program Benefits available to a Tenant under the Program:

- current government issued picture identification like a current driver's license, passport, or Louisiana State Identification Card; and
- documents to verify residency, such as (i) a lease for the Rental Property, or (ii) copies of canceled rent payment checks for the months of June and July 2013, and/or (iii) copies of utility payment statements covering the months of June and July 2013 that identify the Rental Property by address.

step 3: Vacating the Property and Closing

At Closing you will become entitled to the Program Benefits available to Tenants if:

- your landlord (the Property Owner) has accepted an Offer from Sasol and has entered into a Purchase and Sale Agreement with Sasol for the Rental Property occupied by you; and
- Sasol is satisfied that the Property Owner can transfer insurable title to the Property; and
- you and the Property Owner have executed an agreement that your lease has been terminated and all matters between you and the landlord are settled; and
- you have executed a release agreement with Sasol for the acceptance of the Program Benefits available to you under the Program and all conditions contained in such agreement have been fulfilled to the satisfaction of Sasol; and
- you provide proof to Sasol and CIC that you and any co-occupants and family members residing with you have vacated the residence and your new residence is outside of the Program Area.

7 Description of Program Benefits available to Property Owners and Tenants

For the purpose of the Program there are three (3) Property Owner categories and a Tenant category. The table below is a list of the potential Program Benefits you may qualify for and receive if you are an eligible Owner Occupant, Rental Property Owner, Unimproved Property Owner, or Tenant. A detailed description of the Program Benefits is provided below.

Note: It is recommended that you obtain advice from a tax professional because the Purchase Price and all payments of allowances and bonuses will be reported to the Internal Revenue Service on Form 1099.

Program Benefit	Owner Occupant	Rental Property Owner	Unimproved Property Owner	Tenant
Minimum Appraised Price	$100,000	$75,000	$5,000	N/A
Premium Payment over Average Appraised Price	60%	50%	40%	N/A
Early Sign-Up Bonus	$1,000	$1,000	$1,000	$1,000
Miscellaneous Expense Allowance	$8,000	N/A	N/A	$4,000
Rent Disruption Allowance	$1,000 [1]	$1,000	N/A	N/A
Professional Advice Allowance	$500	$500	$500	$500
Closing Cost Assistance Allowance (maximum)	$5,000	N/A	N/A	$5,000
Curative Title Work Allowance (maximum)	$5,000	$5,000	$5,000	N/A
Clear Site Bonus (maximum)	$15,000	$15,000	$15,000	N/A
Advances	Equity	N/A	N/A	Benefits
Home Finding Assistance	Eligible	Eligible	Eligible	Eligible
Normal Seller Closing Cost [2]	Paid by Sasol	Paid by Sasol	Paid by Sasol	N/A

1. Available to an Owner Occupant who also owns and leases an Improved Property to a Tenant.

2. The Program pays for Normal Seller Closing Costs on the sale of your Property. However, mortgages, real estate broker commissions, pro-rated real estate taxes, liens, and judgments and costs related to same **are not covered** under the Program and must be paid by the Property Owner(s).

Property Purchase Price

The Purchase Price offered for a Property will be determined by the higher of the Average Appraised Price or the Minimum Appraised Price plus the Premium Payment.

Minimum Appraised Price

A Minimum Appraised Price has been established for the Program, the amount of which will depend on whether you qualify as an Owner Occupant, Rental Property Owner or Unimproved Property Owner as described in the table on page 16. Therefore if the Average Appraised Price of your Property is below the Minimum Appraised Price, the Purchase Price for your Property will be determined using the Minimum Appraised Price.

Premium Payment

The Premium Payment is available to Property Owners for Properties in the Program Area and is intended to assist you in purchasing property outside of the Program Area. It forms part of the Offer for your Property and will be paid at Closing and is calculated as a percentage of the Average Appraised Price. The amount of such Premium Payment will depend on whether you qualify as an Owner Occupant, Rental Property Owner or Unimproved Property Owner as described in the table on page 16.

Early Sign-Up Bonus

If a Property Owner completes and submits an Appraisal Request and Authorization Form or a Tenant completes and submits a Renters Benefits Request Form **on, or before October 4, 2013** such Property Owner or Tenant will qualify for an Early Sign-Up Bonus of $1,000 that is payable at Closing. The Early Sign-Up Bonus is available only once to a Property Owner, regardless of the number of Properties he/ she may own, provided further that where a Property is owned by multiple Property Owners, the Early Sign-Up Bonus will be made once to the Property Owner(s) who made the Appraisal Request for such Property.

Miscellaneous Expense Allowance

A Miscellaneous Expense Allowance is payable to an Owner Occupant ($8,000) and Tenant ($4,000) at Closing once all conditions to Closing have been fulfilled to the satisfaction of Sasol. The Miscellaneous Expense Allowance is intended to cover moving and personal relocation expenses for Owner Occupants and Tenants. In cases of multiple Property Owners, this payment will be made once to the Property Owner(s) who occupies the Property.

Rent Disruption Allowance

A Rent Disruption Allowance of $1,000 is payable to you per Property if you are an Owner Occupant or Rental Property Owner and you own and lease an Improved Property to a Tenant. A Rental Property Owner will not be entitled to this Rent Disruption Allowance if an Improved Property is vacant as of July 12, 2013. The Rent Disruption Allowance will be payable to an Owner Occupant or Rental Property Owner at Closing, provided that all Tenants have fully vacated the Property and such Property is "Broom Clean" and in a "Neat and Safe Condition" at that date. An authorized representative of Sasol or CIC will inspect the Property prior to Closing to ensure that these requirements have been met.

Professional Advice Allowance

A Professional Advice Allowance of $500 will be paid to every Property Owner (defined as “a person or persons owning and holding good title to a Property as of July 12, 2013”) at the time of the Sasol Offer. A similar amount will be payable to a Tenant (defined as “a person or persons named as (a) tenant(s) in a lease that actively and consistently rent(s) and reside(s) in a Rental Property and for whom the said residence is his/her or their primary residence as of July 12, 2013 and does not include any persons or family members occupying the Property who are not named as a Tenant in the lease”) at the time when his/ her other benefits are paid at Closing. The Professional Advice Allowance is only available once to a Property Owner, as defined, regardless of the number of Properties owned. The Professional Advice Allowance is intended to assist a Property Owner and Tenant in the payment of any costs incurred for any legal, financial, and/or tax advice and assistance they may obtain in reviewing the Purchase and Sale Agreement and any other questions regarding the Program. If you are a Property Owner, the Professional Advice Allowance is yours to keep regardless of your decision to participate any further in the Program.

Closing Cost Assistance Allowance

If you are an Owner Occupant or Tenant and are in the process of purchasing a new residence outside the Program Area, and a fully executed Purchase and Sale Agreement with Sasol is in place, please meet with a CIC representative regarding your eligibility for a Closing Cost Assistance Allowance. The CIC representative will need to have the documents listed below to establish your eligibility:

- a fully executed Purchase and Sale Agreement between Sasol and all of the Property Owners in title to your Property; and
- a title report indicating that the Property Owner(s) has insurable title acceptable to Sasol; and
- a copy of the fully executed purchase and sale agreement for your new home that is outside of the Program Area; and
- a preliminary closing statement from your closing agent that indicates the closing cost you have to pay at closing.

If you qualify for a Closing Cost Assistance Allowance, Sasol will pay up to $5,000 in total, per Owner Occupant or Tenant, toward the normal and customary buyer closing costs for your new home outside of the Program Area such as an appraisal, survey, mortgage loan origination fee and/or discount points, home inspection report, recording fees, transfer tax, closing fee, lender and owner title insurance policies, and home warranty plan. Pre-paid items such as pro-rated taxes and assessments, loan interest, escrow account deposits, and hazard insurance premiums are not considered normal and customary buyer closing costs under the Program.

If you qualify, the Closing Cost Assistance Allowance will be paid directly to the closing agent for your new home on the closing date of the purchase of your new home, so long as the closing is within ninety (90) days of vacating the Property by the Owner Occupant or Tenant.

Note: Please advise your closing agent that it may take up to seven (7) business days from the time CIC receives the preliminary closing statement from your closing agent to process and wire the Closing Cost Allowance to such closing agent.

Curative Title Work Allowance

An allowance of up to $5,000 is available to cover legal costs associated with curing title problems. This allowance does not cover liens, judgments, mortgages, or delinquent taxes. A CIC representative will advise you about qualifying for this allowance after he/ she has received and reviewed the title report for your Property that was prepared by the law firm(s) as approved by Sasol. **The Curative Title Work Allowance will be paid directly to a law firm approved by Sasol.** The list of approved law firms is available on request from CIC.

Clear Site Bonus

Property Owners may be eligible for a Clear Site Bonus of up to $15,000 depending on the nature of the Property and number of structures that need to be removed. To be eligible for this bonus, the Property must be in a "Neat and Safe Condition" **and** all structures, and all personal property must be removed from the Property (not buried on the land) before Closing. Below ground swimming pools must be filled with clean soil or sand, which will be provided by Sasol. All well equipment must be removed as well. A Sasol representative will determine the exact procedures for clearing the site, and the amount of eligible Clear Site Bonus after inspecting your Property and/or reviewing the appraisals. The requirements for the Clear Site Bonus will be included in the Purchase and Sale Agreement provided by Sasol.

Obtaining an Equity or Benefits Advance

Equity Advance: The Program may provide assistance to an Owner Occupant in obtaining an Equity Advance of up to 90% of the equity in the Property based on all eligible payments, allowances, and bonuses due to such Owner Occupant at the time of the request for an Equity Advance if such funds are needed to:

- make a deposit on another property outside of the Program Area;
- close a sale on a new property outside the Program Area;
- pay moving expenses or other related costs; and • clear the site of all improvements and structures.

A CIC representative will assist such Owner Occupant in obtaining an Equity Advance in such circumstances. The amount of the Equity Advance will be deducted from the final payment of the outstanding Purchase Price upon Closing.

To obtain an Equity Advance, **all** Owner Occupants of a Property must have accepted the Offer, by signing the
Purchase and Sale Agreement, have demonstrated that they can transfer insurable title to their property, sign an Equity Advance addendum to the Purchase and Sale Agreement covering the amount of the Equity Advance, and be willing to sign a release form, whereby you agree to release Sasol from any and all past or present property claims against Sasol.

Benefits Advance: The Program may provide assistance to a Tenant in obtaining a Benefits Advance of up to 90% of all eligible payments and allowances due to such Tenant at the time of the request for a Benefits Advance if such funds are needed to:

• make a security deposit on another leased home outside of the Program Area; • close a sale on a new home outside of the Program Area; and • pay moving expenses or other related costs.

A CIC representative will assist such Tenant in obtaining a Benefits Advance in such circumstances. The amount of the Benefits Advance will be deducted from the final payment of the outstanding Program Benefits at Closing.

For a Tenant to obtain a Benefits Advance, **all** Property Owners must have accepted Sasol's Offer and demonstrated that they can transfer insurable title to their Property.

Home Finding Assistance

If you are a Property Owner who received a Purchase and Sale Agreement to sell your Property to Sasol or you are a Tenant and are considering purchasing a new home outside the Program Area, please contact a CIC representative. The CIC representative can refer you to a local real estate broker that is familiar with the Program for assistance in purchasing property outside of the Program Area.

Normal Seller Closing Costs

The Program pays for costs that are normally payable on property sales, such as costs related to the preparation of deeds, recording fees, transfer tax, title exam, and a closing fee. Mortgages, real estate broker commissions, pro-rated real estates taxes, liens, and judgements **are not** covered under the Program and must be paid by the Property Owner.

8 Clarification Questions and Answers

Why is Sasol offering this Program?

Sasol recognizes that our growth plans and related property acquisitions will result in the expansion of our facility toward our neighbors to the west and northwest of our existing facility. Although a final decision on whether to start construction on the world-scale ethane cracker and GTL facility will not be made until 2014 and 2016, respectively, we are taking steps now to address the concerns of our neighbors. Sasol continuously strives to be a good corporate citizen and in the spirit of being a good neighbor to those residents that will be affected by our growth plans, we are offering our residential neighbors to the west and northwest of our existing operations an opportunity to sell their Properties to Sasol and move to a residential area of their choice.

Why isn't Sasol offering the Program to other plant neighbors?

Sasol recognizes that our growth plans and related property acquisitions will result in the expansion of our facility toward our neighbors to the west and northwest of our existing facility. The Program will give those Property Owners and residents affected by the company's growth plans the option to sell their Property to Sasol, and relocate to an alternative neighborhood, if they so choose.

How do interested parties find out more about the Program?

CIC will open an Information Center in the community in early August and launch a website, www.sasolvppp.com to provide Program specifics, timelines and contact information. CIC will also host small group information sessions at the Information Center for prospective residents and sellers around mid-August. Additional information on the opening date for the Information Center and scheduling of the information sessions will be provided as soon as it is available.

Why has it taken so long for Sasol to look seriously at relocating its nearest community neighbors?

Since commencing the front-end engineering and design (FEED) phase for our U.S. growth projects, Sasol has engaged with our neighbors to understand and address specific community needs and

concerns. During this process, we received a number of requests from our near neighbors, a voluntary property purchase program being one such request.

What if an Owner or Tenant decides not to participate in the Program or to not accept Sasol's Offer?
Your participation in the Program is entirely voluntary. You are under no obligation to participate in the Program or to request an appraisal from Sasol. And even if you do register your interest to participate in the Program and request an appraisal, you are not obliged to accept any Offer that Sasol may make to you.

However, if you have decided to participate in the Program and you have accepted Sasol's Offer and signed the Purchase and Sale Agreement you will have to vacate the Property at Closing.

Will Sasol offer to purchase commercial property and places of worship within the Program Area?
The Program does not cover commercial properties or places of worship. Commercial property owners and religious leaders within the Program Area may approach Sasol to consider the purchase of their properties by contacting a CIC representative at the Information Center. Sasol will consider such requests from commercial property owners or religious leaders on a case-by-case basis.

Does Sasol have any plans to build operating facilities on the property it purchases?
Sasol does not have any plans to use the acquired property for operations or any other purpose, at this time.

By when do I have to register my interest to participate in the Program?
Property Owners will have from **August 12, 2013** to **December 4, 2013** to register their interest in participating in the Program by completing and submitting Appraisal Request and Authorization Forms to a CIC representative at the Information Center. Tenants also have until December 4, 2013 to register their interest in participating in the Program by completing and submitting a Renters Benefits Request Form to a CIC representative.

As stated above, in order to qualify for the Early Sign-up Bonus that is payable upon closing, a Property Owner (as defined) or Tenant (as defined) will need to register their interest in participating in the Program and complete and submit an Appraisal Request and Authorization Form and Renters Benefit Request Form, respectively **before October 4, 2013.**

How do I determine if my property falls within the Program area?
You can determine if your property falls within the Program Area by referring to the Program Area description on pages 7 and 8, which is in the form of an aerial map containing a list of the streets along which the relevant properties are located. Alternatively, you can contact a CIC representative at (337) 310-8200 or visit the Information Office at the former Mossville Elementary School located at 3301 Old Spanish Trail Westlake, LA 70669.

Can I participate in the Program and the Program Benefits if my property does not fall within the program area?
No, unfortunately the Program only applies to Property located within the Program Area as identified on pages 7 and 8. If your property falls outside the Program Area you will therefore not be able to participate in the Program Benefits.

How do i know if i qualify to participate in the Program?

You qualify to participate in the Program if you, as of **July 12, 2013**:

- owned, and had title to either an Improved Property or an Unimproved Property in the Program Area; or
- are a Tenant **and** your landlord participates in the Program.

If you are still unsure if you qualify for the Program, contact a CIC representative at (337) 310-8200 or visit the Information Office at the former Mossville Elementary School located at 3301 Old Spanish Trail Westlake, LA 70669.

I rent property together with one or more other co-tenants. Will each of us be individually entitled to benefit under the Program, or will we share the benefits jointly?
Co-tenants are viewed as a single Tenant for the purposes of the Program. Therefore, co-tenants will share the benefits jointly.

Do I have to accept Sasol's offer to purchase my property?
No, the Program is entirely voluntary. You are under no obligation to accept any Offer that Sasol may make to you.

How can I start talking to Sasol about my participation in the Program?
CIC, a real estate and communications services company, will administer the Program on behalf of Sasol. Should you desire, a CIC representative is available to meet with you privately to go over all the features of the Program and assist you in understanding Program options available to you. We invite you to meet with a CIC representative at the former Mossville Elementary School located at 3301 Old Spanish Trail Westlake, LA 70669 or phone the Information Office at (337) 310-8200 to discuss how the Program features may benefit you.

Will Sasol consider buying my property if I can't clear my title after taking advantage of the Curative Title Allowance?
Sasol may consider, on a case-by-case basis, to accept less than perfect title.

How is the Average Appraised Price calculated?
If the difference between the two appraisals requested by CIC is:

- equal to, or less than 10% of the higher appraisal, then the average of the two appraisals will be equal to the Average Appraised Price for purposes of determining the Offer for the Property; or
- greater than 10% of the higher appraisal, the CIC representative will arrange for an appraisal by the third (reserve) appraiser of your choice. The two highest appraised prices will then be averaged to establish the Average Appraised Price for purposes of determining the Offer for the Property.

In example #1, the higher appraisal is $150,000. This means that the lower appraisal must be within 10% of $150,000 or $15,000. Since the two appraisals are only $2,000 apart, a third appraisal is not required. The two appraisals are averaged to establish the Average Appraised Price of $149,000.

In example #2, the higher appraisal is $150,000. This means that the lower appraisal must be within 10% of $150,000 or $15,000. Since the appraisals are $16,000 apart, this means a third appraisal must be done. Now, out of the three appraisals, the two higher appraisals are averaged to establish the Average Appraised Price of $148,000.

	Appraisal #1	Appraisal #2	Appraisal #3	Average Appraised Price
Example #1	$150,000	$148,000	not required	$149,000
				Average of $150,000 and $148,000
Example #2	$150,000	$134,000	$146,000	$148,000
				Average of $150,000 and $146,000

Only improvements on the Property as of July 12, 2013 will be considered in the appraisal.

I own and occupy a Property in the Program Area. How will the Purchase Price of my Property be calculated? What other Program Benefits will I qualify for?

The examples below are indicative of an Offer and potential Program Benefits available to an Owner Occupant:

Average Appraised Price is	equal to, or greater than $100,000	less than $100,000
Average Appraised Price	**150,000**	**90,000**
Higher of Average Appraised Price or Minimum Appraised Price	150,000	100,000
Premium Payment at 60% of Average Appraised Price	90,000	54,000
Offer Price	**240,000**	**154,000**
Early Sign-Up Bonus	1,000	1,000
Miscellaneous Expense Allowance	8,000	8,000
Rent Disruption Allowance*	-	-
Professional Advice Allowance	500	500
Clear Site Bonus (maximum)	15,000	15,000
Potential Program Benefits available to Owner Occupant	**264,500**	**178,500**

* Rent Disruption Allowance of $1,000 will be available to an Owner Occupant if he/she also owns and leases an Improved Property to a Tenant

An Owner Occupant will furthermore qualify for the payment of a:

- maximum Closing Cost Assistance Allowance of $5,000 toward normal and customary buyer closing costs for a new home outside of the Program Area, which will be payable directly to the closing agent; and
- maximum Curative Title Work Allowance of $5,000 to cover legal costs associated with curing title problems payable directly to the law firm.

I own a Property in the Program Area that I rent out to a third party. How will the Purchase Price of my Property be calculated? What other Program Benefits will I qualify for?

The examples in the table below are indicative of an Offer and potential Program Benefits to a Rental Property Owner:

Average Appraised Price is	equal to, or greater than $75,000	less than $75,000
Average Appraised Price	**100,000**	**70,000**
Higher of Average Appraised Price or Minimum Appraised Price	100,000	75,000
Premium Payment at 50% of Average Appraised Price	50,000	35,000
Offer Price	**150,000**	**110,000**
Early Sign-Up Bonus	1,000	1,000
Rent Disruption Allowance	1,000	1,000
Professional Advice Allowance	500	500
Clear Site Bonus (maximum)	15,000	15,000
Potential Program Benefits available to Rental Property Owner	**167,500**	**127,500**

A Rental Property Owner will furthermore qualify for the payment of a maximum Curative Title Work Allowance of $5,000 to cover legal costs associated with curing title problems payable directly to the law firm.

I own a vacant, Unimproved Property in the Program Area. How will the Purchase Price of my Property be calculated? What other Program Benefits will I qualify for?

The examples in the table below are indicative of an Offer and potential Program Benefits for an Unimproved Property Owner:

Average Appraised Price is	equal to, or greater than $5,000	less than $5,000
Average Appraised Price	**7,000**	**4,000**
Higher of Average Appraised Price or Minimum Appraised Price	7,000	5,000
Premium Payment at 40% of Average Appraised Price	2,800	1,600
Offer Price	**9,800**	**6,600**
Early Sign-Up Bonus	1,000	1,000
Professional Advice Allowance	500	500
Clear Site Bonus (maximum)	15,000	15,000

Potential Program Benefits available to Unimproved Property Owner	**26,300**	**23,100**

An Unimproved Property Owner will furthermore qualify for the payment of a maximum Curative Title Work
Allowance of $5,000 to cover legal costs associated with curing title problems payable directly to the law firm.

9 Program definitions

Throughout this Handbook, unless otherwise stated or the context otherwise indicates, the words in bold have the corresponding meaning stated below them, words in the singular include the plural and vice versa, and any reference to one gender includes the other gender.

Appraisal Request
The completion and submission of the Appraisal Request and Authorization Form on page 32 of this Handbook.

Average Appraised Price
If the difference between the two primary appraisals is:

- equal to, or less than 10% of the higher appraisal, then the Average Appraised Price will be equal to the average of the two appraised prices; or
- greater than 10% of the higher appraisal, then a third appraisal will be ordered and the Average Appraised Price will be equal to the average of the two highest of the three appraised prices.

Broom Clean
All possessions from any structures on the Property including, but not limited to, furnishings, automobiles, trucks recreational vehicles, lawn maintenance equipment, tractors, trailers, recreational equipment, tires, paints, household chemicals, automobile and motor maintenance products, fertilizers, and weed and pest control products must be removed.

CIC
Community Interaction Consulting, Inc., a real estate consulting firm selected by Sasol to administer and manage the Program on its behalf.

Clear Site Bonus
A payment of up to $15,000 that is potentially available to a Property Owner at Closing to pay the cost of clearing the site of all structures and improvements as described in more detail on page 19.

Closing (Property Owner)
The date on which all the conditions of the sale process are fulfilled to the satisfaction of Sasol, funds are disbursed to the seller, and title to the Property is transferred to the buyer.

Closing (Tenant)
The date on which all the conditions of a release agreement between Sasol and a Tenant have been fulfilled to the satisfaction of Sasol.

Closing Cost Assistance Allowance

A maximum allowance of $5,000 that is potentially payable to the closing agent of an Owner Occupant or Tenant in respect of a new property purchased by such Owner Occupant or Tenant outside the Program Area provided that the closing of the purchase of such new property falls within ninety days from vacating the Property within the Program Area.

Curative Title Work Allowance
A maximum allowance of $5,000 that is potentially available to Property Owners to cover the legal costs associated with curing title problems which will be payable directly to the relevant law firm.

Early Sign-Up Bonus
A bonus in the amount of $1,000 paid at Closing to a Property Owner or Tenant, where on or before October 4, 2013, such:

- Property Owner registered his/ her interest in participating in the Program and submitted an Appraisal Request and Authorization Form; or
- Tenant registered his/ her interest in participating in the Program and submitted a Renters Benefits Request Form.

Effective Date
The effective date of the Purchase and Sale Agreement will be the last day that Sasol and/ or seller (Property Owner) sign the Purchase and Sale Agreement.

Equity
The proceeds from a sale after deducting all cost to pay out and discharge any outstanding mortgages, liens, pro-rated taxes and assessments, broker commissions, and curative title work.

Equity Advance
An advance equal to up to ninety (90) percent of the Equity that may be payable to an Owner Occupant in order to allow him/ her to, make a deposit on another property outside the Program Area, pay moving expenses, clear the site of all improvements in accordance with the description of Clear Site Bonus and all other related costs.

Handbook
This Program handbook describing the details of the Program and Program Benefits.

Improved Property
Property that has a structure or structures on it that is suitable and fit for a person to live in and that is free from defects that endanger health and safety of the occupants, regardless of whether such Property is vacant or occupied.

Information Centre
The Program office established by CIC at the former Mossville Elementary School located at 3301 Old Spanish Trail Westlake, LA 70669 that can be contacted at (337) 310-8200.

Minimum Appraised Price
A minimum amount established for the Program to determine the Purchase Price and Offer depending on the type of ownership category and which is more fully described on page 17.

Miscellaneous Expense Allowance

A maximum allowance of $8,000 potentially available to Owner Occupants or $4,000 potentially available to Tenants to cover their relocation/ moving expenses.

Neat and Safe Condition
All utilities including water, sewer, electric, gas, telephone and cable service must be disconnected from the Property at the street (or at the main) so that all improvements on the Property may be safely removed in accordance with the utility providers' guidelines. Above ground swimming pools must be drained and modified such that they will not hold water. The location of all the septic tanks and wells must be clearly marked.

Normal Seller Closing Costs
Costs related to preparation of deeds, recording fees, transfer tax, title exam, and a closing fee are considered Normal
Seller Closing Costs for the purpose of the Program and are potentially payable by Sasol for the benefit of Property Owners. Real estate broker commissions, pro-rated real estate taxes, liens, mortgages, and judgments are not covered under the Program and will not be paid by Sasol.

Offer
An offer made in writing by Sasol to a Property Owner to purchase his/ her residential Property in the Program Area at the Purchase Price.

Offer Period
A ninety (90) day period to accept or decline Sasol's Offer to purchase the Property of a Property Owner, as calculated from the date of the Offer.

Owner Occupied Property
Improved Property that is occupied by an Owner Occupant.

Owner Occupant
A Property Owner that lives in a home on his/ her Improved Property.

Premium Payment
A payment in excess of the Average Appraised Price, equal to:

- 60% of the Average Appraised Price for Owner Occupants;
- 50% of the Average Appraised Price for Rental Property Owners; and •
  40% of the Average Appraised Price for Unimproved Property Owners.

Program
The voluntary property purchase program sponsored by Sasol.

Program Area
The area described on pages 7 and 8 of this Handbook.

Program Benefits
The program benefits available to the Property Owners and Tenants under the Program as more fully described on pages 16 to 20.

Property

All residential property within the Program Area including Improved and Unimproved Property regardless of whether the Property is occupied or vacant.

Property Owner
A person or persons owning and holding good title to a Property as of July 12, 2013.

Purchase Price
The purchase price as determined with reference to the higher of the Average Appraised Price or the Minimum Appraised Price plus the Premium Payment for the relevant type of owner category.

Purchase and Sale Agreement
An non-negotiable agreement containing the Purchase Price, Program Benefits applicable to a Property Owner and other contractual terms and conditions that are typical of real estate transactions of this nature, which is provided to the Property Owner by Sasol.

Rental Property
Improved Property that is either vacant or occupied by a third party.

Rental Property Owner
A Property Owner of Rental Property.

Rent Disruption Allowance
An allowance of $1,000 payable to a Rental Property Owner at Closing to cover lost rental income when the Tenant vacates the Rental Property.

Sasol
Sasol North America Inc., a Delaware corporation, having its principal place of business at 900 Threadneedle, Suite 100, Houston, Texas, 77079-2990, U.S.A.

Tenant
A person or persons named as (a) tenant(s) in a lease that actively and consistently rent(s), and resides(s) in, a Rental Property and for whom the said residence is his/her or their primary residence as of July 12, 2013, and does not include any persons or family members occupying the Property who are not named as a Tenant in the lease.

Unimproved Property
Property that is not an Improved Property.

Unimproved Property Owner
The Property Owner of an Unimproved Property.

10 Appraiser instructions

Situation
Sasol North America Inc. (Sasol) is sponsoring a Voluntary Property Purchase Program (Program) focused on purchasing Properties to the west and northwest of its existing Westlake, LA facility. It is Sasol's firm intention to fairly compensate Property Owners for their Properties. Community Interaction Consulting, Inc. (CIC) will administer the Program on behalf of Sasol. You have been selected

by the Property Owner to complete an appraisal of his/ her Property in accordance with the guidelines below.

Guidelines

1. Appraisers will prepare their appraisal report according to the Uniform Standards of Professional Practice (USPAP) and any regulatory agencies of the State of Louisiana using the Appraisal Institute form A1.100 with emphasis on the comparison approach.
2. Appraisers will contact Property Owners within three (3) business days of the appraisal being ordered by CIC to schedule a mutually agreeable time to inspect the Property.
3. No improvements to Properties after July 12, 2013 will be taken into consideration for purposes of the appraisal.
4. Do not use comparable sales where Sasol was the buyer or seller.
5. Do not adjust comparable sales for FHA or VA financing.
6. Provide an "as is" appraised price based on typical marketing time.
7. Accept and consider any information given to you from the Property Owner regarding their Property and, to the extent relevant, reflect this information in your report. This information may come in the form of a prior appraisal or broker price opinion.
8. Any adjustment deemed to be subjective shall be made to benefit the subject Property by making the highest defendable positive adjustment.
9. Include non-permitted livable square footage in your total square footage estimate.
10. Do not consider conditional aspects of the subject property like cracked foundation slabs and deferred maintenance. Focus on the physical characteristics like finished living area, room count, number of bathrooms and garages, floor plan, age and lot size. Accordingly, rate the condition of the subject property and comparable sales as fair, average or good.
11. When calculating total living area, round up all exterior dimensions to the nearest half foot.
12. Include in your report:

- Color photos of the subject Property and the front of all comparable sales
- A sketch, not necessarily to scale, of dimensions used to determine living square footage
- A map indicating the location of the subject Property and the comparable sales • Interior photographs

13. Email your report and invoice to the CIC representative that ordered the appraisal.

11 Sasol Appraisal Request and Authorization Form

I (We), the undersigned, as an Property Owner of

_____ , LA

request and authorize Community Interaction Consulting, Inc. (CIC) to order an appraisal of my(our) Property as described on page 7 of the Sasol North America Inc. Voluntary Property Purchase Program Handbook. I (We) understand that requesting appraisals for my (our) Property does not commit me (us) to sell my (our) Property to Sasol and does not commit Sasol to purchase my (our) Property. Only a fully executed Purchase Agreement between me (us) and Sasol commits me (us) to sell my (our) Property to Sasol in accordance with the terms of the Purchase Agreement.

I (We) agree to provide access to my (our) Property for the following appraisers,

1. _____,
2. _____, and if required
3. _____, The Property is currently occupied by_____ who

may be reached:_____ Title to the Property

is in the name of: _____

_____ Date:
Property Owner _____

_____ Date:
Property Owner _____

Fax to CIC, at (337) 310-8215 or email appraiser selections to the CIC representative

12 Sasol Renters Benefits Request Form

I (We), the undersigned, affirm that I (we) am (are) the Tenant(s) as of July 12, 2013 for the Rental

Property located at: _____, LA

and request the Program Benefits be paid to me (us) when a all the conditions of a release agreement between Sasol and me (us) have been fulfilled to the satisfaction of Sasol. I (we) understand that the Program Benefits will be reported to the Internal Revenue Service as miscellaneous income on form IRS 1099 and I (we) further understand that I (we) must release Sasol from any and all past or present property or occupancy claims against Sasol to be eligible to receive these Program Benefits.

In the event I (we) purchase a residence outside the Program Area I(we) request that the eligible Closing Cost Allowance be paid to the closing agent for the residence I(we) purchased.

Attached is a lease or other verifiable data indicating that I (we) am (are) the Tenant as of July 12, 2013 in accordance with the requirements of the Program.

_____ _____
Printed Name Printed Name

SS# _____ SS#_____

Date: _____ Date:
_____

www.sasolvppp.com

BOBBY JINDAL
GOVERNOR

PEGGY M. HATCH
SECRETARY

State of Louisiana

DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF ENVIRONMENTAL COMPLIANCE

July 1, 2013

Mr. Thomas Diggs
Associate Director for Air
USEPA Region 6-6PDQ
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

RE: Request to remove $PM_{2.5}$ BAM data from comparison to NAAQS standards

Dear Mr. Diggs:

This letter and the enclosed report are being submitted to request the Region to remove $PM_{2.5}$ BAM data from comparison to NAAQS standards. The Louisiana Department of Environmental Quality (LDEQ) has operated continuous beta-attenuation monitors (BAMs) since 2009 to monitor $PM_{2.5}$ concentration in the ambient air in several ambient air monitoring sites in the State. To date, the BAMs have proven to be inconsistent and unreliable in accurately measuring $PM_{2.5}$ in the atmospheric conditions prevalent in the region. LDEQ continues to work with the manufacturer Met One (LDEQ uses the Met One BAM-1020 Monitor) and the EPA to resolve these discrepancies, as operation of these monitors would be of benefit in meeting the overall mission of monitoring the ambient air if the monitors were to perform properly. Through the documentation presented herein and per 40 CFR 58.11(e), LDEQ is requesting that the data collected with the $PM_{2.5}$ BAMs not be compared to the NAAQS standards until issues are resolved.

If you have any questions, please do not hesitate to contact me at 225-219-3550.

Sincerely,

Paul D. Miller, P.E.
Administrator

yz

Enclosure: Request to remove $PM_{2.5}$ BAM data from comparison to NAAQS standards

c: Ms. Maria Martinez, EPA: 6PD-Q
Ms. Kara Allen, EPA: 6PD-Q

Request to remove $PM_{2.5}$ BAM data from comparison to NAAQS standards

LDEQ presently operates six monitoring sites where $PM_{2.5}$ BAMs are collocated with $PM_{2.5}$ Federal Reference Method (FRM) monitors. These sites are Capitol, Port Allen, Lafayette, Monroe, Chalmette Vista and Alexandria. There are two $PM_{2.5}$ BAMs located at Alexandria. 40 CFR 58.11(e) states that monitoring agencies are to use the performance criteria listed in Table C-4 to subpart C of part 53 of 40 CFR to compare and assess the data collected by the continuous BAMs and the FRMs, and that the key "statistical metric" is the bias (40 CFR 58.11(e) (5)), which must be in the ± 10% range for the data from the different instruments to be comparable.

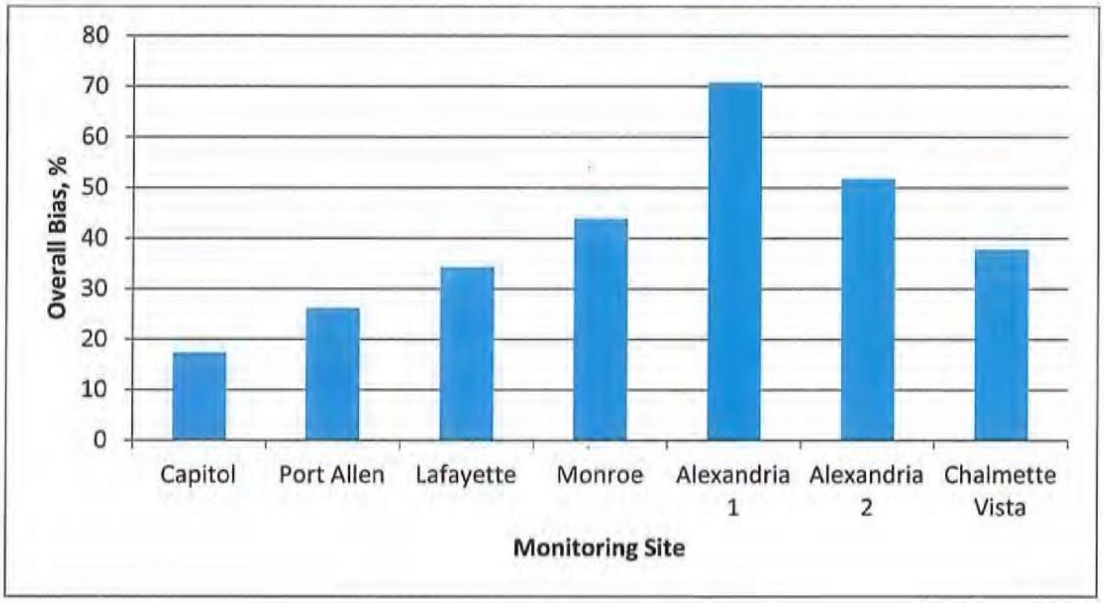
LDEQ utilized the assessment tool provided by the EPA on their website (http://www.epa.gov/airquality/ad_rep_frmvfem.html) to analyze the data comparing $PM_{2.5}$ BAMs to collocated $PM_{2.5}$ FRMs collected from January 2011 to January 2013. The tool is discussed in the accompanying document by Tim Hanley and Adam Reff of OAQPS (http://www.epa.gov/ttnaaqs/standards/pm/data/HanleyandReff040711.pdf).

The article discusses the goals for acceptable measurement uncertainty as "… 10 percent coefficient of variation (CV) for total precision and plus or minus 10 percent total bias." The assessment tool provides a one page summary of these statistics and other factors for each site where Federal Equivalent Method (FEM) BAM and FRM are collocated. These are attached in the accompanying Appendix A to this memorandum.

The overall biases, defined in 40 CFR 58 Appendix A 1.2(b) as "The systematic or persistent distortion of a measurement process which causes errors in one direction", for each site for the data analyzed from January 2011 to January 2013 are summarized in the bar graph below:

OVERALL BIASES FOR SITES WITH COLLOCATED PM25 FRM / FEM

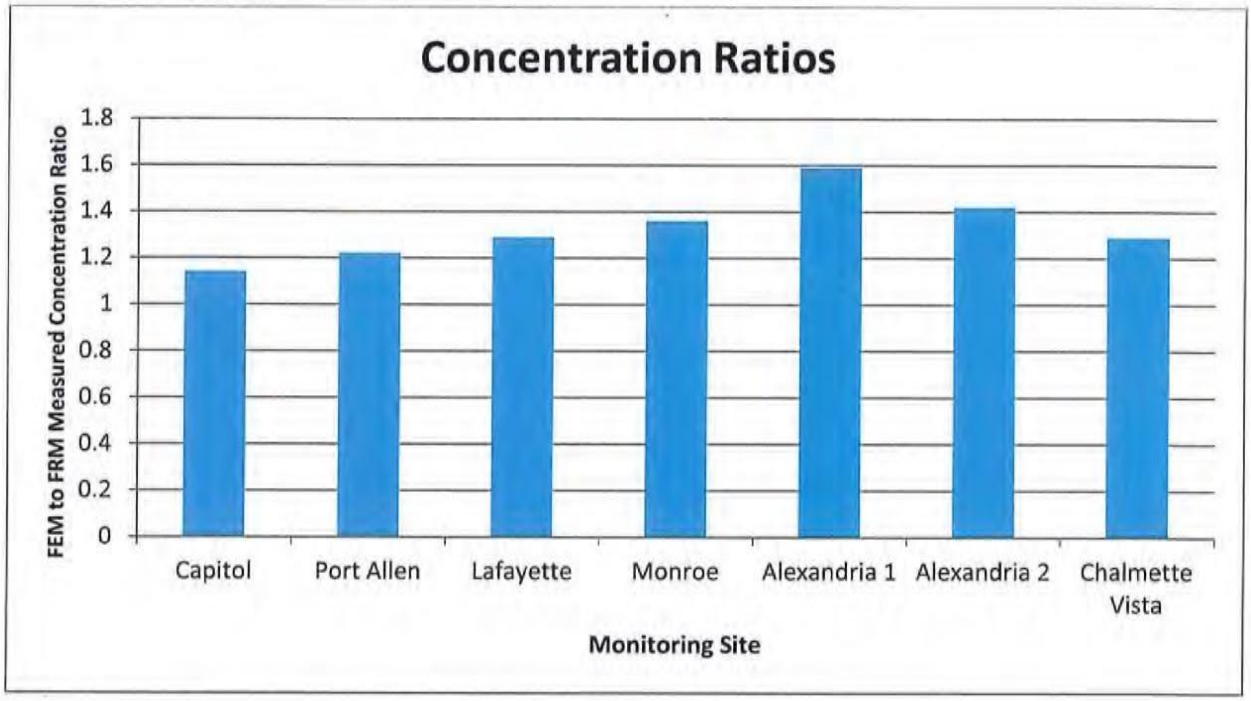
JAN 2011 to JAN 2013



Clearly all sites are above +10% in bias which demonstrates that the $PM_{2.5}$ readings taken by the continuous BAMs are commonly much higher than the readings measured by the FRMs. The bias is more dramatic when considered by season. In Louisiana, fall is the season with the most dramatic biases, ranging from 34.9% to 67.5%.

The summary sheets for each site with collocated FRM / FEM show a variety of statistics and measurement comparisons that show that the FEMs are typically and, in some cases, overwhelmingly, generating readings higher in concentration than the collocated FRMs. The overall ratios of FEM readings to FRM readings at each site are summarized in the figure below:

RATIO OF AVERAGE FEM $PM_{2.5}$ CONCENTRATION TO AVERAGE FRM CONCENTRATION



After assessing the comparability of the PM2.5 FEMs to the collocated FRMs for our network, we have determined that the sites listed in the table below do not meet the comparability requirements. In Appendix A, charts, located in the middle of the summary page for each site, show additive vs. multiplicative bias, and correlation coefficient versus FRM CCV (concentration coefficient of variation). In order to meet the 40 CFR 53 Subpart C correlation criteria for approving continuous $PM_{2.5}$ FEMS, the data must provide calculated statistics that are at or above the solid line in the CCV chart on the right middle side of the page (http://www.epa.gov/ttnamti1/files/ambient/pm25/comparabilityassessmenttool.pdf). As can be observed in these summaries in Appendix A and in the table below, LDEQ does not have any sites that meet these criteria.

Table – Request for Exclusion of $PM_{2.5}$ Continuous FEM Data

Site Name	City	Site ID	Cont POC	Method Description	$PM_{2.5}$ Cont. Begin Date	$PM_{2.5}$ Cont End Date	Continuous/ FRM Sampler pairs per season	Slope (m)	Intercept (y)	Meets bias requirement	Correlation (r)
Sites with $PM_{2.5}$ continuous FEMs that are collocated with FRMs:											
Capitol	Baton Rouge	22-033-0009	3	Beta Attenuation	2011	Continuing	Winter = 172 Spring = 177 Summer = 161 Fall = 149 Total = 659	1.03	1.16	No	0.81
Port Allen	Port Allen	22-121-0001	3	Beta Attenuation	2009	Continuing	Winter = 158 Spring = 164 Summer = 137 Fall = 147 Total = 606	1.01	2.30	No	0.77
Lafayette	Lafayette	22-055-0007	3	Beta Attenuation	2009	Continuing	Winter = 58 Spring = 62 Summer = 61 Fall = 57 Total = 238	1.04	2.23	No	0.86
Monroe	Monroe	22-073-0004	3	Beta Attenuation	2010	Continuing	Winter = 61 Spring = 48 Summer = 46 Fall = 58 Total = 213	0.72	5.79	No	0.65
Alexandria 1	Alexandria	22-079-0002	3	Beta Attenuation	2011	Continuing	Winter = 37 Spring = 42 Summer = 61 Fall = 59 Total = 199	0.92	5.70	No	0.76
Alexandria 2	Alexandria	22-079-0002	4	Beta Attenuation	2011	Continuing	Winter = 37 Spring = 40 Summer = 59 Fall = 58 Total = 194	1.01	3.46	No	0.81
Chalmette Vista	Chalmette	22-087-0007	3	Beta Attenuation	2010	Continuing	Winter = 28 Spring = 31 Summer = 26 Fall = 23 Total = 108	0.89	4.27	No	0.72

LDEQ presently uses the data from the continuous BAMs to provide an indication of the current AQI for $PM_{2.5}$ on its air quality data website. This data is also submitted to AQS on a non-regulatory basis as part of the public record of air quality data for the state. Therefore the data is used to give an indication of current AQI, but not official AQI, which is determined by the collocated FRMs which run at the locations with continuous units. The agency intends to continue doing this, and to work with the manufacturer and EPA to improve the quality of the data obtained from the continuous units in comparison to the collocated FRMs.

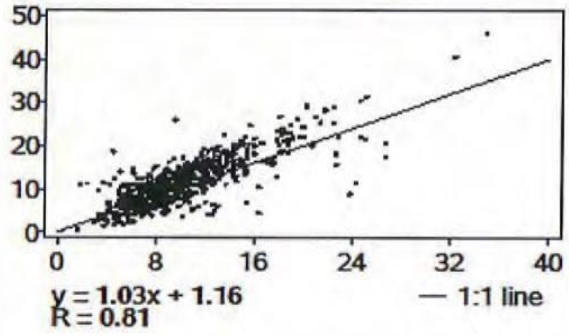
Due to the data and analysis presented in this document, LDEQ respectfully asks EPA to allow elimination of continuous $PM_{2.5}$ FEM data collected by BAMs from consideration for comparison to the NAAQS standards for $PM_{2.5}$ until modifications in methodology and/or hardware result in instrumentation that can accurately and consistently measure $PM_{2.5}$ in the ambient air. LDEQ will continue to work with the manufacturer, Met One, and with EPA to resolve the issues that prevent accurate measurement of $PM_{2.5}$ concentration in ambient air in our region.

PM 2.5 Continuous Monitor Comparability Assessment

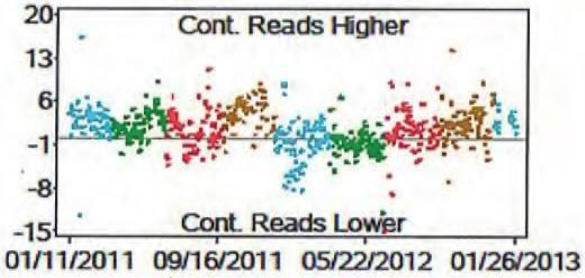
Site 22-033-0009: Baton Rouge, LA

FRM: R & P Model 2025 PM2.5 Sequential w/WINS-GRAVIMETRIC (118), PM2.5 - Local Conditions (88101), POC=1
Cont: Met One BAM-1020 Mass Monitor w/VSCC-Beta Attenuation (170), PM2.5 - Local Conditions (88101), POC=3

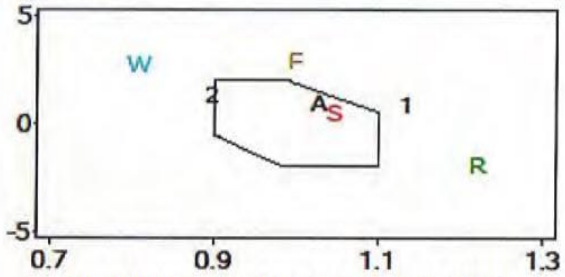
Cont. (y) vs. FRM (x) PM 2.5 (µg/m³)



Cont. minus FRM PM 2.5 (µg/m³)

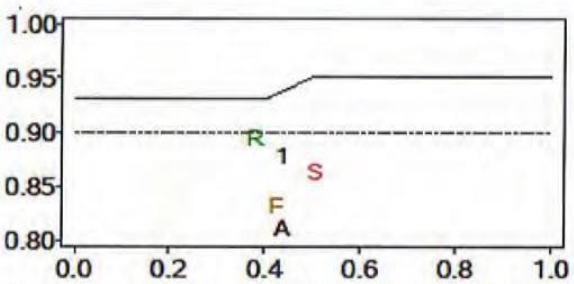


Additive (y) vs. Multiplicate (x) Bias



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

R (y) vs. FRM CCV (x)



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

Mean PM 2.5 (µg/m³)

Dataset	N	FRM	Cont	Ratio (Cont/FRM)
AllData	659	10.0	11.4	1.14
Winter	172	8.9	10.1	1.13
Spring	177	10.6	11.2	1.06
Summer	161	10.7	11.8	1.10
Fall	149	9.7	12.7	1.31
2011	314	10.2	12.5	1.23
2012	335	9.8	10.3	1.05
2013	10	9.3	12.4	1.32

Appendix A Statistics

Dataset	N (all observations)	Bias	N (only >= 3 ug/m^3)	Bias
AllData	659	16.9	641	17.3
Winter	172	16.6	168	15.4
Spring	177	4.4	172	6.2
Summer	161	10.5	154	13.4
Fall	149	39.1	147	36.4
2011	314	24.1	308	25.7
2012	335	9.7	323	8.7
2013	10	33.7	10	33.7

Data Source: EPA AQS Data Mart

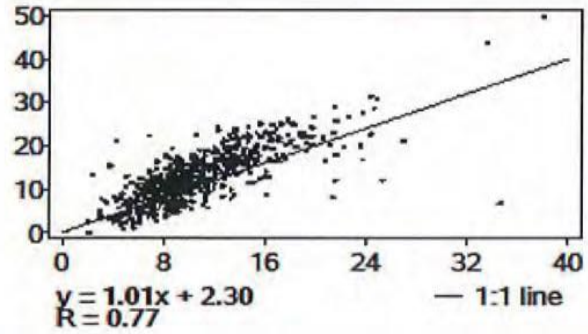
Generated on: May 22, 2013

PM 2.5 Continuous Monitor Comparability Assessment

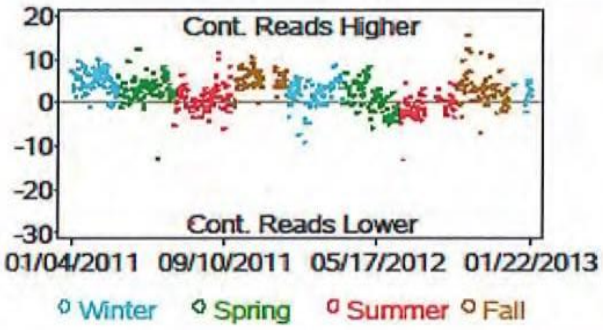
Site 22-121-0001: Baton Rouge, LA

FRM: R & P Model 2025 PM2.5 Sequential w/WINS-GRAVIMETRIC (118), PM2.5 - Local Conditions (88101), POC=1
Cont: Met One BAM-1020 Mass Monitor w/VSCC-Beta Attenuation (170), PM2.5 - Local Conditions (88101), POC=3

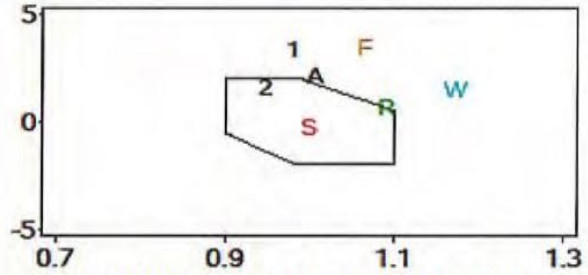
Cont. (y) vs. FRM (x) $PM_{2.5}$ ($\mu g/m^3$)



Cont. minus FRM $PM_{2.5}$ ($\mu g/m^3$)

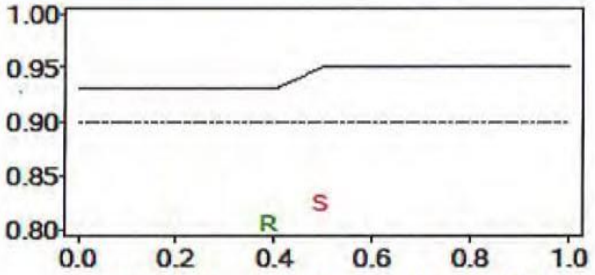


Additive (y) vs. Multiplicate (x) Bias



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

R (y) vs. FRM CCV (x)



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

Mean $PM_{2.5}$ ($\mu g/m^3$)

Dataset	N	FRM	Cont	Ratio (Cont/FRM)
AllData	606	10.6	12.9	1.22
Winter	158	9.2	12.4	1.35
Spring	164	11.2	13.1	1.16
Summer	137	11.7	11.6	1.00
Fall	147	10.3	14.6	1.41
2011	315	11.3	14.6	1.30
2012	281	10.0	11.2	1.13
2013	10	6.3	8.4	1.34

Appendix A Statistics

Dataset	N (all observations)	Bias	N (only >= 3 ug/m^3)	Bias
AllData	606	25.2	592	26.2
Winter	158	36.1	154	38.3
Spring	164	16.8	161	18.5
Summer	137	-2.6	132	-0.5
Fall	147	48.6	145	46.4
2011	315	33.4	314	33.7
2012	281	15.8	270	17.1
2013	10	28.4	8	44.3

Data Source: EPA AQS Data Mart

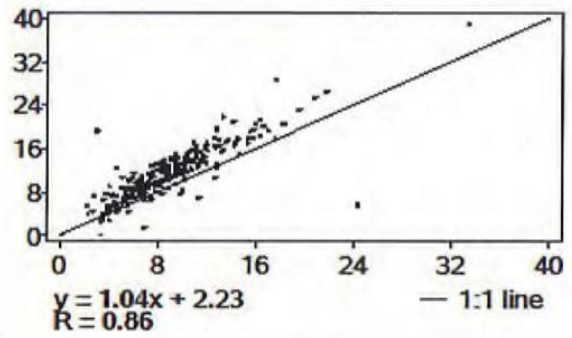
Generated on: May 22, 2013

PM 2.5 Continuous Monitor Comparability Assessment

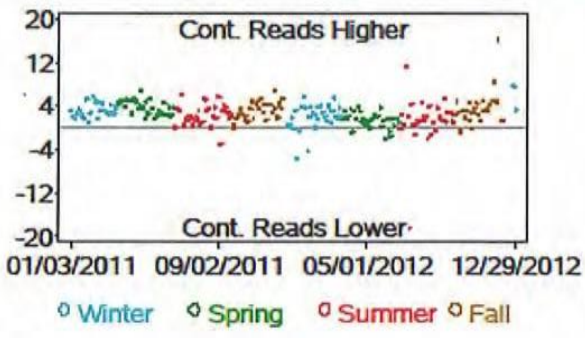
Site 22-055-0007: Lafayette, LA

FRM: R & P Model 2025 PM2.5 Sequential w/WINS-GRAVIMETRIC (118), PM2.5 - Local Conditions (88101), POC=1
Cont: Met One BAM-1020 Mass Monitor w/VSCC-Beta Attenuation (170), PM2.5 - Local Conditions (88101), POC=3

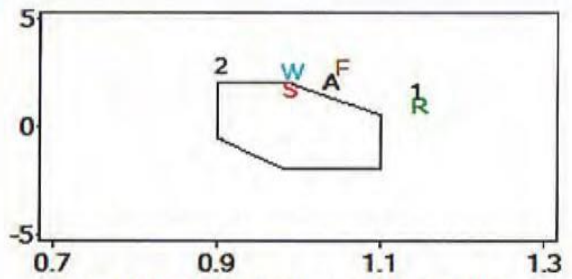
Cont. (y) vs. FRM (x) $PM_{2.5}$ ($\mu g/m^3$)



Cont. minus FRM $PM_{2.5}$ ($\mu g/m^3$)

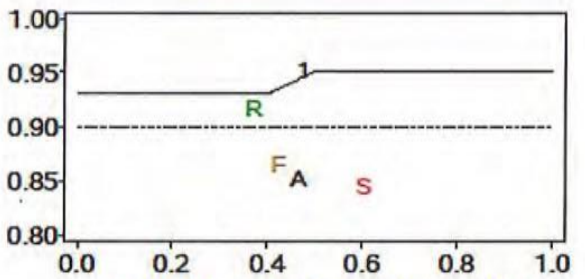


Additive (y) vs. Multiplicate (x) Bias



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

R (y) vs. FRM CCV (x)



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

Mean $PM_{2.5}$ ($\mu g/m^3$)

Dataset	N	FRM	Cont	Ratio (Cont/FRM)
AllData	238	8.8	11.4	1.29
Winter	58	6.9	9.6	1.38
Spring	62	9.6	12.1	1.27
Summer	61	9.1	10.9	1.19
Fall	57	9.5	12.9	1.35
2011	122	8.9	11.9	1.34
2012	116	8.7	10.8	1.24
2013	0	.	.	.

