COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

[CEQ–2023–0003]

RIN 0331–AA07

National Environmental Policy Act Implementing Regulations Revisions Phase 2

AGENCY: Council on Environmental Quality.

ACTION: Final rule.

SUMMARY: The Council on Environmental Quality (CEQ) is finalizing its ''Bipartisan Permitting Reform Implementation Rule'' to revise its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA), including the recent amendments to NEPA in the Fiscal Responsibility Act. CEQ is making these revisions to provide for an effective environmental review process; ensure full and fair public engagement; enhance efficiency and regulatory certainty; and promote sound Federal agency decision making that is grounded in science, including consideration of relevant environmental, climate change, and environmental justice effects. These changes are grounded in NEPA's statutory text and purpose, including making decisions informed by science; CEQ's extensive experience implementing NEPA; CEQ's perspective on how NEPA can best inform agency decision making; longstanding Federal agency experience and practice; and case law interpreting NEPA's requirements.

DATES: The effective date is July 1, 2024.

ADDRESSES: CEQ established a docket for this action under docket number CEQ–2023–0003. All documents in the docket are listed on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Amy B. Coyle, Deputy General Counsel, 202–395–5750, *Amy.B.Coyle@ceq.eop.gov;* Megan Healy, Deputy Director for NEPA, 202–395–5750, *Megan.E.Healy@ceq.eop.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

This final rule completes a multiphase rulemaking process that CEQ initiated in 2021 to revise its regulations to improve implementation of the National Environmental Policy Act (NEPA). Throughout the process, CEQ engaged with agency experts who implement NEPA on a daily basis to develop revisions to the regulations to enhance the clarity of the regulatory text, improve the efficiency and effectiveness of the NEPA process, enhance regulatory certainty and address potential sources of litigation risk, and promote consistency across the Federal Government while recognizing the importance of providing agencies with flexibility to tailor their NEPA processes to the specific statutes and factual contexts in which they administer their programs and decisions. CEQ also engaged with individuals affected by agency implementation of NEPA, including representatives of Tribal Nations, environmental justice experts, and representatives of various industries, to gather input on how to improve the NEPA process. CEQ proposed and is now finalizing this rule to reflect the input CEQ has received, the decades of CEQ and agency experience implementing NEPA, and the recent statutory amendments to NEPA. This final rule will help agencies more successfully implement NEPA and facilitate a more efficient and effective environmental review process.

A. NEPA Statute

To declare an ambitious and visionary national policy to promote environmental protection for present and future generations, Congress enacted NEPA in 1969 by a unanimous vote in the Senate and a nearly unanimous vote in the House,[1] and President Nixon signed it into law on January 1, 1970. NEPA seeks to ''encourage productive and enjoyable harmony'' between humans and the environment, recognizing the ''profound impact'' of human activity and the ''critical importance of restoring and maintaining environmental quality'' to the overall welfare of humankind. 42 U.S.C. 4321, 4331. Furthermore, NEPA seeks to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of people, making it the continuing policy of the Federal Government to use all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans. 42 U.S.C. 4331(a). It also recognizes that each person should have the opportunity to enjoy a healthy environment and has a responsibility to contribute to the preservation and enhancement of the environment. 42 U.S.C. 4331(c).

NEPA requires Federal agencies to interpret and administer Federal policies, regulations, and laws in accordance with NEPA's policies and to consider environmental values in their decision making. 42 U.S.C. 4332. To that end, section 102(2)(C) of NEPA requires Federal agencies to prepare ''detailed statement[s],'' referred to as environmental impact statements (EISs), for ''every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment'' and, in doing so, provide opportunities for public participation to help inform agency decision making. 42 U.S.C. 4332(2)(C). The EIS process embodies the understanding that informed decisions are better decisions and lead to better environmental outcomes when decision makers understand, consider, and publicly disclose environmental effects of their decisions. The EIS process also enriches understanding of the ecological systems and natural resources important to the Nation and helps guide sound decision making based on high-quality information, such as decisions on infrastructure and energy development.[2] *See, e.g., Winter* v. *NRDC,* 555 U.S. 7, 23 (2008) (''Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures.'').

In many respects, NEPA was a statute ahead of its time and remains vital today. It codifies the common-sense idea of ''look before you leap'' to guide agency decision making, particularly in complex and consequential areas, because conducting sound environmental analysis before agencies take actions reduces conflict and waste in the long run by avoiding unnecessary harm and uninformed decisions. *See, e.g.,* 42 U.S.C. 4332; *Laclede Gas Co.* v. *FERC,* 873 F.2d 1494, 1499 (D.C. Cir. 1989) (''When so much depends upon the agency having a sure footing, it is not too much for us to demand that it look first, and then leap if it likes.''). It establishes a framework for agencies to ground decisions in science, by

[1] *See* Linda Luther, Cong. Rsch. Serv., RL33152, The National Environmental Policy Act: Background and Implementation, 4 (2011), *https://crsreports.congress.gov/product/details?prodcode=RL33152.*

[2] *See* CEQ, *The National Environmental Policy Act: A Study of Its Effectiveness after Twenty-five Years* 17 (Jan. 1997) (noting that study participants, which included academics, nonprofit organizations, and businesses, ''applauded NEPA for opening the federal process to public input and were convinced that this open process has improved project design and implementation.'').

requiring professional and scientific integrity, and recognizes that the public may have important ideas and information on how Federal actions can occur in a manner that reduces potential harms and enhances ecological, social, and economic well-being. *See, e.g.,* 42 U.S.C. 4332.

On June 3, 2023, President Biden signed into law the Fiscal Responsibility Act of 2023, which included amendments to NEPA. Specifically, it amended section 102(2)(C) and added sections 102(2)(D) through (F) and sections 106 through 111. 42 U.S.C. 4332(2)(C)–(D), 4336–4336e. The amendments codify longstanding principles drawn from CEQ's NEPA regulations, decades of agency practice, and case law interpreting the NEPA regulations, and provide additional direction to improve the efficiency and effectiveness of the NEPA process consistent with NEPA's purposes. Section 102(2)(C) provides that EISs should include discussion of reasonably foreseeable environmental effects of the proposed action, reasonably foreseeable adverse environmental effects that cannot be avoided, and a reasonable range of alternatives to the proposed action; section 102(2)(D) requires Federal agencies to ensure the professional integrity of the discussion and analysis in an environmental document; section 102(2)(E) requires use of reliable data and resources when carrying out NEPA; and section 102(2)(F) requires agencies to study, develop, and describe technically and economically feasible alternatives. 42 U.S.C. 4332(2)(C)–(F).

Section 106 adds provisions for determining the appropriate level of NEPA review. It clarifies that an agency is required to prepare an environmental document when proposing to take an action that would constitute a final agency action, and codifies existing regulations and case law that an agency is not required to prepare an environmental document when doing so would clearly and fundamentally conflict with the requirements of another law or a proposed action is non-discretionary. *See Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Oklahoma,* 426 U.S. 776, 791 (1976) (holding that a 30–day statutory deadline for a certain agency action created a ''clear and fundamental conflict of statutory duty'' that excused the agency from NEPA compliance with regard to that action); *Dep't of Transp.* v. *Pub. Citizen,* 541 U.S. 752, 756 (2004) (concluding that NEPA did not require an agency to evaluate the environmental effects of certain actions because the agency lacked discretion over those actions). Section 106 also largely codifies the current CEQ regulations and longstanding practice with respect to the use of categorical exclusions (CEs), environmental assessments (EAs), and EISs, as modified by the new provision expressly permitting agencies to adopt CEs from other agencies established in section 109 of NEPA. 42 U.S.C. 4336, 4336c.

Section 107 addresses timely and unified Federal reviews, largely codifying existing practice with a few adjustments, including provisions clarifying lead, joint-lead, and cooperating agency designations, generally requiring development of a single environmental document, directing agencies to develop procedures for project sponsors to prepare EAs and EISs, and prescribing page limits and deadlines. 42 U.S.C. 4336a. Section 108 codifies time lengths and circumstances for when agencies can rely on programmatic environmental documents without additional review, and section 109 allows a Federal agency to adopt and use another agency's CE. 42 U.S.C. 4336b, 4336c. Section 111 adds statutory definitions. 42 U.S.C. 4336e. This final rule updates the regulations to address how agencies should implement NEPA consistent with these recent amendments.

Section 110 directs CEQ to conduct a study and submit a report to Congress on the potential to use online and digital technologies to improve NEPA processes. The development of this report is outside the scope of this rulemaking and the final rule does not incorporate provisions related to implementation of section 110.

B. The Council on Environmental Quality

NEPA codified the existence of the Council on Environmental Quality (CEQ), which had been established 6 months earlier through E.O. 11472, *Establishing the Environmental Quality Council and the Citizen's Advisory Committee on Environmental Quality,* as a component of the Executive Office of the President. 42 U.S.C. 4342. For more than 50 years, CEQ has advised presidents on national environmental policy, assisted Federal agencies in their implementation of NEPA and engaged with them on myriad of environmental policies, and overseen implementation of a variety of other environmental policy initiatives from the expeditious and thorough environmental review of infrastructure projects [3] to the sustainability of Federal operations.[4]

NEPA charges CEQ with overseeing and guiding NEPA implementation across the Federal Government. In addition to issuing the regulations for implementing NEPA, 40 CFR parts 1500 through 1508 (referred to throughout as ''the CEQ regulations''), CEQ has issued guidance on numerous topics related to NEPA review. In 1981, CEQ issued the ''Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,'' [5] which CEQ has routinely identified as an invaluable tool for Federal, Tribal, State, and local governments and officials, and members of the public, who have questions about NEPA implementation.

CEQ also has issued guidance on a variety of other topics, from scoping to cooperating agencies to consideration of

[3] *See, e.g.,* E.O. 14008, *Tackling the Climate Crisis at Home and Abroad,* 86 FR 7619 (Feb. 1, 2021); E.O. 13604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects,* 77 FR 18887 (Mar. 28, 2012); E.O. 13274, *Environmental Stewardship and Transportation Infrastructure Project Reviews,* 67 FR 59449 (Sept. 23, 2002); *see also* Presidential Memorandum, Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures, 78 FR 30733 (May 22, 2013).

[4] *See, e.g.,* E.O. 14057, *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability,* 86 FR 70935 (Dec. 13, 2021); E.O. 13834, *Efficient Federal Operations,* 83 FR 23771 (May 22, 2018); E.O. 13693, *Planning for Federal Sustainability in the Next Decade,* 80 FR 15871 (Mar. 25, 2015); E.O. 13514, *Federal Leadership in Environmental, Energy, and Economic Performance,* 74 FR 52117 (Oct. 8, 2009); E.O. 13423, *Strengthening Federal Environmental, Energy, and Transportation Management,* 72 FR 3919 (Jan. 26, 2007); E.O. 13101, *Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition,* 63 FR 49643 (Sept. 16, 1998). For Presidential directives pertaining to other environmental initiatives, see E.O. 13432, *Cooperation Among Agencies in Protecting the Environment With Respect to Greenhouse Gas Emissions From Motor Vehicles, Nonroad Vehicles, and Nonroad Engines,* 72 FR 27717 (May 16, 2007) (requiring CEQ and OMB to implement the E.O. and facilitate Federal agency cooperation to reduce greenhouse gas emissions); E.O. 13141, *Environmental Review of Trade Agreements,* 64 FR 63169 (Nov. 18, 1999) (requiring CEQ and the U.S. Trade Representative to implement the E.O., which has the purpose of promoting Trade agreements that contribute to sustainable development); E.O. 13061, *Federal Support of Community Efforts Along American Heritage Rivers,* 62 FR 48445 (Sept. 15, 1997) (charging CEQ with implementing the American Heritage Rivers initiative); E.O. 13547, *Stewardship of the Ocean, Our Coasts, and the Great Lakes,* 75 FR 43023 (July 22, 2010) (directing CEQ to lead the National Ocean Council); E.O. 13112, *Invasive Species,* 64 FR 6183 (Feb. 8, 1999) (requiring the Invasive Species Council to consult with CEQ to develop guidance to Federal agencies under NEPA on prevention and control of invasive species).

[5] CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 FR 18026 (Mar. 23, 1981) (Forty Questions), *https://www.energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act.*

effects.[6] For example, in 1997, CEQ issued guidance documents on the consideration of environmental justice in the NEPA context [7] under E.O. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,*[8] and on analysis of cumulative effects in NEPA reviews.[9] From 2010 to the present, CEQ developed additional guidance on CEs, mitigation, programmatic reviews, and consideration of greenhouse gas (GHG) emissions in NEPA.[10] To ensure coordinated environmental reviews, CEQ has issued guidance to integrate NEPA reviews with other environmental review requirements such as the National Historic Preservation Act, E.O. 11988, *Floodplain Management,* and E.O. 11990, *Protection of Wetlands.*[11] Additionally, CEQ has provided guidance to ensure efficient and effective environmental reviews, particularly for infrastructure projects.[12] Finally, CEQ has published resources for members of the public to assist them in understanding the NEPA process and how they can effectively engage in agency NEPA reviews to make sure their voices are heard.[13]

In addition to guidance, CEQ engages frequently with Federal agencies on their implementation of NEPA. CEQ is responsible for consulting with all agencies on the development of their NEPA implementing procedures and determining that those procedures conform with NEPA and the CEQ regulations. Through this process, CEQ engages with agencies to understand their specific authorities and programs to ensure agencies integrate consideration of environmental effects into their decision-making processes. CEQ also provides feedback and advice on how agencies may effectively implement NEPA through their procedures. Additionally, CEQ provides recommendations on how agencies can coordinate on or align their respective procedures to ensure consistent implementation of NEPA across agencies. This role is particularly important in situations where multiple agencies and applicants are regularly involved, such as the review of infrastructure projects.

Second, CEQ consults with agencies on the efficacy and effectiveness of NEPA implementation. Where necessary or appropriate, CEQ engages with agencies on NEPA reviews for specific projects or project types to provide advice and identify any emerging or cross-cutting issues that would benefit from CEQ issuing formal guidance or assisting with interagency coordination. This includes establishing alternative arrangements for compliance with NEPA when agencies encounter emergency situations where they need to act swiftly while also ensuring they meet their NEPA obligations. CEQ also advises on NEPA compliance when agencies are establishing new programs or implementing new statutory authorities. Finally, CEQ helps advance the environmental review process for projects or initiatives deemed important to an administration such as nationally and regionally significant projects, major infrastructure projects, and consideration of certain types of effects, such as climate change-related effects and effects on communities with environmental justice concerns.[14]

Third, CEQ meets regularly with external stakeholders to understand their perspectives on the NEPA process. These meetings can help inform CEQ's development of guidance or other initiatives and engagement with Federal agencies. Finally, CEQ coordinates with other Federal agencies and components of the White House on a wide array of environmental issues and reviews that intersect with the NEPA process, such as Endangered Species Act consultation or effects to Federal lands and waters from federally authorized activities.

In addition to its NEPA responsibilities, CEQ is currently charged with implementing several of the administration's key environmental priorities, including efficient and effective environmental review and permitting. On January 27, 2021, the President signed E.O. 14008, *Tackling the Climate Crisis at Home and Abroad,* to establish a government-wide approach to the climate crisis by

[6] *See, e.g.,* CEQ, Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping (Apr. 30, 1981), *https://www.energy.gov/nepa/downloads/scoping-guidance-memorandum-general-counsels-nepa-liaisons-and-participants-scoping;* CEQ, Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under the National Environmental Policy Act (Jan. 1993), *https://ceq.doe.gov/publications/incorporating_biodiversity.html;* CEQ, Council on Environmental Quality Guidance on NEPA Analyses for Transboundary Impacts (July 1,1997), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/memorandum-transboundary-impacts-070197.pdf;* CEQ, Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (July 28, 1999), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ceqcoop.pdf;* CEQ, Identifying Non-Federal Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Sept. 25, 2000), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/memo-non-federal-cooperating-agencies-09252000.pdf;* CEQ & DOT Letters on Lead and Cooperating Agency Purpose and Need (May 12, 2003), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-DOT_PurposeNeed_May-2013.pdf.*

[7] CEQ, Environmental Justice: Guidance under the National Environmental Policy Act (Dec. 10, 1997) (Environmental Justice Guidance), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf.*

[8] E.O. 12898, *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations,* 59 FR 7629 (Feb. 16, 1994).

[9] CEQ, Considering Cumulative Effects Under the National Environmental Policy Act (Jan. 1997), *https://ceq.doe.gov/publications/cumulative_effects.html; see also* CEQ, Guidance on the Consideration of Past Actions in Cumulative Effects Analysis (June 24, 2005), *https://www.energy.gov/sites/default/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf.*

[10] CEQ, Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act (Nov. 23, 2010) (CE Guidance), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf;* CEQ, Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 FR 3843 (Jan. 21, 2011) (Mitigation Guidance), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf;* CEQ, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 FR 1196 (Jan. 9, 2023) (2023 GHG Guidance), *https://ceq.doe.gov/guidance/ceq_guidance_nepa-ghg.html.*

[11] CEQ, Implementation of Executive Order 11988 on Floodplain Management and Executive Order 11990 on Protection of Wetlands (Mar. 21, 1978), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Memorandum-Implementation-of-E.O.-11988-and-E.O.-11990-032178.pdf;* CEQ & Advisory Council on Historic Preservation, NEPA and NHPA: A Handbook for Integrating NEPA and Section 106 (Mar. 2013), *https://ceq.doe.gov/docs/ceq-publications/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf.*

[12] *See, e.g.,* CEQ, Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act, 77 FR 14473 (Mar. 12, 2012), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf;* CEQ, Effective Use of Programmatic NEPA Reviews (Dec. 18, 2014) (Programmatic Guidance), *https://www.energy.gov/sites/default/files/2016/05/f31/effective_use_of_programmatic_nepa_reviews_18dec2014.pdf;* OMB & CEQ, M–15–20, Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects (Sept. 22, 2015), *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2015/m-15-20.pdf;* OMB & CEQ, M–17–14, Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects (Jan. 13, 2017), *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2017/m-17-14.pdf.*

[13] CEQ, *A Citizen's Guide to the National Environmental Policy Act; Having Your Voice Heard* (Jan. 2021), *https://ceq.doe.gov/get-involved/citizens_guide_to_nepa.html.*

[14] *See, e.g.,* Presidential Memorandum, *Speeding Infrastructure Development Through More Efficient and Effective Permitting and Environmental Review* (Aug. 31, 2011), *https://obamawhitehouse.archives.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more;* E.O. 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,* 82 FR 40463 (Aug. 24, 2017).

reducing GHG emissions across the economy; increasing resilience to climate change-related effects; conserving land, water, and biodiversity; transitioning to a clean-energy economy; and advancing environmental justice, including delivering the benefits of Federal investments to disadvantaged communities.[15] CEQ is leading the President's efforts to secure environmental justice consistent with sections 219 through 223 of the E.O. For example, CEQ has developed the Climate and Economic Justice Screening Tool,[16] and collaborates with the Office of Management and Budget (OMB) and the National Climate Advisor on implementing the Justice40 initiative, which sets a goal that 40 percent of the overall benefits of certain Federal investments flow to disadvantaged communities.[17]

Section 205 of the E.O. also charged CEQ with developing the Federal Sustainability Plan to achieve a carbon pollution-free electricity sector and clean and zero-emission vehicle fleets. Thereafter, CEQ issued the Federal Sustainability Plan,[18] which accompanied E.O. 14057, *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability*.[19] CEQ is leading the efforts with its agency partners to implement E.O. 14057's ambitious goals, which include reducing Federal agency GHG emissions by 65 percent and improving the climate resilience of Federal infrastructure and operations. CEQ also is collaborating with the Departments of the Interior, Agriculture, and Commerce on the implementation of the America the Beautiful Initiative, which was issued to achieve the goal of conserving at least 30 percent of our lands and waters by 2030 as set forth in E.O. 14008.[20] Additionally, E.O. 14008 requires the Chair of CEQ and the Director of OMB to ensure that Federal permitting decisions consider the effects of GHG emissions and climate change.[21]

CEQ is also instrumental to the President's efforts to institute a government-wide approach to advancing environmental justice. On April 21, 2023, the President signed E.O. 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All,* to further embed environmental justice into the work of Federal agencies and ensure that all people can benefit from the vital safeguards enshrined in the Nation's foundational environmental and civil rights laws.[22] The E.O. charges each agency to make achieving environmental justice part of its mission consistent with the agency's statutory authority,[23] and requires each agency to submit to the Chair of CEQ and make publicly available an Environmental Justice Strategic Plan setting forth the agency's goals and plans for advancing environmental justice.[24] Further, section 8 of the E.O. establishes a White House Office of Environmental Justice within CEQ.

Additionally, CEQ plays a significant role in improving interagency coordination and providing for efficient environmental reviews and permitting under the Biden-Harris Permitting Action Plan.[25] The Action Plan outlines the Administration's strategy for ensuring that Federal environmental reviews and permitting processes are effective, efficient, and transparent, guided by the best available science to promote positive environmental and community outcomes, and shaped by early and meaningful public engagement. The Action Plan contains five key elements that build on strengthened Federal approaches to environmental reviews and permitting: (1) accelerating permitting through early cross-agency coordination to appropriately scope reviews, reduce bottlenecks, and use the expertise of sector-specific teams; (2) establishing clear timeline goals and tracking key project information to improve transparency and accountability, providing increased certainty for project sponsors and the public; (3) engaging in early and meaningful outreach and communication with Tribal Nations, States, Territories, and local communities; (4) improving agency responsiveness, technical assistance, and support to navigate the environmental review and permitting process effectively and efficiently; and (5) adequately resourcing agencies and using the environmental review process to improve environmental and community outcomes.

Finally, CEQ is staffed with experts with decades of NEPA experience as well as other environmental law and policy experience. As part of CEQ's broader environmental policy role, CEQ advises the President on environmental issues facing the nation, and on the design and implementation of the President's environmental initiatives. In that role, CEQ collaborates with agencies and provides feedback on their implementation of the numerous environmental statutes and directives. CEQ's diverse array of responsibilities and expertise has long influenced the implementation of NEPA, and CEQ relied extensively on this experience in developing this rulemaking.

C. NEPA Implementation 1970–2019

Following shortly after the enactment of NEPA, President Nixon issued E.O. 11514, *Protection and Enhancement of Environmental Quality,* directing CEQ to issue guidelines for implementation of section 102(2)(C) of NEPA.[26] In response, CEQ in April 1970 issued interim guidelines, which addressed the provisions of section 102(2)(C) of the Act regarding EIS requirements.[27] CEQ revised the guidelines in 1971 and 1973 to address public involvement and introduce the concepts of EAs and draft and final EISs.[28]

In 1977, President Carter issued E.O. 11991, *Relating to Protection and Enhancement of Environmental Quality,* amending E.O. 11514 and directing CEQ to issue regulations for implementation

[15] E.O. 14008, *supra* note 3.

[16] CEQ, *Explore the Map,* Climate and Economic Justice Screening Tool, *https://screeningtool.geoplatform.gov/*.

[17] E.O. 14008, *supra* note 3, sec. 223.

[18] CEQ, *Federal Sustainability Plan* (Dec. 2021), *https://www.sustainability.gov/federalsustainabilityplan/*.

[19] E.O. 14057, *supra* note 4.

[20] E.O. 14008, *supra* note 3.

[21] *Id.* at sec. 213(a); *see also id.,* sec. 219 (directing agencies to ''make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities'').

[22] E.O. 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All,* 88 FR 25251 (Apr. 26, 2023). E.O. 14096 builds upon efforts to advance environmental justice and equity consistent with the policy advanced in documents including E.O. 13985, E.O. 14091, and E.O. 14008, and supplements the foundational efforts of E.O. 12898 to deliver environmental justice to communities across America. *See* E.O. 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,* 86 FR 7009 (Jan. 25, 2021); E.O. 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,* 88 FR 10825 (Feb. 22, 2023); E.O. 14008, *supra* note 3; and E.O. 12898, *supra* note 8.

[23] E.O. 14096, *supra* note 22, sec. 3.

[24] *Id.* at sec. 4.

[25] The Biden-Harris Permitting Action Plan to Rebuild America's Infrastructure, Accelerate the Clean Energy Transition, Revitalize Communities, and Create Jobs (May 22, 2022), *https://www.whitehouse.gov/wp-content/uploads/2022/05/Biden-Harris-Permitting-Action-Plan.pdf*.

[26] E.O. 11514, *Protection and Enhancement of Environmental Quality,* 35 FR 4247 (Mar. 7, 1970), sec. 3(h).

[27] *See* CEQ, Statements on Proposed Federal Actions Affecting the Environment, 35 FR 7390 (May 12, 1970) (interim guidelines).

[28] CEQ, Statements on Proposed Federal Actions Affecting the Environment, 36 FR 7724 (Apr. 23, 1971) (final guidelines); CEQ, Preparation of Environmental Impact Statements, 38 FR 10856 (May 2, 1973) (proposed revisions to the guidelines); CEQ, Preparation of Environmental Impact Statements: Guidelines, 38 FR 20550 (Aug. 1, 1973) (revised guidelines).

of section 102(2)(C) of NEPA and requiring that Federal agencies comply with those regulations.[29] CEQ promulgated its NEPA regulations in 1978.[30] Issued 8 years after NEPA's enactment, the NEPA regulations reflected CEQ's interpretation of the statutory text and Congressional intent, expertise developed through issuing and revising the CEQ guidelines and advising Federal agencies on their implementation of NEPA, initial interpretations of the courts, and Federal agency experience implementing NEPA. The 1978 regulations reflected the fundamental principles of informed and science-based decision making, transparency, and public engagement that Congress established in NEPA. The regulations further required agency-level implementation, directing Federal agencies to issue and periodically update agency-specific implementing procedures to supplement CEQ's procedures and integrate the NEPA process into the agencies' specific programs and processes. Consistent with 42 U.S.C. 4332(2)(B), the regulations also required agencies to consult with CEQ in the development or update of these agency-specific procedures to ensure consistency with CEQ's regulations.

CEQ made typographical amendments to the 1978 implementing regulations in 1979[31] and amended one provision in 1986 (CEQ refers to these regulations, as amended, as the ''1978 regulations'' in this preamble).[32] Otherwise, CEQ left the regulations unchanged for over 40 years. As a result, CEQ and Federal agencies developed extensive experience implementing the 1978 regulations, and a large body of agency practice and case law developed based on them. *See, e.g., Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 355 (1989) (''CEQ regulations are entitled to substantial deference.''); *Wild Va.* v. *Council on Env't Quality,* 56 F.4th 281, 288 (4th Cir. 2022) (noting that prior to the 2020 rule, CEQ's NEPA regulations ''had remained virtually unchanged since 1978.'')

[29] E.O. 11991, *Relating to Protection and Enhancement of Environmental Quality,* 42 FR 26967 (May 25, 1977).

[30] CEQ, Implementation of Procedural Provisions; Final Regulations, 43 FR 55978 (Nov. 29, 1978).

[31] CEQ, Implementation of Procedural Provisions; Corrections, 44 FR 873 (Jan. 3, 1979).

[32] CEQ, National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 FR 15618 (Apr. 25, 1986) (amending 40 CFR 1502.22).

D. 2020 Amendments to the CEQ Regulations

On August 15, 2017, President Trump issued E.O. 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,*[33] which directed CEQ to establish and lead an interagency working group to identify and propose changes to the NEPA regulations.[34] In response, CEQ issued an advance notice of proposed rulemaking (ANPRM) on June 20, 2018,[35] and a notice of proposed rulemaking (NPRM) on January 10, 2020, proposing broad revisions to the 1978 regulations.[36] A wide range of stakeholders submitted more than 12,500 comments on the ANPRM[37] and 1.1 million comments on the proposed rule,[38] including from State and local governments, Tribes, environmental advocacy organizations, professional and industry associations, other advocacy or non-profit organizations, businesses, and private citizens. Many commenters provided detailed feedback on the legality, policy wisdom, and potential consequences of the proposed amendments. In keeping with the proposed rule, the final rule, promulgated on July 16, 2020 (2020 regulations or 2020 rule), made wholesale revisions to the regulations; it took effect on September 14, 2020.[39]

In the months that followed the issuance of the 2020 rule, five lawsuits were filed challenging the 2020 rule.[40] These cases challenge the 2020 rule on a variety of grounds, including under the Administrative Procedure Act (APA), NEPA, and the Endangered Species Act, and contend that the rule exceeded CEQ's authority and that the related rulemaking process was procedurally and substantively defective. The district courts issued temporary stays in each of these cases, except for *Wild Virginia* v. *Council on Environmental Quality,* which the district court dismissed without prejudice on June 21, 2021.[41] The Fourth Circuit affirmed that dismissal on December 22, 2022.[42]

E. CEQ's Review of the 2020 Regulations

On January 20, 2021, President Biden issued E.O. 13990, *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,*[43] to establish an administration policy to listen to the science; improve public health and protect our environment; ensure access to clean air and water; limit exposure to dangerous chemicals and pesticides; hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; reduce GHG emissions; bolster resilience to the impacts of climate change; restore and expand the Nation's treasures and monuments; and prioritize both environmental justice and the creation of well-paying union jobs necessary to achieve these goals.[44] The Executive Order calls for Federal agencies to review existing regulations issued between January 20, 2017, and January 20, 2021, for consistency with the policy it articulates and to take appropriate action.[45] The Executive Order also revokes E.O. 13807 and directs agencies to take steps to rescind any rules or regulations implementing it.[46] An accompanying White House fact sheet, published on January 20, 2021, specifically identified the 2020 regulations for CEQ's review for consistency with E.O. 13990's policy.[47]

[33] E.O. 13807, *supra* note 14.

[34] *Id.* at sec. 5(e)(iii).

[35] CEQ, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 FR 28591 (June 20, 2018).

[36] CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 1684 (Jan. 10, 2020).

[37] *See* Docket No. CEQ–2018–0001, *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, https://www.regulations.gov/document/CEQ-2018-0001-0001.*

[38] *See* Docket No. CEQ–2019–0003, *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, https://www.regulations.gov/document/CEQ-2019-0003-0001.*

[39] CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 43304 (July 16, 2020) (2020 Final Rule).

[40] *Wild Va.* v. *Council on Env't Quality,* No. 3:20cv45 (W.D. Va. 2020); *Env't Justice Health All.* v. *Council on Env't Quality,* No. 1:20cv06143 (S.D.N.Y. 2020); *Alaska Cmty. Action on Toxics* v. *Council on Env't Quality,* No. 3:20cv5199 (N.D. Cal. 2020); *California* v. *Council on Env't Quality,* No. 3:20cv06057 (N.D. Cal. 2020); *Iowa Citizens for Cmty. Improvement* v. *Council on Env't Quality,* No. 1:20cv02715 (D.D.C. 2020). Additionally, in *Clinch Coalition* v. *U.S. Forest Serv.,* No. 2:21cv00003 (W.D. Va. 2021), plaintiffs challenged the U.S. Forest Service's NEPA implementing procedures, which established new CEs, and, relatedly, the 2020 rule's provisions on CEs.

[41] *Wild Va.* v. *Council on Env't Quality,* 544 F. Supp. 3d 620 (W.D. Va. 2021).

[42] *Wild Va.* v. *Council on Env't Quality,* 56 F.4th 281 (4th Cir. 2022).

[43] E.O. 13990, *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,* 86 FR 7037 (Jan. 25, 2021).

[44] *Id.* at sec. 1.

[45] *Id.* at sec. 2.

[46] *Id.* at sec. 7.

[47] The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.*

Consistent with E.O. 13990 and E.O. 14008, CEQ has reviewed the 2020 regulations and engaged in a multi-phase rulemaking process to ensure that the NEPA implementing regulations provide for sound and efficient environmental review of Federal actions, including those actions integral to tackling the climate crisis, in a manner that enables meaningful public participation, provides for an expeditious process, discloses climate change-related effects, advances environmental justice, respects Tribal sovereignty, protects our Nation's resources, and promotes better and more equitable environmental and community outcomes.

On June 29, 2021, CEQ issued an interim final rule to amend the requirement in 40 CFR 1507.3(b) (2020) [48] that agencies propose changes to existing agency-specific NEPA procedures to make those procedures consistent with the 2020 regulations by September 14, 2021.[49] CEQ extended the date by 2 years to avoid agencies proposing changes to agency-specific implementing procedures on a tight deadline to conform to regulations that were undergoing extensive review and would likely change in the near future.

Next, on October 7, 2021, CEQ issued a ''Phase 1'' proposed rule to focus on a discrete set of provisions designed to restore three elements of the 1978 regulations, which CEQ finalized on April 20, 2022.[50] First, the Phase 1 rule revised 40 CFR 1502.13 (2020), with a conforming edit to 40 CFR 1508.1(z) (2020), to clarify that agencies have discretion to consider a variety of factors when assessing an application for authorization by removing a requirement that an agency base the purpose and need on the goals of an applicant and the agency's statutory authority. Second, CEQ removed language in 40 CFR 1507.3 (2020) that could be construed to limit agencies' flexibility to develop or revise procedures to implement NEPA specific to their programs and functions that may go beyond CEQ's regulatory requirements. Finally, CEQ revised the definition of ''effects'' in 40 CFR 1508.1(g) (2020) to restore the substance of the definitions of ''effects'' and ''cumulative impacts'' contained in the 1978 regulations.

On July 31, 2023, CEQ published the Phase 2 notice of proposed rulemaking (proposed rule or NPRM), initiating a broader rulemaking to revise, update, and modernize the NEPA implementing regulations.[51] Informed by CEQ's extensive experience implementing NEPA, public and agency input, and Congress's amendments to NEPA, CEQ proposed further revisions to improve the efficiency and effectiveness of environmental reviews; ensure that environmental reviews are guided by science and are consistent with the statute's text and purpose; enhance clarity and certainty for Federal agencies, project proponents, and the public; enable full and fair public participation and a process that informs the public about the potential environmental effects of agency actions; and ultimately promote better informed Federal decisions that protect and enhance the quality of the human environment, including by ensuring climate change, environmental justice, and other environmental issues are fully accounted for in agencies' decision-making processes.

Publication of the proposed rule initiated a 60–day public comment period that concluded on September 29, 2023. CEQ held four virtual public meetings on the proposed rule on August 26, 2023; August 30, 2023; September 11, 2023; and September 21, 2023, as well as two Tribal consultations on September 6, 2023, and September 12, 2023. CEQ received approximately 147,963 written comments and 86 oral comments in response to the proposed rule and considered these 148,049 comments in the development of this final rule. A majority of the comments (approximately 147,082) were campaign form letters sent in response to an organized initiative and are identical or very similar in form and content. CEQ received approximately 920 unique public comments, of which 540 were substantive comments on a variety of aspects of the rulemaking approach and contents of the proposed rule.

The majority of the unique comments expressed overall or conditional support for the proposed rule. CEQ provides a summary of the comments received on the proposed rule and responses to those comment summaries in the document, ''National Environmental Policy Act Implementing Regulations Revision Phase 2 Response to Comments'' (Phase 2 Response to Comments). Additionally, CEQ provides brief comment summaries and responses for many of the substantive comments it received as part of the summary and rationale for the final rule in section II.

As discussed in section I.B, CEQ relies on its extensive experience overseeing and implementing NEPA in the development of this rule. CEQ has over 50 years of experience advising Federal agencies on the implementation of NEPA and is staffed by NEPA practitioners who have decades of experience implementing NEPA at agencies across the Federal Government as well as from outside the government, including State governments and applicants whose activities require Federal action. CEQ collaborates daily with Federal agencies on specific NEPA reviews, provides government-wide guidance on NEPA implementation, including the recent NEPA amendments, consults with agencies on the development of agency-specific NEPA implementing procedures and determines whether the procedures conform with NEPA and the CEQ regulations, and advises the President on a vast array of environmental issues. This experience also enables CEQ to contextualize the patchwork of fact-specific judicial decisions that have evolved under NEPA. This rulemaking seeks to bring clarity and predictability to Federal agencies and outside parties whose activities require Federal action and therefore trigger NEPA review, while also facilitating better environmental and social outcomes due to informed decision making.

II. Summary of and Rationale for the Final Rule

This section summarizes the changes CEQ proposed to its NEPA implementing regulations in the notice of proposed rulemaking (NPRM or proposed rule), the public comments CEQ received on those proposed changes, a description of the revisions made through this final rule, and the rationale for those changes. CEQ's revisions fall into five general categories. First, CEQ makes revisions to the regulations to implement the amendments to NEPA made by the Fiscal Responsibility Act. Second, CEQ amends the regulations to enhance consistency and clarity. Third, CEQ revises the regulations based on decades of CEQ and agency experience implementing and complying with NEPA to improve the efficiency and

[48] In the preamble, CEQ uses the section symbol (§) to refer to the proposed or final regulations; 40 CFR 150X.X (2020) or (2022) to refer to the current CEQ regulations as set forth in 40 CFR parts 1500–1508, which this Final Rule amends; and 40 CFR 150X.X (2019) to refer to the CEQ regulations as they existed prior to the 2020 rule.

[49] CEQ, Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 FR 34154 (June 29, 2021).

[50] CEQ, National Environmental Policy Act Implementing Regulations Revisions, 86 FR 55757 (Oct. 7, 2021) (Phase 1 proposed rule); CEQ, National Environmental Policy Act Implementing Regulations Revisions, 87 FR 23453 (Apr. 20, 2022) (Phase 1 Final Rule).

[51] CEQ, National Environmental Policy Act Implementing Regulations Revision Phase 2, 88 FR 49924 (July 31, 2023) (Phase 2 proposed rule).

effectiveness of the environmental review process, foster science-based decision making, better effectuate NEPA's statutory purposes, and reflect developments in case law. Fourth, CEQ reverts to and revises for clarity certain language from the 1978 regulations, which were in effect for more than 40 years before the 2020 rule revised them, where CEQ determined the 1978 language provides clearer and more effective and predictable direction or guidance to implement NEPA. Fifth, CEQ removes certain provisions added by the 2020 rule that CEQ considers imprudent or legally unsettled, or that create uncertainty or ambiguity that could reduce efficiency or increase the risk of litigation. Outside of those revisions, CEQ retains many of the changes made in the 2020 rulemaking, including changes that codified longstanding practice or guidance or enhanced the efficiency and effectiveness of the NEPA process. For example, CEQ identified for retention the inclusion of Tribal interests throughout the regulations, the integration of mechanisms to facilitate better interagency cooperation, and the reorganization and modernization of provisions addressing certain elements of the process to make the regulations easier to understand and follow. CEQ considers it important that the regulations meet current goals and objectives, including to promote the development of NEPA documents that are concise but also include the information needed to inform decision makers and reflect public input.

In response to the Phase 1 proposed rule, CEQ received many comments on provisions not addressed in Phase 1. CEQ indicated in the Phase 1 Final Rule that it would consider such comments during the development of this Phase 2 rulemaking. CEQ has done so, and where applicable, this final rule provides a high-level summary of the important issues raised in those public comments. Where CEQ has retained provisions as finalized in the Phase 1 rulemaking, CEQ incorporates by reference the discussion of those provisions in the Phase 1 proposed and final rule, as well as the Phase 1 Response to Comments.[52] CEQ is revising and republishing the entirety of the NEPA regulations, Subpart A of Chapter V, Title 40 of the Code of Federal Regulations.[53]

A. Changes Throughout Parts 1500–1508

In the NPRM, CEQ proposed several revisions throughout parts 1500 through 1508 to provide consistency, improve clarity, and correct grammatical errors. CEQ proposed clarifying edits because unclear language can create confusion and undermine consistent implementation, thereby improving the efficiency of the NEPA process and reducing the risk of litigation.

For these reasons, CEQ proposed to change the word ''impact'' to ''effect'' throughout the regulations where this term is used as a noun because these two words are synonymous, with three exceptions. The regulations would continue to refer to a finding of no significant impact (FONSI) because that term has been widely used and recognized and making the substitution of effect for impact in that instance could create confusion rather than add clarity, and environmental impact statement because this term is used in the NEPA statute. Third, CEQ proposed to use ''cumulative impact'' in the definition of ''environmental justice'' as discussed further in section II.J.9. CEQ makes these change in the final rule as proposed.

Also, to enhance clarity, CEQ proposed to use the word ''significant'' only to modify the term ''effects'' throughout the regulations. Accordingly, where ''significant'' modifies a word other than ''effects,'' CEQ proposed to replace ''significant'' with another synonymous adjective, typically ''important'' or ''substantial,'' which have also been used in varying provisions throughout the CEQ regulations since 1978. CEQ proposed this change to avoid confusion about what ''significant'' means in these other contexts without substantively changing any of the provisions so revised.

CEQ proposed this change based on public comments and agency feedback on the Phase 1 rulemaking that use of the word ''significant'' in phrases such as ''significant issues'' or ''significant actions'' creates confusion on what the word ''significant'' means.[54] CEQ also proposed the change to align with the definition of ''significant effects'' in § 1508.1(mm), as discussed in section II.J.24.

One commenter supported the use of ''important'' in place of ''significant,'' asserting that the change will reduce unnecessary confusion and delays because use of consistent terminology will eliminate ambiguity and increase consistency and will speed up future reviews because all parties will understand what is meant by a term. A few other commenters supported the changes in terms generally, saying that the changes help make the NEPA regulations easier to understand.

A separate commenter supported the use of the term ''important'' arguing that it would broaden the scope of what agencies should consider under NEPA. The commenter described significance, in the context of NEPA, as a high bar, and agreed with CEQ that important issues should also be subject to thorough consideration in environmental reviews.

Multiple commenters disagreed with the proposed use of ''important'' in place of ''significant'' or ''unimportant'' in place of ''insignificant.'' These commenters expressed concern about the interpretation of ''important'' without a definition or additional guidance, and that the use of these adjectives could cause confusion and increase litigation risk. A few commenters requested that the final rule replace ''issues'' with ''effects'' and change ''important issues'' to ''significant effects'' asserting that the phrase ''important issues'' is subjective. One commenter stated that while CEQ described the changes as minor, these terms are well understood by courts and agencies and as such changing them will result in numerous updates of related procedures, regulations, and guidance documents that use these terms just for editorial purposes.

Another commenter expressed concern that replacing the word ''significant'' with another adjective is unnecessary, and points to CEQ's own description in the NPRM that it does not intend to ''substantively change the meaning of the provisions'' and suggesting the replacement words will be synonymous. The commenter further asserted that it will be difficult to ensure consistency of implementation if CEQ continually changes language that has no substantive effect on the regulations.

A separate commenter asserted that while they appreciated the return of the definition of ''significance,'' the use of the new term ''important'' is confusing. The commenter further stated that with the heightened focus on environmental justice, human health, and social or societal effects, it is unclear what is

[52] CEQ, Phase 1 proposed rule, *supra* note 50; CEQ, Phase 1 Final Rule, *supra* note 50; CEQ, National Environmental Policy Act Implementing Regulations Revision Phase 1 Response to Comments (Apr. 2022) (Phase 1 Response to Comments), *https://www.regulations.gov/document/CEQ-2021-0002-39427*.

[53] Consistent with guidance from the Office of **Federal Register**, republishing the provisions that are unchanged in this rulemaking provides context for the revisions. *See* Office of the Federal Register, Amendatory Instruction: Revise and Republish, *https://www.archives.gov/federal-register/write/ddh/revise-republish*.

[54] CEQ, Phase 1 Response to Comments, *supra* note 52, at 120–21.

considered important and who determines whether something is important.

CEQ implements this change from ''significant'' to one of its synonyms when it is not modifying ''effect'' in the final rule. The NEPA regulations have long required agencies to focus on the ''important'' issues, *see* 40 CFR 1500.1 (2019), and agencies have decades of experience doing just that—CEQ disagrees that use of this term in other provisions as a substitute for ''significant issues'' alters the scope of the issues to which those provisions refer. CEQ declines to add a definition for this term because its plain meaning is sufficient and notes that the phrase ''significant issues'' was not defined in the 1978 regulations.[55] CEQ's intent is that agencies focus their NEPA documents on the issues that are key for the public to comment on and the agency to take into account in the decision-making process, and only briefly explain why other, unimportant issues are not discussed. As CEQ indicated in the proposed rule, it does not intend the substitution of ''important'' and ''substantial'' for ''significant'' to substantively change the meaning of the provisions, but rather to bring greater consistency and clarity to agencies in implementing these provisions by eliminating a potential ambiguity that these phrases incorporate the definition of ''significant effects''; for example, ensuring that the phrase ''significant actions'' is not mistakenly understood to mean actions that have significant effects, which was not the meaning of the phrase in the regulations. CEQ discusses comments on specific uses of the terms in specific sections of the rule and in the Phase 2 Response to Comments.

For clarity, CEQ proposed to change ''statement'' to ''environmental impact statement'' and ''assessment'' to ''environmental assessment'' where the regulations only use the short form in the paragraph. *See, e.g.,* §§ 1502.3 and 1506.3(e)(1) through (e)(3). CEQ did not receive comments on this proposal and makes these changes throughout the rule as proposed.

CEQ also proposed to make non-substantive grammatical corrections or consistency edits throughout the regulations where CEQ considered the changes to improve readability. Finally, CEQ proposed to update the authorities for each part, update the references to NEPA as amended by the Fiscal Responsibility Act, and fix internal cross references to other sections of the regulations throughout to follow the correct **Federal Register** format. CEQ makes these changes in the final rule.

B. Revisions To Update Part 1500, Purpose and Policy

CEQ proposed substantive revisions to all sections in part 1500. These revisions include reinstating § 1500.2, ''Policy,'' as its own section separate from § 1500.1, ''Purpose'' consistent with the approach taken in the 1978 regulations. Some commenters recommended that CEQ title § 1500.1 ''Purpose and Policy'' and title § 1500.2 ''Additional Policy'' because, in their view, § 1500.2 reflects CEQ's policy judgments rather than the commands of the NEPA statute.

CEQ declines to make this change. The purpose of §§ 1500.1 and 1500.2 is to place the regulations into their broader context by restating the policies of the Act within the regulations, which will improve readability by avoiding the need for cross references to material outside the text of the regulations. Section 1500.2 reflects CEQ's interpretation of the policies of the Act, rather than CEQ's own policy priorities.

1. Purpose (§ 1500.1)

In § 1500.1, CEQ proposed to restore much of the language from the 1978 regulations with revisions to further incorporate the policies Congress established in the NEPA statute. CEQ proposed these changes to restore text regarding NEPA's purpose and goals, placing the regulations into their broader context and to restate the policies of the Act within the regulations. Some commenters expressed general support for proposed § 1500.1 stating that the revisions appropriately frame NEPA's purposes. CEQ revises § 1500.1 as discussed in this section to recognize that the procedural provisions of NEPA are intended to further the purpose and goals of the Act. One of those goals is to make informed and sound government decisions.

First, CEQ proposed to revise paragraph (a) of 40 CFR 1500.1 (2020) by subdividing it into paragraphs (a), (a)(1), and (a)(2). In paragraph (a), CEQ proposed to revise the first sentence to restore language from the 1978 regulations stating that NEPA is ''the basic national charter for protection of the environment'' and add a new sentence stating that NEPA ''establishes policy, sets goals'' and ''provides direction'' for carrying out the principles and policies Congress established in sections 101 and 102 of NEPA. 42 U.S.C. 4331, 4332. CEQ proposed to remove language from the first sentence of paragraph (a) describing NEPA as a purely procedural statute because CEQ considers that language to be an inappropriately narrow view of NEPA's purpose and ignores the fact that Congress established the NEPA process for the purpose of promoting informed decision making and improved environmental outcomes.

Some commenters objected to the proposed use of the phrase ''basic national charter for protection of the environment'' in paragraph (a), asserting it misrepresents NEPA's purpose as a procedural statute. Other commenters opposed the proposed changes to remove the language clarifying that NEPA is a procedural statute, asserting the proposed changes could give the impression that CEQ seeks to expand NEPA beyond its original mandate.

Another commenter objected to the restoration of the language in paragraph (a) asserting that describing NEPA as the ''basic national charter for the protection of the environment'' displaces the U.S. Constitution from the role of ''America's basic national charter for protection.'' CEQ declines to remove this language, which accurately describes NEPA's purpose, was included in the 1978 regulations, and remained in place until the 2020 rule. CEQ disagrees that describing NEPA as the basic national charter for the protection of the environment denigrates the role of the U.S. Constitution. Congress enacted NEPA exercising its Constitutional authority to declare a national environmental policy and describing NEPA as ''America's basic national charter for the protection of the environment'' does not imply that NEPA overshadows the U.S. Constitution. CEQ also notes that several courts have quoted this language approvingly. *See, e.g., Ctr. for Biological Diversity* v. *Bernhardt,* 982 F.3d 723, 734 (9th Cir. 2020); *Habitat Educ. Ctr., Inc.* v. *United States Forest Serv.,* 673 F.3d 518, 533 (7th Cir. 2012).

In the final rule, CEQ revises paragraph (a) as proposed, but removes the parenthetical references to sections 101 and 102 as unnecessary and incomplete because other sections of NEPA also provide direction for carrying out NEPA's policy, which are addressed throughout the regulations. While CEQ agrees that the NEPA analysis required by section 102(2)(C) and these regulations does not dictate a particular outcome, Congress did not establish NEPA to create procedure for procedure's sake, but rather, to provide for better informed Federal decision making and improved environmental

[55] *See, e.g., Significant,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/significant* (defining ''significant'' as ''having or likely to have influence or effect: IMPORTANT'').

outcomes. These goals are not fulfilled if the NEPA analysis is treated merely as a check-the-box exercise. 42 U.S.C. 4332(2)(C). CEQ does not consider it necessary to repeatedly emphasize in the regulations the procedural nature of the statutory mechanism Congress chose to advance the purposes of NEPA as described in section 2 and the policy directions established in section 101 of NEPA. 42 U.S.C. 4321, 4331. Doing so may suggest that NEPA mandates a rote paperwork exercise and de-emphasizes the Act's larger goals and purposes. Instead, CEQ remains cognizant of the goals Congress intended to achieve through the NEPA process in developing CEQ's implementing regulations, and agencies should carry out NEPA's procedural requirements in a manner faithful to the purposes of the statute.