Appendix A Statistics

Dataset	N (all observations)	Bias	N (only >= 3 ug/m^3)	Bias
AllData	238	34.1	230	34.3
Winter	58	40.5	57	42.6
Spring	62	29.2	61	28.5
Summer	61	22.7	58	23.4
Fall	57	45.2	54	43.9
2011	122	36.5	118	36.1
2012	116	31.7	112	32.5
2013	0	.	.	.

Data Source: EPA AQS Data Mart

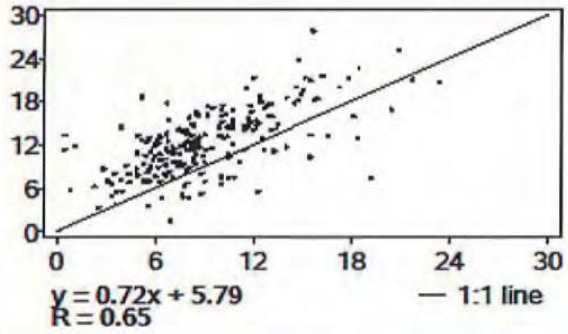
Generated on: May 22, 2013

PM 2.5 Continuous Monitor Comparability Assessment

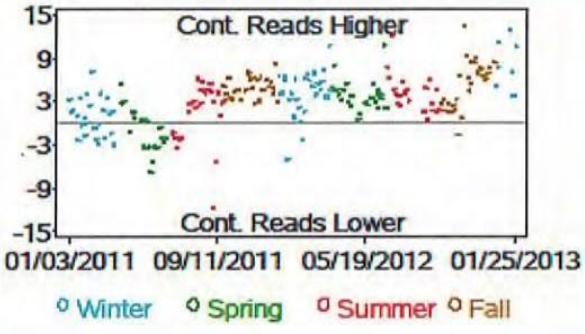
Site 22-073-0004: Monroe, LA

FRM: R & P Model 2025 PM2.5 Sequential w/WINS-GRAVIMETRIC (118), PM2.5 - Local Conditions (88101), POC=1
Cont: Met One BAM-1020 Mass Monitor w/VSCC-Beta Attenuation (170), PM2.5 - Local Conditions (88101), POC=3

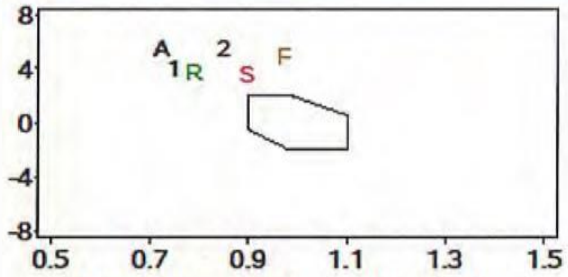
Cont. (y) vs. FRM (x) PM 2.5 (µg/m³)



Cont. minus FRM PM 2.5 (µg/m³)

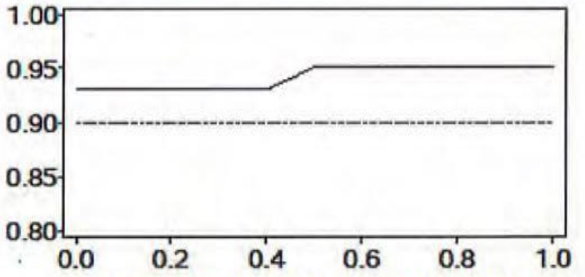


Additive (y) vs. Multiplicate (x) Bias



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

R (y) vs. FRM CCV (x)



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

Mean PM 2.5 (µg/m³)

Dataset	N	FRM	Cont	Ratio (Cont/FRM)
AllData	213	9.1	12.4	1.36
Winter	61	7.2	10.6	1.46
Spring	48	10.6	12.3	1.17
Summer	46	11.1	13.8	1.24
Fall	58	8.2	13.2	1.61
2011	103	9.7	11.5	1.19
2012	106	8.7	13.1	1.51
2013	4	4.6	13.1	2.87

Appendix A Statistics

Dataset	N (all observations)	Bias	N (only >= 3 ug/m^3)	Bias
AllData	213	73.5	205	43.9
Winter	61	111	57	50.0
Spring	48	66.1	45	23.5
Summer	46	26.9	46	26.9
Fall	58	77.1	57	67.5
2011	103	32.7	100	27.9
2012	106	87.6	102	56.6
2013	4	752	3	143

Data Source: EPA AQS Data Mart

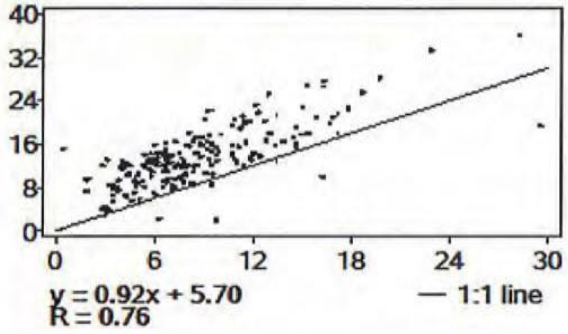
Generated on: May 22, 2013

PM 2.5 Continuous Monitor Comparability Assessment

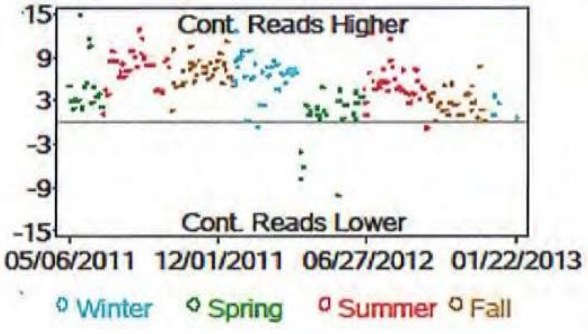
Site 22-079-0002: Alexandria, LA

FRM: R & P Model 2025 PM2.5 Sequential w/WINS-GRAVIMETRIC (118), PM2.5 - Local Conditions (88101), POC=1
Cont: Met One BAM-1020 Mass Monitor w/VSCC-Beta Attenuation (170), PM2.5 - Local Conditions (88101), POC=3

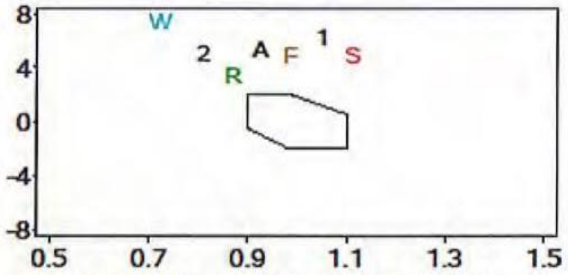
Cont. (y) vs. FRM (x) PM 2.5 (µg/m³)



Cont. minus FRM PM 2.5 (µg/m³)

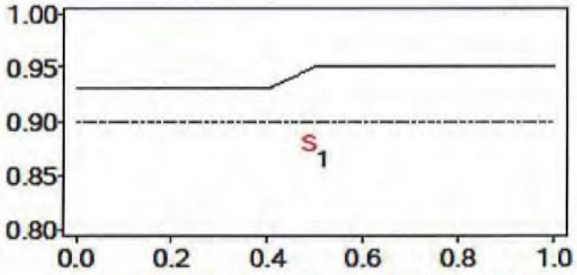


Additive (y) vs. Multiplicate (x) Bias



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

R (y) vs. FRM CCV (x)



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

Mean PM 2.5 (µg/m³)

Dataset	N	FRM	Cont	Ratio (Cont/FRM)
AllData	199	8.6	13.6	1.59
Winter	37	5.8	11.9	2.04
Spring	42	10.1	12.5	1.24
Summer	61	9.4	15.7	1.67
Fall	59	8.3	13.4	1.61
2011	83	8.7	15.6	1.80
2012	115	8.5	12.2	1.44
2013	1	6.1	6.7	1.10

Appendix A Statistics

Dataset	N (all observations)	Bias	N (only >= 3 ug/m^3)	Bias
AllData	199	89.1	190	70.8
Winter	37	124	35	111
Spring	42	94.0	39	29.6
Summer	61	77.4	60	78.0
Fall	59	75.7	56	66.7
2011	83	127	80	90.8
2012	115	62.6	109	56.7
2013	1	9.8	1	9.8

Data Source: EPA AQS Data Mart

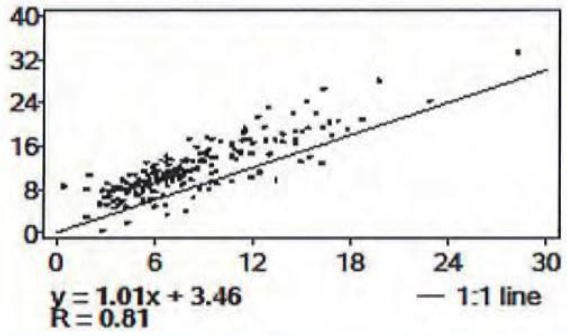
Generated on: May 22, 2013

PM 2.5 Continuous Monitor Comparability Assessment

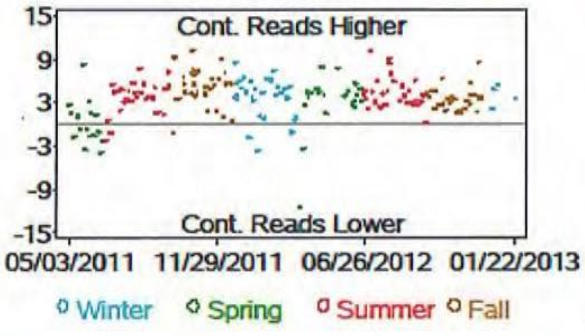
Site 22-079-0002: Alexandria, LA

FRM: R & P Model 2025 PM2.5 Sequential w/WINS-GRAVIMETRIC (118), PM2.5 - Local Conditions (88101), POC=1
Cont: Met One BAM-1020 Mass Monitor w/VSCC-Beta Attenuation (170), PM2.5 - Local Conditions (88101), POC=4

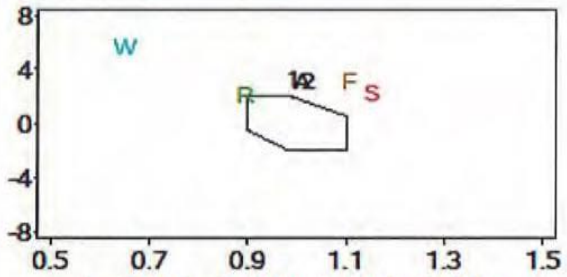
Cont. (y) vs. FRM (x) $PM_{2.5}$ ($\mu g/m^3$)



Cont. minus FRM $PM_{2.5}$ ($\mu g/m^3$)

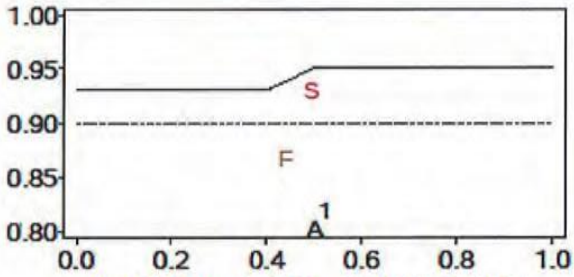


Additive (y) vs. Multiplicate (x) Bias



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

R (y) vs. FRM CCV (x)



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

Mean $PM_{2.5}$ ($\mu g/m^3$)

Dataset	N	FRM	Cont	Ratio (Cont/FRM)
AllData	**194**	**8.3**	**11.9**	**1.42**
Winter	37	5.8	9.7	1.67
Spring	40	9.2	10.6	1.15
Summer	59	9.4	13.4	1.42
Fall	58	8.2	12.6	1.53
2011	83	8.6	12.1	1.41
2012	110	8.2	11.7	1.43
2013	1	6.1	9.6	1.57

Appendix A Statistics

Dataset	N (all observations)	Bias	N (only >= 3 ug/m^3)	Bias
AllData	**194**	**61.0**	**183**	**51.8**
Winter	37	82.8	35	73.2
Spring	40	59.6	35	30.1
Summer	59	46.1	58	48.3
Fall	58	63.3	55	55.8
2011	83	66.3	78	49.6
2012	110	57.1	104	53.5
2013	1	57.4	1	57.4

Data Source: EPA AQS Data Mart

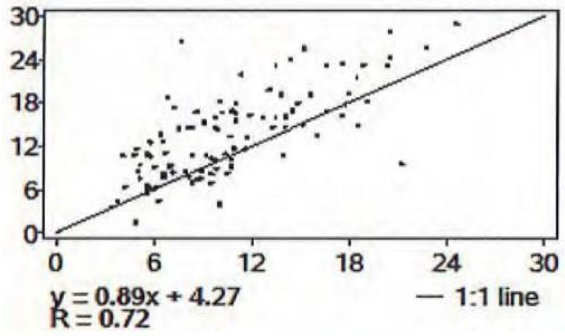
Generated on: May 22, 2013

PM 2.5 Continuous Monitor Comparability Assessment

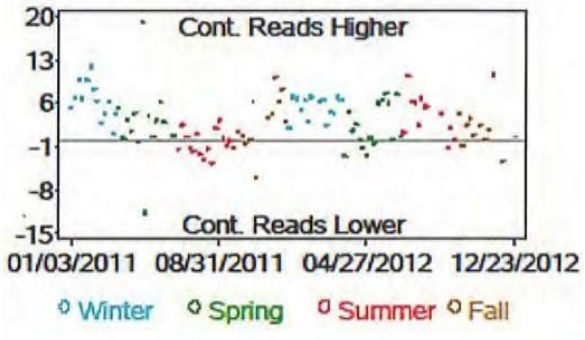
Site 22-087-0007: Chalmette, LA

FRM: R & P Model 2025 PM2.5 Sequential w/WINS-GRAVIMETRIC (118), PM2.5 - Local Conditions (88101), POC=1
Cont: Met One BAM-1020 Mass Monitor w/VSCC-Beta Attenuation (170), PM2.5 - Local Conditions (88101), POC=3

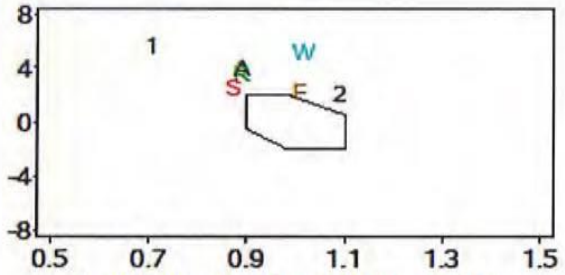
Cont. (y) vs. FRM (x) $PM_{2.5}$ ($\mu g/m^3$)



Cont. minus FRM $PM_{2.5}$ ($\mu g/m^3$)

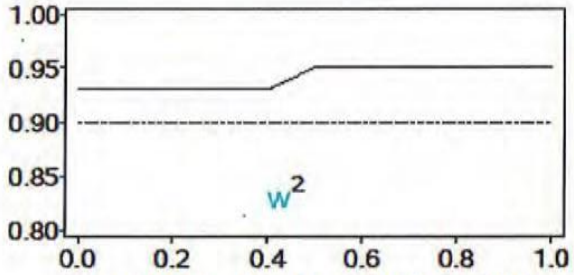


Additive (y) vs. Multiplicate (x) Bias



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

R (y) vs. FRM CCV (x)



A=AllData, 1=2011, 2=2012, 3=2013
W=Winter, R=Spring, S=Summer, F=Fall

Mean $PM_{2.5}$ ($\mu g/m^3$)

Dataset	N	FRM	Cont	Ratio (Cont/FRM)
AllData	108	10.6	13.7	1.29
Winter	28	9.1	14.8	1.63
Spring	31	12.8	15.3	1.19
Summer	26	10.3	11.8	1.14
Fall	23	9.8	12.3	1.26
2011	58	10.8	13.6	1.26
2012	50	10.4	13.8	1.33
2013	0	.	.	.

Appendix A Statistics

Dataset	N (all observations)	Bias	N (only >= 3 ug/m^3)	Bias
AllData	108	36.9	107	37.9
Winter	28	71.7	28	71.7
Spring	31	24.4	31	24.4
Summer	26	20.1	26	20.1
Fall	23	30.3	22	34.9
2011	58	36.4	58	36.4
2012	50	37.5	49	39.7
2013	0	.	.	.

Data Source: EPA AQS Data Mart

Generated on: May 22, 2013

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

MAR 27 2014

Mr. Paul D. Miller, P.E.
Administrator, Office of Environmental Compliance
Assessment Division
Louisiana Department of Environmental Quality
Post Office Box 4301
Baton Rouge, LA 70821-4301

Dear Mr. Miller:

The U.S. Environmental Protection Agency (EPA) Region 6 has concluded its review of the Louisiana Department of Environmental Quality's (LDEQ) 2013 $PM_{2.5}$ Data Exclusion Request for the continuous Federal Equivalent Method (FEM) beta-attenuation monitors (BAMs) to ensure it meets the requirements of Title 40 of the Code of Federal Regulations (CFR) Part 58.11(e) and determine $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS) comparability.

We are pleased to inform you that we have determined that the 2013 $PM_{2.5}$ Data Exclusion Request for all of the FEM BAMs submitted followed the required procedures of 40 CFR Part 58.11(e) to evaluate the data. We have evaluated each site individually to determine whether the data will be excluded from comparison to the $PM_{2.5}$ NAAQS and reviewed applicable requirements for the continuous $PM_{2.5}$ air monitoring network. Details of our evaluation for each site are provided in the enclosure.

We appreciate LDEQ's efforts to prepare and submit the 2013 $PM_{2.5}$ Data Exclusion Request for the BAMs. If you have any questions, please contact me at (214) 665-3102, or your staff may contact Ms. Maria Martinez, Air Quality Analysis Section Chief, of my staff at (214) 665-2230.

Sincerely yours,

Thomas H. Diggs
Associate Director for Air

Enclosure

Louisiana Department of Environmental Quality (LDEQ)
$PM_{2.5}$ Data Exclusion Request Technical Comments

The Environmental Protection Agency (EPA) has reviewed your 2013 $PM_{2.5}$ Data Exclusion Request and our comments are provided below. In addition to the exclusion request, EPA's review includes additional information discussed with LDEQ. In order to reconcile all proposed network changes and as required by 40 CFR §58.14, system modifications need to be submitted to EPA in writing for approval. LDEQ will need to formally submit the requested network changes; this information can be addressed in the 2014 network plan.

Capitol site (Air Quality System, AQS #22-033-0009):

58.11(e) Exclusion Request
At the Capitol site, LDEQ operates a $PM_{2.5}$ Federal Equivalent Method (FEM) beta-attenuation monitor (BAM) designated as a state or local air monitoring stations (SLAMS) monitor and Parameter Code 88101. The Capitol site is also a National Core (NCore) multipollutant site which requires a $PM_{2.5}$ continuous monitor to meet NCore requirements. *See* 40 CFR Part 58, App. D, 3(b).

We disapprove the request to exclude the FEM BAM at the Capitol site. Based on the analysis provided by LDEQ, the data quality for the Capitol $PM_{2.5}$ BAM falls within the limits of 40 CFR Part 53 Subpart C, Table C-4 to be compared to the $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). The 3 years of data for the continuous FEM BAM monitor correlates with the manual Federal Reference Method (FRM) monitor. We understand that there is seasonal variation, but the overall data falls within the parameters for comparison to the NAAQS. Please note if a valid 24-hour measurement is not produced from the primary monitor for a particular day (scheduled or otherwise), but a valid sample is generated by an FRM, FEM or approved regional method monitor, then that value shall be considered part of the site data record.

Network Impacts
For the Baton Rouge metropolitan statistical area (MSA), LDEQ is required to operate one continuous $PM_{2.5}$ monitor to equal at least one-half of the minimum required two sites as listed in 40 CFR Part 58, App. D, 4.7.1, Table D-5. *See* 40 CFR Part 58, App. D, 4.7.2. In addition, at least one of the continuous monitors must be operated with one of the required monitors. The Capitol site meets this requirement with the continuous $PM_{2.5}$ BAM operated in conjunction with a required manual FRM monitor.

Reporting for the Air Quality Index (AQI), an indication of the current $PM_{2.5}$ concentration, is required for all individual MSAs with a population exceeding 350,000. According to the 2012 United States Census population estimates, the Baton Rouge MSA is at 815,298 and is required to report continuous $PM_{2.5}$ for AQI.

Direction
Therefore, operation of the continuous $PM_{2.5}$ BAM at the Capitol site is required to meet the minimum $PM_{2.5}$ network requirements. Please make sure the monitor is designated as SLAMS, Parameter Code 88101 and NAAQS comparable in the 2014 network plan.

Port Allen site (AQS #22-121-0001):

58.11(e) Exclusion Request
At the Port Allen site, LDEQ operates a $PM_{2.5}$ FEM BAM designated as a SLAMS monitor and Parameter Code 88101. We approve the request to exclude the FEM BAM at the Port Allen site. Based on the analysis provided by LDEQ, the Port Allen $PM_{2.5}$ BAM met the performance criteria listed in 40 CFR Part 53 Subpart C, Table C-4 and bias to be excluded from comparison to the $PM_{2.5}$ NAAQS.

Network Impacts
For the Baton Rouge MSA, the Capitol site meets the minimum $PM_{2.5}$ network requirements for a $PM_{2.5}$ continuous monitor. The continued operation of the $PM_{2.5}$ BAM at the Port Allen site is not required to meet minimum network requirements. Based on LDEQ's analysis of the monitoring data, it appears that the discontinuance of the $PM_{2.5}$ BAM at the Port Allen site will not compromise the data collection needed for implementation of the $PM_{2.5}$ NAAQS and the 40 CFR Part 58, App. D ambient air monitoring requirements. Please provide LDEQ's rationale for either continued operation or decommissioning of the $PM_{2.5}$ BAM at the Port Allen site. Any request for a system modification under 40 CFR §58.14(c) should be submitted to EPA Region 6 for concurrence.

Direction
We understand that LDEQ uses the data from the continuous BAMs for reporting AQI, an indication of the current $PM_{2.5}$ concentration. Please make sure the monitor is designated as SLAMS and Parameter Code 88502 in AQS. Please note that LDEQ is required to move and load all of the $PM_{2.5}$ BAM data at the Port Allen site in EPA's national air monitoring database (AQS) from under Parameter Code 88101 to Parameter Code 88502 to ensure the data is excluded from comparison to the NAAQS. Please ensure that the monitor is correctly identified in the 2014 network plan.

Chalmette Vista site (AQS #22-087-0007):

58.11(e) Exclusion Request
At the Chalmette Vista site, LDEQ operates a $PM_{2.5}$ FEM BAM designated as a SLAMS monitor and Parameter Code 88101. We approve the request to exclude the FEM BAM at the Chalmette Vista site. Based on the analysis provided by LDEQ, the Chalmette Vista $PM_{2.5}$ BAM met the performance criteria listed in 40 CFR Part 53 Subpart C, Table C-4 and bias to be excluded from comparison to the $PM_{2.5}$ NAAQS.

Network Impacts
For the New Orleans MSA, LDEQ is required to operate two continuous $PM_{2.5}$ monitors to equal at least one-half of the minimum required three sites as listed in 40 CFR Part 58, App. D, 4.7.1, Table D-5. *See* 40 CFR Part 58, App. D, 4.7.2. In addition, at least one of the continuous monitors must be operated with one of the required monitors. LDEQ currently operates a continuous $PM_{2.5}$ tapered element oscillating microbalance (TEOM) monitor in conjunction with the FRM monitor at the Kenner site (AQS #22-051-1001) to meet this requirement.

Reporting for AQI is required for all individual MSAs with a population exceeding 350,000. According to the 2012 United States Census population estimates, the New Orleans MSA is at 1,227,096 and is required to report continuous $PM_{2.5}$ for AQI.

Direction
We understand that LDEQ uses the data from the continuous BAMs for reporting AQI, an indication of the current $PM_{2.5}$ concentration and that the $PM_{2.5}$ continuous monitor at the Chalmette Vista site provides critical information for the public. EPA supports the operation of a $PM_{2.5}$ continuous monitor at the Chalmette Vista site. Please make sure the monitor is designated as SLAMS and Parameter Code 88502 in AQS and not NAAQS comparable. Please note that LDEQ is required to move and load all of the $PM_{2.5}$ BAM data at the Chalmette Vista site in EPA's AQS database from under Parameter Code 88101 to Parameter Code 88502 to ensure the data is excluded from comparison to the NAAQS. Please ensure that the monitor is correctly identified in the 2014 network plan.

Lafayette USGS site (AQS #22-055-0007):

58.11(e) Exclusion Request
At the Lafayette USGS site, LDEQ operates a $PM_{2.5}$ FEM BAM designated as a SLAMS monitor and Parameter Code 88101. We approve the request to exclude the FEM BAM at the Lafayette USGS site. Based on the analysis provided by LDEQ, the Lafayette USGS $PM_{2.5}$ BAM met the performance criteria listed in 40 CFR Part 53 Subpart C, Table C-4 and bias to be excluded from comparison to the $PM_{2.5}$ NAAQS.

Network Impacts
Reporting for AQI is required for all individual MSAs with a population exceeding 350,000. According to the 2012 United States Census population estimates, the Lafayette MSA is at 474,415 and is required to report for AQI. The Lafayette USGS BAM is the only monitor in the Lafayette MSA currently reporting for AQI and is required.

Direction
Please make sure the monitor is designated as SLAMS and Parameter Code 88502 in AQS and not NAAQS comparable. Please note that LDEQ is required to move and load all of the $PM_{2.5}$ BAM data at the Lafayette site in EPA's AQS database from under Parameter Code 88101 to Parameter Code 88502 to ensure the data is excluded from comparison to the NAAQS. Please ensure that the monitor is correctly identified in the 2014 network plan.

Monroe site (AQS #22-073-0004):

58.11(e) Exclusion Request
At the Monroe site, LDEQ operates a $PM_{2.5}$ FEM BAM designated as a SLAMS monitor and Parameter Code 88101. We approve the request to exclude the FEM BAM at the Monroe site. Based on the analysis provided by LDEQ, the Monroe $PM_{2.5}$ BAM met the performance criteria listed in 40 CFR Part 53 Subpart C, Table C-4 and bias to be excluded from comparison to the $PM_{2.5}$ NAAQS.

Network Impacts
We understand that LDEQ uses the data from the continuous BAMs for reporting AQI, an indication of the current $PM_{2.5}$ concentration. Reporting for AQI is required for all individual MSAs with a population exceeding 350,000. According to the 2012 United States Census population estimates, the Monroe MSA is at 177,782 and is not required to report for AQI.

The Monroe site is not an NCore site and has zero required monitors; therefore, there is no continuous $PM_{2.5}$ requirement. The continued operation of the $PM_{2.5}$ BAM at the Monroe site is not required to meet minimum network requirements. Based on LDEQ's analysis of the monitoring data, it appears that the

discontinuance of the $PM_{2.5}$ BAM at the Monroe site will not compromise the data collection needed for implementation of the $PM_{2.5}$ NAAQS and the 40 CFR Part 58, App. D ambient air monitoring requirements. Please provide LDEQ's rationale for either continued operation or decommissioning of the $PM_{2.5}$ BAM at the Monroe site. Any request for a system modification under 40 CFR §58.14(c) should be submitted to EPA Region 6 for concurrence.

Direction
Please make sure the monitor is designated as SLAMS and Parameter Code 88502 in AQS. Please note that LDEQ is required to move and load all of the $PM_{2.5}$ BAM data at the Monroe site in EPA's AQS database from under Parameter Code 88101 to Parameter Code 88502 to ensure the data is excluded from comparison to the NAAQS. Please ensure that the monitor is correctly identified in the 2014 network plan.

Alexandria site (AQS #22-079-0002):

58.11(e) Exclusion Request
At the Alexandria site, LDEQ operates two $PM_{2.5}$ FEM BAMs; both are designated as SLAMS monitors and Parameter Code 88101. We approve the request to exclude the FEM BAMs at the Alexandria site. Based on the analysis provided by LDEQ, the Alexandria $PM_{2.5}$ BAMs met the performance criteria listed in 40 CFR Part 53 Subpart C, Table C-4 and bias to be excluded from comparison to the $PM_{2.5}$ NAAQS.

Network Impacts
We understand that LDEQ uses the data from the continuous BAMs for reporting AQI, an indication of the current $PM_{2.5}$ concentration. Reporting for AQI is required for all individual MSAs with a population exceeding 350,000. According to the 2012 United States Census population estimates, the Alexandria MSA is at 154,441 and is not required to report for AQI.

The Alexandria site is not an NCore site and has zero required monitors; therefore, there is no continuous $PM_{2.5}$ requirement. The continued operation of two $PM_{2.5}$ BAMs at the Alexandria site is not required to meet minimum network requirements. Based on LDEQ's analysis of the monitoring data, it appears that the discontinuance of the two $PM_{2.5}$ BAMs at the Alexandria site will not compromise the data collection needed for implementation of the $PM_{2.5}$ NAAQS and the 40 CFR Part 58, App. D ambient air monitoring requirements. Please provide LDEQ's rationale for either continued operation or decommissioning of the two $PM_{2.5}$ BAMs at the Alexandria site. Any request for a system modification under 40 CFR §58.14(c) should be submitted to EPA Region 6 for concurrence.

Direction
Please make sure the monitors are designated as SLAMS and Parameter Code 88502 in AQS. Please note that LDEQ is required to move and load all of the $PM_{2.5}$ BAM data at the Alexandria site in EPA's AQS database from under Parameter Code 88101 to Parameter Code 88502 to ensure the data is excluded from comparison to the NAAQS. Please ensure that the monitors are correctly identified in the 2014 network plan.

NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL
PROPOSED Resolution on the National Environmental Policy Act August 20-21, 2020

WHEREAS the National Environmental Policy Act (NEPA) is a bedrock environmental law critical to ensuring that agencies identify and mitigate the significant environmental impacts federal projects will have on communities of color, indigenous, and low-income communities;

WHEREAS the EPA, along the White House Council on Environmental Quality and other federal agencies on the Interagency Working Group on Environmental Justice, has recognized the importance of NEPA in addressing environmental justice issues by creating a working group on NEPA and issuing the 2016 report *Promising Practices for EJ Methodologies in NEPA Reviews;*

WHEREAS on August 14, 2019, the NEJAC recommended changes necessary to ensure that the National Environmental Policy Act better identify and address environmental justice issues;

WHEREAS the White House Council on Environmental Quality proposed sweeping changes to its NEPA regulations then provided the public a paltry 60 days and two public meetings to provide public input on these major regulatory changes;

WHEREAS, on July 16, 2020, the White House Council on Environmental Quality issued final regulations dismantling many of NEPA's most important protections without performing an analysis of the environmental justice impacts of the regulation changes, as Executive Order 12898 requires;

WHEREAS these changes will have devastating impacts on countless communities across the country already suffering from environmental injustice by removing cumulative impact analysis requirements, limiting the projects to which NEPA review would apply, allowing companies to prepare their own environmental analyses, and making it more difficult for the public to hold agencies accountable for a full and fair analysis of projects and their impacts;

THEREFORE SO BE IT RESOLVED that the National Environmental Justice Advisory Council:

- Hereby condemns the NEPA regulations finalized by the White House Council on Environmental Quality on July 16, 2020 due to the devastating impact these changes will have on communities of color, Indigenous, and low-income communities;

- Requests the Administrator of the U.S. Environmental Protection Agency request that the White House Council on Environmental Quality withdraw the new NEPA regulations until it conducts a complete analysis of the environmental justice impacts of the regulation changes, in compliance with Executive Order 12898, and in consultation with the NEJAC;

    - Requests that the Environmental Protection Agency ensure its rules implementing NEPA protect communities from environmental injustice and incorporate suggestions from the NEJAC's August 14, 2019 recommendation letter; and

- Requests that the Administrator of the U.S. Environmental Protection Agency direct the Interagency Working Group on Environmental Justice to discuss the NEPA regulations and work together to implement their NEPA regulations in a way that better protects communities facing environmental injustices instead of further burdening them.

Alaska Community Action on Toxics * American Alpine Club * Center for Food Safety * Center for Environmental Health * Environmental Defense Fund * Environmental Justice Health Alliance for Chemical Policy Reform * Environmental Protection Information Center * Food & Water Watch * Friends of the Earth * National Parks Conservation Association * Ocean Conservancy * Rio Grande International Study Center * Southern Utah Wilderness Alliance * The Wilderness Society * WE ACT for Environmental Justice * Western Watersheds Project * Winter Wildlands Alliance

August 16, 2020

Submitted electronically to *Martin.Karen@epa.gov*

Chairman Richard Moore

National Environmental Justice Advisory Council

Dear Chairman Moore and Members of the National Environmental Justice Advisory Council:

The current Administration has relentlessly rolled back environmental regulations that protect our most vulnerable communities. On July 15, 2020, the Administration finalized an attack on our bedrock environmental law, the National Environmental Policy Act (NEPA). These changes, which fast-track development projects at the expense of public comments and cumulative impacts analyses, will be devastating for communities of color and low-income communities across the country. **For this reason, the undersigned organizations ask the National Environmental Justice Advisory Council (NEJAC) to issue a statement condemning these changes to NEPA as harmful to environmental justice communities.**

1. **The NEJAC has already recognized NEPA's importance to environmental justice communities.**

As the NEJAC reminded Administrator Wheeler in its August 14, 2019 letter, "most NEJAC members have a wealth of ground-level experiences in the use and misuse of NEPA." After months of conferring, drafting, and ultimately deliberating, the NEJAC recommended to the Administrator "that all NEPA reviews include more and higher quality data related to environmental justice." The NEJAC's NEPA recommendation letter listed several improvements that were needed so that NEPA could better analyze harms and risks to environmental justice communities, including requiring the use of Health Impact Assessments and addressing community concerns in meaningful ways. The NEJAC

recommended that NEPA analyses should "[i]dentify and measure the cumulative and synergistic impacts on a community over time, from multiple sources existing inside and outside the project area." Further, the NEJAC requested that Administrator Wheeler " [s]tress to the Council on Environmental Quality (CEQ) the importance of increasing the health and well-being of communities by consistently integrating environmental justice and health analyses and considerations in NEPA reviews." Ultimately, the NEJAC emphasized that "[w]e must raise both the quality and quantity of environmental justice analyses so the impacts affecting environmental justice communities are front and center."

2. The changes to the NEPA regulations will be devastating to our most vulnerable communities.

Since Executive Order 12898 was adopted, NEPA has been the primary way federal agencies incorporate environmental justice considerations into their decisionmaking process. While federal agency efforts to identify and address the disproportionate environmental and health effects of their activities on communities often fall short, reports such as *Promising Practices for EJ Methodologies in NEPA Reviews* and its supporting materials provided agencies with guidance on how to better address environmental justice concerns. With over 80 federal agencies required to comply with NEPA, it is one of the most effective tools to identify and address environmental justice concerns across the federal government.

The current Administration has eviscerated NEPA, allowing major projects to entirely avoid NEPA review, ignore disproportionate impacts, silence community voices, and shut the courthouse door to all but those with considerable resources.

The negative impacts to communities of color and low-income communities are vast because the Administration made the following changes to NEPA.

- **The Administration reduced the number and kinds of projects subject to NEPA review:** The Administration has effectively eliminated NEPA requirement for public input and environmental review entirely, ensuring community voices are completely left out of decisions impacting the health, environment, and safety of their communities. Key provisions that would limit the applicability of environmental review under NEPA include, but are not limited to, allowing agencies to bypass NEPA with processes that serve as the "functional equivalent" of NEPA, limiting what counts as a "major federal action," excluding more categories of projects from review, and allowing projects with minimal federal involvement or funding to avoid NEPA review. Taken together, these changes will allow projects with potentially enormous impacts to move forward with no review and zero public input under NEPA.

- **The Administration eliminated the requirement to consider cumulative impacts and indirect effects:** The NEJAC has long recognized that, to achieve environmental justice, we must examine and address the cumulative impacts of pollution sources and environmental stressors

on communities of color and low-income communities. Many NEJAC members have joined environmental justice advocates around the country in tirelessly fighting for federal and state agencies to consider cumulative impact in permitting and when approving or financing projects. As WE ACT has recognized, no issue is more central to residents of already environmentally overburdened communities than whether cumulative impacts will be considered in environmental decision-making, and no proposal could raise more significant concerns about environmental justice than weakening the requirement that cumulative impacts be considered. Removing NEPA's requirement to analyze the cumulative impacts of a project before it is approved is taking a huge leap backwards in environmental protection, one that will have devastating effects on communities of color and low impact communities.

- **The Administration is allowing private industry to write their own environmental reviews:** In the latest iteration of this Administration's policy of letting the fox guard the henhouse, companies and private project proponents can now actually write their own environmental reviews. The rules also allowing third party contractors to write reviews, even if they have a disclosed conflict of interest in the outcome of the project. As our communities know all too well, private companies make decisions based on private profit, not on public health, and have no incentive to consider any alternatives to a proposal or take a hard look at its environmental consequences. Companies seeking to build a particular project know exactly what they want the project to look like. Allowing them to define the scope of the environmental review, define and evaluate the project alternatives, and identify significant impacts will lead to markedly worse environmental reviews that no longer at least pretend to be unbiased. Our communities will undoubtedly suffer.

- **The Administration has made it more difficult for us to hold the federal government accountable:** Unsurprisingly, the Administration has instituted a suite of changes aimed at stopping us from suing in cases where the government has failed to meet its responsibilities to adequately review impacts or provide the public with meaningful opportunities to engage. For example, the regulations now include more burdensome commenting requirements that must be met before interested people or groups have a right to sue. The new regulations now include a recommendation for agencies to impose a bond requirement—basically to deposit thousands of dollars with the court—before the court will hear our claims. This stunt is a way for the government to avoid accountability to grassroots community groups while leaving the courthouse door wide open for deep-pocketed corporations.

3. The Administration Failed to Consider the Environmental Justice Impacts of These Changes and then Designed the Public Comment Process to Reduce Public Input.

In addition to making sweeping rule changes to the bedrock environmental law, the Administration failed to analyze the impact of these changes on our most vulnerable communities and then designed the public comment process to minimize public input on the actual changes proposed. On June 20, 2018, the Administration issued an "Advance Notice of Proposed Rulemaking Requesting Public

Comment on CEQ's NEPA regulations." The notice vaguely requested public comment on how NEPA regulations could be changed to "ensure a more efficient, timely, and effective NEPA process." In response, the NEJAC gathered recommendations on NEPA, urging the Administration to make improvements to the regulations to better address environmental harms and environmental justice issues. The Administration received over 12,500 comments on the advance notice.

Despite receiving significant public interest in its vague advanced notice and NEJAC's recommendation that NEPA regulations should be strengthened to better address environmental justice issues, the Administration failed to address environmental justice concerns and then failed to assess how the changes would impact communities of color and low income communities.

- **The Administration failed to analyze the impacts of its NEPA changes on environmental justice communities, shirking its duties under Executive Order 12898:** In the final rule, the Administration made a sweeping statement that it "has analyzed this final rule and determined that it would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income population." However, the Administration completed no actual analysis in the public record of how these NEPA changes would impact environmental justice communities. None. Based on our long history using NEPA to illuminate the significant impacts proposed projects would have on communities of color and low-income communities, we know that the Administration could not have made this conclusion had it actually performed a full and fair analysis. Many of the changes in the rules will have devastating impacts on low income communities and communities of color including changes that will be imposing arbitrary page limits, redefining "major federal action," eliminating the requirements to consider cumulative and indirect effects, imposing bond requirements, no longer circulating documents, and allowing collective responses to public comments. The Administration has failed to analyze how these changes will impact environmental justice across the country and flies in the face of Executive Order 12898.

- **The Administration designed the rulemaking process to reduce public input:** The rulemaking process failed to make any attempt to meaningfully engage communities of color or low-income communities. To begin with, the public was given only 60 days to read, analyze, and draft comments on a dense fifty-page proposal overhauling the entire set of regulations. More than 300 organizations around the country requested an extension of this comment period in order to meaningfully engage in the process. The Administration denied that request and then limited in person public comment to only two public hearings. These hearings were both during the work week, and neither meeting was held west of Colorado. People who wanted to comment on the changes had to take time off work and travel, often times at considerable expense, just to have their concerns heard. If an individual was able to make it to either Denver or Washington, DC, then they had to be fortunate enough to secure one of only 105 speaking tickets that sold out within 5 minutes. Making matters worse, the Washington D.C. hearing took place on the same day the U.S. EPA convened a NEJAC meeting in Florida –limiting even the

possibility of environmental justice community participation. In contrast, commenters on changes to the Clean

Water Act's definition of "waters of the United States" were given over 200 days to comment on that proposal, and the public outreach included over 400 public meetings with various stakeholders around the country. *See* 80 Fed. Reg. 37057 (June 29, 2015). The Administration characterized its paltry public participation process as "extensive public outreach" because the Administration "attended the National Environmental Justice Advisory Committee (NEJAC) meeting in Jacksonville, Florida to brief NEJAC members and the public on the proposed rule and to answer questions." 85 Fed. Reg. 43,357 (July 16, 2016).

Despite the truncated comment period, hundreds of environmental and environmental justice groups around the country weighed in opposing the changes. To help the NEJAC understand the depth of their concerns, we have attached some of the comments submitted during comment period.

4. The NEJAC Should Use Its Voice To Take a Stand Against These NEPA Changes.

Since its inception, the NEJAC has played a unique role in the environmental justice space. The NEJAC serves as a place where aggrieved communities have come to ask for intervention with the EPA and to draw attention to the environmental burdens their communities are facing. While the NEJAC is charged with providing advice on environmental justice to the EPA, it also has spoken to and had dialog with the Interagency Working Group on Environmental Justice in the past. These massive and devastating changes to our bedrock environmental law serve to remove communities from being involved in decisions that will negatively impact them and will undoubtedly result in significant harm and environmental injustice.

For these reasons, we urge you to immediately take a formal stand against the changes to NEPA by adopting a resolution against the changes and to asking that they be withdrawn. We also urge you to recommend to EPA and the Interagency Working Group to reject these changes and instead take steps to further project communities facing significant impacts and environmental injustices because of proposed
projects.

Respectfully submitted

,

Pamela Miller
Executive Director

Alaska Community Action on Toxics

Taylor Luneau
Policy Manager

American Alpine Club

George A. Kimbrell
Legal Director

Center for Food Safety

Caroline Cox

Senior Scientist

Center for Environmental Health

Rosalie Winn

Senior Attorney

U.S. Clean Air

Environmental Defense Fund

Michele Roberts

National Co-Coordinator

Environmental Justice Health Alliance for Chemical Policy Reform

Tom Wheeler

Executive Director

Environmental Protection Information Center (EPIC)

Adam Carlesco

Staff Attorney

Food & Water Watch

Marcie Keever

Legal Director, Oceans & Vessels Program

Director

Friends of the Earth

Ani Kame'enui

Deputy Vice President, Government Affairs

National Parks Conservation Association

Ivy N. Fredrickson

Staff Attorney

Ocean Conservancy

Tricia Cortez

Executive Director

Rio Grande International Study Center

Stephen Bloch

Legal Director

Southern Utah Wilderness Alliance

Alison Flint

Senior Legal Director

The Wilderness Society

Kerene Tayloe

Director of Federal Legislative Affairs

WE ACT for Environmental Justice

Erik Molvar

Executive Director

Western Watersheds Project

Hilary Eisen

Policy Director

Winter Wildlands Alliance

Alaska Community Action on Toxics * Animal Legal Defense Fund
Arbor Hill Environmental Justice Corporation * Breast Cancer Action
Buffalo River Watershed Alliance * Center for Environmental Health
Center for Food Safety * Community In-Power and Development Association, Inc. (CIDA) Detroiters Working for Environmental Justice * Ecology Center

Environmental Justice Health Alliance for Chemical Policy Reform * Food & Water Watch
Friends of the Earth * Gasp * Green Door Initiative * Harambee House
Jesus People Against Pollution * New Mexico Environmental Law Center
New York Lawyers for the Public Interest * North Carolina Environmental Justice Network
Physicians for Social Responsibility * PODER Austin * Sierra Club * Sunrise Movement
Tallahassee Food Network * Texas Environmental Justice Advocacy Services (T.E.J.A.S.)
Toxics Action Center * WE ACT for Environmental Justice
West End Revitalization Association
Marc Brenman * Adrienne Hollis * Vincent Martin * Vernice Miller-Travis Maria Savasta-Kennedy * Ronald White * Sacoby Wilson

Edward A. Boling

Associate Director for the National Environmental Policy Act

Council on Environmental Quality

730 Jackson Place NW

Washington, DC 20503

Submitted via https://www.regulations.gov

Re: Comments on Proposed Rule, "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," *CEQ-2019-0003*

Dear Council on Environmental Quality:

These comments are submitted by WE ACT for Environmental Justice and the Environmental Justice Clinic of Vermont Law School on behalf of Alaska Community Action on

Toxics, Animal Legal Defense Fund, Arbor Hill Environmental Justice Corporation, Breast Cancer

Action, Buffalo River Watershed Alliance, Center for Environmental Health, Center for Food Safety, Community In-Power and Development Association, Inc. (CIDA), Detroiters Working for Environmental Justice, Ecology Center, Environmental Justice Health Alliance for Chemical Policy Reform, Food & Water Watch, Friends of the Earth, Gasp, Green Door Initiative, Harambee House, Jesus people Against Pollution, New Mexico Environmental Law Center, New York Lawyers for the Public Interest, North Carolina Environmental Justice Network, Physicians for Social Responsibility, PODER Austin, Sierra Club,

Sunrise Movement, Tallahassee Food Network, Texas Environmental Justice Advocacy Services (T.E.J.A.S.), Toxics Action Center, WE ACT for Environmental Justice, West End Revitalization Association, Marc Brenman, Adrienne Hollis, Vincent Martin, Vernice Miller-Travis, Maria Savasta-Kennedy, Ronald White, and Sacoby Wilson (together, Environmental Justice Commenters) in response to the Council on

Environmental Quality's (CEQ's) publication of "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," CEQ-2019-0003, 85 Fed. Reg.

16 (Jan. 10, 2010). Environmental Justice Commenters write to express deep concerns about proposed changes to the National Environmental Policy Act (NEPA) regulations which would adversely affect environmentally overburdened communities of color and low-income communities (hereafter, environmental justice (EJ) communities) by unreasonably constraining opportunities for public participation and restricting consideration of the cumulative impacts of major federal actions, among other harmful effects. These changes are proposed in the name of modernization, but they conflict with the core goals of NEPA: to protect the environment, to promote the gathering of environmental information, to increase government accountability, to disseminate facts and data, to ensure that agencies are fully informed of possible environmental impacts, and to allow agencies to take those impacts into consideration before making decisions.[52]

This comment urges CEQ to withdraw the proposed rule and refrain from finalizing revisions that would damage NEPA's core functions. The EJ Commenters focus especially on CEQ's failure to evaluate the environmental justice impacts of the proposed rule, the need for robust public participation, and analysis of cumulative effects. Part I describes the background and purposes of NEPA. Part II discusses the inadequacy of CEQ's assessment of the proposed rule's disproportionate impacts on communities of color and low-income communities. Part III provides more detail on why the EJ Commenters oppose the proposed rule. Finally, Part IV makes recommendations for CEQ to improve compliance and enforcement within its authority under current regulations.[53]

I. Background

[52] *See e.g., 42 U.S.C. §4321 (1969); Bradley Karkkainen, Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance, 102 COLUM. L. REV. 903, 909-16 (2002); Jonathan Poisner, A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation, 26 ENVT'L L. 53, 54-55 (1996); Sidney A. Shapiro, Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government, 48 U. KAN. L. REV. 689, 693-96 (2000).*

[53] *To avoid duplication with comments submitted by other community-based, environmental, and environmental justice stakeholders, scholars, and experts, these comments focus on only a subset of objections to the proposed rule. For example, as discussed in comments submitted by David E. Adelman, et al., Law Comments on the Council on Environmental Quality NPRM, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, Docket No. CEQ-2019-0003 (March 10, 2020) (Law Professor's Comments), some of the proposed changes "of greatest concern and weakest legal grounding" include segmentation of projects, narrowing the range of alternatives to be considered, relaxing criteria for categorical exclusion, and placing limits on judicial review. EJ Commenters agree with and incorporate by reference these comments.*

From the inception of the modern environmental justice movement, NEPA has been a crucial engagement tool for communities of color and low-income communities.[54] The goals of NEPA align with those of environmental justice: to "preserve . . . an environment which supports diversity and variety of individual choice" and to "achieve . . . high standards of living and a wide sharing of life's amenities."[55] NEPA is an essential tool in the fight against environmental racism, promoting environmental justice by requiring federal agencies to include a proposed project's potential environmental, economic, and public-health impacts on low-income, communities of color, and rural communities. One of the visionary elements of NEPA is its creation of broad opportunities for public participation in government decisions that affect communities and their environment. NEPA was intended to involve potentially affected parties in deliberations about projects with significant environmental effects, and it recognizes that when the public and federal experts work together, better decisions are made. All of this is threatened by CEQ's proposed rule.

A. For Decades, Analysis Under NEPA has Been an Essential Mechanism for Assessing Whether Federal Projects Were Consistent with Executive Order 12,898

In 1994, President Bill Clinton issued Executive Order (EO) 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and identified the NEPA process as one of the primary vehicles for achieving environmental justice.[56] EO 12,898 directs federal agencies to make environmental justice part of their mission, and to identify and address the disproportionate environmental and health effects of their activities on communities of color and low-income populations.[57] Furthermore, the EO requires agencies to ensure effective public participation and access to information.[7]

The Presidential Memorandum accompanying the EO directs *all* agencies to utilize NEPA to analyze environmental, health, economic, and social effects of federal actions, including effects on communities of color and low-income communities; develop mitigation measures that address significant effects of actions on communities of color and low-income communities; and to provide opportunities for public input in decision making.[58] Most importantly, agencies must provide opportunities for effective community participation in the NEPA process.[59]

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[54] *See Promising Practices for EJ Methodologies in NEPA Reviews*, FED'L INTERAGENCY WORKING GRP. ON ENVT'L JUSTICE & NEPA COMM. *(Mar. 2016)*, *https://www.epa.gov/sites/production/files/201608/documents/nepa_promising_practices_document_2016.pdf.*
[55] *Vernice Miller-Travis*, *Promises To Keep*, THE ENVT'L FORUM *(Dec. 2019)*, *https://www.metgroup.com/assets/Promises-To-Keep_Vernice-Miller-Travis.pdf; see also, 42 U.S.C. § 4331.*
[56] *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, *Exec. Order No. 12,898*, *3 C.F.R. 859 (1995)*, *reprinted as amended in 42 U.S.C. § 4321(1998) (hereafter cited as EO 12,898).*
[57] *Id.*
[7] *Id.*
[58] *The White House*, *Memorandum for the Heads of All Departments and Agencies*, *Re: Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994).*
[59] *Id.*

Executive Order 12,898 realizes the importance of gathering data and conducting research to identify and address disproportionately high and adverse health, environmental, social, and economic effects of federal agency programs and policies on communities of color and lowincome communities.[60] Public participation is an integral part of addressing environmental justice concerns.[6162] The Memorandum also makes clear that an environmental assessment (EA), environmental impact statement (EIS), finding of no significant impact (FONSI), or record of decision (ROD) should "address significant and adverse environmental effects of proposed federal actions on minority populations, low-income populations, and Indian Tribes."[12] Furthermore, each federal agency must provide opportunities for effective community participation in the NEPA process through consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices.[63]

CEQ has repeatedly upheld and published guidance documents on how to include environmental justice in NEPA analysis. In 1997, in consultation with the EPA and other agencies, CEQ developed guidance to "further assist Federal agencies with their NEPA procedures so that environmental justice concerns are effectively identified and addressed."[64] CEQ recognizes that environmental justice issues may arise at any step in the NEPA process,[65] and it may warrant consideration of environmental justice issues at each stage of the NEPA process.[66]

In 2016, CEQ issued a report on how better to implement environmental justice in the NEPA process. CEQ and other agencies recognize that engaging community members early and often can inform an agency's decision-making process.[67] Agencies also benefit from communicating their objectives for the proposed activity (*infra* "public participation").[68] The CEQ document also recognizes that communities have varying levels of access to information, and instructs agencies to "consider providing notice to the public (as appropriate) of the meeting date(s) and time(s) well in advance and through methods of communication suitable for minority and lowincome populations (including LEP populations)."[69] Furthermore, when looking at impacts on environmental justice communities, NEPA requires agencies to consider three types of effects or impacts: direct, indirect, and cumulative impacts.[70] Specifically agencies should be mindful of chemical and non-chemical stressors that may

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[60] *EO 12,898.*
[61] *See U.S. Environmental Protection Agency, Office of Policy, Economics, and Innovation, Engaging the American People: A Review of EPA's Public Participation Policy and Regulations with Recommendations for Action, EPA*
[62] *-R-00-005, December 2000, p. 1; Damu Smith, campaigner, Greenpeace Toxic Campaign, Greenpeace, USA, Testimony, January Hearing Transcript, p. 115; Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 123.* [12] *The White House, supra note 8.*
[63] *Id.*
[64] *Environmental Justice – Guidance Under the National Environmental Policy Act, CEQ (1997).*
[65] *Id.*
[66] *Id.*
[67] *Fed'l Interagency Working Grp. on Envt'l Justice & NEPA Comm, supra note 3.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

amplify impacts from the proposed action, and it notes that EJ communities may be differently affected by past, present, or reasonably foreseeable future impacts than the general population.[7172]

B. NEPA Calls for Environmental Consideration to the 'Fullest Extent Possible'

The CEQ and the EIS were born concurrently from NEPA. Before the passage of NEPA in 1970, federal agencies contemplating an action tended to focus nearly exclusively on the economics and feasibility of their projects without addressing the "human environmental" consequences—including the natural and physical environment, and the relationship between people and their environment.[22] In one of the most important opinions after NEPA was passed, the D.C. Circuit articulated that "perhaps the greatest importance of NEPA is to require . . . agencies to consider environmental issues just as they consider other matters within their mandates."[7374] NEPA not only permits, but compels environmental consideration[24]—and not in a cursory way, but "to the fullest extent possible."[75] NEPA is an environment-centered, rather than a projectcentered statute, and Congress did not intend the Act to be a "paper tiger."[76]

EAs and EISs are intended not only to improve the decision-making processes of their drafting agencies, but also to inform the president, Congress, other state and federal agencies, and members of the public.[77] An interpretation of NEPA hews most closely to the language and intent of Congress when it provides the most useful environmental information for the consideration of all these stakeholders. "A vital requisite of environmental management is the development of adequate methodology for evaluating the full environmental impacts and the full costs of Federal actions."[78] Evaluating the *full* environmental impacts and *complete* costs of agency actions may be an aspirational goal—"crystal-ball inquiry" is not required—but agencies must take all reasonable measures not excluded by conflicting law.[79] Willful departure from this standard can only be classified as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[8081]

NEPA directs agencies not to balance convenience and efficiency when carrying out its objectives, but to use "all practicable means to protect environmental values."[31] For years, CEQ's regulatory language has been based on the statutory directive to comply "to the fullest extent possible . . . unless the existing law applicable to such agency's operations expressly prohibits or makes full

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[71] *Id.*
[72] *U.S.C. §4321.*
[73] *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir.*
[74] *). [24]*
Id.
[75] *Id.*
[76] *Id. at 1114.*
[77] *Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972).*
[78] *S. REP. 91–296, at 20 (1969).*
[79] *Morton, 458 F.2d at 837; see also Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991) (characterizing the standard for EIS preparation as a "rule of reason").*
[80] *Administrative Procedure Act 5 U.S.C. § 706.*
[81] *U.S.C. § 4332.*

compliance with one of the directives impossible."[82] The existing regulatory language is also grounded in the legislative intent behind the Act: NEPA was crafted so "that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."[33]

C. Reducing Opportunities for EJ Communities to Engage and Curtailing Consideration of Cumulative Impacts Threaten a Return to Disastrous Pre-NEPA Decision Making

Poor decision-making prior to NEPA illustrates the importance of robust public participation and the consideration of cumulative impacts in developing projects that serve, not harm, the public. For example, before NEPA, it was common for urban planners to harness federal funds for highways that carved through communities of color, destroying whole neighborhoods. These projects displaced families, increased crime, and reinforced racial segregation and environmental injustice.[83] The threats to public participation inherent in the proposed rule threaten to return the country to this pre-NEPA era of wasteful and environmentally destructive projects.