Second, in § 1500.1(a)(1), CEQ proposed to retain the second sentence of 40 CFR 1500.1(a) (2020) summarizing section 101(a) of NEPA, change ''man'' to ''people'' to remove gendered language, and delete ''of Americans'' after ''present and future generations.'' 42 U.S.C. 4331(a). CEQ proposed to add a second sentence summarizing section 101(b) to clarify that agencies should advance the purposes in section 101(b) through their NEPA reviews. 42 U.S.C. 4331(b). CEQ proposed to include this language in § 1500.1(a)(1) to help agencies understand what the regulations refer to when the regulations direct or encourage agencies to act in a manner consistent with the purposes or policies of the Act. *See, e.g.,* §§ 1500.2(a), 1500.6, 1501.1(a), 1502.1(a), and 1507.3(b).

Some commenters objected to the proposal to remove ''of Americans'' from paragraph (a)(1) contending that the removal would be inconsistent with the statute. After considering these comments, CEQ has determined not to make this change and leave the phrase ''of Americans'' at the end of the first sentence of paragraph (a)(1), because this sentence is specifically describing section 101(a) of NEPA, which includes the phrase. However, CEQ notes that this text in section 101(a) and paragraph (a)(1) does not limit NEPA's concerns solely to Americans or the United States. For example, other language in section 101 reflects NEPA's broader purpose to ''create and maintain conditions under which [humans] and nature can exist in productive harmony'' without qualification. 42 U.S.C. 4331(a). As discussed further in section II.J.13, CEQ removes ''of Americans'' from the definition of ''human environment'' in § 1508.1(r) for consistency with the statute's overall broader purpose.

A commenter recommended CEQ add a dash after ''national policy'' in the second sentence for consistency with the statute to ensure that all six of the goals are modified by the phrase ''consistent with considerations of national policy.'' CEQ agrees that the beginning of the sentence, including the phrase ''consistent with other essential considerations of national policy'' modifies all of the listed items that follow and, in the final rule, revises the sentence to subdivide it into paragraphs (a)(1)(i) through (vi) to make this clarification. Lastly in paragraph (a)(1), in the final rule, CEQ changes ''man'' to ''humans'' rather than the proposed ''people'' to remove the gendered language while also providing consistency with the term ''human'' and ''human environment'' used in the NEPA statute and throughout the regulations.

Third, CEQ proposed to begin § 1500.1(a)(2) with the third sentence of 40 CFR 1500.1(a) (2020), modify it, and add two new sentences to generally restore the language of the 1978 regulations stating that the purpose of the regulations is to convey what agencies should and must do to comply with NEPA to achieve its purpose. Specifically, CEQ proposed to revise the first sentence to state that section 102(2) of NEPA establishes the procedural requirements to carry out the policies ''and responsibilities established'' in section 101, and contains '' 'action-forcing' procedural provisions to ensure Federal agencies implement the letter and spirit of the Act.'' 42 U.S.C. 4332(2), 42 U.S.C. 4331. CEQ proposed to add a new second sentence stating the purpose of the regulations is to set forth what agencies must and should do to comply with the procedures and achieve the goals of the Act. In the third new sentence, CEQ proposed to restore the language from the 1978 regulations that the President, Federal agencies, and the courts share responsibility for enforcing the Act to achieve the policy goals of section 101. 42 U.S.C. 4331.

Fourth, CEQ proposed to strike the fourth and fifth sentences of 40 CFR 1500.1(a) (2020), added by the 2020 rule, which state that NEPA requires Federal agencies to provide a detailed statement for major Federal actions, that the purpose and function of NEPA is satisfied if agencies have considered environmental information and informed the public, and that NEPA does not mandate particular results. While the NEPA process does not mandate that agencies reach specific decisions, CEQ proposed to remove this language because CEQ considered this language to unduly minimize Congress's understanding that procedures ensuring that agencies analyze, consider, and disclose environmental effects will lead to better substantive outcomes. CEQ also considered this language inconsistent with Congress's statements of policy in the NEPA statute.

Some commenters objected specifically to the proposed addition of the phrase ''action-forcing,'' and others contended that the proposed rule would revise the regulation not merely to force action, but to require specific outcomes. Another commenter asserted that proposed paragraph (a)(2) goes too far in separating policy goals from the procedures passed by Congress to achieve them.

CEQ finalizes paragraph (a)(2) as proposed and removes the language that describes NEPA as a purely procedural statute because CEQ considers the language to reflect an inappropriately narrow view of NEPA's purpose that minimizes Congress's broader goals in enacting the statute, as specified in sections 2 and 101 of NEPA. 42 U.S.C. 4321, 4331. While NEPA does not mandate particular results in specific decision-making processes, Congress intended the procedures required under the Act to result in more informed decisions, with the goal that information about the environmental effects of those decision would facilitate better environmental outcomes. *See, e.g., Andrus* v. *Sierra Club,* 442 U.S. 347, 350–51 (1979) (''If environmental concerns are not interwoven into the fabric of agency planning, the action-forcing characteristics of [NEPA] would be lost.'').

Fifth, CEQ proposed to strike the first two sentences of 40 CFR 1500.1(b) (2020), which the 2020 rule added, because they provide an unnecessarily narrow view of the purposes of NEPA and its implementing regulations. CEQ proposed to revise the third sentence and add two new sentences to restore in paragraph (b) language from the 1978 regulations emphasizing the importance of the early identification of high-quality information that is relevant to a decision. Early identification and consideration of issues using high-quality information have long been fundamental to the NEPA process, particularly because such identification and consideration facilitates comprehensive analysis of alternatives and timely and efficient decision making, and CEQ considers it important to emphasize these considerations in this section. CEQ also proposed the changes to emphasize that the environmental information that agencies

use in the NEPA process should be high-quality, science-based, and accessible.

Multiple commenters supported the proposed provisions of § 1500.1(b). One commenter supported the provision for agencies to ''concentrate on the issues that are truly relevant to the action in question, rather than amassing needless detail,'' and to use ''high quality, science-based, and accessible'' information. One commenter recommended that CEQ revise ''Most important'' to ''Most importantly'' in § 1500.1(b). CEQ agrees that this change would improve the readability of the sentence and makes this clarifying edit in the final rule.

Other commenters opposed the change to proposed paragraph (b), asserting it would delete important regulatory text. The commenters asserted that by striking the language, CEQ has turned the section from one that says follow the rules into one that adds to the rules. Upon further consideration, CEQ has determined not to finalize the proposed revisions to the beginning of paragraph (b) because the text from the 1978 regulations could be construed as a direction to agencies rather than a statement about the purpose of the CEQ regulations. Specifically, the final rule retains ''[t]he regulations in this subchapter implement'' from the current regulations and then replaces ''section 102(2) of NEPA'' with ''the requirements of NEPA,'' because the requirements of NEPA extend to additional sections following the 2023 NEPA amendments. Additionally, CEQ includes the proposed new second sentence, with revisions. In the final rule, this provision requires rather than recommends that information be high quality for consistency with § 1506.6. CEQ does not include the proposed references to ''science-based'' and ''accessible'' to avoid potential confusion that this provision was establishing a separate obligation from § 1506.6, which addresses methodology and scientific accuracy.

Finally, CEQ proposed a new paragraph (c) to restore text from the 1978 regulations, most of which the 2020 rule deleted, emphasizing the importance of NEPA reviews for informed decision making. Some commenters recommended CEQ further amend proposed paragraph (c) to state that agencies only have to ''protect'' or ''restore and protect,'' rather than ''enhance'' the environment for consistency with sections 101 and 102 of NEPA. 42 U.S.C. 4331, 4332.

CEQ disagrees with the commenters' view of NEPA's purposes and scope. To the extent that a substantive difference exists between the terms in this context, CEQ notes that section 101(c) of NEPA recognizes ''that each person has a responsibility to contribute to the preservation *and enhancement* of the environment.'' 42 U.S.C. 4331(c) (emphasis added); *see also, e.g., Douglas Ctny.* v. *Babbitt,* 48 F.3d 1495, 1505 (9th Cir. 1995) (''The purpose of NEPA is to 'provide a mechanism to *enhance* or improve the environment and prevent further irreparable damage.' '' (emphasis added) (quoting *Pac. Legal Found.* v. *Andrus,* 657 F.2d 829, 837 (6th Cir. 1981)). Another commenter recommended that CEQ qualify the second sentence of proposed paragraph (c) by appending, ''within the agency's Congressional authorizations.'' CEQ declines to make this change. In implementing any statute, agencies must act within the scope of their legal authority; adding a specific qualification to that effect here is therefore unnecessary and could be confusing. CEQ finalizes paragraph (c) as proposed.

2. Policy (§ 1500.2)

The 2020 rule struck 40 CFR 1500.2 (2019), stating that it was duplicative of other sections, and integrated policy language into 40 CFR 1500.1 (2020).[56] CEQ proposed to restore § 1500.2 because a robust articulation of NEPA's policy principles is fundamental to the NEPA process. CEQ also proposed to restore the policy section because it is helpful to agency practitioners and the public to have a consolidated listing of policy objectives regardless of whether other sections of the regulations address those objectives. CEQ proposed to restore with some updates the language of the 1978 regulations to § 1500.2.

First, CEQ proposed to restore an introductory paragraph to require agencies ''to the fullest extent possible'' to comply with the policy set forth in paragraphs (a) through (f). One commenter asserted that the final rule should delete ''to the fullest extent possible'' because it improperly expands the regulation's authority. CEQ disagrees with the commenter's interpretation of the phrase, which does not expand, but rather qualifies, the scope of § 1500.2 and conforms with the text in section 102 of NEPA, which directs agencies to comply with that section's requirements, including the requirement to prepare an EIS, ''to the fullest extent possible.'' *See* 42 U.S.C. 4332.

Second, CEQ proposed to restore in paragraph (a) the 1978 language directing agencies to interpret and administer policies, regulations, and U.S. laws consistent with the policies of NEPA and the CEQ regulations. Some commenters recommended the final rule revise paragraph (a) to replace ''the policies set forth in the Act and in these regulations,'' with ''with other applicable laws and regulations, in addition to NEPA.'' CEQ finalizes paragraph (a) as proposed and declines to make this change because it aligns with the language of section 102(1) of NEPA. *See* 42 U.S.C. 4332(1). The purpose of § 1500.2(a) is to place the CEQ regulations into their broader context by restating NEPA's policies. Doing so improves readability by avoiding the need for cross references to material outside the text of the regulations.

Third, in paragraph (b), CEQ proposed to restore with clarifying edits the 1978 language directing agencies to implement procedures that facilitate a meaningful NEPA process, including one that is useful to decision makers and the public with environmental documents that are concise and clear, emphasize the important issues and alternatives, and are supported by evidence. CEQ did not receive comments specific to this proposed paragraph and finalizes paragraph (b) as proposed.

Fourth, in paragraph (c), CEQ proposed to direct agencies to integrate NEPA with other planning and environmental review requirements to promote efficient, concurrent processes. One commenter requested the final rule revise proposed paragraph (c) to add qualifying language to require the integration be done at the earliest reasonable time, consistent with § 1501.2(a), except where inconsistent with other statutory requirements or where inefficient. The commenter generally supported integrating the NEPA process with other processes when it is efficient, but asserted that sometimes it may be more efficient to have other processes run consecutively instead of concurrently. CEQ agrees that processes should run consecutively where it is more efficient to do so, and that agencies should not integrate processes when doing so would be inefficient. Therefore, in the final rule, CEQ adds proposed paragraph (c) but does not include ''all'' before ''such procedures,'' and adds ''where doing so promotes efficiency'' at the end of the paragraph.

Fifth, in paragraph (d) CEQ proposed to modernize language from the 1978 regulations in 40 CFR 1500.2(d) (2019) to emphasize public engagement, including ''meaningful public

[56] CEQ, 2020 Final Rule, *supra* note 39, at 43316–17.

engagement with communities with environmental justice concerns, which often include communities of color, low-income communities, indigenous communities, and Tribal communities.''

One commenter requested that CEQ clarify whether the phrase ''affect the quality of the human environment'' in paragraph (d) refers to beneficial or adverse effects and whether it covers temporary effects in addition to permanent ones. CEQ declines to amend the language in question, which CEQ is restoring from the 1978 regulations. Because NEPA directs agencies to consider all of the reasonably foreseeable effects of a proposed action—including positive, negative, temporary, and permanent effects—this phrase is appropriately broad. While the final rule defines ''significant effects'' as limited to only adverse effects, *see* § 1508.1(mm), paragraph (d) is broader because the NEPA regulations encourage and facilitate public engagement for actions that may not have significant effects, including actions that agencies analyze through an EA.

Multiple commenters supported proposed § 1500.2(d) and the emphasis on public engagement. Some commenters recommended the final rule expand the paragraph to clarify how agencies should facilitate public engagement and education. CEQ declines to expand this paragraph because the intent of § 1500.2 is to place the regulations into their broader policy context. Instead, § 1501.9 describes agencies' public engagement responsibilities in detail.

Some commenters opposed proposed paragraph (d) and the emphasis on public engagement. One commenter expressed concern that the proposed rule does not include a similar increased emphasis on State-specific involvement, requested the final rule delineate between State involvement and public involvement, and explicitly emphasize the importance of State-specific engagement, much the same way CEQ has outlined for Tribal engagement.

In the final rule, CEQ adds proposed paragraph (d) but omits the last clause of the proposal and declines to specifically address State-specific involvement in this paragraph because this paragraph is about involving the public, rather than coordinating with other government entities such as States and Tribes. While public involvement and inter-governmental coordination are both critically important components of the NEPA process, they implicate different considerations and are addressed by different portions of the NEPA regulations. CEQ does not include the proposed language describing what communities are often included as communities with environmental justice concerns because ''environmental justice'' and ''communities with environmental justice concerns'' are defined terms in § 1508.1(f) and (m) and the explanatory language is unnecessary in § 1500.2. CEQ also revises the clause in the final rule to clarify the example by adding ''such as those'' after communities so that the example refers to communities in general and communities with environmental justice concerns more specifically, because the regulations encourage meaningful engagement with all communities that are potentially affected by an action. The reference to engagement with communities with environmental justice concerns is an example and not exhaustive. Further, CEQ views an emphasis on engagement with such communities to be important because agencies have not always meaningfully engaged with them, and such communities have been disproportionately and adversely affected by certain Federal activities, and such communities often face challenges in engaging with the Federal Government. In making this change to emphasize public engagement, CEQ notes that consultation with Tribal Nations on a nation-to-nation basis is distinct from the public engagement requirements of NEPA.[57]

Sixth, in paragraph (e), CEQ proposed to restore language from the 1978 regulations regarding use of the NEPA process to identify and assess the reasonable alternatives to proposed actions that avoid or minimize adverse effects. CEQ also proposed to add examples of such alternatives, including those that will reduce climate change-related effects or address health and environmental effects that disproportionately affect communities with environmental justice concerns.

One commenter requested that the final rule further clarify paragraph (e) by adding examples of reasonable alternatives. CEQ declines to add examples to paragraph (e) because reasonable alternatives are not amenable to easy generalization or simple description as they depend on project-specific factors, such as purpose and need, and technical and economic feasibility. Therefore, examples of reasonable alternatives are ill-suited to regulatory text. Some commenters opposed the references to climate change and environmental justice in § 1500.2(e), contending that the references indicate that CEQ's regulations direct or favor particular substantive outcomes, such as the disapproval of oil and gas projects, and will therefore prejudice agencies' analysis of environmental effects; that the NEPA statute does not explicitly address these subjects; or that it will be difficult or burdensome for agencies to account for climate change when conducting environmental reviews.

CEQ adds paragraph (e) as proposed in the final rule. CEQ agrees that NEPA does not dictate a particular outcome, and disagrees that the references to climate change and environmental justice in § 1500.2(e) are contrary to this principle. Rather, Congress enacted and amended NEPA based on the understanding that agency decision makers will make better decisions if they are fully informed about each decision's reasonably foreseeable environmental effects. Paragraph (e) prompts agencies to give appropriate regard to environmental effects related to climate change and environmental justice.

Further, the references to climate change and environmental justice in paragraph (e) reflect and advance NEPA's statutory objectives, text, and policy statements, which include analyzing a reasonable range of alternatives; avoiding environmental degradation; preserving historic, cultural, and natural resources; and ''attain[ing] 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), 4332(2)(C)(iii). The references emphasize that decision makers should integrate those subjects into the analysis of the environmental effects of a proposed action and any reasonable alternatives, as appropriate. Additionally, these changes are consistent with the goal of providing ''safe, healthful, productive, and esthetically and culturally pleasing surroundings'' across the Nation, and the goal that all people can ''enjoy a healthful environment,'' 42 U.S.C. 4331(b), (c), and highlight the importance of considering such effects in environmental documents, consistent with NEPA's requirements and agency practice.[58] The changes are also

[57] *See* E.O. 13175, *Consultation and Coordination with Indian Tribal Governments,* 65 FR 67249 (Nov. 9, 2000); Presidential Memorandum, Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 FR 7491 (Jan. 29, 2021).

[58] Consistent with section 102(2)(C) of NEPA, consideration of environmental justice and climate change-related effects has long been part of NEPA analysis. *See, e.g., Ctr. for Biological Diversity* v. *Nat'l Highway Traffic Safety Admin.,* 538 F.3d 1172

consistent with E.O. 12898 and E.O. 14096.

Finally, in paragraph (f), CEQ proposed to restore the direction from the 1978 regulations to use all practicable means, consistent with the policies of NEPA, to restore and enhance the environment and avoid or minimize any possible adverse effects of agency actions. These revisions to § 1500.2(d), (e), and (f) reflect longstanding practice among Federal agencies and align with NEPA's statutory policies, including to avoid environmental degradation, preserve historic, cultural, and natural resources, 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).

Multiple commenters expressed support for the proposed changes to paragraphs (d), (e), and (f), asserting the changes appropriately emphasize agency obligations to facilitate public participation in the decision-making process, instead of merely keeping the public informed, and to act on information they obtain in that process. These commenters asserted the proposed changes properly describe the objectives of environmental reviews under NEPA as informed decision making, robust public engagement, and protection of the environment.

One commenter requested the final rule revise paragraph (f) to add other laws and agency authorities after ''the requirements of the Act.'' CEQ finalizes paragraph (f) as proposed and declines to make this change because this paragraph aligns with section 101(b) of NEPA. 42 U.S.C. 4331(b). The purpose of §§ 1500.1 and 1500.2 is to place the regulations into their broader context by restating NEPA's policies within the regulations. Doing so improves readability by avoiding the need for cross references to material outside the text of the regulations. CEQ agrees that agencies should comply with other laws and with agency authorities, which are examples of ''other essential considerations of national policy.'' CEQ also notes that this text was in the 1978 regulation, in effect until 2020, and did not create confusion that the NEPA regulations prevented agencies from complying with other legal requirements.

Commenters recommended that CEQ add various qualifiers to § 1500.2 asserting that agencies have limited authorities and resources and must comply with other applicable laws in addition to NEPA. CEQ declines to make these changes. The introductory paragraph of § 1500.2 provides that agencies must carry out the policies set forth in the section ''to the fullest extent possible,'' which renders the suggested amendments redundant. Moreover, § 1501.3 directs agencies to consider, for a particular action, whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another provision of Federal law when determining NEPA applicability to that action, which is consistent with the manner in which Congress addressed this issue in section 106 of NEPA. 42 U.S.C. 4336.

Likewise, commenters suggested that CEQ clarify particular points of NEPA practice, such as defining ''all practicable means;'' explaining how agencies should facilitate public engagement and education; adding examples of reasonable alternatives; requiring environmental documents to describe the steps that the agency has taken to avoid or minimize adverse effects; providing standards against which to quantitatively assess agencies' implementation of the NEPA regulations; requiring only that agencies minimize the ''significant'' adverse effects of a proposed action; or directing agencies to make their planning efforts consistent with State and local plans to the maximum extent possible.

CEQ declines to revise the regulations in response to these comments. The purpose of §§ 1500.1 and 1500.2 is to place the regulations into their broader context by restating the purposes and policies of the Act and addressing a variety of aspects of NEPA practice would distract from that purpose. Other provisions in the regulations implement the provisions of NEPA that effectuate these purposes and policies, and set forth specific procedures that agencies must and should follow. Accordingly, it is not necessary or appropriate for § 1500.2 to address these subjects in greater detail.

Lastly, one commenter recommended that CEQ add a new paragraph to § 1500.2 to require agencies to realize the Federal Government's trust responsibility to Tribal Nations by acting on and not merely considering Indigenous Knowledge. Another commenter made a related recommendation that § 1500.1 explicitly recognize the Federal Government's trust responsibilities to Tribes.

CEQ agrees that agencies should consider and include Indigenous Knowledge in Federal research, policies, and decision making, including as part of the environmental review process under NEPA. CEQ also recognizes that the Federal trust responsibility to Tribal Nations may shape both the procedures that agencies follow and the substantive outcomes of agencies' decision-making processes. CEQ does not, however, view it as properly within the scope of CEQ's authority to direct agencies to act on Indigenous Knowledge through the NEPA regulations, because the NEPA statute includes procedural, rather than substantive requirements, and the obligation to honor the trust responsibility, including the obligation to engage in Tribal consultation, does not arise from the NEPA statute.

3. NEPA Compliance (§ 1500.3)

CEQ proposed to revise § 1500.3 to restore some language from the 1978 regulations and remove some provisions added by the 2020 rule regarding exhaustion and remedies, which aimed to limit legal challenges and judicial remedies.[59] The process established by the 2020 rule provided that first, an agency must request in its notice of intent (NOI) comments on all relevant information, studies, and analyses on potential alternatives and effects. 40 CFR 1500.3(b)(1) (2020). Second, the agency must summarize all the information it receives in the draft EIS and specifically seek comment on it. 40 CFR 1500.3(b)(2), 1502.17, 1503.1(a)(3) (2020). Third, decision makers must certify in the record of decision (ROD) that they considered all the alternatives, information, and analyses submitted by public commenters. 40 CFR 1500.3(b)(4), 1505.2(b) (2020). And fourth, any comments not submitted within the comment period were considered forfeited as unexhausted. 40 CFR 1500.3(b)(3), 1505.2(b) (2020).

First, CEQ proposed to revise paragraph (a) to remove the phrase ''except where compliance would be inconsistent with other statutory requirements'' from the end of the first sentence because § 1500.6 addresses this issue. CEQ also proposed to remove the references to E.O. 13807, which E.O. 13990 revoked, as well as the reference to section 309 of the Clean Air Act because this provision is implemented by EPA.[60]

CEQ removes the clause ''except where compliance would be inconsistent with other statutory requirements'' in the final rule because the relationship between NEPA and agency statutory authority is addressed in § 1500.6 and the circumstances in

(9th Cir. 2008) and CEQ, Environmental Justice Guidance, *supra* note 7.

[59] CEQ, 2020 Final Rule, *supra* note 39, at 43317–18.

[60] *See* E.O. 13807, *supra* note 14; E.O. 13990, *supra* note 43.

which an agency does not need to prepare an environmental document due to a conflict with other statutes is addressed in § 1501.3. Moreover, to the extent that this phrase could be read as identifying when an agency does not need to conduct an environmental review, the NEPA amendments address that in section 106(a)(3) using different language, specifically, that an agency does not need to prepare an environmental document where ''the preparation of such document would clearly and fundamentally conflict with the requirements of another provision of law.'' 42 U.S.C. 4336(a)(3). CEQ also removes the references to E.O. 13807 and section 309 of the Clean Air Act consistent with the proposal.

Second, CEQ proposed to delete paragraphs (b) and (b)(1) through (b)(4) of 40 CFR 1500.3 (2020) addressing exhaustion. CEQ proposed to remove these provisions because they establish an inappropriately stringent exhaustion requirement for public commenters and agencies. CEQ also proposed to delete this paragraph because it is unsettled whether CEQ has the authority under NEPA to set out an exhaustion requirement that bars parties from bringing claims on the grounds that an agency's compliance with NEPA violated the APA, pursuant to 5 U.S.C. 702. As explained in the proposed rule, while the 2020 rule correctly identifies instances in which courts have ruled that parties may not raise legal claims based on issues that they themselves did not raise during the comment period,[61] other courts have sometimes ruled that a plaintiff can bring claims where another party raised an issue in comments or where the agency should have identified an issue on its own. *Pac. Coast Fed'n of Fishermen's Ass'ns* v. *U.S. Dep't of Interior,* 929 F. Supp. 2d 1039, 1045–46 (E.D. Cal. 2013); *Wyo. Lodging and Rest. Ass'n* v. *U.S. Dep't of Interior,* 398 F. Supp. 2d 1197, 1210 (D. Wyo. 2005); *see Pub. Citizen,* 541 U.S. at 765 (noting that ''[T]he agency bears the primary responsibility to ensure that it complies with NEPA . . . and an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action'').

[61] CEQ, 2020 Final Rule, *supra* note 39, at 43317–18 (citing *Dep't of Transp.* v. *Pub. Citizen,* 541 U.S. 752, 764–65 (2004); *Karst Env't. Educ. & Prot., Inc.* v. *Fed. Highway Admin.,* 559 F. App'x 421, 426–27 (6th Cir. 2014); *Friends of the Norbeck* v. *U.S. Forest Serv.,* 661 F.3d 969, 974 (8th Cir. 2011); *Exxon Mobil Corp.* v. *U.S. EPA,* 217 F.3d 1246, 1249 (9th Cir. 2000); and *Nat'l Ass'n of Mfrs.* v. *U.S. Dep't of the Interior,* 134 F.3d 1095, 1111 (D.C. Cir. 1998)).

Because the fundamental question raised by these cases is the availability of a cause of action under the APA and not a question of interpreting NEPA, CEQ proposed to delete the exhaustion provision because CEQ considers interpreting and applying the APA more appropriate for the courts.

CEQ also proposed to remove the exhaustion requirement because it is at odds with longstanding agency practice. While courts have ruled that agencies are not required to consider comments that are not received until after comment periods end, *see, e.g., Pub. Citizen,* 541 U.S. at 764–65 (finding that where a party does not raise an objection in their comments on an EA, the party forfeits any objection to the EA on that ground), agencies have discretion to do so and have sometimes chosen to exercise this discretion, particularly where a comment provides helpful information to inform the agency's decision. As explained in the proposed rule, the exhaustion requirement could encourage agencies to disregard important information presented to the agency shortly after a comment period closes, and such a formalistic approach would not advance NEPA's goal of informed decision making.

Many commenters supported CEQ's proposal to remove the exhaustion provisions asserting that the provisions were unlawful, created additional compliance burdens, did not improve the efficiency of the NEPA process, and did not reduce litigation risk; and that removal is consistent with the NEPA statute, which does not provide for an exhaustion requirement. One commenter that supported removal, asserted that because NEPA does not impose a statutory exhaustion requirement, the determination of whether a particular plaintiff may go forward with a particular claim is a matter for the judiciary. CEQ agrees with this commenter's view. Where appropriate in light of the statutes they administer, individual agencies may address exhaustion through their agency-specific rules of procedure, and courts will continue to consider exhaustion as a normal part of judicial review.

Commenters that opposed removing the exhaustion requirements argued they are necessary to curb ''frivolous litigation claims;'' assist agencies and the public by providing helpful information on filing timely comments and incentivizing them to raise concerns during the NEPA process; and communicate the need for prompt and active participation in the NEPA review process. While CEQ agrees with these commenters' assertions that the regulations should promote early engagement and public participation and the timely identification of concerns during the NEPA process, CEQ disagrees that the exhaustion provisions are the mechanism to achieve these goals. CEQ considers other provisions in the regulations, including §§ 1501.9 and 1502.4, and part 1503, to be the better means of achieving these goals without incurring the risk of including provisions in the regulations that are legally uncertain.

For these reasons, CEQ removes the exhaustion provisions from the regulations and strikes paragraphs (b) and (b)(1) through (b)(4) of 40 CFR 1500.3 (2020) consistent with the proposal. Removal of these exhaustion provisions does not relieve parties interested in participating in, commenting on, or ultimately challenging a NEPA analysis of the obligation to ''structure their participation so that it is meaningful.'' *Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 553 (1978). As CEQ's regulations have made clear since 1978, parties must provide comments that are as specific as possible to enable agencies to consider and address information during the decision-making processes. *See* 40 CFR 1503.3(a) (2019).

Further, nothing in this revision limits the positions the Federal Government may take regarding whether, based on the facts of a particular case, a particular issue has been forfeited by a party's failure to raise it before the agency, and removing this provision does not suggest that a party should not be held to have forfeited an issue by failing to raise it. By deleting the exhaustion requirements, CEQ does not take the position that plaintiffs may raise new and previously unraised issues in litigation. Rather, CEQ considers this to be a question of general administrative law best addressed by the courts based on the facts of a particular case.

Third, CEQ proposed to redesignate paragraph (c), ''Review of NEPA compliance,'' of 40 CFR 1500.3 (2020) as paragraph (b) and add a clause, ''except with respect to claims brought by project sponsors related to deadlines under section 107(g)(3) of NEPA'' to the end of the first sentence stating that judicial review of NEPA compliance does not occur before an agency issues a ROD or takes a final agency action. CEQ did not receive specific comments on this proposal and adds to redesignated paragraph (b) the exception clause to acknowledge the ability of project sponsors to petition a

court when an agency allegedly fails to meet a deadline consistent with section 107(g)(3) of NEPA. 42 U.S.C. 4336(a)(g)(3).

Fourth, CEQ proposed to move the last sentence of paragraph (d) of 40 CFR 1500.3 (2020) regarding harmless error for minor, non-substantive errors, a concept that has been in place since the 1978 regulations, to redesignated paragraph (b). CEQ also proposed to delete the second sentence of paragraph (c) of 40 CFR 1500.3 (2020) stating that noncompliance with NEPA and the CEQ regulations should be resolved as expeditiously as possible. While CEQ agrees with expeditious resolution of issues, CEQ proposed to delete this sentence reasoning that CEQ cannot compel members of the public or courts to resolve NEPA disputes expeditiously.

One commenter opposed the proposed deletion of the second sentence of paragraph (c) of 40 CFR 1500.3 (2020) and disagreed with CEQ's rationale, asserting that it is proper for CEQ to express its interest in agencies resolving NEPA compliance issues as soon as practicable. The commenter further argued that doing so is in the interest of Federal agencies, project proponents, and the public, and that unresolved NEPA disputes can lead to costly litigation that prolongs the NEPA process, wastes taxpayer and project proponent resources, and deprives communities of infrastructure improvements.

CEQ agrees that efficiency is an important goal, and that resolving claims of NEPA noncompliance can result in costly and time-consuming litigation. Upon further consideration, CEQ retains the second sentence of paragraph (c) of 40 CFR 1500.3(2020) in the final rule as the third sentence of § 1500.3(b), but revises the text from ''as expeditiously as possible'' to ''as expeditiously as appropriate.'' While it is true that CEQ cannot compel members of the public or courts to resolve disputes expeditiously, as noted in CEQ's justification for proposing to delete this provision, CEQ considers this sentence to appropriately express CEQ's intention, rather than purporting to inappropriately bind those parties to litigation or dictate what timeline is appropriate for any particular case. Further, CEQ notes that the regulations promote public engagement, appropriate analysis, and informed decision making to facilitate NEPA compliance and avoid such disputes from the outset. CEQ moves the last sentence of 40 CFR 1500.3(d) (2020) to § 1500.3(b) as proposed.

Fifth, CEQ proposed to strike the last sentence of paragraph (c) of 40 CFR 1500.3 (2020) allowing agencies to include bonding and other security requirements in their procedures consistent with their organic statutes and as part of implementing the exhaustion requirements because this relates to litigation over an agency action and not the NEPA process. CEQ explained in the proposed rule that it is unsettled whether NEPA provides agencies with authority to promulgate procedures that require plaintiffs to post bonds in litigation brought under the APA, and that CEQ does not consider it appropriate to address this issue in the NEPA implementing procedures.

Multiple commenters urged CEQ not to remove this sentence or encouraged CEQ to revise the regulations to require parties to post such a bond when petitioning a court to enjoin a NEPA decision during the pendency of litigation. Conversely, many commenters supported the proposed elimination of the bonding provision, which the commenters said discourages public engagement, appropriate analysis, and informed decision making and inequitably burdens disadvantaged communities.

CEQ removes the bonding provision in the final rule by striking the last sentence of 40 CFR 1500.3(c) (2020). NEPA does not authorize CEQ to require posting of bonds or other financial securities prior to a party challenging an agency decision. Agencies may have various authorities independent of NEPA to require bonds or other securities as a condition of filing an administrative appeal or obtaining injunctive relief; this rule does not modify those authorities. CEQ continues to consider it unsettled whether NEPA provides agencies with authority to promulgate procedures that require plaintiffs to post bonds in litigation brought under the APA, commenters did not identify any specific statutory authorities, and even if such authority exists, CEQ does not view such a requirement as appropriate for inclusion in the NEPA regulations. Agency authority to require bonds or other securities as a condition of an administrative appeal or injunctive relief may exist independent of NEPA, and to the extent that such authority does exist, it likely varies by agency. The rule does not modify any existing authority.

CEQ proposed to strike paragraph (d) of 40 CFR 1500.3 (2020) regarding remedies, with the exception of the last sentence, which CEQ proposed to move to proposed paragraph (c) as discussed earlier in this section. CEQ proposed to remove this provision because it is questionable whether CEQ has the authority to direct courts about what remedies are available in litigation brought under the APA, and in any case, CEQ considers the 2020 rule's addition of this paragraph to be inappropriate.

CEQ strikes 40 CFR 1500.3(d) (2020) in the final rule. CEQ considers courts to be in the best position to determine the appropriate remedies when a plaintiff successfully challenges an agency's NEPA compliance. *See, e.g., N. Cheyenne Tribe* v. *Norton,* 503 F.3d 836, 842 (9th Cir. 2007) (rejecting successful NEPA plaintiffs' contention that CEQ regulations mandated a particular remedy and holding that ''a NEPA violation is subject to traditional standards in equity for injunctive relief'').

Finally, CEQ proposed to redesignate paragraph (e) of 40 CFR 1500.3 (2020) on Severability, as proposed paragraph (c), without change. CEQ makes this change in the final rule because CEQ intends these regulations to be severable. This final rule amends existing regulations, and the NEPA regulations can be functionally implemented if each revision in this final rule occurred on its own or in combination with any other subset of revisions. As a result, if a court were to invalidate any particular provision of this final rule, allowing the remainder of the rule to remain in effect would still result in a functional NEPA review process. This approach to severability is the same as the approach that CEQ took when it promulgated the 2020 regulations, because those amendments similarly could be layered onto the 1978 regulations individually without disrupting the overarching NEPA review process.

4. Concise and Informative Environmental Documents (§ 1500.4)

CEQ proposed to revise § 1500.4, which briefly describes and cross references certain other provisions of the CEQ regulations, to emphasize the important values served by concise and informative NEPA documents beyond merely reducing paperwork, such as promoting informed and efficient decision making and facilitating meaningful public participation and transparency. CEQ proposed these changes to encourage the preparation of documents that can be easily read and understood by decision makers and the public, which in turn promotes informed and efficient decision making and public participation.

First, CEQ proposed to retitle § 1500.4 from ''Reducing paperwork'' to ''Concise and informative environmental documents'' and revise the introductory text to clarify that the

listed paragraphs provide examples of the regulatory mechanisms that agencies can use to prepare concise and informative environmental documents. Multiple commenters supported the proposed changes in § 1500.4, opining the changes properly direct agencies to streamline the process of preparing environmental documents and make those documents analytical, concise, and informative. One commenter recommended that CEQ add ''for example'' and ''as appropriate'' to the introductory paragraph.

CEQ revises the title and introductory text of § 1500.4 in the final rule as proposed. Concise and informational documents make the NEPA process more accessible and transparent to the public, allowing the public an opportunity to contribute to the NEPA process. The changes in § 1500.4 align the regulations with the intent of NEPA to allow the public to provide input and enhance transparency, while providing agencies flexibility on how to achieve concise and informative documents. CEQ declines to add ''for example'' and ''as appropriate'' to the introductory paragraph. Those qualifiers are unnecessary because CEQ proposed and is adding ''*e.g.,*'' throughout § 1500.4, where appropriate, to clarify that the cross-references are non-exclusive examples of strategies that agencies must use in preparing analytical, concise, and informative environmental documents.

CEQ proposed to strike paragraphs (a) and (b) of 40 CFR 1500.4 (2020) because they are redundant with § 1500.5(a) and (b) and are more appropriately addressed in that section, which addresses an efficient process. CEQ also proposed to strike paragraph (d) of 40 CFR 1500.4 (2020) because this provision would be addressed in the revised introductory text.

A few commenters objected to the deletion of 40 CFR 1500.4(a) and (b) (2020), which pertain to using CEs and FONSIs, respectively. The commenters asserted that the use of CEs and FONSIs is critical to ensuring ''analytical, concise, and informative'' environmental documents, and that the inclusion of such language encourages concision in the evaluation process. While recognizing the paragraphs are redundant with § 1500.5(a) and (b), they asserted that § 1500.5(a) and (b) address improving efficiency in the process, while § 1500.4 addresses concise environmental documents. The commenters further asserted that the two sections are separate in substance and in form, and each should therefore include independent language addressing any inefficiencies.

CEQ strikes paragraphs (a), (b), and (d) of 40 CFR 1500.4 (2020) consistent with the proposal. While CEQ agrees that, where appropriate, applying CEs and preparing EAs and FONSIs typically result in shorter evaluation timelines, this section addresses the preparation of documents, including CE determinations, EAs, and FONSIs, rather than addressing the use of different types of environmental documents.

CEQ proposed to redesignate paragraphs (c) and (e) through (q) of 40 CFR 1500.4 (2020) as § 1500.4 (a) and (b) through (n), respectively. CEQ proposed to add ''*e.g.,*'' to the cross references listed in proposed paragraphs (b), (c), and (e) to clarify that they are non-exclusive examples of how agencies can briefly discuss unimportant issues, write in plain language, and reduce emphasis on background material. CEQ also proposed to update the regulatory section cross references for consistency with the proposed changes in the rule. CEQ makes these changes in the final rule as proposed.

In proposed paragraphs (c) and (e), CEQ proposed to expand the reference from EISs to all environmental documents, as the concepts discussed are more broadly applicable. Additionally, in paragraph (e), CEQ proposed to insert ''most'' before ''useful'' to clarify that the environmental documents should not contain portions that are useless.

In proposed paragraph (f), CEQ proposed to replace ''significant'' with ''important'' and insert ''unimportant'' to modify ''issues'' consistent with the proposal to only use ''significant'' to modify ''effects.'' CEQ also proposed to clarify in paragraph (f) that scoping may apply to EAs. Additionally, CEQ proposed to expand paragraph (h), regarding programmatic review and tiering, to include EAs to align with the proposed changes to § 1501.11. CEQ makes these changes to paragraphs (c), (e), (f), and (h) in the final rule as proposed.

While CEQ did not propose any changes to paragraph (*l*) regarding use of errata sheets, in the final rule, CEQ moves the clause ''when changes are minor'' from the end to the beginning of the paragraph to make the language clearer that agencies use errata sheets only when changes between the draft EIS and final EIS are minor. Finally, in paragraph (m), CEQ proposed to insert ''Federal'' before ''agency'' consistent with § 1506.3, which allows adoption of NEPA documents prepared by other Federal agencies.

One commenter objected to paragraph (m), contending that directing agencies to eliminate duplication by preparing environmental documents jointly with relevant State, Tribal, and local agencies would threaten the autonomy of Tribes by obligating them to coordinate with Federal agencies in preparing environmental documents. CEQ disagrees with this commenter's interpretation of paragraph (m). Paragraph (m) refers agencies to § 1506.2, which makes clear that agencies should only prepare joint environmental documents by mutual consent. CEQ makes the changes as proposed in the final rule.

Commenters recommended including additional strategies in § 1500.4, including minimizing unnecessary repetition in describing and assessing alternatives, limiting discussion of effects to those that are reasonably foreseeable, and resolving disagreements in the review process expeditiously. CEQ declines to add additional paragraphs. Section 1500.4 lists regulatory provisions that agencies must use in preparing concise and informative environmental documents; these provisions already direct agencies to minimize unnecessary repetition, evaluate the reasonably foreseeable effects of proposed actions, and resolve disagreements expeditiously.

5. Efficient Process (§ 1500.5)

CEQ proposed minor changes to § 1500.5 to provide clarity and flexibility regarding mechanisms by which agencies can apply the CEQ regulations to improve efficiency in the environmental review process. CEQ proposed these changes to acknowledge that unanticipated events and circumstances beyond agency control may delay the environmental review process, and to recognize that, while these approaches may improve efficiency for many NEPA reviews, they could be inefficient for others. To that end, CEQ proposed to retitle § 1500.5 from ''Reducing delay'' to ''Efficient process'' and revise the introductory text to replace ''reduce delay'' with ''improve efficiency of the NEPA processes'' consistent with the new title.

Some commenters recommended against these changes asserting that they give the impression that it is unimportant for agencies to reduce delays in the permitting process. CEQ revises the title and introductory text as proposed. The purpose of the changes is not to discount the importance of reducing delays in the environmental review process, but to emphasize that agencies should make their review processes broadly efficient and not merely fast—recognizing that efficiency also requires effectiveness and quality of

work. CEQ agrees that reducing delays is important but considers the text to give the wrong impression that there are always delays in the NEPA process.

CEQ proposed to add EAs to paragraph (a) to make the provision consistent with the definition of ''categorical exclusion;'' phrase paragraph (d) in active voice; change ''real issues'' to ''important issues that required detailed analysis'' in paragraph (f) for consistency with § 1502.4; change ''time limits'' to ''deadlines'' in paragraph (g) for consistency with § 1501.10; and expand the scope of paragraph (h) from EISs to environmental documents to make clear that, regardless of the level of NEPA review, agencies should prepare environmental documents early in the process. CEQ proposed these revisions to recognize the importance of timely information for decision making and encourage agencies to implement the 12 listed mechanisms to achieve timely and efficient NEPA processes. CEQ did not receive any comments specific to these proposed changes and makes them in the final rule. Additionally, CEQ revises § 1500.5(a) to change ''using'' to ''establishing'' and adds a cross reference to § 1507.3(c)(8) because the language in this provision is addressing the development of CEs, not their application to proposed actions.

One commenter recommended the final rule revise paragraph (d)—requiring interagency cooperation during preparation of an EA or EIS rather than waiting to submit comments on a completed document—to require the lead agency to involve other relevant agencies in the determination of whether to review a proposed action by applying a CE, preparing an EA, or preparing an EIS.

CEQ revises paragraph (d) to incorporate some of the text proposed by the commenter. Specifically, CEQ adds ''including with affected Federal, State, Tribal, and local agencies'' to highlight the efficiency benefits of interagency cooperation with those non-Federal entities, and also adds the words ''request or'' before the ''submit comments'' to highlight the importance of both the lead agency and other agencies to interagency cooperation.

6. Agency Authority (§ 1500.6)

CEQ proposed revisions to § 1500.6 to clarify that agencies have an independent responsibility to ensure compliance with NEPA and a duty to harmonize NEPA with their other statutory requirements and authorities to the maximum extent possible. CEQ proposed to revise the second and third sentences in § 1500.6 and strike the fourth sentence.

While CEQ did not propose changes to the first sentence, which requires an agency to view its policies and missions in the light of NEPA's environmental objectives to the extent consistent with its existing authority, one commenter recommended that CEQ revise the sentence to restore phrasing from the 1978 regulations. In particular, the commenter recommended the final rule delete the last clause, ''to the extent consistent with its existing authority'' because it is ''internally inconsistent and contrary to the plain language of NEPA Section 105.'' 42 U.S.C. 4335. Another commenter recommended the final rule delete the first sentence and disagreed with the description in the proposed rule that ''an irreconcilable conflict exists only if the agency's authorizing statute grants it no discretion to comply with NEPA while also satisfying the statutory mandate,'' asserting that if a statute delegates authority, it does so expressly and there is no presumption that an agency's authorizing statute delegates the agency authority to comply with NEPA.

CEQ declines to revise the first sentence. This provision generally directs agencies to interpret the provisions of NEPA, including section 2's statement of purpose, section 101's statement of policy, and sections 102 through 111's procedural provisions as a supplement to their existing authorities, and agencies can only do so to the extent consistent with those authorities. *See* 42 U.S.C. 4321 *et seq.* This provision does not address the more specific issue of when an agency is excused from completing an environmental document because of contrary statutory authority. That issue is addressed in § 1501.3(a)(2), which incorporates section 106(a) of NEPA's directive that agencies are not required to prepare an environmental document where ''the preparation of such document would clearly and fundamentally conflict with the requirements of another provision of law.'' 42 U.S.C. 4336(a)(3). NEPA applies to all Federal agencies and includes a specific statutory directive that ''the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA].'' 42 U.S.C. 4332(1). While there may be situations in which compliance with another Federal law precludes an agency from complying with NEPA, agencies have an obligation to harmonize NEPA with their other statutes where possible to do so.

CEQ proposed to revise the second sentence of § 1500.6 to remove the qualification added in the 2020 rule that agencies must ensure full compliance with the Act ''as interpreted by'' the CEQ regulations so the provision would instead state that agencies must review and revise their procedures to ensure compliance with NEPA and the CEQ regulations. CEQ proposed this change because the phrase ''as interpreted by'' could be read to indicate that agencies have no freestanding requirement to comply with NEPA itself, which would be untrue. CEQ also considered the change necessary for consistency with § 1507.3(b), which CEQ revised in its Phase 1 rulemaking to make clear that, while agency procedures must be consistent with the CEQ regulations, agencies have discretion and flexibility to develop procedures beyond the CEQ regulatory requirements, enabling agencies to address their specific programs, statutory mandates, and the contexts in which they operate. CEQ proposed to make conforming edits in §§ 1502.2(d) and 1502.9(b) to remove this phrase.

Several commenters expressed support for CEQ's proposal to restore language emphasizing each Federal agency's independent obligation and ability to implement NEPA. The commenters asserted that removing this language would make it clear that agencies have an obligation to comply with NEPA by following CEQ's regulations and also reviewing and revising, as necessary, their own agency policies, procedures, and activities. The commenter further asserted this independent obligation to comply with NEPA, combined with revisions to § 1507.3 in the Phase 1 rule, provides Federal agencies with flexibility to craft regulations tailored to their agency's work, even if they go beyond the requirements of the CEQ NEPA regulations.

Another commenter expressed support for this proposed change and agreed with CEQ's statement that the current text could be read to mistakenly indicate that agencies have no freestanding requirement to comply with NEPA. The commenter suggested that the final rule add to the beginning of the second sentence, to state that ''[a]gencies shall comply with the purposes and provisions of the Act and with the requirements under this Part, to the fullest extent possible.'' The commenter asserted that regardless of what an agency's policies, procedures, and regulations say, it is critical that the agency comply with both NEPA and the CEQ regulations, unless an agency activity, decision, or action is exempted

by law or compliance with NEPA is impossible.

In the final rule, CEQ revises the second sentence of § 1500.6 as proposed to replace ''as interpreted by'' with ''and'' and makes conforming changes to §§ 1502.2(d) and 1502.9(b). CEQ declines to add the clause suggested by the commenter because compliance with NEPA and the regulations is already addressed in the last sentence of this section as well as §§ 1507.1 and 1507.2.

In the third sentence, CEQ proposed to remove the cross-reference to § 1501.1 for consistency with the proposed revisions to § 1501.1 and add the text, consistent with language from the 1978 regulations, explaining that the phrase ''to the fullest extent possible'' means that each agency must comply with section 102 of NEPA unless an agency activity, decision, or action is exempted by law or compliance with NEPA is impossible. 42 U.S.C. 4332.

A couple of commenters suggested revisions to the last sentence of § 1500.6. They asserted that the proposed revisions would create confusion by creating a distinction between complying with section 102 of NEPA and complying with all of NEPA, and that this was incorrect given the recent NEPA amendments and the proposed implementation of those amendments in these regulations. 42 U.S.C. 4321 *et seq.* The commenters recommended the final rule replace ''that section unless'' with ''the Act and the regulations of this subchapter.''

CEQ agrees with the commenter that the statement in section 102 is not limited to that section and replaces the phrase ''that section'' with ''the Act'' for consistency with the statute. Section 102(2) authorizes and directs that, to the fullest extent possible the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in NEPA. 42 U.S.C. 4332(2). CEQ does not include a reference to the regulations as these are not specifically identified in section 102, and § 1507.1 addresses the requirement to comply with the NEPA regulations.

The commenters also recommended the final rule replace ''compliance with NEPA is impossible'' with ''compliance is impracticable.'' The commenters recommended this change because section 101 refers to the Federal Government taking all ''practicable means'' to advance NEPA's goals, implicitly sparing the need to pursue ''impracticable'' steps. 42 U.S.C. 4331.

CEQ declines to make this change and revises the last sentence as proposed to strike ''consistent with § 1501.1 of this chapter'' and replace it with ''unless an agency activity, decision, or action is exempted from NEPA by law or compliance with NEPA is impossible.'' Compliance with NEPA is only impossible within the meaning of this subsection when the conflict between another statute and the requirements of NEPA are clear, unavoidable, and irreconcilable. Absent exemption by Congress or a court, an irreconcilable conflict exists if the agency's authorizing statute does not provide the agency any discretion to comply with NEPA while also satisfying its statutory mandate. While NEPA requires agencies ''to use all practicable means'' to achieve the Act's environmental goals, *see* 42 U.S.C. 4331, the Act does not limit its procedural requirements in the same fashion. Instead, it directs agencies to fulfill the obligations in section 102 of NEPA, which establishes NEPA's procedural obligations, ''to the fullest extent possible,'' 42 U.S.C. 4332, which the Supreme Court has interpreted to require compliance except for ''where a clear and unavoidable conflict in statutory authority exists.'' *See Flint Ridge Dev. Co,* 426 U.S. at 788. Therefore, revising proposed paragraph (a)(3) to replace ''impossible'' with ''impracticable'' would be inconsistent with the statute and deviate from the established legal standard implementing it.

Finally, CEQ proposed to strike the last sentence of 40 CFR 1500.6 (2020) stating that the CEQ regulations do not limit an agency's other authorities or legal responsibilities. In the 2020 rule, CEQ stated that it added this sentence to acknowledge the possibility of different statutory authorities with different requirements and for consistency with E.O. 11514, as amended by section 2(g) of E.O. 11991.[62] CEQ reconsidered its position and proposed to delete the sentence as superfluous and unnecessarily vague. CEQ proposed that the revised last sentence of § 1500.6—agencies must comply with NEPA in carrying out an activity, decision, or action unless exempted by law (including where courts have held that a statute is functionally equivalent) or compliance with NEPA is impossible—accurately reflects the directive that Federal agencies comply with the CEQ regulations ''except where such compliance would be inconsistent with statutory requirements.'' [63] CEQ removes this sentence from 40 CFR 1500.6 (2020) in the final rule.

C. Revisions To Update Part 1501, NEPA and Agency Planning

CEQ proposed substantive revisions to all sections in part 1501 except § 1501.2, ''Apply NEPA early in the process,'' to which CEQ proposed minor edits for readability that are non-substantive. CEQ received a few comments on § 1501.2 requesting additional revisions but declines to make additional changes in response to the comments, which are discussed in the Phase 2 Response to Comments.

1. Purpose (§ 1501.1)

CEQ proposed to revise § 1501.1 to address the purpose and goals of part 1501, consistent with the approach in the 1978 regulations, and move the text in paragraph (a) of 40 CFR 1501.1 (2020) regarding NEPA thresholds to § 1501.3(a). CEQ discusses the revisions to that paragraph in section II.C.2 of this rule. Multiple commenters expressed general support for the overall changes to § 1501.1.

First, consistent with the approach in the 1978 regulations, CEQ proposed to retitle § 1501.1 to ''Purpose,'' and add an introductory paragraph to indicate that this section would address the purposes of part 1501. CEQ did not receive any specific comments on these proposed changes and makes them in the final rule consistent with the proposal.

Second, in paragraph (a), CEQ proposed to highlight the importance of integrating NEPA early in agency planning processes by restoring some of the language from the 1978 regulations, while also including language that emphasizes that early integration of NEPA promotes an efficient process and can reduce delay. CEQ proposed these revisions for consistency with section 102(2)(C) of NEPA and the objective to build into agency decision making, beginning at the earliest point, an appropriate consideration of the environmental aspects of a proposed action. 42 U.S.C. 4332(2)(C). CEQ did not receive any specific comments on proposed paragraph (a) and includes it in the final rule as proposed.

Third, CEQ proposed in paragraph (b) to emphasize early engagement in the environmental review process to elevate the importance of early coordination and engagement throughout the NEPA process to identify and address potential issues early in the decision-making process, thereby helping to reduce the overall time required to approve a project and improving outcomes. Multiple commenters expressed support

[62] E.O. 11514, *supra* note 26; E.O 11991, *supra* note 29.

[63] CEQ, 2020 Final Rule, *supra* note 39, at 43319.

for proposed paragraph (b) and the emphasis on early engagement in the environmental review process. One commenter suggested additional language to clarify that engagement should occur both prior to and during preparation of environmental documents. CEQ agrees that public engagement should continue throughout the NEPA process. However, this section outlines the purposes of part 1501, and while § 1501.1(b) emphasizes that engagement should start early in the NEPA process, the full breadth of appropriate engagement in the NEPA process is more appropriately discussed in § 1501.9. Therefore, CEQ includes paragraph (b), which is consistent with other changes throughout the regulations emphasizing the importance of engagement, as proposed, in the final rule.

Fourth, CEQ proposed to add a new paragraph (c) to restore text from the 1978 regulations regarding expeditious resolution of interagency disputes. One commenter suggested appending ''and in the best interest of the public'' to the end of paragraph (c) and expressed concern that the proposed language, particularly the reference to ''fair,'' implies agencies have an interest of their own. The commenter recommended the regulations clarify that interagency disputes should be resolved in a manner that advances the public interest and not just the interests of the agencies.

CEQ adds paragraph (c), as proposed, to the final rule. While CEQ considers expeditious resolution of interagency disputes to be in the best interest of the public, the purpose of part 1501 is to facilitate the resolution of such disputes in an efficient fashion that accommodates the perspectives, expertise, and relevant statutory authority of the agencies involved in the dispute.

Fifth, CEQ proposed to add paragraph (d) to restore the direction to identify the scope of the proposed action and important environmental issues consistent with § 1501.3, which can enhance efficiency. One commenter requested clarity on what ''important environmental issues'' means, while another commenter asserted that all issues that acutely and negatively impact the environment deserve full study. One commenter also requested the final rule add language to clarify that agencies should remove unimportant issues from study or analysis, not just deemphasize them.

CEQ adds paragraph (d), as proposed, to the final rule. CEQ declines to make the commenter's recommended changes in paragraph (d). Agencies must consider all issues during the environmental review process, but the level of analysis should be commensurate with the importance of the effect, with some issues requiring less analysis. This approach is consistent with the approach of the 1978 regulations that agencies have decades of experience implementing, which indicated that agencies should ''concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.'' 40 CFR 1500.1(b) (2019).

Sixth, CEQ proposed to add paragraph (e) to highlight the importance of schedules consistent with § 1501.10, which includes provisions requiring agencies to develop a schedule for all environmental reviews and authorizations, as well as §§ 1501.7 and 1501.8, which promote interagency coordination including with respect to schedules. CEQ did not receive any specific comments on proposed paragraph (e) and includes it in the final rule as proposed.

Seventh, as discussed further in section II.C.2, CEQ proposed to combine the threshold considerations provision with the process to determine the appropriate level of NEPA review in § 1501.3 by moving paragraphs (a)(1), (a)(2), (a)(4), and (a)(5) of 40 CFR 1501.1 (2020) to § 1501.3(a)(1), (2), (4), and (4)(ii), respectively, and striking paragraphs (a)(3) and (a)(6).

CEQ proposed to delete the factor listed in 40 CFR 1501.1(a)(3) (2020), inconsistency with Congressional intent expressed in another statute, because upon further consideration, CEQ considers this factor to have inadequately accounted for agencies' responsibility to harmonize NEPA with other statutes, as discussed further in section II.C.2. As discussed in section II.B.5, the regulations provide that an agency should determine if a statute or court decision exempts an action from NEPA or if compliance with NEPA and another statute would be impossible; if not, the agency must comply with NEPA. To the extent the factor suggested that agencies should seek to go beyond these two questions to determine Congress's intent regarding NEPA compliance in enacting another statute, the factor is incorrect.

One commenter objected to CEQ's removal of the factor at 40 CFR 1501.1(a)(3) (2020) directing agencies to consider ''[w]hether compliance with NEPA would be inconsistent with Congressional intent expressed in another statute.'' The commenter asserted the proposed rule does not provide sufficient guidance to Federal agencies to determine whether an action is consistent with Congressional intent. In the final rule, CEQ strikes 40 CFR 1501.1(a)(3) (2020) as proposed because CEQ considers this factor to have inadequately accounted for agencies' responsibility to harmonize NEPA with other statutes. Section 1501.3(a)(2) of the final rule requires agencies to consider ''[w]hether compliance with NEPA would clearly and fundamentally conflict with the requirements of another provision of Federal law.'' As discussed further in section II.C.2, § 1501.3(a)(2) incorporates the language of section 106(a)(3) of NEPA, 42 U.S.C. 4336(a)(3), and aligns with the statutory mandate in section 102 of NEPA, 42 U.S.C. 4332, that agencies comply with NEPA ''to the fullest extent possible.'' Therefore, CEQ is removing this factor because it provides an inadequately rigorous standard for exempting agency actions from NEPA and is redundant with § 1501.3(a)(2).

CEQ proposed to strike the factor in 40 CFR 1501.1(a)(6) (2020) regarding functional equivalence to restore the status quo as it existed in the longstanding 1978 regulations. The NPRM explained that certain Environmental Protection Agency (EPA) actions are explicitly exempted from NEPA's environmental review requirements, *see, e.g.,* 15 U.S.C. 793(c)(1) (exempting EPA actions under the Clean Air Act); 33 U.S.C. 1371(c)(1) (exempting most EPA actions under the Clean Water Act), and courts have found EPA's procedures under certain other environmental statutes it administers and certain procedures under the Endangered Species Act (ESA) to be functionally equivalent to or otherwise exempt from NEPA. *See, e.g., Env't Def. Fund, Inc.* v. *EPA,* 489 F.2d 1247, 1256–57 (D.C. Cir. 1973) (exempting agency actions under the Federal Insecticide, Fungicide, and Rodenticide Act); *W. Neb. Res. Council* v. *U.S. Env't Prot. Agency,* 943 F.2d 867, 871–72 (8th Cir. 1991) (noting exemptions under the Safe Drinking Water Act); *Douglas County* v. *Babbitt,* 48 F.3d 1495, 1503 (9th Cir. 1995) (holding that Endangered Species Act procedures for designating a critical habitat replace the NEPA requirements). Nevertheless, CEQ considered this language added to the 2020 rule to go beyond the scope of the NEPA statute and case law because the language could be construed to expand functional equivalence beyond the narrow contexts in which it has been recognized.

Some commenters opposed the proposed removal of the factor on functional equivalence from 40 CFR 1501.1(a)(6) (2020) as well as in other provisions of the regulations, including the removal of 40 CFR 1500.1(a), 1506.9,

1507.3(c)(5), and 1507.3(d)(6) (2020). One commenter asserted that removing it would extend duplicative activity among agencies. Other opponents underscored that courts have held on several occasions that statutes that include their own environmental review processes can make compliance with NEPA redundant. These commenters asserted that CEQ's removal of regulatory language recognizing those decisions will encourage duplication and inefficiency. One commenter asserted that language in the rulemaking that encourages agencies ''to establish mechanisms in their agency NEPA procedures to align processes and requirements from other environmental laws with the NEPA process'' would turn the functional equivalence doctrine on its head, by requiring a specific statute to give way to a general statute rather than *vice versa.*

By contrast, supporters of these changes asserted that the language in question had no justification in law, and that Congress had considered incorporating language related to functional equivalence into NEPA as part of the development of the Fiscal Responsibility Act but had ultimately chosen not to do so.

CEQ strikes the factor in 40 CFR 1501.1(a)(6) (2020) from the final rule. As several commenters acknowledged, courts decided some of the cases addressing functional equivalence before CEQ issued the 1978 regulations, which encouraged agencies to combine environmental documents with ''any other agency document[s] to reduce duplication and paperwork,'' 40 CFR 1506.4 (2019),[64] and to ''adapt[] [their] implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.'' 40 CFR 1507.1 (2019). CEQ acknowledges the continuing validity of the judicial decisions finding EPA's procedures under certain environmental statutes it administers and certain procedures under the ESA are functionally equivalent to NEPA. CEQ considers these circumstances to fall within the scope of the activities and decisions addressed in § 1501.3(a)(1) as ''exempted from NEPA by law.'' CEQ considers it unhelpful to separately discuss functional equivalence in the regulations to avoid suggesting that other agencies and activities or decisions are also exempted from NEPA. CEQ disagrees with commenters who contended that the functional equivalence decisions give agencies license to create new NEPA exemptions.[65] Rather, the appropriate approach is for agencies to align their NEPA procedures with their statutory requirements—an approach that does not require a more specific statute to give way to a more general one, as asserted by a commenter, but rather allows agencies to comply with both statutes at once.

Eighth, CEQ proposed to remove the language in paragraph (b) of 40 CFR 1501.1 (2020) allowing agencies to make threshold determinations individually or in their NEPA procedures because CEQ proposed to move the consideration of thresholds into § 1501.3 to consolidate the steps agencies should take to determine whether NEPA applies and, if so, what level of NEPA review is appropriate. CEQ also proposed to strike this language because it is redundant to language in § 1507.3(d)(1), which provides that agency NEPA procedures may identify activities or decisions that are not subject to NEPA.

Ninth, CEQ proposed to remove as unnecessary paragraph (b)(1) of 40 CFR 1501.1 (2020) because agencies have discretion to consult with CEQ and have done so for decades on a wide variety of matters, including on determining NEPA applicability, without such specific language in the CEQ regulations.

Finally, CEQ proposed to eliminate paragraph (b)(2) of 40 CFR 1501.1 (2020) directing agencies to consult with another agency when they jointly administer a statute if they are making a threshold applicability determination. CEQ proposed to delete this paragraph because while CEQ agrees that consultation is a good practice in such circumstances, it does not consider such a requirement necessary for these regulations because consultation is best determined by the agencies involved.

One commenter expressed appreciation for the consolidation of threshold considerations from paragraph (b) but asserted that the final rule should retain an acknowledgement that the threshold considerations are a non-exhaustive list and that agencies should identify considerations on a case-by-case basis. CEQ considers the language in §§ 1501.3(a) and 1507.3(d)(1) to address the commenter's concern and removes paragraphs (b), (b)(1), and (b)(2) of 40 CFR 1501.1 (2020) in the final rule.

2. Determine the Appropriate Level of NEPA Review (§ 1501.3)

CEQ proposed substantive revisions to § 1501.3 to provide a more robust and consolidated description of the process agencies should use to determine the appropriate level of NEPA review, including addressing the threshold question of whether NEPA applies. CEQ also proposed clarifying edits, including adding paragraph headings to paragraphs (a) through (d). CEQ proposed these revisions to clarify the steps for assessing the appropriate level of NEPA review to facilitate a more efficient and predictable review process.

First, as noted in section II.C.1, CEQ proposed to move paragraph (a) of 40 CFR 1501.1 (2020) to a new § 1501.3(a), title it ''Applicability,'' and add a sentence requiring agencies to determine whether NEPA applies to a proposed activity or decision as a threshold matter. CEQ proposed this move because the inquiry into whether NEPA applies is a component of determining the level of NEPA review. CEQ proposed to consolidate the steps in this process into one regulatory section to improve the clarity of the regulations. CEQ also noted that this consolidated provision is consistent with the approach in section 106 of NEPA, which addresses threshold determinations on whether to prepare an EA/FONSI or EIS. 42 U.S.C. 4336. In moving the text, CEQ proposed to strike ''or is otherwise fulfilled'' after ''[i]n assessing whether NEPA applies'' because, as discussed in section II.C.1, CEQ proposed to remove the functional equivalence factor from the regulation.

Second, CEQ proposed to move the threshold determination factors agencies should consider when determining whether NEPA applies from paragraphs (a)(1) and (a)(2) of 40 CFR 1501.1 (2020), to proposed paragraphs (a)(1) and (2), respectively. CEQ proposed to align the text in paragraph (a)(1) with the language proposed in § 1500.6 by deleting ''expressly'' and replacing ''exempt from NEPA under another statute'' with ''exempted from NEPA by law.'' CEQ proposed to align the text in paragraph (a)(2) with the language in section 106(a)(3) of NEPA, changing ''another statute'' to ''another provision of law'' for consistency with the statutory text. 42 U.S.C. 4336(a)(3).

One commenter requested that the final rule revise paragraph (a)(2) to clarify that in the event of a clear and fundamental conflict with another law, an agency should consider ''whether NEPA or that provision prevails under legal rules for resolving such conflicts between Federal laws.'' In requesting

[64] *See* CEQ, Phase 2 proposed rule, *supra* note 51, at 49956.

[65] *See also* CEQ, Phase 2 proposed rule, *supra* note 51, at 49959 (''CEQ has concerns about . . . language added by the 2020 rule [in 40 CFR 1507.3(c)(5)] to substitute other reviews as functionally equivalent for NEPA compliance, and therefore proposes to remove it.'').

this revision, the commenter described that if a situation arises in which NEPA clearly and fundamentally conflicts with a provision of State, Tribal, or local law, the agency has no further assessment to make before determining that NEPA prevails. However, if a situation arises in which NEPA clearly and fundamentally conflicts with another provision of a Federal law or a U.S. treaty with a foreign power, the commenter asserted the agency must make further assessments before it can determine whether NEPA or the other provision prevails.

In the final rule, CEQ moves paragraph (a) of 40 CFR 1501.1 (2020) to a new § 1501.3(a), ''Applicability,'' and makes the changes to paragraph (a) as proposed. CEQ also moves paragraphs (a)(1) and (a)(2) of 40 CFR 1501.1 (2020), to § 1501.3(a)(1) and (2), respectively, except that CEQ adds the word ''Federal'' to the phrase ''another provision of law.'' CEQ interprets section 106(a)(3), 42 U.S.C. 4336(a)(3), in light of the bedrock legal principle established by the Supremacy Clause of the Constitution that State, Tribal, or local laws do not override Federal law, the corollary that the Federal Government is not subject to State regulation in the absence of clear and unambiguous Congressional authorization, *see EPA* v. *California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 211 (1976), and decades of case law that predated the NEPA amendments and informed CEQ's 2020 rule considering whether NEPA conflicts with another Federal law. *See, e.g., Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Oklahoma,* 426 U.S. 776, 788 (1976). To improve the clarity of the NEPA regulations, CEQ adds the word ''Federal'' to the sentence to avoid any potential confusion that non-Federal legal requirements can override NEPA. CEQ disagrees that an agency must apply principles of statutory interpretation to determine whether NEPA applies where its application would present a clear and fundamental conflict with the requirements of another provision of Federal law, because section 106(a) of NEPA provides that in such circumstances ''an agency is not required to prepare an environmental document with respect to a proposed agency action.'' 42 U.S.C. 4336(a).

Third, CEQ proposed a new factor in paragraph (a)(3) to address circumstances where statutory provisions applicable to a proposed activity or decision make compliance with NEPA impossible. CEQ explained in the proposed rule that this factor is consistent with case law, principles of statutory construction, and the statutory requirement of section 102 of NEPA that agencies interpret and administer ''the policies, regulations, and public laws of the United States'' in accordance with NEPA's policies. 42 U.S.C. 4332(1).

One commenter recommended the final rule change ''impossible'' to ''impracticable'' while another commenter suggested that the final rule remove paragraph (a)(3) because it is duplicative of paragraph (a)(2). CEQ has considered the comments and agrees that proposed paragraph (a)(3) is duplicative of proposed paragraph (a)(2) and could therefore cause confusion. Therefore, CEQ does not include proposed paragraph (a)(3) in the final rule.

Fourth, consistent with section 106(a)(1) and (4) of NEPA, 42 U.S.C. 4336(a)(1) and (4), CEQ proposed to move the threshold determination factor regarding whether the activity or decision is a major Federal action from paragraph (a)(4) of 40 CFR 1501.1 (2020) and the factor regarding whether the activity or decision is non-discretionary from paragraph (a)(5) of 40 CFR 1501.1 (2020), to proposed § 1501.3(a)(4) and (a)(4)(ii), respectively. CEQ proposed to add a new paragraph (a)(4)(i) to add the factor regarding whether the proposed activity or decision is a final agency action under the APA. CEQ proposed to include whether an activity or decision is a final agency action or non-discretionary as subfactors of whether an activity or decision is a major Federal action in § 1501.3(a)(4) because CEQ also proposed these as exclusions from the definition of ''major Federal action.'' The proposed rule explained that when agencies assess whether an activity or decision is a major Federal action, agencies determine whether they have discretion to consider environmental effects consistent with the definition of ''major Federal action'' in § 1508.1.

One commenter recommended the final rule exclude proposed paragraph (a)(4) because the question of whether NEPA applies precedes the determination of whether the proposed action is a major Federal action, and there is no need to consider whether an action is a major Federal action if NEPA does not apply to the action. Other commenters recommended proposed paragraphs (a)(4), (a)(4)(i), and (a)(4)(ii) be separated from paragraph (a) in order to clearly distinguish the factors for threshold applicability determination from the definition of ''major Federal action.''

In the final rule, CEQ moves paragraph (a)(4) of 40 CFR 1501.1(2020) regarding major Federal action to § 1501.3(a)(3) and adds a cross reference to the definition § 1508.1(w). CEQ makes this revision to enhance the clarity of the regulation and for consistency with section 106(a) of NEPA. 42 U.S.C. 4336(a). CEQ disagrees with the commenter that determining whether an action constitutes a major Federal action is not a component of determining NEPA applicability or that treating this determination separately will improve efficiency. Agencies have the flexibility to consider the factors in paragraph (a) in any order and, therefore, the regulation does not require an agency to evaluate whether an action is a major Federal action if NEPA does not apply to it for other reasons.

In the final rule CEQ adds proposed paragraph (a)(4)(i) regarding final agency action to § 1501.3(a)(4) to make this a stand-alone factor, rather than a component of determining whether an action is a major Federal action, for consistency with section 106(a) of NEPA and improved clarity. 42 U.S.C. 4336(a). The final rule also adds the word ''not'' to paragraph (a)(4), so that it reads ''[w]hether the proposed activity or decision is not a final agency action'' for consistency with section 106(a)(1) of NEPA and parallelism with the other factors, which identify circumstances in which NEPA does not apply. 42 U.S.C. 4336(a)(1). CEQ notes that this factor requires the agency to evaluate whether the proposed action would be a final agency action if ultimately taken by the agency. CEQ does not include a cross reference to the definition of ''major Federal action'' as proposed because the final rule does not include this as an exclusion from the definition.

Lastly within paragraph (a), CEQ moves paragraph (a)(5) of 40 CFR 1501.1 (2020) on non-discretionary actions to § 1501.3(a)(5) to make this a stand-alone factor, rather than a sub-factor of major Federal action, for consistency with section 106(a)(4) of NEPA. 42 U.S.C. 4336(a)(4). While non-discretionary actions are excluded from the definition of ''major Federal action'' in section 111(10) of NEPA and § 1508.1(w), Congress determined that it was important to highlight this category as a component of determining NEPA applicability, and CEQ considers it appropriate for the regulations to do so as well. 42 U.S.C. 4336e(10). CEQ does not include a cross reference to the definition of ''major Federal action'' as proposed because the language in the statutory exclusion from the definition of ''major Federal action'' is different from this exclusion.

CEQ notes that where some components of an action are non-discretionary, but others are

discretionary, an agency can exclude considerations of the non-discretionary components from its NEPA analysis. That circumstance more logically presents an issue of the appropriate scope of the analysis, rather than of NEPA applicability, so, as discussed below, CEQ has included a reference to it in paragraph (b). For example, if a statute mandated an agency to make an affirmative decision once a set of criteria are met, but the agency has flexibility in how to meet those criteria, the agency exercises discretion on aspects of its decision and an analysis of alternatives and effects would inform the agency's exercise of discretion. Similarly, if a statute directs an agency to take an action, but the agency has discretion in how it takes that action, the agency can still comply with NEPA while carrying out its statutory mandate.

Fifth, CEQ proposed to move, with clarifying edits and additions, paragraph (e) and its subparagraphs of 40 CFR 1501.9 (2020), ''Determination of scope,'' to a new § 1501.3(b), ''Scope of action and analysis,'' to provide the next step in determining the appropriate level of NEPA review—the scope of the proposed action and its potential effects. In addition, CEQ proposed moving into § 1501.3(b) one sentence from paragraph (a) of 40 CFR 1502.4 (2020) directing agencies to evaluate in a single NEPA review proposals sufficiently closely related to be considered a single action, and the text from paragraph (e)(1) of 40 CFR 1501.9 (2020) regarding connected actions, which are closely related Federal activities or decisions that agencies should consider in a single NEPA document. CEQ proposed to move paragraphs (e)(1)(i) through (e)(1)(iii) of 40 CFR 1501.9 (2020) providing the types of connected actions into § 1501.3(b)(1) through (b)(3), respectively.

CEQ proposed these changes because this longstanding principle from the 1978 regulations—that agencies should not improperly segment their actions—is relevant not only when agencies are preparing EISs, but also when agencies determine whether to prepare an EA or apply a CE. *See, e.g., Fath* v. *Texas DOT,* 924 F.3d 132, 137 (5th Cir. 2018) (''Agencies generally should not segment, or divide artificially a major Federal action into smaller components to escape the application of NEPA to some of its segments.'') (quotations omitted). CEQ proposed to consolidate this text into § 1501.3(b) because the determination of the scope of the action, including any connected actions, necessarily informs the appropriate level of NEPA review. Because including this provision in § 1501.3 would make it applicable to environmental reviews other than EISs, CEQ proposed to strike the sentence that accompanied the text in 40 CFR 1502.4(a) (2020) directing the lead agency to determine the scope and significant issues for analysis in the EIS as part of the scoping process. CEQ proposed in § 1501.3(b)(1) to make a conforming change of ''environmental impact statements'' to ''NEPA review.''

Multiple commenters provided feedback on the first sentence of proposed § 1501.3(b) suggesting the final rule include additional language to limit it to an action that is under Federal agency control, and that NEPA reviews should not be used as a ''Federal handle'' to subject an entire project to Federal review where the Federal action comprises only one portion of the project. CEQ declines these edits because the sentence in question appropriately directs agencies to consider the scope of the proposed action and its potential effects consistent with longstanding agency practice.

In the final rule, CEQ moves paragraphs (e) and (e)(1) of 40 CFR 1501.9 (2020), to § 1501.3(b), and moves paragraph (e)(1)(i) through (e)(1)(iii) of 40 CFR 1501.9 (2020) to § 1501.3(b)(1) through (b)(3), respectively. CEQ adds the first sentence of proposed § 1501.3(b) as proposed with an additional phrase ''whether aspects of the action are non-discretionary'' at the end of the first sentence for consistency with agency practice and case law recognizing that where some aspects of an agency's action are non-discretionary, the agency can properly exclude them from the scope of its analysis. Adding this reference to this sentence clarifies that while NEPA does not apply to an action that is wholly non-discretionary, agencies should approach circumstances in which aspects of an action are non-discretionary, but others are discretionary, as a component of determining scope.

Another commenter suggested use of ''potential effects'' be replaced with ''reasonably foreseeable effects'' to emphasize that agencies are not required to consider effects that are not reasonably foreseeable. CEQ agrees that an agency only needs to consider reasonably foreseeable effects in determining the scope of analysis but declines to make this change as the word ''effects'' is a defined term in the regulations meaning reasonably foreseeable effects. Upon further consideration, CEQ deletes the word ''potential'' before the word ''effects'' to avoid any confusion that agencies must consider effects other than reasonably foreseeable effects.

Some commenters requested additional clarity on the meaning of scope and how determination of scope under paragraph (b) relates to public engagement and the scoping process under § 1502.4. CEQ adds a new second sentence to paragraph (b) to require agencies to use, as appropriate, the public engagement and scoping mechanisms in §§ 1501.9 and 1502.4 to inform consideration of the scope of the proposed action and determination of the level of NEPA review. CEQ adds this language, consistent with other changes made in §§ 1501.9 and 1502.4 to better explain the connection between scope, scoping, and public engagement.

One commenter requested clarity on the relationship between the second and third sentences of proposed § 1501.3(b), specifically suggesting deletion of the second sentence and revisions to the third sentence to provide a clearer standard for connected actions. Another commenter requested the final rule exclude ''Federal'' in the proposed sentence. CEQ declines the suggested edits. These sentences are based on longstanding provisions from 40 CFR 1502.4 and 1501.9(e)(1) (2020) and 40 CFR 1508.25(a)(1) (2019), and agencies have decades of experience applying them, including experience identifying those components of a project that have independent utility and therefore can be analyzed separately without running afoul of the prohibition on segmentation. The two regulatory requirements of the proposed second and third sentences—prohibiting agencies from breaking up a single ''action'' into separate reviews and requiring them to review together closely related ''connected actions''—are related but distinct requirements, which is why CEQ included them in a single paragraph but in different sentences. CEQ also disagrees that connected actions should be broadened to include non-Federal actions. Non-Federal actions have long been excluded from connected actions because the purpose of the doctrine is to prevent the Federal Government from segmenting Federal actions into separate projects and thereby failing to consider the scope and impact of the Federal activity. *See Sierra Club* v. *U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015). Including non-Federal actions as connected actions would be inconsistent with the purpose of the concept and unsettle an aspect of the NEPA implementation that has been stable for decades.

One commenter suggested that CEQ add language to § 1501.3(b) stating that

to avoid segmentation, projects that are separate and distinct must have a logical end point; substantial independent utility; do not foreclose the opportunity to consider alternatives; and do not irretrievably commit Federal funds for closely related projects during the same time period, place, and type. CEQ declines to adopt the language suggested by the commenter. CEQ recognizes that some courts and agencies have included similar language in decisions and agency NEPA procedures (*see, e.g., Del. Riverkeeper Network* v. *FERC,* 753 F.3d 1304, 1315 (D.C. Cir. 2014) (quoting *Taxpayers Watchdog, Inc.* v. *Stanley,* 819 F.2d 294, 298 (D.C. Cir. 1987))); 23 CFR 771.111(f)) (2018), but considers providing additional details on segmentation more appropriately addressed in agency procedures that can be tailored to specific agency programs and actions.

In moving the text from 40 CFR 1501.9(e) (2020) to § 1501.3(b), CEQ proposed to strike paragraphs (e)(2) and (e)(3) of 40 CFR 1501.9 (2020) relating to alternatives and impacts, respectively. CEQ proposed to delete these paragraphs because both the 2020 regulations and the proposed rule separately address the analyses of alternatives and effects regarding EISs (§§ 1502.14, 1502.15) and EAs (§ 1501.5(c)(2)(ii) and (c)(2)(iii)). CEQ considers it to be premature in the process, unnecessary, and unhelpful to address alternatives as part of determining the level of NEPA review.

One commenter requested the final rule provide a better explanation regarding the deletion of 40 CFR 1501.9(e)(2) and (e)(3) (2020) and requested that CEQ provide more direction and guidance on consideration of alternatives and impacts. The commenter stated that this text has been in the regulations since 1978 and requested clearer justification for the changes. CEQ agrees that the effects of a proposed action are relevant to determining the scope of the action and analysis, which is why the first sentence of § 1501.3(b) references effects. However, CEQ does not consider alternatives to be relevant to identifying the scope of action and analysis under paragraph (b), which is intended to inform an agency's determination under paragraph (c) of the appropriate level of review.

In the final rule, CEQ adds the second sentence from proposed paragraph (d)(2)(vi), in which CEQ proposed to include an intensity factor from the 1978 regulations related to the relationship of actions, to be the fourth sentence of § 1501.3(b). CEQ revises the language for clarity to specify that agencies ''shall not term an action temporary that is not temporary in fact or segment an action into smaller component parts to avoid significant effects.'' CEQ has made this change in the final rule because the text in proposed paragraph (d)(2)(vi) directs agencies not to segment actions, which is more appropriately addressed in the paragraph on scope than in the paragraph on intensity.

Sixth, CEQ proposed to redesignate paragraph (a) of 40 CFR 1501.3 (2020) as paragraph (c), title it ''Levels of NEPA review,'' incorporate the language of section 106(b)(3) of NEPA, 42 U.S.C. 4336(b)(3), addressing the sources of information agencies may rely on when determining the appropriate level of NEPA review, and redesignate paragraphs (a)(1) through (a)(3) describing three levels of review—CEs, EAs, and EISs—as paragraphs (c)(1) through (c)(3), respectively without change.

CEQ received multiple comments on the incorporation of section 106(b)(3) of NEPA into proposed paragraph (c). 42 U.S.C. 4336(b)(3). Some commenters supported this incorporation, while others urged CEQ to limit the standard established in section 106(b)(3) to the determination of whether to prepare an EA or an EIS. CEQ disagrees with these commenters and adds the proposed language in the final rule because CEQ considers it appropriate to direct agencies to make use of any reliable data source in considering whether to apply a CE to an action and notes that a decision based on unreliable data would likely be inconsistent with the principles of reasoned decision making. CEQ also considers the approach to reliable data and producing new research in section 106(b)(3) to be consistent with longstanding practice and case law and appropriate to apply broadly to an agency's determination of the appropriate level of NEPA review, including a determination that no such review is required. 42 U.S.C. 4336(b)(3). Moreover, because section 106(b)(3)(B) provides that an agency ''is not required to undertake new scientific or technical research'' outside of the identified circumstances, making this language inapplicable to CE determinations would mean that agencies have a broader (but undefined) obligation to undertake new scientific or technical research for those determinations. 42 U.S.C. 4336(b)(3). Such a result would undermine the efficiency of CEs and create confusion for agencies.

Multiple commenters requested additional guidance from CEQ on how to apply the standard, what is considered a reliable data source, what costs or delays make obtaining new information unreasonable, and how long information will continue to be considered reliable. CEQ considers those questions to raise detailed or fact-specific issues that may be better suited to address in guidance or by agencies in considering specific NEPA reviews. CEQ notes that agencies have extensive experience in assessing the reliability of information in the NEPA process, and the regulations provide additional direction in §§ 1502.21 and 1506.6. CEQ will consider whether additional guidance is necessary to assist agencies in applying the standard.

CEQ makes these revisions as proposed in the final rule with one clarifying change to paragraph (c)(1) to replace ''[n]ormally does not have significant effects and is'' with ''[i]s appropriately.'' As phrased, this provision could be read to conflict with the process provided for in § 1501.4(b) for an agency to determine that a proposed action can be categorically excluded notwithstanding the existence of extraordinary circumstances. This change also provides for a parallel structure with paragraphs (c)(2) and (c)(3).

Seventh, CEQ proposed to redesignate paragraph (b) of 40 CFR 1501.3 (2020) as § 1501.3(d), title it ''Significance determination—context and intensity,'' and address factors agencies must consider in determining significance by restoring with some modifications the consideration of ''context'' and ''intensity'' from the 1978 regulations, which appeared in the definition of ''significantly.'' *See* 40 CFR 1508.27 (2019). The proposed rule explained that because this text provides direction on how agencies determine the significance of an effect, rather than a definition, addressing significance determinations in § 1501.3 is more appropriate than § 1508.1.

Eighth, CEQ proposed to modify the introductory language in paragraph (d) by replacing the requirement that agencies ''analyze the potentially affected environment and degree of the effects'' with a requirement for agencies to consider the context of an action and the intensity of the effects when considering whether the proposed action's effects are significant. CEQ proposed to strike the second sentence of 40 CFR 1501.3(b) (2020) requiring agencies to consider connected actions because this concept would be included in proposed paragraph (c).

Multiple commenters expressed support for the overall restoration of the context and intensity factors, as well as the proposed expansion of the factors, asserting that doing so aligns with

longstanding case law and adds certainty to the process. A few commenters generally opposed the reintroduction and expansion of the factors, asserting they would expand the scope of NEPA review rather than encourage streamlining and that the expansion of the factors is inconsistent with the statutory amendments to NEPA. A few commenters requested that proposed paragraph (d) clarify that agencies may consider mitigation in making a significance determination.

In the final rule, consistent with the proposal, CEQ redesignates paragraph (b) of 40 CFR 1501.3 (2020) as § 1501.3(d), titles it ''Significance determination—context and intensity,'' revises the first sentence of paragraph (d) with additional modifications to the proposal, and strikes the second sentence of 40 CFR 1501.3(b) (2020). CEQ adds and revises the factors as discussed further in this section. CEQ disagrees that the factors will expand the scope of NEPA review. Rather, these factors, including the additional factors, will assist agencies in determining the appropriate level of NEPA review for their proposed actions by focusing their review on the critical factors in determining significance.

As discussed further in this section, CEQ moves language regarding beneficial and adverse effects as well as the language regarding segmentation to the end of paragraph (d) in response to commenters' recommendations because this language is more generally applicable and not specific to context or intensity. Finally, CEQ declines to address the role of mitigation in this paragraph. CEQ has clarified in § 1501.6 that if an agency determines that a proposed action would not have a significant effect because of the implementation of mitigation, then the agency must document its finding in a mitigated FONSI. Therefore, addressing mitigation and its relation to significance is unnecessary in this paragraph.

Ninth, CEQ proposed to strike 40 CFR 1501.3(b)(1) (2020), replace it with proposed paragraph (d)(1), and restore the requirement for agencies to analyze the significance of an action in several contexts consistent with the 1978 regulations. CEQ also proposed to add examples of contexts that may be relevant. In the first sentence, CEQ proposed to encourage agencies to consider the characteristics of the relevant geographic area, such as proximity to unique or sensitive resources or vulnerable communities. The proposed rule indicated that such resources may include historic or cultural resources, Tribal sacred sites, and various types of ecologically sensitive areas. CEQ explained that this revision relates to the intensity factor in proposed paragraph (d)(2)(iii), which CEQ proposed to restore from the 1978 regulations. CEQ proposed to include it as a context factor as well since it relates to the setting of the proposed action and to encourage agencies to consider proximity to communities with environmental justice concerns.

CEQ also proposed to add a third sentence to paragraph (d)(1) encouraging agencies to consider the potential global, national, regional, and local contexts, which may be relevant depending on the scope of the action, consistent with the 2020 and 1978 regulations. Additionally, CEQ proposed to move and revise text providing that the consideration of short- and long-term effects is relevant to the context of a proposed action from 40 CFR 1501.3(b)(2)(i) (2020) to the end of the third proposed sentence in paragraph (d)(1) to encourage agencies to consider the duration of the potential effects whether they are anticipated to be short- or long-term.

Multiple commenters expressed support for the proposed restoration of the consideration of context in determining significance, asserting that doing so is consistent with case law and would promote compliance with NEPA's mandate to consider all significant effects. A few commenters requested the regulations define or add clarity on the terms ''unique or sensitive resources,'' ''vulnerable communities,'' and ''relevant geographic area.'' Some commenters supported the use of these terms while others expressed concern that without clear definitions there could be project delays or increased litigation risk.

In the final rule CEQ strikes 40 CFR 1501.3(b)(1) (2020) and replaces it in § 1501.3(d)(1) with the text in proposed paragraph (d)(1) with a few modifications. CEQ notes that paragraph (d)(1) requires agencies to analyze the significance of an action in several contexts, as evidenced by use of the term ''shall'' in the first sentence, while the second and third sentences use ''should'' to clarify that the determination the appropriate contextual factors will depend on the particular proposed action. In the final rule, CEQ uses the term ''communities with environmental justice concerns'' instead of ''vulnerable communities'' because CEQ has added this as a defined term in § 1508.1, and it is consistent with use of this term elsewhere in the rule. CEQ excludes the word ''relevant'' before ''geographic area'' in the final rule text as an unnecessary modifier since the encouragement is to consider the geographic area of the proposed action, which will necessarily depend on the context and scope of the proposed action. Moreover, agencies have decades of experience implementing a similar provision in the 1978 regulations, which did not include the word ''relevant'' before ''geographic area,'' and the addition of ''relevant'' could have the unintended consequence of indicating to agencies that this provision requires a substantially different analysis. CEQ declines to define ''geographic area'' and ''unique or sensitive resources'' as these phrases have been used in the regulations since 1978, and agencies have extensive experience interpreting them in the context of particular proposed actions. Further, CEQ is unaware of any misunderstanding about the meaning of these phrases and is concerned that adding a new regulatory definition could be disruptive for agencies.

Some commenters expressed support for the language encouraging agencies to consider the potential global, national, regional, and local contexts. Other commenters opposed the inclusion of all four contexts, and in particular the inclusion of ''global,'' stating that requiring agencies to consider all four would expand the complexity and scope of NEPA reviews and lead to inappropriate determinations that certain projects require an EIS, strain agency resources, cause delays and increase litigation risk, and allow subjectivity to be introduced to the decision. Other commenters requested more clarity on the types of actions that require consideration of potential global, national, regional, and local contexts, with another commenter requesting that the language be modified to provide flexibility to consider appropriate geographic contexts based on the site-specific action rather than always require evaluation of all four contexts.

In the final rule, CEQ includes the language on global, national, regional, and local contexts as proposed in § 1501.3(d)(1). The 2020 rule described ''context'' as related to the potentially affected environment in determining significance, stating that this reframing relates more closely to physical, ecological, and socio-economic aspects of the environment.[66] CEQ has reconsidered this approach and now finds it to be unhelpful and potentially limiting. While CEQ agrees that the contexts relevant to an agency's assessment of significance will be those that are potentially affected, identifying

[66] CEQ, 2020 Final Rule, *supra* note 39, at 43322.

the global, national, regional, and local contexts reminds agencies that they should consider whether proposed actions have reasonably foreseeable effects across these various contexts. Describing context in this manner is also consistent with the decades of experience agencies had implementing the 1978 regulations and is consistent with the concepts of indirect and cumulative effects. CEQ has also reconsidered the statement in the 2020 rule that the affected environment, is ''usually'' only the local area, 40 CFR 1501.3(b)(1) (2020) (''For instance, in the case of a site-specific action, significance would *usually* depend only upon the effects in the local area.'') (emphasis added), because many Federal actions have reasonably foreseeable effects that extend regionally, nationally, or globally.

CEQ notes that § 1501.3(d)(1) does not require agencies to evaluate all four contexts—global, national, regional, and local—for every proposed action. Rather, agencies should determine the appropriate contexts to consider based on the scope of the action and its anticipated reasonably foreseeable effects.

CEQ disagrees with commenters' assertion that this language will lead agencies to expand the evaluation of effects beyond those that are reasonably foreseeable. This provision provides guidance to agencies on how to determine whether an effect is significant, and the word ''effect'' is a defined term in the regulations that is always limited to reasonably foreseeable effects. This text recognizes that the global, national, regional, or local context may bear on assessing the significance of reasonably foreseeable effects. For example, in determining the significance of an effect on highly migratory marine species that travels thousands of miles each year from waters around Antarctica to the Arctic Ocean, the agency may need to consider the global context in which the species migrates, including other stressors that occur at other points of the migration route. Conversely, dam operations in a transboundary watershed may have consequences on aquatic ecosystems that are appropriately considered at the regional or watershed level and that may need to consider management and stressors extending across national boundaries. The regional nature of the resource effects, however, may not necessitate an analysis of global context. A decision to fund a project to construct a building to provide additional office space for a Federal agency on previously developed land may have consequences limited to the local area around the new building, and may not necessitate an analysis of global, State, or regional context.

Tenth, CEQ proposed to strike 40 CFR 1501.3(b)(2) (2020), replace it with proposed paragraph (d)(2), and reinstate ''intensity'' as a consideration in determining significance, which CEQ reframed in the 2020 rule as the ''degree'' of the action's effects. Specifically, CEQ proposed to strike the sentence in 40 CFR 1501.3(b)(2) (2020) encouraging agencies to consider the list of factors in assessing the degree of effects and replace it with a requirement to analyze the intensity of effects in light of the list of factors as applicable to the proposed action and in relation to one another. CEQ proposed to reinstate consideration of intensity because the concept of intensity and the intensity factors have long provided agencies with guidance in how the intensity of an action's effects may inform the significance determination. Further, CEQ noted it had reconsidered its position in the 2020 rule that removal of intensity as a consideration was based in part on the proposition that effects are not required to be intense or severe to be considered significant.[67] CEQ does not consider ''intense'' to be a synonym for ''significant;'' rather, it points to factors to inform the determination of significance that are part of longstanding agency practice.

Multiple commenters expressed general support for the restoration of the intensity factors in the proposed rule or identified support for specific factors, whereas others expressed general opposition or opposition to particular factors. One commenter suggested that the final rule replace the phrases ''potential'' and ''degree to which the proposed action may adversely affect'' in proposed paragraphs (d)(2)(ii), (iii), (v), (viii), and (x) with ''the degree of any reasonably foreseeable adverse effect of the proposed action on.'' The commenter also suggested the final rule revise paragraph (d)(2)(ix) to ''the degree of any reasonably foreseeable and disproportionate adverse effects from the proposed action on communities with environmental justice concerns.'' The commenter asserted these changes would focus the consideration on reasonably foreseeable effects, consistent with the statute, while ''may adversely affect'' could be read to mean agencies should consider speculative scenarios and effects that are not reasonably foreseeable. Other commenters made similar suggestions, requesting the regulations consistently refer to ''reasonably foreseeable effects.'' Relatedly, a commenter recommended the regulations consistently refer to ''the proposed action,'' rather than ''the action'' in the factors. Some commenters opposed the inclusion of ''adverse'' in front of multiple factors.

CEQ declines to make these changes in the final rule. The intensity factors inform an agency's determination of whether an effect is significant, and the word ''effect'' is a defined term that means reasonably foreseeable effects. Therefore, paragraph (d)(2) applies only to reasonably foreseeable effects and repeating the phrase ''reasonably foreseeable'' throughout this paragraph is unnecessary. CEQ retains ''adverse'' in the final rule consistent with the definition of ''significant effects'' and the language in § 1501.3(d), which clarify that only adverse effects can be significant.

Eleventh, CEQ proposed to clarify in proposed paragraph (d)(2)(i) that agencies should focus on adverse effects in determinations of significance, consistent with NEPA's policies and goals as set forth in section 101 of the statute. 42 U.S.C. 4331. CEQ proposed to redesignate paragraph (b)(2)(ii) of 40 CFR 1501.3 (2020) as paragraph (d)(2)(i) regarding beneficial and adverse effects and revise it to state that ''[e]ffects may be beneficial or adverse'' but ''only actions with significant adverse effects require an [EIS].''

CEQ proposed to add a third sentence to this paragraph to indicate that a significant adverse effect may exist even if the agency considers that on balance the effects of the action will be beneficial. The proposed rule explained that this provision is intended to be distinct from weighing beneficial effects against adverse effects to determine that an action's effects on the whole are not significant. Rather, an action with only beneficial effects and no significant adverse effects does not require an EIS, consistent with CEQ's proposed revisions to § 1501.3(d)(2), regarding the meaning of intensity.

CEQ proposed to strike paragraph (b)(2)(i) of 40 CFR 1501.3 (2020) but incorporate the text into a fourth sentence in paragraph (d)(2)(i) to clarify that agencies should consider the duration of effects and include an example of such consideration—an action with short-term adverse effects but long-term beneficial effects. The proposed rule explained that while significant adverse effects may exist even if the agency considers that on balance the effects of the action will be beneficial, the agency should consider any related short- and long-term effects in the same effect category together in evaluating intensity.

[67] CEQ, 2020 Final Rule, *supra* note 39, at 43322.

Multiple commenters supported proposed paragraph (d)(2)(i), expressing support for the qualification that only actions with significant adverse effects require an EIS because it will reduce expenditure of agency resources on unnecessary EISs, streamline the NEPA process, and promote a holistic review of projects. One commenter cited *Friends of Fiery Gizzard* v. *Farmers Home Admin.,* 61 F.3d 501 (6th Cir. 1995) to support CEQ's proposed approach.

Multiple commenters also opposed the proposal to only require an EIS for actions with significant adverse effects. Some commenters asserted that proposed (d)(2)(i) and the reference to adverse effects in other proposed intensity factors would illegally limit the scope of NEPA because the statutory requirement to prepare an EIS does not distinguish between adverse and beneficial effects. A few commenters cited case law that they argued contravenes the proposed change. *Hiram Clarke Civil Club* v. *Lynn,* 476 F.2d 421 (5th Cir. 1973); *Environmental Defense Fund* v. *Marsh,* 651 F.2d 983 (5th Cir. 1981). One commenter also asserted the proposal poses a risk that agencies will not assess significant adverse effects or evaluate less damaging alternatives, and that the proposed provision could be interpreted to give agencies discretion to opt out of preparing an EIS based on unsupported claims that the project will be beneficial or based on the project's stated intent. One commenter further asserted that almost no environmentally significant project completely avoids all potentially significant adverse effects and also expressed concern about the lack of an EIS limiting the opportunity for the public to provide comment where they might raise other potentially adverse effects. A few commenters expressed concern that the proposed language favors a certain type of project over another without statutory or factual support for doing so.

Some commenters interpreted the language in the last two sentences of proposed paragraph (d)(2)(i) to read that CEQ supported a ''netting'' approach to EISs, whereby if an action has significant adverse effects but had net beneficial effects then the agency would not have to prepare an EIS. Some commenters supported this interpretation while others opposed it. A few commenters requested CEQ clarify that the significance determination through the application of context and intensity factors across timescales or duration applies to each individual ''effect category'' that is implicated by the proposed action. The commenters state that without this clarification, decision makers could conflate categories of effects by considering an action's effects as a whole thereby dismissing significant adverse effects within an individual category on a given timescale if the decision maker determines the action is beneficial overall. Another commenter requested the regulations clarify that an EIS is not required where the beneficial effects of a proposed action outweigh its adverse effects.