Some pre-NEPA highway projects involved such inadequate consultation with local communities—and are now so widely understood to have been urban disasters—that there are now plans to demolish them altogether. This trend, known as "freeway removal," reflects a national shift toward projects with better health, equity, and connectivity outcomes for local communities.[35] These pre-NEPA projects often bulldozed communities of color that city officials and planners did not view as valuable enough to protect.[36] "As Justice Douglas pointed out nearly [50] years ago, '[a]s often happens with interstate highways, the route selected was through the poor area of town, not through the area where the politically powerful people live.'"[37] These projects disproportionately harmed communities of color and low-income communities, and they also had negative consequences for urban areas generally. One journalist wrote about the impacts of the construction of I-81 in Syracuse, N.Y.:

> The completion of the highway, I-81, which ran through the urban center, had the same effect it has had in almost all cities that put interstates through their hearts. It decimated a close-knit African American community. And when the displaced residents from the 15th Ward moved to other city neighborhoods; the white residents fled. It was easy to move. There was a beautiful new highway that helped their escape.
>
> But this dynamic hurt the city's finances, too. As suburbs grew, they broke off from cities, taking with them tax revenues, even though their residents still used city services. Although the Syracuse region was relatively healthy, the city started to get very sick.[38]

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[82] *H.R. Rep. No. 91–765, at 9 (1969) (Conf. Rep.).*
[33] *Id. at 10.*
[83] *See generally Alan Pyke, Top Infrastructure Official Explains how America used Highways to Destroy Black Neighborhoods, THINKPROGRESS (Mar. 31, 2016), Available at: https://thinkprogress.org/top-infrastructure-officialexplains-how-america-used-highways-to-destroy-black-neighborhoods-96c1460d1962/; David Karas, Highway to Inequity: The Disparate Impact of the Interstate Highway System on Poor and Minority Communities in American Cities, 7 NEW VISIONS FOR PUB. AFF. (SCH. OF PUB. POL'Y & ADMIN. U. Del.) (April 2015), available at:*

The freeway-removal movement acknowledges the racial history of urban planning as well as the importance of community input.[39] Without the effective public participation embodied by existing NEPA guidelines, urban redevelopment is likely to foster and perpetuate segregation and discrimination.

As described above, I-81 cut a path directly through Syracuse's thriving 15th Ward, which was home to 90 percent of the city's African American population at that time.[40] The highway displaced approximately 1,300 families, causing economic, social and environmental suffering

https://cpb-us-w2.wpmucdn.com/sites.udel.edu/dist/a/7158/files/2018/01/nvpa-volume-7-final-20jbac1.pdf (explaining I-40 in Nashville, TN, for example, was constructed through the center of a predominately African American neighborhood and I-94 in St. Paul, MN similarly spliced through one of the few African American communities in the state).

[35] *See* Congress for the New Urbanism, *Freeways without Futures* (2019), at 4, available at:

https://www.cnu.org/sites/default/files/FreewaysWithoutFutures_2019.pdf (seeking to answer the question of whether we should "continue funneling billions of taxpayer dollars into an aging system that pollutes cities, divides neighborhoods, and occupies valuable land that could instead be used for homes and businesses?"). [36] *See generally* Alana Semuels, *The Role of Highways in American Poverty*, THE ATLANTIC (Mar. 18, 2006), available at: https://www.theatlantic.com/business/archive/2016/03/role-of-highways-in-american-poverty/474282/. [37] Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 195 (4th Cir. 1999) (King, J., concurring) (quoting Triangle Improvement Council v. Ritchie, 402 U.S. 497, 502 (1971) (Douglas, J., dissenting)).

[38] Semuels, *supra* note 36.

[39] *See generally* Jessica Kraft-Klehm, *21st Century Futurama: Contemplating Removal of Urban Freeways in the World of Tomorrow*, 49 WASH. U. J. L. & POL'Y 205 (2015), available at: https://openscholarship.wustl.edu/law_journal_law_policy/vol49/iss1/14.

[40] New York Civil Liberties Union, *The I-81 Story*, available at: https://www.nyclu.org/en/campaigns/i-81-story.

that continues to this day.[84] Now, more than 50 years after its construction, city and state officials are considering complete demolition of the 1.4-mile project. The state Department of Transportation has decided the best option would be to remove the corridor completely and build a street grid that would incorporate 25 acres of land to create a walkable, "landscaped urban space in an area that was blighted by the highway."[85] Unlike the highway, the community grid has the potential to reconnect neighborhoods, enhance livability, and support economic vitality of the region.[43] If the original planners of I-81 had engaged in adequate public consultation, there might never have been "blight" to remove. This transition from a project that displaced families to one with a goal of bringing a community back together exemplifies the value of public participation in decision-making.

If public participation had been emphasized before 1970, communities might still be reaping the benefits today. Starting in 2018, the City of New York spent over a year and $75 million renovating the

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[84] Id.

[85] Angie Schmitt, Street Grid to Replace Old I-81 in Syracuse, NYS Decides, STREETSBLOG USA (Apr. 22, 2019), Available at: https://usa.streetsblog.org/2019/04/22/street-grid-to-replace-old-highway-in-syracuse-state-decides/.

[43] Press Release, N.Y. Dept. of Trans., NYSDOT Releases Preliminary Draft Design Report/Draft Environmental Impact Statement for the Interstate 81 Project (Apr. 22, 2019).

Sheridan Expressway in the Bronx.[86] A primary goal of the project was to reconnect a section of the borough that had been cut off by the construction of a six-lane overpass.[87] The overpass had been built in the 1960s under the supervision of Robert Moses, one of New York

City's most notorious and impactful planners. Though Moses made significant contributions to New York, he is also known for razing communities of color and low-income communities in the process, and for defying or ignoring community input in decision-making.[88] Renovations to the Sheridan Expressway include a pedestrian bridge, a two-way bicycle path, and new crossings to restore residents' waterfront access.[89] If decision-makers had considered the concerns and comments of community residents during the original construction, perhaps the project could have avoided negative consequences, and the $75 million modification might not have been necessary.

Without the robust public participation and cumulative-impacts analysis required by NEPA, federal agencies were prone to make decisions without the benefit of local knowledge, or an understanding of local impacts. These examples, in which agencies failed to consult with the impacted communities, were fundamentally unjust, particularly for communities of color. Such projects are not only inefficient and wasteful, but directly harm communities, and the mandate to avoid such impacts is at the heart of both NEPA and EO 12,898. The proposed changes to the regulations, including an abbreviated public-comment period,[48] weaken the interpretation and implementation of the Act so substantially as to threaten a return to this ineffective, top-down decision-making process. Ensuring that communities have meaningful participation in projects that impact their future is essential to preserving environmental justice.

D. Public Participation Leads to More Thorough Agency Review of Environmental Effects

Public participation is one of two "twin aims" of NEPA. "First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process."[90] CEQ has stated that "early and meaningful participation in the federal agency decision making process is a paramount goal of

NEPA."[9192]

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[86] *Dennis Slattery, Bronx's Sheridan Expressway transformed into tree-lined boulevard in first part of Hunts Point Overhaul, DAILY NEWS (Dec. 11, 2019).*
[87] *Id.*
[88] *See Transcript, Diane Rehm on WAMU 88.5, Transportation Secretary Anthony Foxx on the Legacy of the U.S. Highway System (Mar. 31, 2016) (explaining when Robert Moses built Jones Beach and the Southern State Parkway going to the beach, he purposely built the overpasses at a low height to ensure that Black New Yorkers attempting to travel to the beach by bus would not be able to do so).*
[89] *Slattery, supra note 44.*
[48] *See infra Part II(C).*
[90] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97 (1983) (internal citation omitted).*
[91] *CEQ, supra note 14.*
[92] *C.F.R. § 1500.1.*

A major purpose of CEQ's regulation is to ensure that the NEPA procedure provides environmental information to public officials and the public,[51] increasing the overall efficiency of the nation's projects by forcing agencies to consider externalities.[9394] The regulations require agencies to make diligent efforts to involve the public throughout the NEPA process:[53] "Effective environmental reviews protect people, wildlife, and taxpayer dollars by ensuring construction of better projects that serve the national good,"[95] and one CEQ study identified NEPA's most enduring legacy as "a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of their decisions."[96] The current regulation emphasizes that information provided by the environmental review process must be of high quality, and that public scrutiny is essential to implementation.[97] As former EPA Administrator Russell Train has said, "public involvement and careful consideration of alternatives has produced better outcomes—for the agencies themselves, for the nation, and for the human environment."[98] In other words, public participation is central to NEPA's role and to agency compliance.

Public input can have a huge influence on a project and often provides better, more efficient outcomes: "Citizens often have valuable information about places and resources that they value and the potential environmental, social, and economic effects that proposed federal actions may have on those places and resources."[99] The Hoover Dam bypass demonstrates the potential benefits of public input. The initial EIS for the project did not adequately explore alternative sites for the bridge, but environmental groups provided additional options that the project manager analyzed more thoroughly. As a result of the comments, the bypass, which opened in 2012, runs closer to developed areas rather than cutting through pristine corridors. The incorporation of public comments reduced harmful environmental effects and allowed the project to move forward.[59]

Public input has led not only to safer alternatives, but also to better projects. Colorado's I-70 Mountain Corridor represents another success story. The initial plans to improve the corridor included blasting through cliffs, building ugly retaining walls, and channeling the Colorado River. But responding to public comments, the Colorado Department of Transportation chose a plan that was safer and caused less damage to the environment. The corridor won more than 30 awards for its innovative design and sensitivity to the environment.[100]

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[93] *Id.; Jones v. District of Columbia Rede v. Land Agency, 499 F.2d 502, 513 (D.C. Cir. 1974).*
[94] *C.F.R. § 1506.6.*
[95] *H.R. Rep. No. 113-246, pt. 1, at 338 (2013).*
[96] *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years, CEQ at 7 (1997) https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf.*
[97] *Id.*
[98] *NEPA Success Stories, CEQ (2016) https://ceq.doe.gov/get-involved/success_stories.html. (citing NEPA Success Stories: Celebrating the 40- Years of Transparency and Open Government, ELI, at 4 (2010), https://ceq.doe.gov/docs/get-involved/NEPA_Success_Stories.pdf).*
[99] *A Citizen's Guide to the NEPA: Having Your Voice Heard, CEQ, at 1 (Dec. 2007).* [59] *Elly Pepper, Never Eliminate Public Advice: NEPA Success Stories, NRDC (Feb. 1, 2015), https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories.*
[100] *Id.*
[61] *Id.*

Public comments benefit both communities and their surrounding natural environments, leading to better outcomes for all involved. State Highway 9 in Colorado demonstrates how public comments can benefit both the community and the environment. When considering improvements to Highway 9, Colorado's Department of Transportation and the Federal Highway Administration turned to NEPA comments for alternatives. Based on significant public input, in the end, the project incorporated bus signals and wider shoulders for bicycles, provided for wetland mitigation, minimized tree removal, and included a bridge over the Blue River to avoid harming wildlife.[61]

In other instances, public participation has identified errors in data or analysis. In 2009 a retired test pilot delved into a 1500-page EIS prepared by the Corps of Engineers and other state agencies. This concerned citizen found that the EIS contained mathematical errors substantially underestimating the risk of introducing non-native oysters into the Chesapeake Bay. The revisions led to a change in the EIS, demonstrating that the risk was too great to approve the proposed action—potentially saving the environment and money.[101][102]

NEPA allows communities to propose creative solutions. In 2000, the United States Forest Service (USFS) published a draft EIS for logging and timber sale in Ashland, Oregon. The residents formed the Ashland Watershed Stewardship Alliance and produced a 95-page alternate proposal. The new proposal protected homes and communities from wildfires by targeting smallerdiameter trees in the vulnerable wildland-urban interface zone and created local jobs in brushcutting. This proposal became the basis for the development of a plan approved by the USFS and incorporated in the final EIS in May 2001. Because the public got involved, the USFS moved forward with community support and was able to develop a forest-management plan.[103]

These stories are not exclusive or unique; there are countless examples of how public participation has ultimately improved NEPA's efficiency, the human environment, agency decision-making, and public health and trust. CEQ's own experiences indicate that more and earlier public involvement improves project planning, and notably the issues raised by some projects require more time than others. Procedural constraints enforced under the guise of streamlining often result in cutting corners and approving harmful projects, the exact danger that NEPA was designed to protect against. Moreover, curtailing opportunities for public participation limits the opportunity for agencies to benefit from local knowledge, including that of marginalized communities facing linguistic or cultural barriers. These communities have the right to be heard, and agencies can only benefit from soliciting their input.

A letter from a bipartisan group of U.S. representatives—André Carson, Eleanor Holmes Norton, Donna Edwards and Janice Hahn—concerning the Water Resources and Development Act of 2013, highlights the dangers of inadequate NEPA review: "Poorly planned [U.S. Army Corps of Engineers] projects can lead to incomprehensible losses, like the flooding of New Orleans during Hurricane Katrina—and can destroy natural ecosystems that provide free and effective flood protection."[104] The way to make federal projects more efficient isn't to cut corners, but to engage in "robust project review to help ensure better, more resilient projects." These legislators concluded: "We agree with the

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[101] *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government*, ENVT'L. L. INST., 6 (Aug.
[102] *), https://ceq.doe.gov/docs/get-involved/NEPA_Success_Stories.pdf.*
[103] *Id. at 20.*
[104] *H.R. Rep. No. 113-246, pt. 1, at 338.*

conclusions reached by eight past chairs of the Council on Environmental Quality from both Republican and Democratic administrations: NEPA is 'not an impediment to responsible government action; it is a prerequisite for it.'"

In the decades following the passage of NEPA and other environmental laws, public awareness of and participation in environmental decision-making has increased, and so have public educational tools.[65] A 1997 CEQ report found that "Partly as a result of NEPA, public knowledge of and sophistication on environmental issues have significantly increased over the last 25 years."[66] Diminishing public-participation guidelines, or limiting agencies in their authority to exceed minimal public-involvement measures, risks squandering the resource of an educated and active public.

E. Detailed Environmental Review Promotes Good Decision-Making by Federal Agencies

The current NEPA compliance framework already incorporates measures to divert projects for which environmental review is unnecessary, so only projects that threaten significant impacts are required to undergo heavy scrutiny. First, only major federal actions[67] require an EA—minor actions do not. Even then, an action may be "categorically excluded" from review under an agency rule if it fits into a category that has been found, individually or cumulatively, to have no significant effect. As a result of these rules, only a relatively small number of actions require a full EIS.

An EA generally requires only a brief discussion of the need for the proposal, alternatives in cases of conflict, environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.[68] If, following an EA, an agency concludes that a project involves no threats to the human environment, it can issue a FONSI and proceed. Only in cases where an agency has foreseen a significant impact is an EIS mandatory. By the year 1993, some 50,000 EAs were being prepared annually, of which only about 1 percent resulted in the preparation of an EIS.[69]

If an agency has determined that an EIS is necessary, even then there are measures in place to limit the amount of paperwork[70] and possible delay[71] involved, and an agency may use a tiering approach to limit the scope of alternatives under consideration.[72] In short, CEQ regulations already

[65] *See, e.g.*, *Investigating Environmental Contamination*: *A Guide For Communities*, GREAT LAKES CTR. FOR CHILDREN'S ENVT'L HEALTH AND U. OF ILL. AT CHICAGO SCH. OF PUB. HEALTH (2019) https://greatlakes.uic.edu/wp-content/uploads/sites/480/2019/07/
online_comm-resource-guide_071719.pdf (Last visited Dec. 19, 2019); *A Citizen's Guide To Using Federal Environmental Laws To Secure Environmental Justice* ENVT'L. L. INST. (2002)

https://www.epa.gov/sites/production/files/2015-04/documents/citizen-guide-ej.pdf (last visited Dec. 19, 2019); Lauren Braden, *Activist Toolkit: A Citizen's Guide To Protecting The Environment*, SEATTLE AUDUBON SOC'Y http://www.seattleaudubon.org/sas/Portals/0/Conservation/

RESOURCES_AND_PUBLICATIONS/fullhand.pdf (last visited Dec. 19, 2019). [66] CEQ,
supra note 57, at 18.

[67] 40 C.F.R. § 1508.18.

[68] *National Environmental Policy Act Review Process*, EPA, https://www.epa.gov/nepa/national-environmentalpolicy-act-review-process (last visited Dec. 18).
[69]CEQ, *supra* note 57, at 19.

[70] 40 C.F.R. § 1500.4.
[71] *Id*. § 1500.5.
[72] *Id*. §1508.28.

provide for as simple, prompt, and rigorous an environmental review as is reasonably possible within the terms of the statute. "Unfortunately, not every Federal agency, and not every NEPA review, complies effectively with this mandate. Meaningful efforts to improve the Act's implementation should address the critical needs for better guidance and additional training for agency personnel and enhanced resources for NEPA implementation by federal agencies."[105]

Rather than seek to exclude environmentally significant categories from agencies' duties under NEPA, CEQ should work to strengthen agency compliance with the rule already in place. Categorical exclusions, in particular, are ripe for abuse. For example, the Forest Service has acted to exclude broad swathes of its forest-management activity, such as "restoration," which encompasses "activities such as removing trees affected by insects or disease through commercial timber harvest . . . . These projects could also include reducing overgrown areas around communities to reduce wildfire risk and improve wildlife habitat through mechanical thinning and prescribed burning."[106] In other words, the Forest Service claims the right to adopt logging policies that could affect millions of acres per year, but does not consider any such activity to have a "significant effect" on the environment, even to the extent of assessing a potential impact before proceeding.[107] CEQ should work to improve agency compliance with the current rule, not limit the scope of environmental consideration.

F. Extensive Environmental Review Reduces Expensive, Time-Wasting Litigation

NEPA's mandate to support informed decision-making also ensures that this process results in less litigation. More importantly the prospect of litigation has, in some cases, enabled federal officials to review their initial plan, take an in-depth look at issues, and persuade colleagues and supervisors that particular information is needed, or that a superficially less-attractive alternative deserves a more substantial look.[108] With the public fully engaged, litigation is far less likely because communities are satisfied with the project, and more confident that their concerns have been taken into serious consideration.

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[105] Letter from Russell E. Train, seven other former CEQ chairs, and two general counsels, to Cathy McMorris, chair of the Task Force on Reviewing and Strengthening the National Environmental Policy Act (Sept. 19, 2005) (on file with the Georgetown Environmental Law and Policy Institute) http://gelpi.org/gelpi/research_archive/nepa/CEQChairsLetter.pdf.
[106] Supporting Information for Proposed Categorical Exclusions, U.S. FOREST SERV. https://www.fs.fed.us/emc/nepa/revisions/pcesupportinginfo.shtml (last visited Dec. 19).
[107] Id.
[108] Envtl. L. Inst., supra note 62, at 7.
[77] Id. at 23.

In 1993, the Wallowa-Whitman National Forest supervisor was reviewing the management plan for the Hells Canyon National Recreation Area. Ten people representing two tribes submitted a comprehensive "Native Ecosystem Alternative" in response to the draft EIS. Rather than plowing ahead, the Washington Forest Service notified the Wallowa-Whitman supervisor that a new EIS should be drafted to include the Native Ecosystem Alternative. The supervisor then met with stakeholders for 18 months. In 2003, the agency released its final EIS with the approval of the tribes and other groups. "The Wallowa-Whitman NF was able to settle all six minor appeals . . . and no litigation ensued."[77]

Public participation catches potential agency mistakes, thus avoiding possible litigation. In 2006, when the Forest Service in Idaho proposed a road project to improve fish passage and reduce sedimentation, public comments identified a discrepancy between the planned buffer zone for the endangered boreal toad and the federal requirement for that zone. In response, the agency redesigned the road to protect the species. By incorporating public comments, "the Forest Service avoided irretrievably committing taxpayer dollars to a project that violated federal laws and might have led to litigation."[109]

A model NEPA process brings diverse perspectives to the table in order to reach a broadly accepted outcome. In southern Utah, off-road vehicle use on public lands was a contentious issue. To determine how much access to allow the vehicles, the Forest Service held numerous sessions, in 2016, with members of the public, government representatives, stakeholders, and others. Commenting was extended for a year before a draft EIS was issued. In 2009, the Forest Service published a final EIS. The decision was broadly accepted by those concerned with the impacts of off-road vehicle use because they directly affected the final outcome: "[T]he publication of a broadly-accepted final EIS and Record of Decision to close routes and roads in a state known for its vocal social divisions regarding public lands [off-road vehicle] use is a testament to an effective NEPA process."[110] After benefitting from public input, the plan avoided litigation.

NEPA litigation is often portrayed as obstructionist and combative by project proponents but going to court can sometimes result in parties appreciating the merits of each other's positions. In 1996, the Utah Department of Transportation announced the 120-mile Legacy Highway project. Environmental and transportation advocacy groups were unsatisfied with the final EIS when it was released in 2000 because it would unacceptably hurt internationally important wetlands. As a result, in 2001, the environmental groups filed suit, and the Tenth Circuit found deficiencies in the final EIS and noncompliance with the Clean Water Act. The decision inspired the parties to work together to prepare a supplemental EIS. The parties successfully negotiated an alternative and the parkway opened in 2008. Ultimately, NEPA helped bring the various parties together and combined the best aspects of the state's original proposal with the public's best ideas.[111]

Of course, NEPA litigation can also correct errors when an agency's failure to comply with NEPA has led to poor decision-making. In 2013, for example, a group of local, state and national environmental groups filed litigation against the Farm Service Agency (FSA) and the Small Business

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[109] *Pepper, supra note 59.*
[110] *Id. at 22.*
[111] *Id. at 29; see also, Nicole Warburton, Who's minding the shore? Nature preserve turns wasteland into a wetland, DESERET NEWS (Aug. 6, 2017).*

Administration (SBA), claiming the agencies violated NEPA by guaranteeing loans to C&H Farms, a swine facility on the banks of a tributary to the Buffalo National River, without adequately assessing the facility's environmental impact. The FSA said that it had assessed the environmental issues, while the SBA had simply failed to weigh the farm's environmental effects.[112] Ultimately, the district court found the approval of the loan guarantees, and FSA's FONSI, arbitrary and capricious:

> [FSA's] Environmental Assessment that supported the Finding of No Significant Impact was cursory and flawed. It didn't mention the Buffalo River. It didn't mention Big Creek. It didn't mention the nearby Mt. Judea school. It didn't mention the Gray Bat. The Agency concluded that any environmental effect C & H might have would be mitigated by following the Arkansas Department for Environmental Quality's waste-disposal plan. But the Farm Service Agency failed to give reasons for that generalized conclusion. And while it certainly could've relied on the ADEQ's mitigation measures, at a minimum the Farm Service Agency had to make the case for doing so in its Environmental Assessment. It didn't. Brevity is commendable, but conclusions can't take the place of reasons.[113]

Ultimately, after significant efforts by community members and the State to address impacts that should have been considered at the front end, in 2019 the State offered the facility a buyout at a cost of $6.2 million.[114][115]

Again, these cases highlight the vital role public participation plays in the NEPA process and the benefits of public participation to equitable and good decision-making. There are countless such cases, and they all point to one conclusion—more public participation leads to greater efficiency and less litigation. Instead of "streamlining" the public-participation process, CEQ should look for ways to improve and increase participation.

II. CEQ's Assessment of Whether the Proposal Will Have a Disparate Impact on EJ Communities is Grossly Inadequate, Especially Considering NEPA's Central Role in Protecting Their Health and Welfare

In lieu of an analysis under EO 12,898, CEQ provides a conclusory statement that it "[analyzed] this proposed rule and determined that it would not cause disproportionately high and adverse human

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[112] *Buffalo River Watershed Alliance v. U.S. Dept. of Ag., 2014 WL 6837005, *1 (E.D.Ark. 2014).*
[113] *Id. at *4.*
[114] *Emily Walkenhorst, C& H Hog Farms Takes State Buyout; $6.2M Deal Cut to Preserve Buffalo River, ARK. DEMOCRAT & GAZETTE (June 14, 2019), https://www.arkansasonline.com/news/2019/jun/14/c-h-hog-farms-takesstate-buyout-201906/. (noting CEQ proposes to bypass decision of the Eastern District of Arkansas to exclude as non-major federal action "the farm ownership and operating loan guarantees provided by the Farm Service Agency (FSA) . . . and the business loan guarantee programs of the Small Business Administration." For the reasons stated in this subsection, the EJ Commenters agreed with and incorporate by reference Moving Forward Network, Comments on Docket ID No. CEQ-2019-0003, Notice of Proposed Rulemaking, 40 C.F.R. Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508 (March 10, 2020).*
[115] *C.F.R. III (F).*

health or environmental effects on minority populations and low-income populations."[84] However, even cursory analysis would suggest that many key provisions in the proposed rule would have a severely disparate and adverse impact on communities of color and low-income communities. These provisions include but are not limited to imposing arbitrary page limits;[116] redefining "major federal action";[117] striking required cumulative-impact analysis;[118] imposing a bond requirement to stay an action;[119] no longer circulating documents;[120] and allowing collective responses to public comments.[90] In sum, CEQ's boilerplate language is grossly inadequate to fulfill its obligations under EO 12,898.

A. CEQ Failed to Comply with EO 12,898
Section III F (Executive Order 12,898)

The discussion of whether the proposed rule will have a disparate impact on communities of color and low-income communities[121] is entirely inadequate, and fails to comply with EO 12,898.[122] As the Fourth Circuit recently stated, "environmental justice is not merely a box to be checked."[123] CEQ dismisses its obligation seemingly by arguing that only "in the agency implementation" should environmental justice effects be analyzed. To the contrary, CEQ has an obligation to assess compliance with EO 12,898 in rulemaking. NEPA has been an essential mechanism for ensuring that disenfranchised and underrepresented communities have voice in major federal actions.[124] Abridging the public's opportunity to participate through notice and comment has real consequences. Changes in that process, and particularly the changes discussed below—reduced commenting time, moving documents and comment sessions online, striking cumulative impacts, and limiting publication of key documents, among others—would have disparate and adverse consequences for EJ communities.

B. The Proposed Rule Would Limit Critical Opportunities for Public Involvement and Undermine the Protection of EJ Communities Historically Excluded from Decision-Making Parts 1500-1508

Executive Order 12,898 recognizes the importance of gathering data and conducting research to identify and address disproportionately high and adverse effects of federal actions on communities of

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[116] *Id. §§ 1501.5, 1502.7, 1501.10.*
[117] *Id. §§ 1500.4(a), 1501.4.*
[118] *Id. § 1508.7.*
[119] *Id. § 1500.3(4).*
[120] *Id. §§ 1500.4(o), 1501.2(b)(2), 1502.9, 1502.20, 1502.21, 1503.4(c), 1506.3,1506.8(c)(2).*
[90] *Id. § 1503.*
[121] *Id. § 1500.*
[122] *See Attachment A, Memorandum of Understanding of Environmental Justice and Executive Order 12,898, 7 CHARTER FOR INTERAGENCY WORKING GRP. ON ENVT'L JUSTICE (stating CEQ is a participating agency in the Interagency Working Group and "agreed in the MOU to carry out the requirements of the requirements of Executive Order 12,898"), available at https://www.gsa.gov/cdnstatic/MOU_Environmental_Justice.pdf.*
[123] *See Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68, 92 (4th Cir. 2020).*
[124] *CEQ, Environmental Justice Guidance Under the National Environmental Policy Act (1997), available at https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-EJGuidance.pdf (emphasizing the importance of procedures under NEPA for identifying and addressing environmental justice concerns).*

color and low-income communities.[125] Public participation is an integral part of addressing environmental justice concerns,[126][127] and CEQ itself has emphasized "the importance of NEPA's public participation process, pointing out that the President's Memorandum accompanying the EJ Executive Order directed 'each Federal agency shall provide opportunities for community input in the NEPA process.'"[97] The proposed rule would limit public participation by changing the publication requirements for NEPA-related documents, eliminating language exhorting agencies to promote accessibility, broadening the latitude for agencies to omit crucial impacts, limiting the documents made available to the public, erecting financial hurdles to acquiring documents, setting arbitrary time and page limits, diminishing accessibility to limitedEnglish proficiency populations, de-emphasizing transparency, and allowing extraneous proceedings to stand in for proper efforts to involve the public.[128]

Since its inception, NEPA has been seen by Congress as a mechanism to rectify inadequate participation in government decision-making. The Senate reported in 1969: "Many of the environmental controversies of recent years have, in large measure, been caused by the failure to consider all relevant points of view in the planning and conduct of Federal activities."[129] Appreciation of the important role played by affected communities—and EJ communities, in particular—has only grown since then. Evidence suggests that meaningful involvement with these communities—beginning early in the review process and continuing throughout—leads to (1) a more efficient review and (2) less litigation following the review. This is the outcome, and therefore the process, that best serves the health and productivity of the American people.

Not only does the public use NEPA participation to guide and improve agency decisionmaking, it also deters inappropriate and unlawful behavior. In a 2005 letter to U.S. Representative Cathy McMorris, chair of the Task Force on Improving and Strengthening NEPA, a group of eight former CEQ chairs and two general counsels wrote that "[p]ublic participation under NEPA supports the democratic process by allowing citizens to communicate with and influence government actions that directly affect their health and well-being."[130][131] In this capacity, NEPA "serves as a watchdog, ensuring that Federal agencies fulfill their responsibilities under the law." To omit and exclude public participation and transparency from NEPA's purpose is to undermine the purpose of the Act.

The proposed rule reveals its authors' underlying misconception of NEPA's purpose from the very first paragraph, which asserts: "The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the

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[125] EO 12,898.

[126] See U.S. Environmental Protection Agency, Office of Policy, Economics, and Innovation, Engaging the American People: A Review of EPA's Public Participation Policy and Regulations with Recommendations for Action, EPA

[127] -R-00-005, December 2000, p. 1; Damu Smith, campaigner, Greenpeace Toxic Campaign, Greenpeace, USA, Testimony, January Hearing Transcript, p. 115; Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 123 [97] CEQ, supra note 93, at 1.

[128] See infra Part II, III.

[129] S. REP. 91–296, at 20 (1969).

[130] Letter from Russell E. Train et al., former CEQ chairs and general counsels, to Cathy McMorris, chair of Task Force on Reviewing and Strengthening the National Environmental Policy Act (Sept. 19, 2005) http://gelpi.org/gelpi/research_archive/nepa/CEQChairsLetter.pdf.

[131] C.F.R. § 1500.1(a).

decision making process."[101] Under the established interpretation of NEPA, decision-making is an inclusive process. Simply "informing" the public of an agency's actions falls far short of statutory compliance. NEPA is satisfied only when an agency has taken a "hard look" at environmental effects before deciding on a project,[132] and this "hard look" includes public participation.[133][134]

Nonetheless, multiple sections of the proposed rule would now direct agencies to "review and publish," rather than "circulate," environmental documents.[104] Specifically, under § 1502.21, the CEQ would no longer circulate EIS summaries, but only publish them online.[105] This language would place the onus on the public to act as a constant watchdog, rather than on the lead agency to properly communicate its efforts. It is unreasonable to expect local residents, especially members of marginalized populations, to remain abreast of federal agency plans before ground is ever broken in their communities—especially since the federal government is comprised of some 450 agencies and offices.[135][136] Because communities targeted for destructive projects are often marginalized and economically disadvantaged, it is doubly important that agencies employ every means practicable to reach them in the planning process. If CEQ seeks to safeguard the right to participate in the decision-making process, it must continue to require agencies not just to "publish," but to "circulate" NEPA reports.

On top of the diminished circulation requirement, the proposed rule's emphasis on determining the "significance" of environmental impacts at the earliest stage of analysis, and on "eliminating from further study non-significant issues," threatens to limit the EIS before the public, experts and other federal agencies have been consulted.[107] Environmental justice communities in particular will suffer if agencies have discretion to determine that a project or impact is insignificant before public participation has occurred. Many such communities already suffer disproportionate environmental burdens precisely because their well-being was regarded in the past as insignificant.[137][138]

Because scoping occurs so early in the NEPA process, it is likely that potentially significant environmental issues discovered later could be excluded from an EA or FONSI. If agencies are directed to purge "non-significant" issues at such an early stage, "prior to the notice of intent,"[109] it is likely that they will never come to the attention of the communities they affect. Under § 1500.3(c) of the proposed rule agencies would be allowed to perform "scoping outreach,"[139] during which they "may" hold meetings, publish information, or use other means to communicate with interested individuals.[140] If environmental issues are identified and excluded from consideration as early as the scoping process,

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[132] *Sierra Club v. Hodel, 848 F.2d 1068, 1093 (10th Cir. 1988).*
[133] *Webster v. United States Dep't of Agric., 685 F.3d 411, 421 (4th Cir. 2012).*
[134] *C.F.R. §§ 1500.4(o), 1501.2(b)(2), 1502.9, 1502.20, 1502.21, 1503.4(c), 1506.3, and 1506.8(c)(2)* [105] *Id. § 1502.21.*
[135] *National Archives, Federal Register, Agencies, https://www.federalregister.gov/agencies (last visited Mar. 7, 2020).*
[136] *C.F.R. § 1501.4(b).*
[137] *New York Civil Liberties Union, supra note 41.*
[138] *C.F.R. § 1501.9.*
[139] *Id. § 1500.3.*
[140] *Id. § 1501.9(c).*

then public participation must also be required as early and as often as possible, in line with CEQ's current guidance.

The proposed rule's provisions requiring reductions in paperwork would further limit the public's ability to participate. In the spirit of "the fullest possible extent," transparency is required whenever possible and reasonable. The proposed rule would instead encourage agencies to incorporate materials by reference in order to cut down on bulk, erecting more barriers rather than promoting access to information.[141] CEQ should advise that whenever possible, agencies should include, not exclude documents. This is particularly true of electronic documents, which cost virtually nothing and create no waste. The proposed § 1502.21, on EIS publication, calls for agencies to "transmit the entire statement electronically (or in paper copy, if so requested due to economic or other hardship),"[142] whereas the current rule requires agencies to provide documents free of charge whenever possible.[143] The proposed change threatens to decrease accessibility to individuals without access to technology, people with disabilities, and limited-English-proficient populations. Individuals requesting an important public record should not be required to plead economic hardship to receive a paper copy. Translations or summaries of the most crucial documents, such as solicitations of comments, EAs, EISs, and FONSIs should be made available by request, as required by Executive Order 13,166.[144][145]

The language of the proposal's Part 1502 also raises transparency concerns. The current rule states at § 1502.1: "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."[116] The proposed rule would eliminate the mention of disclosure entirely: "An environmental impact statement is a document that informs Federal agency decision making."[146]
It is similarly worrisome that the proposed rule would eliminate the requirement that an agency

"make every effort to disclose" responsible opposing views omitted from draft environmental impact statements.[147] The current language is crucial to emphasizing the second of NEPA's "twin aims," and its elimination would threaten NEPA's overall effectiveness.

Section 1502.14, again restricts rather than enhances access to information. Whereas the current rule describes the discussion of alternatives as "the heart of the environmental impact statement" and requires "a clear basis for choice among options by the decisionmaker and the public,"[148] the proposed rule would cut that language completely. The role of public participation is similarly threatened by the proposed § 1506.9, which allows another analysis prepared pursuant to other proceedings to be substituted for an environmental impact statement in proposals for rules or regulations.[149] The proposed rule would require only, vaguely, that there be "public participation before

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[141] *Id. § 1501.12.*
[142] *Id. § 1502.21.*
[143] *Id. § 1506.6(f).*
[144] *Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50121 (Aug. 16, 2000).*
[145] *C.F.R. § 1502.1.*
[146] *Id. § 1502.1.*
[147] *Id. § 1502.9.*
[148] *Id. § 1502.14.*
[149] *Id. § 1506.9.*

a final alternative is selected." Without any guarantee that public participation in these substitutable proceedings meets or exceeds the requirements of a NEPA-specific process, this provision would undercut that process.

C. The Proposal to Weaken Agency Obligations to Respond to Comments and Publish Them Would Disproportionately Impact Environmental Justice Communities Parts 1503, 1506

The proposed rule would weaken requirements for agencies to publish and respond to public comments. By disincentivizing comments, these changes would negatively impact public participation.[150][151] The current rule requires that an agency preparing a final EIS "shall assess and consider comments both individually and collectively . . . stating its response in the final statement."[122] In contrast, the proposed rule would change "shall" to "may," removing the obligation to respond to comments, and affording agencies new discretion.[152] Public comment not only benefits an agency in planning, but also provides an important transparency function, and lays a foundation of evidence for affected individuals to challenge violations of NEPA.[153] Altering the legal duty to consider comments conflicts with the goals of the Act.

T[154]he current rule requires substantive comments to be "attached whether or not the comment is thought to merit individual discussion by the agency in the text of the statement," whereas § 1503.2 of the proposed rule would allow substantive comments or summaries of them to be "otherwise published" in some extraneous manner.[125] Members of the public and experts alike would be less likely to comment if an agency could disregard even their most substantive scientific and technical input, or omit it from the final statement. Diminished public input would lead to decreased consideration of environmental impacts, to the diminution of NEPA. It would also reduce the overall efficiency of the Act through costly environmental consequences and associated litigation.

Not only does the proposed rule threaten to eliminate the legal requirement that agencies respond to comments, it would also limit agencies' responses to those comments. Should an agency determine that a comment "does not warrant further agency response," it would no longer be required to "cite the sources, authorities, or reasons which support the agency's position."[126] Detailed consideration of public comments is essential to the mandatory "hard look" of the environmental review process, and the current rule requires this consideration. The new rule would remove the incentive, the transparency, and the safeguard.

The proposed rule would also diminish agencies' duty to notify the public of NEPA-related activities. The proposed rule eliminates the requirement that agencies "provide notice by mail to national organizations reasonably expected to be interested in the matter" under certain

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[150] See, Ohio Valley Envtl. Coal. v. United States Army Corps of Engineers, 674 F.Supp.2d 783, 792 (S.D.W. Va. 2009).
[151] C.F.R. § 1503.4.
[152] Id.
[153] See, e.g., Nat. Res. Def. Council v. Lujan, 768 F. Supp. 870, 877 (D.D.C. 1991).
[154] C.F.R. § 1503.2 ("An agency . . . . may individually or collectively . . . .") (emphasis added). [126]
Id. § 1503.2.

circumstances.[155][156] Under the proposed rule, notification of organizations that have specifically requested notice is not required.[128] Reducing the duty of agencies to provide notice, at a time when electronic notification is simpler to provide than ever before, would be an arbitrary and capricious interpretation of NEPA.

D. Bond Requirements for NEPA Action Would Disproportionately Affect EJ Communities Part 1500

The proposal for new bond requirements would disproportionately and adversely affect communities based on income, race, and national origin. Section 1500.3(4)(c) for example, would allow agencies to impose a bond requirement on parties in order to stay an action.[157] Because community groups often lack their own resources to challenge agencies on the basis of NEPA noncompliance, the proposal would impact them disproportionately, and without regard to the validity of their claims.[158] Such bond requirements stand to benefit only parties with deep pockets.[131]

E. Review to the Statutory 'Fullest Extent Possible' Requires Cumulative-Impact Analysis, and Limiting This Analysis Would Disproportionately Affect EJ Communities Part 1508

CEQ's proposal to strike specific references to direct, indirect, and cumulative effects is arbitrary, capricious, and not in accordance with law. Consideration of cumulative impacts is required by statute—not discretionary—but the proposed rule purports to make it optional.[159] The current rule requires that agencies take a "hard look" at cumulative impacts of a proposed action,[160] and there is no plausible basis for the proposed change.[161]

The current regulation defines cumulative impacts as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[135] As the proposal itself points out, there have been "numerous publications on the topic,"[162] and they have been extensively documented by biologists and public health experts.[163] "Perhaps the most significant environmental impacts result from the combination of existing stresses on the environment with the individually minor, but cumulatively major, effects of multiple actions over time."[164] When Congress drafted NEPA,

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[155] *Contrast 42 U.S.C. § 1506.6.*
[156] *C.F.R. § 1506.6.*
[157] *Id. § 1500.3(4)(c).*
[158] *Id. § 1500.3(4)(c).*
[131] *Id. II(B) n.55.*
[159] *Id. § 1508.*
[160] *Id. § 1508.7; San Juan Citizens Alliance v. United States Bureau of Land Mgmt, 326 F.Supp.3d 1227, 1248 (D. N.M. 2019).*
[161] *See National Environmental Justice Advisory Council, Ensuring Risk Reduction in Communities With Multiple Stressors: Environmental Justice And Cumulative Risks/Impacts, EPA (2004).* [135] *40 C.F.R. § 1508.7.*
[162] *Id.*
[163] *EPA, supra note 133.*
[164] *CEQ, supra note 47, at 29.*

concerns about cumulative impacts were front and center. The 1968 Congressional White Paper on a National Policy for the Environment included an entire section on ecology, and detailed, at length, concerns that "[o]rganic nature is such a complex, dynamic, and interacting, balanced and interrelated system that change in one component entails change in the rest of the system. Isolated analytical study of separate components cannot yield desired insight."[165] As CEQ wrote in 1997, "[t]he passage of time has only increased the conviction that cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment. The purpose of cumulative effects analysis, therefore, is to ensure that federal decisions consider the fill range of consequences of actions."[166]

As the Second Circuit held in *Hanly v. Kleindienst*, an environmental assessment must consider:

> (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative [167]harm that results from its contribution to existing adverse conditions or uses in the affected area.[141]

Deferring to CEQ's own regulations, the Fifth Circuit established a set of five considerations to be included in cumulative-impact analysis.[168] Each is grounded within the procedural call of NEPA § 102:

(1) the area in which effects of the proposed project will be felt;
(2) the impacts that are expected in that area from the proposed project;
(3) other actions—past, proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area;
(4) the impacts or expected impacts from these other actions; and
(5) the overall impact that can be expected if the individual impacts are allowed to accumulate[169]

This is not merely an interpretation of CEQ guidelines, but an evaluation of those guidelines within the statutory framework. Redefining effects in a way that weakens the obligation to assess cumulative impacts is simply inconsistent with the mandate of NEPA.

NEPA requires an EIS for all "major federal actions significantly affecting the quality of the human environment." Federal courts have expressly rejected the argument that magnitude of a project

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[165] *S. Comm. On Interior And Insular Affairs And H.R. Comm. On Science And Aeronautics, Congressional White Paper On A National Policy For The Environment, 90th Cong., 4–5 (1968).*
[166] *CEQ, Considering Cumulative Effects Under the National Environmental Policy Act (Jan. 1997), https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf.*
[167] *F.2d 823, 830–31 (2d Cir. 1972).*
[168] *Fritiofson v. Alexander, 772 F.2d 1225, 1245 (5th Cir. 1985), abrogated by Sabine River Auth. v. United States Dep't of Interior, 951 F.2d 669 (5th Cir. 1992).*
[169] *Id.*

can be separated from its impact.[170] If a cumulative impact is significant, therefore, it statutorily requires an EIS. Without an understanding of cumulative-impact measures, there can scarcely be a detailed discussion of potential mitigation measures as required. "One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel. Hence the absolute, as well as comparative, effects of a major federal action must be considered."[171]

As the National Environmental Justice Advisory Council wrote in its December 2004 report, *Ensuring Risk Reduction in Communities with Multiple Stressors: Environmental Justice and Cumulative Risks/Impacts*:

> The sense of anguish expressed . . . and uniformly experience by disadvantaged, underserved, and environmentally overburdened communities reflects a complex web of combined exposures. In recent years, this combination has come to be described as 'cumulative risks and impacts.' Manifested . . . is the concept of vulnerability, a matrix of physical, chemical, biological, social and cultural factors which result in certain communities and sub-populations being more susceptible to environmental toxins, being more exposed to toxins, or having compromised ability to cope with and/or recover from such exposure.[172]

Over time, scientific evidence has further demonstrated the health consequences of the cumulative impacts of social vulnerability, individual susceptibility and exposure to environmental hazards.[173] No issue could be more central to residents of already environmentally overburdened communities than whether cumulative impacts will be considered in environmental decisionmaking, and no proposal could raise more significant concerns about environmental justice than weakening the requirement that cumulative impacts be considered.

F. Redefining 'Effects or Impacts' Threatens to Eliminate Analysis of Climate Impacts, Which Will Disproportionately Affect EJ Communities

Part 1508

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[170] Minnesota Pub. Interest Research Grp. v. Butz, 498 F.2d 1314, 1321 (8th Cir. 1974).
[171] Hanly, 471 F.2d at 831 (2d Cir. 1972).
[172] National Environmental Justice Advisory Council, Ensuring Risk Reduction in Communities with Multiple Stressors: Environmental Justice and Cumulative Risks/Impacts, at 1 (Dec. 2004).
[173] See Rachel Morello-Frosch et al., Understanding the Cumulative Impacts of Inequalities in Health: Implications for Policy, 30 Health Affairs (May 2011), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2011.0153. [148] See generally Kathy Lynn et al., Social Vulnerability and Climate Change: Synthesis of the Literature, USDA GEN'L TECH. REPORT PNW-GTW-838 (Aug. 2011), at 1, https://www.fs.fed.us/pnw/pubs/pnw_gtr838.pdf ("effects of climate change are expected to be more severe for some segments of society than others because of geographic location, the degree of association with climate-sensitive environments, and unique cultural, economic, or political characteristics of particular landscapes and human populations"). [149] 40 C.F.R. § 1508.

Although comments on NEPA's "Draft National Environmental Policy Act Guidance on Considerations of Greenhouse Gas Emissions" are outside the scope of this document, EJ Commenters profoundly disagree with any definition of "[e]ffects or impacts" that would weaken the responsibility of agencies to assess the climate impacts of major federal actions. Omitting these impacts would have a disproportionate effect on communities of color and low-income communities.[148]

By cutting any mention of "cumulative" effects or impacts, the proposed rule threatens to eliminate the analysis of climate impacts,[149] an important cumulative effect that is, by the nature of its scale, incremental. Without guidance to consider less greenhouse-gas-intensive alternatives, agencies may mistakenly dismiss them as meaningless externality,[174] to the great cost and detriment of the country.[175] The populations most vulnerable to climate change impacts include "low income, some communities of color, immigrant groups (including those with limited English proficiency), Indigenous peoples, children and pregnant women, older adults, vulnerable occupational groups, persons with disabilities, and persons with preexisting or chronic medical conditions."[152] As the NAACP recognized, environmental justice is inextricable from climate justice.[176]

CEQ must address not only small-scale environmental impacts, but global ones as well. In 1969, a House of Representatives Report on NEPA quoted testimony asking: "Is the climate changing in an unnatural manner? Is there likely to be an oxygen shortage? . . . How much production of inorganic products can we produce without fouling the global environment?"[177][178] Congress was likewise prescient in its concerns about generational equity, noting that NEPA should help to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[155] This statement recognizes that each generation has a responsibility to improve, enhance, and maintain the quality of the environment to the greatest extent possible for the continued benefit of future generations.[179][180] Likewise, the text of NEPA requires not just CEQ, but all federal agencies, to "recognize the worldwide and long-range character of environmental problems."[157]

Federal courts have also endorsed this view. "We think NEPA is concerned with indirect effects as well as direct effects. There has been increasing recognition that man and all other life on this earth may be significantly affected by actions which on the surface appear insignificant."[181][182] Courts

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[174] *See Armon Rezai et al., Global Warming and Economic Externalities, SCHWARTZ CTR. FOR ECON. POLICY ANALYSIS, NEW SCHOOL FOR SOCIAL RESEARCH, Working Paper No. 2009-3 https://www.economicpolicyresearch.org/images/docs/research/climate_change/SCEPA%20Working%20Paper%202009-3.pdf.*

[175] *Climate Change Impacts, NOAA & U.S. DEP'T OF COMMERCE, https://www.noaa.gov/education/resource-collections/climate-education-resources/climate-change-impacts (last visited Dec. 15, 2019).*

[152] *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment, Ch. 9: Populations of Concern, U.S. GLOBAL CHANGE RESEARCH PROGRAM, https://health2016.globalchange.gov/populations-concern (last visited Dec. 15, 2019).*

[176] *Environmental and Climate Justice, NAACP, https://www.naacp.org/issues/environmental-justice/ (last visited Dec. 18, 2019).*

[177] *H.R. REP. 91–378, at 119 (1969).*

[178] *U.S.C.A. § 4331(b)(1) (West); see also S. REP. 91–296, at 2 (1969).*

[179] *S. REP. 91–296, at 18.*

[180] *U.S.C.A. § 4332(2)(F) (West).*

[181] *Minnesota Pub. Interest Research Grp. v. Butz, 498 F.2d 1314, 1322 (8th Cir. 1974).*

[182] *F.Supp.2d 491, 517 (M.D. N.C. 2010); see also San Juan Citizens Alliance v. United States Bureau of Land Mgmt, 326 F.Supp.3d 1227, 1248 (D. N.M. 2019).*

considering more recent cases such as *North Carolina Alliance for Transp. Reform v. Dep't of Transp.*, still endorse this view after more than 30 years: "Defendants had an obligation to take a 'hard look' at 'any adverse environmental effects' of the project . . . . these include 'indirect effects,' which are those that 'are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.'"[159] The scope of an EIS properly includes climaterelated impacts, and excluding them categorically would be arbitrary and capricious.[183]

III. Key Provisions in the Proposed Rule Would Undermine the Reasonable Consideration of Environmental Impacts Required by NEPA

NEPA doesn't require that environmental harms take precedence over other factors, but it does require that these harms be taken into consideration.[184][185] Although CEQ has declared that the proposed rule would "promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA,"[162] many key provisions in the proposed rule would instead undermine considerations of environmental impacts. Provisions in the rule that are inconsistent with NEPA's substantive goals include: redefining "major federal action;"[186] limiting another agency's ability to do more under NEPA;[187] limiting the scope of reasonably foreseeable environmental impacts;[188] and adding a confusing exception to the provision that governs supplemental EIS requirements.[166]

Congress directed federal agencies to comply "to the fullest extent possible" with [189]NEPA's procedural requirements, such as the inclusion in an EIS of environmental impacts, any adverse effects, and alternatives to a proposed action.[167] Federal courts have interpreted this directive as a "rule of reason,"[190][191] requiring all reasonable measures to delineate and consider the components of an environmental impact statement. This requirement includes adherence to the "multidisciplinary" and "social science" approaches described by NEPA § 102(a). The current NEPA rule reflects this multidisciplinary approach by observing that "[a]ccurate scientific analysis, expert agency commentary, and public scrutiny are essential to implementing NEPA."[169] However, the proposed rule would eliminate this important language without justification and undermine the purpose of the statute.

A. Redefinition of 'Major Federal Action' Threatens Overburdened Communities

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[183] *Wyoming v. United States Dep't of Ag., 661 F.3d 1209, 1251 (10th Cir. 2011).*
[184] *Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 (1989).*
[185] *C.F.R. 1500.*
[186] *Id. §§ 1500.4(a), 1501.4.*
[187] *Id. §§ 1500.3, 1507.3.*
[188] *Id. §§ 1501.8(b)(7), 1502.13.*
[166] *Id. § 1502.*
[189] *U.S.C. § 4332.*
[190] *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C. Cir. 1973).*
[191] *CFR § 1500.1(b.)*

CEQ's proposal to redefine major federal actions to exclude swathes of decisions that have significant environmental impacts on environmental justice communities is arbitrary and capricious, and inconsistent with NEPA. Incremental impacts hit hardest when they affect already overburdened communities of color and low-income communities. Even impacts that have little or no public-health effect individually can cumulatively devastate a community. While some toxins are unsafe at any level of exposure,[192] others may become dangerous at specific thresholds, a phenomenon known as a "non-linear impact." This means that one federal agency decision, individually insignificant, could have extreme health consequences by exacerbating existing or reasonably foreseeable future conditions. Furthermore, otherwise-unrelated activities and pollutants may have "synergistic effects" more significant than either in isolation. For example, lead is an immunosuppressant, which increases susceptibility to bacterial infections.[193] Together, lead *and* bacteria are disproportionately more dangerous than lead *or* bacteria. For this reason, "a comprehensive, integrated, and unified approach toward multiple environmental hazards in overburdened communities is critical to properly addressing cumulative risks and impacts."[194][195]

For example, CEQ provides no reasonable justification for excluding loan guarantees from the Farm Services Agency and the Small Business Administration from the definition of major federal action.[196] The impact of loan guarantees by the FSA and SBA can't be underestimated: from 2012 to 2016, for example, the SBA alone guaranteed 1,524 loans to poultry facilities, totaling approximately $1.8 billion.[197] And the environmental impacts of industrial animal operations, particularly on environmental justice communities, are significant. The concentration and under-regulation of confined animal feeding operations in North Carolina has resulted in severe and well-documented public health impacts associated specifically with Black, Latinx and Native American communities.[175]

B. CEQ Must Not Hinder or Limit Agency Procedures to Comply with NEPA Parts 1500–1501, 1507

In contrast to the Act's directive that agencies comply to "the fullest extent possible," and its spirit of inclusion, the proposed rule would limit the power of agencies to adopt additional procedures or requirements to ensure compliance with NEPA. The proposed § 1500.3 states that

"[a]gency 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."[176] This limiting language is reiterated in § 1507.3 of the proposal: "Except as otherwise provided by law or for agency efficiency, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in these regulations."[177] But to comply with

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[192] *See T. Vorvolakos et al., There is no safe threshold for lead exposure, PSYCHIATRIKI, July-Sept. 2016, at 204.*
[193] *Biologic Markers in Immunotoxicology, NAT'L RESEARCH COUNCIL (US) SUBCOMMITTEE ON IMMUNOTOXICOLOGY (1992), at 63–64.*
[194] *EPA, National Environmental Justice Advisory Council, Ensuring Risk Reduction in Communities with Multiple Stressors: Environmental Justice and Cumulative Risks/Impacts, at 7 (2004).*
[195] *C.F.R. § 1508.7.*
[196] *Update to the Regulations, at 1709.*
[197] *Office of Inspector General, Small Business Administration, Evaluation of SBA 7(A) Loans Made to Poultry Famers, Report 18-13, at 2 (March 6, 2018) https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report-18-13.pdf.*

NEPA, federal agencies must be free to conduct environmental review "to the fullest extent possible," which may vary according to agency resources, the details of the project, and the particularities of potential sites. In other words, CEQ seeks to impose arbitrary limitations on "the fullest extent possible." Placing limits on agencies' environmental consideration is not within CEQ's authority under NEPA.