In the final rule, CEQ addresses the concept that only adverse effects are significant by moving the last sentence of proposed paragraph (d)(2)(i) to paragraph (d) and revising it because this concept is a more general consideration and not specific to intensity. CEQ also includes a definition of ''significant effect'' in § 1508.1 to provide further clarity.

Specifically, CEQ strikes 40 CFR 1501.3(b)(2)(i) and (ii) (2020) because § 1501.3(d) addresses consideration of the duration of effects and whether a particular category of effect is adverse or beneficial coupled with the definition of ''significant effects'' in § 1508.1(mm). CEQ includes the first clause of the last sentence of proposed paragraph (d)(2)(i), encouraging agencies to consider the duration of effects, as the second sentence of § 1501.3(d) and adds an introductory clause to the sentence: ''[i]n assessing context and intensity.'' CEQ also makes ''effects'' singular to emphasize that this analysis is done on an effect-by-effect basis and does not allow agencies to weigh a beneficial effect of one kind against an adverse effect of another kind or evaluate whether an action is beneficial or adverse in net to determine significance. For example, an agency cannot compare and determine significance by weighing adverse water effects against beneficial air effects, or adverse effects to one species against beneficial effects to another species. Then, CEQ includes and modifies the second clause of the last sentence of proposed paragraph (d)(2)(i), providing that an action may have short-term adverse effects but long-term beneficial effects, as the third sentence in § 1501.3(d) to explain that agencies may consider the extent to which an effect is adverse at some points in time and beneficial at others. CEQ also includes an illustrative example of a proposed action for habitat restoration where an agency may consider both any short-term harm to a species during implementation of the action and any benefit to the same species once the action is complete. As another example, an action that will enhance recharge of a groundwater aquifer once completed could have an adverse effect on groundwater recharge in the short term. In evaluating the significance of the action's effect on groundwater recharge, the agency should consider both the short-term harm and long-term benefit. In some circumstances, an effect may be significant due to the harm during one period of time regardless of the benefit at another. For example, if implementation of a habitat restoration action may extirpate a species from the area, then an agency could not reasonably rely on long-term habitat improvements resulting from the action to determine that the overall effect to the species is not significant. The approach to considering duration contemplated by this language is similar to the familiar analysis agencies engage in with respect to compensatory mitigation, in which they may conclude that benefits from the implementation of mitigation measures reduce the anticipated adverse effects of a proposed action below the level of significance.

In place of the third sentence of proposed paragraph (d)(2)(i), CEQ adds a new third sentence at the end of paragraph (d) that prohibits agencies from offsetting an action's adverse effects with other beneficial effects to determine significance. This sentence also includes a parenthetical example that agencies may not offset an action's adverse effect on one species with a beneficial effect on another species. The CEQ regulations have never allowed agencies to use a net benefit analysis across environmental effects to inform the level of NEPA review. Because the final rule clarifies that only adverse effects may be significant, CEQ considers it especially important to emphasize this prohibition in the regulatory text to ensure agencies identify the appropriate level of review for their proposed actions. Finally, CEQ does not include the second sentence of proposed paragraph (d)(2)(i) stating that only actions with significant adverse effects require an EIS because this is made clear through the limitation in the definition of ''significant effects'' in § 1508.1(mm) to adverse effects.

The Fifth and Sixth Circuit cases cited by the commenters illustrate the split among courts on whether actions with only significant beneficial effects and no significant adverse effects trigger an EIS. *See also Humane Soc'y of U.S.* v. *Locke,* 626 F.3d 1040, 1056 n.9 (9th Cir. 2010) and *Drakes Bay Oyster Co.* v. *Jewell,* 747 F.3d 1073, 1090 n.11 (2014) discussing the split in courts in dicta. CEQ considers the Congressional declaration of purpose in section 2 of NEPA and the Congressional declaration of national

environmental policy in section 101 of NEPA to indicate that Congress intended for ''significant effects'' to be those that are damaging, which is what CEQ interprets the phrase ''adverse effects'' to mean. 42 U.S.C. 4321, 4331. The recent amendments to NEPA bolster this interpretation because section 102(2)(C)(iii) directs analysis of ''negative environmental impacts of the no action alternative'' and section 108(1) refers to the significance of adverse effects related to programmatic environmental documents. 42 U.S.C. 4332(2)(C)(iii), 4336b(l). CEQ notes too that the definition of ''significant effects'' and § 1501.3(d) do not eliminate the requirement for agencies to identify and discuss all reasonably foreseeable environmental effects whether adverse or beneficial when preparing an EIS.

Twelfth, CEQ proposed to redesignate paragraph (b)(2)(iii) of 40 CFR 1501.3 (2020) as paragraph (d)(2)(ii) and make a clarifying edit to the factor relating to effects on health and safety by adding language indicating that the relevant consideration is ''the degree to which'' the proposed action may ''adversely'' affect public health and safety. Commenters suggested that the final rule add ''welfare'' and ''public well-being'' to this factor. CEQ declines these additions because public health and safety have a more precise meaning than ''welfare'' and ''well-being'' and therefore, will be more readily applied by agencies. Further, this factor has remained unchanged since 1978, so agencies have a long history of examining these in the consideration of significant effects on the human environment. In the final rule, CEQ redesignates paragraph (b)(2)(iii) of 40 CFR 1501.3 (2020) as § 1501.3(d)(2)(i) and revises it as proposed but omits ''proposed'' before ''action'' for consistency with the language of the factors.

Thirteenth, CEQ proposed to add a new paragraph (d)(2)(iii) to add a new intensity factor to consider the degree to which the proposed action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, park lands, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas. CEQ proposed this factor to reinstate a factor from the 1978 regulations, with clarifying edits, which agencies have considered for decades. As noted earlier in this section, CEQ proposed to use the wording from the 1978 factor on unique characteristics in paragraph (d)(1) on context because they relate to the setting of an action. The proposed rule indicated that consideration of this factor is consistent with both the definition of ''effects'' and the policies and goals of NEPA. 42 U.S.C. 4331.

Some commenters expressed support for the restoration of the factor in proposed paragraph (d)(2)(iii) and the proposed modifications to the 1978 regulatory text. One commenter recommended removing ''historic or cultural resources'' because it is redundant and imprecise. Two commenters asked that the final rule define ''park lands,'' ''prime farmlands,'' and ''ecologically critical areas'' for clarity. A few commenters requested that the final rule broaden the reference to Tribal sacred sites to include culturally significant sites, including sites of Native Hawaiians, Alaskan Natives, and indigenous peoples in the United States and its Territories. Other commenters requested use of ''and other indigenous communities'' to include non-federally recognized Tribes.

CEQ adds proposed new paragraph (d)(2)(iii) at § 1501.3(d)(2)(ii) in the final rule, revising ''park lands'' to ''parks'' to modernize the language that was included in the 1978 regulations and omitting ''proposed'' before ''action'' for consistency with the language of the factors. CEQ declines to remove the word ''prime'' before ''farmlands,'' which would substantially expand this factor beyond historical practice and including all farmland within this factor would be inconsistent with directing agencies to consider the ''unique characteristics of the geographic area.'' CEQ declines to make the other changes suggested by the commenters. However, CEQ notes that in addition to ''Tribal sacred sites,'' the list of intensity factors includes several other factors that may be relevant to Tribal and Indigenous cultural sites, including ''historic or cultural resources'' and ''resources listed or eligible for listing in the National Register of Historic Places.'' The list also directs agencies to consider ''[w]hether the action may violate relevant Federal, State, Tribal, or local laws,'' as well as ''[t]he degree to which the action may have disproportionate and adverse effects on communities with environmental justice concerns'' and ''[t]he degree to which the action may adversely affect rights of Tribal Nations that have been reserved through treaties, statutes, or Executive orders.'' Finally, CEQ notes that the list is not intended to be an exhaustive list of all potential factors, and agencies can consider other factors in their determination of significance as appropriate for the proposed action.

Fourteenth, CEQ proposed to redesignate paragraph (b)(2)(iv) of 40 CFR 1501.3 (2020) as paragraph (d)(2)(iv) and revise ''effects that would'' to ''actions that may'' violate ''relevant'' Federal, State, Tribal, or local laws. CEQ proposed to add ''other requirements'' after law as well as ''inconsistencies'' with ''policies designed for protection of the environment'' because agencies should not necessarily limit their inquiry to statutory requirements. CEQ explained that it may be appropriate for agencies to give relatively more weight to whether the action threatens to violate a law imposed for environmental protection as opposed to a policy, but formally adopted policies designed for the protection of clean air, clean water, or species conservation, for example, may nonetheless be relevant in evaluating intensity.

Some commenters recommended the final rule strengthen this factor to identify examples of relevant environmental protection laws and policies to ensure Federal agencies do not overlook actions taken by States to address climate change or environmental justice. Another commenter suggested CEQ provide guidance encouraging agencies to coordinate with coastal programs to achieve consistency with all relevant State and Territory plans, policies, and initiatives to protect coastal uses and resources.

In the final rule, CEQ redesignates paragraph (b)(2)(iv) of 40 CFR 1501.3 (2020) as § 1501.3(d)(2)(iii) and revises it as proposed. CEQ declines to make the commenters' suggested edits as they are unnecessarily specific for this rule and encompassed in the proposed text. However, this does not preclude an agency from identifying more specific examples in its agency NEPA procedures if the agency determines it would be helpful for assessing significance for its proposed actions.

Fifteenth, CEQ proposed to add a new paragraph (d)(2)(v) to consider the degree to which effects are highly uncertain. The 1978 regulations included factors for ''controversial'' effects and those that are ''highly uncertain or involve unique or unknown risks.'' CEQ proposed to restore a modified version of this concept that makes clear that the uncertainty of an effect is the appropriate consideration, and not whether an action is controversial. The proposed rule explained that while a legitimate disagreement on technical grounds may relate to uncertainty, this approach would make clear that public controversy over an activity or effect is not a factor for determining significance.

A few commenters expressed support for proposed paragraph (d)(2)(v). A couple of commenters suggested the

final rule include the phrase ''high degree of uncertainty'' to better conform with NEPA practice under the 1978 regulations. Another commenter requested clarity on what is meant by ''highly uncertain.'' A few commenters recommended the regulations restore ''highly controversial'' from the 1978 regulations because it was well-developed in case law and doing so would provide clarity to agencies on how to assess the degree to which effects were ''highly controversial.''

CEQ adds proposed new paragraph (d)(2)(v) at § 1501.3(d)(2)(iv) in the final rule. CEQ declines to use the term ''highly controversial.'' While some may be familiar with the terminology, it could mistakenly give the impression that it refers to public controversy. CEQ also declines to use ''high degree of uncertainty,'' which means the same thing as ''highly uncertain,'' because the phrase ''highly uncertain'' has been included in the NEPA regulations since 1978 and making this substitution would require restructuring the sentence in a manner that would reduce parallelism and readability without otherwise improving the clarity or improving meaning. *See* 40 CFR 1508.27(b)(5) (2019).

Sixteenth, CEQ proposed to add a new paragraph (d)(2)(vi) to consider the degree to which the action may relate to other actions with adverse effects. CEQ proposed this paragraph to reinstate a factor from the 1978 regulations and for consistency with the longstanding NEPA principle that agencies cannot segment actions to avoid significance. *See, e.g., Sierra Club* v. *Marsh,* 769 F.2d 868 (1st Cir. 1985); *Kern* v. *U.S. Bureau of Land Mgmt.,* 284 F.3d 1062 (9th Cir. 2002).

Some commenters supported the restoration of this factor, but suggested removal of the term ''adverse.'' Other commenters indicated that CEQ did not explain why it proposed to use ''in the aggregate'' instead of the 1978 regulations' phrasing ''cumulatively significant impact on the environment'' and asserted that this would be a confusing change. One commenter expressed support for the second sentence in the factor specifying that an agency cannot segment or term an action temporary that is not in fact temporary.

Another commenter opposed the restoration of this intensity factor, asserted it would confuse the NEPA process and imply that an EIS can be required solely based on the effects of other actions when the action under consideration does not have significant adverse effects itself. Another commenter also expressed concern about the factor and stated that if CEQ's goal is to ensure that the potential for repetition or recurrence of an impact is considered, the regulations should state this more clearly.

Upon further consideration, CEQ is not restoring this text from the 1978 regulations to the final rule. The inclusion of cumulative effects as a component of effects already addresses the interrelationship between the effects of an action under consideration. Moreover, rather than identifying a factor for an agency to consider in assessing significance, this language more directly relates to the prohibition on an agency segmenting an action, which the final rule addresses in § 1501.3(b) related to the scope of an action and effects.

Seventeenth, CEQ proposed to add a new paragraph (d)(2)(vii) to add a factor relating to actions that would affect historic resources listed or eligible for listing in the National Register of Historic Places. CEQ proposed this factor to generally reinstate a factor from the 1978 regulations, which agencies have decades of experience considering. The proposed rule explained that consideration of this factor furthers the policies and goals of NEPA, including to ''preserve important historic, cultural, and natural aspects of our national heritage.'' 42 U.S.C. 4331.

A couple of commenters expressed support for proposed paragraph (d)(2)(vii), while another commenter requested the final rule broaden the factor by inserting ''or State or Tribal equivalents to registers of historic places'' to the end of the factor. CEQ adds proposed new paragraph (d)(2)(vii) at § 1501.3(d)(2)(v) in the final rule. CEQ declines the commenter's recommended addition because the revised provision is consistent with decades of agency practice. CEQ notes that the list of intensity factors is not exhaustive.

Eighteenth, CEQ proposed to add a new paragraph (d)(2)(viii) to add the degree to which the action may adversely affect an endangered or threatened species or its habitat, including critical habitat under the Endangered Species Act. 16 U.S.C. 1532(5). CEQ proposed to reinstate and expand an intensity factor from the 1978 regulations, which only addressed critical habitat. CEQ proposed this addition to clarify that agencies should consider effects to the habitat of endangered or threatened species even if it has not been designated as critical habitat.

Some commenters expressed support for the expansion of the factor to include impacts to habitat regardless of whether they have been designated as critical. A few commenters disagreed with the proposed expansion of this intensity factor and suggested that the final rule restore the 1978 language that ''limited'' this factor to review of critical habitat. Multiple commenters requested the final rule exclude this factor, asserting that CEQ failed to justify the proposed expansion to require agencies to consider the effect of an action on habitat that have not been designated as critical habitats under the Endangered Species Act. Commenters stated that it was unclear why this would be an intensity factor when agencies already must engage in ESA section 7 consultation. One commenter expressed concern the proposed expansion would expand the scope of the significance determination, resulting in project delays and siting issues. Other commenters specifically recommended removing ''habitat, including'' because the language expands habitat considerations beyond what is protected by Federal law.

CEQ adds proposed new paragraph (d)(2)(viii) in § 1501.3(d)(2)(vi) of the final rule, as proposed, because critical habitat is a regulatory category under the Endangered Species Act designation process and does not necessarily align with the geographic range of the species or the habitat a species is using. Major Federal actions can have significant effects on endangered or threatened species habitat regardless of whether critical habitat has been designated. Moreover, the section 7 consultation process considers effects to listed species generally, including where habitat that has not been designated as critical habitat is used by a species and therefore, damage to that habitat may affect the species. As a result, revising the factor in this manner helps to align environmental review under NEPA and the section 7 consultation process.

Nineteenth, CEQ proposed to add a new paragraph (d)(2)(ix) to include consideration of the degree to which the action may have disproportionate and adverse effects on communities with environmental justice concerns. CEQ proposed this factor because evidence continues to accumulate that communities with environmental justice concerns often experience disproportionate environmental burdens such as pollution or urban heat stress, and often experience disproportionate health and other socio-economic burdens that make them more susceptible to adverse effects.

Multiple commenters expressed support for the proposed addition of environmental justice as an intensity factor. One commenter requested clarity on what is meant by ''the degree to

which an action may have a disproportionate effect.'' Another commenter recommended the final rule revise the factor to read ''the degree of any reasonably foreseeable and adverse effects from the proposed action on communities with environmental justice concerns'' to focus on reasonably foreseeable effects.

CEQ adds the factor in proposed paragraph (d)(2)(ix) related to communities with environmental justice concerns in § 1501.3(d)(2)(vii) in the final rule with modifications. Specifically, the final rule revises the factor to revise the phrase ''have disproportionate and adverse effects'' to ''adversely affect'' to enhance the consistency of this factor with the other intensity factors. CEQ notes that the intensity factors inform an agency's determination of whether an effect is significant, and the word ''effect'' is defined to mean reasonably foreseeable effect.

Finally, CEQ proposed to add a new proposed paragraph (d)(2)(x) to include effects upon rights of Tribal Nations that have been reserved through treaties, statutes, or Executive orders. CEQ proposed this factor because Tribes' ability to exercise these rights often depends on the conditions of the resources that support the rights, and agencies should consider these reserved rights when determining whether effects to such resources are significant. CEQ specifically sought comments from Tribes on this proposed addition.

Multiple commenters, including Tribal government agencies and Tribal leaders, supported the addition of proposed paragraph (d)(2)(x), but also urged CEQ to specifically address effects on Tribal sovereignty, reservations, religious and cultural practices and cultural heritage, current cultural practices, and habitat on which resources crucial to the exercise of Tribal Nations' reserved rights depend. A few commenters recommended the factor include broader references when discussing ''rights'' to ensure inclusion of the rights of indigenous peoples not denominated as Tribes. A few commenters opposed the proposed addition, asserting that it prejudges which effects would be significant.

CEQ adds proposed new paragraph (d)(2)(x) in § 1501.3(d)(2)(viii) of the final rule, as proposed. The provision identifies an important factor that agencies should consider in determining whether an effect is significant and will help agencies consider rights that have been reserved through treaties, statutes, or Executive orders during the NEPA process, without prejudging which categories of environmental effects will be most important in any given analysis. Regarding the additional considerations that commenters suggest that CEQ incorporate into these provisions, CEQ notes that paragraphs (d)(2)(ii), (iii), (v), and (vii) capture many of them in whole or in part. Because the list of considerations in paragraph (d)(2) is not exhaustive, CEQ declines to specify these additional terms. Regarding the recommendation to add a reference to rights of indigenous peoples in this factor, CEQ does not make this revision because this factor addresses the unique and distinctive rights of Tribal Nations that have a nation-to-nation relationship with the United States.

3. Categorical Exclusions (§ 1501.4)

CEQ proposed revisions to § 1501.4 regarding CEs to clarify this provision, and provide agencies new flexibility to establish CEs using additional mechanisms outside of their NEPA procedures to promote more efficient and transparent development of CEs that may be tailored to specific environmental contexts or project types.

Many commenters expressed general support for the proposed changes to § 1501.4. Some of these commenters suggested that the final rule go further to encourage the use of CEs. Other commenters advocated for additional provisions in the section, such as requiring agencies to notify the public of the proposed use of a CE and make all documentation on the use of a CE for a specific action available to the public. CEQ addresses the specific comments throughout this section and in the Phase 2 Response to Comments.

CEQ intends the changes in the final rule to promote agency use of CEs whenever appropriate for a proposed action. The mechanisms in § 1501.4 as well as § 1507.3 will provide agencies with additional flexibility in establishing CEs while ensuring that CEs are appropriately substantiated and bounded to ensure they apply to actions that normally do not have significant effects. CEQ declines to require agencies to provide public notice in advance of using a CE. While agencies may choose to do this where they deem appropriate, an across-the-board requirement would burden agency resources and undermine the efficiency of the CE process. Similarly, requiring agencies to publish documentation of every CE determination would be overly burdensome. Consistent with § 1507.3(c)(8)(i), agencies must identify in their NEPA procedures which of their CEs require documentation. Agencies also can identify processes or specific CEs in their agency procedures for which they will make determinations publicly available where they determine this is appropriate. CEQ encourages agencies to notify the public and make documentation publicly available for CEs when they expect public interest in the determination.

CEQ proposed changes throughout § 1501.4. First, CEQ proposed to revise the first sentence in paragraph (a) to strike the clause requiring agencies to identify CEs in their agency NEPA procedures and replace it with a clause requiring agencies to establish CEs consistent with § 1507.3(c)(8), which requires agencies to establish CEs in their NEPA procedures. CEQ proposed this revision because it would more fully and accurately reflect the purposes of and requirements for CEs. Because paragraph (c) provides mechanisms for agencies to establish CEs outside of their NEPA procedures, CEQ makes this change to § 1501.4(a) in the final rule but adds ''or paragraph (c)'' so that the first sentence refers to the various mechanisms for establishing CEs. As is reflected in the regulations, CEQ views CEs to be important tools to promote efficiency in the NEPA process where agencies have long exercised their expertise to identify and substantiate categories of actions that normally do not have a significant effect on the human environment.

Second, in the description of CEs in the first sentence of paragraph (a), CEQ proposed to add the clause ''individually or in the aggregate'' to modify the clause ''categories of actions that normally do not have a significant effect on the human environment.'' CEQ proposed to add this language to clarify that when establishing a CE, an agency must determine that the application of the CE to a single action and the repeated collective application to multiple actions would not have significant effects on the human environment. CEQ proposed this clarification to recognize that agencies often use CEs multiple times over many years and for consistency with the reference to a ''category of actions'' in the definition of ''categorical exclusion'' provided by section 111(1) of NEPA, which highlights the manner in which CEs consider an aggregation of individual actions. 42 U.S.C. 4336e(1).

CEQ intended the proposed change to have a meaning similar to the 1978 regulations' definition ''categorical exclusion'' as categories of actions that do not ''individually or cumulatively'' have significant effects, which the 2020 rule removed stating that the removal was consistent with its removal of the term ''cumulative impacts'' from the regulations. The Phase 1 rulemaking reinstated cumulative effects to the

definition of ''effects,'' [68] so the 2020 rule's justification for removing the phrase no longer has a basis. However, CEQ proposed to use the phrase ''in the aggregate'' rather than ''cumulatively'' to avoid potential confusion. Cumulative effects refer to the incremental effects of an agency action added to the effects of other past, present, and reasonably foreseeable actions. In the context of establishing CEs, agencies consider both the effects of a single action as well as the aggregation of effects from anticipated multiple actions covered by the CE such that the aggregate sum of actions covered by the CE does not normally have a significant effect on the human environment. As part of this analysis, agencies consider the effects—direct, indirect, and cumulative—of the individual and aggregated actions.

Because the definition of ''effects'' includes cumulative effects, CEQ proposed the phrase ''in the aggregate'' to more clearly define what agencies must consider in establishing a CE—the full scope of direct, indirect, and cumulative effects of the category of action covered by the CE. Agencies have flexibility on how to evaluate whether the aggregate actions covered by a CE will not ordinarily have significant effects and may consider the manner in which the agency's extraordinary circumstances may apply to avoid multiple actions taken in reliance on the CE having reasonably foreseeable significant effects in the aggregate.

Commenters both supported and opposed the addition of the phrase ''individually or in the aggregate'' in proposed § 1501.4(a) and § 1507.3(c)(8)(ii). Commenters who supported the inclusion of the text asserted that it restores an important clarification regarding the proper scope of CEs from the 1978 regulations and that it gives meaning to the statutory definition of ''categorical exclusion'' in section 111(1) of NEPA. 42 U.S.C. 4336e(1). Commenters opposed to this phrase asserted it is undefined, lacks foundation in the statute, is burdensome on agencies, and will require agencies to consider effects beyond those that are reasonably foreseeable.

CEQ disagrees that the phrase ''individually or in the aggregate'' lacks foundation in the statute because use of the phrase ''does not significantly affect'' in section 111(1) of NEPA indicates it is the ''*category* of actions'' that the agency has determined normally would not result in significant effects to the environment, not an individual action to which the CE would apply. *See* 42 U.S.C. 4336e(1) (emphasis added). CEQ also disagrees that this phrase will add burden to agencies because CEQ considers this a clarifying edit consistent with the longstanding definition of ''categorical exclusion'' and agency practice. Finally, CEQ notes that all effects analyses are bounded by reasonable foreseeability, including in the establishment of CEs.

Some commenters also requested the regulations clarify the relationship between the phrase ''individually or in the aggregate'' and the definition of cumulative effects. CEQ views these terms as related. The term ''effects'' as used in the definition of ''categorical exclusion'' and throughout the regulations includes cumulative effects, which, in turn, refers to the effects of the action being analyzed in an environmental document when added to the effects of other past, present, and reasonably foreseeable actions. The use of ''in the aggregate'' in this paragraph refers to the fact that in substantiating a CE to determine that a category of actions normally does not have significant effects, the agency must consider both the effects—including cumulative effects as well as direct and indirect—of an individual action within that category and of the aggregate of the actions that the agency can reasonably foresee will be taken and covered by the CE. Because the regulations use the phrase ''in the aggregate'' consistent with the ordinary meaning of the phrase, CEQ does not consider it necessary to add additional explanatory text.

A few commenters requested the regulations clarify that an agency should ensure that actions covered by a CE will not have a significant effect ''individually or in the aggregate'' at the time the agency establishes and substantiates the CE. Conversely, another commenter asserted considering the aggregate effects of a CE is inappropriate when an agency establishes a CE, asserting that an agency should consider any aggregate effects when applying the CE to a proposed action. CEQ declines to address substantiation of CEs in § 1501.4 as this issue is addressed in § 1507.3(c)(8)(ii). Further, CEQ disagrees that agencies would need to analyze aggregate effects each time the agency applies a CE, except to the extent the agency's extraordinary circumstances review requires such an analysis. Requiring such an analysis each time an agency applies a CE, independent of any analysis required as part of the agency's extraordinary circumstances review, would undermine the efficiency of CEs. Instead, agencies must consider whether a category of actions normally does not have a significant effect individually or in the aggregate at the time that the agency establishes a CE.

Some commenters opposed the use of the term ''normally'' in the description of a CE in paragraph (a), which CEQ discusses in section II.J.2. CEQ retains this term for the reasons discussed in the 2020 rule, section II.J.2, and the Phase 2 Response to Comments.

Third, CEQ proposed to revise the end of the first sentence of paragraph (a) to add the qualifier, ''unless extraordinary circumstances exist that make application of the categorical exclusion inappropriate'' with a cross reference to paragraph (b). As discussed in section II.J.11, CEQ proposed to add a definition of ''extraordinary circumstances.'' CEQ stated in the proposed rule, that these provisions are consistent with longstanding practice and recognize that, as the definition provided by section 111(1) of NEPA indicates, CEs are a mechanism to identify categories of actions that normally do not have significant environmental effects. *See* 42 U.S.C. 4336e(1). Extraordinary circumstances serve to identify individual actions whose effects exceed those normally associated with that category of action and therefore, may not be within the scope of the CE. CEQ did not receive comments on this specific proposed change and makes this addition to paragraph (a) in the final rule.

Fourth, CEQ proposed to add a new sentence at the end of paragraph (a) to clarify that agencies may establish CEs individually or jointly with other agencies. The proposed rule noted that where agencies establish CEs jointly, they may use a shared substantiation document and list the CE in both agencies' NEPA procedures or identify them through another joint document as provided for by § 1501.4(c). CEQ proposed this addition to clarify that agencies may use this mechanism to establish CEs transparently and with appropriate public process. The proposed rule noted that agencies may save administrative time and resources by establishing a CE jointly for activities that they routinely work on together and where having a CE would create efficiency in project implementation.

Multiple commenters supported the inclusion of this clarification in paragraph (a), stating that joint establishment of CEs by agencies can help improve efficiency, reduce redundancy, and improve cohesion between agencies. On the other hand, one commenter opposed the proposed addition asserting that joint CEs will not

[68] CEQ, Phase 1 Final Rule, *supra* note 50, at 23469.

help communities participate fully in the NEPA process. CEQ adds the proposed language in § 1501.4(a) in the final rule. The NEPA regulations have never prohibited agencies from establishing CEs jointly, and the proposed change in paragraph (a) provides clarity to agencies and the public that this is an acceptable practice. The requirement to substantiate CEs as described in § 1507.3(c)(8), including public review and comment, apply to establishment of joint CEs in the same manner as CEs established by an individual agency.

Fifth, CEQ proposed edits to paragraph (b)(1) addressing what agencies do when there are extraordinary circumstances for a particular action. CEQ proposed to change ''present'' to ''exist'' and clarify the standard for when an agency may apply a CE to a proposed action notwithstanding the extraordinary circumstances. CEQ proposed to make explicit that an agency must conduct an analysis to satisfy the requirements of the paragraph. Next, CEQ proposed to change the description of the determination that agencies must make from ''there are circumstances that lessen the impacts'' to ''the proposed action does not in fact have the potential to result in significant effects notwithstanding the extraordinary circumstance.'' Then CEQ proposed to change ''or other conditions sufficient to avoid significant effects'' to ''or the agency modifies the action to address the extraordinary circumstance.'' CEQ proposed this standard for consistency with agency practice and case law. Additionally, CEQ proposed this change because the language in paragraph (b)(1) of 40 CFR 1501.4 (2020) could be construed to mean that agencies may mitigate on a case-by-case basis extraordinary circumstances that would otherwise have the potential for significant effects and thereby apply a CE with no opportunity for public review or engagement on such actions. While the 2020 Response to Comments sought to distinguish ''circumstances that lessen the impacts'' from required mitigation to address significant effects,[69] based on CEQ's discussions with agency representatives and stakeholders, the potential for confusion remained. CEQ proposed the revised text to make clear that if an extraordinary circumstance exists, an agency must make an affirmative determination that there is no potential for significant effects in order to apply a CE. If the agency cannot make this determination, the agency must either modify its proposed action in a way that will address the extraordinary circumstance, or prepare an EA or EIS.

Sixth, CEQ proposed to add a sentence to paragraph (b)(1) to require agencies to document their determinations in those instances where an agency applies a CE notwithstanding extraordinary circumstances. While not required, CEQ proposed to encourage agencies to publish such documentation to provide transparency to the public of an agency determination that there is no potential for significant effects. CEQ proposed this sentence in response to feedback from the public requesting such transparency.

Multiple commenters generally supported proposed § 1501.4(b), which sets out the process for applying a CE to a proposed action, and its subparagraphs addressing consideration of extraordinary circumstances. Several commenters opposed the proposed requirement in paragraph (b)(1) to prepare a separate analysis as part of the extraordinary circumstances review, asserting it will decrease efficiency, disincentivize use of CEs, and strain already limited agency resources.

Multiple commenters opposed allowing an agency to apply a CE when extraordinary circumstances exist and expressed concerns that this provision would allow the use of mitigated CEs. Some of these commenters recommended the final rule remove paragraph (b)(1); further specify what extraordinary circumstances agencies must consider, such as the presence of endangered, threatened, or rare or sensitive species; or include ''other protective measures.'' Some commenters urged the final rule to require, rather than encourage, publication of the CE determinations in paragraph (b)(1). Other commenters urged CEQ not to make publication a requirement because it would be burdensome on agencies. One commenter who supported proposed paragraph (b)(1) also suggested the regulations clarify that the standard to apply a CE to a proposed action also includes mitigation commitments to address extraordinary circumstances.

CEQ revises paragraph (b)(1) as proposed with two additional clarifying edits. In applying CEs, the evaluation of extraordinary circumstances is critical to ensure that a proposed action to which a CE may apply would not cause significant effects. However, mere presence of an extraordinary circumstance does not mean that the proposed action has the potential to result in significant effects. To ensure both the efficient and the appropriate use of CEs, CEQ revises paragraph (b)(1) to enable agencies to analyze and document that analysis to ensure application of the CE is valid. CEQ disagrees that requiring agencies to document this analysis is inefficient because this provision does not require an agency to prepare documentation of every extraordinary circumstance review. Rather, the provision requires documentation only when the agency identifies the presence of extraordinary circumstances but nevertheless determines that application of the CE is appropriate. Documentation in such instances is appropriate so that the agency can demonstrate that it adequately assessed the extraordinary circumstances and determined that the action will nonetheless not have the potential to result in significant effects. CEQ declines to require agencies to publish this documentation because it could burden agency resources and undermine the efficiency of the CE process.

CEQ has considered the comments on this paragraph related to mitigated CEs and modifies the text in the final rule to clarify what it means for an agency to modify its action. Specifically, CEQ replaces the phrase ''address the extraordinary circumstance'' with the phrase ''avoid the potential to result in significant effects.'' This change clarifies that while an agency may rely on measures that avoid potential significant effects, it may not rely on measures to compensate for potential significant effects as the basis for relying on a CE when extraordinary circumstances are present, and the agency has determined that the proposed action has the potential to result in significant effects. While CEQ has determined that reliance on compensatory mitigation in this provision is inappropriate, it notes that other provisions of the regulations, such as the allowance for mitigated FONSIs in § 1501.6, promote the use of compensatory mitigation to promote efficient environmental reviews and quality decision making. CEQ also revises the introductory clause of the last sentence from ''In such cases'' to ''in these cases'' to make it clear that the documentation requirement applies to both situations—(1) when the agency conducts an analysis and determines that the proposed action does not in fact have the potential to result in significant effects notwithstanding the extraordinary circumstance or (2) the agency modifies the action to avoid the potential to result in significant effects.

[69] CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act Final Rule Response to Comments 130 (June 30, 2020) (2020 Response to Comments), *https://www.regulations.gov/document/CEQ-2019-0003-720629.*

Seventh, CEQ proposed to add a new paragraph (c) to provide agencies more flexibility to establish CEs outside of their NEPA procedures. CEQ proposed this provision to allow agencies to establish CEs through a land use plan, a decision document supported by a programmatic EIS or EA, or other equivalent planning or programmatic decisions. Once established, the proposal would allow agencies to apply CEs to future actions addressed in the program or plan, including site-specific or project-level actions. CEQ proposed this provision because it anticipated that expanding the mechanisms through which agencies may establish CEs will encourage agencies to conduct programmatic and planning reviews, increase the speed with which agencies can establish CEs while ensuring public participation and adequate substantiation, promote the development of CEs that are tailored to specific contexts, geographies, or project-types, and allow decision makers to consider the cumulative effects of related actions on a geographic area over a longer time frame than agencies generally consider in a review of a single action.

Proposed paragraph (c) would not require agencies to establish CEs through this new mechanism, but rather would provide new options for agencies to consider. CEQ also noted in the proposed rule that this mechanism does not preclude agencies from conducting and relying on programmatic analyses in making project-level decisions consistent with § 1501.11 in the absence of establishing a CE. Additionally, the proposed rule noted that it does not require agencies to conduct a NEPA analysis to establish CEs generally, consistent with § 1507.3(c)(8).

Numerous commenters expressed support for proposed paragraph (c), asserting it will improve flexibility and efficiency. Some commenters opposed the proposed provision, expressing concern about public engagement. One commenter requested CEQ exclude ''other equivalent planning or programmatic decision'' from paragraph (c) asserting that CEQ should limit the provision to documents prepared pursuant to NEPA to ensure public transparency and early public involvement. Another commenter recommended the final rule include an example in paragraph (c) to illustrate the appropriateness of creating a CE for restoration actions in a planning document, referencing § 1500.3(d)(2)(i) for proposed Federal actions with short-term, non-significant, adverse effects and long-term beneficial effects, such as restoration projects.

CEQ adds paragraph (c) with additional text to clarify that the phrase ''other equivalent planning or programmatic decision'' requires that such decision be supported by an environmental document prepared under NEPA. CEQ anticipates that this alternative approach will provide agencies with more flexibility on how to identify categories of actions that normally will not have significant effects and establish a CE for those categories. An environmental document such as a programmatic EIS prepared for land use plans or other planning and programmatic decisions can provide the analysis necessary to substantiate a new CE established by the associated decision document that makes sense in the context of the overall program decision or land use plan. For example, a land management agency could consider establishing a CE for zero or minimal impact resilience-related activities through a land use plan and the associated EIS. Enabling an agency to establish a CE through this mechanism will reduce duplication of effort by obviating the need for the agency to revise its NEPA procedures consistent with § 1507.3 after completing a programmatic EIS. Agencies also may find it efficient to establish a CE through a land use planning process rather than undertaking a separate process to establish the CE via agency procedures after completion of the land use planning process.

Eighth, CEQ proposed to add paragraphs (c)(1) through (c)(6) to set forth the requirements for the establishment of CEs through the mechanism proposed in paragraph (c). In paragraphs (c)(1) and (c)(2), CEQ proposed to require agencies to provide CEQ an opportunity to review and comment and provide opportunities for public comment. The proposed rule noted that agencies may satisfy the requirement for notification and comment under paragraph (c)(2) by incorporating the proposed CEs into any interagency and public review process that involves notice and comment opportunities applicable to the relevant programmatic or planning document.

One commenter requested that paragraph (c)(1) include a requirement for CEQ to provide review and comment to agencies within 30 days of the receipt of the draft plan, programmatic environmental document, or equivalent decision document, consistent with the timeframe included in § 1507.3(b)(2). Another commenter asserted that requiring agencies to coordinate with CEQ defeats the purpose of having an alternative mechanism for establishing CEs outside of an agency's NEPA procedures.

Some commenters asserted that bundling new CEs with other large actions could make it hard for the public to track and result in a lack of public participation and potential for abuse. CEQ disagrees that the alternative process for establishing CEs will curtail meaningful public engagement on proposed CEs and notes that paragraph (c)(2) would require notification and an opportunity for public comment. Further, programmatic environmental documents are subject to the public and governmental engagement requirements in § 1501.9.

The final rule adds paragraphs (c)(1) and (c)(2) as proposed. CEQ declines to include a timeline in the final rule but notes that it will strive to provide comments as quickly and efficiently as possible. CEQ disagrees that requiring agencies to consult with CEQ defeats the purpose of this alternative mechanism. Consultation with CEQ facilitates consistency and coordination across the government, which can lead to greater efficiency. CEQ also can help ensure that agencies are adequately substantiating CEs through this new mechanism.

In paragraphs (c)(3) and (c)(4), CEQ proposed to include the same requirements for agencies to substantiate CEs and provide for extraordinary circumstances when they establish CEs under this section as when they establish CEs through their agency NEPA procedures pursuant to § 1507.3. Specifically, paragraph (c)(3) would require agencies to substantiate their determinations that the category of actions covered by a CE normally will not result in significant effects, individually or in the aggregate. Paragraph (c)(4) would require agencies to identify extraordinary circumstances.

CEQ did not receive comments specific to paragraphs (c)(3) and (c)(4) and adds them to the final rule as proposed. CEQ notes that agencies have flexibility in how they identify the list of new extraordinary circumstances. For example, agencies could rely on their list set forth in their NEPA procedures. Or, the agency could identify a list specific to the CEs established under paragraph (c). Agencies also could do a combination of both. CEQ also notes that while agencies would need to satisfy the requirements in paragraphs (c)(3) and (c)(4) in a manner consistent with the establishment of CEs under § 1507.3, agencies could document their compliance with these requirements in the relevant programmatic or planning documents.

In paragraph (c)(5), CEQ proposed to direct agencies to establish a process for determining that a CE applies to a specific action in the absence of extraordinary circumstances or determine the CE still applies notwithstanding the presence of extraordinary circumstances. Finally, in paragraph (c)(6), CEQ proposed to direct agencies to maintain a list of all such CEs on their websites, similar to the requirement for agencies to publish CEs established in their agency NEPA procedures consistent with §§ 1507.3(b)(2) and 1507.4(a).

One commenter asserted that requiring agencies to publish a list of all CEs established pursuant paragraph (c) on an agency's website defeats the purpose of having an alternative mechanism for establishing CEs outside of an agency's NEPA procedures. CEQ adds paragraphs (c)(6) as proposed. CEQ disagrees that providing transparency on a website is burdensome or will affect the efficiency of the alternative process for establishing CEs. Agency websites should clearly link the CEs established pursuant to § 1504.1(c) to their underlying programmatic or planning documents. Additionally, where they determine it is efficient and helpful to do so, agencies may incorporate CEs established through these mechanisms into their agency NEPA procedures during a subsequent revision. Irrespective of whether agencies do this, CEQ encourages agencies to list all agency CEs in one location, regardless of how the agency established the CE, so that the public can easily access the full list of an agency's CEs.

Ninth, CEQ proposed new paragraphs (d) and (d)(1) through (d)(4) to identify a list of examples of features agencies may want to consider including when establishing CEs, regardless of what mechanism they use to do so. In paragraph (d)(1), CEQ proposed to specifically allow for CEs that cover specific geographic areas or areas that share common characteristics, such as a specific habitat type for a given species. CEQ did not receive any comments specific to this proposal and adds paragraphs (d) and (d)(1) to the final rule.

To promote experimentation and evaluation, CEQ proposed in paragraph (d)(2) to indicate that agencies may establish CEs for limited durations. CEQ did not receive any comments specific to this proposal and adds paragraph (d)(2) to the final rule. Agencies may establish CEs for limited durations when doing so will enable them to narrow the scope of analysis necessary to substantiate that a class of activities normally will not have a significant environmental effect where uncertainty exists about changes to the environment that may occur later in time that could affect the analysis or where an agency anticipates that the frequency of actions covered by a CE may increase in the future. As with all CEs, agencies should review their continued validity periodically, consistent with the CE review timeframe in § 1507.3(c)(9). Once the limited duration threshold is met, agencies may either consider the CE expired, conduct additional analysis to create a permanent CE, or reissue the CE for a new period if they can adequately substantiate the reissued CE.

CEQ proposed in paragraph (d)(3) to provide that a CE may include mitigation measures to address potential significant effects. The proposed rule explained that a CE that includes mitigation is different than an agency modifying an action to avoid an extraordinary circumstance that would otherwise require preparation of an EA or EIS.

Numerous commenters interpreted proposed paragraph (d)(3) to allow ''mitigated CEs,'' and commenters expressed both support and opposition for the proposed provision. Supportive commenters asserted that mitigated CEs can provide efficiencies to agencies. Commenters opposed to the provision expressed concern that this would allow agencies to provide compensatory mitigation for impacts of CEs and asserted the provision violates a bedrock principle of NEPA that an agency may not weigh beneficial effects against adverse effects to determine that an action's effects on a whole are not significant. Some commenters objected to the proposal that mitigation included as part of a CE must be legally binding, enforceable, and subject to monitoring.

CEQ includes paragraph (d)(3) as proposed. This provision provides for a CE that includes mitigation measures integrated into the category of action itself, which agencies would adopt through a public comment process, and does not enable mitigation that is identified after the fact or on a case-by-case basis. Where an agency establishes a CE for a category of activities that include mitigation measures, agencies would implement the activities covered by the CE as well as the mitigation incorporated into those activities as described in the text of CE. This provision would enable agencies to incorporate mitigation as part of the category of action covered by a CE. The potential to integrate compensatory mitigation into a CE does not authorize weighing beneficial and adverse effects, just as agencies may not weigh beneficial effects against adverse effects to determine significance of a proposed action. Rather, a CE may incorporate compensatory mitigation requirements as part of the action to ensure that an environmental effect is not significant. For example, in appropriate circumstances an agency might conclude that a category of activity that results in degradation of five acres of habitat will not ordinarily have significant effects where five acres of equivalent habitat are effectively restored or conserved elsewhere within that same geographic location. As another example, a CE might cover a category of activities that result in releasing a certain volume of sediment into a waterway if measures were taken to reduce sediment into the waterway from other sources. In establishing a CE that incorporates a mitigation measure, the agency would need to determine that implementation of the mitigation measure will mean that the category of activities will not normally have a significant effect. Where an agency establishes a CE with a mitigation requirement, the agency would need to include such mitigation in their proposed actions in order for the CE to apply.

In paragraph (d)(4), CEQ proposed to provide that agencies can include criteria for when a CE might expire such that, if such criteria occur, the agency could no longer apply that CE. For example, an agency could establish a CE for certain activities up to a threshold, such as a specified number of acres or occurrences. Once the applications of the CE met the threshold, the agency could no longer use the CE. Similarly, an agency might set an expiration date or threshold where the agency can substantiate that a category of activities will not have a significant effect up to a certain number of applications of the CE, but beyond that point there is uncertainty or analytic difficulty determining whether application of the CE would have significant effects. Adopting CEs of this type may significantly reduce the difficulty substantiating a CE and therefore, may promote more efficient and appropriate establishment of CEs in certain circumstances.

Some commenters requested that the criteria to cause a CE to expire be mandatory while another commenter asserted the expiration criteria would undermine the use of the CEs. CEQ includes paragraph (d)(4) as proposed in the final rule and notes that this provision is merely an example of a type of feature that can be incorporated into a CE. In establishing the CE, agencies

would determine whether the criteria were mandatory.

Finally, CEQ proposed to add paragraph (e) to implement the process for adoption and use of another agency's CE consistent with section 109 of NEPA. 42 U.S.C. 4336c. As discussed in section II.I.3, CEQ proposed to strike the provision that would allow an agency to establish a process in its agency NEPA procedures to apply a CE listed in another agency's NEPA procedures in 40 CFR 1507.3(f)(5) (2020) and replace it with this provision.

Numerous commenters generally opposed the concept of adopting and using another agency's CE. A few commenters asserted that such an allowance could be ''disastrous'' because it allows agencies to skip full assessment of the potential environmental and socioeconomic impacts of the proposed action required by NEPA, and it limits public engagement.

CEQ includes paragraph (e) in the final rule because it implements the provisions of section 109 of NEPA, which allows agencies to adopt and apply the CEs of other agencies. 42 U.S.C. 4336c. CEQ notes that the statutory provision only allows for agency adoption and use of CEs established administratively by the agency, including those that Congress directs agencies to establish administratively, but does not permit adoption of CEs directly created by statute, for which an agency has not evaluated whether the category of activities that fall within the CE will not normally have significant effects. While CEQ encourages agencies to include legislative CEs established by statute in their NEPA procedures to provide transparency, they are not ''established'' by the agency, but rather by Congress. Therefore, this provision does not apply to legislative CEs.

In paragraph (e)(1), CEQ proposed to require the adopting agency to identify the proposed action or category of proposed actions that falls within the CE. CEQ did not receive comments on this proposed paragraph and adds it to the final rule as proposed.

In paragraph (e)(2), CEQ proposed to require the adopting agency to consult with the agency that established the CE, consistent with the requirement of section 109(2) of NEPA that an agency consult with ''the agency that established the categorical exclusion.'' 42 U.S.C. 4336c(2). While some commenters opposed the consultation requirements included in paragraph (e)(2), it is consistent with section 109(2) of NEPA. Therefore, CEQ adds paragraph (e)(2) in the final rule with revisions to clarify that ''the application'' refers to ''the proposed action or category of proposed actions to which the agency intends to apply'' the adopted CE. Consultation with the agency that established the CE ensures that the CE is appropriate for the proposed action or categories of action that the adopting agency is contemplating as well as to ensure the adopting agency follows any process contemplated in the establishing agency's procedures. Agencies structure their CEs in a variety of manners, and it is essential that the adopting agency comport with the establishing agency's process necessary for appropriate application of the CE. For example, some agencies structure their CEs to have a list of conditions or factors to consider in order to apply the CE. Other agencies require documentation for certain CEs. These conditions would apply to the adopting agency as well. In contrast, procedures internal to the establishing agency and unrelated to proper application of the CE, such as protocols for seeking legal review or briefing agency leadership, would not.

CEQ proposed in paragraph (e)(3) to require the adopting agency to evaluate the proposed action for extraordinary circumstances and to incorporate the process for documenting use of the CE when extraordinary circumstances are present but application of the CE is still appropriate consistent with § 1504.1(b)(1). One commenter requested additional clarity on which agency's extraordinary circumstances the adopting agency needs to consider while another commenter asserted both agencies' extraordinary circumstances should apply. Another commenter asserted that section 109 of NEPA does not require the extraordinary circumstances review included in paragraph (e)(3), and suggested the final rule include this in paragraph (e)(1). The commenter further asserted that the cross-reference to § 1501.4(b) in paragraph (e)(3) presents problems of action-specific application.

In the final rule, CEQ swaps proposed paragraphs (e)(3) and (e)(4) to better reflect the order in which these activities occur. CEQ includes proposed paragraph (e)(3) at § 1501.4(e)(4), adds an introductory clause, ''[i]n applying the adopted categorical exclusion to a proposed action,'' and removes reference to a ''category of proposed actions'' since consideration of extraordinary circumstances would come at the stage of application and evaluation of a particular action, not at the adoption stage, because the purpose of assessing for extraordinary circumstances is to determine whether a particular action normally covered by a CE requires preparation of an EA or EIS.

CEQ declines to specify which agency's extraordinary circumstances apply in this paragraph and instead adds language to § 1501.4(e)(3) (proposed paragraph (e)(4)) to require agencies to explain the process the agency will use to evaluate for extraordinary circumstances. When the agencies consult regarding the appropriateness of the CE consistent with paragraph (e)(2), the agencies should discuss how the adopting agency will review for extraordinary circumstances (*e.g.,* whether the adopting agency will apply the establishing agency's extraordinary circumstances exclusively or both agencies' provisions), taking into account how each agency's NEPA procedures define and require consideration of extraordinary circumstances. The adopting agency should then explain how it will address extraordinary circumstances in its notification under § 1501.4(e)(4). CEQ expects that agencies will follow the extraordinary circumstances process set forth in the NEPA procedures containing the CE, but may determine it is appropriate to also consider the extraordinary circumstances process in their own procedures because, for example, their extraordinary circumstances address agency-specific considerations.

In proposed paragraph (e)(4), CEQ proposed to require the adopting agency to provide public notice of the CE it plans to use for its proposed action or category of proposed actions. Some commenters asserted the procedural requirements under paragraph (e)(4) are unnecessary and could make the process more difficult. One commenter requested the regulations clarify that public notice is not intended for each individual project using the other agency's CE, but rather when one agency decides to use another agency's CE. Some commenters requested the final rule require agencies to accept public comment on the notice. Conversely, a few commenters expressed concern that the requirement to provide notice contemplates the potential for pre-adoption public comment and necessitates formal comment. These latter commenters requested CEQ clarify that formal public comment and agency response are not required for the notice.

In the final rule, CEQ adds proposed paragraph (e)(4) at § 1501.4(e)(3) because section 109(3) of NEPA requires public notice of CE adoption. 42 U.S.C. 4336c(3). In the final rule text, CEQ uses ''public notification'' instead of ''public

notice'' for consistency with use of ''notification'' throughout the rule. CEQ changes ''use'' to ''is adopting'' to clarify that this notice is about adoption of the CE for a proposed action or category of actions, not the application of the adopted CE to a particular proposed action. CEQ replaces ''for'' with ''including a brief description of'' before ''the proposed action or category of proposed actions'' and adds the clause ''to which the agency intends to apply the adopted categorical exclusion'' to further clarify the purpose of the notice. Then, as discussed earlier in this section, the final rule requires that the notice specify the process for consideration of extraordinary circumstances. CEQ notes that several agencies have already successfully adopted other agencies' CEs and provided such notice since the NEPA amendments were enacted.[70] CEQ declines to add a requirement to this paragraph to require agencies to seek comment on the adoption. While CEQ encourages agencies to do so in appropriate cases, such as when there is community interest in the action, the statute does not require agencies to seek public comment on the adoption and use of another agency's CE. Finally, CEQ adds a requirement to include a brief description of the consultation process required by § 1501.4(c)(2) to demonstrate that this process occurred.

Lastly, in paragraph (e)(5), CEQ proposed to require the adopting agency to publish the documentation of the application of the CE. Some commenters opposed this proposed requirement, asserting it is not required by NEPA and differs from the section 109(4) requirement to document adoption of the CE, and that the requirement will only delay projects that clearly qualify for use of a CE. 42 U.S.C. 4336c(4). Other commenters supported the documentation requirement and requested that paragraph (e)(5) require agencies to publish decision documents.

CEQ adds § 1501.4(e)(5) in the final rule with the addition of ''adopted'' to modify ''categorical exclusion'' for clarity and consistency with § 1501.4(c)(3) and (c)(4). Paragraph (e)(5) implements sections 109(3) and 109(4) of NEPA and reflects CEQ's understanding that section 109(4) of NEPA describes a step that is distinct from and occurs later than the step described in section 109(3). *See* 42 U.S.C. 4336c(3), (4). Section 109(3) requires agencies to ''identify to the public the categorical exclusion that the agency plans to use for its proposed actions,'' while section 109(4) requires an agency to ''document adoption of the categorical exclusion.'' CEQ reads these provisions together to be consistent with requiring both notice of the adopting agency's adoption, which would describe the agency's intended use, as well as actual application of the adopted CE to proposed actions. It also furthers the purposes of NEPA to inform the public. Additionally, providing transparency about how agencies are using the adopted CEs will help allay commenters' concerns about this provision because they will be made aware of what CEs agencies are adopting and how they are using them. Therefore, agencies must prepare such documentation each time they apply the CE to a proposed action. Paragraph (e)(5) requires agencies to publish this determination that the application of the CE is appropriate for the proposed action, and that there are no extraordinary circumstances requiring preparation of an EA or EIS, including the analysis required by § 1501.4(b)(1) if the agency determines that there is no potential for significant effects notwithstanding those extraordinary circumstances. CEQ notes that use of the defined term ''publish'' in § 1501.4(e)(5) provides agencies with discretion to determine the appropriate manner in which to publish the documentation and that § 1501.4(e)(5) does not require agencies to publish any pre-decisional or deliberative materials the agencies may use to support a determination of the applicability of the adopted CE.

When an agency is adopting one or more CEs that it plans to use for one or more categories of actions, it may publish a single notice of the adoption under § 1501.4(e)(3), consistent with section 109(3) of NEPA. *See* 42 U.S.C. 4336c(3). However, when the agency then applies the adopted CE to a specific action, it must document that particular use of the CE to satisfy section 109(4) of NEPA, as reflected in § 1501.4(e)(4) and (5). *See* 42 U.S.C. 4336c(4). Finally, agencies must publish the documentation to provide transparency to the public consistent with section 109(3) and (4) of NEPA.

If an adopting agency anticipates long-term use of an adopted CE, CEQ encourages agencies to establish the CE either in their own procedures or through the process set forth in § 1501.4(c). Section 1501.4(e) can serve as an important bridge when agencies are implementing new programs where they have not yet established relevant CEs or when existing programs begin to undertake new categories of actions but where other agencies have experience with similar actions and have established a CE for those actions. In these circumstances, the agency can immediately begin to implement the new programs or activities after adoption of another agency's CE for similar actions without the need to first develop its own CE to cover them.

CEQ notes that section 109 of NEPA does not provide that an agency can modify the CE it is adopting. 42 U.S.C. 4336c. Therefore, agencies must adopt a CE as established and cannot modify the text of the adopted CE. However, in the public notification required by § 1501.4(e)(3), agencies must describe the action or category of actions to which they intend to apply the adopted CE and the action or category of actions for which the CE is adopted may be narrower in scope than the CE might otherwise encompass. If an agency later seeks to apply the adopted CE to a different category of actions than those identified in the prior adoption notice, the agency must further consult with the establishing agency and provide new public notification consistent with § 1501.4(e). If the agency publishes a consolidated list of CEs on its website, as CEQ recommends, the adopting agency should include identification of the action or category of actions for which it has adopted the CE with the list. If an adopting agency would prefer to narrow or otherwise modify the text of the adopted CE, it should instead substantiate and establish a new CE in its agency NEPA procedures.

4. Environmental Assessments (§ 1501.5)

CEQ proposed to revise § 1501.5 to make it consistent with section 106(b)(2) of NEPA, which addresses when an agency must prepare an EA, and section 107(e)(2) of NEPA, which address EA page limits. 42 U.S.C. 4336(b)(2), 4336a(e)(2). CEQ also proposed to revise § 1501.5 to provide greater clarity to agencies on the requirements that apply to the preparation of EAs and codify agency practice. CEQ proposed edits to address what agencies must discuss in an EA, how agencies should consider public comments they receive on draft EAs, what page limits apply to EAs, and what other requirements in the CEQ regulations agencies should apply to EAs.

First, regarding the contents of an EA, CEQ proposed to split paragraph (c)(2) of 40 CFR 1501.5 (2020), requiring an EA to briefly discuss the purpose and need for the proposed action, alternatives, and effects, into paragraphs

[70] *See, e.g.,* U.S. Dep't of Com., Adoption of Energy Categorical Exclusions under the National Environmental Policy Act, 88 FR 64884 (Sept. 20, 2023); U.S. Dep't of Transp., Notice of Adoption of Electric Vehicle Charging Stations Categorical Exclusion under the National Environmental Policy Act, 88 FR 64972 (Sept. 20, 2023).

(c)(2)(i) through (iii) to improve readability and provide a clearly defined list of requirements for EAs. CEQ proposed this formatting change to make it easier for the public and agencies to ascertain whether an EA includes the necessary contents. For example, when an agency develops an EA for a proposal involving unresolved conflicts concerning alternative uses of available resources, section 102(2)(H) of NEPA requires an analysis of alternatives, which will generally require analysis of one or more reasonable alternatives, in addition to a proposed action and no action alternative. *See* 42 U.S.C. 4332(2)(H). CEQ did not receive specific comments on these proposed changes and makes them in the final rule.

Second, CEQ proposed to move the requirement for EAs to list the agencies and persons consulted in the development of the EA from paragraph (c)(2) of 40 CFR 1501.5 (2020) into its own paragraph at § 1501.5(c)(3). CEQ also proposed to clarify the term ''agencies'' in this paragraph by specifying that the EA should list the Federal agencies and State, Tribal, and local governments and agencies consulted. CEQ did not receive specific comments on these proposed changes and makes them in the final rule to improve readability and improve clarity.

Third, CEQ proposed to add a new paragraph at § 1501.5(c)(4) to require each EA to include a unique identification number that can be used for tracking purposes, which the agency would then carry forward to all other documents related to the environmental review of the action, including the FONSI. As discussed in section II.D.4, CEQ proposed a comparable provision for EISs in § 1502.4(e)(10). CEQ included this proposal because identification numbers can help the public and agencies track the progress of an EA for a specific action as it moves through the NEPA process and may allow for more efficient and effective use of technology such as databases.

Many commenters expressed support for the addition of these requirements. Commenters agreed with CEQ's proposal that having a consistent reference point to facilitate public and agency engagement would increase transparency and accessibility and improve the public's ability to track agency reviews and decision making. Other supportive commenters indicated that the use of unique identification numbers would or should promote the use of technology, such as databases by Federal agencies, for tracking purposes and some commenters encouraged CEQ to require agencies to use technology and databases. Commenters also suggested that the final rule provide additional information such as standardizing the number format or specifying which documents require the numbering. Commenters that raised concern about the requirement suggested that without a requirement for electronic tracking systems, the requirement is premature and burdensome.

In this final rule, CEQ is retaining the proposed text and, in response to comments, adding a clause to also require use of the identification numbers in any agency databases or tracking systems. Identification numbers can help both the public and the agencies track the progress of an action as it moves through the NEPA process from initiation to final decision. The use of identification numbers will increase transparency and accountability to the public when a proposed action is tiered from an existing analysis or when an agency adopts another agency's NEPA analysis to support its own decision making. In addition to the Permitting Dashboard, many agencies already have internal or external databases and tracking systems for their environmental review documents.[71] While the proposed requirement would likely result in agencies using these tracking numbers in their systems, CEQ considers it important to add text to the final rule to emphasize their use as agencies continue to develop new ways to provide transparency and improve efficiency in their processes.

CEQ agrees with commenters that additional information will be needed for agencies to implement this provision. For example, there is the question whether to have a government-wide system assign the unique identification number, to use a standardized numbering format, or whether agencies will develop their own format. However, CEQ considers these questions best answered through instructions to agencies, which CEQ can revise or reissue as needed, especially given the speed at which technology advances and changes. CEQ intends to develop such instructions following issuance of this final rule.

Fourth, to reflect current agency practice and provide the public with a clearer understanding about potential public participation opportunities with respect to EAs, CEQ proposed to add a new paragraph (e) that would provide that if an agency chooses to publish a draft EA, it must invite public comment on the draft and consider those comments when preparing a final EA.

Numerous commenters expressed support for this proposed change. Some commenters recommend the final rule go further to require public comment on all EAs, with at least one commenter suggesting a 30-day minimum comment period. Another commenter requested the regulations require agencies to respond to comments on an EA and publish the comments on a website, similar to the requirements for EISs.

Some commenters opposed the proposed change, asserting that it creates the perception that publication of a draft EA for public comment should be the default practice when in fact, agencies have discretion not to do this. They also requested CEQ explicitly state in the rule and preamble that there is no obligation for agencies to publish a draft EA for comment. Other commenters emphasized discretion, stating that because agencies already have discretion to prepare a draft EA, they should have discretion on whether to invite public comment on it. The commenters also expressed concern that proposed § 1501.5(e) removes agency discretion on how to manage EAs and could prolong the development of EAs. Some commenters asserted the language on draft EAs contradicts case law, hinders the efficiency of the EA process, and could disincentivize agencies from publishing draft EAs.

CEQ considered these comments and includes paragraph (e) as proposed. CEQ considers this approach to strike the right balance between agency discretion and ensuring that agencies consider public comments when they choose to prepare both a draft and final EA. As the proposed rule articulated, this provision reflects the fact that one of the primary purposes for which agencies choose to prepare draft EAs is to facilitate public participation. Codifying this practice enhances the public's understanding of the NEPA process and meaningful public engagement and does not restrict agency discretion over whether to choose to prepare a draft EA for public comment.

CEQ declines to mandate that all EAs be made available for comment because agencies appropriately have flexibility to determine what level of engagement is appropriate for an EA given the specific circumstances of a proposed action, consistent with § 1501.5(f). However, in developing EAs, agencies must involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable, in accordance with § 1501.5(f). CEQ also declines to require agencies to respond to comments and

[71] *See, e.g.,* U.S. Forest Serv. Schedule of Proposed Actions, *https://www.fs.usda.gov/sopa/index.php.*

publish public comments on a website. Doing so would unduly limit the discretion of agencies to tailor the public engagement process for EAs to the specific circumstances of a proposed action, which could include responding to comments or publishing them on a website though the regulations do not require it. Adding such requirements instead of leaving it to agency discretion could disincentivize agencies from publishing draft EAs due to concerns about the burden of responding to voluminous comments.

Fifth, CEQ proposed to redesignate paragraphs (e) and (f) of 40 CFR 1501.5 (2020) as § 1501.5(f) and (g) respectively. CEQ makes these changes in the final rule.

Sixth, CEQ proposed to revise paragraph (g) addressing page limits to dispense with the requirement for senior agency official approval to exceed 75 pages, not including any citations or appendices, for consistency with section 107(e)(2) of NEPA. 42 U.S.C. 4336a(e)(2). CEQ did not receive any comments on this proposed change and makes this change in the final rule.

Seventh, CEQ proposed to add paragraph (h) to clarify that agencies may reevaluate or supplement an EA if a major Federal action remains to occur and the agency considers it appropriate to do so. Proposed paragraph (h) also provided that agencies may reevaluate an EA or otherwise document a finding that changes to the proposed action or new circumstances or information relevant to environmental concerns are not substantial, or the underlying assumptions of the analysis remain valid. CEQ proposed to add this language to clarify that an agency may apply the provisions at § 1502.9 regarding supplemental EISs to a supplemental EA to improve efficiency and effectiveness.

A few commenters expressed that supplemental EAs should consider whether the effects analysis still supports a FONSI rather than merely addressing underlying assumptions. Some commenters interpreted the supplementation and reevaluation language to allow an agency to change its finding after it issued the FONSI.

In the final rule, CEQ includes § 1501.5(h) to address supplementation and reevaluation, but revises it from the proposal to address concerns raised by the commenters about potential confusion. The final rule divides supplementation and revaluation into subparagraphs and incorporates the same supplementation standard as § 1502.9. Paragraph (h)(1) provides that agencies ''should'' supplement EAs rather than ''may'' as proposed. CEQ uses ''should'' in the final rule because there may be instances where an agency determines that supplementation is appropriate because the changes to the proposed action or new information indicate the potential for significant effects, and in such instances, agencies should supplement their analysis if an action remains to occur and is therefore incomplete or ongoing. As discussed in section II.D.8, CEQ replaces ''remains to occur'' with ''incomplete or ongoing'' to more clearly describe the standard for supplementation, and CEQ uses this same phrasing in § 1501.5(h)(1).

In § 1501.5(h)(1)(i) and (ii), the final rule includes the same criteria for supplementation as in § 1502.9(d)(i) and (ii) with an additional clause at the end of (h)(ii) to clarify the meaning in the case of EAs. CEQ includes ''to determine whether to prepare a finding of no significant impact or an environmental impact statement'' at the end of paragraph (h)(ii) to clarify what ''that bear on the analysis'' means in the context of an EA. After considering the comments, CEQ determined that it should not create a different supplementation standard for EAs from EISs since the purpose of supplementation is to address circumstances where the analysis upon which the agency based its decision has changed and there is potential for new significant effects. Aligning the standards for EISs and EAs will also reduce the complexity of the NEPA regulations and the environmental review process.

To further align this provision with § 1502.9, CEQ adds in § 1501.5(h)(2) the same text in § 1502.9 to state that agencies may prepare supplements when the agency determines the purposes of NEPA will be furthered in doing so. CEQ includes this paragraph for consistency with EISs and to make clear that agencies have such discretion.

Two commenters requested CEQ revise paragraph (h) to clarify that new circumstances or information in the absence of remaining discretionary approval involving a major Federal action do not trigger a requirement to reevaluate or supplement an EA. The commenters stated the proposed text could be interpreted to suggest that agencies are obligated to reevaluate an EA whenever new circumstances or information arise. While the proposed qualifier that ''an action remains to occur,'' would address the commenters' concerns, as noted in this section, the final rule clarifies that ''remains to occur'' means when an action is incomplete or ongoing, which is consistent with § 1502.9 as well as longstanding case law that makes clear that there must be an incomplete or ongoing action in order for reevaluation or supplementation to be necessary.

Some commenters expressed that paragraph (h) would result in the public and project sponsor not having certainty on the whole of the administrative record. These commenters requested the regulations require an agency to rescind the FONSI until a new one is reached; another commenter similarly requested CEQ add a paragraph on rescission of FONSIs. CEQ declines to require agencies to rescind a FONSI while a reevaluation or supplemental EA is ongoing because these processes are intended to inform whether a FONSI remains valid. If an agency prepares a supplemental EA, it will determine whether it is necessary to revise or issue a new FONSI or whether the existing FONSI remains valid based on the outcome of the supplemental analysis.

In the final rule, CEQ addresses reevaluation in its own paragraph, consistent with § 1502.9, by adding § 1501.5(i) to provide that an agency may use a reevaluation to document its consideration of changes to the proposed action or new information and its determination that supplementation is not required. For example, a reevaluation can be a short memo describing a change in project design that briefly explains why that change does not change the analysis conducted in the EA in a manner that warrants supplementation.

Finally, CEQ proposed to clarify which provisions applicable to EISs agencies should or may apply to EAs. CEQ proposed to replace paragraph (g) of 40 CFR 1501.5 (2020), listing the provisions for incomplete or unavailable information, methodology and scientific accuracy, and environmental review and consultation requirements, with proposed new paragraphs (i) and (j). CEQ proposed in paragraph (i) to clarify that agencies generally should apply the provisions of § 1502.21 regarding incomplete or unavailable information and § 1502.23 regarding scientific accuracy. CEQ proposed to revise these from ''may apply'' to ''should apply'' because CEQ considers it important to disclose where information is incomplete or unavailable and ensure scientific accuracy for all levels of NEPA review, not just EISs.

CEQ proposed in paragraph (j) that agencies may apply the other provisions of parts 1502 and 1503 as appropriate to improve efficiency and effectiveness of EAs. The proposed list included example provisions where this might be the case—scoping (§ 1502.4), cost-benefit analysis (§ 1502.22), environmental review and consultation

requirements (§ 1502.24), and response to comments (§ 1503.4).

Various commenters asked for clarity regarding proposed §§ 1501.5(i) and (j), expressing confusion on the difference between ''generally should apply'' and ''may apply.'' Some commenters requested the final rule require application of §§ 1502.4, 1502.21, 1502.22, 1502.23, 1502.24, and 1503.4 to EAs.

In the final rule, CEQ adds proposed paragraph (i) at § 1501.5(j) but only references § 1502.21 regarding incomplete and unavailable information because CEQ has moved 40 CFR 1502.23 (2020), which is applicable to environmental documents, including EAs, to § 1506.6 as discussed in sections II.D.18 and II.H.4. CEQ retains ''generally should'' in the final rule. While CEQ encourages agencies to follow § 1502.21, CEQ retains the ''generally'' qualifier to acknowledge that there may be some circumstances where the section does not or should not apply. Additionally, because EAs can include significant effects that an agency mitigates to reach a FONSI, it is important that agencies apply § 1502.21 in such cases. CEQ also adds proposed paragraph (j) at § 1501.5(k), consistent with the proposal, to encourage agencies to apply the provisions of parts 1502 and 1503 where it will improve the efficiency and effectiveness of an EA.

Some commenters provided general comments on EAs. Some commenters requested the final rule add more requirements to align with EISs, including requiring agencies to consider the same scope of effects as those considered in an EIS; to provide decision makers with a summary and comparison of effects; and to consider alternatives to address adverse environmental effects. Other commenters argued generally that the proposed changes to § 1501.5 would result in EAs looking more like EISs, which is contrary to goal of an efficient process.

CEQ declines to make additional changes to § 1501.5. As discussed in this section, CEQ concluded that § 1501.5 strikes the right balance to ensure agencies preparing an EA conduct an appropriate and efficient review without imposing unnecessary requirements that would mirror an EIS or result in a less efficient process.

5. Findings of No Significant Impact (§ 1501.6)

CEQ proposed two revisions to § 1501.6 on findings of no significant impact (FONSIs) to clarify the 2020 rule's codification of the longstanding agency practice of relying on mitigated FONSIs in circumstances where the agency incorporates mitigation into the action to reduce its effects below significance. Mitigated FONSIs are an important efficiency tool for NEPA compliance because they expand the circumstances in which an agency may prepare an EA and reach a FONSI, rather than preparing an EIS, consistent with the requirements of NEPA.

CEQ proposed to revise paragraph (a), which provides that an agency must prepare a FONSI if it determines, based on an EA, not to prepare an EIS because the action will not have significant effects. At the end of paragraph (a), CEQ proposed to clarify that agencies can prepare a mitigated FONSI if the action will include mitigation to avoid the significant effects that would otherwise occur or minimize or compensate for them to the point that the effects are not significant. The proposed rule noted that so long as the agency can conclude that effects will be insignificant in light of mitigation, the agency can issue a mitigated FONSI. The proposed rule noted this change improved consistency with the language in § 1501.6(c) and aligns with CEQ's guidance on appropriate use of mitigation, monitoring, and mitigated FONSIs.[72]

Numerous commenters supported proposed § 1501.6(a), viewing the proposed changes as consistent with agency practice and longstanding CEQ guidance as well as promoting efficiency in the NEPA process. In contrast, multiple commenters opposed the proposed changes and raised concerns that use of mitigated FONSIs would reduce opportunities for public participation and allow agencies to trade off different kinds of environmental effects to rely on a net benefit outcome to arrive at a FONSI.

In the final rule, CEQ revises paragraph (a) with additional, non-substantive edits for clarity, including subdividing paragraph (a) into subparagraphs. In paragraph (a), CEQ adds an introductory clause to make clear that an agency prepares a FONSI after completing an EA. In paragraph (a)(1), CEQ revises the text to clarify that an agency prepares a FONSI when it determines that NEPA does not require preparation of an EIS because the proposed action will not have significant effects. In paragraph (a)(2), CEQ also repeats the clause ''if the agency determines, based on the environmental assessment, that NEPA does not require preparation of an environmental impact statement'' after mitigated FONSI to make clear that a mitigated FONSI is also based on the EA. Finally, CEQ adds a new paragraph (a)(3) to clarify that an agency must prepare an EIS following an EA if the agency determines that the action will have significant effects.

CEQ has long recognized in guidance that agencies may use mitigation to reduce the anticipated adverse effects of a proposed action below the level of significance, resulting in a FONSI. CEQ agrees that mitigated FONSIs promote efficiency, and the final rule includes safeguards to ensure that agencies will only use mitigated FONSIs when they can reasonably conclude that the mitigation measures will occur. Regarding opportunities for public engagement, the final rule supports public engagement in the EA process, consistent with § 1501.9.

CEQ disagrees that the use of a mitigated FONSI allows agencies to trade off different kinds of environmental effects and rely on a net benefit outcome to arrive at a FONSI. The CEQ regulations have never allowed agencies to use a net benefit analysis across environmental effects to inform the level of review. Instead, agencies must consider each type of effect or affected resources separately when determining whether a proposed action would have a significant effect. Therefore, an agency could not rely upon mitigation focused on one type of effect to arrive at a FONSI if the proposed action would nonetheless have a significant adverse effect of a different kind or on a different resource. A mitigated FONSI only enables an agency, consistent with existing practice, to determine that an effect is not significant in light of mitigation.

To accommodate the changes to paragraph (a), in the final rule, CEQ redesignates paragraphs (a)(1), (a)(2), and (b) of 40 CFR 1501.6 (2020) as § 1501.6(b)(1), (b)(2), and (c), respectively. CEQ also makes a non-substantive, clarifying change to § 1501.6(b)(2) to simplify the language from ''makes its final determination'' to ''determines.''

Next, CEQ proposed to revise proposed § 1501.6(c) addressing what an agency must include in a FONSI regarding mitigation. The second sentence provides that when an agency relies on mitigation to reach a FONSI, the mitigated FONSI must state the enforceable mitigation requirements or commitments that will be undertaken to avoid significant effects. CEQ proposed to strike the last clause, ''to avoid significant impacts'' at the end of the second sentence and replace that phrase with a requirement for the FONSI to state the authorities for the enforceable mitigation requirements or

[72] CEQ, Mitigation Guidance, *supra* note 10.

commitments, since they must be enforceable for agencies to reach a mitigated FONSI. CEQ proposed this change because, where a proposed action evaluated in an EA may have significant effects, and an agency is not preparing an EIS, the FONSI must include mitigation of the significant effects. CEQ also proposed to add examples of enforcement authorities including ''permit conditions, agreements, or other measures.''

Commenters were generally supportive of proposed § 1501.6(c). A few commenters opposed the proposed changes or questioned CEQ's authority to include them in the regulations. As discussed in sections II.I.1 and II.I.2 on §§ 1505.2(c) and 1505.3(c), the rule reinforces the integrity of environmental reviews by ensuring that if an agency assumes as part of its analysis that mitigation will occur and will be effective, the agency takes steps to ensure that the assumption is correct. In the final rule, which redesignates proposed paragraph (c) as § 1501.6(d), CEQ strikes the phrase ''to avoid significant impacts,'' as proposed, from the end of the second sentence and replaces it with the clause ''and the authority to enforce them'' such that the sentence requires agencies to both state the enforceable mitigation requirements or commitments and the authority to enforce those commitments when the agency finds no significant effects based on mitigation. Next, the sentence includes a list of examples of such commitments and authorities. The final rule includes more specificity than the proposed rule, to include ''terms and conditions or other measures in a relevant permit, incidental take statement, or other agreement.''

Finally, as discussed further in section II.G.2, CEQ proposed to add a new sentence at the end of paragraph (c) to require agencies to prepare a monitoring and compliance plan when the EA relies on mitigation as a component of the proposed action, consistent with § 1505.3(c). CEQ proposed these changes to help effectuate NEPA's purpose as articulated in section 101, including to ''attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences'' and to ''preserve important historic, cultural, and natural aspects of our national heritage.'' 42 U.S.C. 4331(b).

For the reasons discussed in section II.G.2, CEQ adds this requirement in the final rule in § 1501.6(d). Specifically, the final rule requires agencies to prepare a mitigation and compliance plan for the enforceable mitigation and any other mitigation required by § 1505.3(c) to ensure that if an agency assumes as part of its analysis that mitigation will occur and will be effective, the agency takes steps to ensure that the assumption is correct.

6. Lead Agency (§ 1501.7)

CEQ proposed several changes to § 1501.7, which addresses the responsibilities of lead agencies. First, CEQ proposed to retitle § 1501.7 from ''Lead agencies'' to ''Lead agency'' to align with section 107(a) of NEPA. 42 U.S.C. 4336a(a). CEQ did not receive comments specific to the section title and makes this change in the final rule.

Second, in paragraph (a) of § 1501.7, CEQ proposed to eliminate the reference to ''complex'' EAs so that the regulations would require a lead agency to supervise the preparation of any EIS or EA for an action or group of actions involving more than one Federal agency. The 2020 rule added the concept of complex EAs to this section without defining the term. CEQ invited comment on whether it should retain the concept of a complex EA in the regulations, and if so, how the regulations should define a complex EA.

Three commenters supported removal of complex EAs arguing it was confusing and unnecessary. A commenter suggested that if CEQ retains the concept, the rule define it as an EA that requires reviews from multiple Federal agencies. CEQ removes the reference to complex EAs as unnecessary given that the provision already states that a lead agency must supervise preparation of an EA when more than one Federal agency is involved and the term is not used elsewhere in the rule.

Some commenters suggested that the text of proposed § 1501.7(a) was inconsistent with sections 107(a)(2) and 111(9) of NEPA, which address the role of and define ''lead agency.'' CEQ disagrees that the language in paragraph (a) is inconsistent. CEQ considers the longstanding language in paragraphs (a)(1) and (a)(2) to describe the situations where there are more than one Federal agency participating in the environmental review process for purposes of identifying the lead agency and therefore retains this text in the final rule.

Third, CEQ proposed to revise paragraph (b) regarding joint lead agencies for consistency with section 107(a)(1)(B) of NEPA. 42 U.S.C. 4336a(a)(1)(B). CEQ proposed to clarify that Federal, State, Tribal, or local agencies may serve as a joint lead agency upon invitation from the Federal lead agency and acceptance by the invited agency, consistent with paragraph (c). CEQ proposed to retain Federal agencies in the list of potential joint lead agencies because, consistent with current practice, there are circumstances in which having another Federal agency serving as a joint lead agency will enhance efficiency. CEQ noted in the proposed rule that it does not read the text in section 107(a)(1)(B) of NEPA, 42 U.S.C. 4336a(a)(1)(B), as precluding this approach; rather, Congress specified that State, Tribal, and local agencies may serve as joint lead agencies because they are ineligible to serve as the lead agency. CEQ also proposed to add a sentence at the end of paragraph (b) to require joint lead agencies to fulfill the role of a lead agency, consistent with the last sentence of section 107(a)(1)(B) of NEPA. 42 U.S.C. 4336a(a)(1)(B).

One commenter asserted CEQ's proposal was inconsistent with section 107(a)(1)(B) of NEPA. 42 U.S.C. 4336a(a)(1)(B). Other commenters expressed concerns or asked questions about how this might work in practice and how agencies might manage and share responsibilities. One commenter asserted that the proposal for lead agencies to jointly fulfill the role of a lead agency may be complicated and difficult to implement and requested CEQ maintain the existing regulatory approach for providing for joint lead agencies generally.

In the final rule, CEQ revises paragraph (b) as proposed, but makes agency singular in the first sentence for consistency with the rest of the paragraph. In general, CEQ anticipates that there will only be one joint lead agency but does not intend the regulations to be so restrictive. While section 107(a)(1)(B) does not specifically refer to Federal agencies, it makes clear that there is one lead agency when there is more than one Federal agency, but it is silent as to what role the other Federal agency or agencies will fulfill. 42 U.S.C. 4336a(a)(1)(B). Therefore, CEQ is clarifying in the final rule that other Federal agencies may serve as joint lead agencies or cooperating agencies. With respect to the questions about how agencies manage and share responsibilities, CEQ notes that the provision for joint lead agencies has been in the regulations since 1978, and agencies have a great deal of experience in implementing these provisions. Sometimes agencies will engage in an MOU or otherwise outline their respective roles and responsibilities. CEQ encourages this as a best practice to facilitate an efficient process, and agencies should consider using the letter or memorandum required by

§ 1501.7(c) to set out their roles and responsibilities.

Fourth, CEQ proposed to revise paragraph (c) for consistency with section 107(a)(1) of NEPA to clarify that the participating Federal agencies must determine which agency will be the lead agency and any joint lead agencies, and that the lead agency determines any cooperating agencies. 42 U.S.C. 4336a(a)(1). CEQ also proposed this change for consistency with the text in § 1506.2(c) on joint EISs.

One commenter interpreted paragraph (c) to mean that the factors listed in paragraphs (c)(1) through (c)(5) apply only if there is disagreement among participating agencies on which agency should be the lead agency and asserted this interpretation is inconsistent with section 107(a)(1)(A) of NEPA. 42 U.S.C. 4336a(a)(1)(A). CEQ did not intend this interpretation. Therefore, in the final rule, for clarity and greater consistency with the statute, CEQ adds the clause ''considering the factors in paragraphs (c)(1) through (c)(5)'' to the first sentence in paragraph (c) to clarify that participating Federal agencies should consider these factors in determining which agency should serve as the lead agency.

One commenter suggested that proposed paragraphs (b) and (c) might create confusion between agencies and a project proponent regarding which agency is ultimately the lead agency for the NEPA review, is responsible for meeting timeframes and deadlines, and serves as the contact for the project proponent.

In the final rule, CEQ revises the first sentence of paragraph (c) for additional clarity by moving the reference to joint lead agencies to the end. Consistent with this provision, participating Federal agencies will first determine which agency will serve as the lead agency. Then, the lead agency will determine which agencies will serve as joint lead or cooperating agencies. While agencies are in the best position to communicate with applicants about responsibilities and appropriate points of contact, the language in paragraphs (b) and (c) make clear that the lead agency is ultimately responsible, though it may share responsibilities with a joint lead agency if the participating agencies designate one. Further, § 1501.10(a) sets forth the provisions on setting deadlines and schedules and § 1500.5(g) indicates that all agencies are responsible for meeting deadlines.

Fifth, in paragraph (d), CEQ proposed to revise the text for consistency with section 107(a)(4) of NEPA, which allows any Federal, State, Tribal, or local agency or a person that is substantially affected by a lack of lead agency designation to submit a request for designation to a participating Federal agency. 42 U.S.C. 4336a(a)(4). CEQ also proposed to add a requirement for the receiving agency to provide a copy of such a request to CEQ consistent with the statute. Finally, CEQ proposed to make a non-substantive change to replace the phrase ''private person'' with the word ''individual'' for consistency with this term's use in other sections of the regulations.

Sixth, in paragraph (e), which addresses what happens if Federal agencies are unable to agree which agency will serve as the lead agency, CEQ proposed to revise the text for consistency with section 107(a)(5) of NEPA, clarify that the 45 days is calculated from the date of the written request to the senior agency officials as set forth in § 1501.7(d), and replace ''persons'' with ''individuals'' for consistency with the rest of regulations. 42 U.S.C. 4336a(a)(5).

A commenter stated that the change of ''person'' to ''individual'' is inconsistent with sections 107(a)(4) and (a)(5)(A) of NEPA. 42 U.S.C. 4336a(a)(4), 4336a(a)(5)(A). While CEQ does not view this as a substantive change, in the final rule, CEQ revises references to ''individual'' or ''private person'' to ''person'' throughout the regulations for consistency with the recent amendments to NEPA, including in § 1501.7(d) and (e), and to avoid using the word ''person'' and the word ''individual'' in different sections of the regulations where the same meaning is intended. Otherwise, CEQ makes the changes to paragraph (d) and (e) as proposed.

Seventh, in paragraph (f), CEQ proposed to revise the text for consistency with section 107(a)(5)(C) and (a)(5)(D) of NEPA, to change ''within 20 days'' to ''no later than 20 days'' in the first sentence, and ''20 days'' to ''40 days'' and ''determine'' to ''designate'' in the second sentence. 42 U.S.C. 4336a(a)(5)(C)–(D). CEQ did not receive any comments to this specific proposal and revises paragraph (f) as proposed in the final rule except that the final rule strikes ''and all responses to it'' to clarify that the 40-day deadline for CEQ to designate a lead agency runs from the date of request. This change is consistent with section 107(a)(5)(D) which requires that CEQ designate the lead agency ''[n]ot later than 40 days after the date of the submission of a request.'' 42 U.S.C. 4336a(a)(5)(D).

Eighth, CEQ proposed minor edits to paragraph (g), which addresses joint environmental documents, including EISs, RODs, EAs, and FONSIs. While section 107(b) of NEPA addresses joint EISs, EAs, and FONSIs, which are defined collectively as an ''environmental document'' in section 111(5) of NEPA, the statute does not explicitly address joint RODs. 42 U.S.C. 4336a(b); 4336e(5). Because joint RODs can in some circumstances be inefficient, CEQ proposed to revise § 1501.7(g) to add a caveat that agencies must issue joint RODs except where it is ''inappropriate or inefficient'' to do so, such as when an agency has a separate statutory directive, or it would take significantly longer to issue a joint ROD than separate ones. Additionally, for consistency with § 1501.5, CEQ proposed to add that agencies can jointly determine to prepare an EIS if a FONSI is inappropriate.

Commenters generally supported CEQ's proposal. Some commenters recommended CEQ expand the inappropriate or inefficient exception to EISs, EAs, and FONSIs. Another comment suggested the regulations require agencies to document their rationale for not preparing a joint document.

CEQ finalizes § 1501.7(g) as proposed with minor, non-substantive clarifying edits. CEQ is not applying the inappropriate or inefficient exception to EISs, EAs, and FONSIs because section 107(b) of NEPA directs agencies to prepare joint EISs, EAs, and FONSIs ''to the extent practicable.'' 42 U.S.C. 4336a(b). With respect to RODs, CEQ includes the inappropriate or inefficient exception in the final rule text in recognition that, in some cases, requiring a joint ROD could inadvertently slow the NEPA process down, and the exclusion of RODs from section 107(b) of NEPA makes it appropriate to apply a tailored standard to joint RODs. *See* 42 U.S.C. 4336a(b). For example, agencies may have different procedures for issuing authorizations under their applicable legal authorities or may need to consider different factors. However, in other cases, a joint ROD could improve efficiency by avoiding duplication of effort or analysis. Agencies collaborating on a NEPA document for a specific action are in the best position to identify when a joint ROD is not appropriate for that particular action.

Lastly, in paragraph (h)(2), CEQ proposed to add a clause to the beginning of the paragraph, consistent with section 107(a)(2)(C) of NEPA, to require the lead agency to give consideration to a cooperating agency's analyses and proposals. 42 U.S.C. 4336a(a)(2)(C). CEQ proposed to move the qualifier clause—to the extent practicable—to precede the existing

requirement to use the environmental analysis and information provided by cooperating agencies. CEQ proposed this move to clarify that this qualifier only modifies the second clause. CEQ also proposed to change ''proposals'' to ''information'' to make the text consistent with § 1501.8(b)(3) and because the use of ''proposal'' here was inconsistent with the definition of ''proposal'' provided in § 1508.1(ff). Finally, because the reference to jurisdiction by law or special expertise was unnecessarily redundant given that the definition of ''cooperating agency'' in § 1508.1(g) incorporates those phrases, CEQ proposed to remove them from the sentence.

One commenter asserted that proposed § 1501.7(h)(2) unnecessarily conflicts with section 107(a)(2)(C) of NEPA, 42 U.S.C. 4336a(a)(2)(C), and is inconsistent with proposed §§ 1501.8(b)(3), 1508.1(e), and 1508.1(dd). Another commenter opposed the changes to paragraph (h)(2) and requested CEQ retain the existing language. The commenter asserted that the existing text provides a clear statement that agencies should use information and analyses provided by cooperating agencies to the maximum extent practicable and that the proposed changes remove this clarity. As a result, the commenter opined that for cooperating agencies, it will be unclear on what qualifies as an analysis or proposal for consideration and what qualifies as information.

In the final rule, CEQ makes the changes as proposed but retains ''proposal'' in the second clause because, upon further consideration, CEQ has determined removing ''proposal'' could introduce unnecessary confusion and potential delay, particularly because both the 1978 regulations and the 2020 regulations treated proposals in the same manner as environmental analysis for purposes of this provision, and agencies have not raised concerns that the inclusion of proposals creates challenges for lead agencies. CEQ retains the qualifier ''to the maximum extent practicable,'' which CEQ views as striking the right balance between ensuring that the lead agency uses the environmental analysis, proposal, and information provided by cooperating agencies and providing the lead agency with flexibility in determining the content of a document. CEQ disagrees that this provision is in conflict with § 1501.8(b)(3), which merely states the requirement for cooperating agencies to assist with developing information and analyses for NEPA documents; it does not address the lead agency's role in considering or using that content. CEQ similarly does not see a conflict with the definitions of ''cooperating agency'' and ''proposal'' and the commenter who asserted that a conflict exists did not explain the conflict. Finally, CEQ disagrees that this provision conflicts with section 107(a)(2)(C) of NEPA; the provision incorporates the text of the statute and goes beyond it to require lead agencies to use the information in their documents to the maximum extent practicable. 42 U.S.C. 4336a(a)(2)(C).

Other commenters requested CEQ add a requirement for lead agencies to document how and to what extent they have considered the studies, analyses, and other information provided by cooperating agencies. CEQ declines to add this requirement as unnecessary and burdensome. In most cases, lead and cooperating agencies can address these issues informally and disclosure of this informal process is unnecessary for the decision maker to make an informed decision and documenting them would consume agency resources and could lead to a more formalized and less collaborative process between the agencies.

CEQ did not propose edits to paragraph (h)(4) requiring the lead agency to determine the purpose and need, and alternatives in consultation with any cooperating agency. One commenter recommended the final rule add ''with ultimate authority to finalize the purpose and need and alternatives resting with the lead agency'' to the end of this paragraph. CEQ declines to make this change. While the lead agency has ultimate responsibility, in order for documents to address the decisions of all agencies with jurisdiction by law and therefore result in an efficient review and decision-making process, the cooperating agency must have a consultative role. CEQ encourages agencies to collaborate early on purpose and need and alternatives to resolve any disputes early in the process and ensure the document will meet the needs of all agencies relying on the documents for their actions.

As discussed further in section II.C.8, CEQ proposed to move the requirements for schedules and milestones in paragraphs (i) and (j) of 40 CFR 1501.7 (2020) to § 1501.10(c) in order to consolidate provisions related to deadlines, schedules, and milestones in one section. CEQ makes this change in the final rule as discussed further in section II.C.9.

7. Cooperating Agencies (§ 1501.8)

CEQ proposed an addition to paragraph (a) of § 1501.8 to clarify the meaning of the phrase ''special expertise,'' which is one of the criteria that qualifies an agency to serve as a cooperating agency. Among other things, paragraph (a) provides that, at the request of a lead agency, an agency with special expertise may elect to serve as a cooperating agency. CEQ proposed to clarify in paragraph (a) that special expertise may include Indigenous Knowledge.

While a few commenters opposed the inclusion of Indigenous Knowledge as a form of special expertise, many commenters expressed support. Having considered the comments, CEQ continues to view the inclusion of Indigenous Knowledge as a form of special expertise as appropriate and, therefore, finalizes the change to § 1501.8(a) as proposed except that CEQ removes the cross reference to § 1507.3(e) because this provision does not address the appeals procedures for cooperating agencies. This addition of Indigenous Knowledge as a form of special expertise helps ensure that Federal agencies respect and benefit from the unique knowledge that Tribal governments bring to the environmental review process.

CEQ invited comment on whether it should include a definition of ''Indigenous Knowledge'' in the regulations. CEQ received a range of comments on this question. Some commenters opposed a definition, and several commenters suggested a range of diverse definitions. Other commenters recommended CEQ engage in Tribal consultation on the definition, CEQ held two Tribal consultations on the rule but a consensus view on a definition did not emerge from those consultations. CEQ has determined not to define ''Indigenous Knowledge'' in this rulemaking. The comments CEQ received did not provide an adequate basis for CEQ to determine that providing a definition in the regulations would be workable across contexts and Tribal Nations. CEQ, therefore, considers it appropriate for agencies to have flexibility to approach Indigenous Knowledge in a fashion that makes sense for their programs and the Tribal Nations with which they work. Agencies' implementation of this provision may be informed by the existing approaches that some agencies have developed to Indigenous Knowledge [73] and the Guidance for

[73] *See, e.g.,* U.S. Dep't of the Interior, 301 Departmental Manual 7, Departmental Responsibilities for Consideration and Inclusion of Indigenous Knowledge in Departmental Actions and Scientific Research (Dec. 5, 2023), *https://www.doi.gov/document-library/departmental-*

Continued

Federal Departments and Agencies on Indigenous Knowledge that CEQ and the Office of Science and Technology Policy issued on November 30, 2022.[74] CEQ will consider whether additional guidance specific to the environmental review context or a regulatory definition is needed in the future.

A couple of commenters requested CEQ clarify what is meant by ''jurisdiction by law'' in § 1501.8(a). CEQ declines to add additional language to explain this phrase, which has been in the regulations since 1978 and generally has been construed to mean when an agency has a role in an action that is conferred by law. CEQ has not heard concern from agencies that the phrase is unclear or that a lack of definition is creating practical problems. Therefore, establishing a definition is unnecessary and could unsettle existing agency practice that has successfully implemented this provision.

Another commenter requested CEQ revise paragraph (a) to require the lead agency to grant cooperating agency status if a State or local agency has jurisdiction by law or special expertise over a project that could impact the local agency's interest. Other commenters requested that CEQ compel lead agencies to invite certain parties as a cooperating agency, such as substantially affected Tribal agencies. CEQ declines to make it a requirement for the lead agency to invite or grant cooperating agency status to a State, Tribal, or local agency. Section 107(a)(3) of NEPA permits but does not require lead agencies to designate Federal, State, Tribal, or local agencies that have jurisdiction by law or special expertise as cooperating agencies. *See* 42 U.S.C. 4336a(a)(3). Because agency authorities and obligations can vary dramatically, CEQ considers it important to maintain flexibility for the lead agency to determine on a case-by-case basis whether a State, Tribal, or local agency should serve as a cooperating agency.

One commenter requested that CEQ extend to potential non-Federal cooperating agencies the right to appeal to CEQ when a lead Federal agency denies them cooperating agency status. CEQ declines to make this change in the final rule because lead agencies are in the best position to make a case-by-case determination of whether to invite non-Federal agencies to be cooperating agencies. Such an appeal process could also unduly burden CEQ and its limited resources and delay the environmental review process.

In paragraph (b)(6) regarding consultation with the lead agency on developing schedules, CEQ adds ''and updating'' after ''developing'' for consistency with § 1501.10(a) that provides for both the development and updates to schedules. In paragraph (b)(7), CEQ proposed to require cooperating agencies to meet the lead agency's schedule for providing comments, but strike the second clause requiring cooperating agencies to limit their comments to those for which they have jurisdiction by law or special expertise with respect to any environmental issue. CEQ proposed this deletion to align this paragraph with section 107(a)(3) of NEPA, which provides that a cooperating agency may submit comments to the lead agency no later than a date specified in the lead agency's schedule. *See* 42 U.S.C. 4336a(a)(3).

Some commenters recommended CEQ retain this clause to avoid unnecessary delays and avoid disagreements amongst lead and cooperating agencies. CEQ disagrees that this clause will necessarily avoid disagreements amongst lead and cooperating agencies because agencies may disagree on whether an agency's comments fall within its jurisdiction or special expertise. Imposing this limitation on the participation of cooperating agencies may also undermine the kind of collaborative engagement between lead agencies and cooperating agencies that enhances the efficiency and quality of environmental reviews. CEQ is also concerned that retaining the clause could have unintended consequences that could delay decision making by cooperating agencies with jurisdiction by law. For example, if a cooperating agency considers a document to be legally insufficient with respect to a particular issue, this could lead the cooperating agency to develop its own, separate NEPA document, resulting in a delay in the cooperating agency's action and potential legal risk to the lead agency with a different analysis. CEQ encourages cooperating agencies to identify and seek to resolve issues as early in the process as possible.

8. Public and Governmental Engagement (§ 1501.9)

CEQ proposed to address public and governmental engagement in a revised § 1501.9 by moving the provisions of 40 CFR 1506.6 (2020), ''Public involvement,'' into proposed § 1501.9 and updating them as described in this section, and moving the provisions of 40 CFR 1501.9 (2020) specific to the EIS scoping process to § 1502.4. CEQ proposed these updates to better promote agency flexibility to tailor engagement to their specific programs and actions, maintaining the requirements to engage the public and affected parties in the NEPA process, and thereby fostering improved public and governmental engagement. CEQ proposed the revisions to § 1501.9 to emphasize the importance of creating an accessible and transparent NEPA process. CEQ also proposed many of these changes in response to feedback on the Phase 1 proposed rule, the 2020 proposed rule, and input received from stakeholders and agencies during development of this proposed rule. Much of that feedback requested increased opportunities for public engagement and increased transparency about agency decision making, along with general requests that CEQ elevate the importance of public engagement in the NEPA process. Finally, CEQ proposed to move general requirements related to public engagement to part 1501 to emphasize that public engagement is important to multiple components of the NEPA process and agency planning, while moving other provisions related to scoping for EISs to § 1502.4.

First, CEQ proposed to move the provisions of 40 CFR 1501.9 (2020) on scoping for EISs—paragraphs (a), (b), (c), (d), (d)(1) through (8), (f), and (f)(1) through (5)—to proposed § 1502.4, ''Scoping.'' As discussed in sections II.C.2 and II.C.10 CEQ proposed to move the provisions in 40 CFR 1502.4 (2020) on ''Major Federal actions requiring the preparation of environmental impact statements'' to §§ 1501.3 and 1501.11. Also, as discussed in section II.C.2, CEQ proposed to move the remaining text of 40 CFR 1501.9(e) and (e)(1) through (3) (2020) on the determination of scope to § 1501.3 because determining the scope of actions applies to all levels of NEPA review.

Many commenters were supportive of CEQ's proposed approach. Commenters expressed support for the restoration of provisions related to early review and coordination and the proposed revisions to §§ 1501.9 and 1502.4 to reinforce the importance of early public engagement designed to meet the needs of the community. Supportive commenters characterized CEQ's proposed changes as being more in line with the statute as well as best practice by emphasizing the importance of initiating public outreach and planning as early as possible. Commenters also pointed to early engagement and opportunities for comment as trademarks of an effective

manual/301-dm-7-departmental-responsibilities-consideration-and.

[74] *See* Office of Science and Technology Policy and CEQ, Guidance for Federal Departments and Agencies on Indigenous Knowledge (Nov. 30, 2022), *https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf.*

NEPA process that can help prevent unexpected problems and delays by helping agencies identify potential roadblocks early, design effective solutions when proposals and alternatives are still being developed, and build trust with communities. Some commenters opposed the outreach and engagement requirements in proposed § 1501.9, asserting that they were too open ended and would add burden and time to the process.