Other provisions would specifically limit agencies' freedom to engage the public, solicit comments or incorporate them into the project-planning process. Under § 1500.3(b)(3), the proposed rule would limit the comment period on a final EIS to 30 days, after which any right to comment would be "deemed unexhausted and forfeited."[178] Especially for large and complex projects, the current 45 days is already an all-too-short period for other agencies, governments and community stakeholders to receive, disseminate, digest and respond to documents.[179] Moreover, many of the local residents most affected by a major federal project are initially neither educated

[175] V. Guidry *et al*., *Connecting Environmental Justice and Community Health Effects of Hog Production in North Carolina*, 79 NORTH CAROLINA MEDICAL J. 324-328 (Sept. 2018) (citing J. Johnston and S. Wing, *Industrial Hog Operations in North Carolina Disproportionately Impact African-Americans*, *Hispanics and American Indians*, CHAPEL HILL, NC: DEP'T OF EPIDEMIOLOGY, UNI. OF NORTH CAROLINA AT CHAPEL HILL (2014)) (demonstrating the disproportionate impacts of the swine industry on African American, Latinx, and Native American communities that led the North Carolina Environmental Justice Network, Rural Empowerment for Community Help (REACH) and Waterkeeper Alliance, Inc., to file a complaint against the state Department of Natural Resources for permitting more than 2,000 hog operations in violation of Title VI of the Civil Rights Act. In 2017, EPA issued a Letter of Concern to the state agency raising concerns about the negative impacts of the facilities on communities of color.); *see also* Letter to William G. Ross, Department of Environmental Quality, from Lilian Dorka, External Civil Rights
Compliance Office, EPA, EPA Case # 11R-14-R4 (Jan. 12, 2017), available at
https://www.epa.gov/sites/production/files/2018

05/documents/letter_of_concern_to_william_g_ross_nc_deq_re_admin_complaint_11r-14-r4_.pdf; For the reasons stated in this subsection, the EJ Commenters agreed with and incorporate by reference Christina Stella, Animal Legal Defense Fund, Comments on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (Docket No. CEQ-2019-0003) (March 10, 2020). [176] 40 C.F.R. § 1500.3.

[177] *Id*, § 1507.3.
[178] *Id*. § 100.3(b)(3).
[179]*Exec. Office Of The President*, *Fact Sheet: CEQ On Length Of Environmental Impact Statements*, CEQ (2019) https://www.whitehouse.gov/wp-content/uploads/2017/11/20190722EISPageLengthFactSheet.pdf (last visited Dec. 19, 2019).

about[198] the project nor organized to respond to it. The proposed rule states that it "is the Council's intention that any actions to review, enjoy, stay, or alter an agency decision on the basis of an alleged NEPA violation be raised as soon as practicable," but the practical effect of these "streamlining" measures may be that communities are unable to exercise their rights before irreversible actions are taken.

The proposed rule would require that agencies provide for the electronic submission of comments,[180] but it fails to acknowledge that many individuals affected by major federal projects may

[198] *C.F.R. § 1503.1(3)(c).*

experience technical or linguistic barriers to electronic publication and processes. In doing so, it threatens their right to participate. Other provisions allowing agencies to conduct public hearings and meetings by electronic communication[199] and publish documents electronically[200] threaten to disenfranchise individuals with limited English proficiency or limited financial means and violate the spirit of NEPA.

C. The Proposed Rule Would Set Arbitrary Limits and Inhibit Consideration of Reasonably Foreseeable Environmental Impacts

Parts 1501, 1502, 1508

The scope of necessary and practicable environmental review is variable by geography and project type. For example, construction of an airport would involve different and more extensive environmental considerations than a large office building. However, CEQ's proposed rule would set arbitrary time and page limits for environmental reports.[201] The current rule states clearly and specifically that "the Council has decided that prescribed time limits for the entire NEPA process are too inflexible."[202] However, the proposed rule would establish arbitrary timeframes of one year for environmental assessments, and two years for environmental impact statements.[203] Although the current version of the rule allows an agency to set project-specific timelines, that is considerably different from setting an arbitrary global deadline, which would only inhibit consideration to "the fullest possible extent."

NEPA specifically requires an EIS to include a detailed discussion of alternatives.[204] This includes considering alternatives that might be outside of the lead agency's scope of expertise.[205][206] But, under § 1501.8(b)(7) of the proposed rule, a cooperating agency would be required to limit its comments "to those matters for which it has jurisdiction by law or special expertise."[188] Cooperating agencies are also required to work under the timelines of lead agencies, risking the possibility that process will devolve into rubber-stamping exerices. By potentially limiting the input and thoroughness of other agencies—which may have been brought to the project specifically because of their relevant authority or expertise—this provision conflicts with the overall goals of the NEPA process.

Similarly, § 1502.13 of the proposed rule, regarding environmental impact statements, would require that "[w]hen an agency's statutory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency's authority."[207] However,

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[199] *Id. § 1506.6(3)(c).*
[200] *Id. § 1507.4.*
[201] *Id. §§ 1501.5, 1502.7, 1501.10.*
[202] *Id. § 1501.8.*
[203] *Id. § 1501.10.*
[204] *Morton, 458 F.2d at 834.*
[205] *Id.*
[206] *C.F.R. § 1501.8(b)(7).*
[207] *Id. § 1502.13.*
[190] *Id. § 1502.14.*

the current rule explicitly requires consideration of "reasonable alternatives not within the jurisdiction of the lead agency,"[190] meaning the proposed change would markedly reduce the statutorily required consideration of alternatives. As CEQ explained in a 1986 memo, in addition to alternatives "outside the legal jurisdiction of the lead agency," an EIS must also consider alternatives involving potential legal conflicts.[208][209] "Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies."[192]

By considering only the "goals of the applicant and the agency's authority," CEQ threatens to unacceptably diminish the consideration of alternatives—the means to accomplish the agency's purpose—and reduce the utility of the EIS to Congress and other NEPA stakeholders. For example, the Federal Highway Administration (FHWA) might consider the problem of rush-hour traffic in a major city and weigh the possibility of constructing a new highway. Under the proposed rule, the only goals under consideration would be those of the FHWA (to alleviate congestion). The only authority under consideration would be the authority delegated to FHWA (to fund highways). It is therefore implied that the only consideration would be whether a new highway would alleviate traffic. Another way to achieve FHWA's goal might be to subsidize the construction of affordable housing in the city center, but because this does not fall under FHWA authority, it would be excluded from the discussion of the need for a project. In the same way, the language of the proposed rule would unacceptably exclude the jurisdiction of other agencies. Using the same example, FHWA might state a goal of reducing traffic-related deaths, but the diminished airquality resulting from increased local highway traffic might cause many more deaths than the traffic alleviation prevents, and directly conflict with the goals of EPA or the Department of Health and Human Services. To limit discussion of the need for a project to "the goals of the applicant" in this case would literally disregard environmental effects—precisely counter to the goals of NEPA.

The proposed rule retains a requirement to consider the "no-action alternative," but this requirement is practically meaningless if the scope of considering project goals and necessity is limited to agency goals and jurisdiction. If a lead agency's goals conflict with those of another agency, or if other agencies are better positioned to solve a problem, this information should be communicated to Congress, policymakers, and the public. This big-picture consideration is central to the role of an EIS, and to ban its inclusion would arbitrarily and capriciously diminish the value and effectiveness of NEPA environmental review.

CEQ limitations on the breadth and depth of NEPA reporting also have negative implications for state-level environmental protection. When CEQ issued its advance notice of proposed rulemaking on this issue, it received a comment from the attorneys general of California,

Illinois, Maryland, Massachusetts, New Jersey, New York, Oregon, Vermont and Washington, and the secretary of the Pennsylvania Department of Environmental Protection. The number of signatory states is remarkable, but the list should by no means be read as exhaustive of those in opposition to "any

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[208] *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg.*
[209] *(March 23, 1981) (as amended in 1986).* [192]
Id. at 18027.

revisions that would threaten or destroy the fundamental environmental protections in NEPA."[210] The commenting States found, as we do, that "existing data do not demonstrate a need for any significant changes to NEPA regulations implied by this Advance Notice," and insisted that CEQ must "continue to prioritize protection of public health and the environment, and to ensure public participation in accordance with NEPA, over mere administrative expedience."

States have their own, specific interest in ensuring that the NEPA process is thorough and involves public participation: They are injured when their residents "suffer from the effects of environmental pollution or degradation, including cumulative impacts in environmental justice communities." States have a duty to protect their residents from environmental health risks. Moreover, states are required to undertake NEPA review when they partner with federal agencies on joint projects. Major changes to the process would "require revisions to the States' internal processes and significant investments of time and training resources to accommodate disruptive changes to long-settled processes."[211]

Some states, such as New York, have historically accepted a federal EIS in lieu of a state EIS, but "[w]eaker federal review, less comprehensive federal EISs, or preparation of fewer EISs under NEPA may require that more EISs be prepared under a state process, leading to increased expenditures of state resources."[212][213] In California, limiting the federal review of alternatives or cumulative impacts could make coordinated review under state and federal environmental framework statutes impossible. By upsetting state statutes, administrative procedures and caselaw—and limiting the involvement and recourse of affected citizens—the suggested revisions to the NEPA process threaten to increase litigation while decreasing the efficiency of the projectplanning process.

D. CEQ's Exclusion of Effects that May be Distant in Time or Geography Violates the Letter and Spirit of NEPA
Part 1508

In addition to eliminating any mention of cumulative actions or effects, the proposed rule also attempts to exclude from reporting requirements any effects that are "remote in time, geographically remote, or the result of a lengthy causal chain."[196] This violates the letter and spirit of NEPA, and represents a misinterpretation of court precedent. No court has held that any reasonably foreseeable environmental effect lies outside the scope of agency contemplation for the purposes of NEPA analysis, and there is no specific distance in time or geography that would excuse an agency from its duty to consider effects to the "fullest possible extent" within the "rule of reason."

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[210] *Attorneys General of California, Illinois, Maryland, Massachusetts, New Jersey, New York, Oregon, Vermont and Washington, and secretary of the Pennsylvania Department of Environmental Protection, comments on advance notice of proposed rulemaking, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28591 (published June 20, 2018).*
[211] *Id.*
[212] *Id.*
[213] *C.F.R. § 1508.1(g)(1).*

To excuse an agency from its statutory duty to reasonably consider geographically or temporally distant effects would be a capricious disregard of CEQ's statutory authority. As the D.C. Circuit stated in 1973, "the agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of an alternative to particular agency action involves some degree of forecasting."[214]

For example, it could hardly have escaped the notice of Congress that dumping toxins into the headwaters of a stream could potentially affect the entire length of a watercourse,[215] and such obvious impacts are well within the scope of NEPA's "detailed statement." Likewise, consideration of the chronic degradation of the country's air, water and soil, whether by erosion and deforestation, or by the gradual addition of so-called "forever chemicals,"[216] is not beyond an agency called to investigate potential threats to the world's supply of oxygen,[200] among other environmental impacts.

Congress was especially clear on the issue of impacts remote in time: "In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means . . . to the end that the Nation may— (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations . . . ." An agency can hardly fulfill its environmental responsibilities to succeeding generations without considering the long-term consequences of its actions. Today this concept is known as "intergenerational equity,"[217] and in 1969, our leaders were prescient in calling for its consideration. Eliminating it would be a step backward, and contrary to the clear intent of Congress.

E. The Proposed Rule Conflicts with CEQ's Role Under NEPA Part 1500

For the past 50 years, provisions have been in place that create accountability when agencies fail to properly consider environmental impacts, including resorting to litigation when needed. However, the proposed rule seeks to limit agency accountability. For example, allowing agencies to require the payment of a bond in exchange for a stay would have a chilling effect on community lawsuits. Similarly, § 1500.3(d) declares "the Council's intention that minor, nonsubstantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action."[202] This statement could be interpreted as placing another burden on complainants not only to prove that NEPA compliance was inadequate, but that the failure to comply affected agency decision-making—a nearly impossible burden in such a complex decision-making process. Without the power to hold agencies accountable for their noncompliance, the public participation function so central to NEPA would be greatly devalued.

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[214] Scientists' Inst. for Pub. Info., Inc., 481 F.2d at 1092.

[215] See Impacts of Mismanaged Trash, EPA, https://www.epa.gov/trash-free-waters/impacts-mismanaged-trash (last visited March 3, 2020).

[216] See Sydney Evans et al., PFAS Contamination of Drinking Water Far More Prevalent Than Previously Reported, EWG (Jan. 22, 2020), https://www.ewg.org/research/national-pfas-testing/ (last visited March 3, 2020)

[200] H.R. REP. 91–378, at 119 (1969).

[217] See J.K. Summers & L.M. Smith, The Role of Social and Intergenerational Equity in Making Changes in Human Well-Being Sustainable, AMBIO (October 2014), 718, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4165836/ (last visited March 3, 2020). *[202] 40 C.F.R. § 1500.3(d).*

F. The Proposed Rule Would Arbitrarily Muddle the Requirement of a Supplemental EIS Part 1502

The proposed rule would establish a new and incoherent standard for supplemental environmental impact statements. Currently, a supplemental EIS is required if (1) "[t]he agency makes substantial changes . . . that are relevant to environmental concerns" or (2) "[t]here are significant new circumstances or information relevant to environmental concerns."[218] The proposed rule would add an exception when "changes to the proposed action or new circumstances or information relating to environmental concerns are not significant and therefore do not require a supplement." In other words, the proposed rule would insert an exception for when circumstances that have been determined either substantial or significant are somehow deemed not significant. It is inherently contradictory that "significant new circumstances relevant to environmental concerns" (therefore requiring a supplementary statement) could also be "not significant" (therefore not requiring a supplement).[219][220][221]

G. The Proposed Rule Falls Short of Statutory Information Gathering Requirements Part 1502

NEPA requires agencies to take all reasonable measures to report the impact of major actions significantly affecting the human environment, and this includes an element of information-gathering. In addition to preparing a "detailed statement" of an action's environmental impact, including alternatives, NEPA requires an agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[205] This requirement is reflected in the current rule's section titled "Incomplete or unavailable information."[206] However, the proposed rule includes language seemingly nullifying the existing requirement. The proposed § 1502.24 states that agencies "are not required to undertake new scientific and technical research to inform their analyses."[222] Absolving agencies of responsibility for technical analysis would contradict the language of the Act itself.

H. Allowing Early, Irreversible Commitments of Resources Violates NEPA Part 1506

The proposed rule would specifically allow an agency considering a proposed action for federal funding to authorize activities including acquisition of land interests and purchase of equipment.[223] CEQ also invited comment on "whether there are circumstances under which an agency may authorize irreversible and irretrievable commitments of resources."[209] Allowing such commitments during the NEPA process undermines the integrity of the process itself and violates 42 U.S.C. § 4332(C)(v), which

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[218] *Id. § 1502.9(c).*
[219] *Id.*
[220] *U.S.C. § 4332(E).*
[221] *C.F.R. § 1502.22.*
[222] *Id. § 1502.24.*
[223] *Id. § 1506.1(b).*
[209] *Id. § 1504.*

requires an agency to disclose "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented" in an environmental impact statement *before* embarking on an action within the scope of NEPA.[224] "The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they "retain a maximum range of options."[225][226] This bar on irreversible commitments of resources is important because such a commitment makes it difficult or impossible for an agency to take the objective "hard look" at environmental effects central to NEPA's procedural elements. It puts the agency's thumb on the scale of a specific course of action before environmental review has occurred, and before other agencies, experts and community members are allowed to weigh in, diminishing the effectiveness and significance of environmental review.

IV. Instead of Limiting Public Participation and Analysis of Cumulative Impacts, CEQ Should Strengthen NEPA Implementation and Enforcement

The proposed rule changes are arbitrary, capricious, and not in accordance with law. NEPA regulations do not need to be changed, and the Environmental Justice Commenters call on CEQ to withdraw the rule. As demonstrated above and in the paragraphs that follow, CEQ can "reduce paperwork and delays, and promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA"[212] without engaging in rulemaking. The current regulations already provide the CEQ with all the necessary tools it needs to complete these objectives. Instead, the CEQ should improve compliance and enforcement.

A. CEQ Should Incorporate Its Own and Inter-Agency Best Practices

If its goal is to improve public participation, CEQ should implement existing compilations of best practices. The Federal Interagency Working Group on Environmental Justice and the NEPA Committee in 2016 developed a list of best practices that included measures to streamline and standardize implementation of NEPA across agencies.[227] They recommend engaging communities of color, low-income communities, and other interested individuals and communities when: "1) defining the affected environment; 2) identifying potentially affected communities of color and low-income populations; 3) assessing potential impacts to communities of color and low-income populations; 4) assessing potential alternatives; 5) determining whether potential impacts to communities of color and low-income communities are disproportionately high and adverse . . . ; and 6) developing mitigation and monitoring

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[224] *Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988) (holding that the sale of an easement without preparing an EIS violated NEPA).*
[225] *Id.*
[226] *C.F.R. § 1500.*
[227] *Fed'l Interagency Working Grp. on Envt'l Justice & NEPA Comm., supra note 3.*

measures."[228] Thus, effective public participation should occur in every step of the process, *beginning in the scoping process.*

When doing so, the Working Group recommends to "consider identifying . . . . concerns such as any *cultural*, *institutional*, *geographic*, *economic*, *historical*, *linguistic*, *or other barriers to achieve meaningful engagement*" with those communities.[215] Additionally, the agencies should solicit and consider input "from each segment of the community of color or low-income community that may potentially be affected," so it should target particularly affected groups, such as people of color-owned small businesses, low-income transit riders, subsistence fishers.

B. CEQ Could Expedite the NEPA Process Without Reducing the Overall Level of Review

Cumulative-impact analysis is not only reasonable but also necessary for the full consideration of significant impacts.[216] In this era of advanced computing and information technology—with concerns about the community environmental health more pressing than ever before[217]—cumulative-impact analysis is even more manageable and crucial than it was in the

1970s, especially for environmentally overburdened communities. The CDC has reported that

"residents in mostly minority communities continue to have lower socioeconomic status, greater barriers to health-care access, and greater risks for, and burden of, disease compared with the general population living in the same county or state."[218] But modern mapping tools and other technology have made data on cumulative impacts more available than it has ever has been before.[219] Consequently, consideration of that data is more reasonable than ever before. The current rule acknowledges these "state of the art analytic techniques,"[220] and the technology has only progressed.

CEQ has repeatedly found and reiterated that developing and making better use of these data tools improve the efficiency of NEPA compliance. Rather than lowering the standard of environmental consideration and threatening NEPA's effectiveness, CEQ should incorporate the results of its own studies into practice. From 2011 to 2015, CEQ sponsored a set of five pilot projects to establish recommendations and best practices to streamline the EIS process.[221] Based on the results of these projects, CEQ announced that data-gathering and public participation could be simplified (without being diminished), consultation coordinated, efficiency, quality and transparency of decision-making improved, and project time and cost reduced via the following measures:[222]

1. Agencies should refine and develop their NEPA management and public engagement IT tools by leveraging existing tools and working collaboratively across the federal government to ensure the compatibility of IT tools.

[228] *Id. at 9.*
[215] *Id.*

[216] *Hanly*, 471 F.2d at 83031.

[217]K. Gebbie et al., *Who Will Keep the Public Healthy*, NAT'L ACADS. PRESS (2003), https://www.ncbi.nlm.nih.gov/books/NBK221190/ (last visited Feb. 26, 2020).

[218] CDC, *CDC Health Disparities and Inequalities Report* — United States (2013).
[219] *See*, *e.g.*, *NEPAssist*, EPA, https://www.epa.gov/nepa/nepassist (last visited Dec. 2, 2019); *EJSCREEN: Environmental Justice Screening and Mapping Tool*, EPA, https://www.epa.gov/ejscreen (last visited Dec. 1, 2019);

TOXMAP, NIH, https://toxmap.nlm.nih.gov/toxmap/app/ (last visited Dec. 1, 2019); California Office of Health

Hazard Assessment, CalEnviroScreen, https://oehha.ca.gov/calenviroscreen (last visited March 6, 2020); *NCDEQ Community Mapping System*, N.C. DEP'T OF ENVT'L. QUALITY, https://ncdenr.maps.arcgis.com/apps/webappviewer/index.html (last visited Dec. 1, 2019).

[220] 40 C.F.R. § 1501.8.
[221] Memorandum from Michael Boots, CEQ chair, to interested parties and heads of federal agencies, on National Environmental Policy Act Pilot Projects Report and Recommendations, https://ceq.doe.gov/docs/ceqreports/CEQ_NEPA_Pilots_Conclusion__Recommendations_Jan2015.pdf (Jan. 26, 2015) (last visited Dec. 2, 2019). [222] *Id.*

2. Agencies should have a suite of NEPA IT tools at their disposal and be able to choose which ones they need to meet their needs, depending on the project and step in the NEPA review process.
3. Agencies should review the Best Practice Principles for developing EAs and incorporate them into their NEPA practices.
4. Agencies should provide comments to CEQ on which Best Practice Principles for Environmental Assessments should be incorporated into CEQ guidance.
5. Agencies should encourage use of EPA's NEPAssist geospatial IT tool by program and project managers as well as NEPA practitioners.
6. Agencies should ensure their IT tools are compatible to ensure ease of use with NEPAssist.
7. Agencies should consider developing and using a Statement of Principles in lieu of the more complex and time-intensive process required to adopt a formal Memorandum of Understanding when developing cooperating or participating agency agreements with other Federal, tribal, state, or local governmental entities.
8. Agencies should review the final best practices report for the FRA's Northeast Corridor Future project when developing a large-scale (temporal and spatial) NEPA review.
9. Agencies should review the final reports for the USFS 4FRI and Fivemile-Bell restoration projects and use the best practices when developing a large-scale (temporal and spatial) NEPA review.
10. Agencies should optimize the use of collaborative stakeholder groups for developing and implementing monitoring for the effects of proposed projects and the effectiveness of proposed mitigations.

C. CEQ Must Improve the NEPA Process by Ensuring Linguistic Accessibility

CEQ should take measures consistent with Executive Order 13,166, "Improving Access to Services for Persons with Limited English Proficiency," which requires federal agencies to identify the need for language-access services, and to develop and implement systems to provide language access to persons who are limited English proficient. Early in the scoping process, an agency should analyze whether there are any segments of the affected communities whose primary language is not English. If there are, notices and other vital documents should be translated into appropriate languages, and an interpretation made available for any public meeting.

D. Meaningful Participation Requires More Engagement with Stakeholder Communities and Addressing Barriers to Participation

A 1997 CEQ study "concluded that creating a true partnership with the community involves more than holding a hearing and making documents available. Public involvement takes effort—and time."[229] Among other measures, hearings should also be made more accessible.

In reading the more than 12,000 public comments on the Advance Notice of Proposed Rulemaking, organizations across the board articulated the need for a more modernized notification process, for both NOI's and Notices of Availability. For instance, the Women's Mining Coalition ("WMC") commented the "use of the Federal Register to publish NOIs and Notices of Availability should be modernized to capitalize upon the widespread use of electronic communications (e.g., email, agency websites, social media, etc.),"[230] and the International Association for Public Participation (IAP2) suggested "that options for public notice referenced in §1506.6(b) be broadened to allow for the use of new, technological, and innovative communication methods developed since the regulations were written.[231] Many of these methods (such as cellphone and web-based applications) can be used to reach much wider audiences including low income, minority, and disabled individuals."[232] Webinars, social media and listservs may be effective for some but may exclude others, so it should not be the only form of communication. The language must also be accessible, there must be "multiple forms of communication (e.g., written, oral, pictorial) to accommodate varied levels of reading proficiency, to facilitate meaningful engagement, and to account for limited-English proficiency."[233]

E. Venue Selection Should be Appropriate for all Persons

Meaningful public participation in a hearing or in-person meeting requires that the chosen space must be one that is not intimidating nor inaccessible to interested parties. The parties should be invited to a familiar place to them and set on equal ground with everyone else; no should have to talk

[229] *CEQ, supra note 57, at 18.*
[230] *WMC, 2018.*
[231] *IAP2, 2018.*
[232] *WMC, 2018; IAP2, 2018.*
[233] *Id.*

up to a stage for their voices to be heard. Those who come to public hearings should feel that they have a seat at the table. The location of public hearings should be readily accessible, as EO 12,898 dictates.[234] Moreover, meaningful engagement if communities of color and low-income communities requires outreach.

F. Timing of Events Could be Improved Through Proper Scheduling

Events with a public participatory element should be scheduled at times when people in potentially affected populations are able to attend. Communities and populations vary, and choosing an appropriate time requires a basic survey and analysis. Simply scheduling events on weekends is insufficient, as many individuals, particularly those from low-income populations who work in the service industry, work extensively on weekends. Weekend events prioritize those who work in industries in which weekends are observed. In some regions, Sunday may be a particularly poor choice, as conflicts with church may become an issue.

Moreover, public meetings should begin at a very early stage in the process. "When [community members] are invited to a formal scoping meeting to discuss a well-developed project about which they have heard little, they may feel they have been invited too late in the process. In addition, public 'hearings' at times are seen as parties 'talking past each other,' with very little listening."[229]

G. CEQ Should Enhance Technical Assistance Programs for EJ Communities

A community's technical understanding can be enhanced through technical assistance grants and by disseminating scientific information in language understandable to the general public. Based on the information gathered, federal agencies experience varying d[235]egrees of success providing technical assistance to the affected communities. The degree to which communities of color and low-income communities can participate in the decision-making process is strongly dependent on their knowledge of the environmental hazards and the effects of these hazards on their health. Therefore, in addition to providing more opportunities for data collection and gathering scientific information on the connection between hazards and health, the information gathered through these efforts must be made accessible to communities.

Over time, many agencies have provided technical assistance grants for various purposes. For example, Congress made public involvement in decision-making an important part of the Superfund process when the program was established by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.[230] Congress aimed to ensure that the people whose lives were affected by abandoned hazardous wastes would have a say in the actions taken to clean up sites. The role of community members in the Superfund process was further strengthened in the

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[234] EO 12,898 at 7632 (§ 5-5).
[229] CEQ, supra note 57, at 18.
[235] U.S.C. §9601.

Superfund Amendments and Reauthorization Act of 1986 (SARA).[236] With SARA, Congress created EPA's Technical Assistance Grant (TAG) program. TAGs are available at Superfund sites on EPA's National Priorities List (NPL) or proposed for listing on the NPL, and for which a response action has begun. Groups, including unincorporated associations, can receive up to $50,000. The grant helps pay for technical advisors who can do any of the following:

- Review site-related documents from EPA or other agencies.
- Meet with a group and other community members to explain site information.
- Make site visits, when appropriate and necessary, to learn more about site activities.
- Travel to meetings and hearings about the site.
- Evaluate plans for reusing the site after it is cleaned up.
- Interpret and explain health-related information.
- Participate in public meetings.

EPA also has a list of technical assistance groups available for community organizations that might have difficulty finding assistance.[237][238]

Furthermore, there are additional resources to inform approaches to technical assistance. In 2000, EPA released a *Draft Title VI Guidance* document which detailed what effective public participation would look like.[233] EPA recommends providing supplemental technical information and technical assistance to make data more meaningful.[239] In 2011, the IWG on Environmental Justice published the *Community-Based Federal Environmental Justice Resource Guide*.[240] The purpose of the guide is to assist communities with technical or financial assistance to reduce exposure.[241] The EPA also provided technical assistance for their *Environmental Justice Showcase Communities Project*.[242] The project aimed to achieve real success in EJ communities by helping design future EJ projects and helping EPA increase its ability to address local challenges in an efficient way.[238] Other agencies that have provided technical assistance with the NEPA process include the National Oceanic and Atmospheric Administration (NOAA). NOAA provides technical assistance, as well, for the NEPA requirement that the agency "[f]ully consider the impacts of NOAA's proposed actions on the quality of the human environment; including consideration of Executive Order 12,898 addressing Environmental Justice in NEPA documentation for decision making."[243]

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[236] *Pub. L. No. 99499.*
[237] *Technical Assistance Grant Program: Fact Sheet, EPA (Oct. 2018), https://semspub.epa.gov/work/HQ/100001770.pdf.*
[238] *C.F.R. § 14207 (2000).*
[239] *Id.*
[240] *Community-Based Federal Environmental Justice Resource Guide, IWG (2011), https://www.epa.gov/sites/production/files/2015-02/documents/resource-guide.pdf.*
[241] *Id. at 3.*
[242] *Id. at 42.*
[238] *Id.*
[243] *Id. at 26.*

The Bureau of Indian Affairs has a technical assistance grant program to help tribes prepare NEPA documents.[244] The Bureau of Reclamation also provides opportunities for affected Indian tribes to participate in the NEPA investigation process.[245]

The Department of Energy (DOE) provides technical assistance and leadership needed to ensure compliance with NEPA and other environmental review related requirements.[246] The DOE states the purpose of the technical assistance program is to foster sound planning and decision making while building public trust.[247] The DOE's Office of Legacy Management also has an EJ program and hosts a number of capacity-building activities to help local community groups gain and sustain tools to achieve EJ for themselves.[248] In addition, the Office of Fossil Energy (FE) also offers technical assistance: "[FE] is committed to Environmental Justice (EJ) efforts that achieve the greatest benefit for all our stakeholders. FE continues to make consistent, measurable progress in implementing EJ through its strong National Environmental Protection Act (NEPA) program, while adhering to the highest applicable standards for environment, safety and health."[249]

V. Conclusion

For these reasons, the Environmental Justice Commenters strongly object to the weakening of critical protections proposed in this rulemaking and call on CEQ, rescind the proposed rule and to fulfill the promise of NEPA by strengthening implementation and enforcement.

Sincerely,

Marianne Engelman Lado
Director
Jerry Thomas
Jon Turner
Clinicians

Environmental Justice Clinic
Vermont Law School
164 Chelsea Street
P.O.Box 96
South Royalton, VT 05068
Mengelman-Lado@vermontlaw.edu

[244] *DOI, Response to Interrogatory Question 37.*
[245] *Id.*
[246] *IWG, supra note 82, at 36.*
[247] *Id.*
[248] *Id. at 38.*
[249] *Id. at 37.*

JerryThomas@vermontlaw.edu
JonTurner@vermontlaw.edu
917-608-2053 (cell)

Kerene Tayloe
Director of Federal Legislative Affairs
WE ACT for Environmental Justice
50 F Street, NW 8th Floor
Washington, DC 20001
kerene@weact.org 212-
961-1000 x323

On behalf of:

Susana Almanza
PODER Austin
Martha Dina Argüello
Physicians for Social Responsibility
Marc Brenman
IDARE LLC*
Scott Edwards
Food & Water Watch
Leslie Fields
Sierra Club
Jeff Gearhart
Ecology Center
Michael Hansen
Gasp
Adrienne L. Hollis
Hollis Environmental Consulting Services, LLC*
Karuna Jaggar
Breast Cancer Action
Eric Jantz
New Mexico Environmental Law Center
Shaina Kasper
Toxics Action Center
Pastor Dr. Charlotte Keys
Jesus People Against Pollution
Hilton Kelley
Community In-Power and Development Association Inc. (CIDA)
Aaron Mair
Arbor Hill Environmental Justice Corporation
Vincent Martin
Detroit, Michigan
Dr. Mildred McClain
Harambee House
Pamela Miller
Alaska Community Action on Toxics
Vernice Miller-Travis
WE ACT for Environmental Justice*
M. Miaisha Mitchell
Tallahassee Food Network
Naeema Muhammad
North Carolina Environmental Justice Network
Marti Olesen
Buffalo River Watershed Alliance
Juan Parras
Texas Environmental Justice Advocacy Services (T.E.J.A.S.)
Erich Pica
Friends of the Earth
Varshini Prakash
Sunrise Movement
Michele Roberts
Environmental Justice Health Alliance for Chemical Policy Reform
Amy van Saun
Center for Food Safety
Maria Savasta-Kennedy
UNC School of Law*

Cristina Stella
Animal Legal Defense Fund
Rachel Spector
New York Lawyers for the Public Interest
Kaya Allan Sugerman
Center for Environmental Health
Kerene Tayloe
WE ACT for Environmental Justice
Donele Wilkins
Green Door Initiative
Guy Williams
Detroiters Working for Environmental Justice
Sacoby Wilson
University of Maryland-College Park*
Omega & Brenda Wilson
West End Revitalization Association (WERA)
*: Institutional affiliation for identification purposes only

March 10, 2020

Ms. Mary Neumayr, Chair

Council on Environmental Quality 730 Jackson Place, N.W.

Washington, D.C. 20503

RE: **CEQ-2019-0003**
PROPOSED REVISIONS TO REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

Dear Chairman Neumayr:

This letter represents the collective comments of 328 organizations and tribal nations, representing millions of members and supporters, responding to the Council on

Environmental Quality's (CEQ) proposed revisions to regulations implementing the National Environmental Policy Act (NEPA or the Act). Many of our organizations and members will also be submitting individual comments.

This proposed revision of CEQ's NEPA regulations is deeply flawed, violates the letter and intent of NEPA and will not satisfy the objectives of this exercise as articulated in the preamble. It is therefore arbitrary and capricious and must be withdrawn.

I. INTRODUCTION

NEPA is the lodestar of this country's environmental conscience and actions. In NEPA, Congress clearly articulated environmental policies and goals for the United States, while acknowledging the "worldwide and long-range character of environmental problems". [1] Fully implemented, NEPA could help Americans meet today's dual challenges of climate change and loss of biological diversity. As Senator Henry Jackson, the primary Senate sponsor of the Act, explained, NEPA "serves a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values."[2] While full implementation of NEPA has yet to be realized, NEPA's procedural requirements, as interpreted through CEQ's regulations have fundamentally

changed the nature of federal decision making for the better by providing thorough analysis and public involvement.

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[1] 42 U.S.C. § 4332(F).

[2] Statement in *National Environmental Policy: Hearing before the Committee on Interior and Insular Affairs, United States Senate*, 91st Congress, 1st Session, April 16, 1969, Appendix 2, p. 206, quoted in Caldwell, Lynton Keith, *The National Environmental Policy Act: An Agenda for the Future*, p. xvi, Indiana University Press (1998).

NEPA currently requires "that environmental information is available to public officials and citizens before decisions are made and before actions are taken."[3] Through NEPA, communities have been able to learn ahead of time when their government is proposing to permit the expansion of an airport, a new management plan on a nearby national forest, or a new deepwater port for export of coal. Through NEPA, Americans living, working and recreating near or on public lands have had an opportunity to consider proposed changes to land management plans and actions such as proposed timber harvest, oil and gas leasing and road construction, and to influence those decisions. Marginalized communities have had an opportunity to have their voices heard before construction of a proposed highway that might divide their community.

Receiving public comment is only part of the purpose of the NEPA process. Those comments must be evaluated and considered by the agencies when they are making decisions. Through compliance with the current regulations, federal agencies have learned that they are expected to stop, look and listen to the taxpayers they are serving before committing resources. Through public comments and comments from other agencies, lead agencies have learned of better alternatives to achieve a particular goal while minimizing harm to communities, public land and the environment. Federal agencies have learned important new information about an area that an agency manages or a community in which it operates. In short, while implementation has been far from perfect, Americans as a whole have benefitted from the important information and public involvement achieved through NEPA's implementation.

In a response to CEQ's Advance Notice of Proposed Rulemaking[4] (ANPRM), many of the signatories to this letter urged that, "CEQ invest its modest resources and most importantly, its leadership position, in a systematic initiative to enforce [the regulations]." We pointed out that, "[c]hanges to the regulations will not result in improvements unless federal agencies have the organizational structure and resources that facilitate their implementation." We explained, painstakingly, that the current regulations hold the key to almost all of the efficiency issues suggested by the ANPRM and that, "[w]hat is lacking is the capacity and will to fully implement the regulations." [5] Unfortunately, that wellgrounded advice was fundamentally disregarded. While we welcome the long-overdue recognition of tribal nations throughout the regulations, the extreme reversals of long-held CEQ positions would serve neither tribes nor the public well but instead would have a significantly detrimental and adverse impact on decisionmaking.

We incorporate by reference the response to the ANPRM[6] to this letter (Attachment A) and ask that CEQ respond to each point raised in that letter along with responses to this Notice of Proposed Rulemaking (NPRM).

[3] 40 C.F.R. § 1500.1(b).
[4] 83 Fed. Register 28591 (June 20, 2018).
[5] Letter from 341 public interest organizations to Mary Neumayr, Council on Environmental Quality, in response to Docket No. CEQ-2018-0001, August 20, 2018.
[6] *Id*.

The proposed revisions fundamentally mischaracterize and attempt to rewrite the purpose of NEPA. They seek to substantially reduce both the breadth and depth of NEPA analysis as well as eviscerate available remedies for inadequate compliance. They try to reduce or eliminate the applicability of NEPA to a wide range of actions. They dismiss conflict of interest concerns along with the public's interest in being able to enforce the law. Instead of the public's interest in sound decisionmaking being central to the NEPA process, they elevate the profit-driven objectives of private corporations.

Given the emphasis in the ANPRM on efficiency, it is particularly startling to see that the proposal contains several stunning reversals of long-held CEQ positions and decades of practice and case law. While agencies can change their position, it must show awareness of the change, give a reasoned explanation for it, and explain how the change is permissible under the relevant statute. In this instance, some changes are not even acknowledged in CEQ's preamble. For example, there is no acknowledgement that the proposed revision would eliminate all systematic public involvement in the referral process.[250] There is also no acknowledgement that CEQ is eliminating the rule that EISs must be available for 15 days prior to a hearing on the EIS. [251] Other changes are acknowledged but brushed off with a broad reference to providing "more flexibility"[252] or stating that provisions in the current regulations are "unnecessarily limiting"[253][254][255]and are devoid of a reasoned explanation and supporting rationale. For example, CEQ states in the preamble that NEPA does not contain the terms "direct indirect, or cumulative effects"[11] that it proposes to simplify the definition by simply eliminating those

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[250] Proposed revisions to § 1504, 85 Fed. Reg. at 1704.
[251] Proposed § 1506.6(f), 85 Fed. Reg. at 111705.
[252] Proposed 1506.5(c), 85 Fed. Reg. at 1705 (giving agencies more flexibility by allowing applicants to prepare EISs).
[253] Preamble to Proposed § 1502.22(a), 85 Fed. Reg. at 1703 (proposing to delete the word "always" from the obligation to obtain information relevant to reasonably foreseeable significant adverse impacts in certain circumstances).
[254] Fed. Reg. at 1707. This statement about the lack of the precise terms being in the statute is reminiscent of the Department of Labor's partial reliance on the lack of the term "service advisor" as a reason for reversing a long-standing position under the Fair Labor Standards Act. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 217, 2127 (2016).
[255] Fed. Reg. at 1707-08.

terms and eliminate the requirement to analyze cumulative effects all together, referencing excessively lengthy documentation and irrelevant or inconsequential information.[12] But CEQ never explains the basis on which they reached these conclusions, let alone acknowledge the fundamental importance of cumulative effects in meeting NEPA's mandate. CEQ cannot cure these deficiencies by providing a new rationale in a preamble to final regulations.

Other proposed revisions delete long-standing criteria that are replaced with the vaguest of direction – for example, the proposed deletion of the definition of "significantly" at 40 C.F.R. § 1508.27 and the substitution of vague, ambiguous language amenable to numerous interpretations. Neither of these tactics will result in efficiency; rather, they will result in further delays and inefficiencies and in a substantial amount of litigation.

The proposed revisions not only fail to satisfy the effectiveness objectives set forth [256]by CEQ but also violate the Congressionally mandated purpose of NEPA of, among other goals, fulfilling the responsibilities of each generation as trustee of the environment for succeeding generations.[13]

Today, our country and our world face some of the most significant challenges to life on earth that we have encountered in recorded history. The science is clear that human caused activity is inducing both major changes in climate and in the extinction of flora and fauna. A plethora of authoritative studies and reports tell us that we have a rapidly closing window of time in which we can possibly prevent or slow continued warming that will harm humans' existence on earth for centuries as well as jeopardize the continued existence of about one million animal and plant species.[257] As the United States Global Change Research Program stated,

> The last few years have also seen record-breaking, climate-related weather extremes, the three warmest years on record for the globe, and continued decline in arctic sea ice. These trends are expected to continue in the future over climate (multi-decadal) timescales. Significant advances have also been made in our understanding of extreme weather events and how they relate to increasing global temperatures and associated climate changes. Since 1980, the cost of extreme events for the United States has exceeded $1.1 trillion; therefore, better understanding of the frequency and severity of these events in the context of a changing climate is warranted.[258]

Climate change poses significant national security and economic risks to the United States. As the Department of Defense stated in 2019, "The effects of a changing climate are a national security issue with potential impacts to Department of Defense missions, operational plans, and

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[256] *U.S.C. § 4331(b)(1).*

[257] *"Global Assessment Report on Biodiversity and Ecosystem Services", Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, 2019; "Global Warming of 1.5°C, Intergovernmental Panel on Climate Change, 2018, available at https://www.ipcc.ch/sr15/.*

[258] *Special Report: Fourth National Climate Science Assessment, Vol. 1, U.S. Global Change Research Program, Washington, D.C. pp. 12-34 (2017), available at https://www.ipcc.ch/sr15/download/.*

installations." The report identifies climate-related events such as flooding, drought, desertification and wildfires on 79 military installations within the next twenty years.[259] In addition, the Executive Vice President of the New York Federal Reserve Bank recently stated that, "Climate change has significant consequences for the US economy and financial sector through slowing productivity growth, asset revaluations and sectorial reallocations of business activity."[260]

This nation's minority and low-income communities [261] and Native American tribes[19] experience and will continue to experience disproportionately severe effects of climate change. As the most recent climate change assessment for the United States says,

"People who are already vulnerable, including lower-income and other marginalized communities, have lower capacity to prepare for and cope with extreme weather and climate-related events and are expected to experience greater impacts."[262] And the same study finds that:

> The health risks of climate change are expected to compound existing health issues in Native American and Alaska Native communities, in part due to the loss of traditional foods and practices, the mental stress from permanent community displacement, increased injuries from lack of permafrost, storm damage and flooding, smoke inhalation, damage to water and sanitation systems, decreased food security, and new infectious diseases.[263]

Our national parks are particularly impacted by climate change, warming twice as fast as the rest of the country on average, given their geographic distribution in the U.S.[22] Moreover, many parks contain unique geological and ecological features—e.g., high mountains and arid deserts—that are particularly vulnerable to changes in the climate. For instance, Cape Hatteras National Seashore is eroding into the sea from rising tides; Rocky Mountain National Park is experiencing record wildfires, scaring the landscape and devastating nearby communities and local economies; and namesake features at Glacier and Saguaro National Parks are disappearing from loss of snow and ice and other changes to the landscape resulting from warming temperatures. The changes within National Park

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[259] *Report on Effects of a Changing Climate to the Department of Defense, Office of the Under Secretary of Defense for Acquisition and Sustainment, January 2019, available at https://media.defense.gov/2019/Jan/29/2002084200/-1/-1/1/CLIMATE-CHANGE-REPORT2019.PDF.*

[260] *"Climate events have cost the US economy more than $500 billion over the last 5 years, Fed official says", https://markets.businessinsider.com/news/stocks/climate-change-impact-oneconomy-has-cost-500-billion-fed-2019-11-1028675379.*

[261] *"A Roadmap to an Equitable Low-Carbon Future: Four Pillars for a Just Transition", the Climate Equity Network, April 2019, available at: https://dornsife.usc.edu/assets/sites/242/docs/JUST_TRANSITION_Report_FINAL_12-19.pdf* [19] *http://www.ncai.org/policy-issues/land-natural-resources/climate-change.*

[262] *Fourth National Climate Change Assessment, Vol. II, Summary Findings, available at: https://nca2018.globalchange.gov/.*

[263] *Id., chpt. 14. See also, Climate Change Forcing Some Alaskan Villages to Relocate, Insurance Journal, June 20, 2019, available at https://www.insurancejournal.com/news/west/2019/06/20/530000.htm.* [22] *"Disproportionate Magnitude of Climate Change in United States National Parks", Environmental Research Letters, Volume 13, Number 10, available at: https://iopscience.iop.org/article/10.1088/1748-9326/aade09.*

landscapes put wildlife and cultural and natural resources in jeopardy, as well as increase risks to visitors. These treasured places must be protected and preserved, not only because they tell the stories of our nation's diverse history and provide unforgettable experiences, but also because they are important to the health of the ecosystems of which they are a part, protecting the air we breathe and the water we drink. Nor are these impacts limited to our parks – they apply equally to our national forests, national wildlife refuges, national monuments, and other public lands and resources. In short, now is precisely the wrong time to limit the way our nation considers climate impacts through the proposed evisceration of the NEPA process.

II. CEQ'S PROCESS FOR PROPOSING REVISIONS TO ITS REGULATIONS HAS BEEN GROSSLY INADEQUATE AND INAPPROPRIATE. CEQ IS ALSO IN VIOLATION OF ITS OWN NEPA REGULATIONS AND THE ENDANGERED SPECIES ACT.

A. The Public Process Has Been Grossly Inadequate.

CEQ has demonstrated its unfortunate and newfound contempt for both the NEPA process and the public by its design of a deeply inadequate public process for this proposed revision. It has made no effort whatsoever to approach this effort in a thoughtful, collaborative manner or even in a way designed to allow the most affected individuals to engage in it.

Despite CEQ's repeated public statements that it has engaged in significant public outreach, in fact, it has simply conducted the minimal processes. If there has been significant outreach, it has not been to the public. In no respect has this process mirrored the thoughtful process in which CEQ engaged when it developed the current regulations. As Nicholas Yost, former CEQ general counsel and the primary author of the current regulations has explained, that process involved not just soliciting ideas, but engaging in an iterative dialogue with a number of stakeholders with the goal of reaching common ground on a path forward. At that time, CEQ sought out complaints and concerns and discussed those concerns directly with the affected parties. As Mr. Yost observed, "The resulting public response to the final regulations was everything we had hoped for and worked to achieve," with support for the regulations offered by both the public interest and the business community.[264]

The short ANPRM process was not a well-designed outreach effort but merely a list of broad and often repetitive questions, much more friendly to NEPA specialists than the public. The breadth of the questions provided no real focus what CEQ's intentions really were in terms of its proposed rulemaking.

The process for the proposed revisions is considerably worse. We have identified over 80 issues that warrant comment in the proposed regulations, including the 23 extra questions CEQ poses in the NPRM. Indeed, we continue to find new issues and are not at all certain that all of the problematic text has yet been identified and analyzed. Most of the issues raised involve complex legal

[264] https://www.eli.org/sites/default/files/docs/yost_forum_2019_nov-dec.pdf.

issues and decades of case law; some involve other areas of the law entirely, such as tort law and Constitutional law. CEQ took 18 months to develop this proposal behind closed doors. Any expectation that the public can comprehensively respond to this proposal in 60 days is appallingly wrong at best, and highly cynical at worst.

The public meeting arrangements were equally and dramatically inadequate. Since the proposal has national implications, public meetings should have been held in a number of different regions around the country and the failure to do so seriously eroded the ability of many who could not go to Denver or Washington, D.C. (and even if they had, might not have been able to secure a speaking slot) to directly address the agency. CEQ provided only a short, 90-minute notice of sign-up times on the website, during the daytime, thus making it almost impossible for anyone working and/or not at their computers during that time period to sign up. This is especially true given that all slots were signed up within 15 minutes. Indeed, the whole idea of holding meetings in restricted space with the need to get "tickets" to participate twists the ideals of democracy that NEPA represents into something more akin to a lottery.

All of us have been to dozens of NEPA scoping sessions and public hearings held in large auditoriums associated with various schools or community centers. CEQ's choice of venue, especially in Denver, speaks loudly to its disinterest in hearing from the public.

Finally, CEQ's refusal to respond to the requests of thousands of citizens and 167 Members of Congress for an extension of this comment period until five days before the end of the comment period is unfathomable and the response, when it finally came, extremely disappointing. By not providing a TIMELY response, CEQ breaks the bounds of rudimentary civility, let alone accountability and responsiveness to the public it was intended to serve.

B. CEQ Has Violated Its Own Regulations for this Proposed Revision and Must Prepare an Environmental Impact Statement (EIS) on this Proposal.

As CEQ noted in its preamble, it is disregarding its own past practices in failing to prepare NEPA analysis on these proposed revisions.[265] More bluntly, for the first time, it is violating its own regulations.[266][267] CEQ's definition of "major federal action" specifically identifies proposed regulations

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[265] *Council on Environmental Quality, National Environmental Policy Act, Incomplete or Unavailable Information, Final Rule, 51 Fed. Reg. 15618, 15619 (April 25, 1986); Council on Environmental Quality, National Environmental Policy Act, Implementation of Procedural Provisions; Final Regulations, 43 Fed. Reg. 55978, 55989 (November 29, 1978).*

[266] *"CEQ, itself, of course, under established principles found in the Administrative Procedure Act, is required to adhere to its own regulations". Wingfield v. Office of Management and Budget, 7 E.L.R. 20362 (D.D.C. 1977). In that case, the Court found that CEQ was not the cause of the plaintiff's alleged injury. However, in this situation, all the action is CEQ's and CEQ's alone. [26] 40 C.F.R. §1508.18(a) and (b)(1).*

[267] *C.F.R. § 1502.5(d); proposed 1502.5(d).*

and interpretations adopted pursuant to the Administrative Procedures Act. This proposed, massive revision, which would significantly alter how

NEPA is implemented, clearly falls within the current definition as a major federal action.[26] The current regulations and the proposed regulations also state that in the context of informal rulemaking, the draft EIS shall normally accompany the proposed rule.[27] Thus,

CEQ should have issued a draft EIS on January 10, 2020, when it published this proposal.[268] [269]CEQ states that it need not comply with NEPA because the proposed rule would not authorize any activity or commit resources to a project that may affect the environment. Courts have established that an agency's interpretation of a statute can be subject to NEPA review when that interpretation can lead to subsequent, significant effects on the environment. For example, in both 1987 and 1997, the Office of Surface Mining Reclamation and Enforcement prepared an EIS analyzing several alternative ways of interpreting Valid Existing Rights for coal mining.[29] Similarly, attempts to use categorical exclusions to address regulations have been rejected. The Forest Service's attempt to use its categorical exclusion for rules and regulations to avoid preparing a EA or EIS on its nation-wide forest planning regulations was unsuccessful.[270][271] Among other changes, the 2005 planning regulations included a significantly different approach in regards to NEPA's applicability to forest plans, arguing that EISs were not required for plans that did not authorize site specific actions. The Court found that the planning regulations did not come within the scope of the CE, not just because it was a nationwide rule, but because "the USDA appears to have charted a new path and adopted a new policy approach regarding programmatic changes to environmental regulations."[31] The Court stated that the issue was not just whether the action would cause significant impact but "'whether the path taken to reach the conclusion was the right one in light of NEPA's procedural requirements'"[272] The Court also noted that "No Ninth Circuit case involving invocation of a CE, that was upheld on appeal, involved broad, far-reaching programmatic actions such as the 2005 Rule."[33]

Here, CEQ has clearly not taken the right path. These revisions will change the environmental impact assessment process for the entire executive branch of government, covering millions of federal actions. The scope and impact of the Forest Service's planning regulations, while very significant, pale beside the impact of CEQ's regulations. The proposed regulations, clearly under the sole control and fully the responsibility of CEQ, a federal agency, will have a very significant effect on the quality of the human

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[268] While we strongly believe that the impacts from this rulemaking rise well above the threshold for significance, as CEQ knows, it's own regulations require, at a minimum, preparation of an EA for a proposed action that is not normally categorically excluded. 40 C.F.R. § 1501.4(b).

[269] Fed. Reg. 20138 (April 25, 1997) 52 Fed. Reg. 2421 (January 22, 1987).

[270] Citizens for Better Forestry v. U.S. Dept.of Agriculture, 481 F. Supp. 2d 1059 (N.D. Cal. 2007). See also, Natural Resources Defense Council v. Duvall, 777 F. Supp. 1533 (E.D. Ca. 1991) (Bureau of Reclamation was required to prepare an EIS on its proposed regulations setting the price of water utilized from its irrigation infrastructure.) See also, Cal. Ex rel. Lockyer v. U.S. Dep't. of Agriculture, 459 F. Supp. 2d 874, 1014 (N.D. Cal. 2006), affirmed, 575 F.3d 999 (9th Cir. 2009) (USDA's reliance on categorical exclusion for repeal of roadless rule and promulgation of new state petitions rule for roadless area was improperly and unreasonably categorically excluded as merely a procedural rule).

[271] F. Supp. 2d at 36.

[272] Id. at 38. [33] Id. at 39.

environment. We attach two set of examples that identify just a few of the differences between the current regulations and the proposed regulations in particular circumstances and demonstrate how these changes would affect birds[273] and the ocean environment.[35]

C. CEQ's Proposed Revision Triggers the Need for Consultation under Section 7 of the Endangered Species Act

Section 7 of the Endangered Species Act (ESA) requires each agency to engage in consultation with the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) (collectively, the Services) to "insure 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 adverse modification of habitat of such species… determined…to be critical…"[36]

As the Supreme Court has made clear, a Section 7 Consultation is required for each discretionary agency action that "may affect listed species or critical habitat."[37] Agency "action" is broadly defined in the ESA's implementing regulations to include "(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-inaid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[38]

The trigger for consultation is very low.[39] The "may affect" standard broadly includes "any possible effect, whether beneficial, benign, adverse or of an undetermined character."[40] Even if the Services and action agency ultimately conclude that an action is not likely to adversely affect listed species, any possible effect riggers the consultation requirement.[41] Only if an agency action truly has "no effect" on listed species, and the action agency makes such a finding, is the consultation requirement waived. [42] The Services' regulations clearly anticipate the use of "programmatic" consultations on federal, nationwide rulemakings that impact listed species that may affect listed species.[43]

Since the decision to completely re-write the NEPA regulations clearly represents an agency action of the kind that falls within the scope of section 7, the only question is whether the proposed changes "may affect" endangered species or their designated critical habitats, and therefore require consultations. The clearest demonstration as to how the regulations may affect listed species is the proposed change that allows agencies to ignore cumulative impacts. By allowing all federal agencies to ignore cumulative impacts, environmental impacts that occur downstream, downwind or otherwise outside the action areas of an agency's proposed action will never be evaluated.

For example, the cumulative impacts of degraded water quality will harm listed species — such as salmon, steelhead and bull trout — in downstream waters through higher

[36] 16 U.S.C. § 1536(a)(2).

[273] *Attachment B, "Impacts to Birds of Proposed Changes to NEPA."* [35] *Attachment C, "Ocean Impacts of Proposed Changes to NEPA".*

[37] *See Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); 50 C.F.R. § 402.14. [38] 50 C.F.R. § 402.02 (emphasis added).

[39] 50 C.F.R. § 402.14(a).

[40] 51 Fed. Reg. 19,926 (Jun. 3, 1986).

[41] 51 Fed. Reg. 19,926 (June 3, 1986)). *See Karuk Tribe v. Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) ("[A]ctions 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.")

[42] *Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 598 (D.C. Cir. 2019).

[43] *See* 50 C.F.R. § 402.02 (defining "action"); *Id*. (defining "programmatic consultation").

pollution levels. Similarly, the failure to assess the cumulative effects of energy development projects on climate change will result in very significant impacts to all listed species. But because the NEPA regulations will allow federal agencies to ignore cumulative pollution impacts, these harms will never be assessed. And these impacts will not be consulted upon because the harm will occur beyond the scope of the NEPA assessment.