In this final rule, CEQ is reorganizing these sections as proposed. Public engagement is a foundational element of the NEPA process and is appropriately addressed in part 1501. Agencies have decades of experience designing effective outreach strategies that are tailored to the specifics of their programs and actions. Technology, when used appropriately, can further improve these strategies, and this final rule will provide agencies with the flexibility and encouragement to more effectively engage with interested or affected governments, communities, and people.

Second, CEQ proposed to retitle § 1501.9 to ''Public and governmental engagement'' and accordingly update references to ''public involvement'' within this section and throughout the CEQ regulations to ''public engagement.'' CEQ proposed this change to better reflect how Federal agencies should interact with the public and interested or affected parties, stating that the word ''engagement'' reflects a process that is more interactive and collaborative compared to simply including or notifying the public of an action. Engagement is also a common term for Federal agencies with experience developing public engagement strategies or that work with public engagement specialists. CEQ proposed to add ''governmental'' to the title to better reflect the description of the provisions included in the section, which relate to both public and governmental entities.

Commenters were generally supportive of this proposed change because it implies a process that is more interactive and collaborative instead of just notifying the public of an action. CEQ is revising the title of § 1501.9 as proposed.

Third, CEQ proposed to add proposed paragraphs (a) and (b) to articulate the purposes of public and governmental engagement and to identify the responsibility of agencies to determine the appropriate methods of public and governmental engagement and conduct scoping consistent with § 1502.4 for EISs. CEQ proposed to use the phrase ''meaningful'' engagement in this particular paragraph to better describe the purpose of this process because public and governmental engagement should not be a mere check-the-box exercise, and agencies should conduct engagement with appropriate planning and active dialogue or other interaction with stakeholders in which all parties can contribute.

Many commenters expressed support for CEQ's use of ''meaningful engagement.'' Commenters who disliked the descriptor ''meaningful'' stated that the word is too subjective, open to differing interpretations, and likely to cause unnecessary controversy and delay. Other commenters suggested the description of ''meaningful'' was not strong or specific enough, as proposed, to result in the desired outcome and recommended CEQ define meaningful engagement.

In the final rule, CEQ combines purpose and responsibility, which it had proposed to address in separate paragraphs, in § 1501.9(a) because these concepts are linked, and upon further consideration, CEQ considers addressing them together to reduce redundancy in proposed paragraphs (a) and (b), and enhance the clarity of the final rule. Additionally, the second sentence of proposed paragraph (b) addresses the role of engagement in determining the scope of a NEPA review; as discussed further in this section, CEQ revises § 1501.9(b) to address this topic. The first two sentences in § 1501.9(a) describe the purposes of public engagement and governmental engagement. CEQ is retaining ''meaningful engagement'' as proposed to better describe the overall purpose of public engagement. Public engagement should not be a simple check-the-box exercise, and agencies should conduct engagement with appropriate planning and active dialogue or other interaction with interested parties in which all can contribute. Federal agencies have flexibility to determine what methods are appropriate to achieve a collaborative and inclusive process that meaningfully and effectively engages communities affected by their proposed actions. As part of meaningful engagement, CEQ encourages agencies to engage with all potentially affected communities including communities with environmental justice concerns, consistent with § 1500.2(d).

In the final rule, CEQ adds a new third sentence to paragraph (a) to clarify that the purpose of § 1501.9 is to set forth agencies' responsibilities and best practices for such engagement. Finally, CEQ moves the first sentence of proposed paragraph (b) to be the last sentence of paragraph (a) requiring agencies to determine the appropriate methods of engagement for their proposed actions. Agencies are best situated to carry out this responsibility, because agencies understand their programs and authorities, and the communities that are interested in and affected by them.

CEQ revises § 1501.9(b) in the final rule, different from the proposal, to clarify the role of public and governmental engagement in determining the scope of a NEPA analysis. As discussed in section II.C.2, agencies must identify the scope of their proposed action, consistent with the definition of ''major Federal action,'' which in turn informs the level of NEPA review, and what alternatives and effects an agency must consider; public input has long informed this process. Therefore, CEQ has added a sentence to § 1501.9(b) to require agencies to use public and governmental engagement to inform the level of review for and scope of analysis of a proposed action consistent with § 1501.3. CEQ qualifies this provision ''as appropriate'' to account for the variety of ways that agencies should engage with the public and because not all actions will necessitate public engagement. For example, agencies must engage with the public when developing new CEs, but generally do not do so when applying CEs to their proposed actions.

CEQ adds the second sentence of proposed paragraph (b) in the final rule, which cross references to scoping for EISs as set forth in § 1502.4. Finally, CEQ adds a new sentence to § 1501.9(b) encouraging agencies to apply that scoping provision to EAs as appropriate. This addition is consistent with § 1501.5(j), which encourages agencies to apply § 1502.4 to EAs as appropriate to improve efficiency and effectiveness and is also responsive to public comments requesting more clarity on what is required for an EIS versus an EA as well as comments requesting increased opportunities for involvement on EAs. Agencies have experience successfully using the scoping process for EAs, and the regulatory text clarifies that agencies may continue to use the scoping process to inform the level of review, or find it helpful when they intend to rely on mitigation in an EA to reduce effects below significance and reach a FONSI rather than preparing an EIS.

Fourth, in the proposed rule, § 1501.9 had separate paragraphs addressing outreach (paragraph (c)) and notification (paragraph (d)) with the former recommended procedures and the latter required. Specifically, proposed

paragraph (c)(1) recommended that agencies invite likely affected agencies and governments, and proposed paragraph (c)(2) recommended that agencies conduct early engagement with likely affected or interested members of the public. CEQ modeled these provisions on the prior approaches in 40 CFR 1501.7(a)(1) (2019) and 40 CFR 1501.9(b) (2020) requiring the lead agency to invite early participation of likely affected parties. Proposed paragraph (c)(3) would provide flexibility to agencies to tailor engagement strategies, considering the scope, scale, and complexity of the proposed action and alternatives, the degree of public interest, and other relevant factors. CEQ proposed to move from 40 CFR 1506.6(c) (2020) to § 1501.9(c)(3) the requirement that agencies consider the ability of affected parties to access electronic media when selecting the appropriate methods of notification. CEQ also proposed to add a clause to the end of paragraph (c)(3) to require agencies to consider the primary language of affected persons when determining the appropriate notification methods to use.

At least one commenter noted that the use of ''should'' in proposed paragraph (c)(1) was inconsistent with proposed § 1501.7(h)(1) requiring lead agencies to invite the participation of cooperating agencies. Other commenters asked that the language on outreach be stronger, recommending that CEQ change ''should'' to ''shall'' in proposed paragraph (c) and ''consider'' to ''ensure'' in proposed paragraph (c)(3).

In the final rule, CEQ combines proposed paragraphs (c) and (d) in § 1501.9(c) to address outreach and notification. CEQ revised the introductory text from ''lead agency'' to ''agencies'' for consistency with the use of ''agencies'' in the rest of § 1501.9. This change does not mean that each agency involved in an EIS or EA needs to conduct these responsibilities independently or that the lead agency is not ultimately responsible given its role in supervising the preparation of an EIS or EA consistent with § 1501.7(a), but rather that there is flexibility in which agency conducts these responsibilities under the lead agency's supervision.

CEQ also revises the introductory text from agencies ''should'' to ''shall'' for consistency with the both the 2020 and 1978 regulations and to resolve the inconsistency between § 1501.7(h)(1), which requires the lead agency to invite cooperating agencies at the earliest practicable time and proposed § 1501.9(c)(1) encouraging the lead agency to invite the participation of likely affected agencies and governments, including cooperating agencies, as early as practicable. CEQ also is changing ''should'' to ''shall'' because using ''should'' would be confusing and inaccurate to the extent that it could be read to suggest that some requirements are optional. CEQ adds ''as appropriate'' to qualify the requirement in paragraph (c)(2) to conduct early engagement to make clear that when the regulations require or encourage agencies to conduct engagement, they should do so early in the process. These changes from the proposal do not establish new obligations for agencies, but rather, clarify which provisions are obligatory in light of the requirements of the NEPA statute and other provisions in the regulations.

CEQ also adds ''any'' in paragraph (c)(1) to acknowledge that for some actions, there will not be any likely affected agencies or governments. CEQ finalizes paragraph (c)(3) as proposed with two changes, which requires agencies to consider the appropriate methods of outreach and notification, including the ability of affected persons and agencies to access electronic media and the primary language of affected persons. In the final rule, CEQ includes ''and persons'' after entities consistent with the phrasing in paragraph (c)(5)(i) and makes language plural for consistency with ''persons.'' Additionally, CEQ notes that agencies will also need to consider other statutory requirements, such as those under the Rehabilitation Act, when selecting appropriate methods of outreach and notification.

Fifth, CEQ proposed to move the introductory clause of 40 CFR 1506.6 (2020), ''Agencies shall'' to proposed paragraph (d) and add the paragraph heading ''Notification.'' As discussed earlier in this section, CEQ is combining proposed paragraph (c) and (d) in the final rule. CEQ proposed in § 1501.9 and throughout the proposed regulations to replace the word ''notice'' with ''notification,'' except where ''notice'' is used in reference to a **Federal Register** notice. CEQ is making this change in the final rule to clearly differentiate between those requirements to publish a notice in the **Federal Register** and other requirements to provide notification of an activity, which may include a notice in the **Federal Register** or use of other mechanisms.

Sixth, in the proposed rule, CEQ proposed a new paragraph (d)(1) to require agencies to publish notification of proposed actions they are analyzing through an EIS. CEQ proposed this requirement in response to feedback from multiple stakeholders and members of the public requesting more transparency about agency proposed actions. CEQ finalizes the proposed provision in § 1501.9(c)(4) with an additional clause at the end of its proposed language to reference that this requirement can be met through a NOI consistent with § 1502.4. CEQ adds this language in response to at least one comment expressing confusion on this point.

Agencies may publish notification through websites, email notifications, or other mechanisms such as the Permitting Dashboard,[75] so long as the notification method or methods are designed to adequately inform the persons and agencies who may be interested or affected, consistent with the definition of ''publish'' in § 1508.1(gg). An NOI in the **Federal Register,** consistent with § 1502.4(e), can fulfill the notification requirement, but agencies also may elect to use additional notification methods.

Seventh, CEQ proposed to move 40 CFR 1506.6(b) (2020), including its subparagraphs, (b)(1) through (b)(3) and (b)(3)(i) through (b)(3)(x), to proposed § 1501.9(d)(2) (including (d)(2)(i) through (d)(2)(iii) and (d)(2)(iii)(A) through (d)(2)(iii)(I)), and proposed to make minor revisions to improve readability and consistency with the rest of § 1501.9. CEQ is finalizing these changes with some additional edits as described in the following paragraphs.

In the final rule, proposed paragraph (d)(2) becomes § 1501.9(c)(5) requiring agencies to provide public notification of NEPA-related hearings, public meetings, or other opportunities for public engagement, as well as the availability of environmental documents. At least one commenter noted that CEQ's proposed addition of the qualifier ''as appropriate'' before the requirement to provide public notification of the availability of documents could be read to give agencies discretion to provide such notice. This was not CEQ's intent as the regulations have always required agencies to provide such notice so CEQ does not include this qualifier in the final rule.

In the proposed rule, paragraphs (d)(2)(i) through (d)(2)(iii) expanded on these general public notification requirements in paragraph (d)(2). Specifically, CEQ proposed to move 40 CFR 1506.6(b)(1) and (b)(2) (2020) to proposed paragraphs (d)(2)(i) and (d)(2)(ii), respectively, and change

[75] *See* Fed. Permitting Improvement Steering Council, Permitting Dashboard for Federal Infrastructure Projects, *https://www.permits.performance.gov/*.

''organizations'' to ''entities and persons'' in paragraph (d)(2)(ii). In the final rule, CEQ strikes the introductory clause, ''In all cases,'' as superfluous, and consolidates into § 1501.9(c)(5)(i) the requirement to notify both those entities and persons who have requested notification on an individual action as well as those who have requested regular notification, such as actions in a geographic region or a category of actions an agency typically takes. Paragraph (c)(5)(ii), which was proposed paragraph (d)(2)(ii), only addresses when notification is required in the **Federal Register**—when an action has effects of national concerns. CEQ also changes ''notice'' to ''notification'' in § 1501.9(c)(5)(ii) for consistency with the rest of § 1501.9 and adds the word ''also'' to make clear that this notification is in addition to the notification required by paragraph (c)(5)(i).

Eighth, CEQ proposed to move 40 CFR 1506.6(b)(3) (2020) to proposed paragraph (d)(2)(iii), which addressed notification for actions for which the effects are primarily of local concern. CEQ proposed to change ''notice may include'' to ''notification may include distribution to or through'' followed by a list of mechanisms for notification. CEQ makes this change as proposed in § 1501.9(c)(5)(iii) the final rule.

Ninth, CEQ proposed to move 40 CFR 1506.6(b)(3)(i) and (b)(3)(iii) through (b)(3)(x) (2020) to proposed § 1501.9(d)(2)(iii)(A) through (d)(2)(iii)(I), respectively. CEQ proposed to combine the provisions from 40 CFR 1506.6(b)(3)(i) and (ii) (2020) on notice to State, Tribal, and local governments and agencies in proposed § 1501.9(d)(2)(iii)(A) to consolidate similar provisions. CEQ also proposed to remove the parenthetical in proposed paragraph (d)(2)(iii)(C) and instead refer to local newspapers ''having general circulation.'' Lastly, CEQ proposed to add a sentence in proposed paragraph (d)(2)(iii)(I) that recommended agencies establish email notification lists or similar methods for the public to easily request electronic notifications for proposed actions. CEQ includes all of these changes as proposed in the final rule at § 1501.9(c)(5)(iii)(A) through (I).

Tenth, CEQ proposed to move the requirements to make EISs available under FOIA from 40 CFR 1506.6(f) (2020) to § 1501.9(d)(3). CEQ received comments on this provision requesting that CEQ restore the language from the 1978 regulations because some members of the public do not have easy access to electronic information, it is important for the public to have access to agency comments, and that restoring the language would help restore consistency in agency implementation of FOIA to ensure transparency. CEQ considered the comments and the changes between the 1978 and 2020 rules and determined the existing language addresses access to underlying documents and comments. However, CEQ determined it is appropriate to restore language related to fees as the 2020 rule removed language that agencies should make documents related to the development of NEPA documents free of charge or no more than the cost of duplication. Therefore, in the final rule, CEQ adds a clause to § 1501.9(c)(6) to require agencies to make EISs and any underlying documents available consistent with FOIA and without charge to the extent practicable.

Eleventh, CEQ proposed to move 40 CFR 1506.6(c) (2020) requiring agencies to hold or sponsor public meetings or hearings to § 1501.9(e), with modification, including adding the paragraph heading ''Public meetings and hearings.'' Additionally, CEQ proposed to make this provision discretionary, and add that agencies could do so in accordance with ''regulatory'' requirements as well as statutory requirements or in accordance with ''applicable agency NEPA procedures.'' In the proposal, CEQ revised the sentence requiring agencies to consider the ability of affected entities to access electronic media and to instead encourage agencies to ''consider the needs of affected communities'' when determining what format to use for a public hearing or public meeting because the best option for the communities involved may vary. Lastly, CEQ proposed to add a sentence to clarify that when an agency accepts comments for electronic or virtual meetings, agencies must allow the public to submit them electronically, via regular mail, or another appropriate method.

Commenters raised concerns about the proposed change from ''shall'' to ''may'' suggesting that this would make discretionary whether to hold public hearings, meetings and other opportunities for public engagement. CEQ notes that this provision gives agencies the discretion to determine the appropriate methods of public engagement except where required by other statutory or regulatory requirements, including agency NEPA procedures. However, CEQ did not intend to make a substantive change to this provision, and therefore, in § 1501.9(d) of the final rule, retains the use of ''shall'' consistent with 40 CFR 1506.6(c) (2020). In the third sentence addressing format for hearings or meetings, CEQ adds examples of formats agencies might consider—whether an in-person or virtual meeting or a formal hearing or listening session is most appropriate—and requires rather than encourages agencies to consider the needs of affected communities.

Commenters also requested that CEQ restore the recommendation from the 1978 regulations that agencies make draft EISs available at least 15 days in advance when they are the subject of a public meeting or hearing. CEQ agrees that this recommendation is helpful to facilitate a more effective public engagement, and therefore includes a new sentence at the end of § 1501.9(d) consistent with the longstanding recommendation from the 1978 regulations but broadening it to apply to draft environmental documents.

Twelfth, CEQ proposed to move 40 CFR 1506.6(a) (2020) requiring agencies to involve the public in preparing and implementing their agency NEPA procedures to proposed § 1501.9(f), adding a paragraph heading ''Agency procedures'' and changing the word ''involve'' to ''engage'' consistent with CEQ's proposed change of ''involvement'' to ''engagement'' through the regulations. CEQ finalizes this provision in § 1501.9(e) as proposed.

Finally, CEQ notes two provisions in 40 CFR 1506.6 (2020) that it did not incorporate into § 1501.9. First, as discussed in section II.I.3, CEQ proposed to move the requirement for agencies to explain in their NEPA procedures where interested persons can get information on EISs and the NEPA process from 40 CFR 1506.6(e) (2020) to § 1507.3(c)(11) since this is a requirement for NEPA procedures, not public engagement. And second, CEQ proposed to delete 40 CFR 1506.6(d) (2020) on soliciting information from the public because that concept is present in the purpose and language of revised § 1501.9. In the final rule, CEQ strikes these paragraphs from 40 CFR 1506.6 (2020).

9. Deadlines and Schedule for the NEPA Process (§ 1501.10)

CEQ proposed to retitle § 1501.10 to ''Deadlines and schedule for the NEPA process'' from ''Time limits'' and revise the section to direct agencies to set deadlines and schedules for NEPA reviews to achieve efficient and informed NEPA analyses consistent with section 107 of NEPA, 42 U.S.C. 4336a. CEQ proposed these changes to improve transparency and predictability for stakeholders and the public regarding NEPA reviews.

Commenters were generally supportive of CEQ's proposed changes to this provision in order to promote a timely NEPA process. Some commenters expressed support while suggesting additional changes as described further in this section and in the Phase 2 Response to Comments. Other commenters opposed the inclusion of the deadlines, expressing concerns that the deadlines would result in rushed analyses, strain agency and applicant resources, and have negative impacts on public engagement. CEQ addresses these concerns in the context of specific provisions discussed in this section.

CEQ revises the title of § 1501.10 and reorganizes and revises the provision as discussed further in this section. As discussed in section II.J.1, CEQ removes the references to ''project sponsor'' in favor of the defined term ''applicant,'' which includes project sponsors, throughout § 1501.10 and the rest of the regulations.

In addition to those revisions, CEQ proposed revisions to specific provisions of § 1501.10. First, in paragraph (a), CEQ proposed an edit to the first sentence to emphasize that while NEPA reviews should be efficient and expeditious, they also must include ''sound'' analysis. CEQ also proposed to direct agencies to set ''deadlines and schedules'' appropriate to individual or types of proposed actions to facilitate meeting the deadlines proposed in § 1501.10(b). Consistent with section 107(a)(2)(D) of NEPA, CEQ also proposed in this paragraph to require, where applicable, the lead agency to consult with and seek concurrence of joint lead, cooperating, and participating agencies and consult with project sponsors and applicants when establishing and updating schedules. 42 U.S.C. 4336a(a)(2)(D).

Some commenters supported the proposed requirement for consultation on schedules in paragraph (a), as well as in paragraph (c). Multiple commenters opposed the proposed requirements to seek concurrence asserting that it would result in delay and exceed the statutory requirements of section 107(a)(2)(D) of NEPA. 42 U.S.C. 4336a(a)(2)(D). Multiple commenters requested additional clarity on how agencies would carry out consultation with the applicant pursuant to paragraphs (a) and (c). One commenter suggested making reference to ''use of reliable and currently accurate data'' as an example of sound analysis in paragraph (a).

CEQ makes the revisions to paragraph (a) as proposed with three additional edits. First, CEQ excludes the reference to project sponsors in favor of the defined term ''applicant'' in § 1508.1(c). Second, CEQ adds ''for the proposed action'' after ''schedule'' to clarify that lead agencies establish schedules for each action. Third, CEQ includes the requirement to seek the concurrence of any joint lead, cooperating, and participating agencies, and in consultation with any applicants, adding the word ''any'' to clarify that not all actions will necessarily have a joint lead, cooperating, and participating agencies or applicants.

CEQ adds the requirement to ''seek the concurrence'' as proposed to encourage up-front agreement on schedules to facilitate achieving the statutory deadlines. This provision requires the lead agency to seek concurrence, not obtain concurrence. While lead agencies should strive to reach agreement on schedules because agreement on a schedule up front will facilitate the agencies' meeting a deadline, lead agencies do not need to obtain concurrence to proceed if the agencies cannot reach an agreement on the schedule. CEQ considers this approach to strike the right balance because requiring the lead agency to obtain, rather than seek, concurrence could unreasonably delay the process if an agency will not concur and not requiring any agreement would undermine the efficacy of the schedule if other agencies cannot meet the schedule or have unaddressed concerns with it. CEQ declines to add a reference to the ''use of reliable and currently accurate data'' as an example of sound analysis because § 1506.6 addresses the requirement to use reliable data, and CEQ does not consider it necessary or appropriate to address data in this section on deadlines and schedules.

Second, CEQ proposed to update paragraph (b) and its subparagraphs for consistency with section 107(g) of NEPA. *See* 42 U.S.C. 4336a(g). In the proposed revisions, paragraphs (b)(1) and (b)(2) would require agencies to complete an EA within one year and an EIS in two years, respectively, unless the lead agency, in consultation with any applicant or project sponsor, extends the deadline in writing and establishes a new deadline providing only as much time as necessary to complete the EA or EIS. CEQ proposed to include ''any'' to account for circumstances where there is no applicant or project sponsor, in which case the consultation requirement would be inapplicable to extension of deadlines.

Some commenters opposed the deadlines asserting that agencies will shortcut public participation or Tribal consultation in the NEPA process, and that the deadlines create conflicts with implementation of section 106 of the National Historic Preservation Act. 54 U.S.C. 306101. Other commenters expressed concern that the deadlines will impede the ability of ''minority and Indigenous communities'' to organize and advise their communities of impending harm. Other commenters expressed concerns that other proposed changes, including consideration of reasonably foreseeable climate change related effects and disproportionate and adverse effects on communities with environmental justice concerns, will make it challenging for agencies to meet the prescribed deadlines. One commenter asserted that the proposed deadlines are arbitrary and at odds with the need for rigorous scientific study to support NEPA findings.

CEQ makes the changes to paragraphs (b), (b)(1), and (b)(2) as proposed with two additions to implement the statutory deadlines established in section 107(g) of NEPA. 42 U.S.C. 4336a(g). First, CEQ excludes the reference to project sponsors in favor of the defined term ''applicant'' in § 1508.1(c). Second, CEQ includes ''as applicable'' before ''in consultation with any applicant'' in § 1501.10(b)(1) and (b)(2) to emphasize that not all actions have applicants. In such cases, an agency may extend the deadline and set a new deadline in writing. CEQ appreciates the concerns expressed by commenters that timelines could lead to rushed analysis but recognizes that establishing deadlines can improve the efficiency and timeliness of the environmental review process and notes that section 107(g) of NEPA and this provision provide agencies with the ability to extend the deadline where necessary to ensure they meet their public engagement and consultation obligations and conduct the requisite analysis. 42 U.S.C. 4336a(g). Further, agencies have demonstrated that they can complete robust and high-quality environmental reviews within these timelines. CEQ encourages agencies to conduct early public engagement, consistent with § 1501.9, because early engagement can improve the efficiency and quality of the environmental review process and can help ensure agencies conduct meaningful engagement while also meeting the statutory timeframes.

CEQ also notes that nothing in the regulations modifies compliance with section 106 of NHPA. CEQ disagrees that the updated provisions of these regulations, including §§ 1502.15(b); 1502.16(a)(6), (a)(9), and (a)(13); and 1508.1(g)(4)—which reflect current practice and requirements such as those requiring consideration of certain effects

like climate-related effects—impose new requirements that will increase review timeframes such that agencies will not be able to meet timelines. Rather, as discussed in section II.D.14, II.D.15, and II.J.5, CEQ is updating these provisions to reflect current practice and categories of reasonably foreseeable effects long considered under NEPA consistent with the statute and case law. CEQ disagrees that these changes will prevent agencies from complying with the deadlines or that the deadlines will prevent agencies from conducting rigorous analysis. Many agencies already have considerable experience analyzing these types of effects.

Third, consistent with section 107(g) of NEPA, CEQ proposed a new paragraph (b)(3) to identify the starting points from which agencies measure the deadline for EAs and EISs and to require agencies to measure from the soonest of three dates, as applicable. 42 U.S.C. 4336a(g). Consistent with section 107(g)(1) of NEPA, the proposed dates were: (i) the date the agency determines an EA or EIS is required; (ii) the date the agency notifies an applicant that its application to establish a right-of-way is complete; and (iii) the date the agency issues an NOI. 42 U.S.C. 4336a(g)(1).

Multiple commenters expressed support for the starting points proposed in paragraph (b)(3), with some commenters suggesting changes for further clarification. Many of these commenters requested the regulations require agencies to include in their agency NEPA procedures criteria for automatically starting the one-year or two-year periods. Suggestions included criteria for when an application for a permit, authorization, or right-of-way is considered complete.

CEQ makes the changes as proposed in paragraph (b)(3) and (b)(3)(i) through (b)(3)(iii) because they incorporate the statutory provisions of section 107(g)(1) of NEPA. *See* 42 U.S.C. 4336a(g)(1). CEQ declines to require agencies to include criteria in their agency NEPA procedures, though agencies may do so at their discretion so long as they are consistent with this provision.

Fourth, after considering the comments on this section and more generally emphasizing the importance of consistency and clarity, in the final rule, CEQ adds paragraph (b)(4) to address the end dates for measuring the deadlines. This revision is consistent with CEQ's approach in the proposed rule to implementing section 107(g)(1) in a manner that is transparent and practical and will ensure consistency across Federal agencies in measuring deadlines, avoiding inconsistencies that could create confusion among agencies and applicants. 42 U.S.C. 4336a(g)(1). Paragraphs (b)(4)(i) and (b)(4)(i)(A) through (b)(4)(i)(C) specify that for EAs, the end date is the date on which the agency publishes an EA; makes the EA available pursuant to an agency's pre-decisional administrative review process, where applicable; or issues an NOI to prepare an EIS. CEQ notes that in situations where an agency publishes both a draft EA and a final EA, the final EA is the EA used to determine the end date. Paragraph (b)(4)(ii) specifies for EISs that the end date is the date on which EPA publishes a notice of availability of the final EIS or, where applicable, the date the agency makes the final EIS available pursuant to its pre-decisional administrative review process, consistent with § 1506.10(c)(1).

Fifth, CEQ proposed in paragraph (b)(4) to require agencies to submit the report to Congress on any missed deadlines as required by section 107(h) of NEPA. 42 U.S.C. 4336a(h). Some commenters requested the regulations include additional detail on the annual report to Congress, including detail on the content and deadlines for submitting the report. One commenter also requested that the regulations allow for a pause in the time periods for specific scenarios, such as when the agency is waiting for information from an applicant or to award contracts to support analyses. Similarly, other commenters suggested generally that the final rule include provisions to provide more flexibility in measuring the deadlines to avoid rushed environmental analyses.

CEQ finalizes proposed § 1501.10(b)(4) in paragraph (b)(5) as proposed but changes ''The'' to ''Each'' to clarify that each lead agency separately has a responsibility to report to Congress if it misses a deadline. CEQ declines to provide more specifics about the report to Congress at this time, but will consider whether guidance is necessary to assist agencies in their reporting obligations. CEQ also declines to provide a mechanism for pausing the deadline clock. The regulations, consistent with the statute, provide that a lead agency may extend the deadline in order to provide any additional time necessary to complete an EIS or EA. Where an agency has extended a deadline for an EA or EIS in conformity with this section and section 107(g) of NEPA, the agency has not missed a deadline for purposes of 107(h) and would not need to submit a report to Congress. 42 U.S.C. 4336a(g)–(h). For example, if an agency is experiencing a delay outside its control such that it does not have the requisite information to complete its EA or EIS, the lead agency may extend the one- or two-year deadlines. Because the statute and regulations provide agencies with the flexibility to extend deadlines when necessary to complete an EA or EIS, CEQ does not consider it necessary or appropriate to establish a mechanism for agencies to pause the deadline clock.

Sixth, to enhance predictability, CEQ proposed to move the text from paragraph (i) of 40 CFR 1501.7 (2020) to the beginning of a new paragraph (c) and modify the language for consistency with sections 107(a)(2)(D) and 107(a)(2)(E) of NEPA, which require the lead agency to develop schedules for EISs and EAs. 42 U.S.C. 4336a(a)(2)(D), 4336a(a)(2)(E). CEQ proposed to divide the first sentence moved from 40 CFR 1501.7(i) (2020) into two sentences and add an introductory clause, ''[t]o facilitate predictability,'' to reinforce the purpose of schedules. CEQ proposed to add ''for completion of environmental impact statements and environmental assessments as well as any authorizations required to carry out the action'' after ''the lead agency shall develop a schedule'' for consistency with section 107(a)(2)(D) of NEPA. 42 U.S.C. 4336a(a)(2)(D). CEQ proposed in the second sentence to retain the requirement for the lead agency to set milestones for environmental reviews and authorizations, and add ''permits'' for consistency with section 107(a)(2)(D) of NEPA. 42 U.S.C. 4336a(a)(2)(D). CEQ also proposed in the second sentence to require agencies to develop the schedules in consultation with the applicant or project sponsor, and in consultation with and seek the concurrence of any joint lead, cooperating, and participating agencies.

CEQ proposed to add a new third and fourth sentence to paragraph (c) to note that schedules may vary depending on the type of action; agencies should develop schedules based on their experience reviewing similar types of actions; and highlight factors listed in paragraph (d) that may help agencies set specific schedules to meet the deadlines.

Finally, CEQ proposed to move the text from paragraph (j) of 40 CFR 1501.7 (2020) regarding missed schedule milestones to the end of paragraph (c) and modify it to make it consistent with section 107(a)(2)(E) of NEPA and provide clarification to enhance interagency communication and issue resolution. 42 U.S.C. 4336a(a)(2)(E). CEQ proposed to require that, when the lead or any participating agency anticipates a missed milestone, that agency notify the responsible agency (and the lead agency if identified by another agency) and request that they

take action to comply with the schedule. To emphasize the importance of informed and efficient decision making, CEQ proposed to require agencies to elevate any unresolved disputes contributing to the missed milestone to the appropriate officials for resolution within the deadlines for the individual action.

One commenter requested that the final rule include a deadline for the development of a schedule. CEQ declines to include this proposal in the final rule. While CEQ encourages agencies to work efficiently in developing a schedule, CEQ recognizes that the complexity of the schedule will vary considerably from case to case, and defers to agencies to oversee the efficient and effective preparation of a schedule. Also, as discussed earlier in this section, commenters both supported and opposed the requirement for lead agencies to consult with applicants and consult and seek concurrence of joint lead, cooperating, and participating agencies when establishing schedule milestones. Another commenter stated that, with respect to the fifth sentence of paragraph (c), the final rule should require, not just recommend, agencies to consider all previous relevant actions and incorporate that information into their schedules.

In the final rule, CEQ revises the existing text of paragraph (c) as proposed excluding the reference to project sponsors in favor of the defined term ''applicant'' in § 1508.1(c)) for consistency with section 107(a)(2)(D) of NEPA and to ensure that agencies are identifying at the beginning of the process the steps they need to take and the timeframe in which they need to take them in order to meet the statutory timeframes. 42 U.S.C. 4336a(a)(2)(D). For the reasons articulated earlier in this section, CEQ includes the requirements for consultation and seeking concurrence on schedules. Next, CEQ adds a new sentence in the final rule to direct all agencies with milestones to take appropriate measures to meet the schedule. Finally, CEQ moves paragraph (j) of 40 CFR 1501.10 (2020) regarding missed milestones to the end of paragraph (c) as proposed, but further revises it for clarity in the final rule. CEQ simplifies the text to clarify that any participating agency can identify a potentially missed milestone to the lead agency and the agency responsible for the milestone. CEQ also adds ''potentially'' before ''missed milestone'' in the last sentence for consistency of use in the sentence.

Seventh, CEQ proposed to redesignate paragraph (c) of 40 CFR 1501.10 (2020), addressing factors in setting deadlines, as paragraph (d), and make changes to the text for consistency with proposed paragraph (b). Specifically, CEQ proposed to change ''senior agency official'' to ''lead agency'' and ''time limits'' to reference ''the schedule and deadlines.''

Eighth, CEQ proposed to add a new factor that the lead agency may consider in determining the schedule and deadlines to paragraph (d)(7): the degree to which a substantial dispute exists regarding the size, location, nature, or consequences of the proposed action and its effects. CEQ proposed this factor to restore and clarify a factor included in the 1978 regulations at 40 CFR 1501.8(a)(vii) (2019) regarding the degree to which the action is controversial. While the 2020 regulations removed this factor because it overlapped with other factors, CEQ reconsidered its position and determined that this is an important factor that could have implications for establishing schedules and milestones. CEQ noted in the proposed rule that, in such instances, agencies should seek ways to resolve disputes early in the process, including using conflict resolution and other tools, to achieve efficient outcomes and avoid costly and time-consuming litigation later in the process. To accommodate this new factor, CEQ proposed to redesignate paragraph (c)(7) of 40 CFR 1501.10 (2020) to be paragraph (d)(8).

One commenter suggested CEQ append ''or benefit'' to ''[p]otential for environmental harm'' in paragraph (d)(1). CEQ declines this change because ''environmental benefits'' is already covered by the factor in paragraph (d)(4) regarding public need. Other commenters suggested CEQ modify paragraph (d)(4) in the final rule to include consideration of the impact on the environment in addition to public need or modify it to reflect that the consequences of delay include cost considerations of short- and long-term delays. CEQ declines to make these changes because paragraph (d)(1) already covers potential for environmental harm, and CEQ interprets ''consequences of delay'' to include any cost-related consequences to the public of short- or long-term delays.

Regarding paragraph (d)(7), one commenter opposed the replacement of ''controversial'' from the 1978 regulations with ''substantial dispute'' asserting that ''controversial'' is well defined in case law as scientific rather than public controversy. The commenter further asserted that shifting this language could become a new source of dispute. CEQ disagrees and considers this change consistent with case law interpreting the term ''controversial,'' as used in the 1978 regulations as distinct from general public controversy or opposition. *See, e.g., Bark* v. *United States Forest Serv.,* 958 F.3d 865, 870 (9th Cir. 2020) (''A project is 'highly controversial' [under the 1978 regulations] if there is a 'substantial dispute about the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.' '' (quoting *Native Ecosystems Council* v. *United States Forest Serv.,* 428 F.3d 1233, 1240 (9th Cir. 2005) (alteration omitted)); *see also Standing Rock Sioux Tribe* v. *U.S. Army Corps of Eng'rs,* 985 F.3d 1032, 1042 (D.C. Cir. 2021).

One commenter recommended the final rule add a factor to accommodate government-to-government consultation with Tribal Nations, while other commenters requested inclusion of consideration of Tribal consultation in developing schedules overall. In the final rule, CEQ adds paragraph (d)(9) for consideration of the time necessary to conduct government-to-government Tribal consultation. While agencies are already able to take this into account when building schedules, CEQ adds this factor to encourage agencies to ensure they are building sufficient time in the schedule to conduct meaningful consultation. Finally, CEQ adds ''court ordered deadlines'' to paragraph (d)(8), which lists time limits imposed on the agency, since agencies are sometimes conducting NEPA for actions subject to a court order.

Ninth, CEQ proposed to redesignate paragraph (d) of 40 CFR 1501.10 (2020) as paragraph (e), strike the text allowing a senior agency official to set time limits because this is superseded by the enactment of section 107(g) of NEPA, 42 U.S.C. 4336a(g), setting statutory deadlines, and replace it with a requirement for EIS schedules to include a list of specific milestones. CEQ proposed to strike the text in paragraphs (d)(1) through (d)(7) of 40 CFR 1501.10 (2020) listing potential time limits a senior agency official could set and replace them with proposed new paragraphs (e)(1) through (e)(5) to list the minimum milestones that an EIS schedule must include: publication of the NOI, issuance of the draft EIS, the public comment period, issuance of the final EIS, and issuance of the ROD.

Relatedly, CEQ proposed to add new paragraphs (f) and (f)(1) through (f)(4) to identify the milestones that agencies must include in schedules for EAs: the decision to prepare an EA; issuance of

a draft EA, where applicable; the public comment period, where applicable; and issuance of the final EA and a decision whether to issue a FONSI or NOI to prepare an EIS.

Multiple commenters expressed support for proposed § 1501.10(e) and (f), asserting the changes would improve the transparency, timeliness, and certainty of environmental reviews. Some commenters suggested additional milestones to further these goals, such as the starting points in proposed paragraph (b)(3), specific stages of the review process (*i.e.,* decision to prepare a document and issuance of a draft or final document), and 60-or 90-day deadlines for cooperating and participating agency review stages.

CEQ declines to add additional milestones at this time. CEQ notes that this is a non-exhaustive list, and CEQ may issue guidance with recommendations for additional milestones in the future or agencies may elect to include additional milestones on an action-by-action basis or in their agency NEPA procedures.

Tenth, CEQ proposed to redesignate paragraph (e) of 40 CFR 1501.10 (2020) as paragraph (g) allowing an agency to designate a person to expedite the NEPA process, with no proposed changes to the language. One commenter asserted that paragraph (g) provides agencies too much discretion as to whether they should designate someone to expedite the NEPA process. The commenter suggested that, at a minimum, the paragraph be expanded to discuss when that role would be beneficial and set requirements on who can fill the role. CEQ declines additional edits to paragraph (g), which has been in the regulations since 1978. CEQ considers it appropriate to preserve agency flexibility to assign staff to expedite the NEPA process.

Eleventh, CEQ proposed to strike paragraph (f) of 40 CFR 1501.10 (2020), allowing State, Tribal, or local agencies, or members of the public to request a Federal agency set time limits. One commenter opposed the proposed removal of this paragraph, expressing concern that the proposal would diminish the involvement and use of information from States. CEQ makes this change in the final rule because the NEPA statute sets deadlines for EAs and EISs rendering this paragraph unnecessary and inconsistent with the statute. However, CEQ notes that State, Tribal, and local agencies have a role in the development of schedules to the extent they are serving as joint lead, cooperating, or participating agencies.

Finally, to increase predictability and enhance agency accountability, CEQ proposed to add a new paragraph (h) to require agencies to make schedules for EISs publicly available and to publish revisions to the schedule. The proposal also would require agencies to publish revisions to the schedule and include an explanation for substantial revisions to increase transparency and public understanding of decision making and to encourage agencies to avoid unnecessary delays.

One commenter expressed concern that paragraph (h) would increase the potential for litigation related to timelines. Another commenter opposed the requirement for agencies to publicly post schedules for an EIS, asserting that the requirement would distract from analyzing and disclosing significant environmental effects.

CEQ adds paragraph (h) as proposed in the final rule. CEQ disagrees that making schedules publicly available will have any meaningful effect on the agency's analysis. CEQ also does not see litigation risk attached to the posting of schedules, which would not constitute a final agency action for purposes of judicial review, and the commenter did not provide an explanation as to how this might be the case.

Multiple commenters requested clarity on what qualifies as ''substantial'' changes to an EIS schedule. CEQ declines to include additional language in the rule and defers to agencies to determine what schedule changes are ''substantial'' and require an explanation. CEQ anticipates this may vary from case-to-case depending on the agency and the complexity of the proposed action. CEQ will continue to consider whether additional guidance would be helpful.

A few commenters requested that the final rule expand paragraph (h) to require agencies to make EA schedules publicly available. CEQ declines to require agencies to publish schedules for EAs, though CEQ encourages agencies to do so, especially when doing so would facilitate public engagement. CEQ is concerned that requiring agencies to make schedules for all EAs publicly available could significantly increase the administrative burden on agencies especially since not all EAs will involve complex schedules, *i.e.,* they may only include the dates for the decision to prepare an EA and the issuance of an EA.

Some commenters expressed general support for § 1501.10 but suggested additional changes arguing that there are ''loopholes'' for agencies to exploit or manipulate the deadlines. Commenters requested the regulations provide for oversight of agencies to ensure they are adhering to the deadlines. Another commenter suggested CEQ add incentives to the final rule for agencies to adhere to the timelines.

CEQ declines to make additional revisions to address the commenters' suggestions. The final rule implements the statutory deadlines, and Congress has provided a reporting mechanism to address situations where agencies miss deadlines. Further, section 107(g)(3) of NEPA provides a mechanism for project sponsors to petition the courts for relief if an agency fails to meet the deadlines. 42 U.S.C. 4336a(g)(3). The statute does not establish a mechanism for CEQ to enforce deadlines, and CEQ declines to revise the regulations in a manner that would substantially change the role that CEQ has played with respect to environmental reviews for decades.

A commenter requested clarification on supplementation and whether or not supplemental environmental documents would affect the timeline of the original document. CEQ declines to add additional language to § 1501.10 in response to this comment. In cases where an agency determines a supplemental draft EA or a supplemental draft EIS is necessary, the end point remains the final EA or final EIS. However, as provided in § 1501.10(b), the lead agency may extend the deadline to provide additional time necessary to complete the final EA or final EIS. When an agency prepares a supplemental EA or EIS following the completion of a final EA or EIS, the lead agency should adhere to the deadlines and develop schedules for the supplemental NEPA review consistent with paragraph (b) and section 107(g) of NEPA. 42 U.S.C. 4336a(g).

10. Programmatic Environmental Documents and Tiering (§ 1501.11)

CEQ has encouraged agencies to engage in environmental reviews for broad Federal actions through the NEPA process since CEQ's initial guidelines issued in 1970. This continues to be a best practice for addressing broad actions, such as programs, policies, rulemakings, series of projects, and larger or multi-phase projects. CEQ developed guidance in 2014 on Effective Use of Programmatic NEPA Reviews,[76] compiling best practices across the Federal Government on the development of programmatic environmental reviews. CEQ proposed to codify some of these principles in the CEQ regulations.

First, CEQ proposed to revise and retitle § 1501.11, ''Programmatic

[76] CEQ, Programmatic Guidance, *supra* note 12.

environmental documents and tiering,'' for consistency with section 108 of NEPA, to consolidate relevant provisions, and to add new language to codify best practices for developing programmatic NEPA reviews and tiering, which are important tools to facilitate more efficient environmental reviews and project approvals. 42 U.S.C. 4336b. As discussed further in this section, CEQ proposed to move portions of 40 CFR 1502.4 (2020) on EISs for broad Federal actions to § 1501.11 because agencies can review actions at a programmatic level in both EAs and EISs.

Several commenters expressed support for the overall proposed changes in § 1501.11 and for use of programmatic reviews and tiering. These commenters asserted that programmatic reviews and tiering are important tools for efficiency and supported the clarity provided in the proposed rule on both tools. In the final rule, CEQ revises the title of § 1501.11 and moves the text of 40 CFR 1502.4 (2020) to § 1501.11 as further described in this section.

CEQ proposed to reorganize the paragraphs in § 1506.11 to address programmatic environmental documents and then tiering. Accordingly, second, CEQ proposed to add a new paragraph (a) to address programmatic environmental documents. CEQ proposed to move paragraph (b) of 40 CFR 1502.4 (2020) to § 1501.11(a) and revise the first sentence to clarify that agencies may prepare programmatic EAs or EISs to evaluate the environmental effects of policies, programs, plans, or groups of related activities. CEQ proposed to revise the second sentence to provide that programmatic environmental documents should be relevant to the agency's decisions and timed to coincide with meaningful points in agency planning and decision making; change ''statements'' to ''documents'' to include EAs; and change ''program'' to ''agency'' to broaden the language for consistency with the revised first sentence of paragraph (a). Finally, CEQ proposed a third sentence in paragraph (a) to clarify that agencies can use programmatic environmental documents in a variety of ways, highlighting some examples for agencies to consider to facilitate better and more efficient environmental reviews.

One commenter requested that CEQ change paragraph (a) to require agencies to prepare programmatic environmental documents. CEQ declines to require preparation of programmatic environmental documents as agencies need flexibility to determine when a programmatic environmental document is appropriate.

Another commenter suggested CEQ add language stating if an agency is preparing to make a programmatic decision on a policy, program, plan, or group of related activities that meets other applicable thresholds for NEPA analysis, an agency must prepare a programmatic analysis commensurate with the scope of that decision. The commenter asserted that while it may be permissible to prepare a programmatic analysis when an agency is not presently making a decision, it is mandatory to prepare one when making a programmatic decision.

A few commenters requested CEQ restore regulatory language from 40 CFR 1502.4(b) (2019) stating that programmatic EISs are sometimes required for proposed decisions regarding new agency programs or regulations. The commenter stated that the 2020 rule removed this direction to focus the provision on the discretionary use of programmatic EISs in support of clearly defined decision-making purposes. The commenter asserted CEQ would better serve agencies and the public by acknowledging that programmatic EISs are sometimes required.

CEQ declines to make these change in the final rule. Agencies have the discretion to determine whether to prepare a programmatic or non-programmatic NEPA document to evaluate their actions, and CEQ is concerned that the commenter's proposals are unnecessarily prescriptive and declines to introduce a new concept of ''programmatic decision.''

Third, CEQ proposed to move the list of ways agencies may find it useful to evaluate a proposal when preparing programmatic documents from paragraphs (b)(1) and (b)(1)(i) through (b)(1)(iii) of 40 CFR 1502.4 (2020) to § 1501.11(a)(1) and (a)(1)(i) through (a)(1)(iii), respectively. CEQ proposed to expand the list to encompass EAs as well as EISs. CEQ proposed to modify the beginning of paragraph (a)(1)(ii) to clarify ''[g]enerically'' to mean ''[t]hematically or by sector,'' and add technology as an example action type. CEQ proposed in paragraph (a)(1)(iii) to modify ''available'' to ''completed'' for clarity. CEQ moves these provisions and makes these revisions as proposed in the final rule.

One commenter opined that the language in proposed paragraph (a)(i)(iii) regarding stage of technological development makes it seem as though environmental review must happen more quickly than accrual of significant investment. The commenter asserted that the accrual of significant investment would prejudice the review and, therefore, should be barred until the review takes place and suggested regulatory language to that effect.

CEQ declines to modify paragraph (a)(1)(iii) to incorporate the commenter's proposed language. The concept the commenter proposes to add—to not prejudice the outcome of dependent decisions—is addressed in § 1506.1, and it is unnecessary and potentially confusing to address that issue here. However, CEQ changes ''restrict later alternatives'' to ''limit the choice of reasonable alternatives'' to align the text with § 1506.1(a).

Fourth, CEQ proposed to add a new paragraph (a)(2) to provide examples of the types of agency actions that may be appropriate for programmatic environmental documents, including programs, policies, or plans; regulations; national or regional actions; or actions with multiple stages and are part of an overall plan or program. CEQ did not receive any comments specific to this paragraph and adds it in the final rule.

Fifth, CEQ proposed to move paragraph (b)(2) of 40 CFR 1502.4 (2020) to § 1501.11(a)(3) and revise it to recommend, rather than require, that agencies employ scoping, tiering, and other tools to describe the relationship between programmatic environmental documents and related actions to reduce duplication. CEQ proposed to strike the last sentence of 40 CFR 1502.4(b)(2) (2020) stating that agencies may tier their analyses because tiering and programmatic environmental documents would now be addressed together in this section, rendering the language unnecessary.

A commenter requested CEQ replace ''should'' with ''shall'' in paragraph (a)(3) because the discretionary language relaxes the standard for agencies to seek efficiencies. CEQ declines to make this change. While scoping is required for EISs, including programmatic EISs, it is not required for EAs. It also would unnecessarily constrain agency processes to require tiering for all programmatic environmental documents, particularly because at the time that an agency prepares a programmatic environmental document, it may not yet know whether or what agency actions it may consider in the future related to the programmatic environmental document. Rather, CEQ intends this provision to encourage agencies to use scoping, tiering, and other methods to make programmatic environmental documents more effective, efficient, and transparent.

A commenter requested that CEQ add text to proposed paragraph (a)(3)

providing that programmatic documents should explain which issues the programmatic document analyzes and which issues the agency is deferring. This commenter pointed to CEQ's 2014 memorandum on use of programmatic NEPA reviews, which explains that the programmatic analysis and the decision document should explain which decisions are supported by the programmatic NEPA document and which decisions are deferred to a later time. Two commenters further requested CEQ clarify that tiering is required to analyze the deferred analysis of issues, effects, or alternatives before making a final project-level or site-specific decision; stating that the current text is permissive in that it allows but does not require tiering.

CEQ considered the comments and in the final rule revises § 1501.11(a)(3) to clarify that a programmatic document must identify any decisions or categories of decisions that the agency anticipates making in reliance on it. This direction includes any action or category of action that the agency anticipates making in reliance on a programmatic environmental document without additional analysis and any action or category of action the agency anticipates making after developing a subsequent, tiered environmental document. This provision only requires agencies to identify actions the agency anticipates making when it prepares a programmatic environmental document; it does not require agencies to identify every conceivable circumstance in which the agency could develop a tiered environmental review in the future. Including this information in a programmatic environmental document ensures that agencies are transparent about the relationship between their programmatic documents and any subsequent documents and decisions. Failure to anticipate and list a particular circumstance where a programmatic environmental document could inform a future decision does not preclude tiering to the programmatic environmental document in an environmental document related to that future circumstance.

Sixth, CEQ proposed to redesignate paragraphs (a), (b), and (c) of 40 CFR 1501.11 (2020), which address tiering, as paragraphs (b), (b)(1), and (b)(2), respectively, with some modifications as discussed further in this section. CEQ also proposed to redesignate paragraphs (c), (c)(1), and (c)(2) as paragraphs (b)(2), (b)(2)(i), and (b)(2)(ii), respectively, with no proposed modifications. CEQ proposed to title paragraph (b) ''Tiering.'' CEQ makes these changes in the final rule.

Seventh, CEQ proposed to add two new sentences at the beginning of paragraph (b) to describe when agencies may employ tiering. The first proposed sentence would allow agencies to employ tiering with an EIS, EA, or programmatic environmental document relevant to a later proposed action. The sentence emphasizes the benefits of tiering to avoid duplication and focus on issues, effects, or alternatives, not fully addressed in the earlier document. In the existing text, CEQ proposed to strike as redundant the reference to issues not yet ripe for decision as well as the last sentence on applying tiering to different stages of actions. CEQ did not receive comments specific to the changes proposed in this paragraph and finalizes them as proposed except that CEQ reorders the list of documents—EISs, EAs, and programmatic environmental documents—in § 1501.11(b)(1) for consistency with paragraph (b).

Eighth, in § 1501.11(b)(1) CEQ proposed to add ''programmatic environmental review'' to the list of documents from which agencies may tier. CEQ also proposed to clarify that the tiered document must discuss the relationship between the tiered analysis and the previous review; analyze site-, phase-, or stage-specific conditions and effects; and allow for public engagement opportunities consistent with the type of environmental document prepared and that are appropriate for the location, phase, or stage. Finally, CEQ proposed to clarify that the tiered document must state where the earlier document is ''publicly'' available.

One commenter requested CEQ clarify that tiering to a previous programmatic analysis is only appropriate if those analyses took the requisite ''hard look'' at site-specific environmental impacts. CEQ declines to make this change. While agencies must ensure a hard look at site-specific effects before finalizing a site-specific agency action, agencies have discretion to consider such effects in a programmatic environmental document or subsequent tiered documents. Multiple commenters requested CEQ clarify that tiered reviews must include the requisite site-specific analysis for the action, with some commenters raising concerns that agencies do not provide the necessary opportunity for the public to review alternatives and provide comments by using programmatic environmental reviews without subsequent site-specific reviews. CEQ agrees that tiering does not authorize an agency to avoid the public engagement, including any opportunity for comment, that it would need to do if it analyzed an action through a single environmental document, rather than through a tiered approach and notes that the text CEQ proposed in § 1501.11(b)(1) addresses this issue. Regardless of whether an agency employs tiering, agencies must comply with the requirements for consideration of alternatives and public comments consistent with the requirements for EAs or EISs, as applicable.

A few commenters expressed concern that the use of tiering would lead to delays in incorporating new scientific evidence into environmental reviews and allow agencies to circumvent the requirement to consider alternatives. Another commenter expressed similar concern that the expanded use of programmatic documents with CEs would limit consideration of alternatives. CEQ disagrees with the commenters' concerns because agencies cannot use programmatic documents or tiering to circumvent the requirements of NEPA, including section 102(2)(C)(iii) requirement to consider a reasonable range of alternatives for actions requiring an EIS. 42 U.S.C. 4332(2)(C)(iii).

Other commenters requested CEQ clarify certain aspects of tiering, including establishing bounds for use of programmatic CEs. As described in § 1501.11(a), programmatic environmental documents may be an EA or EIS. As such, § 1501.11 does not address programmatic CEs. Section 1501.4 addresses circumstances in which agencies may conduct programmatic reviews to establish new CEs.

One commenter stated that the rule needs to clearly distinguish between tiering and supplementation and suggested CEQ could clarify the different approaches in § 1501.11(b)(2)(ii). CEQ agrees that the reference to supplementation in § 1501.11(b)(2)(ii) is confusing because supplementation is a different concept. Section 1502.9(d) sets forth the standard for supplementation of EISs, and agencies may supplement EAs at their discretion. Therefore, CEQ strikes ''a supplement (which is preferred)'' from the first sentence of this paragraph.

CEQ makes the changes to § 1501.11(b) and (b)(1) as proposed, though CEQ revises programmatic environmental ''review'' to ''document'' in paragraph (b)(1) for consistency with the rest of the section. CEQ notes that programmatic documents can most effectively address later activities when they provide a description of planned activities that would implement the program and consider the effects of the program as specifically and

comprehensively as possible. A sufficiently detailed programmatic analysis with such project descriptions can allow agencies to rely upon programmatic environmental documents for further actions with no or little additional environmental review necessary. When conducting programmatic analyses, agencies should engage the public throughout the NEPA process and consider when it is appropriate to re-engage the public prior to implementation of the action.

Ninth, in paragraph (c), CEQ proposed to include the provisions of section 108 of NEPA, which address when an agency may rely on a programmatic document in subsequent environmental documents. 42 U.S.C. 4336b. CEQ notes that it interprets the reference to ''judicial review'' in paragraph (c)(1) to mean an opportunity for a party to challenge the programmatic document, including through an administrative proceeding or challenge brought under the Administrative Procedure Act. CEQ proposed in paragraph (c)(2) to require agencies to briefly document their reevaluations when relying on programmatic environmental documents older than 5 years. Two commenters opined that there is no incentive for an agency to prepare a programmatic environmental document if the statute and regulations require them to complete it within one or two years and then review it every five years. The commenters asserted that programmatic documents generally take longer to prepare, but the long-term benefits are worth the investment. The commenters are concerned that the time limits for EAs and EISs will result in agencies preparing fewer programmatic environmental documents. A separate commenter indicated that many agencies review programmatic documents at longer intervals than five years.

CEQ appreciates the commenters' concerns but notes that the timeframes are statutory. CEQ encourages agencies to use programmatic environmental documents and tiering whenever it will result in more efficiency overall. CEQ also notes that a reevaluation of a programmatic document need not be a lengthy process especially where agencies can quickly and easily verify the ongoing accuracy of the evaluation.

One commenter asserted that the process for reevaluation is unclear in the statute and in the proposed rule and asked CEQ to clarify the steps. The commenter requested that the regulations state that the tiered environmental review is what triggers the need for reevaluation and that it also serves as the documentation of the reevaluation.

CEQ declines to articulate additional steps for reevaluation. The regulations already provide a process for reevaluation in §§ 1501.5 and 1502.9(e). CEQ agrees that agencies may make use of tiered documents to support their reevaluation. However, because of the nature of tiering, such documents may not assess all of the underlying assumptions of the programmatic document.

Another commenter recommended that the regulations allow agencies to tier from programmatic documents while reevaluation is ongoing and requested CEQ clarify that those projects are not at risk of noncompliance for reliance on previous versions should the agency issue a new version of the document.

CEQ declines to make these specifications in the final rule. CEQ agrees that a tiered document may also serve as a reevaluation of the programmatic document. CEQ considers the language in section 108(1) of NEPA to be clear that agencies may tier from a programmatic review in a subsequent environmental document for up to five years without additional analysis, and therefore any tiered documents relying on the programmatic document during those five years is entitled to the statutory presumption that no additional review is required even where the agency subsequently revises the programmatic document. 42 U.S.C. 4336b(1).

A few commenters requested that the regulations require the five-year reevaluation for EISs and EAs be subject to public comment; that agencies provide public notice of the reevaluation; and that reevaluation of programmatic analyses be made publicly available.

CEQ declines to make these changes to retain flexibility depending on the context of the reevaluation. Some reevaluations may be simple and not require public comment. Other reevaluations may warrant and benefit from public engagement, including public comment. If the agency finds that any assumptions are no longer valid or that the criteria for supplementation in § 1502.9(d) are met, then the regulations require the agency to conduct a supplemental analysis to continue to rely on the programmatic review in subsequent environmental documents.

11. Incorporation by Reference Into Environmental Documents (§ 1501.12)

CEQ proposed minor modifications to § 1501.12 to emphasize the importance of transparency and accessibility of material that agencies incorporate by reference. First, CEQ proposed to revise the title to add ''into environmental documents'' at the end to clarify into what agencies incorporate by reference. CEQ makes this change in the final rule.

Second, CEQ proposed to add to the second sentence a specific requirement for agencies to briefly explain the relevance of any material incorporated by reference into the environmental document to clarify that agencies must not only summarize the content incorporated but also explain its relevance to the environmental review document. CEQ proposed this addition because explaining the relevance of incorporated material in addition to summarizing it will better inform the decision maker and the public.

A few commenters opposed the proposed requirement for agencies to briefly explain the relevance of the incorporated material to the environmental document, asserting that the relevance of the material is often obvious and that requiring this explanation would add burdensome paperwork without additional benefit. A commenter also asserted that the requirement defeats the purpose of incorporating material by reference.

CEQ disagrees with the commenters' assertions and makes the proposed addition in the final rule. CEQ adds the language to emphasize the importance of transparency regarding material that agencies incorporate by reference and rely upon as part of their analysis. Briefly explaining the relevance of incorporated material should not require substantial agency resources or lengthy text. Section 1501.11 already requires an agency to briefly summarize material that it incorporates by reference; briefly explaining the relevance of the material does not require additional analysis, but rather, only requires that the agency briefly document how the material is related to the agency action it is reviewing in an environmental document. While in some cases the relevance of material incorporated by reference may be obvious, in such cases, briefly explaining relevance will be a trivial task that may require no more than a sentence. Where the relevance of the material is not immediately obvious, a brief explanation will help better inform both the public and decision makers. CEQ disagrees that the requirement is burdensome or duplicative, and encourages agencies to integrate the description of relevance into the summary of the material.

Third, CEQ proposed to change ''may not'' to ''shall not'' in the third sentence to eliminate a potential ambiguity over

whether agencies must make material they incorporate by reference reasonably available for public inspection. One commenter supported the preclusion of incorporation by reference if the material is not reasonably available for public inspection. Another commenter requested that CEQ define ''reasonably available for inspection'' to clarify what information should be made available prior to public comment. In considering this comment, CEQ determined that it was more appropriate to revise the text in the final rule to improve clarity rather than define this phrasing from the 1978 regulations, and therefore changes ''inspection'' to ''review.'' CEQ does not intend this change in wording to be substantive, but rather to modernize the regulatory language and, thereby, improve clarity of the requirement. CEQ anticipates that agencies will generally make this material available electronically or online, though it may be appropriate for agencies to provide physical copies in certain circumstances such as for localized actions where internet access or bandwidth is limited.

Another commenter expressed support for incorporation by reference, but questioned whether the standard should allow agencies to incorporate by reference proprietary data. CEQ declines to change the ''reasonably available for review'' standard. Incorporation by reference is a tool that agencies can use to improve the efficiency of their environmental review process. However, it cannot be used to circumvent the public engagement, public comment, public access, and transparency requirements of NEPA and these regulations, including section 107(c)'s requirement that for an EIS, an agency must request public comment on ''alternatives or impacts and on relevant information, studies, or analyses with respect to the proposed agency action.'' 42 U.S.C. 4336a(c). CEQ therefore retains the requirement that has been in the NEPA regulations since 1978 that prohibits agencies from incorporating by reference material that is not reasonably available for review, including proprietary data that is not available for review and comment.

Another commenter recommended CEQ revise existing regulatory text in the third sentence. The commenter suggested CEQ replace ''within the time'' with ''at the beginning of and throughout the time'' asserting that the current language allows an agency to post documents near the end of the comment period. The commenter stated that documents should be available for the full comment period to allow for meaningful public review and comment. CEQ agrees that materials that are incorporated by reference should be reasonably available throughout the public comment period. CEQ is unaware of agencies incorporating by reference material that is not available throughout the comment period. However, CEQ agrees that the reasonable availability of material incorporated by reference is critical to the public comment process for EISs under the regulations and under section 107(c) of NEPA, which requires agencies preparing EISs to request public comment on ''relevant information, studies, or analyses with respect to the proposed agency action.'' 42 U.S.C. 4336a(c). Therefore, the final rule replaces the word ''inspection'' with ''review'' and the word ''within'' with the word ''throughout'' to remove any ambiguity over when the materials an agency incorporates by reference must be reasonably available to the public. The final rule also adds ''or public review'' after ''comment'' to make it clear that the material must be available while an environmental document is available for public review in those cases where the regulations do not require an agency to seek public comment. CEQ makes these changes in the final rule to ensure that material incorporated by reference, including research publications and data, is openly available and accessible to the public.

Fourth, CEQ proposed in the third sentence to add a reference to ''publicly accessible website'' as an example of a mechanism through which material incorporated by reference may be reasonably available to the public. CEQ did not receive any comments specific to this proposed example. CEQ makes this change in the final rule.

Finally, CEQ proposed to add a new fourth sentence encouraging agencies to provide digital references, such as hyperlinks, to incorporated material or otherwise indicate how the public can access the material for review. One commenter expressed support for the proposed inclusion of digital references. CEQ adds this sentence in the final rule.

A few commenters expressed general support for proposed § 1501.12. Another supportive commenter appreciated the emphasis on transparency and accessibility of material incorporated by reference, but suggested CEQ establish standards for the digital format of environmental documents and their underlying analysis to facilitate interagency information sharing and collaboration. CEQ appreciates the comment and notes that it is currently engaged in an eNEPA study, consistent with section 110 of NEPA, to assesses such issues. *See* 42 U.S.C. 4336d. Following the completion of that study, CEQ may issue guidance or consider additional rulemaking in the future to address these issues.

Another commenter requested that the regulations require agencies to disclose if the cited material is outdated, disputed, or not fully proven. CEQ declines to make this change. Agencies generally have an obligation under § 1506.6 and § 1502.21 for EISs to disclose any relevant assumptions or limitations of the information on which they rely, including information incorporated by reference. Imposing a distinct requirement for material that is incorporated by reference is unnecessary and could create confusion.

One commenter expressed agreement that incorporation by reference can cut down on bulk but indicated that CEQ should expand § 1501.12 to address other reasons to incorporate materials by reference, such as to reduce duplicative work and ensure efficient use of agency resources. The commenter also requested CEQ rephrase the section to ensure that agencies can use pre-existing documents to further the efficiency requirements of NEPA. While CEQ agrees that incorporation by reference also reduces duplicative work and facilitates efficient use of agency resources, CEQ does not consider it necessary to add additional text to the regulations to make these points as the regulations already emphasize efficiency and use of other documents. *See, e.g.,* §§ 1506.2, 1506.3.

Finally, a commenter asserted the proposed rule did not sufficiently address avoidance of duplication between the NEPA process and States' environmental review and permitting processes. The commenter requested that CEQ clarify in § 1501.12 that there is a presumption that agencies can incorporate by reference environmental studies prepared in accordance with State procedural requirements akin to NEPA. CEQ declines to make this change. Establishing a presumption that agencies can incorporate by reference States' materials would be confusing and is unnecessary because the language in § 1501.12 allows agencies to incorporate material generated by States, and § 1506.2 has long promoted elimination of duplication with State requirements.

D. Revisions To Update Part 1502, Environmental Impact Statements

CEQ proposed to revise several sections of part 1502, as discussed in section II.D of the NPRM. CEQ is not implementing any substantive changes to § 1502.3, but is revising the section title to read ''Statutory requirements for environmental impact statements.'' CEQ

is not making substantive changes to § 1502.6, Interdisciplinary preparation; § 1502.18, List of preparers; § 1502.19, Appendix; § 1502.20, Publication of the environmental impact statement; § 1502.22, Cost-benefit analysis; or § 1502.24, Environmental review and consultation requirements. CEQ received some comments on these sections but declines to make additional changes, as further explained in the Phase 2 Response to Comments.

1. Codification of 2023 GHG Guidance

CEQ invited comment on whether it should codify any or all of its 2023 National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change (2023 GHG guidance).[77] CEQ also invited comment on which provisions of part 1502 or other provisions of the CEQ regulations CEQ should amend if a commenter recommended codification of part of the guidance.

CEQ received numerous comments responding to this request for comments on codification of the 2023 GHG guidance. Comments expressed both support and opposition, with many commenters including general recommendations or considerations that did not specify what amendments to the rule CEQ should consider. Others identified specific text or concepts they recommended CEQ include. Some commenters resubmitted the same comments they submitted on the interim guidance, whereas others reiterated points they made as part of their comments on the interim guidance.

Some commenters requested that CEQ incorporate quantification and contextualization of climate effects from the guidance into the final rule, with specific suggestions for adding text to §§ 1502.16(a)(1), 1501.3(d), and 1508.1(g). Another commenter requested that CEQ modify § 1502.16(a)(7) to align the provision with the guidance for emphasizing quantification of emissions in determining reasonably foreseeable climate change-related effects. This commenter also recommended CEQ add provisions to § 1501.3 recognizing that while there is no particular threshold for GHG emissions that triggers an EIS, Federal agencies should quantify, where relevant, the reasonably foreseeable direct and indirect GHG emissions of their proposed actions and reasonable alternatives and the effects associated with those projected emissions in the determination of significance.

Another commenter asked that CEQ expand § 1502.6(a)(7) or § 1508.1(g)(4) to include key principles from the guidance. The commenter provided as an example that CEQ could clarify that climate change related effects should include analysis of reasonably foreseeable direct, indirect, and cumulative GHG emissions over the expected lifetime of the action.

Multiple commenters requested that CEQ add, in full, sections IV(B), (E), and (F); V; VI(A) through (C) and (E); and VII of the guidance. One commenter requested that CEQ strengthen proposed § 1502.15(b) and proposed § 1502.23(c) to require consideration of projections based on varying emissions scenarios and related variations in climate change effects on the proposed action and alternatives. The commenter referenced information included in the 2023 GHG guidance that provides important information on quantifying and analyzing uncertainty in the long-range projects of climate change. The commenter requested CEQ strengthen the final rule by codifying the need to manage this uncertainty and analyze it; otherwise, the commenter asserted, agencies may unlawfully seek to minimize or avoid analysis of long-range projects of climate change altogether.

One commenter requested that CEQ add consideration for proportionality and causality in the NEPA analysis of GHG-related impacts to more appropriately assign mitigation efforts to the true source of greenhouse gases. Another commenter suggested that CEQ integrate the warning against perfect substitution analysis from the guidance directly into the regulatory text. They also requested the rule include a provision on the appropriate use of the social cost of GHGs in climate change analyses.

Some commenters opposed codifying any part of the 2023 GHG guidance for multiple reasons. Two commenters expressed that inclusion of the guidance in the regulations would trigger concerns on overreach of the authority of the administrative branch. Other commenters expressed the view that CEQ should not codify any parts of the guidance until CEQ resolves policy issues and addresses the comments submitted on the guidance. A few other commenters were concerned that incorporation of climate change would unlawfully expand the scope of NEPA analyses past ''foreseeable effects'' and result in agencies prioritizing climate change above other environmental issues. One commenter expressed that because climate change science continues to evolve, it would be premature to codify the guidance and that retaining it as guidance would provide flexibility to continue to update the manner in which agencies address climate change in NEPA reviews as science evolves. Another commenter stated that codification of guidance would be arbitrary and capricious, and that NEPA was not intended to be a climate policy framework.

Two commenters stated that if CEQ does decide to codify all or part of the 2023 GHG guidance, CEQ should issue another NPRM to provide an opportunity for the public to comment prior to issuing a final rule, consistent with the APA. Similarly, a few other commenters stated that CEQ did not provide enough information about how CEQ may incorporate the guidance, including what parts of the guidance CEQ would include, and that any attempt to codify the interim guidance through the final rule would be contrary to CEQ's obligations under the APA.

A few commenters asserted that the guidance wrongfully elevates climate change and its effects, no matter how small the effect may be, and that this emphasis is inconsistent with the purpose of NEPA and recent NEPA amendments.

After considering the comments, CEQ has determined not to revise the text of the proposed rule in the final rule to codify the 2023 GHG guidance, with the exception of one revision on quantification that was requested by commenters and that is included in the final rule in § 1502.16. CEQ responds to the comments summarized here in the Phase 2 Response to Comments, and CEQ will consider these and the comments received on the 2023 GHG guidance during development of any final GHG guidance. If CEQ deems it appropriate, CEQ may consider codification of the 2023 GHG guidance in a future rulemaking.

2. Purpose of an Environmental Impact Statement (§ 1502.1)

CEQ proposed to divide § 1502.1 into paragraphs (a), (b), and (c) to enhance readability and amend the text in the section to restore the approach taken in the 1978 regulations regarding the purpose of EISs as they relate to NEPA.

In proposed paragraph (a), CEQ proposed to restore language from the 1978 regulations clarifying that one purpose of an EIS is to ''serve as an action-forcing device'' for implementing the policies set out in section 101 of NEPA by ensuring agencies consider the environmental effects of their action in decision making. 42 U.S.C. 4331. CEQ proposed these changes because Congress did not enact NEPA to create

[77] *See* CEQ, 2023 GHG Guidance, *supra* note 10.

procedure for procedure's sake; rather, NEPA's procedures serve the substantive policies and goals Congress established and restoring the action-forcing language would clarify how EISs serve this broader function. CEQ proposed this change for consistency with the proposed edits in § 1500.1. *See* section II.B.1.

One commenter expressed support for the proposed changes in paragraph (a), specifying that the action-forcing language captures the intent of NEPA and serves the substantive policies and goals established by Congress. Multiple commenters opposed the proposed changes in paragraph (a), asserting that the language is contrary to the procedural approach of NEPA, and that it elevates the goals of the Act above the statutory requirements of other legislation. One commenter requested CEQ replace the proposed clause at the end of the sentence with language stating that the goals of NEPA cannot and do not supersede the requirements of other Federal statutes. Specific to the restoration of the action-forcing language, one commenter opposed the language because they do not agree that an EIS could be an action-forcing device on its own. The commenter described that an environmental study could reveal information that could be action forcing but that an EIS itself should not be and that an EIS is a device used to disclose and study the environmental consequences of actions. Other comments expressed that the phrasing inappropriately inserts a substantive element into NEPA's procedural requirements.

CEQ disagrees with the assertions of the commenters opposing this change and restores the language from the 1978 regulations as proposed in § 1502.1(a). As CEQ articulated in the proposed rule, CEQ considers it appropriate to restore this text from the 1978 regulations to ensure that agencies use the information gathered and analyzed in an EIS in their decision-making processes. CEQ disagrees that this language, which was part of the 1978 regulations implemented by agencies and interpreted by courts for decades, imposes a substantive requirement inconsistent with the statute. This provision does not require agency decision makers to make any particular decision based on the information in an EIS; it only requires that the information in an EIS inform the agency's decision, which is consistent with NEPA, agency practice, and case law.

In proposed paragraph (b), CEQ proposed minor edits for clarity and consistency with other changes proposed throughout the regulations. CEQ proposed to change ''It'' to ''Environmental impact statements'' to improve readability in light of the proposal to break this section into lettered paragraphs. CEQ also proposed to change ''significant'' to ''important'' before ''environmental issues'' and insert ''reasonable'' before ''alternatives'' for consistency with similar phrasing throughout the regulations.

Two commenters requested that CEQ further revise paragraph (b). One requested that CEQ replace ''enhance'' with ''restore and maintain'' because the underlying statute does not put the burden on Federal decision makers or project sponsors to ''enhance'' the quality of the human environment. This commenter pointed to 42 U.S.C. 4331(a) and the language ''restoring and maintaining environmental quality.'' A second commenter requested CEQ replace ''avoid and minimize'' with ''reduce to the extent practical'' to conform to the plain language of the NEPA statute.

CEQ finalizes § 1502.1(b) as proposed. CEQ does not consider it necessary to further revise this paragraph as the commenters suggested because this language has been in the regulations since 1978, and CEQ is unaware of any confusion or practical or legal problems created by this language. In the absence of such confusion or problem, CEQ views the potential cost to agencies and applicants of assessing what, if any, change in practice is needed to accommodate revised text as likely to outweigh any potential benefit of the language proposed by the commenters.

In proposed paragraph (c), CEQ proposed to restore the 1978 language clarifying that an EIS is more than a disclosure document, and that agencies must use EISs concurrently with other relevant information to make informed decisions. CEQ considers this language to provide important direction to agencies to ensure that EISs inform planning and decision making and do not serve as a perfunctory check-the-box exercise.

One commenter expressed support for the changes in proposed paragraph (c) stating that it reinforces that EISs must state how alternatives and decisions will or will not achieve the requirements of NEPA, the CEQ regulations, and other environmental laws and policies. Another commenter expressed that the language regarding an EIS being more than a disclosure document suggests that something more than a disclosure of environmental impacts is required to comply with the regulations. The commenter asserted this is contrary to NEPA's original intent.

One commenter requested that CEQ delete the last sentence of the paragraph requiring agencies to use EISs in conjunction with other relevant material to plan actions and make decisions. The commenter asserted that the sentence is not tethered to the EIS review process but addresses agency efforts to plan actions and make decisions, and therefore, the commenter asserted, CEQ is inserting itself into ongoing activities beyond environmental review pursuant to NEPA.

CEQ makes the changes as proposed in § 1502.1(c) and adds ''involve the public'' to the last sentence directing agencies to use other material to plan actions and make decisions. As CEQ noted elsewhere in this final rule, CEQ disagrees that NEPA is merely a check-the-box exercise, and considers it appropriate to reinforce this point in the regulations. CEQ also declines to exclude the proposed last sentence of paragraph (c). This provision does not go beyond NEPA, but rather emphasizes that an EIS is one of the documents agencies must use in their decision-making processes along with other relevant documents.

3. Implementation (§ 1502.2)

CEQ proposed minor modifications to § 1502.2. First, CEQ proposed to restore from the 1978 regulations the introductory paragraph directing agencies to prepare EISs consistent with paragraphs (a) through (g) to achieve the purpose established in § 1502.1. While the 2020 rule removed this paragraph as unnecessary, upon reconsideration CEQ proposed to restore the language to provide clarity on the purpose of this section and improve readability.

One commenter expressed support for all of the proposed revisions in § 1502.2 to ensure that lead agencies explain in an EIS how alternatives and agency decisions will or will not achieve the requirements of NEPA, CEQ regulations, and other environmental policies. Further, the commenter characterized the proposed changes as necessary to facilitate NEPA's goals of transparency and public participation. CEQ appreciates the commenters' supportive statements and in the final rule adds the introductory paragraph to § 1502.2 as proposed.

Next, in paragraph (b), CEQ proposed to replace the word ''significant'' with ''important'' and add a reference to an EA for clarity and consistency. In paragraph (c), CEQ proposed to change ''analytic'' to ''analytical,'' and ''project size'' to ''the scope and complexity of the action'' since this provision is

applicable to more than projects, and the length of an EIS should be proportional to the scope and complexity of the action analyzed in the document.

One commenter expressed support for EISs being brief, concise, and no longer than necessary, but expressed concern over the language encouraging that the length of an EIS should be proportional to the effects and scope because this language conflicts with the page limits identified in § 1502.7. The commenter requested CEQ delete the sentence discussing proportionality to resolve any confusion.

CEQ disagrees with the commenter. The page limits provide the maximum length for EISs. Agencies should not automatically use every page allowable under the page limits and should not write documents longer than necessary. This statement acknowledges that some EISs may be less than the page limits.

CEQ proposed to delete ''as interpreted in'' before ''the regulations in this subchapter'' in paragraph (d), for consistency with the changes in §§ 1500.6 and 1502.9 as discussed in section II.B.6. The proposed rule explained that this phrase could inappropriately constrain agencies whose agency NEPA procedures go beyond the CEQ regulations. One commenter opposed the deletion of this language, expressing support for the inclusion of it to meet the spirit and flexibility of the 2020 rule.

CEQ removes ''as interpreted in'' from paragraph (d) in the final rule because CEQ considers this language inappropriately constricting and potentially causing confusion in light of changes CEQ is making to other provisions of the regulations allowing agencies to tailor their procedures to their programs and include more specific requirements and suggestions. Under the revisions, EISs must state how alternatives and decisions will or will not achieve the requirements of NEPA, the CEQ regulations, and other environmental laws and policies.

Finally, CEQ proposed to delete the word ''final'' in paragraph (f) because the regulations do not distinguish between a decision and final decision and, therefore, using the phrase ''final decision'' is inconsistent with use of ''decision'' elsewhere in the regulations. CEQ makes this change as proposed in the final rule.

4. Scoping (§ 1502.4)

As discussed in section II.C.8 on § 1501.9, ''Public and governmental engagement,'' section II.C.2 on § 1501.3, ''Determine the appropriate level of NEPA review,'' and section II.C.10 on § 1501.11, ''Programmatic environmental document and tiering,'' CEQ proposed to revise § 1502.4 by retitling it ''Scoping'' and moving provisions from 40 CFR 1501.9 (2020) to this section and moving the existing provisions of 40 CFR 1502.4 (2020), ''Major Federal actions requiring the preparation of environmental impact statements'' to §§ 1501.3 and 1501.11. CEQ proposed to move the requirements of scoping for EISs to part 1502, which addresses the requirements specific to EISs, while moving requirements for determining scope applicable to all environmental reviews to § 1501.3(b). CEQ also proposed to revise the provisions moved from 40 CFR 1501.9 (2020) to proposed § 1502.4 to align scoping with related changes made on public engagement in § 1501.9 and to add requirements focused on increasing efficiency in the EIS scoping process.

As discussed further in sections II.C.8 and section II.C.10, commenters were generally supportive of this approach. Commenters did provide a few targeted comments as discussed further in this section and the Phase 2 Response to Comments.

CEQ proposed these changes because it has heard from multiple Federal agencies that there is uncertainty over the differences between the scoping process required for EISs and other public involvement or engagement requirements for NEPA reviews more generally. By revising § 1501.9 on public and governmental engagement and moving the scoping provisions to § 1502.4, CEQ is emphasizing the importance of public engagement in the NEPA process generally, clarifying what requirements are specific to the scoping process for EISs, and clarifying what requirements and best practices agencies should consider regardless of the level of NEPA review.

First, CEQ proposed to move 40 CFR 1501.9(a) (2020), outlining the general purpose of scoping, to § 1502.4(a) and proposed to change the words ''significant'' and ''non-significant'' to ''important'' and ''unimportant,'' respectively, to align with CEQ's proposed change to only use the word ''significant'' when describing effects, which CEQ indicated was a clarifying, non-substantive change. CEQ finalizes this paragraph as proposed with three additional changes to replace the paragraph heading ''Generally'' with ''Purpose,'' to more accurately describe the paragraph; to add use of the word ''scoping'' in the first sentence to make clear that this sentence is describing the purpose of scoping; and to change ''may'' to ''should'' in the second sentence to address comments requesting clarification that scoping can and should begin prior to issuance of the NOI. This last change also emphasizes the importance for agencies to begin scoping work early to facilitate meeting the statutory two-year deadline for completing EISs. CEQ made clear in the 2020 regulations that scoping should begin as soon as practicable, so the agency can gather the requisite information to allow the public to provide meaningful input on the NOI, including on the topics specifically identified for inclusion in the notice in § 1502.4(e)(1) through (e)(10). Agencies cannot be reasonably expected to have this information available to them without beginning scoping prior to issuance of the NOI.

Second, CEQ proposed to move paragraph (c) of 40 CFR 1501.9 (2020) on scoping outreach to § 1502.4(b) and add an introductory sentence requiring agencies to facilitate notification to persons and agencies that may be interested or affected by an agency's proposed action, consistent with the public and governmental engagement requirements in proposed § 1501.9. CEQ finalizes this paragraph as proposed.

Third, CEQ proposed to move paragraph (b) of 40 CFR 1501.9 (2020) on cooperating and participating agencies to § 1502.4(c) and retitle it ''Inviting participation'' to better reflect that the paragraph covers cooperating and participating agencies as well as proponents of the action and other likely affected or interested persons. CEQ also proposed to strike the last sentence providing an example of when an agency might hold a scoping meeting.

Some commenters expressed concern for the removal of the language requiring cooperating and participating agencies be invited and consulted, and noted their specific reference in the NEPA statute. CEQ did not intend a substantive change by modifying the paragraph heading and notes that §§ 1501.7 and 1501.8 have long provided for the invitation of such agencies to serve as cooperating or participating agencies. In the final rule, CEQ adds a clause to the regulatory text to make clear that the invitation to Federal, State, Tribal, and local agencies and governments is to participate as cooperating or participating agencies. CEQ also notes that agencies invited to serve as cooperating or participating agencies should respond in a timely manner to facilitate the inclusion in the NOI of any information that these agencies may need as part of the scoping process.

A commenter also expressed confusion about the reference to ''the

proponent of the action'' since that is the lead agency. This phrase, which has been in the regulations since 1978, refers to an outside party such as a project sponsor or applicant. Therefore, in this final rule, CEQ revises this phrase to ''any applicant'' for consistency with the final rule's definition of ''applicant'' and includes ''any'' since not all actions will involve such parties.

Fourth, CEQ proposed to move paragraphs (f) and (f)(1) through (f)(5) of 40 CFR 1501.9 (2020), which addresses additional scoping responsibilities, to § 1502.4(d) and (d)(1) through (d)(5), respectively. Within this list, CEQ proposed modifications to paragraph (d)(1) to change ''significant'' to ''important'' to align with changes in paragraph (a) and the use of ''significant'' throughout the regulations, which CEQ intended to be a clarifying, non-substantive change. CEQ finalizes these changes consistent with its proposal. Additionally, in paragraph (d)(3) of the final rule, CEQ changes ''public'' EAs and other EISs to ''publicly available'' to clarify the meaning of this provision.

Fifth, CEQ proposed to move the requirements for an NOI from paragraphs (d) and (d)(1) through (d)(8) of 40 CFR 1501.9 (2020) to § 1502.4(e) and (e)(1) through (e)(8), respectively. CEQ proposed to delete the reference to 40 CFR 1507.3(f)(3) (2020) because CEQ proposed to remove that provision from the regulations, as discussed in section II.I.3 of the proposed rule. CEQ proposed to revise the language in paragraph (e)(7) for consistency with section 107(c) of NEPA requiring the NOI to include a request for public comment on alternatives or impacts and on relevant information, studies, or analyses, and proposed to delete the cross reference to § 1502.17 because CEQ proposed to broaden the language in § 1502.17. 42 U.S.C. 4336a(c). CEQ also proposed to delete the cross reference because it would no longer be necessary since CEQ proposed to remove the exhaustion process in 40 CFR 1500.3 (2020), which relied, in part, on this provision as the first step in that process. Lastly, CEQ proposed these edits because the purpose of scoping is to receive input from the public on the proposed action and alternatives as well as other information relevant to consideration of the proposed action, and CEQ considered the language in this paragraph to be redundant to the other required information in proposed paragraph (e). CEQ is finalizing these changes as proposed for the reasons set forth in the NPRM and this final rule. Also, CEQ revises paragraph (e)(1) to add the word ''agency'' between ''proposed action'' to align the text with changes to § 1502.13 and for consistency with section 107(d) of NEPA. *See* 42 U.S.C. 4336a(d).

Sixth, to this list of NOI requirements, CEQ proposed to add paragraph (e)(9) to require the lead agency to list any cooperating and participating agencies that have been identified at the time of the NOI, as well as any information those agencies require to facilitate their decisions or authorizations related to the EIS. CEQ proposed to add this requirement to ensure that lead and cooperating agencies communicate about any unique statutory or regulatory requirements of each agency so that the necessary information is included in the initial NOI and does not require re-issuance of a second NOI by the cooperating or participating agency. For example, the U.S. Forest Service's regulations regarding administrative review require the responsible official to disclose during the NEPA scoping process that a proposed project or activity or proposed plan, plan amendment, or plan revision is subject to one of its administrative review regulations. 36 CFR 218.7(a), 219.52(a). When the Forest Service acts as a cooperating agency and the lead agency does not include the necessary information in the NOI, the Forest Service then must issue its own NOI, which can add additional time to the NEPA process. CEQ is finalizing this proposal consistent with the NPRM.

Seventh, CEQ proposed to add paragraph (e)(10) to require that the NOI include a unique identification number for tracking purposes that would be carried forward in all other documents related to the action such as the draft and final EISs and ROD (comparable to the provision in § 1501.5(c)(4) requiring tracking numbers for EAs). As discussed in greater detail in section II.C.4, CEQ proposed this provision because identification numbers can help both the public and agencies track the progress of an EIS for a specific action as it moves through the NEPA process. In the final rule, CEQ has retained the proposal and, in response to comments, added a clause to also require use of the unique identification numbers in any agency databases or tracking systems.

Eighth, CEQ proposed to move and edit the second sentence regarding supplemental notices in 40 CFR 1507.3(f)(3) (2022) to paragraph (f), ''Notices of withdrawal or cancellation,'' to require that an agency publish in the **Federal Register** a notice of withdrawal of the NOI or a supplemental notice to inform the public that it is no longer considering a proposed action and, therefore, discontinuing preparation of an EIS. CEQ proposed this requirement to codify common agency practice and to increase transparency to the public. CEQ is finalizing this change as proposed because agencies should publish such notices if they withdraw, cancel, or otherwise cease the consideration of a proposed action before completing a final EIS in order to provide notice to the public that a proposed action is no longer under consideration. Such a notice does not need to be lengthy, but should clearly reference the original NOI, name of the project in the original notice, unique identification number, and who to contact for additional information.[78]

Finally, CEQ proposed to move paragraph (g) of 40 CFR 1501.9 (2020) on NOI revisions to § 1502.4(g), updating the cross references and changing ''significant'' to ''important'' and ''impacts'' to ''effects,'' which CEQ indicated was a clarifying, non-substantive edit. CEQ makes this change in the final rule, consistent with the NPRM to align the text with the changes to § 1502.9(d)(1)(ii).

5. Timing (§ 1502.5)

CEQ proposed to make three clarifying amendments to § 1502.5. First, in paragraph (a), CEQ proposed to add ''*e.g.,*'' in the parenthetical ''(go/no-go).'' CEQ proposed this amendment in response to agency feedback during the development of the proposed rule to clarify that the feasibility analysis and the ''go/no-go'' stage may not occur at the same point in time and may differ depending on what is included in the feasibility analysis and how the agency has structured that analysis. CEQ proposed this change for consistency with the longstanding practice that agencies have discretion to decide the appropriate time to begin the NEPA analysis, but also that agencies should integrate the NEPA process and other planning or authorization processes early. *See* § 1501.2(a).

Two commenters recommended CEQ delete the introductory paragraph of § 1502.5 encouraging agencies to commence preparation of an EIS as close as practicable to the time the agency is developing or receives a proposal, as well as the feasibility analysis and go/no-go language in

[78] *See, e.g.,* U.S. Forest Serv., Powell Ranger District; Utah; Powell Travel Management Project; Withdrawal of Notice of Intent to Prepare an Environmental Impact Statement, 87 FR 1109 (Jan. 10, 2022); U.S. Army Corps of Eng'rs, Withdrawal of the Notice of Intent to Prepare an Environmental Impact Statement for the Carpinteria Shoreline, a Feasibility Study in the City of Carpinteria, Santa Barbara County, CA, 86 FR 41028 (July 30, 2021).

paragraph (a). The commenters asserted that the feasibility analysis stage is generally considered an early stage of project management and suggested this stage was pre-proposal and therefore pre-NEPA. The commenters explained that this stage can and should take considerable time, and therefore should not be covered by the time limits, or agencies will likely miss the statutory deadlines. The commenters asserted that the NEPA process should not commence until this stage is completed. One of these commenters further pointed to the statutory definition of ''proposal'' added in 2023 and asserted this should be the starting point for the timing requirements for EISs and EAs. The commenter further asserted that CEQ should encourage pre-NEPA ''environmental considerations'' early in agency planning and decision making prior to issuing a NOI to file an EIS.

In the final rule CEQ revises § 1502.5(a) to revise ''at the feasibility analysis (go/no-go) stage'' to instead refer to the feasibility analysis or equivalent stage evaluating whether to proceed with the project. This revised text improves the clarity of the sentence and recognizes that feasibility analyses are not a component of project authorizations for every agency. The regulations have long encouraged agencies to integrate NEPA into their planning and decision-making processes. As CEQ advised in the 2020 regulatory revisions, agencies often begin ''pre-NEPA'' work before they make the formal determination to prepare an EIS by issuing a NOI. As discussed in section II.D.4, agencies must commence this work before issuing an NOI in order to meet the content requirements for an NOI. CEQ does not consider it necessary to delineate these phases in the regulations, as the commenter suggests, because agencies have decades of experience in developing EISs consistent with this provision, and CEQ is unaware of any agency concerns with or practical problems created by this provision.

Second, CEQ proposed to add ''complete'' in the first sentence of paragraph (b) to clarify that agencies must begin preparing an EIS after receiving a complete application, though agencies can elect to begin the process earlier if they choose to do so. CEQ also proposed to add ''together and'' in the second sentence of paragraph (b) to clarify further that agencies should work ''together and with'' potential applicants and other entities before receiving the application. CEQ proposed these changes based on its experience that early conversations and coordination among Federal agencies, the applicant, and other interested entities can improve efficiencies in the NEPA process and ultimately lead to better environmental outcomes. Additionally, CEQ noted that similar to the proposed change to paragraph (a), the proposed changes to paragraph (b) are consistent with other directions in the regulations to integrate the NEPA process and other processes early. *See* §§ 1500.5(h)–(i), 1501.2(a).

One commenter requested CEQ revise paragraph (b) in order to ensure there are no unnecessary delays in proceeding. The commenter suggested language be added to require agencies to commence review of the application and decide on its completeness within 30 days and issue a NOI within 6 months. The commenter also requested CEQ add language requiring agencies to establish objective measures in their regulations for determining when an application is complete.

CEQ declines to add this level of specificity in its regulations because the regulations apply to a broad range of agencies and contexts, and these specific requirements may not work for all of them. Instead, it is best left to agency-specific NEPA procedures or agency program regulations to articulate these sorts of deadlines. In the final rule, CEQ adds ''complete'' in paragraph (b) consistent with its proposal.

6. Page Limits (§ 1502.7)

CEQ proposed to amend § 1502.7, to align the text with section 107(e) of NEPA, which sets page limits for EISs at 150 pages or 300 pages for proposals of extraordinary complexity, not including citations or appendices. 42 U.S.C. 4336a(e). CEQ proposed to remove the requirement for the senior agency official of the lead agency to approve longer documents for consistency with the statute, which does not provide a mechanism to approve longer documents.

CEQ received a number of comments on page limits. Some commenters expressed concerns that the page limits would prevent agencies from conducting the requisite analysis under NEPA. Some of those commenters requested that CEQ retain the provision allowing the senior agency official to authorize an exceedance of the page limits. Other commenters expressed support for the page limits and requested that CEQ impose additional requirements to ensure agencies do not circumvent the page limits. Commenters also requested CEQ define ''extraordinary complexity.''

CEQ makes the changes as proposed in the final rule. The NEPA statute sets clear page limits for EAs and EISs and does not establish a mechanism for exceeding those page limits. Allowing senior agency officials to approve an exceedance of the page limits would undermine the direction in the statute and CEQ's longstanding goals of developing concise, readable NEPA documents that will inform the decision maker and the public. CEQ is confident that agencies can both meet page limits and fully consider the elements required by the statute and these regulations.

CEQ has long encouraged and continues to strongly encourage agencies to prepare EISs that are both comprehensive and informative, as well as understandable, to the decision maker and the public. Agencies should consider establishing within their procedures mechanisms to do so that will be most effective for their programs and activities. These mechanisms could include placing technical analyses in appendices and summarizing them in plain language in the EIS; making use of visual aids, which are excluded from the definition of ''page'' provided by § 1508.1(bb), including sample images, maps, drawings, charts, graphs, and tables; and using interactive documents, insets, colors, and highlights to create visually interesting ways to draw attention to key information and conclusions. Agencies should consider making EISs and technical appendices machine readable, where possible and feasible, to facilitate data sharing and reuse in future analyses.

7. Writing (§ 1502.8)

CEQ proposed minor edits to § 1502.8 to change ''may'' to ''should'' and change ''graphics'' to ''visual aids or charts'' for consistency with modifications proposed in § 1502.12 regarding visual aids or charts. One commenter expressed support for the proposed changes to require agencies to use plain language and encourage use of visual aids and charts. However, this commenter stated that use of visual aids and charts must be designed to be understandable to non-technical audiences, pointing to documents they have reviewed that included tables that are difficult to understand.

CEQ makes the edits as proposed in § 1502.8 in the final rule. The CEQ regulations have long required agencies to write environmental documents in plain language as a means to preparing readable, concise, and informative documents. *See, e.g.,* §§ 1500.4 and 1502.8. Agencies commonly use visual aids, such as graphics, maps, and pictures, throughout their environmental documents. CEQ agrees with the commenters that the visual

aids and charts must be understandable but does not consider it necessary to make additional changes to the regulatory text since the text indicates that the purpose of visual aids and charts is to enable decision makers and the public to readily understand the EIS. EISs must be written in plain language, and this requirement would also apply to visual aids and charts.

8. Draft, Final, and Supplemental Statements (§ 1502.9)

CEQ did not propose any substantive changes to paragraph (a) of § 1502.9 and did not receive any comments on it. Therefore, CEQ finalizes paragraph § 1502.9(a) as proposed.

CEQ proposed to revise paragraph (b) addressing draft EISs by deleting ''as interpreted'' from the requirement that draft EISs meet the requirements for final EISs in section 102(2)(C) of NEPA ''as interpreted in the regulations in this subchapter.'' 42 U.S.C. 4332(2)(c). CEQ proposed to delete this clause as inappropriately restrictive and for consistency with the same proposed change in §§ 1500.6 and 1502.2. CEQ makes this change in the final rule for the reasons discussed in section II.B.6 with respect to deleting the same phrase in § 1500.6.

CEQ also proposed to add the phrase ''the agency determines that'' to the introductory clause of the third sentence of § 1502.9(b) so that the beginning of the sentence would read, ''If the agency determines that a draft statement is so inadequate as to preclude meaningful analysis.'' CEQ proposed this addition to clarify that it is the agency preparing a draft EIS that determines a draft statement requires supplementation to inform its decision-making process.

A commenter suggested additional language for the second sentence of paragraph (b) to clarify that a lead agency must work with a cooperating agency to develop the proposed action and subsequent range of all alternatives. Another commenter recommended CEQ add the phrase ''may identify a preferred alternative'' to the end of § 1502.9(b) to clarify that agencies have the authority to identify a preferred alternative in a draft EIS.

In the final rule, CEQ revises paragraph (b) consistent with its proposed clarifying changes. CEQ declines to make the edits suggested by the commenters as §§ 1501.7 and 1501.8 address the roles of lead and cooperating agencies, and § 1502.14(d) already requires agencies to identify a preferred alternative or alternatives in the draft EIS, if one or more exists.

In § 1502.9(c), CEQ proposed to clarify that a final EIS should ''consider and respond'' to comments rather than just ''address'' them, thereby restoring language from the 1978 regulations and aligning the language with text in § 1503.4(a) regarding consideration of comments. The proposed rule explained that the 2020 rule did not explain the change from ''consider and respond'' to ''address,'' [79] and CEQ is concerned that it could be read as weakening the standard for responding to comments within § 1502.9 and in § 1503.4. CEQ makes this change in the final rule for consistency with § 1503.4(a).

One commenter suggested that CEQ replace ''responsible opposing view'' in paragraph (c) with ''relevant and non-frivolous opposing view'' to promote transparency and remove subjectivity regarding the definition of ''responsible.'' In the final rule, CEQ revised paragraph (c) consistent with its proposed clarifying changes. CEQ declines to change ''responsible,'' which has been in the regulations since 1978, and CEQ has not heard that there is confusion regarding the meaning of this term or that it is creating practical problems for agencies implementing NEPA or the public seeking to participate in NEPA reviews. CEQ interprets this phrasing to mean that there is a reasoned basis for the opposing view, not one that is arbitrary.

Paragraph (d) of § 1502.9 and its subparagraphs address the standards for supplemental EISs. While CEQ did not propose changes to paragraph (d)(1), a commenter suggested that the phrase ''if a major Federal action remains to occur'' is vague. In the final rule, CEQ revises the text in paragraph (d)(1) addressing when an agency has to consider a supplemental EIS. In the 2020 rule, CEQ added a clause to specify that agencies prepare supplements if an action ''remains to occur.'' Upon further consideration, CEQ revises this phrase in the final rule to ''is incomplete or ongoing'' to provide more clarity and specifically identify the circumstances when an agency needs to consider supplementation. CEQ intends the phrase ''incomplete and ongoing'' to have the same substantive meaning as ''remains to occur,'' and notes that courts have used both phrases. *See, e.g., Marsh* v. *Or. Nat. Res. Council,* 490 U.S. 360, 373 (1989) (holding that supplementation may be required ''[i]f there remains major Federal action to occur''; *Norton* v. *S. Utah Wilderness All.,* 542 U.S. 55, 73 (2004) (citing *Marsh* and holding that an agency is not required to supplement when the action in question is ''completed,'' and is no longer ''ongoing'').

In paragraph (d)(1)(ii), CEQ proposed to replace the word ''significant'' with ''important'' and ''impacts'' with ''effects'' (except where ''impact'' is used as part of the term FONSI) for consistency, as discussed in section II.A. CEQ also proposed to add ''substantial or'' before ''important new circumstances or information,'' for consistency with language in section 108(1) of NEPA, which confirms that an agency may rely on the analysis in an existing programmatic environmental document for five years without having to supplement or reevaluate the analysis, provided no substantial new circumstances or information exists. 42 U.S.C. 4336b(1).