Under the joint regulations implementing the ESA, if an impact on a listed species may occur, then the EPA must complete consultations with the Services.[274] If EPA elects to first complete an informal consultation, it must first determine whether its action is "not likely to adversely affect" (NLAA) a listed species or is "likely to adversely affect" (LAA) a listed species. [275] The Services define "NLAA" determination to encompass those situations where effects on listed species are expected to be "discountable, insignificant, or completely beneficial."[276] Discountable effects are very rare, and limited to situations where it is not possible to "meaningfully measure, detect, or evaluate" harmful impacts.[277] Any harm or take of an individual member of a listed species crosses the LAA threshold and requires formal consultations with the Services.[278]

During a programmatic formal consultation process, the Services would assess the environmental baseline, potential cumulative effects to the species, and determine if the CEQ's regulatory changes would jeopardize any listed species or action jeopardizes the continued existence of each species impacted by the agency action.[49] CEQ would be required to implement Reasonable and Prudent Measures for species that are not jeopardized by the rule change, and implement Reasonable and Prudent Alternatives for species that are jeopardized (or equally protective alternative measures).

Additionally, the proposed regulatory changes would gut the sole program that CEQ oversees to protect species listed under the ESA, replacing that program with an insignificant measure, in

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[274] *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 (hereafter CONSULTATION HANDBOOK).*

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.* [49] *Id.*

violation of ESA section 7(a)(1). The proposed rule changes would gut the sole program that CEQ provides to conserve species listed under the

ESA, replacing that program with an insignificant measure, in violation of ESA section

7(a)(1). "[S]ection 7(a)(1) imposes a specific obligation upon all federal agencies to carry out programs to conserve each endangered and threatened species."[279] "Total inaction is not allowed."[280] "[W]hile agencies might have discretion in selecting a particular program to conserve…they must in fact carry out a program to conserve, and not an 'insignificant' measure that does not, or is not reasonably likely to, conserve endangered or threatened species. To hold otherwise would turn the modest command of section 7(a)(1) into no command at all by allowing agencies to satisfy their obligations with what amounts to total inaction."[52] "Conservation" means to use all necessary methods and procedures to bring any listed species to the point at which ESA protections are no longer necessary.[53] An agency cannot strip away the sole existing conservation measure it provides for listed species without violating the duty to conserve imposed by section 7(a)(1).[54]

CEQ's current NEPA regulations provide benefits that promote the conservation of listed species by requiring an assessment of cumulative impacts that includes consideration of the cumulative impacts of future federal actions, unlike the regulations implementing the ESA itself, which limit the analysis to "those effects of future State or private activities, not involving Federal activities[.]"[55]. Further, the existing CEQ NEPA regulations require the assessment of impacts that do not necessarily cause jeopardy in violation of the ESA, but nonetheless may be significant. The CEQ's proposed regulatory changes would strip away those benefits by barring the assessment of cumulative impacts entirely and otherwise weakening the analysis of impacts that do not amount to violations of other federal laws, making the remaining consideration of impacts merely an "insignificant measure" that cannot satisfy the section 7(a)(1) duty. In sum, the proposed NEPA regulation revisions take away the additive value that NEPA analysis provides to informing decisions above and beyond the analysis that would occur in the course of an ESA section 7(a)(2) consultation, and do not provide any substitute for those stripped benefits.

D. Proposed § 1506.13 - Effective Date.

CEQ proposes to give agencies the discretion to apply the revised regulations to activities and environmental documents begun before the effective date of the final rule.[56] Given the emphasis in the proposal on efficiency and clarity, this proposed change is seriously counterproductive. This step would allow for agencies to change course in midstream. Under this proposed approach, an agency could decide to switch the regulatory approach after the public comment period has ended, creating confusion and wasting work already done.

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[279] *Fla. Key Deer v. Paulison, 522 F.3d 1133, 1146 (11th Cir. 2008) (citing Sierra Club v. Glickman, 156 F.3d 606, 616 (5th Cir.1998)).*

[280] *Id. (citing Glickman, 156 F.3d at 617–18; Nat'l Wildlife Fed'n, 332 F. Supp. 2d 170, 187 (D. D.C. 2004) (section 7(a)(1) confers discretion, but that "discretion is not so broad as to excuse*

total inaction"); *Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior,* 354 F. Supp. 2d 1156, 1174 (D. Or. 2005) ("compliance is not committed to agency discretion by law")). [52] *Fla. Key Deer v. Paulison*, 522 F.3d at 1147.

[53]16 U.S.C. § 1532.

[54] *Cf. Ctr. for Biological Diversity v. Vilsack*, 276 F. Supp. 3d 1015, 1032 (D. Nev. 2017), amended, No. 2:13-CV-1785-RFB-GWF, 2018 WL 3059913 (D. Nev. June 19,

2018*)* (terminating conservation program without providing any substitute measures to address adverse impact violated affirmative 7(a)(1) duty to conserve).

[55] 50 C.F.R. § 402.02.
[56] 85 Fed. Reg. 1684, 1706 (Jan. 10, 2020), proposed 40 C.F.R. § 1506.13.

Here are just some of the EISs that could be subject to this sudden switch in rules:

- EISs for a number of national forests in the process of forest plan revision as required by the National Forest Management Act (NFMA). The forests are in various phases of the revision effort, and a number are about to release for public comment/administrative review the draft environmental impact statement or the final environmental impact statement and proposed Record of Decision. These national forests include: Custer-Gallatin, Helena-Lewis & Clark, Grand MesaUncompahgre-Gunnison, Carson, Cibola, Gila, Santa Fe, Sequoia, and Sierra National Forests.

- The EIS for the Draft North Cascades Grizzly Bear Restoration Plan[57]

- The EIS for the Columbia River System Operations[58]

- The EIS for the SPOT Terminals LLC, Deepwater Port License Application, Texas.[59]

A switch in the rules mid-stream would negate the public involvement purpose of NEPA and create massive confusion. Any such new regulations should apply only to NEPA processes begun after publication of any final rule in the Federal Register.

III. THE PROPOSED REVISIONS ARE FUNDAMENTALLY INCONSISTENT WITH THE PURPOSE OF NEPA AND CONGRESS' CLEAR DIRECTION

CEQ's proposed revisions wrongfully mischaracterize the very purpose of NEPA and CEQ's implementing regulations. They do so by turning today's substantively robust process with a clear purpose and linkage to NEPA's policies into a paperwork "check the box" exercise. The current regulations make it clear that the President, the executive branch agencies and the courts "share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101."[60]

The current regulations remind all branches of government and the public of the statutory duty to "interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations."[61] Their overriding focus is on utilizing a common

[57] Draft EIS *available at* https://parkplanning.nps.gov/document.cfm?parkID=327&projectID=44144&documentID=77025 .

[58] Notice of availability of draft EIS *available at*: https://www.govinfo.gov/content/pkg/FR2020-02-28/pdf/2020-04107.pdf.

[59] Notice of availability of draft EIS *available at*: https://www.govinfo.gov/content/pkg/FR2020-02-07/pdf/2020-02452.pdf.

[60] 85 Fed. Reg. 1684, *at* 1706; 40 C.F.R. § 1500.1(a).

[61] 40 C.F.R. § 1500.2(a); 42 U.S.C. § 4332(1).

sense and public[281]-friendly process as an "action-forcing" mechanism for achieving the goals of NEPA.[62]

In contrast, the proposed revisions, beginning with the statement that NEPA is a procedural statute,[282] fundamentally mischaracterize NEPA and strip the process of its true purpose. Despite a partial repetition of the current regulation's admonition that NEPA's purpose is to provide for informed decision making and to foster excellent action,[283] a number of key changes make clear that the proposed regulations would dramatically undermine these critical goals. Such an intent runs throughout the proposed revisions but the proposed changes below particularly highlight this diminished, crabbed approach:

A. Proposed § 1500.1 - Purpose and Policy.

This section begins by characterizing NEPA as merely procedural and states that the "purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision making process."[284][285] In fact, going through the process in and of itself does not satisfy the purpose and function of NEPA as the current Section 1500.1 makes clear. Rather, the purpose and function of the process is reflected in decisionmaking informed by the NEPA process. If the process is completed only by virtue of a paperwork exercise, then the federal agency has not considered the information "before decisions are made and before actions are taken" as currently required.[66]

[281] *C.F.R. § 1500.1(a).*

[282] *Proposed C.F.R. § 1500.1(a).*

[283] *Id.*

[284] *Id.*

[285] *C.F.R. § 1500.1(b).*

Further, the proposed articulation of the "purpose and function of NEPA" would recast the role of the public from its current iterative form to a more passive role of merely being informed; compare "Accurate scientific analysis, expert agency comments and public scrutiny are essential to implementing NEPA"[286] with "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."[287]

Both changes are a retrenchment from the current regulations and should be abandoned.

B. Section 40 C.F.R. § 1500.2 - Policy.

CEQ proposes to eliminate this section, which directs agencies to comply with various requirements of NEPA "to the fullest extent possible", from the regulations entirely.

Section 102(2) of NEPA directs agencies to interpret and administer the policies, regulations and public laws of the United States in accordance with NEPA's policies "to the fullest extent possible".[69] In their deliberations on this provision of NEPA, Congress made it clear that:

> … It is the intent of the conferees that the provision "the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in Section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.[70]

CEQ's proposal to drop this section reinforces its inexplicable intention to define NEPA much more narrowly than the plain statutory language and Congressional require. Nothing in the preamble addresses the reason for doing this other than simplifying and eliminating redundancy and repetition, but the preamble never explains how dropping part of the law is justifiable simplification nor does it point the readers to provisions which make the current provision redundant or repetitious.[71] Section 1500.2 should be restored in full to the regulations.

C. Proposed § 1500.3, "Mandate" and §1507.3(a) - Agency NEPA Procedures (retitled from "Agency Compliance").

This section purports to forbid agencies from imposing additional procedures or requirements beyond those set forth in the CEQ regulations "except as otherwise provided by law or for agency efficiency."[72] Of course, CEQ cannot override statutory direction and thus we believe agencies are free

[286] *Id.*
[287] *Proposed 40 C.F.R. § 1500.1(a).*

to implement whatever procedures or requirements they believe will, in fact, implement NEPA "to the fullest extent possible."[73]

However, CEQ's intent is clear even though the language is ambiguous. The proposed regulation is intended to strongly discourage any such efforts by line agency leadership who might actually want to implement the statute more robustly and comprehensively than outlined in the proposed regulations. It is appalling that CEQ, charged by Congress with overseeing implementation of all of NEPA, would characterize its regulations as a ceiling rather than a floor for agency NEPA implementation. CEQ has no authority to direct agencies to ignore the requirements of the law or to limit those agencies' discretion. All federal agencies are charged with implementing their own

[69] 42 U.S.C. § 4332.
[70] House of Representatives, Conference Report to accompany S. 1075, National Environmental Policy Act of 1969, Dec. 17, 1969, Report No. 91-765, at 9-10, *available at*, https://ceq.doe.gov/docs/laws-regulations/Senate-Report-on-NEPA.pdf.
[71] 85 Fed. Reg. at 1693.
[72] Proposed 40 C.F.R. § 1500.3(a).
[73] 42 U.S.C. § 4332; 40 C.F.R. § 1500.2.

statutory responsibilities in a manner consistent with NEPA's purposes and directives, whether CEQ's regulations captures the statute's requirements or not.[74] CEQ states in the preamble that this is a clarifying change, but it presents no argument in the preamble that this proposed regulation and prohibition is warranted or justified. [75] and it should be removed throughout the regulations.

D. Proposed § 1500.6 - Agency Authority.

Similar to the other provisions noted above, the proposed change in this regulation would narrow the concept of "full compliance with the purposes and provisions of the Act [NEPA]" to compliance with CEQ's new regulations. The current regulations correctly explain that each agency must interpret the provisions of NEPA as a supplement to its existing authority and as a mandate to interpret its policies and mission activities in that light. Again, CEQ demonstrates its intent to strip the statute down to the bare bones of its own regulations rather than a follow the letter of the law. This change should be rejected.

E. Proposed § 1502.1 - "Environmental Impact Statement Purpose".

Again reflecting its desire to reduce the NEPA process to paperwork, the proposed regulations abandon the current regulatory explanation that an EIS is intended 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."[76] Instead, the proposal characterizes the "primary purpose" of an EIS as ensuring the agencies consider the environmental impacts of their actions in decisionmaking. No one disputes that agency consideration of environmental impacts is a major purpose of an EIS, but the question is to what end that consideration is intended to achieve. Once again, the preamble offers no justification for this proposed change.[77] The current regulation should stand.

F. Proposed § 1502.9 - "Draft, Final and Supplemental EISs".

As the preamble notes, CEQ proposes to substitute the word "practicable" for the term "possible" throughout the proposed regulations. Both words have an appropriate place in the regulations. CEQ provides one sentence on this proposed change, merely stating that practicable "is the more commonly used term in regulation."[78] CEQ should not conflate these two words as they have different definitions and different appropriate application in this context. According to Black's Law Dictionary, "practicable" is defined to mean "[a]ny idea or project which can be brought to fruition or reality without any unreasonable demands."[79] In contrast, "possible" is defined to mean "[c]apable of existing or happening; feasible."[80] CEQ's proposal disregards this distinction.

[74] 42 U.S.C. § 4332.
[75] 85 Fed. Reg. at 1706. [76] 40 C.F.R. § 1502.1.
[77] 85 Fed. Reg. at 1700.
[78] 85 Fed. Reg. at 1692.
[79] Black's Law Dictionary (11th ed. 2019).
[80] *Id.*

The current regulations use the word "practicable" for certain process requirements; for example, they require the lead agency to publish a notice of intent "as soon as practicable after its decision to prepare an EIS".[81] However, the proposed regulatory change that states that a draft EIS "must meet, to the fullest extent practicable, the requirements established for final statements in section 102(2)(C) of NEPA"[82] is directly contrary to the statutory language to comply with the requirements for the detailed statement now known as an EIS "to the fullest extent possible".[83] It must be revised to conform to the statutory language.

Additionally, we are concerned about proposed §1502.19(b) that directs agencies to prepare a supplemental draft if a draft EIS "is so inadequate as to preclude meaningful analysis." The current regulations direct agencies to prepare a revised draft in these circumstances. The preamble does not explain why the proposed regulation makes this change so we are unable to comment on CEQ's rationale if it has one. But if a draft EIS is fundamentally inadequate, the entire EIS needs to be revised and republished. If only one particular section is inadequate, a supplemental draft EIS would be appropriate.

In all these respects, the current regulation should stand.

G. Proposed § 1504.3 - "Pre-Decisional Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory".

We are concerned about an omission in 1504.3(c)(1). The current regulation states that the agency referring a matter to CEQ should request that "no action be taken to implement the matter until the Council acts upon the referral." The proposed revision does not include that requirement nor

any direction to a lead agency to not proceed with the action during the course of the referral except in the instance of the lead agency requesting an extension of the time to respond at 1504.3(d).

When involved in a referral, CEQ considers the whole of NEPA's policies and goals, not just an agency's compliance with procedural requirements. Thus, CEQ's recommendations have often dealt with whether a proposed action should proceed at all,[84] or if it does, how it should proceed.[85] Obviously, for the process to work, the proposed

[81] 40 C.F.R. § 1501.7.
[82] 40 C.F.R. § 1502.9(b).
[83] 42 U.S.C. § 4332.
[84] For example, in late 1981, CEQ recommended that the proposed Dickey-Lincoln School Lakes Project that would have been built on the St. John River be deauthorized. President Reagan subsequently signed a bill deauthorizing the Dickey portion of the project and after a feasibility study, the rest of the project was dropped. Rand, Sally and Tawater, Mark, "Environmental Referrals and the Council on Environmental Quality", Environmental Law Institute, February, 1986, pp. 248-266, available at: https://www.slideshare.net/whitehouse/august-1986-theseventeenth-annual-report-of-the-council-on-environmental-quality.
[85] See, for example, Findings and Recommendations of CEQ regarding the Tennessee-Tombigbee Waterway Wildlife Mitigation Feasibility Study, March 26, 1985, 50 Fed. Reg. 12850 (April 1, 1985).

action must not proceed while the referral is ongoing. Because there is no specific explanation for this omission in the preamble, it is impossible to tell if the omission was deliberate, and if so, what the rationale might be for removing this sentence. Whatever the reason for its omission, the underlying direction to the lead agency not to proceed with the action until the referral process has been concluded needs to be added back into this section.

H. Proposed § 1506.1(b) - "Limitations on Actions During the NEPA Process".

The proposed revision to this section would expand the types of actions that can be taken before completion of the NEPA process. The current regulation was drafted both to minimize the possibility of biasing the decisionmaking process, including the possibility of foreclosing alternatives, and to address concerns that the limitations on pre-decisional action "would impair the ability of those outside the Federal government to develop proposals for agency review and approval."[86] Thus, the current regulation states that applicants are not precluded from developing plans or other work necessary to support an application for government permits or assistance and gives the Rural Electrification Administration authority to approve minimal expenditures not affecting the environment (*e.g.*, long lead time equipment and purchase options) made by non-governmental entities seeking loan guarantees.

The proposed amendment to this regulation expands this by specifically proposing that agencies be authorized to engage in "such activities, including, but not limited to "acquisition of interests in land" while the NEPA process is still underway. This addition is of deep concern. Even with the best of intentions, advance acquisition of land is almost certainly going to bias the analytical and

decisionmaking process. The preamble presents no justification for this dangerous addition other than a vague reference to making the process "more efficient and flexible . . . ."[87] We question how an applicant expending resources prior to the conclusion of the NEPA process achieves either efficiency or flexibility. In fact, it makes the process more efficient only if one assumes that the outcome is predetermined. The flexibility it affords runs only to the applicant, not to the public's interest in a fair and unbiased process.

Courts have made it clear, often in the context of deliberating on injunctive relief, that allowing action to proceed before the completion of an adequate NEPA process undermines the purposes of the law. As the Court of Appeals for the First Circuit said in *Sierra Club v. Marsh*,[88] "The way that harm arises may well have to do with the psychology of decision makers, and perhaps a more deeply rooted human psychological instinct not to tear down projects once they are built." As that Court noted, there is great "difficulty in stopping a bureaucratic steam roller, once started . . . . "[89]

We believe that prior to the completion of the NEPA process project proponents should be limited to activities necessary to support their various applications for assistance,

[86] 43 Fed. Reg. 5598, 55986 (November 29, 1978).
[87] 85 Fed. Reg. at 1704.
[88] 872 F.2d 497, 504 (1st Cir. 1989).
[89] *Id*.

permits or approval and that this provision should not be broadened to acquisition of interests in land or other, unnamed activities that are not specifically for the purpose of supporting applications. Going beyond that fundamentally starts moving the horse behind the cart with likely bad results. No explanation for making these changes is offered in the preamble.[90] The regulation should not be amended.

Whether it should make any additional changes to 1506.1, including whether there are circumstances under which an agency may authorize irreversible and irretrievable commitments of resources

We believe the answer to this question is no, there are no such circumstances. Should there be a bona fide emergency situation that requires an action that would normally require an EIS, CEQ can address that need through the development of alternative arrangements. [91] The Act itself flags "irreversible and irretrievable commitments of resources" as an element that must be included in the "detailed statement" (now termed an EIS) so that those considering the decision would understand the gravity and permanence of their actions.[92] To allow such actions to proceed without completion of the NEPA process would be an illegal mockery of the law.

Proposed § 1506.2(d) - Elimination of Duplication with State, Tribal and Local Procedures.

While supporting the addition of tribal governments in the regulations, we note the addition of the sentence that reads, "While the statement should discuss any inconsistencies, NEPA does not require reconciliation." Why this is this a desirable addition? What problem is it trying to solve? NEPA is replete with references to the need to cooperate with other levels of government to achieve NEPA's

goals. The preamble does not explain what advantage there is in including this addition.[93] We oppose the provision.

Proposed § 1508.1(s), Definition of "Mitigation"

Similar to the addition noted above, CEQ has chosen to affirmatively state that NEPA does not mandate the form or adoption of any mitigation. The CEQ regulations have never stated that mitigation is required under NEPA, although the current regulations do require consideration of mitigation measures as part of the analysis of alternatives,[94] environmental consequences,[95] and when a cooperating agency requires certain mitigation measures to address concerns.[96] Further, mitigation measures chosen by an agency must

[90] 85 Fed. Reg. at 1704.
[91] 40 C.F.R. §1506.11.
[92] 42 U.S.C. § 4332(2)(C)(v).
[93] 85 Fed. Reg. at 1704.
[94] 40 C.F.R. § 1502.14(f).
[95] *Id*. § 1502.16(h).
[96] *Id.* § 1503.3(d).

be included in any Record of Decision,[288] and, of course, implemented.[98] Mitigation may also be utilized to support an agency's Finding of No Significant Impact.[289][290]

We believe that fifty years after NEPA's passage, federal agencies are well aware that there is not an enforceable duty under NEPA to mitigate each adverse impact. However, NEPA encourages them to try to do so in its admonition to administer the policies, regulations and public laws of the United States in accordance with NEPA's policies.[100] As the Supreme Court stated, "omission of a reasonably complete discussion of possible mitigation measures would undermine the "action forcing" function of NEPA."[291][292] CEQ's proposed statement undermines the core purpose of the analysis and should be struck. This new and narrowed view from CEQ undercuts the law's purposes and policies. Juxtapose these proposed prohibitory statements with this statement made during the Senate debate about NEPA:

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[288] Id. § 1505.2(c). [98] Id. § 1505.3.

[289] Council on Environmental Quality, "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact", January 14, 2011. Additionally, of course, there may be considerable mitigation requirements under other laws such as the Clean Water Act and Endangered Species Act in particular situations.

[290] U.S.C. § 4332.

[291] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989).

[292] Cong. Rec. 21, 20956 (1969).

> "An environmental policy is a policy for people. . . Its basic principle of the policy is that we must strive in all that we do to achieve a standard of excellence in man's relationships to his physical surroundings. If there are to be departures from this standard they will be exceptions to the rule and the policy. And as exceptions they will have to be justified in the light of public scrutiny."[102]

CEQ's proposed statements about what NEPA does not require as a procedural matter inserted into the regulations reinforce the appearance that CEQ's apparent goal to reduce NEPA to a paperwork process, untethered from environmental policy. Agencies will clearly get the message that they should do only the minimum required by these regulations and may, in fact, be prohibited from doing more.[293] They should be removed from the regulations.

IV. CEQ UNJUSTIFIABLY PROPOSES TO ELIMINATE NEPA'S APPLICABILITY TO A WIDE VARIETY OF FEDERAL ACTIONS.

A. Proposed §§ 1501.1, 1507.3(c) and 1508.1(q) - Major Federal Action/NonMajor Federal Action.

CEQ proposes to reverse its long-standing position that if a proposed federal action has a significant impact, including a significant cumulative impact, it is a federal action significantly affecting the human environment. In place of the unitary reading of the direction to agencies to "include in every recommendation or report on proposals for legislation and other major federal action significantly affecting the quality of the human environment," CEQ wants to go back to a minority line of cases from the early 1970's that interpreted the phrase "major federal actions significantly affecting the quality of the human environment" as meaning that first, a determination of whether an action is a "major federal action" needed to be made, followed by a determination of significance.

From the beginning of its formal interpretation of NEPA, CEQ explained that:

> (b) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed actions, the environmental impact of which is to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or

[293] *Proposed sections 1500.3 and 1507.3(a).*

> represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. The lead agency should prepare an environmental statement if it is reasonable to
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> anticipate a cumulatively significant impact on the
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> environment from Federal action.[294]

CEQ adopted a similar approach in the next iteration of guidelines published in 1973 after public review and comment.[295] Those guidelines explained that even if a proposed action was localized in its potential impact, "if there is potential that the environment may be significantly affected, the statement is to be prepared." [296] The guidelines stated that the words "major" and "significantly" were intended to imply thresholds of importance and impact that had to be met before an EIS was required, discussed "federal control and responsibility" and pointed to the example of general revenue sharing funds as an example of when such control and responsibility did not exist.[297]

Subsequently, CEQ specifically adopted the reasoning in *Minnesota Public Interest Research Group v. Butz*.[108] As that decision explained:

> To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act, *i.e.*, to 'attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences.' By bifurcating the statutory language, it would be possible to speak of a 'minor federal action significantly affecting the quality of the human environment,' and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA; the activities of federal agencies cannot be isolated from their impact upon the environment. This approach is more consonant with the purpose of NEPA and is supported in S.Rep. No. 91-296, supra, and the CEQ Guidelines.[109]

Thus, the preamble to the final regulations explained, "any Federal action which significantly affects the quality of the human environment is 'major' for purposes of NEPA."[110] CEQ proposes to remove the sentence, "[m]ajor reinforces but does not have a meaning independent of significantly".[111] A close look at CEQ's rationale set out in its preamble for removing this sentence and at the associated case law reveals that CEQ's concerns with the current regulation are not well-founded. First, Congress itself characterized "major" actions quite broadly. Note the wording in Section 102(2)(C) which states that, "all agencies of the Federal Government shall . . . . include in every recommendation or report on proposals for legislation and <u>other</u> major Federal action significantly affecting the quality of the human environment, a detailed statement. . . . . " [112] The use of the word "other" clearly means that Congress

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[294] *Council on Environmental Quality, Statements on Proposed Federal Actions Affecting the Environment, Guidelines, 36 Fed. Reg. 7724-25 (April 23, 1971).*
[295] *Council on Environmental Quality, Preparation of Environmental Impact Statements, Guidelines, 38 Fed. Reg. 20550, 20551 (August 1, 1973).*
[296] *Id. at 20551.*
[297] *Id. at 20552.*

considered "every recommendation or report on proposals for legislation" to be major Federal actions. Consider also the Senate report language interpreting this provision that states:

[108] 498 F.2d 1314, 1321 (8th Cir. 1974). As one commentator has pointed out, although the discussion in CEQ's 1973 guidelines influenced some courts to think that there were dual standards, "[t]he unitary standard adopted by CEQ appears correct." Daniel R. Mandelker, et al., *NEPA Law and Litigation*, 544 (2019) (citing *NAACP v. Medical Center, Inc.*, 584 F.2d 619, 627 (3rd Cir. 1978)). Further as noted below, the case CEQ relied upon for its current regulation, in turn, found support for the unitary approach in the 1973 CEQ guidelines.

[109] *Id*. at 1321-22. Note that the Court found the 1973 Guidelines to be supportive of this interpretation.

[110] Council on Environmental Quality, Final Regulations, 43 Fed. Reg. 55978, 55979 (November 29, 1978).

[111] 40 C.F.R. § 1508.18. It is also important to note that the Guidelines addressed only Subsection (C) of Section 102(2) of NEPA. 43 Fed. Reg. 55978 (November 29, 1978). It was not until promulgation of the 1978 NEPA regulations that CEQ developed the categorical exclusion provision that allows agencies to designate certain classes of actions as typically not requiring preparation of either an EA or an EIS.

[112] 42 U.S.C. § 4332(C) (emphasis added).

> Each agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs, shall make a determination as to whether the proposal would have a significant effect upon the quality of the human environment. <u>If the proposal is considered to have such an effect</u>, then the recommendation or report supporting the proposal must include statements by the responsible official of certain findings . . . . . "[113]

This language simply does not support any interpretation of NEPA that suggests there is some subset of federal actions that have significant effects but are not "major". Indeed, CEQ's current regulation on this point is quite consistent with the Senate report language.

CEQ's proposed reinterpretation of the phrase "major Federal actions significantly affecting the environment" focuses on giving independent meaning to a single word: "major" But "interpretation of a word or phrase depends upon reading the whole statutory text, considering the statute's purpose and context." CEQ's existing interpretation is, moreover, more consistent with NEPA's "overall statutory scheme," That scheme starts with NEPA's ambitious directive that the Federal government should "use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources" to, e.g., "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations," "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," and "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. § 4331(b). It would not have been consistent with that goal for Congress to exempt federal actions with significant adverse impacts on the environment from NEPA's action-forcing requirement

simply because, by some non-environmental metric, an agency deemed the action not "major." By far the more compelling interpretation is the one CEQ has held for decades, that *any* federal action significantly affecting the environment is, for purposes of NEPA, a major action.

Further, CEQ's existing language does not make the term "major" meaningless, as the preamble alleges.[114] Rather, the current regulation – a large portion of which CEQ proposes to retain – focuses on actions "that may be major and which are potentially subject to Federal control and responsibility."[115] That language is consistent with the Supreme Court's in *Department of Transportation v. Public Citizen*[116] that held that when an agency has no ability to prevent certain effects, the agency need not consider those effects when determining whether its action is a 'major Federal action."[117] And, in fact, the Court cited the current regulatory definition of "major federal action" in explaining NEPA's requirements and focusing on "federal control and responsibility" as a key element of the

[113] Report of the Senate Committee on Interior and Insular Affairs to accompany S. 1075, No. 91296, July 6, 1969, p. 20 (emphasis added).
[114] 85 Fed. Reg. at 1709.
[115] 40 C.F.R. § 1508.18.
[116] 541 U.S. 752 (2004).
[117] *Id*. at 770.

definition.[118] Nothing in the Court's unanimous opinion suggested in any way that CEQ's current regulation was problematic.

The focus of the decision in *NAACP v. Medical Center, Inc.*, the case typically cited as authority for the so-called "dual standard" approach (that is, asking first whether a proposed federal action is "major" and second, whether it will have significant impacts) is actually consistent with the current regulatory definition. The case focused on the fact that the Department of Health, Education, and Welfare (HEW)'s involvement in approving a capital expenditure by the Wilmington Medical Center was *ministerial*.[119] The underlying statute proscribed detailed standards by which HEW was obligated to reimburse states for certain health care and hospital costs. The decision observed that the regulations specifically excluded situations in which federal aid is distributed in a program such a revenue sharing, in which there is 'no Federal agency control over the use' of the funds. We believe that Medicare, Medicaid, and child health payments are analogous to payments under revenue sharing because the Secretary may not control their disbursal. Rather, he pays the hospital for its services to its patient under certain prescribed programs. The agency's decision as to allocation of those funds is controlled by the health care provider's costs and the agency is obligated to make payment except in narrow circumstances."

A careful reading of this case shows that the same result would likely be reached under CEQ's current regulations. While there was federal involvement in the form of funding, as the court pointed out, it was analogous to general revenue funds, which are excluded from the language of the current regulations.[120] The current regulations also define "proposal" in a manner that requires that an agency

"has a goal and is actively preparing to make a decision one or more alternative means of accomplishing that goal."[121] That definition makes it clear that an agency has to have discretion to choose among alternatives, and thus the situation in *NAACP v. Medical Center* would likely be decided the same way under the current regulations.

In short, there is no sound rationale or non-arbitrary justification for the proposed deletion of the second sentence in Section 1508.18. There is also no case that we know of that holds a discretionary federal agency action – that is, a proposed action where an agency has sufficient control and responsibility – and that has significant environmental effects can be treated as "minor" and therefore outside of the scope of NEPA.

The major immediate impact of this proposed change would likely be massive confusion and uncertainty and certainly a great deal of litigation. If this standard were actually adopted, we anticipate agencies would identify some further subset of proposed federal actions with significant environmental impacts as not being actions for purposes of NEPA. We see the beginnings of this within the proposed definition itself with the specific exclusion of certain programs run by the Farm Service Agency and Small Business

[118] *Id*. at 763.
[119] 584 F.2d 619 at 629.
[120] 40 C.F.R. § 1508.18(a).
[121] 40 C.F.R. § 1508.23.

Administration.[122] But the harm will not stop there. The proposed regulations invite all agencies to identify other actions that they deem to be "[n]on-major Federal Actions".[123] Within the context of this rulemaking, the harm includes the issues discussed below.

1. Proposed §1508.1(q) – Excluding Projects with Minimal Federal funding or Minimal Federal Involvement.

CEQ's proposal to exempt projects with minimal federal funding or minimal federal involvement (where the agency cannot control the outcome of the project) is extremely vague and could lend to significant environmental harm. Even the example given in the preamble raises questions. What if that "very small percentage" of federal funding actually is critical for a small community? How is an agency supposed to determine the value of a particular contribution to whether a proposed action will or will not proceed without federal involvement? Where and how does an agency draw the line on mining and oil and gas operations on split estate lands? For good neighbor/shared stewardship projects on national forest land? What are examples of the problem this provision is trying to solve?

2. Proposed § 1508.1(q) – Excludes actions that do not result in final agency action under the Administrative Procedure Act and specifically exempts an agency's "failure to act" from "major federal action" definition.

CEQ proposes to narrow the definition of "major federal action" such that the NEPA process would exclude actions that do not result in final agency action under the APA. It would also strike from CEQ's

current definition circumstances where a responsible agency official fails to act "and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law" as agency actions. [124] CEQ's explanation for this proposed deletion is that in the circumstances described in the current regulation, "there is no proposed action and therefore no alternative that the agency may consider. *S. Utah Wilderness All.*, 542 U.S.

at 70-73."[125]

But CEQ's proposal is based on a misreading of the Supreme Court's holding in regards to the APA. The Court found that in that case, there was neither a proposal by the Bureau of Land Management to act nor a requirement to do so. NEPA did not apply, in the Court's view, because there was no proposed action for it to apply to in the context of that particular land management plan. But the Court was extremely clear that the Section 706(1) of the APA did authorize courts to compel an agency to act when

[122] Proposed § 1508.1(q)(1), 85 Fed. Reg. 1712, 1729 (January 10, 2020).
[123] Proposed § 1507.3(c)(1), 85 Fed. Reg. at 1728.
[124] 40 C.F.R. § 1508.18.
[125] 85 Fed. Reg. at 1709. We note that the case was actually titled as *Norton v. Southern Utah Wilderness Alliance* in the Supreme Court. But then, as we point out, CEQ misread the holding also.

agency action is required and is unlawfully withheld.[126] And that is precisely the type of action to which CEQ's current regulation applies:

The reference in that Section to a 'failure to act' was not intended by the Council to require the preparation of an EIS where no Federal decision was required and none had been made. The phrase 'failure to act' was intended rather to describe one possible outcome in those situations where a Federal decision has been or was required to be made.[127]

CEQ's proposal to remove this provision, which <u>on its face</u> is bounded by the APA or other applicable law, is actually inconsistent with the Supreme Court's holding in *Norton v. SUWA* as well as the plain language of the APA.[128] CEQ should withdraw this proposed deletion. Leaving it in violates agency responsibilities under the APA.

3. <u>Proposed § 1508.1(q) - Exempts loans, loan guarantees and other forms of financial assistance</u>

This section would specifically exclude farm ownership and operating loan guarantees by the Farm Service Agency (FSA) pursuant to 7 U.S.C. 1925 and 1941-1949 and Small Business Administration (SBA) pursuant to 15 U.S.C. 636(a), 636(m) and 695697f from being considered a major federal action or action for purposes of NEPA. More generally, it states that actions do not include "loans, loans guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of the action."[129]

There is no legal justification for CEQ proposing to exclude these broad classes of actions from NEPA. Indeed, NEPA specifically states that:

> it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[130]

Courts have found sufficient federal control and responsibility in the context of financial loans and other forms of financial assistance to warrant application of NEPA for loans, loan guarantees and other forms of financially generally and for FSA and SBA actions specifically. For example, *Buffalo River Watershed Alliance v. Department of*

[126] 542 U.S. at 63.
[127] *Defenders of Wildlife v. Andrus*, 672 F.2d 1238, 1245 (D.C. Cir. 1980), quoting from letter by CEQ General Counsel Nicholas C. Yost to the Department of Justice.
[128] 542 U.S. at 63; 5 U.S.C. § 706(1).
[129] 85 Fed. Reg. at 1729.
[130] 42 U.S.C. § 4331(a) (emphasis added).

Agriculture[298] dealt with a large hog farm (6,500 swine) backed by both a SBA and FSA loan guarantee. Importantly, a condition for eligibility for these guarantees was that the company could not obtain financing on reasonable terms from other institutions. In holding for the plaintiffs, the court distinguished the situation from a case where loan guarantees are given with no oversight and/or by virtue of nondiscretionary criteria. In enjoining FSA and SBA from making payment on their loan guarantees pending the agencies' compliance with NEPA and the Endangered Species Act, the court stressed that on "balance, the interest in getting the environmental assessment right outweighs any harm that enjoining the guaranties will cause the federal agencies. And the public interest is best-served by ensuring that federal tax dollars aren't backing a farm that could be harming natural resources and an endangered species."[299] The court also found that plaintiffs' injuries were redressable because of the agencies' continuing oversight responsibilities.[300][301]

In *Food & Water Watch v. U.S. Department of Agriculture*,[134] the court faced a similar factual situation involving a FSA loan guarantee for a poultry concentrated animal feeding operation. Again, the court found that without the FSA loan, it was unlikely that that the operation could have proceeded, since "an applicant for an FSA loan guarantee must certify that the applicant is 'unable to obtain sufficient credit elsewhere without a guarantee to finance actual needs at reasonable rates and terms.' 7 C.F.R. § 762.120(h)(1)."[302] Again, the court found the plaintiff's injuries were redressable, whether through

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[298] No. 13-cv-450, 2014 WL 6837005 (E.D. Ark. Dec. 2, 2014) (appeal dismissed (8th Cir. 151310) (April 24, 2015)).
*[299] Id. at *6.*
*[300] Id. at *3-4.*
[301] F. Supp. 3d 39 (D.D.C. 2018).
[302] Id. at 54.

imposition of mitigation measures or through withdrawal of the loan guarantee.[303] Similarly, the actions of the Rural Utilities Service (RUS) within the Department of Agriculture were the subject of two decisions involving the proposed expansion of the Sunflower Electric Power Corporation's coal-fired generating plant. [304][305] The court determined that the RUS assistance in the form of debt forgiveness and consent to a lien subordination as well as approvals relating to the expansion of the power plant were major federal actions under NEPA and that an EIS was required.[138]

The preamble to this proposed revision argues that these types of actions are not actions for purposes of NEPA because the federal agencies involved do not operate the facilities themselves, control the bank, expend funds unless there is a default, or take physical possession of the property. Those factors, by themselves, are not determinative. The case law demonstrates that in some of these situations, the agencies retain ample control and responsibility through their legal authority to impose conditions, including mitigation measures, as part of the terms of financial assistance or to decline to grant the assistance in the first place. CEQ's revisionist interpretation is thus contrary to law.

CEQ also invites comment on whether any types of financial instruments, including loans and loan guarantees, should be considered non-major Federal actions and the basis for such an exclusion.

CEQ must not exclude financial instruments, such as loans and loan guarantees, from what may be considered major federal actions triggering NEPA review. As discussed above, CEQ must also not narrow the definition of major federal action so as to exclude certain financial instruments from NEPA's reach. These proposed changes defy the purpose and language of NEPA, undermine longstanding precedent and agency practice, and generate confusion, rather than achieve clarity.[139]

Excluding or otherwise narrowing CEQ regulations to exclude certain financial instruments would violate the language, structure, and purpose of NEPA.[140]

NEPA's substantive policy directs the federal government to "use all practicable means" to "improve and coordinate Federal plans, functions, programs, *and resources*" so that the nation may achieve its environmental policy goals.[141] Congress's inclusion of the word "resources" recognizes that a commitment of significant federal funding may impact the environment, thus warranting NEPA review. Moreover, the statute explicitly states that the Federal Government is "to use all practical means and measures, *including financial and technical assistance*, . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . and fulfill the . . . requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added). Thus, it is Congress's clear, express intent that financial assistance, such as loans and loan guarantees, be included in NEPA review.

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[303] Id. at 55-57.

[304] Sierra Club v. U.S. Department of Agriculture, 777 F. Supp. 2d 44 (D.D.C 2011); Sierra Club v. U.S. Department of Agriculture, 841 F. Supp. 349 (D.D.C. 2012).

[305] F. Supp. 2d at 56-64; 841 F. Supp. 2d 349, 357-360 (D.D.C. 2012) (enjoining RUS from granting additional future approvals or financial support for Holcomb Expansion prior to completing an EIS).

Congress's intent for NEPA to apply to financial instruments is further supported by the statute's explicit requirement that agencies comply with NEPA "to the fullest extent possible." [142] Agency loans and loan guarantees can be substantial—even, at times, reaching billions of dollars. These large commitments of resources may have significant environmental impacts in that they can enable projects with enormous long-term environmental impacts that would not have come to fruition without federal agency financial support. In order for agencies to effectuate Congress's national environmental policy, these financial instruments properly fall within NEPA's reach.

[139] *See* 85 Fed. Reg. 1684 (noting one of CEQ's goals with the proposed rulemaking is to "provide greater clarity").

[140] *See Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) ("It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'") (citation omitted).

[141] 42 U.S.C. § 4331(b) (emphasis added).

[142] 42 U.S.C. § 4332.

Courts and agencies have long-recognized that federal action triggering NEPA includes when a federal agency enables a private party to act.[306] Commitments of federal financing to private parties falls within this category of NEPA-eligible actions.[307] Applying NEPA to financial instruments makes sense given that NEPA "guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience that may also play a role in the decisionmaking process and the implementation of the decision."[308] In other words, because federal financial tools enable private projects that may have significant environmental effects, decisionmakers must have the relevant information available to inform their decision.[309]

CEQ's proposals to exclude certain types of financial instruments from NEPA's reach, therefore, undermine decades of court precedent and agency practice. CEQ offers no explanation for eliminating

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[306] See Save Barton Creek Ass'n v. FHWA, 950 F.2d 1129, 1134 (5th Cir. 1992); Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1088 (D.C. Cir. 1973) ("there is 'Federal action' within the meaning of the statute not only when an agency [acts], but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment").

[307] Found. on Econ. Trends v. Heckler, 756 F.2d 143, 155 (D.C. Cir. 1985) ("Federal funding has long been recognized as an appropriate basis to enforce NEPA's requirements on non-federal parties.").

[308] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

[309] See, e.g., Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1088 (D.C. Cir. 1973) ("there is 'Federal action' within the meaning of [NEPA] . . . whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment"); Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept., 446 F.2d 1013, 1027 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972) (federal funding "triggered the advertisement for contract bids, the letting of contracts, and the commencement of construction," thus implicating NEPA); NEPA Law and Litig. § 8:20 (federal financing of a private entity's project is sufficient to require NEPA "because it is the federal agency that has 'enabled' the nonfederal entity to act.").[146] [147] See 85 Fed. Reg. 1684 (CEQ's proposed rule "would modernize and clarify the regulations"). [148] Id. at 1729 (emphasis added).

these longstanding practices and consequent protections. Moreover, rather than providing clarity—one of CEQ's purported goals in the rulemaking—CEQ's proposed changes would instead result in confusion among courts, agencies, and private parties seeking financial assistance as these stakeholders scramble to adjust to new expectations.[147] For these reasons CEQ must remove the proposed language relating to financial instruments.

In addition to soliciting comments on whether federal loans, loan guarantees, and other financial tools ought to be considered non-major federal actions, CEQ is proposing to redefine "Major Federal action" in such a way so as to unreasonably exclude certain financial instruments.[148]. CEQ's proposed redefinition provides:

> (q) Major Federal action . . . .
>
> (1) Actions do not include loans, loan guarantees, or other forms of financial assistance where the Federal agency *does not exercise sufficient control and responsibility over the effects of the action.*

The proposed language above—limiting NEPA applicability to financial instruments unless certain new criteria are met—is problematic for several reasons. First, agency control has historically been but one factor when evaluating whether NEPA applies to financial instruments; courts and agencies also evaluate the amount of financial assistance. It would be unreasonable for NEPA applicability to turn on control and responsibility alone. CEQ's proposed language undermines established case law recognizing that agency control does not always equate "responsibility over" an action's effects.[310][311][312] Last, CEQ fails to offer support for creating what amounts to an exclusion of many significant financial instruments from NEPA's reach, and nor does CEQ explain or support this departure from past policy and practice.

CEQ's proposed language creates a barrier to NEPA applicability based, unreasonably, solely on an agency's "control and responsibility over the effects of an action."[150] In contrast, CEQ's existing regulations define "major Federal action" as an "action[ ] with effects that may be major and which [is] *potentially subject* to Federal control and responsibility."[151] Operating against CEQ's existing requirement that control and responsibility may be possible—but *not required*—for NEPA to apply, courts have taken the approach of examining both the amount of a federal financial instrument and the potential for agency control.[313][314] CEQ's proposal eliminates one part of this evaluation—the financial instrument's amount—without explanation. Given that federal financial commitments are often millions, and even billions, of dollars, it is unreasonable and irresponsible to remove this factor when evaluating whether an action may significantly affect the environment.

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[310] *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973) (recognizing major federal action occurs when an agency enables a private party to act).*

[311] *Fed. Reg. 1729.*

[312] *C.F.R. § 1508.18 (emphasis added).*

[313] *See, e.g., Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 960 (9th Cir.*

[314] *); Indian River Cty. v. Rogoff, 201 F. Supp. 3d 1, 18 (D.D.C. 2016) ("The Court does not have before it any persuasive authority that financial assistance at the level provided by the PAB allocation, when paired with federal-agency control, cannot make up major federal action.") (emphasis in original).*

CEQ's proposed language requiring control and responsibility *over the effects* also misconstrues the type of control relevant to NEPA and financial instruments. Typically, agencies exercise control in the context of financial instruments by, for example, evaluating whether a project meets certain eligibility criteria.[315] Agencies may then place conditions on a commitment of financial assistance.[316] Eligibility criteria and conditions on a financial instrument—sufficient controls to trigger NEPA—are nonetheless distinct from the kind of "responsibility over the effects" CEQ is prescribing. CEQ's proposed language, therefore, fails to align with the realities of federal financial tools and must be removed.

Finally, CEQ's proposed language is arbitrary and capricious on several grounds, necessitating its removal. CEQ's docket accompanying this rulemaking offers no support for excluding financial instruments from NEPA's reach, or otherwise narrowing the definition of major federal action so as to exclude financial instruments absent sufficient control and responsibility over the effects of the action. In this way, CEQ lacks reasonable grounds for making this change.

4. Proposed § 1508.1(q)(2)(i) - Recharacterizes the nature of "action" for treaties, international conventions and agreements.

This proposed revision would recharacterize the federal action for purposes of NEPA in the case of a treaty, international convention or agreement. Under the current regulation,[155] agencies have prepared NEPA analyses either prior to negotiations or prior to ratification. The proposed revision change would delay NEPA compliance until a treaty, convention or agreement has already been negotiated and ratified or executed by the United

States and is being implemented. The proposed revision also removes the statement that "Proposals for legislation include requests for ratification of treaties" from the current definition of "Legislation".[156] Thus, U.S. positions during negotiations and the decision whether to sign or ratify such an instrument would be devoid of analysis and public involvement. But if NEPA analyses are not conducted until after negotiations have been completed and agreements signed or ratified, those decisions will have been made uninformed by any NEPA analysis. For this reason, the proposed revision is contrary to law.

The proposed change is also contrary to decades of agency NEPA practice. CEQ fails to provide any explanation for the change. For example, in 1973, the Department of State prepared a draft and final EIS on the proposed ratification of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters. The National Oceanic and Atmospheric Administration prepared and a draft and final EIS in 1979-1980 in cooperation with the Department of State for the proposed Interim Convention on Conservation of North Pacific Fur Seals prior to its submission to the U.S. Senate. The Department of State prepared draft and final EISs in 1982 prior to negotiations for an international

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[315] *See, e.g., 10 C.F.R. § 611.100 (eligibility criteria for loan guarantees under the Department of Energy's Title XVII program).*

[316] *See, e.g., Indian River Cty. v. Rogoff, 201 F. Supp. 3d 1, 19 (D.D.C. 2016) (noting that an agency's "discretion to condition its loan award on the recipient's compliance with various*

regime for Antarctic Mineral Resources, in 1984 prior to submitting the Compact of Free Association for Micronesia to Congress for ratification, and in 1988, prior to negotiations on the proposed Montreal Protocol on Substances that Deplete the Ozone

conditions, including environmental mitigation measures" proved sufficient to trigger NEPA); *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889, 915 (N.D. Cal. 2007) (when evaluating agency financing to a project, "the Court must consider carefully the nature of [agency] involvement in these projects and particularly what conditions, if any, the agencies impose in connection with financing.").

[155] 40 C.F.R. § 1508.18 (b)(1).
[156] 40 C.F.R. § 1508.17.
Layer. In 1988, the Department of the Army prepared an Environmental Assessme[317]nt for the Intermediate Range Nuclear Forces Treaty. Any departure from that practice, as well as from Congress's expressed intention that federal actions be informed by advance consideration of environmental impacts, demands a lawful and rational justification that the proposed rule's preamble does not provide.

5. Proposed § 1501.8(q)(2) - Guidance Documents.

This provision proposes to strike the word "guide" from the current definition of major federal action in the context of stating that, "Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based."[157]

The rationale for this proposed deletion is simply that "guidance is nonbinding." This statement significantly underestimates the impact of guidance. Guidance may vary in its nature and effect, but some guidance functions as the equivalent of a directive, setting a firm policy position that has legal effect. And "it is well established that an interpretative guidance issued without formal notice and comment rulemaking can qualify as final agency action."[318] In fact, CEQ's own guidance has been given "substantial deference" by the federal courts.[319]

CEQ should abandon this entire effort to re-interpret the most well known phrase in NEPA.

ADDITIONAL QUESTIONS RELATED TO "MAJOR FEDERAL ACTION"

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[317] C.F.R. § 1508.18(b)(2) (emphasis added).
[318] State of Arizona v. Shalala, 121 F. Supp. 2d 40, 48 (D.D.C. 2000), citing, among other cases, Bennett v. Spear, 520 U.S. 154, 177-78 (1997) for a two-prong test that (1) the action must first mark the "consummation" of the decisionmaking process and secondly must cause "legal consequences" or "determine rights or obligations."
[319] League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service, 549 F.3d 1211 (9th Cir. 2008) (giving Auer deference to CEQ guidance on consideration of past actions in cumulative effects analysis); Seattle Audubon vs. Lyons, 871 F. Supp. 1291, 1319-20 (W.D. Wash. 1994) (relying in part on CEQ General Counsel's memo advising on correct formulation of the no action alternative to affirm Forest Service's framing of no action alternatives in regards to the proposed Pacific Northwest Forest Plan).

Should CEQ make any further changes to this paragraph [the definition of "major federal action" paragraph], including changing "partly" to predominantly" for consistency with the edits to the introductory paragraph regarding "minimal Federal funding." CEQ also invites comment on whether there should be a threshold (percentage or dollar figure) for "minimal Federal funding," and if so, what would be an appropriate threshold and the basis for such a threshold.

For good reason, CEQ has never equated the amount of federal funding for a proposed action with the level of analysis required for NEPA compliance. It should not take that step now. The level of environmental impact may be relatively small despite a large amount of federal funding or quite significant despite a modest amount of federal funding. For example, federal approval of the introduction of a foreign species for purposes of biological control may not involve a large amount of federal funding, but has the potential for significant ecological impact. Conversely, a decision to invest a significant amount of federal funding for preservation of a historic site may, by maintaining the site in its current condition, not have a significant impact.

Creating a financial threshold to determine whether a proposed action should be analyzed under NEPA would not be wise or supported by any evidence or rationale identified in the proposed rule's preamble. The threshold analysis for NEPA purposes turns on environmental and related social and economic effects, not funding levels. Categorical exclusions are the appropriate way to treat actions without significant impacts. Imposing funding limitations would invite efforts to avoid any such threshold and ultimately would be arbitrary and capricious. For the reasons stated above, we also oppose changing "partly" to "predominantly."

Whether the definition of "major Federal action" should be further revised to exclude other *per se* categories of activities or to further address what NEPA analysts have called "the small handle problem." Commenters should provide any relevant data that may assist in identifying such categories of relevant data that may assist in identifying such categories of activities.

As discussed above, we strongly disagree with CEQ's proposed reinterpretation of the key phrase in Section 102(2)(C) of NEPA, "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment". That proposed reinterpretation would reverse decades of consistent CEQ and case law interpretation to further the apparent goal of narrowing NEPA review. Thus, we do not support CEQ adding additional categories of federal actions allegedly exempt from NEPA review.

We also do not believe that the CEQ regulations should be revised to address what is informally characterized as the "small federal handle" issue. The preamble cites the discussion of this issue in a treatise by Professor Mandelker.[320] As Professor Mandelker's discussion illustrates, court decisions in this area depend largely on the facts of a particular case.[321][322] For example, the 9th Circuit's decision in *Save Our Sonoran, Inc., v. Flowers*[162] affirmed the lower court's determination that while the Corps'

[320] *Mandelker, Daniel R., Glicksman, Robert L., Aughey, Arianne Michalek, McGillivray, Donald, Doelle, Meinhard, MacLean, Jason, NEPA Law and Litigation, § 8.20, Thomas Reuters (2019), cited at 85 Fed. Reg. 1709.*
[321] *Id.*
[322] *F.3d 1113 (9th Cir. 2004).*

direct jurisdiction was over the desert washes at a development site, these washes were like "capillaries through tissue".[163] Thus, "any development the Corps permits would have an effect on the whole property . . . . [and] [t]he NEPA analysis should have included the entire property."[164] As the Court of Appeals decision explained, the Supreme Court's decision in *Dept. of Transportation v. Public Citizen*[165] is consistent with this reasoning:

> In *Public Citizen*, the Supreme Court excluded from the scope of NEPA analysis any environmental effect that does not have a 'reasonably close causal relationship' to the proposed development. Here, the district court found that any development permitted by the Corps would affect the entire property. *Public Citizen's* causal nexus requirement is satisfied.[166]

Agencies have substantial guidance from case law. CEQ should not proceed to further rulemaking on this issue.

B. Proposed § 1508.17 - Legislation.

The current definition of legislation that reads "'[l]egislation' includes a bill or legislative proposal to Congress" should be retained. The proposed revision of the definition substitutes the word "means" for "includes." However, there are potentially other instruments that a department may send to Congress besides a bill or legislation. For example, the action at issue in *NRDC v. Lujan*[167] was neither a bill nor legislation, but rather a report that Congress required the Secretary of the Interior to submit. The report had to include certain factual information, analysis and recommendations about the Arctic National Wildlife Refuge.[168]

CEQ offers no explanation for this narrowing of the definition of legislation and it should be withdrawn.

CEQ also asks for comments on whether the legislative EIS requirement should be eliminated or modified because the President proposes legislation, and therefore it is inconsistent with the Recommendations Clause of the U.S. Constitution, which provides the President shall recommend for Congress' consideration 'such [m]easures as he shall judge necessary and expedient…." U.S. Constitution, Ar. II, 3. The President is not a Federal agency, 40 CFR 1508.12, and the proposal of legislation by the President is not an agency action. *Franklin v. Mass.*, 505 U.S. 788, 800-01 (1992).

[163] *Id*. at 1122.
[164] *Id*. at 1122.
[165] 541 U.S. 752 (2004).

[166] *Save Our Sonoran, Inc.*, 408 F.3d at 1122 (citation omitted). *See also*, White Tanks Concerned Citizens, Inc. v. Strock, 563 F.3d 1033 (9th Cir. 2009).
[167] 768 F. Supp. 870 (D.D.C. 1991).
[168] 16 U.S.C. § 3142(h).

CEQ cannot eliminate the legislative EIS (LEIS) requirement. The sole type of action that Congress specifically identified as being the subject of the "detailed statement" required by Section 102(2)(C) of NEPA is a "report on proposals for legislation."[169]

Nothing in the Supreme Court's decision in *Franklin v. Massachusetts* stands for the proposition that Congress cannot require an agency to submit information to it in a systematic manner, which is exactly what Congress did in Section 102(2)(C) of NEPA. Rather, *Franklin* holds that in a situation in which the President's "personal transmittal of the [decennial census] report to Congress settles the apportionment," there is no final agency action for purposes of the APA.[170] But as has been pointed out, "[o]f course, there is a big difference between saying that APA review is unavailable and saying that officials do not have to comply with NEPA when they suggest legislation."[171] As the Court in *Public Citizen* stated:

> *Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties. . . . When the President's role is not essential to the integrity of the process, however, APA review of otherwise final agency actions may well be available.[172]

C. Proposed §§ 1502.4(b), 1502.4(c)(3) - Programmatic EISs.

CEQ proposes to eliminate the language in the current regulation that states that programmatic EISs "are sometimes required"[173] and to eliminate the requirement that programmatic EISs "shall" be prepared for federal or federally assisted research, development of demonstration programs for new technologies that, if applied, could significantly affect the quality of the environment.[174] Both proposed changes are unlawful and unwarranted.

Many years before CEQ's current regulations were promulgated, the U.S. Court of Appeals for the D.C. Circuit determined that a programmatic EIS may be "sometimes required" in the context of the development of new technology. In the seminal decision of *Scientists' Institute For Public Info, Inc. v. Atomic Energy Commission*,[175] the Court observed that the:

[169] 42 U.S.C. § 4332(2)(C).
[170] *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992). Note that the Court did not find that Congress was precluded from including the President under the Administrative Procedures Act. Rather, it found that "textual silence" was not enough to bring the Presidency within its purview and that out of respect for separation of powers, it "would require an express statement by Congress

before assuming it intended the President's performance of his statutory to be reviewed" under the APA. *Id*. at 800–01.

[171] *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 554 (D.C. Cir. 1993) (Powell, J., concurring).
[172] *Id.* at 552.
[173] 40 C.F.R. § 1502.4(b).
[174] 40 C.F.R. § 1502.4(c)(3).
[175] 481 F.2d 1079 (D.C. Cir. 1973).

Application of NEPA to technology development programs is further supported by the legislative history and general policies of the Act. When Congress enacted NEPA, it was well aware that new technologies were a major cause of environmental degradation. The Act's declaration of policy states:

> The Congress [recognizes] the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of . . . new and expanding technological advances. National Environmental Policy Act, § 101(a), 42 U.S.C. §4331(a) (1970).

And the Senate report notes, as one of the conditions demanding greater concern for the environment:

> A growing technological power which is far outstripping man's capacity to understand and ability to control its impact on the environment. S.Rep. No. 91-296.

NEPA's objective of controlling the impact of technology on the environment cannot be served by all practicable means, see 42 U.S.C. §4331(b) (1970), unless the statute's action forcing impact statement process is applied to ongoing federal agency programs aimed at developing new technologies which, when applied, will affect the environment. To wait until a technology attains the stage of complete commercial feasibility before consideration the possible adverse environmental effects attendant upon ultimate application of the technology will undoubtedly frustrate meaningful consideration and balancing of environmental costs and other benefits. Modern technological advances typically stem from massive investments in research development, as is the case here. Technological advances are therefore capital investments and, as such, once brought to a stage of commercial feasibility the investment in their developments acts to compel their application. Once there has been, in the terms of NEPA, "an irretrievable commitment of resources" in the technology development stage, the balance of environmental costs and economic and other benefits shifts in favor of ultimate application of the technology.[323]

[323] *Id. at 1089-90.*

The Court stated that it "tread firm ground in holding NEPA requires impact statements for major federal research programs . . . aimed at development of new technologies which, when applied, will significantly affect the quality of the human environment."[324] While as in all NEPA case law, holdings most typically depend on the facts of a particular situation, the articulation of NEPA law in the D.C. Circuit's decision in *Scientists' Institute v. AEC* stands.

Also before CEQ's current regulations were promulgated, the U.S. Supreme Court recognized that in some cases, an EIS on a proposed program could be required. While determining that in the particular case at hand, factually there was not a proposed program, [325]the Court in *Kleppe v. Sierra Club* [178] made it clear that in "certain situations," a comprehensive EIS would be required.[179] The Supreme Court further explained that "when several proposals for coal-related actions that will have cumulative or synergistic environmental impact 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."[326][327]

Far from clarifying NEPA's requirements or making the process more efficient, CEQ's proposed deletion of the fact that programmatic EISs are "sometimes required" and the proposed change from "shall" to "should" in relationship to programmatic EISs at an appropriate stage of technological development will mislead and confuse agencies and likely result in violations of law. There is no explanation in the preamble for these changes[181] and they should be rejected in any final rulemaking.

Whether the regulations should clarify that NEPA does not apply extraterritorially, consistent with *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-16 (2013), in light of the ordinary presumption against extraterritorial application when a statute does not clearly indicate that extraterritorial application is intended by Congress.

The regulations should not state that NEPA does not apply to federal agency decisions in regards to federal actions that would take place outside of the United States or with effects outside of the United States. The "extraterritoriality issue" is a red herring in the context of NEPA.

The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[328] The presumption also "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries

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[324] *Id. at 1091.*
[325] *U.S. 390 (1976).* [179] *Id. at 409.*
[326] *Id. at 410. The Court went on to say that, "[c]umulative environmental impacts are, indeed, what requires a comprehensive impact statement." Id. at 413.*
[327] *Fed. Reg. at 1700.*
[328] *Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 108 (2013) (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).*

foreign policy consequences not clearly intended by the political branch."[329] Examples of situations in which the presumption has been applied include the applicability of the Eight Hour Law to American workers in foreign countries where the U.S. law would have applied to citizens working in their own country for an American contractor were the statute applied abroad,[330] the application of U.S. security laws when the statements at issue were made from a foreign company's headquarters in its home country,[331] and allegations that certain corporations violated the law of nations in a foreign country.[332]

In contrast, implementation of NEPA does not regulate the conduct of either individuals or corporations. Where courts have found that application of NEPA would, in fact, have serious foreign policy implications, they have excused agencies from compliance.[333] But in a case where the federal agency decisionmaking occurs primarily in the U.S. and a case does not present a conflict between U.S. and foreign sovereign law, the presumption against extraterritoriality does not apply to NEPA implementation of federal agency decisionmaking.[334] Further, courts have analyzed the presumption differently when the proposed action in question has effects in the U.S.[335]

NEPA's legislative history and statutory language clearly evidence concern and awareness about environmental degradation of the worldwide environment and biosphere.[336] Shortly after the law's passage, Congressional Members and Congressional committees that had been involved in NEPA's enactment stated that the EIS requirement was meant to apply to federal agency actions wherever they were proposed to occur. In responding to a suggestion made during an oversight hearing that perhaps NEPA did not apply fully to the international environmental effects of agency actions, a Merchant Marine and Fisheries Committee report contained the following admonition:

Stated most charitably, the committee disagrees with this interpretation of NEPA. The history of the Act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context.[337]

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[329] *Id. at 116.*
[330] *Foley Bros. v. Filardo, 336 U.S. 281, 287 (1949).*
[331] *Morrison v. Nat'l Australia Bank, 561 U.S. 247, 255 (2010).*
[332] *Kiobel v. Royal Dutch Petroleum Co., 569. U.S. 108, 124–25 (2013).*
[333] *See, e.g., Nat. Res. Def. Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1366 (D.C. Cir. 1981).*
[334] *Envtl. Def. Fund v. Massey, 986 F.2d 528, 533 (D.C. Cir. 1993).*
[335] *Nat'l Org. for the Reform of Marijuana Laws v. Dep't of State, 452 F. Supp. 1226, 1233 (D.D.C. 1978); see also, U.S. v. Nippon Paper Indus. Co., 109 F.3d 1 (1st Cir. 1997).*
[336] *See, e.g., 115 CONG. REC. 29,082 (1969) ("Although the influence of U.S. policy will be limited outside its borders, the global character of ecological relationships must be the guide for domestic activities. Ecological consideration should be infused into all international relations."); 115 CONG. REC. 26,576 (1969) ("It is an unfortunate fact that many and perhaps most forms of environmental pollution cross international boundaries as easily as they cross state lines."). 42 U.S.C. § 4321 ("The purposes of this chapter are . . . to promote efforts which will prevent or eliminate damage to the environment and biosphere"); 42 U.S.C. § 4332(F) (recognizing the "worldwide and long-range character of environmental problems").*
[337] *Administration of the National Environmental Policy Act, Merchant Marine and Fisheries Committee, H.R. REP. NO. 92-316, pt. 1, at 53 (1971).*

When Congress was debating proposed legislation (which did not pass) to exempt the Export-Import Bank from NEPA, Senator Muskie stated that he was amazed at: [b]ureaucratic descriptions of legislative intent 180 degrees opposite from what I know the actual legislative intent to have been. The thought never occurred to me that somewhere down the line nine years later the argument would be made that because major Federal actions impacting on areas outside the United States were not specifically referenced that, therefore, they were excluded.[338][339]

The Agency for International Development (A.I.D.) has followed regulations implementing NEPA since 1976 for projects such as irrigation projects, road construction, water and sewage projects and resettlement projects.[193] When site specific NEPA analysis is prepared for actions in host countries, A.I.D. representatives hold consultations with the host government throughout the process, including appropriate public participation.[340][341]

NEPA also applies to transboundary effects caused by U.S. federal agency actions. In *Backcountry Against Dumps v. Perry*,[195] the Court held that NEPA required DOE to consider the effects in Mexico of a proposed transmission line that would be partly constructed in the United States and partly in Mexico.[342] Similarly, the Bureau of Reclamation was required to analyze the impacts of transferring water from the Missouri River Basin to the Hudson Bay Basin and the associated concerns regarding biota transfer in Canada.[343]

In short, in many circumstances that do not involve the presumption against extraterritoriality, agencies have a responsibility to assess actions and effects outside of the United States. CEQ should not proceed with rulemaking on this issue.

D. Proposed §§1501.1(a)(2) and 1507.3(c) - NEPA Threshold Applicability, Non-Discretionary Actions.

This proposed threshold would state that actions that are non-discretionary actions, in whole or in part, are not subject to NEPA. The CEQ regulations and applicable case law make it clear that an agency has to have some discretion for NEPA's procedural requirements to apply.[344] This makes sense given the relationship of the NEPA process to decisionmaking. On the other hand, far too often, we have found that agencies proffer a much more modest view of their discretion when considering

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[338] *Export-Import Bank Amendments of 1978: Hearings before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 2d Session (1978), p. 220.*
[339] *C.F.R. pt. 216.*
[340] *Id. at § 216.8.*
[341] *WL 3712487 (S.D. Cal. 2017).*
[342] *Id. at 4–5.*
[343] *Manitoba v. Salazar, 691 F. Supp. 2d 37, 51 (D.D.C. 2010); see also, Swinomish Tribal Cmty.v. FERC, 627 F. 2d 499 (D.C. Cir. 1980); Wilderness Soc'y v. Morton, 463 F.2d 1261 (D.C. Cir. 1972).*
[344] *A "proposal," for purposes of NEPA "exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision one or more alternative means of accomplishing that goal. . . ." 40 C.F.R. § 1508.23. See also, State of South Dakota v. Andrus, 614 F.2d 1190, 1193 (8th Cir. 1980), Milo Cmty. Hosp. v. Weinberger, 525 F.2d 144, 148 (1st Cir. 1975).*

NEPA's applicability than they do in other contexts. And agencies have sometimes incorrectly asserted that a statutory authorization to undertake an action excuses the need to comply with NEPA.[199]

Even if legislation directs an agency to construct a particular structure at a particular location, the agency typically retains considerable discretion as to design, construction and mitigation measures. While we believe it is unnecessary to include this provision in the CEQ regulations at all, we particularly object to the proposed language suggesting that an action is not subject to NEPA if there is a lack of discretion "in part". If such a situation truly exists, the agency must still comply with NEPA for the remainder of the action and explain its rationale for not analyzing alternatives for the non-discretionary portion of the action. The current wording invites confusion and abuse and should be removed or modified.

E. Proposed §§ 1501.1(a)(4) and 1507.3(c) - NEPA Threshold Applicability and Congressional Intent.

This provision invites agencies to judge for themselves whether Congress intended there to be compliance with NEPA for a particular type of action. The preamble does not identify any legal authority or justification for this proposal and we do not believe there is any such authority. Congress included in NEPA the admonition, as we need to keep reminding CEQ, that agencies should implement the provisions of Section 102(2) "to the fullest extent possible."[200] Congress is quite capable of exempting either a class of actions or a particular project from NEPA and has done so unequivocally on several occasions. The U.S. Supreme Court has stated quite clearly that:

NEPA's instruction that all federal agencies comply with the impact statement requirement – and with all the other requirements of § 102 – 'to the fullest extent possible,' 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. This conclusion emerges clearly from the statement of the Senate and House conferees, who wrote the 'fullest extent possible' language into NEPA" 'The purpose of the new language is to make it clear that each agency of the Federal Government *shall* comply with the directives set out in [§ 102(2)] *unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal

> Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid

[199] *See*, *e.g.*, *Friends of Columbia Gorge*, *Inc. v. U.S. Forest Serv.*, 546 F. Supp. 2d 1088, 1094– 95 (D. Or. 2008).
[200] 42 U.S.C. § 4332.

> compliance.'115 Cong. Rec. 39703 (1969) (House conferees. *See id*. at 40418 (Senate conferees). *See also* 40 CFR §1500.4(a) (1975).[345]

Courts have also been clear that legislation authorizing a particular project does not relieve an agency from the obligation to evaluate the project under NEPA. In *Izaak Walton League of America v. Marsh*,[346] appellants argued that Congressional authorization for a particular lock and dam project on the Mississippi River demonstrated that Congress did not mean for the Corps to undertake the NEPA process subsequent to the authorization's passage. Citing to the U.S. Supreme Court's consistent position that repeal by implication is disfavored, the Court held that passage of the authorization bill did not relieve the Corps from its NEPA obligations.[347] As the Court said in *Izaak Walton*:

> We note, however, that NEPA itself states that all government action must be taken in accordance with the goals set forth in the Act. [cite omitted] Moreover, Congress has shown that it is fully capable of expressing its desire to exempt projects from NEPA. . . . . Given Congress' clearly expressed desire to ensure that all government actions are taken in accordance with NEPA, and its ability to expressly override the requirements of the Act, we believe that, even when substantive legislation is involved, repeal by implication should be found only in the rarest of circumstances. Absent very strong evidence in the legislative history demonstrating a congressional desire to repeal NEPA, or a direct contradiction between that Act and the new legislation, claims under NEPA should be reviewed."[348]

Thus, the law is already clear that the only statutory conflict that can excuse an agency from NEPA compliance is when Congress "expressly prohibits" or makes full compliance with some aspect of NEPA's requirements "impossible". CEQ's proposed invitation to agencies to second guess Congress' intent invites agencies to go down an unlawful pathway. This proposal should be withdrawn.

F. Proposed § §1501.1(5) and 1507.3(b)(6) - NEPA Threshold Applicability and Functional Equivalence.

These proposed sections invite all agencies to substitute any other analysis or process for NEPA. According to the proposed text, the analysis or process could be mandated by another law or by an executive order for proposed regulations or in the case of other proposed actions, apparently a process developed by the agency itself. The open invitation to abandon the NEPA process comes with three general criteria that are so broad and vague as to be open to multiple interpretations: 1) there are substantive and procedural standards that ensure full and adequate consideration of environmental issues; 2) there is public participation before a final alternative is selected, and 3) a

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[345] *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1976) (emphasis added).*
[346] *Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir. 1981).*
[347] *Id. at 368. The court also noted that prior decisions had come to the conclusion that Congressional appropriations do not eliminate an agency's responsibility to comply with NEPA. Id. at 367.*
[348] *Id. at 367.*

purpose of the review that the agency is conducting is to examine environmental issues. The preamble provides no legal rationale for this proposal.[349]

While some public participation is required under CEQ's proposal, it does not have to be equivalent to NEPA. Limiting public participation runs counter to CEQ's long standing position that "public scrutiny [is] essential to implementing NEPA."[206] Allowing another statutory process that is not primarily focused on environmental issues to replace the NEPA process runs counter, of course, to the whole purpose of NEPA. And there is no requirement that reasonable alternatives, the very core of NEPA analyses, need to be analyzed. In fact, pretty much any process that includes some look at environmental issues and some modicum of public participation could, under the proposed rule, be substituted for NEPA.

> There is neither a policy rationale nor a legal basis for this wholesale abandonment of NEPA in CEQ's regulations. The government-wide implementation of the functional equivalence exemption would trigger considerable debate in every agency and within every affected community of interest. Is this meant to be the end of NEPA implementation for federal land management planning? For military installation planning? For fishery management plans? For all permit processes? Would all of these various other processes need to be supplemented with elements that they currently rely on the NEPA process for in reaching a decision? What level of public participation would suffice?

Throughout NEPA's fifty years of implementation, the functional equivalence doctrine has been narrowly approved by federal courts for the Environmental Protection Agency (EPA) in the context of implementing certain pollution control laws such as particular activities under the Clean Air Act[350] and RCRA.[351] Those cases have rested on the notion that EPA's mission in carrying out those particular statutory responsibilities was primarily environmental protection. That specific application of the functional equivalence doctrine has support in NEPA's legislative history.[209] But as the D.C. Circuit said in the context of a decision applying the functional equivalent doctrine to EPA's cancellation of most uses of DDT, "We are not formulating a broad exemption from NEPA for all environmental agencies or even for all environmentally protective regulatory actions of such agencies. Instead, we delineate a narrow exemption from the literal requirements for those actions which are undertaken pursuant to sufficient safeguards so that the purpose and policies behind NEPA will necessarily be fulfilled."[352]

> In light of the Bureau of Land Management's recent statement that they may promulgate regulations exempting the planning process under the Federal Land Policy and Management

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[349] See, 85 Fed. Reg. at 1695. [206] 40 C.F.R. § 1500.1(b).

[350] Portland Cement Ass'n v. Ruckelhaus, 486 F.2d 375 (D.C. Cir. 1973).

[351] State of Alabama ex rel. Siegelman v. U.S. EPA, 911 F.2d 499 (11th Cir. 1990). [209] Colloquy between Senator Boggs and Senator Muskie, differentiating between "what we might call the environmental impact agencies rather than the environmental enhancement agencies", identifying as the later the Federal Water Pollution Control Administration and the National Air Pollution Control Administration, later subsumed into EPA, 115 Cong. Rec. 40425 (December 20, 1969).

[352] Environmental Defense Fund v. EPA, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

> Act from NEPA,[353] it is important to understand that when the Senate deliberated on the passage of NEPA, they were fully cognizant of the "procession of landmark conservation measures on behalf of recreation and wilderness, national recreational planning, national water planning and research . . . urban planning for open space . . ." and other related measures.[354] However, Congress also perceived a "very real reason for concern" given the absence of an environmental policy that applied to all federal agencies and a procedure that would be used by "all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment. This would be true of the licensing functions of independent agencies as well as the ongoing activities of the regular Federal agencies."[355]

Courts have rejected attempts by other agencies to utilize the functional equivalence doctrine, including attempts by the Forest Service for timber harvests,[356] the U.S. Fish and Wildlife Service for sport hunting regulations in national wildlife refuges around the country,[357] and the National Marine Fisheries service for issuance of permits under the Marine Mammal Protection Act.[358] As the District Court in Alaska said in the latter decision:

> The mere fact an agency has been given the role of implementing an environmental statute is insufficient to invoke the 'functional equivalent' exception. To extend the doctrine to all cases in which a federal agency administers a statute which was designed to preserve the environment would considerably weaken NEPA, rendering it inapplicable in many situations. Given that NEPA requires that '*all agencies* of the Federal Government' shall 'to the fullest extent possible' incorporate the EIS into their decision making, it is clear Congress did not intend this result. *See* 42 U.S.C. §4332.[359]

CEQ now proposes to go far beyond Congress' intent and case law and open functional equivalence to every agency in the government, regardless of their mission. This is a prescription for a complete lack of predictability with agencies able to create ad hoc processes on a case by case basis. A less efficient way to manage the environmental review process can scarcely be imagined. This proposal should be withdrawn.

> G. Proposed § 1506.9 - Use of functional equivalence doctrine for proposed regulations and Proposed § 1502.4, Deletion of regulations as a type of action appropriately subject to preparation of a programmatic EIS.

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[353] https://thehill.com/policy/energy-environment/481477-blm-weighs-cutting-environmentalreview-when-crafting-public-lands.

[354] *Report of the Senate Committee on Interior and Insular Affairs to accompany S. 1075, No. 91296, July 6, 1969, p. 14.*

[355] *Id.*

[356] *Texas Committee on Natural Resources v. Bergland, 573 F.2d 201, 208 (5th Cir. 1978), reh'g denied, 576 F.2d 931 (5th Cir. 1978).*

[357] *Fund for Animals v. Hall, 448 F. Supp. 2d 127, 134 (D.D.C. 2006).*

[358] *Jones v. Gordon, 621 F. Supp. 7, 13 (D Alaska 1985), aff'd in part, rev'd in part, 792 F.2d 821 (9th Cir. 1986).*

[359] *Id. at 13.*

We strongly oppose proposed Section 1506.9 that authorizes the blanket utilization of other processes to replace the NEPA process for proposed regulations. CEQ's stated rationale for this revision is that it would "promote efficiency and reduce duplication in the assessment of regulatory proposals."[218] To the contrary, the proliferation of a variety of processes would promote inefficiency. The proposed change is also unlawful.

There is no doubt that proposed regulations are actions for purposes of NEPA.[219] The question, then, becomes why CEQ would seek to substitute other processes for the NEPA process for this entire class of actions. To the extent that any other processes applicable to rulemaking contain similar requirements as the NEPA process, just as for all other actions subject to NEPA, CEQ has consistently directed the NEPA process to be integrated into those processes. The current regulations themselves direct agencies to prepare draft EISs "concurrently with and integrated with" environmental impact analyses and other requirements of other laws and executive orders "to the fullest extent possible".[220]

CEQ has emphasized the need for agencies to comply concurrently, rather than sequentially, with all applicable requirements for a proposed action for many years. For example, CEQ's *Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act*[221] states in relevant part that:

> Agencies must integrate, to the fullest extent possible, their draft EIS with environmental impact analyses and related surveys and studies required by other statutes or Executive Orders. Coordinated and concurrent environmental reviews are appropriate whenever other analyses, surveys, and studies will consider the same issues and information as a NEPA analysis. Such coordination should be considered when preparing an EA as well as when preparing an EIS. Techniques available to agencies when coordinating a combined or a concurrent process include combining the scoping, requests for public comment, and preparation and display of responses to public comments. [fn. 61. 40 CFR 1502.25(a). Examples provided in the Regulation are: The Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*); the

[218] 85 Fed. Reg. at 1,705.

[219] Indeed, one of the earliest appellate court decisions interpreting NEPA dealt with proposed regulations, *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1972), *cert. denied*, 404 U.S. 942 (1972). *See also*, *New York v. U.S. Nuclear Regulatory Comm'n*, 824 F.3d 1012 (D.C. Cir. 2016); *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8 (D.D.C. 2007), *American Public Transit Ass'n v. Goldschmidt*, 485 F. Supp. 811 (D.D.C. 1980), *rev'd on other grounds*, 655 F.2d 1272 (D.C. Cir. 1981).

[219] 40 C.F.R. § 1502.25(a).

[220] 40 C.F.R. § 1502.25(a).

[221] 77 Fed. Reg. 14473 (March 12, 2012).

> National Historic Preservation Act (16 U.S.C. 470 *et seq.*); and the Endangered Species Act (16 U.S.C. 1531 *et seq.*).]
>
> The goal should be to conduct concurrent rather than sequential processes whenever appropriate. In situations where one aspect of a project is within the particular expertise or

jurisdiction of another agency an agency should consider whether adoption or incorporation by reference of materials prepared by the other agency would be more efficient.

A coordinated or concurrent process may provide a better basis for informed decision making, or at least achieve the same result as separate or consecutive processes more quickly and with less potential for unnecessary duplication of effort. In addition to integrating the reviews and analyses, the CEQ Regulations allow an environmental document that complies with NEPA be combined with a subsequent agency document to reduce duplication and paperwork. [fn.62, 40 C.F.R.

15006.4, 1500.4(k), 15004(n).][360]

There is no legal authority or justification for a wholesale substitution of any other process for the NEPA process. Regulatory review and the NEPA process have fundamentally different purposes. The details of the processes differ; for example, regulatory review has no requirement for scoping, nor does it provide for public meetings held in affected communities. Substituting the executive order-based regulatory impact analysis process for the statutorily mandated NEPA process is unacceptable and this proposed regulation must not be carried forward in any final rulemaking. Such a substitution would likely also eliminate judicial review given that Executive Order 12866 and subsequent related executive orders, like most executive orders, includes language that states that it is not enforceable by law.[361] As one federal court decision stated in response to an argument that the Administrative Procedures Act is sufficient to replace NEPA because it affords public notice comment, "An exception of such staggering breadth would render NEPA meaningless."[224]

Finally, regulations should be included in Section 1502.4(b) describing the types of actions that are appropriately subject to preparation of a programmatic EIS.[225]

Neither of these proposed changes should go forward.

H. <u>Proposed §1501.1(b) - NEPA threshold applicability analysis.</u>

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[360] *Id. at 14478-79. See also, Council on Environmental Quality and Governor's Office of Planning and Research, State of California, NEPA and CEQA: Integrating Federal and State Environmental Reviews" (February, 2014) for a step-by-step guide to how to integrate compliance with NEPA and a state environmental quality review act to avoid duplication of both process and documentation.*

[361] *E.O. 12866, 58 Fed. Reg. 51,735 (October 4, 1993)("§10 Judicial Review. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person"); E.O. 13563, 76 Fed. Reg. 3,821 (January 21, 2011) (supplementing EO 12866 and reading "§ 7(d)This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person").* [224] *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation, 818 F. Supp. 2d 214, 237 (D.D.C. 2011).*

This provision would allow federal agencies to make determinations about whether particular actions are exempt from NEPA under one of the many theories discussed above either in their agency NEPA procedures or an individual basis for a particular proposed action. First, we strongly disagree that there are legally sound rationale for the proposed "exemptions" discussed above. To the extent an agency believes that there is a class of actions exempt from NEPA, the agency should identify that in its draft NEPA procedures subject to public review and comment. Inviting this type of analysis on an ad hoc basis invites behind-closed-door negotiations between agencies and project proponents and will lead to confusion, inconsistency, and inefficiency as well as likely resulting in an unprecedented proliferation of litigation.

V. FOR THOSE ACTIONS THAT WOULD REMAIN SUBJECT TO NEPA UNDER THE PROPOSED REVISIONS, CEQ'S PROPOSAL WOULD ILLEGALLY ELIMINATE KEY COMPONENTS OF EFFECTS ANALYSIS.

A. Proposed § 1508.1(g) - Cumulative Effects.

CEQ's shocking and arbitrary proposal to delete cumulative impacts from all levels of NEPA analysis cannot stand. It is true, as the preamble states, that NEPA simply references environmental impacts and effects and does not use the "terms direct, indirect and cumulative impacts." It also doesn't contain the term "environmental impact statement," or, for that matter, the term "reasonably foreseeable". However, Section 102(2)(C) of NEPA directs agencies to provide a "detailed statement" on "the environmental impacts". It doesn't say a subset of impacts or impacts that are convenient to analyze.

NEPA's legislative history is replete with references to the complexity of environmental impacts, the consequences of "letting them accumulate in slow attrition of the environment" and the "ultimate consequences of quiet, creeping environmental decline" - all of which pointed to the need for an analysis of proposed impacts beyond the immediate, direct effects of an action[226]. For 50 years, CEQ has interpreted the law to accomplish just that.

[225] We have further comments on the treatment of programmatic EISs in the proposed revisions, *supra* in Section IV (C).

[226] 115 Cong. Rec. 29070 (October 8, 1969); *see also*, report accompanying S. 1075, National Environmental Policy Act of 1969, Senate Committee on Interior and Insular Affairs, July 9, 1969.

Within a few months of its establishment, CEQ explained that, "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impacts of the action proposed (and of further actions contemplated)."[362][363] It also explained that the requirement in Section 102(2)(C) of NEPA to identify

[362] *Council on Environmental Quality: Statements on Proposed Federal Actions Affecting the Environment; Interim Guidelines, April 30, 1970, Section 5(b) (filed with Fed. Reg. May 11,*

[363] *), available in Environmental Quality, The First Annual Report of the Council on*

"the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" in the detailed statement (now known as an EIS) required the agency "to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations."[364] CEQ has consistently interpreted NEPA ever since then as requiring analysis and consideration of cumulative effects; indeed, it has been a primary focus of CEQ's work. In 1973, CEQ's revised Guidelines repeated the statement from the 1971 Guidelines with the additional admonition to agencies that:

> In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulative considerable. This can occur when one or more agencies over a period of years put into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major decision. In all such cases, an environmental statement should be prepared if it reasonable to anticipate a cumulatively significant impact on the environment from Federal action[365].

Federal courts recognized the importance of cumulative effects analysis long before CEQ's 1979 regulations. In 1975, the Court of Appeals for the Second Circuit reversed a lower court decision in part on the grounds that the analysis in the EIS at issue evaluated only the effects of the particular proposed action, a proposal for dumping two million cubic yards of polluted spoil in Long Island Sound.[366] The Court made it clear that the Navy should have considered the cumulative environmental impacts of other closely related projects (e.g., the Corps' further deepening of the Thomas River channel, the maintenance

of that channel, the dredging of the Thames by the Electric Boat Division of General Dynamics and the Coast Guard's Thames River dredging project in its NEPA analysis. Alluding to the legislative history referenced above, the Court pointed out that:

> As was recognized by Congress at the time of passage of NEPA, a good deal of our present air and water pollution has resulted from the accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources. 'Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.' S. Rep. No. 91296, 91 Cong., 1st Sess. 5 (1969). NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more

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Environmental Quality, 288 (1970) available at https://www.slideshare.net/whitehouse/august1970-environmental-quality-the-first-annual-report-of. The Interim Guidelines were published in final form with similar text. 36 Fed. Reg. 7,724 (April 23, 1971).

[364] *Id. at Section 7(a)(iv); see also. 42 U.S.C. § 4331(b)(1).*

[365] *Council on Environmental Quality, Guidelines, Preparation of Environmental Impact Statements, 38 Fed. Reg. 20550, 20551 (August 1, 1973).*

[366] *Natural Resources Defense Council v. Callaway, 524 F.2d 79, 87-90 (2nd Cir. 1975).*

> comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration. [cites omitted]. The fact that another proposal has not yet been finally approved, adopted or funded does not foreclose it from consideration, since experience may demonstrate that its adoption and implementation is extremely likely.[367]
>
> The Court explained that the fact that the other dredging projects in question had not been proposed by the Navy and, in fact, had not yet been approved were not the deciding factors. Rather, "all are to occur in the same geographical area, all are related in that they involve dredging and disposal of spoil, all present similar problems of pollution, and the spoil from each project is likely to be dumped in the New London area. Clearly the projects are closely enough related so that they can be expected to produce a cumulative environmental impact which must be evaluated as a whole."[368]

In 1976, the U.S. Supreme Court acknowledged the importance of cumulative impacts. While ruling that in the particular situation at issue an EIS was not required, the

Court stated that, "when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequence must be considered together. [369] The Court reasoned that "[o]nly through *comprehensive* consideration of pending proposals can the agency evaluate different courses of action."[370][371][372]

Given this long and consistent interpretation of NEPA, it likely surprised no one that CEQ included a regulatory definition of cumulative effects[235] when it promulgated the current regulations. In fact, at the time the regulations were issued in final form in 1978, the preamble did not identify any comments critical of the requirement to analyze cumulative effects.[236] Similarly, cumulative effects were not the subject of any of the "40 Most Asked Questions Regarding the NEPA Regulations."[373]

The Fifth Circuit Court of Appeals also provided important guidance to agencies by laying out a widely accepted step-by-approach to analyzing cumulative effects in *Fritiofson v. Alexander*, a case involving permits for dredging canals around West Galveston Island, Texas.[238] The Court's direction was simple to understand and feasible to follow, consisting of 1) identifying the area in which effects of the proposed project will be felt; 2) identifying the impacts expected in that area from the proposed project; 3) identifying past, present and reasonably foreseeable actions that have had or are expected

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[367] *Id. at 88-89.*
[368] *Id. at 89.*
[369] *Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976).*
[370] *Id. (emphasis added).*
[371] *C.F.R. § 1508.7.*
[372] *Fed. Reg. 55978 (November 29, 1978).*
[373] *Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (March 23, 1981).*

to have impacts in the same area; 4) identifying the expected impacts from these other actions, and 5) considering the overall impacts that can be expected if the individual impacts are allowed to accumulate.[239]

It is especially tragic that CEQ would attempt to abandon the requirement to analyze cumulative effects even as our country and our world are increasingly experiencing the impacts of cumulative change, for as one court stated, "the impact of greenhouse gas emission on climate change is precisely the kind of cumulative impacts analyses that NEPA requires agencies to conduct."[240] In fact, this proposed and wrenching change in the NEPA process is so fundamental and so ill advised that one has to ask why this is being proposed now. The preamble explanation is strikingly brief to justify the removal of the most important requirements in the NEPA regulations. The preamble alludes primarily to wanting agencies to focus their time and resources on the most significant effects rather than producing "encyclopedic documents" that include irrelevant or inconsequential information.[241] But the direction to avoid producing encyclopedic documents and to focus on the most significant effects simply mirrors CEQ's current regulations.[242]

In fact, contrary to the preamble's suggestion that the requirement to assess cumulative impacts diverts agencies from focusing their time and resources on the most significant effects, leading to excessively long documentation that includes irrelevant or inconsequential information, cumulative effects analysis has lead to some important changes in agency decisionmaking. Sometimes cumulative impacts are, in fact, the most significant effects of an action.

> One example is the U.S. Forest Service's 2019 decision not to allow oil and gas leasing in the Ruby Mountains of Humboldt-Toiyabe National Forest in Nevada, expressly based on its analysis of cumulative impacts under NEPA. In response to a request from BLM to offer 52,533 acres of Forest Service lands in the Ruby Mountains for leasing, USFS initially proposed to make the lands available for leasing, subject to stipulations to

[238] *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985), *abrogated by Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992).

[239] *Id*. at 1245. *See also*, *Grand Canyon Trust v. FAA*, 290 F.3d 339 (D.C. Cir. 2002). [240] *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508 (9th Cir. 2007), amended at 538 F.3d 1172 (9th Cir. 2008).

[241] 85 Fed. Reg. at 1708.

[242] 40 C.F.R. § 1500.1.

protect surface resources.[374] Based on the analysis in an EA that the Forest Service prepared, the Forest Supervisor concluded that, "Even with multiple No Surface Occupancy stipulations applied, the cumulative effects would be noticeable. These effects include increased noise, dust and light pollution, and disturbance to wildlife and fisheries. These adverse effects outweigh the benefits that could result

[374] *See USDA Forest Service, Ruby Mountains Oil and Gas Leasing Availability Environmental Assessment, March 2019, at 8, available at https://www.fs.usda.gov/nfs/11558/www/nepa/107601_FSPLT3_4630840.pdf and at Attachment E.*

from oil and gas development."[375] The Forest Supervisor stated that his final decision to select the No Leasing Alternative instead was based on the combined impact of a list of "primary factors" that included these cumulative effects.[376] Notably, these impacts were not only cumulative, but also indirect effects in the Forest Service's view, as the EA stated: "For the majority of resources analyzed, the effects from the leasing decision would be indirect since no ground disturbing activities are authorized at the leasing stage."[377] In sum, the analysis of indirect cumulative effects played a primary role in reversing the Forest Service's position from proposing to allow leasing to instead making the lands unavailable for oil and gas development.

Another example is the Tennessee Valley Authority's (TVA) 1993 decision to deny requests from three companies separately seeking authorization to build barge terminals along a 12-mile stretch of the Tennessee River in Alabama and Tennessee that would serve adjacent wood chip mills,[378][379] which was expressly based on the analysis of cumulative impacts in its final EIS. *Chip Mill Terminals on the Tennessee River—Record of Decision.*[248] TVA identified the no action alternative as the preferred one "after weighing the potential benefits of the requests with the likelihood of substantial, cumulative localized impacts and the risk of significant timber harvesting impacts." *Id*. at 28,431. The cumulative impacts were traffic associated with the chip mills that would be served by the barge terminals. *See id*. at 28,432–33 ("In addition to the potential risk of significant timber harvesting impacts, localized impacts in the vicinity of the chip mill facilities themselves are of concern to TVA. TVA estimates that the movement of logs into the three chip mills would add approximately 1,080 truck movements to the daily average traffic flows in and around South Pittsburg. On State Route 156, approximately 93 trucks per hour (or more than one per minute) would be added…. the potential cumulative localized impacts, especially truck traffic impacts, are a serious concern."). Although TVA recognized that an action alternative that required obtaining agreement from the state forestry agencies, the mill operators, the forestry associations, and the timberland owners to employ better protective practices was environmentally preferable, it was unable to obtain the necessary agreements, and therefore selected the no action alternative. *Id*. at 28,431. Whereas the *cumulative* localized impacts were a key factor in the decision, the final EIS specifically noted that the "localized environmental impacts associated with each mill by itself are expected to be insignificant on an individual basis."[380]

Further, the TVA decision to deny the barge terminal authorizations also "weighed heavily" the indirect effects on ESA-listed wildlife from increased timber harvesting associated with the three chip mills. TVA explained that:

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[375] *USDA Forest Service, Decision Notice and Finding of No Significant Impact for Ruby Oil and Gas Leasing Availability Analysis, May 2019, at 3, available at https://www.fs.usda.gov/nfs/11558/www/nepa/107601_FSPLT3_4646040.pdf and at Attachment D.*

[376] *USDA Forest Service, Decision Notice and Finding of No Significant Impact for Ruby Oil and Gas Leasing Availability Analysis at 2-3.*

[377] *USDA Forest Service, Ruby Mountains Oil and Gas Leasing Availability Environmental Assessment, March 2019, at 15.*

[378] *One of the companies was also seeking permission from TVA related to building a chip mill facility.*

[379] *Fed. Reg. 28,429 (May 13, 1993). Available at Attachment F.*

[380] *Tennessee Valley Authority, Final Environmental Impact Statement Chip Mill Terminals on the Tennessee River, Feb. 1993, Volume 1, at 32. Available at Attachment G.* [250] *58 Fed. Reg. 28,432.*

> Although TVA does not think that the Endangered Species Act precludes approving one or more of the requests, TVA has weighed heavily the Service's technical determination of likely impacts to listed species if harvesting occurs. TVA's own assessment of potential impacts to listed species concluded that some species could be significantly impacted depending on where and how timber harvesting may occur.[250]

Thus, even though TVA believed that its decision to deny the authorizations for the barge terminals was not required by the ESA, the analysis of significant impacts of timber harvesting, along with the analysis of localized cumulative impacts, were the driving factors that led TVA to select the no action alternative.

Reference is also made in the preamble to the notion that determining the geographic and temporal scope of such effects "has been difficult."[381][382] Agencies already need to determine the appropriate geographic and temporal scope of all impacts, even for direct impacts. There is no explanation given as to why the guidance CEQ has provided in the handbook on cumulative effects is inadequate or what particular aspects of this work is the most challenging. Ironically, we note that E.O. 12866, "Regulatory Planning and Review"[252] which CEQ suggests might be used as a substitute for the NEPA process for proposed regulations, requires agencies to assess the impact of cumulative regulations on a particular business sector, communities and government entities.[383]

While federal courts have found some NEPA documents to be legally inadequate because of an agency's failure to assess cumulative effects, the identified problems are quite amenable to being addressed (and often are in revised documents). Common failures include presenting general, broad statements "devoid of specific, reasoned conclusions"[384] or identifying reasonably foreseeable actions that will affect the same resource as the proposed action but then failing to actually do the analysis.[255] More recently, federal courts have held that agencies have failed to meet the challenge of assessing the incremental impacts of proposed oil and gas projects on climate change. For example, in its NEPA analyses for oil and gas leasing on federal land in three western states, the Bureau of Land Management's (BLM) documents acknowledged that the additional oil and gas wells it was considering would contribute incrementally to total regional and global GHG emission levels.[256] BLM declined to go further, arguing that in order to analyze or disclose cumulative climate impacts the agency would have to identify every past, present, or reasonably foreseeable project on earth to produce a separate cumulative impact analysis. The reviewing court correctly stated that NEPA does not require that feat. But as the court noted, there is often an option between global analysis and nothing, and here, the court directed BLM to quantify emissions from individual leasing decisions when added to GHG emissions from other BLM projects in the region and nation. "To the extent other BLM actions in the region – such as other lease sales – are reasonably foreseeable when an EA is issued, BLM must discuss them as well."[257]

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[381] *Ibid. at 1708.*
[382] *Fed. Reg. 51735 (October 4, 1993).*
[383] *See id. § 1(b)(11).*
[384] *Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 811-12 (9th Cir. 1999)*

Neither the vague statements in the preamble nor the fact that agencies have lost some cases because of their failure to follow the current regulation are justification for reversing CEQ's long held position articulated through multiple notice and comment periods and upheld by dozens of court opinions. CEQ's decision to bar consideration of cumulative effects will have real world environmental consequences by thwarting the development of information that has in the past altered agency decision-making. CEQ must withdraw this arbitrary proposal. If the agencies need further guidance on how to analyze cumulative effects, CEQ can provide that guidance. But it cannot obliterate a fifty-yearold legal requirement that is based on consistent interpretation of the law.

Additionally, CEQ asks whether it should codify any aspects of its proposed GHG guidance in the regulation, and if so, how CEQ should address them in the regulations.

We do not think CEQ should include its proposed GHG guidance in the regulations in any form. The courts have made it clear for many years that climate change is among the impacts to be assessed.[258] CEQ's draft guidance fell woefully short of the mark in many respects. Among other problems, it significantly failed to reflect relevant judicial decisions regarding issues such as quantification of GHG emissions and analysis of the

[255] *See*, *e.g.*, *Sierra Club v. U.S. Dept. of Agr.*, 116 F.3d 1482 (7th Cir. 1997) (unpublished table decision) ("the discussion fails to analyze the effects of the various activities in combination . . . to determine whether the sum of these incremental disturbances will create a significant detrimental effect.").

[256] *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 56 (D.D.C. 2019).

[257] *Id.* at 77. *See also*, The Wilderness Society, "Measuring the Climate Impact of Trump's Reckless Leasing of Public Lands," (July 16, 2019),

https://www.wilderness.org/sites/default/files/media/file/TWS%20Report_Measuring%20the%20climate%20impact%20of%20Trump%20reckless%20leasing_July%202019.pdf (last accessed July 28, 2019).

[258] *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003); *Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003).

actual effects resulting from them, the scope of that analysis, upstream and downstream effects, alternatives, cumulative effects analysis, the effects of climate change on vulnerable populations and on the proposed action itself. We are including more comprehensive criticisms submitted during the comment period on that draft guidance as part of the record with this letter.[259]

B. Proposed § 1508.1(g) - Indirect Effects.

CEQ's proposed deletion of the definition and references to indirect effects is unlawful and will lead to confusion and litigation. Like cumulative effects, indirect effects have long been the subject of CEQ direction and guidance and the need for agencies to analyze indirect or secondary effects has also been the subject of numerous federal court decisions. Analysis of indirect effects is required whether CEQ's regulations specify them or not.

Along with the above-noted statements about cumulative effects, CEQ first addressed the need to analyze indirect or secondary effects in the 1970 Interim Guidelines.[260] Those guidelines explained that, "Both primary and secondary significant consequences for the environment should be included in the analysis". The example given of secondary effects – the implications of a proposed action for population distribution or concentration and the effects of such a population change on resources such as water and public services in the area, was included in the 1971 Guidelines.[261] The 1973 Guidelines expanded on this discussion by explaining that:

> "Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e.g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities, or through changes in natural conditions, may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects. Such population and growth impacts should be estimated if expected to be significant (using data identified as indicated in § 1500.8(a)(1) and an assessment made of the effect of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, of the area in question."[262]

[259] Letter from forty-one organizations in response to Docket No. 2019-0002, Attachment H. [260] 35 Fed. Reg. 7390, 7391 (May 12, 1970).

[261] 36 Fed. Reg. 7724, 7725 (Apr. 23, 1973). ("Significant adverse effects on the quality of the human environment include both those that directly affect human beings and those that indirectly affect human beings through adverse effects on the environment.").

[262] 40 C.F.R. § 1500.8(a)(3)(ii) (1973).

CEQ succinctly explained the necessity and challenges of analyzing secondary, or what is now called indirect impacts, in its Fifth Annual Report. In that report, CEQ pointed out that:

> "Impact statements usually analyze the initial or primary effects of a project, but they very often ignore the secondary or induced effects. A new highway located in a rural area may directly cause increased air pollution as a primary effect. But the highway may also influence residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth. For many projects, these secondary or induced effects may be more significant than the project's primary effects."[385]

> In the 1975 annual report, CEQ again pointed out that agencies needed to improve their analysis of secondary impacts as those impacts were often the public's major concerns about

[385] *CEQ, THE FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, 410-11 (1974).*

> various types of development projects, transportation plans and projects involving social and economic effects.[386]

After a discussion of CEQ's work in analyzing secondary effects of public infrastructure projects and sponsoring studies to investigate better methodologies for prediction, CEQ stated that:

"While the analysis of secondary effects is often more difficult than defining the first-order physical effects, it is also indispensable. If impact statements are to be useful, they must address the major environmental problems likely to be created by a project. Statements that do not address themselves to these major problems are increasingly likely to be viewed as inadequate. As experience is gained in defining and understanding these secondary effects, new methodologies are likely to develop for forecasting them, and the usefulness of impact statements will increase."[387][388][389]

CEQ then codified the current definition of indirect effects[266] with no apparent objections or concerns evidenced in the preamble to the current regulations regarding the definition.

Federal courts affirmed that NEPA requires agencies to consider indirect or secondary effects in long before promulgation of the regulations. In *City of Davis v. Coleman*,[267] the Court held that an EIS prepared for a proposed highway interchange in a hitherto agricultural area did not meet NEPA's requirements because it failed to analyze the growth-inducing effects of the proposed interchange. Although the highway agencies maintained that the proposed interchange was for highway safety reasons, there was considerable evidence leading the court to conclude that it was intended to help support what was elsewhere in the record characterized as a "rapid change to urban development."[390] The Court stated that:

> "We think that this is precisely the kind of situation Congress had in mind when it enacted NEPA: substantial questions have been raised about the environmental consequences of federal action, and the responsible agencies should not be allowed to proceed with the proposed action in ignorance of what those consequences will be. NEPA and CEQA require that the interchange's environmental impact be studied and analyzed in good faith before CDHW and FHWA decide whether the project is to be completed as planned, or to be modified or abandoned."[391]

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[386] *CEQ, THE SIXTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, 656 (1975).*
[387] *Id. at 411.*
[388] *C.F.R. § 1508.8(b) (2020).*
[389] *F.2d 661 (9th Cir. 1975).*
[390] *Id. at 674.*
[391] *Id. at 675-76.*

Courts have been clear that when the record shows that growth-inducing impacts or other indirect impacts are reasonably foreseeable, agencies must analyze these impacts.[392][393] Courts have also been clear that the Supreme Court's holding in *Department of Transportation v. Public Citizen*[271] did not obliterate the obligation to analyze indirect effects when they are reasonably foreseeable as a result of an agency's proposed decision. For example, in *Florida Wildlife v. U.S. Army Corps of Engineers*,[272] the court found the Corps' reliance on *DOT v. Public Citizen* to be misplaced when the Corps had jurisdiction over a development and the record showed that the proposed development was explicitly anticipated to serve as a "catalyst for growth".[394] Similarly, the D.C. Circuit held that FERC should have considered potential downstream greenhouse gas emissions from power plants burning natural gas supplied by the proposed pipeline when conducting its NEPA analysis.[395]

The justification for striking the terms "direct" and "indirect" and deleting the definition of "indirect effects" from the regulations is as transparent and inadequate as the justification for deleting the requirement to analyze cumulative effects. The rationale is simply that it is too hard. In fact, we seriously disagree with that proposition.

To the extent agencies are truly having difficulty with how to go about assessing effects, CEQ should be working on further guidance or workshops or whatever would be the best mechanism for transmitting information on how to best and most efficiently meet the goals and requirements of the law. To the extent the difficulties are either self-imposed (for example, by agencies feeling pressured to omit references to climate change) or because they lack the capacity to prepare or oversee adequate NEPA analyses, CEQ should also address those problems. We remind CEQ that lack of agency resources is not a valid excuse for failing to comply with the law. [396] But CEQ cannot arbitrarily delete requirements

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[392] Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs, 109 F.Supp.2d 30, 41 (2006) (holding that the Corps' practice of issuing individual environmental assessments on floating gambling casinos along the Mississippi coast without analyzing the indirect effects of what the Corps' did concede would likely be future development resulting from the proliferating number of gambling barges along the coast).

[393] U.S. 752 (2004). (It should be noted that the decision in Public Citizen also referenced with approval the lead agency's assessment of cumulative effects); See also, id. at 769-70. [272] 401 F. Supp. 2d 1298 (S.D. Fla. 2005).

[394] Id. at 46. See also, Barnes v. U.S. Dep't of Transp., 655 F.3d 1124 (9th Cir. 2011) (finding that the indirect effects of permitting an additional runway at an airport 12 miles west of the City of Portland were so obvious that the FAA had a responsibility to analyze them even absent a comment specifically identifying concerns regarding "growth inducing effects.").

[395] Sierra Club v. Federal Energy Regulatory Comm'n., 867 F.3d 1357, 1374 (D.C. Cir. 2017) ("We conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so."). See also, Wilderness Workshop v. U.S. Bureau of Land Mgmt., 342 F. Supp. 3d 1145 (D. Colo. 2018) ("BLM failed, in part, to take a hard look at the severity and impacts of GHG pollution. Namely, it failed to take a hard look at the reasonably foreseeable indirect impacts of oil and gas.").

[396] Pub. Emps. for Envtl. Responsibility v. U.S. Fish and Wildlife Serv., 177 F. Supp. 3d 146, 155 (D.D.C. 2016) ("The Court is aware of no case condoning an agency's failure to examine alternatives in an EA solely on the ground of unavailability of resources.").

that would strip NEPA analyses down to solely direct effects, thereby recreating one of the fundamental problems that NEPA was intended to address.

For all of the reasons stated above, we strongly oppose both the deletion of the definition of indirect effects in CEQ's regulation and any possible attempt in the final regulation or future rulemaking to affirmatively state that agencies are not required to analyze indirect effects. In fact, agencies are required to analyze the full array of reasonably foreseeable impacts, including indirect effects, along with direct impacts and cumulative impacts. The current regulatory provisions should stand.

C. Proposed § 1508.1(g) - Definition of "Effects or Impacts".

The proposed revision of the definition of effects directs agencies to focus their efforts on an extremely narrow range of what effects would, under the proposed revision, remain to be analyzed once cumulative and possibly indirect effects are eliminated.

In support of amending the definition of effects, CEQ cites two Supreme Court cases with distinct fact patterns that apply proximate cause to NEPA cases.[397][398] As laid out below, the holdings of *Metropolitan Edison* and *Public Citizen* narrowly apply to distinct factual scenarios and cannot be extrapolated to all NEPA cases.

In *Metropolitan Edison*, the Supreme Court attempted to give greater context to the meaning of the terms effects and impacts within NEPA.[277] The *Metropolitan Edison* plaintiffs challenged the proposed restart of one of the reactors at the Three Mile Island Nuclear Power Plant and argued NEPA required the Nuclear Regulatory Commission to consider the threats to the psychological health of residents in an environmental impact statement.[399] In describing the rationale for the effect and impact requirements, the court described the requirements as "like the familiar doctrine of proximate cause from tort law." [400] However, this description is dicta. The court's holding focused on the congressional intent of promoting human welfare and effects on the physical environment.[401] Given this, the court concluded that fear of a nuclear accident did not have a sufficiently close connection to the physical environment and NEPA does not apply. In making this ruling, the operative reasoning was not proximate cause, but the lack of a sufficiently close connection to the physical environment.[402]

Like *Metropolitan Edison*, the facts of *Public Citizen* also involved unique circumstances. *Public Citizen* involved rules issued by the Federal Motor Carrier Safety Administration (FMCSA) that concerned safety regulations for Mexican motor carriers.[403] After issuing the proposed rules, FMCSA issued a programmatic environmental assessment and made a finding of no significant impact.[404] Environmental

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[397] *Dep't of Transp. v. Pub. Citizen, 541 U.S. at 766, (2004); Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. at 766.*
[398] *U.S. at 774.*
[399] *Id. at 768-69.*
[400] *Id. at 774.*
[401] *Id. at 773.*
[402] *Id. at 778.*
[403] *Pub. Citizen, 541 U.S. at 758-79.*
[404] *Id.*

groups filed petitions for judicial review for FMCSA's rules and argued that the rules were promulgated in violation of NEPA.[405] Subsequently, the President lifted a moratorium on qualified Mexican motor carriers and the court of appeals held the EA was deficient for not considering the environmental impact of lifting the moratorium.[285]

In making the holding, the *Public Citizen* court quoted language in *Metropolitan Edison* pointing to the proximate cause requirement in tort law. Ultimately, the court held the EA did not need to consider the environmental effects arising from the entry of Mexican motor carriers. The main reasoning behind this holding was not proximate cause, but that the lifting of the moratorium was a result of the President's actions. The court concluded that FMCSA had no discretion to prevent the entry of Mexican trucks and therefore did not need to consider the environmental effects in its EA.

Courts are reluctant to apply a proximate cause requirement to NEPA based on *Metropolitan Edison* and *Public Citizen*. For example, in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1029, the Ninth Circuit declined to apply *Metropolitan Edison* and its proximate cause analogy to its case. The *Mothers for Peace* court laid out a chain of three events at issue: (1) a major federal action; (2) a change in the physical environment; and (3) an effect.[406] The court found that *Metropolitan Edison* was concerned with the relationship between events 2 and 3 (the change in the physical environment and the effect), whereas the case at bar concerned the relationship between events 1 and 2 (the major federal action and the change in the physical environment).[407] *Mothers of Peace* demonstrates the narrow application of *Metropolitan Edison* to cases where the impact is not on the physical environment and there is a missing link in the chain of causation.[408][409][410]

Public Citizen also has a narrow application. For example, in the 2019 decision in *Birkhead v. FERC*,[289] the D.C. Court of Appeals discussed FERC's claim that it need not consider downstream greenhouse-gas emissions if it 'cannot be considered a legally relevant cause' of such emissions due to lack of jurisdiction over any entity other than the pipeline applicant. The court stated:

> But this line of reasoning [from *Public Citizen]* gets the Commission nowhere. . Because the Commission may therefore 'deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves – even where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline. . . . Accordingly, the Commission is 'not excuse[d]
>
> . . from considering these indirect effects' in its NEPA analysis.[411]

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[405] *Id.* [285] *Id.*

[406] *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1029 (9th Cir. 2006).*

[407] *Id. at 1029-30 (citing Metropolitan Edison, 460 U.S. at 775 n.9).*

[408] *Id. (citing No Gwen All. of Lane County, Inc. v. Aldridge, 855 F.2d 1380, 1385 (9th Cir.*

[409] *)).*

[410] *F.3d 510 (D.C. Cir. 2019).*

[411] *Id. at 519.*

Other courts recognize the limited application of *Public Citizen* and its holding.[412][413] The proposed rule supports the changes using dicta from these two cases but ignores the fact patterns and reasoning behind the holdings. Importantly, the case law cited in the preamble represents narrow factual applications that do not provide an adequate legal basis for the new definition of effects in the regulations. The current definition of effects should be retained.[292]

D. Proposed § 1508.1(aa) - Definition of "reasonably foreseeable".

CEQ proposes to adopt a definition of "reasonably foreseeable" as being "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision."[293] Although the preamble does not specifically say so, we assume this is another attempt to graft tort law onto NEPA law. In the context of tort law, however, the appropriate definition would specifically reference a "reasonably prudent decision maker" and not an "ordinary person". Under the Restatement 2d of Torts, "[i]f an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person."[414]

In the context of NEPA compliance, the decision maker is an actor with a high level of skills, which would be taken into account when determining whether the duty to discuss impacts is present. In other words, the reasonable person is a reasonable decision maker in the agency with the knowledge and skills to evaluate the impacts. And that decision maker must remember that:

> [t]he basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects are known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempts to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.' 'The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible. . . ' [cite omitted] But implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to 'the fullest extent possible.'[415]

We do not believe a definition of "reasonably foreseeable" is needed nor we do we believe that this definition is either in conformance with the law nor helpful. It should not be retained.

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[412] *Fla. Wildlife Fed'n v. United States Army Corps of Eng'rs, 401 F. Supp. 2d 1298, 1324-25 (S.D. Fla. 2005) (rejecting reliance of Public Citizen where the agency has discretion to prevent or manage indirect effects); Sierra Club v. Mainella, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (Public Citizen applies only to "situations where an agency has 'no ability' because of lack of 'statutory authority' to address the impact") Humane Soc'y of the United States v. Johanns, 520 F. Supp. 2d 8, 25-26 (D.D.C. 2007) ("The holding in Public Citizen extends only to those situations where an agency has "no ability" because of lack of "statutory authority" to address the impact. NPS, in contrast, is only constrained by its own regulation from considering impacts on the Preserve from adjacent surface activities").* [292] *40 C.F.R. § 1508.8 (2020).*

[413] *Fed. Reg. at 1730.*

[414] *Restatement (Third) of Torts: Phys. & Emot. Harm § 12 (2010).*

[415] *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C. Cir. 1973).*

CEQ also asks for comments on whether to include in the definition of effects the concept that the close causal relationship is "analogous to proximate cause in tort law," and if so, how CEQ could provide additional clarity regarding the meaning of this phrase."

CEQ should not attempt further imposition of tort law in the context of its regulations implementing NEPA. The two bodies of law have quite different purposes. Tort law is a system of determining liability for harm that has already occurred. A fundamental purpose of NEPA and the NEPA process is to predict and prevent harm. Given those differences, it is quite necessary for NEPA to require a broader analysis of potential impacts than tort law's post-event analysis of causation. Imposing tort concepts into NEPA law narrows the agencies' responsibilities and ultimately is likely to lead to the harm to the environment and to present and future generations that NEPA seeks to prevent.

E. Proposed Deletion of Current Definition of Significance at 40 C.F.R. §1508.27 and Proposed § 1501.3 - Definition of Significance and Appropriate Level of NEPA Review.

[416]With one brief and unenlightening phrase in the preamble, "Because the entire definition of significantly is operative language,"[296] CEQ proposes to eliminate without further explanation the long-standing factors of context and intensity and arbitrarily reference only a subset of the effects that are cognizable under NEPA. If the goal of this exercise is to foster uncertainty and confusion, these proposals are perfect. If, however, as articulated, the goal includes efficiency, these proposed changes are about the most unproductive measures imaginable. The question of whether a proposed action has
"significant impacts" is the single most common inquiry in the context of NEPA compliance. CEQ's proposal to remove clear direction on this point and substitute poorly drafted, inadequate text is irresponsible. For decades, agencies at all levels of government and the public at large have become familiar with the current criteria for significance and used them systematically as a roadmap to evaluate a proposed action. Courts have also used the criteria as a guide.[417]

CEQ fails to justify its proposed change from its well-established previous position. How does the notion that "significantly" is an operational term in NEPA eliminate the need for regulatory direction on how the term should be interpreted? Further, the one brief sentence in the preamble directs the reader to proposed §1501.4 for a further discussion of significance. Proposed §1501.4 addresses categorical exclusions. We assume that the reference is meant to be to proposed § 1501.3 that discusses "the appropriate level of NEPA review".[418] However, that proposed regulation is similarly inadequate. The preamble acknowledges that "significance" is "central to determining the appropriate level of review". But CEQ proposes to "simplify" the definition by omitting "context" and intensity", two key terms with decades of utilization, and substituting ""the potentially affected environment" for context and nothing at all for "intensity" with no explanation of whether there is some difference in

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[416] *Fed. Reg. at 1710.*

[417] *For instance, in Friends of Back Bay v. U.S. Army Corps of Eng'rs, the court considered these factors in determining that consideration of a proposal that would impact an estuary designated as nationally significant by the EPA required preparation of an EIS. 681 F.3d 581, 589 (4th Cir. 2012). Similarly, in Fund for Animals v. Norton, the court used these factors to determine that preparation of an EIS was required before authorizing a permit to the state of Maryland to manage the population of mute swans. 281 F. Supp. 2d 209 (D.D.C. 2003).*

[418] *Id. at 1714.*

meaning intended by the change in terms for "context" and and no substitute for "intensity".[419] Proposed §1501.3 then goes on to identify only two types of effects in this section. Specifically, the proposed revision omits or weakens (with no explanation in the majority of instances) the following criteria that are in CEQ's current regulation in the definition of "significantly":

> The following should be considered in evaluating intensity:
>
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) 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 Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.[300]

Out of these ten factors for agencies to consider, CEQ weakens the first by deleting the second sentence explaining that a significant impact may exist even if the Federal agency official believes "that on balance the effect will be beneficial,"[301] and weakens the last consideration by changing "threatens a violation" to "violates" and then states affirmatively that there is no need to try to reconcile any such differences.[302] It completely abandons historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers and ecologically critical areas, highly controversial effects, highly

[419] *Id. at 1695.*

uncertain, unique or unknown risks, precedential action, cumulatively significant impacts, significant scientific, cultural, or historical resources, endangered and threatened species and their habitat. In short, CEQ proposes to abandon seven of the criteria entirely, and weaken two of them, leaving only public health and safety intact. Are agency officials now supposed to assume that impacts on air, water, soil, wildlife, historic and cultural resources, aesthetic values, social effects, are now not to be evaluated for significance? This is both illogical

[300] 40 C.F.R. §1508.27(b).
[301] 40 C.F.R. § 1508.27(b)(1).
[302] Proposed 40 C.F.R. § 1506.2(d).

and unlawful. Congress made it clear that consideration of all of the factors currently listed in the effects definition is part of the federal government's continuing responsibility.[303] What is the rationale for removing them as criteria for significance?

Astonishingly, the preamble only explains the deletion of two of these factors. First, CEQ states that it is removing controversy as a consideration "because this has been interpreted to mean scientific controversy".[304] But CEQ never explains why scientific controversy isn't worthy of being a consideration in determining the significance of the effects of a proposed action. In fact, the current regulation already makes it clear that the controversy referenced is controversy about the effects and not about the action itself. What is the rationale for removing this factor?

Additionally, CEQ states that it did not include the seventh factor in the current regulation, dealing with individually insignificant but cumulatively significant impacts because it is addressed in two other regulations. But those regulations deal with scoping and EISs respectively, not the threshold question of whether an EIS is needed in the first place. Further, only a portion of the current criteria is addressed in those other sections while all references to cumulatively significant impacts are deleted. The preamble fails to note this. The preamble also fails to address any reason at all for removal of criteria (3), (4), (6), and (8), (9).

The current definition of "significantly" is extremely useful and should be retained.

F. The Proposed Revisions Gut the Alternatives Requirement – the Heart of the NEPA Process.

Two statutory provisions of NEPA clearly state that the required analysis must include: "a detailed statement by the responsible official on . . . alternatives to the proposed action"[305] and that agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources".[306] These requirements are essential to NEPA's purpose of ensuring informed decision-making. The thoughtful and thorough consideration of reasonable alternatives ensures that federal agencies have considered the information "before decisions are made and before actions are taken".[307] A number of key

[303] 42 U.S.C. § 4331(b)

[304] 85 Fed. Reg. at1695; *see also NPCA v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2000) ("Agencies must prepare environmental impact statements whenever a federal action is 'controversial,' that is, when 'substantial questions raised as to whether a project may cause significant degradation of some human environmental factor,' . . . cites omitted. A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI … casts serious doubt upon the reasonableness of an agency's conclusions") (citations omitted); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1032 (9th Cir. 2007). [305] 42 U.S.C § 4332(C)(iii). [306] 42 U.S.C. § 4332 (E).

[307] 40 C.F.R. § 1500.1(b).

changes make clear that CEQ intends to downgrade the importance of alternatives. [420]The proposed changes below particularly highlight this diminished, crabbed approach:

Proposed §1502.14 - Heart of the EIS Process.

CEQ begins its proposed revisions in this section by ripping from the current regulation the statement that alternatives are "the heart of the environmental impact statement."[308] The original phrase is there for a reason.[421] Without a robust analysis of alternatives, the NEPA process becomes a process documenting the effects of a "done deal" rather than contributing to a decisionmaking process. There is no explanation in the preamble of why CEQ is proposing to delete the phrase.[422]Deleting this phrase signals to agencies and to the public CEQ's intent to downgrade the importance of alternatives and many of the other changes to this key regulation substantiate that intent.

1. Proposed §1502.14(a) - "Rigorously explore and objectively evaluate all reasonable alternatives".

The proposed text would (1) eliminate the direction to "rigorously explore and objectively evaluate" alternatives and, (2) would eliminate "all" before the phrase "reasonable alternatives." The deletion of "rigorously explore and objectively evaluate" is another example of downgrading the importance of the alternatives analysis. CEQ has directed agencies to rigorously explore and objectively evaluate alternatives since at least April, 1970. [423][424] The deletion of that direction does not "simplify and clarify" the regulations, as the preamble suggests,[312] but rather weakens them.

The preamble also states that CEQ's proposes to delete "all" in this sentence because "NEPA itself provides no specific guidance concerning the range of alternatives an agency must consider." But the preamble cites the very guidance CEQ issued to interpret the alternatives requirement in 40 C.F.R. § 1502.14 as the rationale for amending 40 C.F.R. §1502.14. As the very first question in CEQ's 40 Most

[420] *C.F.R. § 1502.14.*

[421] *In fact, many years before promulgation of the current CEQ regulations, a court characterized alternatives as the "linchpin" of the impact statement – a less elegant, but similar way of making the same point. Monroe County Conservation Council, Inv. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972).*

[422] *See 85 Fed. Reg. at 1701-02.*

[423] *Council on Environmental Quality: Statements on Proposed Federal Actions Affecting the Environment; Interim Guidelines, April 30, 1970, Section 7(a)(iii), supra at fn. 92.*

[424] *Fed. Reg. at 1701.*

Asked Questions document makes clear, the interpretation of the alternatives requirement is informed by the rule of reason and has never required agencies to examine, for example, every single possible iteration of an alternative. [425] There is no need to drop "all" from the direction to analyze "all reasonable alternatives." Doing so would send a signal that the requirement to fully analyze and consider all reasonable alternatives, including those identified and presented in a timely manner from the public, is now less than it once was.[426][427]

> Deletion of 40 C.F.R. § 1502.14(c) - Reasonable alternatives not within the jurisdiction of the lead agency.

Once again, CEQ proposes to overturn a principle established long before the current NEPA regulations were promulgated by entirely removing the requirement for an agency to consider reasonable alternatives to the proposed action not within its own jurisdiction. The issue of whether Congress intended to bound an agency's responsibility to analyze alternatives by its jurisdiction was decided early in NEPA's history. In the landmark case of *Natural Resources Defense Council v. Morton*,[315] the Court of Appeals for the District of Columbia considered whether the Department of the Interior was obliged to consider an alternative outside of its jurisdiction in the context of an EIS prepared for a proposed off-shore oil and gas lease sale off the coast of eastern Louisiana.[428] As the court noted, the proposal was responsive to President Nixon's directive on supply of energy. Alternatives analyzed within the EIS focused on possible changes to the proposed offering that would help mitigate environmental impacts.

Plaintiffs had argued that the EIS should include an alternative of eliminating oil import quotas. Department of the Interior officials rejected this idea, arguing in the EIS that such an alternative involved many complex factors and concepts, including foreign affairs and national security. Further, the Department officials argued that the alternatives required under NEPA were only those alternatives that could be adopted and implemented by the agency issuing the EIS.

The Court understood that NEPA's broad purposes did not support this narrow approach. In reflecting on NEPA's legislative history and statutory language, it said:

> What NEPA infused into the decisionmaking process in 1969 was a directive as to environmental impact statements that was meant to implement the Congressional objectives of government coordination, a comprehensive approach to environmental management, and a determination to face problems of pollution 'while they are still of manageable proportions and while alternative solutions are still available' rather than persist in environmental decision-making wherein 'policy is established by default and inaction' and environmental decisions

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[425] *Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations", 46 Fed. Reg. 18026, 18026-27 (March 23, 1981).*

[426] *See, e.g., Colo. Envtl. Coal. v. Salazar, 875 F. Supp. 2d 1233 (D. Colo. 2012), in which the Court found that the Bureau of Land Management failed to analyze a reasonable "community alternative."*

[427] *F.2d 827 (D.C. Cir. 1972).*

[428] *The lower court had enjoined the proposed sales, Nat. Res. Def. Council, Inc. v. Morton, 337 F. Supp. 165 (D.D.C.), supplemented, 337 F. Supp. 167 (D.D.C. 1971), and the government appealed that decision.*

> 'continue to be made in small but steady increments' that perpetuate the mistakes [429]of the past without being dealt with until 'they reach crisis proportions.'[317]

Given this background, the court felt that it would be "particularly inapposite" for the Department to limit its analysis of alternatives by jurisdictional lines of authority. The issue of energy supply was a national one with a broad scope, broader than that of any one particular entity in the federal government. The court held that, "When the proposed action is an integral part of a coordination plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened."[430]

While it was true that the Department of the Interior did not have the authority to modify or eliminate oil import quotas, the court noted that both the Congress and the President did have such authority. A broad examination of alternative ways of fulfilling a goal would be useful, not just for the "exposition of the thinking of the agency" but also for the guidance of other decision-makers who would be provided with the environmental effects of all reasonably achievable alternatives.

Finally, the court noted that there were pragmatic ways to address concerns about the challenge of analyzing alternatives outside of an agency's jurisdiction. In a frequentlyquoted discussion, the court stated:

We reiterate that the discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned. As to alternatives not within the scope of authority of the responsible official, reference may of course be made to studies of other agencies – including other impact statements[431]. Nor is it appropriate, as Government counsel argues, to disregard alternatives merely because they do not offer a complete solution to the problem. If an alternative would result in supplying only part of the energy that the lease sale would yield, then its use might possibly reduce the scope of the lease sale program and thus alleviate a significant portion of the environmental harm attendant on offshore drilling.[320]

As CEQ explained in its guidance about this requirement:

> An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are

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[429] F.2d at 836 (quoting S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969), p. 5).
[430] Id. at 835
[431] The CEQ regulations explicitly permit adoption of other agencies' EISs, 40 C.F.R. § 1506.3, and incorporation by reference of other publicly available material, 40 C.F.R. § 1502.21. *[320] 458 F.2d at 836.*

reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).[432][433]

In our collective experience, this issue tends to be raised more in the abstract than in the actual NEPA administrative process. Most of the time, most of us are focused on reasonable alternatives that are within the lead agency's jurisdiction. But there are situations in which it is reasonable to evaluate alternatives outside of an agency's jurisdiction. CEQ's preamble actually cites two such examples - when preparing a legislative EIS and to respond to specific Congressional directives.[322] But there are also other times when it is reasonable to consider such alternatives. For example, in the context of the NEPA process for a proposed land exchange between the Forest Service and Weyerhaeuser Co., the Muckleshoot Indian Tribe raised the possibility of the Forest Service purchasing the land it desired through the Land and Water Conservation Fund. Although the funds to do so would have had to have been appropriated by Congress, the Forest Service could have made a request for them to do so. Given that such an acquisition appeared compatible with the agency's goal, consideration of that alternative was required.[434] CEQ should not rescind this requirement.

CEQ also asked for comment on whether the regulations should establish a presumptive maximum number of alternatives for evaluation of a proposed action, or alternatively for certain categories of proposed actions. CEQ seeks comment on (1) specific categories of actions, if any, that should be identified for the presumption or for exceptions to the presumption; and (2) what the presumptive number of alternatives should be (e.g., a maximum of three alternatives including the no action alternative).

CEQ should not establish a maximum number of alternatives for proposed actions or for certain categories of proposed actions. There is neither a rationale nor legal support for such an approach. Setting an artificial number could, on the one hand, encourage the development of 'strawman" alternatives (that is, made up alternatives that are not actually reasonable but created for the sake of having a certain number of alternatives) and, on the other, would certainly discourage legitimately reasonable alternatives. It could certainly discourage development, analysis and consideration of community-developed alternatives, an important mechanism for members of the public to meaningfully and constructively engage in the NEPA process in a solutions-oriented fashion.

H. Proposed §1502.22 - Incomplete and Unavailable Information.

CEQ proposes two ill-advised and unsupported changes to this important section. First, it proposes to remove the word "always" from the first statement in the current regulation that reads, "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall **alway**s make clear that such information is lacking."[324] The sole reason given in the preamble for

[432] *CEQ, Forty Most Asked Questions, Q. 2(b), 46 Fed. Reg. 18026 (Mar. 23, 1981).*
[433] *Fed. Reg. at1702.*
[434] *Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 814 (1999).*

this proposed deletion is that the word "always" is "unnecessarily limiting".[325] Indeed, the word "always" is supposed to be prescriptive and that is precisely why it should stay in the regulation. As the Court of Appeals for the D.C. Circuit made clear early in its consideration of NEPA's requirements, "one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown."[326]

This is no adequate justification proffered in the preamble as to why "always" should be deleted nor is there is any indication of what criteria an agency should use to determine in what instances incomplete or unavailable information about reasonably foreseeable significant adverse effects should, per the proposed revision, not be identified. This proposed change runs counter to CEQ's avowed goal of efficiency by creating uncertainty over when an agency has to make clear that such information is lacking.

The second proposed change to this regulation is to replace the term "exorbitant" with "unreasonable" in the portion of the regulation that excuses an agency from obtaining complete information relevant to reasonably foreseeable significant adverse impacts. In other words, under the current regulation, an agency has to obtain such information if that is possible unless the overall costs of obtaining it are "exorbitant"; the proposed amendment would change the criteria to "unreasonable costs." We oppose the change in terminology. "Exorbitant" is a term that is more objectively evaluated than "unreasonable". The preamble cites no actual problems that the term "exorbitant" has caused any

agencies.[327]

In both instances, the original language of 40 C.F.R. § 1502.22 should be retained.

<u>CEQ also asks for comments on whether the 'overall costs' of obtaining incomplete or unavailable information warrants further definition to address whether certain costs are or are not unreasonable.</u>

The preamble cites no problems with implementation of the current language in the regulation. We believe that language should be retained and that additional regulatory language on "overall costs" is not needed.

I. <u>Proposed § 1502.24 - Methodology and scientific accuracy.</u>

CEQ proposes to amend this regulation by adding the astonishing statement that, "Agencies . . . are not required to undertake new scientific and technical research to inform their analyses."

[324] 40 C.F.R. § 1502.22 (bolding added). [325] 85 Fed. Reg. at 1703.

[326] *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973), cited in CEQ's preamble to the proposed revision of 40 C.F.R. § 1502.22, 50 Fed. Reg.

32,234, 32,236 (Aug. 9, 1985) and the preamble to the final revised rule, 51 Fed. Reg. 15,618, 15,620 (Apr. 24, 1986).

[327] 85 Fed. Reg. at 1703.

NEPA's legislative history evidences a high degree of interest in scientific and technical research to inform decisionmaking.[435] And while there was increasing awareness in the late 1960's of the need for much more scientific research on environmental issues, NEPA was unique:

An important difference between the proposals before the 90th Congress and the efforts and proposals described in the preceding paragraphs is that in pending legislation the knowledge assembled through survey and research would be systematically related to official reporting, appraisal and review. The need for more knowledge has been established without doubt. But of equal and perhaps greater importance at this time is the establishment of a system to insure that existing knowledge and new findings will be organized in a manner suitable for review and decision as matters of public policy.[436][437]

Indeed, the first mandate to agencies in NEPA is that "all agencies of the Federal Government shall . . . . utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment.[330]

Judicial decisions reflect the importance of obtaining information prior to making a decision, even if that involves undertaking new scientific research. "NEPA requires each agency to undertake research needed adequately to expose environmental harms."[438] For example, when the National Park Service proposed to significantly increase cruise ship traffic in Glacier Bay National Park and Preserve, the EA it prepared to support that decision identified numerous gaps in information about the impacts on marine mammals and other wildlife. There was evidence that there would be environmental effects but uncertainty over the intensity of those effects. However, the agency issued a Finding of No Significant Impact (FONSI). As the Court of Appeals for the 9th Circuit described the situation:

> The Park Service proposes to increase the risk of harm to the environment and then perform its study. . . . . This approach has the process exactly backwards. See *Sierra Club*, 843 F.2d at 1995. Before one brings about a potentially significant irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges. A part of the preparation process here could well be to conduct the studies that the Park Service recognizes are needed. . . . .

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[435] Lynton K. Caldwell, The National Environmental Policy Act: An Agenda for the Future, Indiana University Press, pp. 55-58 (1998).

[436] Lynton K. Caldwell & William J. Van Ness, A National Policy for the Environment, Special Report to the Senate Committee on Interior and Insular Affairs, introduced by Senator Henry M. Jackson, Legislative History of S. 1075, Cong. Rec.-Senate, 29071, October 8, 1969.

[437] U.S.C. § 4332(2)(A).

[438] Save Our Ecosystems v. Clark, 747 F.2d 1240, 1248 (9th Cir. 1984).

> The Park Service's lack of knowledge does not excuse the preparation of an EIS; rather it requires the Park Service to do the necessary work to obtain it.[439]

Obtaining new science in the context of NEPA can also be extremely useful in developing for future proposed actions. For example, The Northwest Forest Plan requires the Forest Service to survey for rare species, and to protect them with no-harvest buffers prior to implementing ground-disturbing activities such as logging. These surveys are then used in the agency's effects analysis and the general location, number, and prevalence of the species occurrence is disclosed to the public. In many cases, citizens have collected survey data and provided it to the Forest Service for consideration during the NEPA process. Often, the surveys and related effects analysis results in "new research" that not only limits project effects (because acres are buffered from harvest), but also results in new information about rare species that is relevant to future projects and scientific study more broadly.

The proposed amendment to Section 1502.24 is wrong as a matter of law and contrary to the purpose and policies of NEPA. There is explanation for this proposed regulation in the preamble.[333] It must be withdrawn.

J. Proposed §§ 1501.4(a), 1508.1(d) - Categorical Exclusions Definition.

CEQ proposes to revise the definition of categorical exclusion (CE) by deleting the explanation that these are categories of actions "which do not individually or cumulatively have a significant effect on the human environment" and adding the word "normally". It also deletes the sentence in the current definition that states that an agency may decide, in its procedures or otherwise, to prepare environmental assessments to aid its compliance with NEPA even if the actions falls within a CE. All three changes are problematic.

As explained earlier,[440] cumulative impact analysis is an integral part of NEPA compliance and cannot be ignored or removed. That is just as true in the context of an agency's promulgation of a CE as it is for an EA or an EIS. For example, the Forest Service was required to take into consideration the cumulative effects of promulgating a categorical exclusion for certain fuel reduction projects on national forests.[441] The notion that the agency might catch cumulative effects in the context of project level analysis (presumably, as an extraordinary circumstance) was not adequate. The court pointed to specific aspects of the CE that could result in significant cumulative effects and held that "In order to assess significance properly, the Forest Service must perform a programmatic cumulative impacts analysis for the Fuels CE."[442] The court stated that if "assessing the cumulative impacts of the Fuels CE

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[439] *NPCA v. Babbitt, 241 F.3d 722, 733 (9th Cir. 2001); see also Sierra Club v. Norton, 207 F. Supp. 2nd 1310, 1335 (S.D. Ala. 2002) ("NEPA was designed to prevent uninformed action. . . . Defendant's argument in this case would turn NEPA on its head, making ignorance into a powerful factor in favor of immediate action where the agency lacks sufficient data to conclusively show not only that proposed action would harm an endangered species, but that the harm would prove to be 'significant.").* [333] *See, 85 Fed. Reg. at 1703.*

[440] *Supra at Section V. (A).*

[441] *Sierra Club v. Bosworth, 510 F.3d 1016 (9th Cir. 1007).*

[442] *Id. at1029.*

as a whole is impractical, then use of the categorical exclusion mechanism was improper."[443][444][445] Cumulative impacts must go back into the definition of a CE.

The addition of the word "normally" to the definition of a CE is also troublesome. The rationale for this change given in the preamble is to take into account the possibility of extraordinary circumstances that may require an agency to prepare an EA or an EIS. But that provision already exists in the current definition[338] so the need to change the definition and delete the specific reference to extraordinary circumstances only to insert "normally" into it to reference what was deliberately deleted is not well reasoned.[339] A reader could easily interpret this change to indicate that the standard for a CE has been changed and weakened. The current definition should be retained.

Finally, the preamble gives no reason for the deletion of the statement that agencies can choose to do EAs even if an action might potentially qualify as a CE. We can think of no good reason for this deletion ourselves. The sentence should be retained. K. Proposed § 1501.4(b)(1) - Extraordinary Circumstances.

We are concerned with the proposed regulatory language and associated preamble language that would authorize an agency to consider whether "mitigating circumstances or other conditions are sufficient to avoid significant effects and therefore categorically exclude the proposed action." Obviously, we want to see effects on resource conditions mitigated. However, doing so in the context of a categorical exclusion allows an agency to essentially do the type of analysis that is required for an EA without any public notice or involvement. If the proposed action truly will have no effect on a particular resource, there should not be a need for analysis. If it appears that the proposed action may have an impact on a resource, the agency should move to an EA. If it appears that it may have a significant impact, the agency must do an EIS.[446] This language should be withdrawn. L. Proposed § 1507.3(e)(5) - Borrowing Another Agency's CE.

This proposed provision would allow agencies to apply another agency's categorical exclusion. This is a dangerous erosion of the whole concept of CEs which has always been based on each individual agency's experience with its normal activities in its normal context and organization and based on its administrative record.[447]

There is no reasonable legal or policy justification for this provision. CEQ has issued comprehensive, detailed guidance on how to establish or revise a CE, how to apply CEs and how to

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[443] *Id. at 1028.*

[444] *C.F.R. § 1508.4 ("Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.")*

[445] *C.F.R. § 1508.4.*

[446] *Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F. Supp. 2d 1059, 1090 (N.D. Cal. 2007).*

[447] *We note that CEQ does not propose that each agency be bound by other agency's categories of actions that require the preparation of EISs.*

conduct periodic reviews of CEs.[448] The guidance also addresses an appropriate way to use another agency's experience with a particular categorical exclusion.[449]

Clearly, given the number of CEs in the executive branch, it is simply not that difficult to go through the regular process of documenting the justification for a CE, consulting with CEQ, going out for public notice and comment and, as appropriate, finalizing the CE. We are already concerned that many CEs rest on insufficient record and are subject to being misused. That concern is widespread.[450] This proposed endorsement of co-mingling CEs throughout the executive branch will exacerbate that concern about misuse and abuse. Furthermore, as we discuss below,[451] this proposal would enable an agency to use a CE without even the minimal public notice provided in situations where agencies use other agencies' analysis. CEQ should withdraw the regulation and disavow this direction in the preamble.

Additionally, CEQ asks whether there are any other aspects of CEs that CEQ should address in its regulations. Specifically, CEQ invites comment on whether it should establish government-wide CEs in its regulations to address routine administrative activities, for example, internal orders or directives regarding agency operations, procurement of office supplies and travel, and rulemakings to establish administrative processes such as those established under FOIA. Alternatively, CEQ invites comment on whether and how CEQ should revise the definition of major Federal action to exclude these categories from the definition, and if so, suggestions on how it should be addressed.

Since its establishment, CEQ has avoided making determinations about the level of analysis needed for specific categories of proposed actions and we would advise CEQ to maintain that posture unless there is a compelling reason to do otherwise. No such reason has been cited here. In regards to major Federal action, as discussed earlier, we oppose CEQ's unwarranted interest in reversing decades of law and agency practice to impose a two-step process.

M. Proposed §§ 1501.6(a) and 1508.1(l) - Finding of No Significant Impact.

There is a discrepancy in the definition of a Finding of No Significant Impact (FONSI) between proposed § 1501.6(a), where it describes a FONSI as being appropriate when the proposed action is "not likely to have significant effects" and the definition of a FONSI at § 1508.1(l) that correctly explains that a FONSI briefly presents the reason why a proposed action will not have a significant effect. The provision in §1501.6(a) needs to conform to the definition. There is no rationale or justification for changing the phrase "will not" to "not likely". Since the preamble itself uses the "will not" construct in relationship

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[448] *Council on Environmental Quality, "Establishing Applying, and Revising Categorical Exclusions under the National Environmental Policy Act" (Nov. 23, 2010), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf.*

[449] *Id. at 9.*

[450] *Daniel R. Mandelker, et al., NEPA Law and Litigation, § 7.17, "Categorical Exclusions – Use, abuse, and proposals for reform," Thomas Reuters (2019).*

[451] *Infra at Section VI. (H).*

to the proposed § 1501.6(a) regulatory language,[346] we trust this is a mistake that will be corrected if and when the regulations become final.

N. Proposed §§ 1502.9(c)(4), 1507.3 - Changes to Proposed Action or New Circumstances and Information Deemed Not Significant

A proposed addition to the current provisions for supplementing EISs would, as the preamble notes, codify the existing practice of some federal agencies that prepare a nonNEPA document to determine whether a supplemental NEPA analysis is required. We oppose those agencies' use of this type of documentation. For example, the Bureau , avoid NEPA review and, in effect, to inappropriately justify a distinct implementation-level "proposal" on the basis of an existing NEPA analysis developed for a separate, typically programmatic level decision. For example, BLM has sought to use DNAs to justify the sale of geographically discrete oil and gas leases on the basis of land use plan-level NEPA analyses. But BLM's programmatic NEPA analyses—which can cover millions of acres— does not provide the requisite site-specific analysis of impacts or consider alternatives calibrated to geographically specific proposed oil and gas leases, including the option not to issue the oil and gas lease or to condition the lease on site-specific stipulations or mitigation measures. A DNA, which is not a NEPA document, cannot be used to provide for that analysis. It should therefore be no surprise that these DNAs—because of conflicts with NEPA's statutory framework—have triggered litigation.

We have seen this attempted dodge of analysis before by agencies trying to rely on a programmatic NEPA analysis that simply does not cover a proposed site-specific action. The DNA process is simply putting a new label on it. To the degree that agencies think implementation-level actions should not require further NEPA review, the proper course is not to contrive a new, non-NEPA mechanism, but to correctly utilize the tiering process[347] improve the robustness of programmatic NEPA analyses that address these implementation-level issues in advance or to consider and justify appropriate categorical exclusions.

[346] 85 Fed. Reg. 1684, 1698.

[347] *See* Council on Environmental Quality, *Effective Use of Programmatic NEPA Reviews*, December 18, 2014; available at https://ceq.doe.gov/docs/ceq-regulations-andguidance/Effective_Use_of_Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf.

Similarly, for many years, some agencies, such as the U.S. Army Corps of Engineers, have utilized a Supplemental Information Report (SIR) as a mechanism for evaluating new information related to an action analyzed in an EIS. Except for new information that clearly has no potential for significance relevant to environmental concerns or substantial changes related to the proposed action, this type of analysis should be evaluated through the NEPA process. The analysis could be presented in an EA available for public review or, of course, through a supplemental EIS. Further, an SIR is not an appropriate place to present new analysis of information available at the time the original NEPA documentation was provided. As one court explained:

> The Forest Service may use a [supplemental information report] to analyze the significance of information that is 'truly new'", but may not use a [supplemental information report' for

> information that it 'knew or should have known' at the time it prepared the original [NEPA document]. It is 'inconsistent with NEPA for an agency to use [a supplemental information report], rather than a supplemental [environmental assessment] or [environmental impact statement], 'to add information it knew or should have known. Environmental consideration documents must be 'prepared early enough so that [they] can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.'[348]

Generally, the default mechanism for evaluating new information, especially in the context of a proposed action analyzed in an EIS, should be, at a minimum, an EA with public involvement. Agencies continue to lose cases by relying on the very types of documents that CEQ proposes to authorize.[349] A brief EA with public involvement is the most appropriate and efficient way to assess the significance of new information or changed circumstances.

O. Proposed § 1501.10 - Time Limits

CEQ proposes to set time limits of one year for preparation of an EA and two years for preparation of an EIS. Time is to be measured from the date of a decision to prepare an EA to the publication of a final EA or publication of a Notice of Intent (NOI) for an EIS until publication of a Record of Decision. A senior agency official of the lead agency may approve a longer period based on certain enumerated factors.[350]

[348] *Rock Creek Alliance v. U.S. Forest Service*, 703 F. Supp. 2d 1152, 1180-81 (D. Mont. 2010). [349] *See*, *e.g.*, *Triumvirate LLC v. Bernhardt*, 367 F. Supp. 3d 1011 (D. Alaska 2019) (in forgoing an EA, BLM improperly relied on DNA to issue another outfitter's permit even though the permits would have had similar effects); *W. Watersheds Project v. Zinke*, 336 F. Supp.3d 1204, 1212 (D. Idaho 2018) (enjoining oil and gas leasing in sage grouse habitat via DNAs without additional public notice and comment); *Friends of Animals v. BLM*, 232 F. Supp. 3d 53 (D.D.C. 2017) (approving use of DNA where the new gather was part of an ongoing action in the same herd management area); *Friends of Animals v. BLM*, 2015 WL 555980 (D. Nev. 2015) (reliance on DNA violated NEPA where the new gather was an action of different scope and intensity).

[350] 85 Fed. Reg. at 1717; proposed § 1501.10.

[452]There are several problems with this proposed regulation. First, the measurement of time for EISs is glaringly wrong. An accurate assessment of how long an EIS takes should begin with the NOI and end with the publication of the final EIS. The time period between publication of a final EIS and a Record of Decision is not driven by NEPA, but rather by a variety of factors that the decision maker may or may not even control. For example, there may be change in leadership and a change in policy direction or direction to delay making certain decisions. A project proponent may ask for a "time out" because of changed circumstances (including changed project economics). National security concerns may dictate

[452] *C.F.R. § 1610.5-2(a)(1).*

a different course of action. The possibilities are many, but they are not driven by NEPA since absent the unusual circumstance of an agency being required to supplement a final EIS, there are no procedural requirements under NEPA between a final EIS and the Record of Decision.

Second, the proposed regulation's use of the ROD as the end of the two-year period is arbitrary because it will put at particular disadvantage those agencies that provide by regulation a pre-decisional period in which draft decisions may be protested or objected to. Both the Forest Service and the Bureau of Land Management have adopted such procedures as a way to identify areas of disagreement with stakeholders, and to provide the agency an opportunity to modify draft proposals to reduce the potential for future litigation. The purpose of increasing public support and reducing litigation would seem to be one CEQ would support.

BLM regulations mandate that after a final EA or an EIS on a land use plan or amendment is filed, the public has 30 days to file a protest.[351] BLM regulations set no deadline for completion of agency review of protests, stating only that "[t]he Director [of BLM] shall promptly render a decision on the protest."[453] BLM guidance states that "[i]t will be the BLM's goal to resolve all protests within 90 days."[454] Only "after protests are resolved" does BLM issue a ROD.[455] Thus, assuming that BLM prepares an EIS on a land use plan revision, agency regulations and guidance anticipate that the pre-decisional administrative protest process will take 120 days, all of which occur prior to the ROD's issuance.[456] This post-analysis process thus could consume roughly one-sixth (or more) of the entire two-year period the draft rule provides for an agency to complete the EIS from notice of intent to ROD.

The Forest Service provides for pre-decisional challenges to agency decisions both at the plan and project implementation level. Forest Service regulations permit interested parties to file written objection to a new plan, plan amendment, or plan revision within 60 days of the proposed decision, and following completion of the FEIS.[457] The Forest Service "must issue a written response … within 90 days," but "[t]he reviewing officer has the discretion to extend the time when it is determined to be necessary to provide adequate response to objections or to participate in discussions with the

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[453] *Id. § 1610.5-2(a)(3).*

[454] *Bureau of Land Management, Land Use Planning Handbook, H-1601-1 (Mar. 11, 2005), at Appendix E, page 1, available at https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1601 -1.pdf (last viewed Mar. 8, 2020).*

[455] *Id. at Appendix F, page 20.*

[456] *In practice, BLM can take many months to resolve all objections and issue a ROD. For example, BLM issued its Final EIS and proposed Resource Management Plan for the Uncompahgre Field office in June 2019; eight months later, the agency still has not ruled on the protests or issued a ROD. See BLM, Uncompahgre Field Office Resource Management Plan webpage, available at https://eplanning.blm.gov/epl-frontoffice/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=8 6003 (last viewed Mar. 8, 2020).*

[457] *Id. § 219.56(a).*

parties."[458] Thus, the time period between completion of a Forest Plan FEIS and a ROD can be 150 days or longer, or more than 20% of the two-year period provided in the draft rule.

For projects implementing a forest plan, Forest Service regulations require the agency to provide the public 30 days after the Final EIS to file a pre-decisional objection if the proposal is an authorized hazardous fuel reduction project, and 45 days for all other projects.[459] The Forest Service has the following 45 days to issue a written decision, although the regulations permit "[t]he reviewing officer … to extend the time for up to [an additional] 30 days when he or she determines that additional time is necessary to provide adequate response to objections or to participate in resolution discussions with the objector(s)."[460] The Forest Service regulations do not require the Forest Service to issue the ROD by a certain deadline after the objection decision is issued. All told, the Forest Service may take 120 days or longer after the FEIS is complete to issue the ROD.

By placing a two-year cap on the period between the Notice of Intent and the ROD, the proposed rule may thus have the perverse effect of compressing the time to prepare NEPA analysis for numerous BLM and Forest Service decisions when compared to other agencies who do not provide a pre-decisional protest or objection period. We request that CEQ explain why it takes this position, and that CEQ identify all agencies that have a predecisional protest, objection, or appeal period so that the public and CEQ can understand the disparate (and so far undisclosed) impact of this proposed rule on agencies with such processes.

A third problem is agency capacity. Today, many agencies lack sufficient capacity to competently execute their NEPA responsibilities, whether preparing their own analyses and conducting their own public involvement or overseeing contractors. In that context, forcing a "one size fits all" timeframe will likely result in longer time periods before compliance is actually completed. Rushed NEPA documents will result in badly flawed results, increased litigation, decreased agency credibility with the public and distorted, poorly reasoned decisionmaking.

The exception to the proposed rule allowing for an extended period to be approved by a senior agency official does not fix the problem. Understanding the pressure to produce faster and faster, agency staff will be reluctant to even ask for an extension. Further, the criteria for a senior agency official to consider regarding time period considerations[360] have been revised to delete the time required for obtaining information.[361]

This proposed regulation should be withdrawn.

P. Proposed §§ 1501.5(e), 1501.7, 1502.7 – Page Limits

While recognizing that the length of environmental review documents are influenced by, "the complexity and significance of the proposed action and environmental effects the EIS considers,"[362] CEQ proposes to afford agencies less flexibility to navigate these factors by setting more rigid

[458] *Id. § 219.56(g).*
[459] *Id. §§ 218.7(c)(2)(iv) & 218.26(a).*
[460] *Id. § 218.26(b).*

"presumptive" page limits and adding more bureaucracy by adding a requirement for senior agency officials to approve lengthier documents in writing. The additional requirement of written approval only adds time to the environmental review process and does not serve CEQ's stated purpose of advancing regulatory changes that will reduce delay. Additionally, if implemented as currently proposed, it appears the preparers of an EIS may seek the additional pages late in the drafting process, once it is realized it may not be possible to comply with the set limits. The time to consider and set page limits reflecting the complexity of review is early in the process, which is why the current regulations wisely encourage agencies to set page limits during the scoping process in § 1501.7.

The proposed regulation also fails to acknowledge the direction at both current and proposed 40 C.F.R. § 1502.25 regarding integration of an EIS with other information required by other environmental review requirements.

CEQ should withdraw the proposed changes to page limits. To reduce the length of environmental review documents, CEQ should retain the current flexibility of the regulations and focus on ensuring agencies have the resources necessary to produce timely reviews.

V. CEQ PROPOSES A NUMBER OF CHANGES INTENDED TO ELEVATE THE ROLE OF A PRIVATE SECTOR APPLICANT WHILE DIMINISHING THE ROLE OF THE PUBLIC.

A. Proposed § 1506.5(c) - Agency Responsibility for Environmental Documents.

This now misnamed section would reverse CEQ's prohibition against private sector applicants preparing EISs for their own projects. It would also delete the current conflict of interest provisions prohibiting consultants who have a financial interest or other interest

[360] 40 C.F.R. § 1501.8(b).
[361] 85 Fed. Reg. at 1717; *also see*, discussion proposed § 1502.24 [362] 85 Fed. Reg. at 1700.
in the outcome of the proposed action to prepare EISs for their own projects. The proposal attempts to assuage concerns about the bias that would be introduced by requiring that the agency provide guidance, participate in its preparation, independently evaluate the EIS and take responsibility for its scope and content.

CEQ's preamble states that, "These changes are intended to improve communication between proponents of a proposal for agency action and the officials tasked with evaluating the effects of the action and reasonable alternatives, to improve the quality of NEPA documents and efficiency of the NEPA process."[461]

[461] *Id. at 1705.*

In the immortal words of Ludovico Ariosto, "This dog won't hunt. This horse won't jump."[462][463] CEQ's solicitude for contractor-agency communication is misplaced. The current regulations already direct agencies to designate policies or staff to advise potential applicants of studies or other information foreseeably required for later Federal action,[365] to involve applicants to the extent practicable in preparing environmental assessments,[464] set time limits at the request of an applicant,[367] assist the applicant by outlining the types of information required,[465] and specifically states that nothing is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.[466] In short, it is hard to identify any barriers to communication with an applicant. Importantly, CEQ neither identifies any such barriers nor explains why this change is needed to improve communications.

This change would negate the purpose of EISs by allowing a biased party to conduct the analysis. CEQ clearly understands the risks of conflict of interest because it previously published guidance interpreting Section 1506.5(c) and the conflict of interest provision. That guidance addressed the importance of this provision:

Some persons believe these restrictions are motivated by undue and unwarranted suspicion about the bias of contractors. The Council is aware that many contractors would conduct their studies in a professional and unbiased manner. However, the Council has the responsibility of overseeing the administration of the National Environmental Policy Act in a manner most consistent with the statute's directives and the public's expectations of sound government. The legal responsibilities for carrying out NEPA's objectives rest solely with federal agencies. Thus, if any delegation of work is to occur, it should be arranged to be

> performed in as objective a manner as possible. Preparation of environmental impact statements by parties who would suffer financial losses if, for example, a "no action" alternative were selected, could easily lead to a public perception of bias. It is important to maintain the public's faith in the integrity of the EIS process, and avoidance of conflicts in the preparation of environmental impact statements is an important means of achieving this goal.[370]

In that guidance, CEQ again stressed that there was no barrier to applicants communicating with agencies by providing them with information, nor were consulting firms barred from competing because they might have a future interest in the action.[371] Thus, CEQ sought to walk a careful line between balancing the public interest and acknowledging the role of outside consultants to supplement the agency's capacity, or lack thereof to prepare EISs.

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[462] *Ariosto, Ludovico, Orlando Furiorso, Canto VII (1532). See also, Jennings, Waylon, "That Dog Won't Hunt", © Sony/ATV Music Publishing LLC (1986) ("You think you can say some words, take away the hurt, . . . But when it ain't working out we got a saying down South, Baby that dog won't hunt").*
[463] *C.F.R. § 1501.2(d)(1).*
[464] *Id. § 1501.4(b).* [367] *Id. § 1501.8(a).*
[465] *Id. § 1506.5(a).*
[466] *Id. § 1506.5(c).*

CEQ now proposes to erase that line entirely. It fails to address the complete elimination of the conflicts of interest provisions in the regulations other than a vague reference to commenters urging that CEQ allow "greater flexibility for the project sponsor to prepare NEPA documents." But CEQ never explains why it proposed to reverse its position on conflict of interest and why it thinks doing so is in the public interest.

In *Davis v. Mineta,*[372] the Court of Appeals identified precisely the type of harm that can occur when an applicant prepares a NEPA document. In that case, the applicant for several connected highway projects hired a consultant to distribute an EA. The contract with the consultant also required that a FONSI be signed and distributed by a date certain. The Court unsurprisingly found that the consultant had an "inherent, contractually-created bias in favor of issuance of a FONSI rather than preparation of an EIS."[373]

It is true that federal agencies themselves are proponents of actions for which they prepare EISs. State and local governments may also act as both proponent and as a joint preparer under CEQ's current regulations.[374] But there is an important difference. The responsibility of government agencies is to act in the public's interest. The responsibility of companies is to act in their shareholders' interest. Both segments of society have legitimate – but quite different roles to play and NEPA law has recognized that difference.

CEQ's proposes to eliminate the conflict of interest provision and in its place institutionally codifies an inherent conflict of interest. This is counter to widely accepted ethical standards that restrict people with a conflict of interest from influencing important government decisions. That is why senior level federal government employees must file public financial disclosure statements and why conflicts of interests are broadly interpreted and regulated by the Office of Government Ethics. Indeed, a federal employee who fails to recuse him or herself from a particular matter if it would have a direct and predictable

[370] 48 Fed. Reg. 34,263, 34,266 (July 28, 1983).
[371] *Id*.
[372] 302 F.3d 1104 (10th Cir. 2002).
[373] *Id*. at 1112.
[374] 40 C.F.R. § 1506.2.

effect on that employee's own financial interests or certain other financial interests that are [467]treated as the employee's own are subject to potential criminal prosecution.[375] That is why there are rules about judges recusing themselves from cases in which they have an interest[468] and why the American Bar Association's Model Rules of Professional Conduct, adopted by a number of jurisdictions, have detailed rules and prohibitions related to conflict of interest.[469] It is why responsible newspapers

[467] *U.S.C. § 208.*
[468] *See 28 U.S.C. § 455 for recusal rules for Supreme Court Justices, federal judges, and federal magistrate judges.*
[469] *American Bar Ass'n., Model Rules of Professional Conduct, §§ 1.7 – 1.12.*

identify any conflict of interest inherent in their reporting, such as interests of their ownership. [470][471] There are also important considerations regarding conflicts of interest in the medical field, especially pharmaceutical industry, the financial industry and many other spheres of modern life. People generally understand that no matter how good one's intentions are, self-interest is a powerful motivation and that therefore, conflict of interest rules have an important public policy purpose. It is difficult to think of any context in which conflicts of interest provisions have been eliminated once imposed. CEQ should not aim at setting a precedent in this regard.

CEQ's proposal, if finalized, would undermine the integrity of the NEPA process. It should be withdrawn.

B. Proposed § 1502.13 - Purpose and Need

CEQ proposes to reword the brief definition of purpose and need to highlight the needs of the applicant and diminish the role of alternatives. Specifically, the definition would be altered to direct an agency to base the purpose and need "on the goals of the applicant and the agency's authority." It also changes the context for purpose and need from alternatives to the proposed action.[379] Neither change is acceptable.

The purpose and need of a proposed action is fundamentally related to the public purpose underlying a federal agency's authority to act on a particular proposal. Every time a federal agency considers whether to grant permit or license, approve funding or take some other federal action at the request of an applicant, it does so because Congress decided there was a national interest in a federal agency making a decision in the public's interest. The public interest is what the agency needs to be considering when conducting a NEPA analysis, not the goals of the applicant.[472]

Obviously, the agency has to communicate with the applicant about the project, and as we have discussed immediately above, there is no barrier to doing that. The agency needs to do due diligence in understanding the applicant's purposes for the process to make sense.

In proposing this change, the preamble cites a 2003 letter sent by Chairman James Connaughton to Secretary of Transportation Norman Mineta discussing CEQ's interpretation of purpose and need.[473] The specific quote utilized from that letter is that, "Thoughtful resolution of the purpose and need statement at the beginning of the process will contribute to a rational environmental

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[470] *See, e.g., Ethical Journalism, A Handbook of Values and Practices for the News and Editorial Departments, NEW YORK TIMES, https://www.nytimes.com/editorial-standards/ethicaljournalism.html (last visited Mar. 4, 2020).*
[471] *Fed. Reg. at 1720.*
[472] *Obviously, the agency has to communicate with the applicant about the project, and as we have discussed immediately above, there is no barrier to doing that. The agency needs to do due diligence in understanding the applicant's purposes for the process to make sense.*
[473] *Id. at 1701.*

review process and save considerable delay and frustration later in the decision[-]making process."[474] We agree, especially given that the purpose and need statement frames the alternatives that an agency evaluates. But what the letter does not do is support the notion of putting an applicant's needs up front in the purpose and need statement. Indeed, the entire letter is in the context of transportation projects where local and state governments have specific statutory roles in the planning process. It does not address purpose and need in the context of an applicant from the private sector. But even in the transportation context, the Connaughton letter cautions that agencies must not "put forward a purpose and need statement that is so narrow as to 'define competing "reasonable alternatives" out of consideration(and even out of existence)," *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997); [*see also*,] *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995)."[475][476]

Several federal court decisions have addressed the appropriate way to frame the purpose and need when an agency is considering an application for a federal permit, approval or benefit of some sort. For example, in *Simmons v. U.S. Army Corps of Engineers*, [384] the Corps argued that they were restricted to analyzing the particular alternative that the applicant proposed. The Court disagreed and explained that:

> This is a losing position in the Seventh Circuit. . . . The general goal of Marion's application is to supply water to Marion and the Water District –not to build (or find) a single reservoir to supply that water. . . . An agency cannot restrict its analysis to those 'alternative means by which a particular applicant can reach his goals.' [cites omitted] This is precisely what the Corps did in this case. The Corps has 'the duty under NEPA to exercise a degree of skepticism in dealing with selfserving statements from a prime beneficiary of the project.'" [cite omitted] And that is exactly what the Corps has not shown in its wholesale acceptance of Marion's definition of purpose.[477]

In [478]*National Parks & Conservation Ass'n v. Bureau of Land Management*,[386] the proposed action was construction of a landfill near Joshua Tree National Park. A land exchange with the Bureau of Land Management ("BLM") was part of the applicant's plan. The purpose and need statement in the EIS included three goals of the proponent and one goal of BLM. BLM did not dispute "that the majority of these purposes and needs respond to Kaiser's goals, not those of the BLM."[479] While the court acknowledged that agencies had to consider the goals of a private applicant, it pointed out that it "is a far cry from mandating that those private interests define the scope of the proposed

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[474] *Id. (citing Letter from the Hon. James L. Connaughton, Chairman, Council on Environmental Quality, to the Hon. Norman Y. Mineta, Secretary, Department of Transportation (May 12, 2003) (''Connaughton Letter''), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQDOT_PurposeNeed_May-2013.pdf).*
[475] *Id.*
[476] *F.3d 664 (7th Cir. 1997).*
[477] *Id. at 669 (internal citations omitted).*
[478] *F.3d 1058 (9th Cir. 2010).*
[479] *Id. at 1070.*

project."[480] The Court held that the purpose and need statements unlawfully narrowed BLM's examination of other alternatives to meet Kaiser's objectives and thus eliminated from analysis reasonable alternatives that would have been responsive to BLM's own purpose and need. "The BLM adopted Kaiser's interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange."[481]

These decisions make clear that an agency should not confine the purpose and need to an applicant's goals. Rather, an agency should frame the purpose and need to be responsive to the public purpose as well. Thus, the proposed revision of the purpose and need definition should not be finalized because it unduly elevates the goals of an applicant over needs of the public. The current definition should be retained.

C. Proposed § 1508.1(z) - Definition of "Reasonable Alternatives"

CEQ proposes to add a definition of "reasonable alternatives" to the regulations. The proposed definition would, among other things, state that reasonable alternatives "meet the purpose and need for the proposed action, and, where applicable meet the goals of the applicant."

Similar to our position on the insertion of the applicant's goals into the definition of purpose and need, we oppose including an applicant's goals as an intrinsic criterion for the definition of "reasonable alternatives." CEQ articulated the correct position in its "Forty Most Asked Questions", published shortly after promulgation of the current regulations. In that guidance, in response to the question of whether an agency had the responsibility for analyzing alternatives outside of the capability or the applicant, CEQ stated:

> Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.[390]

A number of federal court decisions have affirmed this approach. For example, in *Van Abbema v Fornell*,[391] the Court of Appeals for the Seventh Circuit focused on the Corps of Engineers' evaluation of alternatives prior to its decision on a permit application for coal loading facility proposed for construction on the Mississippi River. The Court found the Corps' evaluation of alternatives to be inadequate and stated that:

> At the outset we note that the evaluation of "alternatives" mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals. In the

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[480] *Id. at 1072.*

[481] *Id.; see also, Backcountry Against Dumps v. Chu, 215 F. Supp. 3d 966, 977–80 (S.D. Cal. 2015) (finding the purpose and need statement for a permit to construct an electric transmission line was unlawful because it limited consideration of alternatives to the project).*

> current proposal the general goal is to deliver coal from mine to utility. . . . . In some discussion of alternatives to the proposal, the Corps has suggested that an alternative may not be feasible at least partly because the applicant does not own the necessary land or perhaps cannot gain access to it. . . . . The fact that this applicant does not now own an alternative site is only marginally relevant (if it is relevant at all) to whether feasible alternatives exist to the applicant's proposal. This is particularly true because an existing facility in Quincy, Illinois is presently transloading the mine's coal from truck to barge.[392]

The Court of Appeals for the First Circuit issued a similar holding in *Dubois v. U.S. Deptartment of Agriculture*.[393] In that case, instead of "rigorously exploring" various alternatives raised by members of the public, the Forest Service evaluated only alternatives that provided an advantage to that particular applicant. The court found that the agency's evaluation was not in accordance with the law.[394]

Agencies must independently assess whether an alternative is a reasonable alternative to meeting the purpose and need and not rely solely on the assessment of the applicant. For example, in *Southern Utah Wilderness Alliance v. Norton*,[395] the Bureau of Land Management's "unquestioning acceptance" of the project proponents for oil and gas leasing inappropriately limited the agency's alternative analysis.[482] And in the context of restoration projects funded by British Petroleum (BP) in the wake of the Deepwater Horizon disaster, the responsible federal agencies erred by limiting the alternatives to only those alternatives that BP and the Trustees thought were reasonable.[483]

[390] Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Regulations, 46 Fed. Reg. 18,026, 18,027 (March 23, 1981) (emphasis in original).

[391] 807 F.2d 633 (7th Cir. 1986).

[392] 807 F.2d 633, 638–39 (7th Cir. 1986) (emphasis in original) (internal citations omitted). [393] 102 F.3d 1273 (1st Cir. 1996).

[394] *Id*. at 1288–90. To the extent CEQ's 1983 guidance on alternatives suggested that the First Circuit's decision in the earlier case of *Roosevelt Campobello International Park Commission v. U.S. EPA*, 684 F.2d 1041 (1st Cir. 1982), is contrary to the decisions in *Dubois* or *Van Abbema*, we must point out that CEQ's analysis failed to note a critical part of court's reasoning. Plaintiffs in that case did not identify and suggest to the lead agency any alternatives it thought should be studied in the EIS during the administrative process. The Court concluded that, "petitioners' argument that EPA erred by restricting its consideration to alternative sites in Maine must fail, because they did not suggest any reasonable alternatives to EPA during the comment period." *Id*. at 1047.

[395] 237 F. Supp. 2d 48 (D.D.C. 2002).

[482] *Id. at 52–53.*

[483] *See Gulf Restoration Network v. Jewell, 161 F. Supp. 3d 1119, 1130 (S.D. Ala. 2016) ("The Trustees point to the PEIS's 'purpose and need' statement—to accelerate meaningful restoration—and argue that they have fulfilled their*

Requiring alternatives to meet the purpose and need of an applicant also overlooks the importance of alternatives developed outside of the agency but which must be considered by the agency. For example, in 2008, the Bureau of Land Management leased the entire Roan Plateau for oil and gas development. That decision was challenged by a coalition of sportsmen and conservation groups. In 2012, a federal court ruled that BLM had violated NEPA by failing to consider a reasonable alternative of protecting the top of the plateau while allowing oil and gas development on less sensitive areas around the base of the plateau.[398] Following that ruling, the parties to the lawsuit reached a settlement that led BLM to prepare a supplemental NEPA analysis considering an alternative protecting almost the entire top of the plateau, while allowing drilling around the base. In 2016, the agency selected that alternative in a new resource management plan for the Roan. Under that plan, the wildlife, pristine lands and other resources atop the plateau are protected, while oil and gas development is currently proceeding on less sensitive lands around the base.

The proposed definition of reasonable alternatives is fatally flawed and must be withdrawn.

D. Proposed § 1501.9(a) – Scoping

CEQ proposes to reverse its long-standing position that the publication of a NOI triggers the scoping process. Our concern with the proposed section is the sentence that reads, "Scoping may include appropriate pre-application procedures or work conducted prior to publication of the notice of intent."

This sentence is confusing in part because the term "pre-application procedures" generally refers to what an applicant needs to do to submit a complete application to a federal agency. Some agencies have very detailed pre-application procedures that includes distribution of information to other agencies and to the public,[484] but other have a much more informal process that is basically conducted between the agency and the applicant. However, either a formal or informal pre-application process does not serve the same purposes as scoping.

CEQ has previously stated that scoping can be a useful tool prior to publication of an NOI, "so long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively." Further, CEQ stated that "scoping that is done before the assessment, and in aid of its preparation, cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered."[400]

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duty to consider a reasonable range of restoration alternatives. Since there could be no early restoration project absent an agreement with (and funding from) BP, no other project could achieve the stated goal. . . . This is the paradigm of a self-fulfilling prophecy. While 'no minimum number of alternatives' must be considered, [] agencies must present a reasoned alternatives analysis." (internal citation omitted)). [398] *Colo. Envtl. Coal. v. Salazar, 875 F. Supp. 2d 1233 (D. Colo. 2012).*

[484] *See, e.g., 18 U.S.C. § 5.6 (detailing the Federal Energy Regulatory Commission's preapplication procedures).*

CEQ should not allow agencies to count communications between it and an applicant to be considered scoping unless the public has notice and opportunity to also participate in scoping at the same stage.

E. Proposed §§ 1502.16, 1504.2 - Environmental Consequences and Criteria for Referral to CEQ

CEQ proposes to add to the environmental consequences that must be evaluated in an EIS, "where applicable, economic and technical considerations, including the economic benefits of the proposed action" as a required part of the discussion of environmental consequences in an EIS. This is confusing, redundant and in part, outside of the scope of NEPA. Economic effects interrelated with environmental effects are currently included in the definition of effects[401] and would remain in the definition in the proposed revision of that regulation.[402] Technical considerations are not really "effects", but would normally be part of an agency's assessment as to whether an alternative was a reasonable alternative.

The proposed additions of economic and technical considerations as a required part of effects analysis in an EIS are troubling and misguided. The preamble says that this section is being proposed "[t]o align with the statute."[403] Presumably, the reference is to Section 102(2)(B) of NEPA which directs agencies to:

> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations[.].[404]

[400] Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Regulations, 46 Fed. Reg. 10826, 10830 (Mar. 23, 1981).
[401] 40 C.F.R. § 1508.8(b).
[402] 85 Fed. Reg. at 1729.
[403] 85 Fed. Reg. at 1702.
[404] 42 U.S.C. § 4332 (2)(B).

CEQ appears to misunderstand the meaning of this provision. The Senate report accompanying NEPA explains its purpose:

> In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them *in comparison* with economic and technical factors. As a result, unless the results of planning are radically revised at the policy level and this often means the Congress-environmental enhancement opportunities may be forgone and unnecessary degradation incurred. A vital

> requisite of environmental management is the development of adequate methodology for evaluating the full environmental impacts *and the full costs of Federal actions*.[485]

In other words, this provision was included in NEPA to try to even out the playing field by directing agencies to develop "methods and procedures, in consultation with CEQ," to insure that environmental values and impacts were given consideration *along with* (not as part of) economic and technical considerations. Congress was not worried that economic and technical considerations weren't being considered; it was concerned that *environmental impacts* were not being considered. To the extent that economic factors are referenced, the Senate report refers to the "full costs" of federal actions. This could appropriately include analysis of the costs of environmental attributes such as natural barriers to flooding that could be adversely affected by federal actions. CEQ's proposed addition turns Congress' intent on its head.[486][487]

The federal courts have correctly understood for many years that purely economic interests do not fall within NEPA's zone of interest. Because NEPA claims are brought under the APA, plaintiffs must show that they are "adversely affected or aggrieved by agency action within the meaning of a relevant statute".[407] Courts "have long described the zone of interests that NEPA protects as being environmental."[488] In the words of the D.C. Circuit Court of Appeals, "NEPA is meant to supplement federal agencies' other nonenvironmental objectives."[409]

For the same reasons, CEQ should delete proposed § 1504.2(g), which would add economic and technical considerations as a criteria for agencies to weigh in deliberating on whether to refer a proposed action to CEQ.

CEQ should delete these proposed additions from any final rulemaking.

F. Proposed § 1506.6(c) - Public Involvement – 15 Days

CEQ says it is proposing to update the public involvement section to give agencies "greater flexibility to design and customize public involvement to meet the specific circumstances of their proposed actions."[410] We can think of no circumstances which would require holding a public hearing on an EIS immediately after the publication of an EIS, nor does the preamble or proposed regulation identify any such circumstances.[411] We are left without any rational explanation, then, of why the proposed regulation deletes the current requirement for an agency to make an EIS available to the public for at least 15 days prior to such a hearing. This is outrageously unfair. The EIS needs to be

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[485] *S. Rep. No. 91-296, at 20 (1969) (emphasis added).*

[486] *It is also dismaying to see that under this proposed provision, the economic benefit need only be assessed for the proposed action, typically the preferred alternative and/or the applicant's proposal. For other types of impacts in Section 1502.16 (environmental consequences), analysis is to be undertaken for the proposed action and reasonable alternatives. This difference clearly reinforces the notion that this proposed revision is intended to be for the benefit of private proponents.*

[487] *U.S.C. § 702.*

[488] *Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005) (citations omitted).* [409] *Glass Packaging Inst. v. Regan, 737 F.2d 1083, 1092 (D.C. Cir. 1984) (citing 42 U.S.C. § 4335).*

released in sufficient time before the hearing so that the public can properly prepare. The current requirement at Section 1506.6(c)(2) should be retained.

G. Proposed § 1506.6(f) - Public Involvement - FOIA Exemption

CEQ proposes to delete the provision in the current regulations that makes agency comments on EISs available to the public pursuant to the Freedom of Information Act (FOIA) without regard to the exclusion for interagency memoranda.[412] The preamble explains this deletion by stating that FOIA has been amended numerous times since NEPA was enacted. That is a true statement but it fails to explain the rationale for this deletion. The only amendment to the provision for exclusion for interagency memoranda caps the time period in which the exclusion can be claimed to twenty-five years. Twenty-five years is obviously not a relevant timeframe for NEPA purposes and that time limit has no rational connection to the deletion that CEQ proposes. [413] This proposed deletion should be withdrawn.

H. Proposed § 1503.4 – Response to Comments

CEQ's current regulations state that agencies "shall assess and consider comments both individually and collectively."[414] The proposed revision "clarifies" that agencies "may respond individually and collectively." To be clear, this proposed revision is not a clarification; it is a rollback of agency's responsibility to address each substantive comment (or summaries thereof, if the response has been exceptionally voluminous). Does this mean that any response to comments whatsoever is optional? Does it mean that an agency can choose to summarize their responses to comments collectively even if there were only 65 [489]comments? CEQ needs to explain rationale for changing "shall" to "may" and for removing the responsibility to assess comments both individually and collectively.

[410] 85 Fed. Reg. at 1,705; *see also* 40 C.F.R. § 1506.6(f).
[411] Emergency situations involving proposed actions that would normally require an agency to prepare an EIS are, of course, already covered under current 40 C.F.R. § 1506.11 or proposed § 1506.12.
[412] 40 C.F.R. § 1506.6(f).
[413] 5 U.S.C. § 552(b)(5) ("[I]nter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested[.]").
[414] 40 C.F.R. §1503.4(a).

Additionally, there is no explanation as to why CEQ is proposing to remove the "detailed language",[415] from paragraph 5(a), governing an agency's response when it believes comments do not require an agency response. The current language requiring an agency to cite sources, authorities, or reasons which support the agencies position that no response is warranted and setting out what might

[489] *Fed. Reg. at 1704.*

change an agency's thinking is intended gives the public some level of assurance that all comments are being considered.

Neither of these changes should be adopted and the current regulation regarding response to comments should be retained.

I. Proposed § 1506.3 – Adoption

CEQ proposes to amend the section on one agency adopting another agency's EIS to allow adoption of both EAs and CEs. But it fails to provide the safeguard that is built into the adoption process for EISs – public notification – for either EAs or CEs and fails to explain that omission.[490] We want to emphasize how extraordinarily disturbing this is from the public's perspective.

For EAs, the proposed regulation states at § 1506.3(d) that notice will be given "consistent with § 1501.6." But proposed §1501.6 deals solely with FONSIs and FONSIs are not a type of document subject to adoption. Any such adoption provision should specifically state that EAs can only be adopted after appropriate public involvement is afforded in compliance with §1506.6, at a minimum.

As discussed earlier,[491] we strongly oppose the proposal to allow one agency to use another agency's categorical exclusion. The provision at § 1506.3(f) dramatically highlights our concern. This provision would transform the adoption process – up until now, a relatively transparent one – into a process shielded from any outside scrutiny. This process is much worse than the current categorical exclusion process, where at least the public can reference an agency's approved NEPA procedures to determine what type of actions are likely to be categorically excluded. This proposed adoption provision, however, leaves the public totally in the dark, without any sense of which of the some 2,000 categorical exclusions that exist might be utilized by an agency.

We strongly object to categorical exclusion "adoption" and urge that it be withdrawn entirely.

J. Proposed §§ 1504.3(e), 1504.3(f) - Procedures for Referral and Response.

The proposed revision to the referral procedure drops the provisions that currently provides for an opportunity for the public to submit written comments on the matter under referral, as well as deleting the specific option of "holding public meetings or hearings." No rationale is offered for these changes in the preamble other than a vague, general allusion to simplification and efficiency.

Matters referred to CEQ are among the most highly visible and potentially significant federal actions. CEQ has always entertained outside comments under this regulation and depending on the nature of the referral, held public meetings or hearings, conducted site visits and/or provided for a written public comment period. For example, during the referral process for the proposed Manteo (Shallowbag) Bay Project located in Dare County, North Carolina (more commonly referred to as the Oregon Inlet matter), CEQ sought public comments on the referral and received extensive comments

[490] *See, 85 Fed. Reg. at 1704-05.*
[491] *Supra at Section V. (L).*

from the public, their elected representatives, and interested state agencies. CEQ also held a public meeting in Manteo, North Carolina.[492]

In other words, while retaining flexibility CEQ has customarily conducted the referral process in a manner consistent with the basic NEPA principles of public involvement and transparency. It is very disturbing and consistent with the current CEQ's disdain for the public, that CEQ is proposing to remove all provisions for public involvement are being removed. CEQ should retain the current provisions for public involvement.

VI. THE PROPOSALS TO LIMIT OR ELIMINATE JUDICIAL REVIEW ARE OUTSIDE OF THE SCOPE OF CEQ'S AUTHORITY.

A. Proposals to Limit or Eliminate Judicial Review

CEQ proposes multiple regulatory changes that are clearly intended to limit or eliminate judicial review under the APA's judicial review provisions, 5 U.S.C. § 701–706. For example, the proposed regulations attempt to: establish burdensome commenting requirements (§ 1503.3); purport to define "final agency action" for purposes of judicial review (§ 1500.3(c)); purport to interpret the judicially-created exhaustion doctrine (§ 1503.3(b)); purport to instruct federal courts on what causes of action exist and what remedies are available (§1500.3(d)); and direct agencies to self-certify compliance with the regulations with the notion that said certification would act as a shield from courts' traditional "hard look" at agency compliance by creating a "conclusive presumption" of compliance (§ 1502.18). CEQ also invites agencies to structure their decision making processes in a manner that would allow for a stay pending judicial review, possibly contingent on a bond and security requirements or other conditions (§1500.3(c)).

CEQ lacks statutory authority to interpret the APA through its NEPA regulations in a manner that would bind other federal agencies or that would warrant judicial deference, let alone limit by regulation judicial review of NEPA challenges. It is black letter law that courts do not defer to regulations construing statutes that the agency does not administer. Where courts have afforded deference to CEQ regulations, they have done so solely within the confines of interpreting NEPA's requirements. Nothing in NEPA or the APA bestow upon CEQ the authority to interpret the APA in the NEPA regulations to be followed by the entire executive branch. Since no single agency oversees administration of the APA, the courts do not defer to agencies' interpretation of the stastute. As the Supreme Court said in *United States v. Florida East Coast Railroad Co.*:

> [The Administrative Procedure Act] is not legislation that the Interstate Commerce Commission, or any other single agency, has primary responsibility for administering. An

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[492] *Resolution of the October 16, 2001 National Oceanic and Atmospheric Administration referral to the Council on Environmental Quality for the Army Corps of Engineers' Manteo (Shallowbag) Bay Project, available at: https://georgewbush-whitehouse.archives.gov/ceq/text/ceq_frnotice.html and https://georgewbushwhitehouse.archives.gov/ceq/oregoninlet*

> agency interpretation involving, at least in part, the provisions of that Act does not carry the weight, in ascertaining the intent of Congress, that an interpretation by an agency "charged with the responsibility" of administering a particular statute does.[419]

See also Adams Fruit Co. v. Barrett[420] ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*[421] ("[W]hen it comes to statutes administered by several different agencies—statutes, that is, like the APA []—courts do not defer to any one agency's particular interpretation.").

This principle is at its strongest when applied to Chapter 7 of the APA. The APA's judicial review provisions are administered solely by the courts. Congress did not delegate to CEQ or any other agency authority to speak with the force of law in administering and interpreting this chapter. Because any final regulation purporting to interpret the APA's provisions as applied to NEPA challenges does not fall within CEQ's delegated interpretive authority to resolve ambiguities and fill gaps in NEPA, it would warrant no deference whatsoever.[422]

The proposed regulations are replete with instances where CEQ oversteps its bounds and intrudes on the authority of the judiciary to administer, interpret, and apply the APA's judicial review provisions. Proposed § 1500.3(c) states CEQ's "intention" that judicial review "not occur before an agency has issued the [ROD] or taken other final agency action." The federal judiciary, however, has developed an extensive body of caselaw on what constitutes final, reviewable agency action under 5 U.S.C. § 704.[493] A reviewing court will not be bound by CEQ's regulation in determining whether the action at issue in a particular NEPA challenge is final and reviewable. Federal agencies cannot limit the subject matter jurisdiction of federal courts under the APA by regulation.[494]

Similarly, CEQ's language in this subsection regarding agencies' authorities to structure their decision making to incorporate administrative procedures for private parties to seek stays, including procedures establishing bond or other security requirements, encroaches on a well-developed body of caselaw interpreting and applying the language of 5 U.S.C. § 704 and § 705. CEQ's opinion as to the

[419] 410 U.S. 224, 252 n.6 (1973) (citations omitted).
[420] 494 U.S. 638, 649 (1990) (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)).
[421] 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (citation omitted).
[422] *See Crandon v. United States* (*Chevron* deference inappropriate where "[t]he law in question . . . is not administered by any agency but by the courts"); *Sorenson Communications Inc. v. FCC* ("To accord deference would be to run afoul of congressional intent [in enacting the APA] From the outset, we note an agency has no interpretive authority over the APA. . .we cannot find that an exception applies simply because the agency says we should.").

[493] *See, e.g., Bennett v. Spear, 520 U.S. 154, 177–78 (1997).*
[494] *See Munsell v. Dep't of Agric., 509 F.3d 572, 580 (D.C. Cir. 2007).*

propriety of such rulemaking will neither expands federal agencies' authorities to promulgate rules structuring their NEPA decision making nor meaningfully inform a court determining whether a party's compliance (or lack thereof) with such rules has affected the finality of an agency decision. Likewise, CEQ's "intention" that "minor, non-substantive errors that have no effect on agency decision making shall be considered harmless," proposed § 1500.3(d), is superfluous to the harmless error doctrine that the courts have developed under 5 U.S.C. § 706(2). To the extent CEQ seeks to expand this doctrine, it is without authority to do so.

Just as CEQ lacks delegated interpretive authority for the APA, so too does it lack authority to interpret the body of statutory and common law that establishes the judiciary's powers and limits thereto and enshrine this interpretation in the NEPA regulations. CEQ may not instruct a reviewing court sitting in equity as to what it may or may not presume when determining whether a NEPA violation is a basis for irreparable harm or injunctive relief under applicable judicial precedents, although CEQ purports to do so in proposed § 1500.1(d). Nor may CEQ impose binding regulatory exhaustion requirements that originated in judicially-created and prudential doctrines subject to exceptions to restrict judicial review, as it attempts to do in proposed § 1500.3(b)(3) ("Comments or objections not submitted shall be deemed exhausted and forfeited."). Finally, CEQ cannot create a "conclusive presumption" that restricts a reviewing court's discretion to determine whether an agency "has considered the information in the submitted alternatives, information, and analyses section submitted by public commenters," as stated in proposed § 1502.18, merely because the agency decision maker has certified in the ROD that she has done so. *See also* proposed § 1500.3(b)(4) (certification requirement). These draft regulatory changes inappropriately encroach on the judiciary's constitutional functions to interpret and apply the law, including both statutory and common law.

Any federal agency relying on CEQ's regulations purporting to interpret the APA or the federal judiciary's powers and constraints as applied to NEPA challenges to defend its actions or support its arguments does so at its peril. That agency will be unable to take advantage of the pass-through deference courts otherwise accord to CEQ's NEPA regulations (where valid). CEQ's attempts to stick its oar into what are plainly—and exclusively—judicial waters will only lead to potential confusion within agencies, inconsistencies in amendments to agency-specific NEPA regulations, and protracted litigation. CEQ should abandon these attempts.

VII. CEQ'S PROPOSAL FUNDAMENTALY UNDERMINES ENVIRONMENTAL JUSTICE CONSIDERATIONS AND PUTS FRONTLINE COMMUNITIES AT RISK.

It is accepted fact that frontline communities are disproportionately impacted by pollution and other environmental and health hazards.[495][496] However, it is these low-income, rural, and minority communities that would be most severely impacted by CEQ's proposed revisions, placing them at

[495] *American Bar Association, Resolution on Environmental Justice and Report to the House of Delegates, Approved by House of Delegates, Aug. 11, 1993, reprinted in Hill, Barry E., Environmental Justice Legal Theory and Practice, pp. 407-414, ELI Press (2009).*
[496] *U.S.C. § 4332(C)*

extreme risk by ignoring cumulative impacts, limiting scientific analysis, narrowing the scope of review, shielding significantly impactful projects from any type of meaningful public input or disclosure of impacts, limiting consideration of alternatives, and making it much more difficult for environmental justice ("EJ") communities to hold the government accountable by limiting or eliminating judicial review.

While the substance of these technical comments *writ large* contains a litany of concerns with the effect that CEQ's draft rule will have on EJ communities, we wish to use this section to bond them together in greater detail in order to better illustrate CEQ's shameful disregard of the frontline communities most at risk by ill-considered projects or decisions.

In NEPA, Congress presciently placed environmental justice concerns at the core of the statute by recognizing that each person "should enjoy a healthful environment" and by premising the entire requirement for an environmental impact statement on "major Federal actions significantly affecting the quality of the *human* environment."[426]

The term "environmental justice" formally entered the federal lexicon in 1994 when President Clinton signed an Executive Order addressing "Environmental Justice in Minority and Low-Income Populations." Critically, the Executive Order was the first acknowledgment that exposure to environmental hazards is related to race and income levels, mandating federal agencies to develop strategies for "identifying and addressing…[the] disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations."[497] That President Clinton, in a memorandum subsequently cited by CEQ itself its "Environmental Justice Guidance Under the National Environmental Policy Act" ("EJ Guidance), recognized "the importance of procedures under NEPA" and emphasized

"the importance of NEPA's public participation process" in implementing later EO 12898 ("Federal Action to Address Environmental Justice in Minority Populations and LowIncome Populations") lends great strength to the statement that NEPA and the current regulations are the most effective way to identify and address environmental justice concerns.

CEQ notes in its EJ Guidance that EJ issues "may arise at any step of the NEPA process and agencies should consider these issues at each and every step of the process."[498] In this sweeping proposal that will fundamentally change nearly every step of the NEPA review process, CEQ has provided no explanation or analysis of how the development and implementation of this rule would affect implementation of EO 12898 and, consequently, EJ communities. The potential for disproportionate impacts should have been considered in a NEPA analysis on this proposal, but as noted above[429], CEQ has disregarded its own responsibility to comply with NEPA and prepare an EIS on the proposal. [499][500] Further, without providing the analysis CEQ says it prepared under EO 12898 for

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[497] *"Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994), amended by Exec. Order No. 12,948, 60 Fed. Reg. 6381 (Jan. 30, 1995).*

[498] *"Environmental Justice Guidance Under the National Environmental Policy Act," CEQ. 1997.* [429] *Supra at Section II (B).*

[499] *Id.*

[500] *Fed. Reg. at 1711-1712.*

review by the public at large or the affected environmental justice communities, [431] CEQ cursorily concluded that the proposed rule "would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income." [501] Further, CEQ's EJ Guidance, which outlines environmental justice principles and considerations in the NEPA process, would be rescinded.

Of particular concern is CEQ's proposal to eliminate the requirement to consider cumulative impacts, which CEQ identifies as one of the six general principles that agencies should consider in environmental reviews as they seek to incorporate environmental justice concerns under EO 12898. [433] [502] Eliminating cumulative effects analysis will disproportionately and adversely affect EJ communities. As CEQ noted, "Evidence is increasing that the most devastating environmental effects may not result from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time."[435] This is particularly true with EJ communities. The EPA recently found that people of color and the poor are much more likely to be exposed to pollution, impacting their health. The pollution to which communities are exposed does not come from a single action or source, but rather from multiple actions over a period of time. Cumulative effects analysis under NEPA is one of the few tools available to agencies to consider exactly how a proposed project may contribute to past, present, and future pollution burdens.[503]

The current proposal not only eliminates critical cumulative impact analysis on which EJ communities rely, it sidelines these communities by multiple provisions with the current proposal which would limit or entirely eliminate meaningful public input. Specifically, CEQ narrows the scope of review and unjustifiably proposes to eliminate

NEPA's applicability to a wide variety of federal actions.[437] Additional measures, such as new limitations on additional scientific analysis[438], the proposal to gut the alternatives requirement[439], elimination of the requirement to give the public 15 days to review an EIS,[440] and establishing burdensome commenting requirements[441] will severely limit the public's access to information on impacts to their communities and make it nearly impossible to meaningfully engage in the decisionmaking process.

Taken together, the proposed changes in CEQ's proposal will institutionalize a decisionmaking process across the federal government that unconscionably shields EJ communities from the most relevant information on impacts to their communities and unconscionably silences their voices in the decisionmaking process.

VII. CONCLUSION

[501] *Id.* [433] *Id.*

[502] *Id. ("Agencies should consider relevant public health data and industry data concerning potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards.")* [435] *Ibid.*

[503] *See Louisiana Energy Servs, L.P. (Claiborne Enrichment Center), CLI 98-3, 47 N.R.C. 77 (1998); Private Fuel Storage, L.L.C. The Louisiana Energy Services Corporation applied to the U.S. Nuclear Regulatory Commission for a license to construct and operate a nuclear fuel*

We urge CEQ to withdraw this entire regulatory proposal and work to enforce the sensible and lawful provisions of the current CEQ regulations. We remind CEQ again that studies conducted to determine the cause of delay in federal actions coming under NEPA have consistently found that NEPA is *not* the primary driver of delay.[442] Further, we believe that the outcome of upending five decades of NEPA law and attempting to redesign the process will actually result in more, not less, time spent on NEPA. But most urgently, the consequences of finalizing these proposed revisions will be to do lasting damage to the quality of our human environment and will restrict the public's ability to actively engage in decisionmaking.

enrichment facility near the small rural community of Homer, Louisiana. The proposed site was located near two unincorporated communities populated primarily by low-income, minority families that were descendants of freed slaves. Among other social and economic impacts, the facility would have eliminated a road connecting the two communities, causing residents to experience greatly increased travel times to work, school, and other activities.

[437] *Supra*, Section IV.

[438] *Supra* at Section V (I). [439] *Supra* at Section V (F).

[440] *Supra* at Section VI (F).

[441] *Supra* at Section VI.

[442] USDA Forest Service, *Environmental Analysis and Decision Making: The Current Picture* (Phoenix, Az. Sept. 2017), Department of Treasury report by Toni Horst, et al., *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*, (December, 2016) Congressional Research Service, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, R42479, (April 11, 2012).

March 10, 2020

Submitted via Regulations.gov and via email to fn-ceq-nepa@ceq.eop.gov

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

Re: Docket No. CEQ-2019-0003, Notice of Proposed Rulemaking, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act

Dear Ms. Neumayr:

On behalf of our millions of members and supporters across the country, the undersigned **331 conservation, health, and justice organizations and businesses** urge the Council on Environmental

Quality (CEQ) to withdraw the Notice of Proposed Rulemaking (NPRM) and retain the existing CEQ regulations that properly implement the National Environmental Policy Act (NEPA).[504]

The deeply flawed and illegal changes in the NPRM would silence public input and purge informed, science-based decision-making from the federal environmental review process. They would put industry, developer, and polluter interests before public health and safety, and before the health of our waters, lands, air and wildlife. The changes create significant risks for frontline and indigenous communities that are already disproportionately harmed by pollution, flooding, and climate change.

NEPA is a critical tool for saving lives and protecting the environment for the health, safety, and wellbeing of future generations. The existing CEQ regulations correctly implement NEPA's action forcing procedures that include giving the public a voice in federal decisions that affect the environment, carefully reviewing the environmental impacts of proposed actions, and investigating less environmentally harmful alternative actions. Reviews carried out under the current regulations have exposed the true cost of environmentally damaging and ill-conceived proposals, leading to better solutions and substantial savings for federal taxpayers.[505]

For example, NEPA review led to an inter-agency agreement halting construction of a dangerous new levee, protecting vulnerable Mississippi River communities from flooding, preventing the loss of 50,000 acres of wetlands, and saving taxpayers more than $345 million. NEPA review of a Corps of Engineers' proposal to dredge California's Bolinas Lagoon showed that the project would cause extensive harm to one of the most pristine tidal lagoons in California and was not necessary. The misguided proposal was then abandoned, saving taxpayers $133 million, and the non-federal sponsor developed a communitysupported plan to restore and manage the lagoon. NEPA review protected public health and the environment by allowing a coalition of tree planters, rural residents and scientists in the Pacific Northwest to work with the Forest Service to develop an effective, less-costly, and safer nonchemical weed control alternative in lieu of toxic herbicides.

The changes proposed in the NPRM would unravel the vital protections provided by NEPA, threatening the health, safety, and well-being of people and wildlife across the country. Among many other unacceptable and illegal changes, the NPRM would:

1. **Eliminate NEPA review for many projects:** The proposal attempts to exclude many projects from environmental review and public input under NEPA. Among other things, the NPRM creates new tests for determining whether NEPA applies at all to a project (including by changing the definition of "major federal action") and allows agencies to exempt a project from NEPA review by determining that some other type of analysis would serve the same purpose.

[504] *Many of our organizations will also be submitting individual comments and/or joining other group comments urging CEQ to withdraw the NPRM.*

[505] *While NEPA implementation has been far from perfect, the information and public involvement obtained through the NEPA process has provided enormous benefits to people, wildlife, and the environment across the country.*

These changes could allow agencies to move forward with controversial projects – including building pipelines, roads, dams, floodgates, and levees – without any NEPA review or opportunity for public comment.

2. **Ignore severe environmental, public safety, and health impacts:** The proposal would severely limit the types of impacts examined during a NEPA review. The NPRM's directive that analysis of cumulative effects "is not required" would eliminate review of a project's role in increasing climate change and many other types of harm. It would also dispense with review of rising sea levels, stronger storms, and other climate change impacts on the effectiveness and resilience of a proposed project. Agencies could also ignore many types of severe impacts based on the NPRM's elimination of all references to "indirect" effects, and its directive to review only impacts with a "reasonably close causal relationship" to the proposed action. These changes could let agencies ignore the long-term impacts of toxic pollution from gold or copper mines; the risks of new levees diverting floodwaters onto other communities; and loss of wetlands caused by reservoir management practices that starve a river of the water flows needed to sustain those wetlands.

3. **Allow projects to be approved even if critical scientific and technical information is missing:** The proposal would give agencies the green light to make decisions without scientific and technical information essential to making a reasoned choice among project alternatives. The NPRM specifically states that agencies "are not required to undertake new scientific and technical research to inform their analyses." This could let agencies approve navigation infrastructure, major river dredging projects, reservoir operating plans, and large flood projects without conducting the research needed to understand the impacts of those projects on flooding, habitat loss, or ecosystem health.

4. **Significantly weaken the review of alternatives:** The proposal would significantly weaken the assessment of alternatives during a NEPA review, dramatically undermining NEPA's fundamental purpose of exploring less environmentally harmful approaches to achieving the project purpose. The NPRM eliminates the requirements to "rigorously explore and objectively evaluate all reasonable alternatives" and to consider reasonable alternatives not within the jurisdiction of the lead agency. The NPRM instead directs a much less extensive review, requiring only that agencies "evaluate reasonable alternatives to the proposed action."

5. **Allow agencies to ignore critical public input:** The proposal creates loopholes that could let federal agencies ignore public comments, effectively silencing the communities and individuals that could be harmed most by a federal action. The NPRM would let agencies ignore public comments that they deem are not "specific" enough or do not include reference to data sources or scientific methodologies. The NPRM improperly places the burden on the public to list *any and all* possible impacts of a proposed project; to provide specific language changes; and to "explain why an issue raised is significant" to the consideration of impacts to the environment, the economy, employment and potential alternatives. Comments most likely to be ignored include those from the general public; those from frontline communities without resources to fund technical reviews; and those that rely on traditional knowledge rather than technical data. The NPRM also creates new hurdles to challenging a flawed environmental review in court.

6. **Allow project applicants to write their own environmental reviews without conflict of interest safeguards:** The proposal eliminates longstanding safeguards designed to protect the independence and integrity of environmental reviews. Under the current regulations, the federal agencies prepare NEPA reviews and agencies can only hire consultants to assist in a NEPA review after obtaining disclosures of any conflicts of interest or financial stakes in the project the contractor would be reviewing. The NPRM, however, lets companies prepare their own NEPA reviews – despite their clear interest in obtaining project approval. Agencies could also hire contractors without obtaining a conflicts of interest disclosure.

The changes proposed in the NPRM would wreak havoc on communities, wildlife, and the environment. We urge CEQ to withdraw the NPRM and retain the existing NEPA implementing regulations that have properly served the nation for more than 40 years.

Sincerely,

Bo Webb
Campaign Director

Don Riepe
Director, NE Chapter

ACHE American Littoral Society
Cindy E Lowry
Katherine Robb
Executive Director
Senior Program Manager
Alabama Rivers Alliance American Public Health Association
Maria De Luna
Eileen Shader
National Policy & Advocacy Coordinator
Director, River Restoration
Alianza Nacional de Campesinas
American Rivers
Susan Inman
Joseph Zupan
Altamaha Coastkeeper Executive
Director
Altamaha Coastkeeper Amigos Bravos
Steve Holmer Thomas
Anderson Vice President of
Policy Administrative Director
American Bird Conservancy
Amigos De Bolsa Chica
Trey Sherard
Interim Riverkeeper
Anacostia Riverkeeper
Olivia Anderson
Project Coordinator and Development Lead
Anacostia Riverkeeper Inc.
Marjorie Levine
Director
Angler Action Foundation
Bethany Cotton
Terrestrial Wildlife Director
Animal Welfare Institute
Georgia Ackerman
Riverkeeper & Executive Director
Apalachicola Riverkeeper
Mary Varson Cromer
Deputy Director
Appalachian Citizens' Law Center, Inc.
Joe Lovett
Executive Director
Appalachian Mountain Advocates
Brendan Mysliwiec
Director of Federal Policy and Legislation
Appalachian Trail Conservancy
Jim Vogt
President
Aquashicola/Pohopoco Watershed Conservancy
Francisco Lopez President
Arrecifes Pro Ciudad Inc.
Constantino Aucca
President of ECOAN
Asociacion Ecosistemas Andinos – ECOAN
Kathy Phillips
Assateague COASTKEEPER
Assateague Coastal Trust
Dean A. Wilson
Executive Director
Atchafalaya Basinkeeper
Heather Cantino
Steering Committee Chair
Athens County's Future Action Network, a.k.a. Athens County (OH) Fracking Action Network
Scott Zucker
Vice President
Audubon Everglades
Jill Mastrototaro
Policy Director
Audubon Mississippi
Dan VanNorman
President of Audubon Chapter and Alternate
Delegate to the Everglades Coalition
Audubon of Southwest Florida
Connie M. Ericson
Advocacy Chair
Audubon Society Northern Virginia
Bob Sallinger
Conservation Director
Audubon Society of Portland
Kevin Graff
Vice-President
Baltimore Bird Club
Kevin Emmerich
Director
Basin and Range Watch
Jordan Macha

Executive Director & Waterkeeper
Bayou City Waterkeeper
Bob Fisher
Communications Chair
Bird Conservation Network
Charles Scribner
Executive Director
Black Warrior Riverkeeper
David C Perry
Executive Director
Blue Ridge Land Conservancy and Central Virginia Land Conservancy
Jenn Aiosa
Executive Director
Blue Water Baltimore
Rebecca Roter
Chairperson
Breathe Easy Susquehanna County
Beth K. Stewart
Executive Director
Cahaba River Society
Myra A Crawford
Executive Director
Cahaba Riverkeeper
Sean Bothwell
Executive Director
California Coastkeeper Alliance
Nick Jensen
Lead Conservation Scientist
California Native Plant Society
Bill Jennings
Executive Director
California Sportfishing Protection Alliance
Linda Castro
Assistant Policy Director
California Wilderness Coalition
Michael J. Painter
Coordinator
Californians for Western Wilderness
John Cassani
Calusa Waterkeeper
Lori Haus-Bulcock
Board of Directors
Cape Coral Friends of Wildlife
Kemp Burdette
Cape Fear Riverkeeper
Cape Fear River Watch
Parker Agelasto
Executive Director
Capital Region Land Conservancy
Glenn Wahl
Co-Founder
Cattaraugus-Chautauqua for Clean Water
David C. Kyler
Co-Director **Center for a Sustainable Coast**
Joe Laszlo
Facilitator
Central Illinois Healthy Community Alliance
Reed Perry
Government Relations Specialist
Chesapeake Conservancy
Judy Pollock
President
Chicago Audubon Society
Michael William Mullen
Riverkeeper/Executive Director

Choctawhatchee Riverkeeper
John Koeferl
President
Citizens Against Widening the Industrial Canal
Aimee Erickson
Executive Director
Citizens Coal Council
Natasha Leger
Executive Director
Citizens for a Healthy Community
Anne Coglianese
Coastal Resilience Program Manager **City of New Orleans**
Jennifer Peters
National Water Programs Director
Clean Water Action
Ken Dolsky
Organizer
Coalition Against Pilgrim Pipeline - NJ
Emily Vuxton

Policy Director
Coalition to Restore Coastal Louisiana
Bayard Ewing
Chair, Conservation Committee
Colorado Native Plant Society
Brett VandenHuevel
Executive Director
Columbia Riverkeeper
Clark Bullard
Director
Committee on the Middle Fork Vermilion River
Brigid Lawlor
U.S. Provinces Advocacy Liaison
Congregation of Our Lady of the Good Shepherd, U.S. Provinces
Heather A. Govern, Esq.
Vice President and Director, Clean Air and Water Program
Conservation Law Foundation (CLF)
Jesse Demonbreun-Chapman
Executive Director & Riverkeeper
Coosa River Basin Initiative/Upper Coosa Riverkeeper
Larry Baldwin
Waterkeeper
Crystal Coast Waterkeeper
William Franks
President
Cumberland-Harpeth Audubon Society
Peg Furshong
Director of Programs
CURE (Clean Up the River Environment)
Frank James
Staff Director
Dakota Rural Action
John Murtaugh
Representative, Rockies and Plains
Defenders of Wildlife
Diane Rosencrance
Executive Director
Delaware Highlands Conservancy
Matthew Sarver
Conservation Chair
Delaware Ornithological Society
Maya K. van Rossum the Delaware Riverkeeper
Delaware Riverkeeper Network
Anne Bekker
Conservation Co-Chair
Delaware Valley Ornithological Club
Angelo DePaola
Owner and operator
Depe Oysters LLC
Babak Tondre President & Co-Owner
DIG Cooperative Inc.
Mary Gutierrez Director
Earth Ethics, Inc.
Amy Rosmarin
Executive Director
Earthkeeper Health Resources
Aaron Mintzes
Senior Policy Counsel
Earthworks
Daneeta Loretta Jackson Producer
Elektrik Zoo Films, Inc.
Dan Silver
Executive Director
Endangered Habitats League
Morgan Patton
Executive Director
Environmental Action Committee of West Marin
Maureen Cunningham
Senior Director for Clean Water
Environmental Advocates of New York
Caitlin Hart
Senior Legislative Analyst
Environmental Defense Fund
Thomas Wheeler
Executive Director
Environmental Protection Information Center
Michelle Roos
Executive Director
Environmental Protection Network
Steve Box
Executive Director
Environmental Stewardship
Jim La Rochelle

President
Evanston North Shore Bird Club
Carol Hoover / Skye Steritz
Executive Director / Program Manager
Eyak Preservation Council / Copper River Delta Sound Waterkeeper
Blair Schilling
Attorney
Fishman Haygood, LLP
Bill Tanger
Vice President and Conservation Chair
Float Fishermen of Virginia
Emma Haydocy
Director
Florida Bay Forever
Michael Chenoweth
President
Florida Division of the Izaak Walton League of America
Mark Perry
Executive Director
Florida Oceanographic Society
Liz Kirkwood
Executive Director
FLOW (For Love of Water)
Dave Peterson
Conservation Chair
Fly Fishers International
Sherry Pease
Executive Director
Foothill Conservancy
Spring D Ligi
Nature Instructor
Frederick Bird Club - MOS
Judith Rodd
Director
Friends of Blackwater, Inc.
Ivy Frignoca
Casco Baykeeper
Friends of Casco Bay
Glenda Booth
President
Friends of Dyke Marsh
Andrew N Tyler
Consultant
Friends of Fakahatchee
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President
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Scott Beauchamp
Policy Director
Friends of the BWCA
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President
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Executive Director
Friends of the Cheat
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Executive Director
Friends of the Chemung River Watershed
Kristin Larsen
Executive Director
Friends of the Cloquet Valley State Forest
Robert Burns
Detroit Riverkeeper
Friends of the Detroit River
Marcie Keever
Director, Oceans & Vessels Program
Friends of the Earth
Barbara Ullian
Chair
Friends of the Kalmiopsis
Dawn Buehler
Kansas Riverkeeper & Executive Director
Friends of the Kaw
John C McCue
Chairman
Friends of the Middle River
Trevor A Russell
Water Program Director
Friends of the Mississippi River
Scott C Yaich
Board Member
Friends of the North Fork and White Rivers
Ronald Martin Stork
Policy Director
Friends of the River

Bill Tanger
Chair
Friends of the Rivers of Virginia
Kathleen J. Vasvary
Missionary
Friends of the Santa Cruz River
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President
Galveston Bay Foundation
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Vice President
Gas Free Seneca
Peter Duffey
Board Director
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Michael Worley
President & CEO
Georgia Wildlife Federation
Linda Stone
VP Admin & Gulf Coast Programs
Global Green
Rachael Thompson
Executive Director
Glynn Environmental Coalition
Pam Young
Executive Director
Golden Gate Audubon Society
Rick Eichstaedt
Director/Attorney
Gonzaga University Environmental Law and Land Use Clinic
Fred Akers
Administrator
Great Egg Harbor Watershed Association
Shelley Silbert
Executive Director
Great Old Broads for Wilderness
Bruce A. Morrison
President
Great Rivers Environmental Law Center
David Stokes
Executive Director
Great Rivers Habitat Alliance
Veronica Warnock
Conservation Director
Greater Hells Canyon Council
Fran Teplitz
Executive Co-director
Green America
Sascha Bollag
Attorney
Green Justice
Charlie Cray
Business and Political Strategist
Greenpeace
Theaux Le Gardeur
Gunpowder RIVERKEEPER
Captain Bill Sheehan
Riverkeeper & Executive Director
Hackensack Riverkeeper
Emily Sutton
Haw Riverkeeper
Haw River Assembly
Sean Grace
President
Hawk Mountain Sanctuary
Cynthia Sarthou
Executive Director
Healthy Gulf (formerly Gulf Restoration Network)
April Peebler
Executive Director
Heirs To Our Oceans
Stephen Buczynski
President
Hendry-Glades Audubon Society
Matt Reed
Public Lands Director
High Country Conservation Advocates
Patricia Adams
Attorney
Holy Cross Neighborhood Association
Indra Frank
Director of Environmental Health and Water Policy
Hoosier Environmental Council
Aaron Lehmer-Chang
Co-owner
House Kombucha

Richard Webster
Legal Director
Hudson Riverkeeper
Jennifer Kalt
Director
Humboldt Baykeeper
Colleen McNally-Murphy
Associate National Director
Hydropower Reform Coalition
Nic Nelson
Executive Director
Idaho Rivers United
Bonnie Duman
Board Member
Illinois Audubon Society
Edward L Michael
Government Affairs Chair
Illinois Council of Trout Unlimited
Tamima Itani
Vice President and Treasurer
Illinois Ornithological Society
Liz Stelk
Executive Director
Illinois Stewardship Alliance
Howdy Henritz
President
Indian Creek Watershed Association
Michael Conner
Executive Director
Indian Riverkeeper
Emily A Wood
Executive Director
Indiana Wildlife Federation
Megan Brousseau
Associate Director
Inland Empire Waterkeeper
Vicki Nichols Goldstein
Founder & Director
Inland Ocean Coalition
Shiney Varghese
Senior Policy Analyst
Institute for Agriculture and Trade Policy
Michael R. Schmidt
Staff Attorney
Iowa Environmental Council
Joe Wilkinson
President
Iowa Wildlife Federation
Jared Mott
Conservation Director
Izaak Walton League of America
Jim Scheff
Director
Kentucky Heartwood
Tom Fitzgerald
Director
Kentucky Resources Council
Pat Banks
Director
Kentucky Riverkeeper
Ward G. Wilson
Executive Director
Kentucky Waterways Alliance
Kimberly Baker
Executive Director
Klamath Forest Alliance
Joseph Vaile
Climate Program Director
Klamath-Siskiyou Wildlands Center
Patricia Schuba
President
Labadie Environmental Organization (LEO)
Lori Fisher
Executive Director
Lake Champlain Committee
Sandy Bihn
Executive Director
Lake Erie Waterkeeper
Reinaldo Diaz
Waterkeeper
Lake Worth Waterkeeper
Rena Cohen
President
Lake-Cook Chapter, Illinois Audubon Society
Cindy Brown
Executive Director
Land Trust for Louisiana
Deborah A Aldridge

President
Last Stand
Rebecca Jim Tar
Creekkeeper
LEAD Agency, Inc.
Matthew Davis
Legislative Director
League of Conservation Voters
Nancy Porter
Director
League of Women Voters of Iowa
Cathy Eisenhofer
President
League of Women Voters of Johnson County Iowa
Jessica Jones Capparell
Legislative and Policy Affairs Senior Manager
League of Women Voters of the United States Mary Ploeser
Co-Chair
League of Women Voters Upper Mississippi River Region Inter League Organization (LMVURRILO)
Sandy Rosenthal
Founder and President
Levees.org
Angela Shugart
Executive Director
Little River Waterkeeper
John Weisheit
Conservation Director
Living Rivers & Colorado Riverkeeper
Michael Myers
Executive Director
Loudoun Wildlife Conservancy
Dr. Barry Kohl
President
Louisiana Audubon Council
John A. Ruskey
Founding Director
Lower Mississippi River Foundation
Ted Evgeniadis
Lower Susquehanna Riverkeeper
Lower Susquehanna Riverkeeper Association
Laura Paul Executive
Director **lowernine.org**
Drew Martin
Conservation Chair
Loxahatchee Group
Karen Forget
Executive Director
Lynnhaven River NOW
Colin Rees
Steering Committee Chair
Maryland Bird Conservation Partnership
Kurt R. Schwarz
Conservation Chair
Maryland Ornithological Society
Jen Lomberk, Esq.
Matanzas Riverkeeper
Matanzas Riverkeeper
Michael Collins
President
Memphis Tennessee Ornithological Society
Rachel Silverstein
Executive Director & Waterkeeper
Miami Waterkeeper
Sean Hammond Policy Director
Michigan Environmental Council
Ayako Nagano Managing Attorney
Midori Law Group, P.C.
David Schmitt
Executive Director
Mill Creek Alliance
Cheryl Nenn
Riverkeeper
Milwaukee Riverkeeper
Albert Ettinger
Legal Counsel
Mississippi River Collaborative
Kelly McGinnis
Executive Director
Mississippi River Network
Heather Navarro
Executive Director
Missouri Coalition for the Environment Rachel Bartels
Director
Missouri Confluence Waterkeeper

Dana Ripper
Director
Missouri River Bird Observatory
Craig Sterle
Division Past President
MN Division-Izaak Walton League of America
Meredith Diskin
Program Coordinator
Mobile Baykeeper
Patrice Tomcik
Project Manager, State Campaigns
Moms Clean Air Force
Eric Harder
Youghiogheny Riverkeeper
Mountain Watershed Association
Gray Jernigan
Southern Regional Director and Green Riverkeeper
Mountain True
Darryl E Malek-Wiley
CEO
M-W & Associates
Cynthia Routledge
President
Nashville Chapter of Tennessee Ornithological Society
Lawrence E. Couch
Director
National Advocacy Center of the Sisters of the Good Shepherd
Ani Kame'enui
Deputy Vice President, Government Affairs
National Parks Conservation Association
Laura Daniel Davis
Chief of Policy and Advocacy
National Wildlife Federation
Veronica Bowers
Director
Native Songbird Care & Conservation
Diana and Byron Steskal
Nebraska Landowners
Nebraska Easement Action Team (NEAT)
George Cunningham
Board Member
Nebraska Wildlife Federation
Elliott Ruga
Policy & Communications Director
New Jersey Highlands Coalition
Susan Michelle Silber
Director
NorCal Resilience Network
Carrie Clark
Executive Director
North Carolina League of Conservation Voters
Matt Norton
Policy Director
Northeastern Minnesotans for Wilderness
Michael J. Goff
President and CEO
Northeast-Midwest Institute
Nina Bell
Executive Director
Northwest Environmental Advocates
Jonah Sandford
Staff Attorney
Northwest Environmental Defense Center
Gregory Remaud
Baykeeper & CEO
NY/NJ Baykeeper
William Rossiter
Vice President
NY4WHALES
Kathryn Heintz
Executive Director
NYC Audubon
Michael Stocker
Director
Ocean Conservation Research
Courtney Vail
Director of Strategic Campaigns
Oceanic Preservation Society
Damon Mullis
Executive Director/Riverkeeper
Ogeechee Riverkeeper
Rich Cogen
Executive Director
Ohio River Foundation
Jackie Antalan

Director of Outreach & Programs
Operation HomeCare
Mark Salvo
Program Director
Oregon Natural Desert Association
Doug Heiken
Conservation and Restoration Coordinator
Oregon Wild
J. Sam Miller
Organizer
Our Water, Our Air, Our Rights
Vivian Stockman
Executive Director
OVEC-Ohio Valley Environmental Coalition
Brenda Curtis
Board Member & Conservation Chair
Peace River Audubon
Rev. Sandra L. Strauss
Director of Advocacy and Ecumenical Outreach
Pennsylvania Council of Churches
Howard Penn
Executive Director
Planning and Conservation League
Pat Lupo, OSB and Sarah Peelman
Co-chairs
PLEWA, Pennsylvania Lake Erie Watershed Association
Peter Hudiburg
Founder
Plymouth Friends for Clean Water
Phillip Musegaas
Vice President of Programs and Litigation
Potomac Riverkeeper Network
Marcia Westkott
Chair
Powder River Basin Resource Council
Nancy Hilding
President
Prairie Hills Audubon Society of Western South Dakota
Ryan Grosso
Water Resources Associate
Prairie Rivers Network
Roseanna Sacco
President
Preserve Monroe
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President
Presidio Historical Association
Alyssa Barton
Policy Manager
Puget Soundkeeper
Joe Siegrist
President/CEO
Purple Martin Conservation Association
John Ruskey
Owner, Founder
Quapaw Canoe Company
Tom Sobal
Director
Quiet Use Coalition
Phil Irwin
Vice President
Rappahannock League for Environmental Protection
Bill Shultz
Raritan Riverkeeper
Eleanor Hines
North Sound Baykeeper
RE Sources for Sustainable Communities
Marianne Cufone
Executive Director
Recirculating Farms Coalition
Jen Pelz
Rio Grande Waterkeeper
Rio Grande Waterkeeper (WildEarth Guardians)
Lisa Wittenborn
Program Director
Rivanna Conservation Alliance
Raj Shukla
Executive Director
River Alliance of Wisconsin
Katherine Baer
Director of Science and Policy
River Network
Barbara L. Walsh
Executive Director
Rockbridge Area Conservation Council (RACC)
Roz McClellan
Coordinator

Rocky Mountain Recreation Initiative
Stacey Detwiler
Conservation Director
Rogue Riverkeeper
Don McEnhill
Executive Director
Russian Riverkeeper
Trygve B. Sletteland
Founder and Executive Director
Sacramento River Council (subsumed into Sacramento River Preservation Trust)
David Harrison
Conservation Director
Salem Audubon Society
Diane Wilson
Executive Director
San Antonio Bay Estuarine Waterkeeper
Sejal Choksi-Chugh
Executive Director
San Francisco Baykeeper
Christine Canaly
Director
San Luis Valley Ecosystem Council
Gail Musante official signer
Sanford-Oquaga Area Concerned Citizens (S-OACC)
Laura Early
Executive Director
Satilla Riverkeeper
Tonya Bonitatibus
Riverkeeper
Savannah Riverkeeper/Waterkeeper
Carol Campbell
Member
Save EPA
Joseph Bogaard
Executive Director
Save Our Wild Salmon Coalition
Kate McPherson
Narragansett Bay Riverkeeper
Save the Bay
Michael Rice Director **Save the Cape, Inc.**
Gary Wockner
Executive Director
Save The Colorado
Kay Charter
Executive Director
Saving Birds Thru Habitat
Joseph Campbell
President
Seneca Lake Guardian, A Waterkeeper Affiliate
Matt Pluta
Choptank Riverkeeper
ShoreRivers
Dalal Aboulhosn
Deputy Legislative Director
Sierra Club
Carol Adams-Davis
Vice Chair
Sierra Club Mobile Bay Group
Sandra Seberger
Chairman
Sierra Club-Black Hills
Charles Marsh
Kathy Hawes
President
Executive Director
Sleepy Creek Watershed Association
Tennessee Clean Water Network
Snake River Waterkeeper
David Whiteside
Executive Director
Executive Director
Snake River Waterkeeper
Tennessee Riverkeeper
Dave Willis
Rhiannon Lewis-Stephenson
Chair
Communications and Development Coordinator
Soda Mountain Wilderness Council
The Environmental Protection Information
Laura Sue Fuderer
Conservation Chair
Barbara Heskins Davis
South Bend-Elkhart Audubon Society
Vice President Programs
Brad K. Evans

Waterkeeper
Mike Petersen
South Platte River Waterkeeper
Executive Director
The Lands Council
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Southern Maryland Audubon Society
Executive Director
Sharon Yoker
Secretary of TriLakes Fly Fishers
Heather Smith
Southwest Missouri Fly Fishers
Grand Traverse Baykeeper
The Watershed Grand Traverse Bay
Lisa Rinaman
Riverkeeper
Ann Witsil
St. Johns Riverkeeper
Interim Executive Director
The Wetlands Conservancy
Suzannah Glidden
Co-founder
Paul Botts
Stop the Algonquin Pipeline Expansion (SAPE)
President & Executive Director
The Wetlands Initiative
Andre Mele
Executive Director
Drew McConville
Suncoast Waterkeeper
Sr. Managing Director, Government Relations
The Wilderness Society
Angela Howe
Legal Director
Richard McNutyt
Surfrider Foundation
President
Tidewaters Gateway Partnership Inc. Justin Bloom
Director
Jennifer Mckay
Tampa Bay Waterkeeper
Policy Director
Tip of the Mitt Watershed Council
Ashley Short
Riverkeeper & In-House Counsel
Tualatin Riverkeepers
Sandra Schubert
Executive Director
Tuleyome
Lee First
Twin Harbors Waterkeeper
Richard M Frank
Professor of Environmental Practice
U.C. Davis School of Law
Andrew Rosenberg
Director, Center for Science and Democracy
Union of Concerned Scientists
Guy Alsentzer
Executive Director
Upper Missouri Waterkeeper
Mary Rafferty
Executive Director
Virginia Conservation Network
Christina Hausman Rhode
Executive Director
Voyageurs National Park Association
David Groenfeldt, PhD
Director
Water-Culture Institute
Betsy Nicholas
Executive Director
Waterkeepers Chesapeake
Jen Lomberk, Esq.
Vice Chair, Waterkeepers Florida
Waterkeepers Florida
Rhiannon Tereari'i Chandler-'Iao Executive Director
Waterkeepers Hawaiian Islands
Angie Rosser
Executive Director
West Virginia Rivers Coalition
Troy Redding
Community Organizer
Western Colorado Alliance
Barbara Vasquez
Oil and Gas Chair
Western Organization of Resource Councils

Larry Baldwin
Advocacy Director
White Oak-New Riverkeeper Alliance
Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians

Christine Ellis
Executive Director
Winyah Rivers Alliance
Julie E Wille
Co-founder of Women for Wild Lands

I, Richard Moore, Chair of the National Environmental Justice Advisory Council, certify that this is the final meeting summary for the public meeting held on August 19-20, 2020, and it accurately reflects the discussions and decisions of the meeting.

_____ 11/19/2020_____

Richard Moore, NEJAC Chair Date