Two commenters indicated that the proposed rule does not align with the statutory language in section 108 of NEPA regarding supplementation and reevaluation, because that section does not include the words ''or important'' before ''new circumstances.'' *See* 42 U.S.C. 4336b. Two commenters opposed the replacement of ''significant'' with ''substantial,'' expressing concern that it will increase uncertainty. A few commenters also requested that CEQ add definitions for ''substantial changes,'' ''substantial or important new circumstances,'' and ''environmental concerns are not substantial.''

In the final rule, CEQ revises paragraph (d)(1)(ii) by replacing ''significant'' with ''substantial'' to track the language of section 108(1) of NEPA requiring agencies to supplement if there are substantial new circumstances or information about the significance of adverse effects that bear on the analysis. 42 U.S.C. 4336b(1). CEQ interprets this language as consistent with the longstanding standard for supplementation and considers it a non-substantive change that clarifies one of the standards for supplementation of an EIS. Directly incorporating the language from section 108(1) of NEPA also avoids creating an implication that there are different supplementation standards for programmatic environmental documents and other environmental documents. As noted, the language in section 108(1) is consistent with longstanding practice, so there are not different standards for supplementation for programmatic environmental documents. 42 U.S.C. 4336b(1). This approach also obviates the need for the definitions requested by commenters because agencies have extensive experience applying the supplementation standard.

One commenter suggested that CEQ revise § 1502.9(d)(1)(ii) to clarify that

[79] *See* CEQ, 2020 Final Rule, *supra* note 39, at 43364–65.

supplementation is not limited to new environmental effects and that it also would apply to situations where the purpose and need or the alternatives are changed. CEQ declines to edit this paragraph to clarify this point because this scenario would be covered by the other criterion for supplementation in paragraph (d)(1)(i). Consistent with existing agency practice, agencies should continue to focus on whether a change to the proposed action could have environmental effects that have not been analyzed in determining whether changes to the proposed action require supplementation.

Another commenter noted that the cross-reference to the Emergencies section, § 1506.11, was incorrect in proposed paragraph (d)(3). In the final rule, CEQ fixes the cross reference and revises ''alternative procedures'' to ''alternative arrangements'' for consistency with the phrasing of § 1506.11.

CEQ proposed to redesignate paragraph (d)(4) of 40 CFR 1502.9 (2020) as paragraph (e) of § 1502.9 and title it ''Reevaluation'' to clarify that reevaluation is a separate tool to document new information when supplementation is not required. CEQ proposed to add in paragraph (e) that agencies may ''reevaluate'' an EIS in part to determine that changes to the proposed action or new circumstances or information relevant to environmental concerns are not ''substantial'' or ''that the underlying assumptions of the analysis remains valid,'' and therefore, the agency does not need to prepare a supplemental EIS. CEQ proposed this language in part for consistency with section 108(2) of NEPA's rule that an agency may rely on programmatic documents that are more than five years old if it reevaluates the underlying analysis. 42 U.S.C. 4336b(2). However, while section 108(2) requires reevaluation for programmatic documents more than five years old, CEQ proposed to leave agencies discretion over whether and when to reevaluate non-programmatic documents. 42 U.S.C. 4336b(1).

One commenter requested that CEQ revise paragraph (e) to clarify that when agencies reevaluate their NEPA documents, supplementation is required if the changes are substantial or the underlying assumptions of the analysis do not remain valid. A couple of commenters requested specific wording changes, including adding ''or important'' after ''substantial'' in the first sentence of paragraph (e) and changing ''the agency should'' to ''the agency must document the finding.'' Another commenter asked CEQ to revise paragraph (e) to clarify that new circumstances or information in the absence of a major Federal action do not trigger a requirement to reevaluate an EIS. Another commenter recommended language to clarify that reevaluation should only be permitted in circumstances for which the proposed action has not changed physical location.

In the final rule, CEQ revises paragraph (e) to simplify the paragraph on reevaluation and provide that agencies may reevaluate EISs to determine that supplementation is not required. This text is substantively the same as the proposed rule, but avoids unnecessary repetition of the standard for supplementation and avoids any potential confusion that there is an independent standard for reevaluation. Agencies may use reevaluation to document why a change to an action or new information does not require supplementation. Additionally, agencies may use reevaluation to conduct additional analysis to determine whether the change to the action or the new information meets either of the criteria for supplementation; in such cases, the agency would then prepare a supplemental EIS. Some agency procedures already provide such processes and § 1507.3(c)(10) provides that agencies must include such processes in their NEPA procedures, as appropriate. CEQ revises the last sentence of paragraph (e) to clarify that agencies also may prepare a supplemental EA and FONSI to reevaluate an EIS. Some agencies already do this in practice, and CEQ is revising this language in the final rule to codify the practice.

One commenter provided general feedback on § 1502.9 recommending CEQ include language requiring that final EISs and reevaluated EISs adhere to the regulatory requirements in place at the time the agency develops the supplement. CEQ declines to make these changes as agencies are in the best position to determine which regulatory requirements apply on a case-by-case basis, consistent with § 1506.12, which addresses the effective date of the final rule.

9. Recommended Format (§ 1502.10)

In § 1502.10, CEQ proposed to revise the recommended format of an EIS. CEQ proposed to add cross references to the relevant regulatory sections at the end of paragraphs (a)(1), (a)(2), and (a)(4) through (a)(6). In paragraph (a)(7), CEQ proposed to strike the reference to ''submitted alternatives, information, and analyses'' given the proposed revisions to § 1502.17. CEQ proposed to move appendices to paragraph (a)(7), include the summary of scoping information required by § 1502.17 and the list of preparers required by § 1502.18 in appendices, rather than the main body of the EIS, and add cross references to the relevant regulatory sections. Therefore, CEQ proposed to strike paragraphs (a)(8) and (a)(9) of 40 CFR 1502.10 (2020) referencing the list of preparers and appendices since these lists would be addressed in paragraph (a)(7). Finally, CEQ proposed to revise paragraph (b) to require agencies to include all of the sections referenced in paragraph (a) if they choose to use a different format.

CEQ received minimal comments on the proposed changes to § 1502.10, and the few comments submitted expressed support for the proposed changes. One commenter also requested that CEQ require the EIS format for EAs. CEQ makes the changes to § 1502.10 as proposed. CEQ declines to apply this section to EAs as well because § 1501.5 already addresses the required sections of an EA.

10. Cover (§ 1502.11)

CEQ proposed to revise § 1502.11(a) to clarify that the list of ''responsible agencies'' on an EIS cover are the ''lead, joint lead, and any cooperating agencies.'' CEQ did not receive comments specific to this proposal but has added the phrase ''to the extent feasible'' before ''any cooperating agencies'' to address the rare circumstance in which there may be such a large number of cooperating agencies that listing all of them on the cover would make the cover unreadable. In such circumstances, an agency may include a note on the cover that identifies where in the EIS a list of the cooperating agencies is found.

Consistent with the proposed change in § 1502.4(e)(10) to require a unique identification number for tracking purposes, CEQ proposed to amend paragraph (g) to require the cover to include the identification number identified in the NOI. As discussed further in sections II.C.4 and II.D.4, CEQ is including the requirement for unique identification numbers in the final rule, and therefore adds this requirement to § 1502.11(g) as proposed. The inclusion of the identification number on the cover clarifies the relationships of documents to one another, helps the public and decision makers easily track the progress of the EIS as it moves through the NEPA process, and facilitates digitization and analysis.

CEQ proposed to strike the requirement in paragraph (g) of 40 CFR 1502.11 (2020) to include on the cover

of the final EIS the estimated preparation cost. Multiple agencies requested this change during development of the proposed rule. The 2020 rule added this requirement stating that including estimated total costs would be helpful for tracking such costs, and that agencies could develop their own methodologies for tracking EIS preparation costs in their agency NEPA procedures.[80] However, Federal agency commenters stated that agencies typically do not estimate total costs, that they are difficult to monitor especially when applicants and contractors are bearing some of the cost, that the methodology for estimating costs is inconsistent across agencies, and that providing these estimates would be burdensome. At least one agency commenter noted that agencies inconsistently implemented a similar requirement in E.O. 13807,[81] which undermined the utility of the estimates, that tracking costs added a significant new burden on staff, and that it was not clear whether tracking such costs provided useful information for agencies or the public.

Commenters both supported and opposed the proposal to remove the requirement to include the estimated preparation costs on the cover of the final EIS. Commenters who supported removing the requirement stated that the requirement added in 2020 imposed a substantial administrative burden on agencies and increased the length of the EIS preparation process because accurately tracking the total cost of preparation is difficult and labor-intensive. A few commenters expressed support for removing the requirement but suggested that, in order to facilitate transparency, CEQ could encourage agencies to include estimated cost information in the EIS, indicating this information could easily be included in an appendix.

Commenters who opposed the removal expressed that the requirement improves transparency and accountability and also suggested that tracking costs can improve the efficiency of the NEPA process. One commenter also asserted that CEQ failed to explain why it is no longer necessary to fulfill the data gap that was outlined in the 2020 rulemaking as a basis for adding the requirement.

As stated in the proposed rule, CEQ does not consider EIS costs to be germane to the purpose of an EIS. Requiring that they be included on the cover could incorrectly lead the public and decision makers to believe that those costs provide information about the proposed action addressed in the EIS. In general, the purpose of the cover is to indicate the subject matter of the document and provide the public with an agency point of contact, provide a short abstract of the EIS, and indicate the date by which the public must submit comments. Further, CEQ was concerned that requiring agencies to calculate costs may unnecessarily add time and expense to the EIS preparation process, particularly where aspects of an environmental review serve multiple purposes, and allocating costs to NEPA compliance and other obligations may be complicated.

CEQ recognizes the value in gathering information on overall costs, trends in costs, and approaches that can reduce costs, as this can provide a full picture of how and whether agencies are effectively using their resources, including to conduct environmental reviews. Each agency should track and monitor these costs through their own procedures and mechanisms and consult with CEQ about any lessons learned to inform CEQ's ongoing evaluation of the efficiency and effectiveness of the NEPA process. However, CEQ does not consider requiring in the NEPA regulations that agencies publish costs on the cover of EISs to be the appropriate mechanism to develop that information.

CEQ considered the comments it received and is removing the requirement to include costs from paragraph (g). Removing this requirement does not preclude agencies from developing cost information or including it in an EIS if they deem it appropriate, but CEQ is concerned that the increased administrative burden of tracking costs, including the potential additional time needed to gather information, will unnecessarily delay NEPA processes. Further, the lack of consistent methodology across agencies coupled with the significant burden to develop consistent methodology, for which CEQ lacks the specialized expertise to do so, limits the utility of requiring agencies to present this information.

11. Summary (§ 1502.12)

CEQ proposed modifications to § 1502.12 to clarify the purpose of the summary and update what elements agencies should include in the summary, with a goal of creating summaries that are more useful to the public and agency decision makers. CEQ proposed these changes so that the summary would provide the public and agency decision makers with a clear, high-level overview of the proposed action and alternatives, the significant effects, and other critical information in the EIS.

In the second sentence of § 1502.12, CEQ proposed to replace the word ''stress'' with ''include'' in describing the contents of the summary to clarify that an adequate and accurate summary may include more than what is listed in § 1502.12. Next, CEQ proposed to clarify that the summary should ''summarize any disputed issues,'' ''any issues to be resolved,'' and ''key differences among alternatives.''

CEQ proposed these changes to provide the public and decision makers with a more complete picture of the disputed issues, rather than focusing on ''areas of'' disputed issues, and to facilitate informed decision making and transparency. CEQ also proposed these edits for consistency with § 1502.14(b), which requires agencies to discuss alternatives in detail. CEQ explained in the proposed rule that summarizing the key differences between alternatives would enhance the public's and decision makers' understandings of the relative trade-offs between the alternatives that the agency considered in detail.

One commenter expressed concern with CEQ's proposal stating that summarizing ''any'' issue trivializes the analytical process and makes the summary more like a catalog of issues raised, regardless of how ill-informed or baseless the issues may be.

CEQ finalizes the changes as proposed. CEQ disagrees with the commenter's interpretation of the use of the term ''any.'' CEQ's intent in using the qualifier ''any'' is to acknowledge that some EISs will not have any disputed issues or issues for resolution. It is not CEQ's intent for agencies to include a laundry list of every minor issue. Rather, CEQ intends the summary to explain the big-picture and important issues that the EIS addresses.

CEQ also proposed to add language to the second sentence to require that the summary identify the environmentally preferable alternative or alternatives. CEQ proposed this addition to enhance the public's and decision makers' understandings of the alternative or alternatives that will best promote the national environmental policy, as expressed in section 101 of NEPA, by providing a summary of that alternative early on in the document. As discussed further in section II.D.13, CEQ is finalizing its proposal to require agencies to identify the environmentally preferable alternative in the EIS, and therefore finalizes this addition to § 1502.12 as proposed.

[80] *Id.* at 43329.

[81] E.O. 13807, *supra* note 14.

CEQ proposed to add a third sentence to § 1502.12 to require agencies to write the summary in plain language and encourage use of visual aids and charts. CEQ proposed this addition to make EIS summaries easier to read and understand.

One commenter expressed support for the proposed changes to require agencies to write the summary in plain language and to encourage use of visual aids and charts. However, this commenter stated that agencies must design their use of visual aids and charts to be understandable to non-technical audiences, pointing to documents they have reviewed that included tables that are difficult to understand.

CEQ adds the proposed sentence to § 1502.12 in the final rule. The CEQ regulations have long required agencies to write environmental documents in plain language as a means to preparing readable, concise, and informative documents. *See, e.g.,* 40 CFR 1500.4 and 1502.8 (2019). Agencies commonly use visual aids, such as graphics, maps, and pictures, throughout their environmental documents. CEQ agrees with the commenters that visual aids and charts should be understandable but does not consider it necessary to make additional changes to the regulatory text. Section 1502.8 explains that agencies should use visual aids or charts in EISs so that decision makers and the public can readily understand them, which includes in the summary.

Finally, similar to other changes regarding page limits, CEQ proposed to allow agencies flexibility in the length of a summary. CEQ proposed to remove the 15-page limitation on summaries and instead to encourage that summaries not exceed 15 pages. Although summaries should be brief, CEQ acknowledged with this proposed change that some proposed actions are more complex and may require additional pages.

One commenter suggested that CEQ require the summary to include a consistency analysis that compares the proposed action and alternatives with applicable State and county resource management plans and State statutes. To accommodate their suggestion, the commenters indicated that the page limit might need to be adjusted to more than 15 pages.

CEQ makes the change to the length of summaries as proposed to provide agencies with flexibility to vary the length of documents based on the complexity of the action. Because summaries count toward the page limits set in § 1502.7, agencies have an incentive to keep summaries as short as possible while providing necessary information to the public and decision makers. While CEQ declines to require the summary to include a consistency analysis per the commenter's suggestion because it is inappropriately specific for government-wide regulations, the additional flexibility for length would accommodate such an approach, should an agency choose to do so.

12. Purpose and Need (§ 1502.13)

CEQ proposed to revise § 1502.13 to align the language with the text of section 107(d) of NEPA, which requires an EIS to include a statement that briefly summarizes the underlying purpose and need for the proposed agency action. *See* 42 U.S.C. 4336a(d).

CEQ received multiple comments requesting that CEQ revise § 1502.13 to revert to the 2020 rule's language providing that when an agency's statutory duty is to review an application for authorization, the agency must base the purpose and need on the applicant's goals and the agency's authority. CEQ revised this language in the Phase 1 rulemaking and declines to restore the 2020 language for the reasons discussed in the Phase 1 rulemaking, the Phase 1 Response to Comments, and the Phase 2 Response to Comments. Additionally, CEQ declines to include this language in the final rule because it is inconsistent with section 107(d) of NEPA. 42 U.S.C. 4336a(d). CEQ revises § 1502.13 as proposed.

One commenter requested CEQ clarify that the purpose and need of a proposed action should define or limit the reasonableness of the range of alternatives, which is identified in the statutory amendments. CEQ addresses alternatives in § 1502.14 and declines to edit this section to address alternatives. Another commenter requested CEQ add a direction for agencies to use narrow purpose and need statements that limit the potential reasonable alternatives. CEQ declines to make this change because it would be inconsistent with section 107(d) of NEPA and would undermine the discretion and judgment that agencies appropriately exercise in defining the purpose and need for their actions. *See* 42 U.S.C. 4336a(d).

13. Alternatives Including the Proposed Action (§ 1502.14)

CEQ proposed revisions to § 1502.14 to promote the rigorous analysis and consideration of alternatives. To that end, CEQ proposed to reintroduce to § 1502.14 much of the 1978 text that the 2020 rule removed and to modernize it to ensure agency decision makers are well-informed. Many commenters on the Phase 1 rule requested CEQ revise this provision to revert to the 1978 language or otherwise revise it to ensure agencies fully explore the reasonable alternatives to their proposed actions.[82]

First, CEQ proposed to revise the introductory paragraph of § 1502.14 to reinstate the language from the 1978 regulations that provided that the alternatives analysis ''is the heart of the environmental impact statement.'' As CEQ explained in the NPRM, while the 2020 rule described this clause as ''colloquial language'' to justify its removal,[83] CEQ has reconsidered its position and now considers the language to be an integral policy statement that emphasizes the importance of the alternatives analysis to allow decision makers to assess a reasonable range of possible approaches to the matters before them, and notes that numerous court decisions quoted this language from the 1978 regulations in stressing the importance of the alternatives analysis. *See, e.g., Wyoming* v. *U.S. Dep't of Agric.,* 661 F.3d 1209, 1243 (10th Cir. 2011). The proposed rule also noted that numerous commenters on the 2020 rule and the 2022 Phase 1 rule supported the inclusion of this language.[84]

Multiple commenters supported restoring the language that describes the alternatives section as the heart of the EIS, citing pre-1978 case law and asserting that without evaluation of reasonable alternatives, the NEPA process loses its potential to truly inform better decision making. Another commenter asserted that robust analysis of the relative environmental effects of a range of reasonable alternatives is necessary to ensure the EIS serves the regulatory purpose of providing for meaningful public input and informed agency decision making. In the final rule, CEQ reinstates the language from the 1978 regulations to the introductory paragraph of § 1502.14, as proposed.

Second, CEQ proposed a clarifying edit in the second sentence of the introductory paragraph to replace ''present the environmental impacts'' with ''identify the reasonably foreseeable environmental effects'' for consistency with § 1500.2(e) and section 102(2)(C)(i) of NEPA. 42 U.S.C. 4332(2)(C)(i). CEQ did not receive comments specific to this proposal and makes this change in the final rule.

Third, in the introductory paragraph, CEQ proposed to add a third sentence

[82] *See* CEQ, Phase 1 Response to Comments, *supra* note 52, at 162.

[83] *See* CEQ, 2020 Final Rule, *supra* note 39, at 43330.

[84] *See, e.g.,* CEQ, 2020 Response to Comments, *supra* note 69, at 274; CEQ, Phase 1 Response to Comments, *supra* note 52, at 55.

stating that the alternatives analysis should sharply define issues for the decision maker and the public and provide a clear basis for choice among the alternatives. CEQ proposed reintroducing this language from the 1978 regulations because it provides an important policy statement, concisely explaining the goals of the alternatives analysis. CEQ received generally supportive comments on this proposal, and CEQ makes this edit to the third sentence of the introductory paragraph in the final rule.

Fourth, CEQ proposed in paragraph (a) to restore from the 1978 regulations the clause that agencies must ''rigorously explore and objectively evaluate'' reasonable alternatives at the beginning of the first sentence. CEQ proposed to reinsert this language because it provides a standard that agencies have decades of experience applying in the analysis of alternatives.

Some commenters expressed general support for restoring the requirement to rigorously explore and objectively evaluate reasonable alternatives in paragraph (a). Other commenters opposed the restoration of this language, asserting that it is arbitrary and subjective and has the potential to increase litigation over whether an agency met the subjective test of rigorous and objective evaluation. CEQ makes this change in the final rule because restoring this language will help ensure agencies conduct a robust analysis of alternatives and their effects, rather than a cursory, box-checking analysis.

One commenter asserted that the first sentence of paragraph (a) should refer to the definition of ''reasonable alternatives'' to make it clear that alternatives proposed in scoping that do not meet the purpose and need and that are not technically and economically feasible should be eliminated from further consideration. CEQ declines to add a cross reference to the definition of ''reasonable alternatives'' as unnecessary because the phrase ''reasonable alternatives'' is a defined term in the regulations, and the definition applies whenever the regulations use the term.

Fifth, CEQ proposed to add two additional sentences to paragraph (a). CEQ proposed the first sentence to clarify that agencies need not consider every conceivable alternative to a proposed action, but rather must consider a reasonable range of alternatives that fosters informed decision making. CEQ proposed to add this sentence to replace the first sentence in paragraph (f) of 40 CFR 1502.14 (2020), which required agencies to limit their consideration to a reasonable number of alternatives. CEQ proposed this language for consistency with longstanding CEQ guidance [85] and to reinforce that the alternatives analysis is not boundless; the key is to provide the decision maker with reasonable options to ensure informed decision making. CEQ did not receive specific comments on this proposed change and adds the proposed new sentence to § 1502.14(a).

CEQ also proposed a second new sentence in paragraph (a) to clarify that agencies have the discretion to consider reasonable alternatives not within their jurisdiction, but NEPA and the CEQ regulations generally do not require them to do so. CEQ explained that such alternatives may be relevant, for instance, when agencies are considering program-level decisions [86] or anticipate funding for a project not yet authorized by Congress.[87]

Several commenters opposed this proposal, asserting that if an agency has no authority to implement an alternative, it is unreasonable, and the agency should not consider it. One commenter stated that NEPA is a procedural statute that does not confer substantive authority; as such, NEPA cannot authorize an agency to pursue an action that is otherwise not authorized. Some commenters characterized consideration of alternatives outside the agency's jurisdiction as inefficient and a waste of agency resources. Others expressed that allowing consideration of such alternatives would be contrary to law, and the alternatives would not be consistent with the purpose and need of the proposal. Multiple commenters stated that *Public Citizen* supports the proposition that an agency's NEPA analysis is properly limited by the scope of the agency's authority and that, as such, CEQ's proposed language is in tension with this ruling as well as other case law. However, other commenters stated the opposite—that case law has well established that agencies may and in some cases must consider alternatives beyond the agency's jurisdiction.

CEQ adds this second new sentence to the end of § 1502.14(a) in the final rule to acknowledge that in limited situations, it may be appropriate for an agency to consider an alternative outside its jurisdiction. As noted in the proposed rule, CEQ anticipates that such consideration will occur relatively infrequently and notes that such alternatives would still need to be technically and economically feasible and meet the purpose and need for the proposed action, consistent with the definition of ''reasonable alternatives.'' CEQ's revision is intended to strike a balance; the final rule does not require agencies to consider alternatives outside their jurisdiction or preclude agencies from doing so. Further, the final rule retains the qualification that the agency need only consider reasonable alternatives.

Some commenters requested CEQ revise § 1502.14(a) to expressly comply with the statutory direction that alternatives must be technically and economically feasible and must meet the purpose and need of the proposal. 42 U.S.C. 4332(2)(C)(iii). The commenters stated the alternatives that do not meet those criteria are not consistent with the statute. CEQ declines to add additional language in § 1502.14(a) because the definition of ''reasonable alternatives'' already includes the requirement that an alternative be technically and economically feasible and meet the purpose and need. CEQ addresses additional comments on the definition of ''reasonable alternatives'' in section II.J.22.

Sixth, as noted earlier in this section, CEQ proposed to strike the requirement to limit consideration to a reasonable number of alternatives from paragraph (f) and to add a sentence to paragraph (a) directing agencies to consider a reasonable range of alternatives that fosters informed decision making. CEQ proposed to repurpose paragraph (f) to establish a requirement to identify the environmentally preferable alternative. In addition to proposing a new definition of ''environmentally preferable alternative'' in § 1508.1(*l*), CEQ proposed in this provision to describe elements that the environmentally preferable alternative may generally include. CEQ proposed to use ''or'' in the list to make clear that the environmentally preferable alternative need not include each delineated element and recognize that identifying the environmentally preferable alternative may entail making trade-offs in some cases. CEQ explained that it proposed this approach to provide agencies flexibility to rely on

[85] *See* CEQ, Forty Questions, *supra* note 5.

[86] *See, e.g.,* Fed. R.R. Admin., Final Program Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for the proposed California High-Speed Train System (2005), *https://hsr.ca.gov/programs/environmental-planning/program-eir-eis-documents-for-the-statewide-high-speed-rail-system-tier-1/final-program-environmental-impact-report-environmental-impact-statement-eir-eis-for-the-proposed-california-high-speed-train-system-2005/.*

[87] *See, e.g.,* U.S. Army Corps of Eng'rs, *Final Environmental Impact Statement for Savannah Harbor Expansion Project* (rev. July 2012), *https://www.sas.usace.army.mil/Missions/Civil-Works/Savannah-Harbor-Expansion/Final-Environmental-Impact-Statement/.*

their discretion and expertise to strike an appropriate balance in identifying the environmentally preferable alternative. Finally, CEQ proposed to clarify in paragraph (f) that the environmentally preferable alternative may be the proposed action, the no action alternative, or a reasonable alternative and that agencies may identify more than one environmentally preferable alternative as they deem appropriate.

Two commenters opposed the removal of ''limit their consideration to a reasonable number of alternatives'' in paragraph (f), asserting the statement is consistent with long-standing CEQ guidance and case law. The commenter further opined that the proposed paragraph (f) unnecessarily and inexplicably creates an open question regarding the number of alternatives an agency must consider and is likely to result in delays and increase litigation risk. One commenter stated that while they recognize that proposed paragraph (a) states that an agency does not need to consider every conceivable alternative, they asserted that it is helpful and consistent with judicial precedent to describe what constitutes a ''reasonable number.'' Another commenter asserted that removal of this language could lead agencies to develop more alternatives than are reasonable or necessary under NEPA.

CEQ declines to retain the statement that agencies must limit their consideration to a reasonable number of alternatives because CEQ considers the new sentence in paragraph (a) to provide clearer direction to agencies that they should consider a reasonable range of alternatives that foster informed decision making. Agencies have long had discretion to identify that range, and CEQ encourages agencies to identify and consider an appropriate range and explain why it considered and dismissed other alternatives so that agency decision makers and the public have a clear understanding as to how the agency arrived at the alternatives it considered in the document. While CEQ considers the new sentence in paragraph (a) to be clearer than the sentence previously included in paragraph (f), it does not interpret the new sentence to require agencies to consider a greater number of alternatives and does not intend for agencies to do so.

Multiple commenters supported proposed § 1502.14(f), while other commenters opposed it. Those who supported identification of the environmentally preferable alternative in the EIS expressed that earlier identification will provide more transparency to the public and allow the public an opportunity to comment on it. Some commenters also specifically supported the inclusion of addressing climate-change related effects and disproportionate and adverse effects on communities with environmental justice concerns in the examples of an environmentally preferable alternative.

Commenters who opposed the proposed language expressed concern that the concept of an environmentally preferable alternative would create new complexity and risk for litigation. They expressed that the identification of such an alternative is inherently subjective and would result in unnecessarily broad and time-consuming environmental reviews not supported by the statute. One commenter contended that the proposed new requirement inappropriately introduces political doctrine into the rule. One commenter suggested that if CEQ retains the requirement to identify the environmental preferable alternative in the EIS, that the final rule should be less prescriptive about the attributes of the environmentally preferable alternative.

CEQ adds the requirement to identify the environmentally preferable alternative or alternatives in the EIS in § 1502.14(f), and adds a clause to clarify that the agency must identify the environmentally preferable alternative from amongst the alternatives considered in the EIS. CEQ adds this clarification to address a misunderstanding by some of the commenters that the environmentally preferable alternative or alternatives that § 1502.14(f) requires agencies to identify is an additional alternative to the proposed action, no action, and reasonable alternatives that the agency would otherwise consider in an EIS. Rather, this provision requires agencies to identify which alternative amongst the proposed action, no action, and reasonable alternatives is the environmentally preferable alternative.

CEQ disagrees that requiring agencies to identify the environmentally preferable alternative in the EIS requires an inherently subjective determination, would result in unnecessarily broad and time-consuming environmental reviews, or introduces political doctrine. As CEQ noted in the proposed rule, the regulations have always required agencies to identify the environmentally preferable alternative in a ROD. 40 CFR 1505.2 (2019) and 40 CFR 1505.2 (2020). Agencies, therefore, have decades of experience with identifying the environmentally preferable alternative.

Moreover, CEQ views this information as helpful for decision makers and the public. Requiring agencies to identify the environmentally preferrable alternative in the draft EIS will enable public comment on this determination, which can include comment on whether the agency has adequately explained its conclusion or whether the determination is overly subjective. This new provision provides additional guidance on what this alternative entails, improving consistency and furthering NEPA's goal of ensuring that agencies make informed decisions regarding actions that impact the environment. Additionally, requiring the draft and final EIS to identify the environmentally preferable alternative will increase the transparency of the agency's decision-making process at an earlier stage, as well as provide an opportunity for the public to comment on the environmentally preferable alternative before the agency makes its decision.

CEQ disagrees that merely requiring agencies to identify which alternative or alternatives are environmentally preferable in the EIS, rather than only in the ROD, will increase litigation. The requirement in the final rule shifts the timing of identifying the environmentally preferred alternative or alternatives, but commenters have not explained why requiring agencies to make this identification earlier in the decision-making process would increase litigation risk, and CEQ does not view this shift as materially affecting litigation risk, since claims alleging a violation of NEPA must be brought after an agency issues a ROD. *See, e.g., Oregon Nat. Res. Council* v. *Harrell,* 52 F.3d 1499, 1504 (9th Cir. 1995). CEQ also notes the regulations do not require agencies to select the environmentally preferable alternative, just as the long-standing requirement for agencies to identify the environmentally preferable alternative in a ROD did not. Rather, identifying the environmentally preferable alternative will increase transparency and allow the public to comment on it.

Some commenters expressed that, overall, the proposed changes to § 1502.14 expand the alternatives analysis and could interfere with agencies' ability to meet the page and time limits. CEQ disagrees with the commenters' assertions because the revised regulations clarify, rather than expand, the requirements for alternatives analysis.

While CEQ did not propose edits to § 1502.14(b), one commenter requested that CEQ restore the 1978 language to ensure agencies devote substantial treatment to each alternative they considered in detail. The 2020 rule removed the substantial treatment

language and replaced it with the requirement to discuss each alternative. The commenter asserted that CEQ should restore this language because restoring direction to rigorously explore and objectively evaluate reasonable alternatives would ensure agencies take a hard look at their proposed action. CEQ declines to add this language. The language that CEQ adds to paragraph (a), requiring agencies to rigorously explore and objectively evaluate alternatives to foster informed decision making, addresses this concern and provides agencies sufficient direction to take a hard look at their proposed actions and alternatives.

14. Affected Environment (§ 1502.15)

CEQ proposed revisions to § 1502.15 to emphasize the use of high-quality information; clarify considerations of reasonably foreseeable environmental trends; and emphasize efficiency and concise documents. CEQ also proposed to divide § 1502.15 into separate lettered paragraphs.

First, CEQ proposed to move the first sentence of 40 CFR 1502.15 (2020) into paragraph (a) of § 1502.15 but did not propose any changes to the text. One commenter suggested changes to proposed paragraph (a) to more clearly describe that the affected environment must be a clear, unambiguous base case against which the agency can compare all effects equally and noted a particular example in which, the commenter asserted, confusion about this point had resulted in distorted analyses for a category of actions that did not provide the agency decision maker and the public an appropriate comparison of the proposed actions, no action alternatives, and reasonable alternatives. In the final rule, CEQ deletes ''or created'' in the first sentence because areas created by the proposed action or alternatives would constitute reasonably foreseeable effects, and are not part of the affected environment. CEQ notes, however, that the affected environment cannot be frozen in time and therefore must examine reasonably foreseeable environmental trends in the affected areas.

Second, CEQ proposed to add new paragraph (b) to encourages agencies to use high-quality information, including best available science and data—in recognition that high-quality information should inform all agency decisions—to describe reasonably foreseeable environmental trends. CEQ also proposed to note explicitly that such trends include anticipated climate-related changes to the environment and that agencies should provide relevant information, consistent with § 1502.21, when such information is lacking. CEQ proposed this paragraph to articulate clearly NEPA's statutory mandate that science inform agencies' decisions as part of a systematic, interdisciplinary approach. *See* 42 U.S.C. 4332(2)(A).

In the second sentence of paragraph (b), CEQ proposed to encourage agencies to use the description of baseline environmental conditions and reasonably foreseeable trends to inform its analysis of environmental consequences and mitigation measures by connecting the description of the affected environment with the agency's analysis of effects and mitigation. CEQ proposed this language to clarify that agencies should consider reasonably foreseeable future changes to the environment, including changes of climate conditions on affected areas, rather than merely describing environmental trends or climate change trends at the global or national level. When describing the proposed changes to paragraph (b) in the proposed rule, CEQ noted that, in line with scientific projections, accurate baseline assessment of the affected environment over an action's lifetime should incorporate forward-looking climate projections rather than relying on historical data alone.

A few commenters opposed proposed § 1502.15(b), with some commenters particularly taking issue with the singling out of climate change. A few commenters requested that the final rule require agencies to use high-quality information, with some further requesting that the regulations define high-quality information. One commenter expressed that it will be nearly impossible to use best available science, and another requested that Indigenous Knowledge be included as a source of high-quality information.

CEQ adds proposed § 1502.15(b) in the final rule with a few modifications. In the first sentence, CEQ changes ''should'' to ''shall'' before ''use high-quality information'' for consistency with § 1506.6 (proposed as § 1502.23) and modifies the clause providing examples of high-quality information for consistency with the changes to the examples CEQ makes in § 1506.6, as discussed in section II.H.4. The final rule includes ''reliable data and resources, models, and Indigenous Knowledge'' as examples of high-quality information in lieu of the proposed phrase ''including the best available science and data.'' As noted in section II.H.4, this change incorporates the language of section 102(2)(E) of NEPA and is consistent with section 102(2)(D) of NEPA. 42 U.S.C. 4332(2)(D)–(E). Peer-reviewed studies and models are examples of reliable data and resources.[88] The final rule also replaces ''lacking'' with ''incomplete or unavailable'' for consistency with the language of § 1502.21, which the sentence cross-references. CEQ declines to remove the example of climate change from this sentence. Because climate change has implications for numerous categories of effects—from species to water to air quality—it is a particularly important environmental trend for agencies to consider in addressing the affected environment.[89] *See* 42 U.S.C. 4321, 4331, 4332(2)(C)(iv). Lastly, CEQ includes the third proposed sentence in the final rule but uses ''affected environment'' instead of ''baseline'' and describes existing ''environmental conditions, reasonably foreseeable trends, and planned actions in the area'' as examples of the affected environmental that should inform the agency's analysis of environmental consequences and mitigation measures.

Third, CEQ proposed to move the second through fourth sentences of 40 CFR 1502.15 (2020) to new paragraph (c) and revise the second sentence to divide it into two sentences to enhance readability. In the first sentence of paragraph (c), CEQ proposed minor revisions to clarify that agencies may combine the affected environment and environmental consequences sections in an EIS. In the second sentence, CEQ proposed to clarify that the description ''should,'' rather than ''shall'', be no longer than necessary to understand the ''relevant affected environment'' and the effects of the alternatives.

One commenter disagreed with allowing agencies to combine the affected environment and environmental consequences sections of the EIS. The commenter asserted that agencies should discuss the two issues separately so that it is clear in the EIS how much attention is paid to each section and in order to ''force the agency to present actual'' effects in the EIS. The commenter asserted that agencies will provide more material on the affected environment instead of describing effects.

CEQ makes the change as proposed in § 1502.15(c) of the final rule. The final rule allows but does not require

[88] *See, e.g.,* OMB, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 FR 8452 (Feb. 22, 2002); OMB, Final Information Quality Bulletin for Peer Review, 70 FR 2664 (Jan. 14, 2005); and OMB, M–19–15, Improving Implementation of the Information Quality Act (2019), *https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf.*

[89] *See, e.g.,* U.S. Glob. Change Rsch. Program, Fifth National Climate Assessment (2023), *https://nca2023.globalchange.gov.*

agencies to combine the description of the affected environment with the analysis of environmental consequences. CEQ added this provision in the 2020 regulations to promote more efficient documents, and CEQ encourages agencies to reduce redundancy in their documents and provide clear and concise but thorough descriptions in the EIS. CEQ disagrees that allowing agencies to combine these discussions also allows them to give more weight to one section or the other. Agencies must thoroughly discuss both the affected environment and the environmental consequences of their proposed actions and alternatives to meet the requirements of both §§ 1502.15 and 1502.16.

15. Environmental Consequences (§ 1502.16)

CEQ proposed several changes to § 1502.16 to clarify the role of this section and methods of analysis and make updates to ensure that agencies integrate climate change and environmental justice considerations into the analysis of environmental effects. First, CEQ proposed to add ''reasonably foreseeable'' in proposed paragraph (a)(1) before ''environmental effects'' for consistency with section 102(2)(C)(i) of NEPA and in proposed paragraph (a)(2) before ''adverse environmental effects'' for consistency with section 102(2)(C)(ii) of NEPA. 42 U.S.C. 4332(2)(C)(i)–(ii). In the final rule, CEQ reorganizes § 1502.16 to integrate proposed paragraph (a)(1) into § 1502.16(a), as discussed further in this section, and adds the reference to ''reasonably foreseeable'' effects in paragraph (a) to make clear that agencies must discuss the environmental consequences described in paragraphs (a)(1) through (a)(13) when they are reasonably foreseeable effects of the proposed action or alternatives. Therefore, CEQ omits further references to ''reasonably foreseeable'' in paragraphs (a)(1) through (a)(13) to avoid duplication. The recent amendments to NEPA codified the longstanding principle from the 1978 regulations and recognized by the courts that effects must be reasonably foreseeable. CEQ also notes that the definition of ''effects'' in § 1508.1(i) incorporates ''reasonably foreseeable'' into the definition such that the term ''effects'' incorporates the reasonably foreseeable standard each time it is used in this section and throughout the regulations.

Second, in proposed paragraph (a)(1), CEQ proposed to modify the second sentence, requiring agencies to base the comparison of the proposed action and reasonable alternatives on the discussion of effects, to add a clause at the end: ''focusing on the significant or important effects.'' CEQ proposed this change to emphasize that agencies' analyses of effects should be proportional to the significance or importance of the effects. CEQ did not receive specific comments on this proposal, and CEQ makes this change in the final rule in paragraph (a), into which CEQ integrates proposed paragraph (a)(1) as discussed further in this section. CEQ includes the word ''important'' in addition to ''significant'' because even if an agency does not identify which effects rise to the level of significance, it should still focus on the effects that are important for the agency decision maker to be aware of and consider. Consistent with this provision, agencies should generally identify the effects they deem significant to inform the public and decision makers.

While CEQ did not propose any substantive changes to paragraph (a), a few commenters suggested changes. One commenter expressed that even though paragraph (a) specifies that the environmental consequences discussion should not duplicate discussions from § 1502.14, it is confusing and unnecessary for the regulations to essentially require the same information in both sections. Another commenter requested that CEQ add qualifying language, ''as relevant or appropriate'' to the last sentence of paragraph (a) stating that ''[t]he discussion shall include.'' The commenter asserted this language would help improve efficiency by providing lead agencies flexibility to tailor the EIS to the specifics of the action.

CEQ agrees with the commenter that the language in paragraph (a) could be confusing. To enhance clarity, the final rule integrates proposed paragraph (a)(1) into § 1502.16(a) and combines the first two sentences of proposed paragraph (a)(1), to require that the comparison of the proposed action and alternatives ''be based on their reasonably foreseeable effects and the significance of those effects'' and that this discussion focus on the significant and important effects. The final rule also consolidates the last two sentences of proposed paragraph (a) to state that the environmental consequences section should not duplicate discussions ''required by'' § 1502.14, which CEQ revises to address the commenter's confusion about this text, and must include ''an analysis of'' the issues discussed in the subparagraphs to paragraph (a).

CEQ declines to add the qualifier ''as relevant or appropriate'' to the last sentence, because some of the items in the list are always required. For paragraphs (a)(5) through (a)(10) and (a)(13), which are only required when they are reasonably foreseeable, the final rule adds the qualifier ''where applicable''—in some cases replacing the word ''any,'' as used in the proposed rule—to make clear that an EIS need only include the specific topics where those effects are reasonably foreseeable. Where the effects that relate to a particular topic in the list exist but are not significant or important, the EIS can briefly describe the effect and explain why the agency has reached the conclusion that it is not significant or important.

Third, CEQ proposed to add a new sentence to the end of proposed paragraph (a)(1) clarifying the proper role of the no action alternative to ensure that agencies do not distort the comparative analysis by selecting a different alternative (for example, the preferred alternative) as the baseline against which the agency assesses all other alternatives. CEQ also invited comment on whether it should include additional direction or guidance regarding the no action alternative in the final rule.

One commenter requested that the regulations clarify the proper role of the no action alternative and disagreed with the direction included in the proposed rule. The commenter asserted that establishing a no action alternative as the baseline against which alternatives are compared, rather than establishing the proposed action as the baseline, favors the no action alternative over the proposed action and is contrary to NEPA's goals of informing rather than driving decisions. CEQ disagrees with the commenter's position as agencies have long used the no action alternative as the baseline from which to assess the proposed action and alternatives,[90] and this approach is consistent with the requirement of section 102(2)(C)(i)–(ii) of NEPA that an EIS include the reasonably foreseeable environmental effects of the proposed agency action. 42 U.S.C. 4332(2)(C)(i)–(ii). The no action alternative is a particularly useful comparison for the effects of the proposed action, and the CEQ

[90] *See* CEQ, Forty Questions, *supra* note 5, Question 3, ''No Action Alternative'' (stating that the no action alternative ''provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives.''); *see also Ctr. for Biological Diversity* v. *United States DOI*, 72 F.4th 1166, 1185 (10th Cir. 2023) (''In general, NEPA analysis uses a no-action alternative as a baseline for measuring the effects of the proposed action.''' (quoting *Biodiversity Conservation All.* v. *U.S. Forest Serv.*, 765 F.3d 1264, 1269 (10th Cir. 2014)).

regulations require agencies to compare effects across alternatives.

Multiple commenters requested guidance on how to evaluate the no action alternative in circumstances in which the Federal action does not dictate whether the underlying project will occur. CEQ declines to add additional specifications to the regulations but will consider whether additional guidance on this topic will help agencies carry out their NEPA responsibilities. CEQ notes that agencies have decades of experience with this issue even prior to the addition of this provision into NEPA and the CEQ regulations.

One commenter requested CEQ revise the language to make it clear that the no action alternative is focused on the environmental consequences of not issuing the approval rather than on the proposed facility not being built or the proposed physical action not occurring. CEQ declines to add this specific additional language to the regulations as the consideration of the no action alternative is specific to the agency's authority and the scope of the NEPA review.

One commenter stated CEQ should provide additional guidance to ensure that Federal agencies fully disclose the environmental implications of the no action alternative. Another commenter requested CEQ provide additional guidance encouraging agencies to select the no action alternative, when appropriate. Relatedly, another commenter stated that the no action alternative should be more than a baseline for comparison; it should also be an alternative that the agency can select even if it does not meet the applicant's or project's purpose and need. CEQ agrees that in many cases, the no action alternative is among the alternatives that the agency may select, and that doing so is consistent with the regulations and long-standing agency practice, but this is a fact-specific inquiry based on the agency's authority. CEQ will consider this and the other recommended topics when developing guidance.

One commenter requested the regulations include a new section on the no action alternative instead of including it in § 1502.16. Another commenter requested the regulations include a definition of ''no action alternative'' and requested clarification that agencies should analyze more than one action alternative and therefore must include more than just the no action alternative and one action alternative. CEQ declines to add a separate section on or define the phrase ''no action alternative.'' CEQ includes the proposed language in the final rule, as the fourth sentence of paragraph (a), to provide additional context for the longstanding requirement in § 1502.14 to assess the no action alternative and for consistency with section 102(2)(C)(iii) of NEPA and longstanding agency practice. 42 U.S.C. 4332(2)(C)(iii).

Fourth, CEQ proposed to add a new paragraph (a)(3), requiring an analysis of the effects of the no action alternative, including any adverse environmental effects. CEQ proposed this change for consistency with section 102(2)(C)(iii) of NEPA, which requires ''an analysis of any negative environmental impacts of not implementing the proposed action in the case of a no action alternative.'' 42 U.S.C. 4332(2)(C)(iii).

One commenter suggested that the phrase ''including any adverse effects'' does not conform with section 102(2)(C)(iii) of NEPA. CEQ disagrees with the commenter's characterization. The difference in phrasing between proposed paragraph (a)(3) and section 102(2)(C)(iii) is because paragraph (a)(3) addresses what needs to be contained in the discussion of environmental consequences, while section 102(2)(C)(iii) of NEPA addresses the range of alternatives. 42 U.S.C. 4332(2)(C)(iii). Multiple commenters were generally supportive of the requirement to analyze the adverse effects of the no action alternative.

CEQ adds proposed paragraph (a)(3) in the final rule at § 1502.16(a)(2). As CEQ noted in the proposed rule, CEQ interprets ''negative'' to have the same meaning as the term ''adverse.'' For example, an environmental restoration project that helps mitigate the effects of climate change and restores habitat could have adverse effects if it were not implemented or the construction of a commuter transit line could have adverse effects from persistent traffic congestion, air pollution, and related effects to local communities if it were not implemented.

Fifth, to accommodate proposed new paragraph (a)(3), CEQ proposed to redesignate paragraphs (a)(3) through (a)(5) of 40 CFR 1502.16 (2020) as paragraphs (a)(4) through (a)(6), respectively. CEQ did not receive any comments on this proposed reorganization. However, because the final rule integrates proposed paragraph (a)(1) into paragraph (a), the final rule does not redesignate these paragraphs.

Sixth, in proposed paragraph (a)(5), CEQ proposed to insert ''Federal'' before ''resources'' for consistency with section 102(2)(C)(v) of NEPA. 42 U.S.C. 4332(2)(C)(v). One commenter asserted that the proposed insertion of ''Federal'' ignores analysis and reporting of potentially significant resources committed by other entities. CEQ adds the word ''Federal'' to the final rule in § 1502.16(a)(4) because Congress added it to the corresponding phrase in the statute. Another commenter suggested CEQ revise this paragraph to encompass resources held in trust. CEQ declines to make this addition, as CEQ interprets the phrase ''Federal resources'' to plainly mean resources owned by the Federal Government or held in trust for Tribal Nations.

Seventh, CEQ proposed to add references to two specific elements that agencies must include in the analysis of environmental consequences and revise the reference to another element, all related to climate change. CEQ proposed to revise proposed paragraph (a)(6), addressing possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal and local land use plans, policies, and controls for the area concerned. CEQ proposed to broaden ''land use plans'' to ''plans'' generally and to add an example that clarifies that these plans, policies, and controls include those addressing climate change.

Eighth, CEQ proposed to add a new paragraph (a)(6) to clarify that the discussion of environmental consequences in an EIS must include any reasonably foreseeable climate change-related effects, including effects of climate change on the proposed action and alternatives (which may in turn alter the effects of the proposed action and alternatives).

Ninth, CEQ proposed to add a new paragraph (a)(9) to require agencies to address any risk reduction, resiliency, or adaptation measures included in the proposed action and alternatives. CEQ proposed this addition to ensure that agencies consider resiliency to the risks associated with a changing climate, including wildfires, extreme heat and other extreme weather events, drought, flood risk, loss of historic and cultural resources, and food scarcity. CEQ noted in the proposed rule that these analyses further NEPA's mandate that agencies use ''the environmental design arts'' in decision making and consider the relationship between the ''uses'' of the environment ''and the maintenance and enhancement of long-term productivity.'' 42 U.S.C. 4332(2)(A), 4332(2)(C)(iv). CEQ also noted that the proposed change helps achieve NEPA's goals of protecting the environment across generations, preserving important cultural and other resources, and attaining ''the widest range of beneficial uses of the environment without degradation, risk to health or safety, or

other undesirable and unintended consequences.'' 42 U.S.C. 4331(b)(3).

Multiple commenters expressed support generally for both proposed paragraphs (a)(6) and (a)(7), asserting that it is necessary to emphasize climate change. On the other hand, one commenter opposed proposed paragraphs (a)(6) and (a)(7) and asserted that they are based on political doctrine rather than scientific and technical analyses. CEQ disagrees with the commenter's assertion and notes that the inclusion of climate change in proposed paragraphs (a)(6) and (a)(7) is consistent with section 102(2)(C)(i) of NEPA, 42 U.S.C. 4332(2)(C)(i), which requires agencies to address ''reasonably foreseeable environmental effects of the proposed agency action;'' with section 102(2)(I) of NEPA, 42 U.S.C. 4332(I), which requires Federal agencies to ''recognize the worldwide and long-range character of environmental problems;'' and with a large volume of case law invalidating NEPA analyses that failed to adequately consider reasonably foreseeable effects related to climate change. *See e.g., Vecinos para el Bienestar de la Comunidad Costera* v. *FERC,* 6 F.4th 1321 (D.C. Cir. 2021) (holding NEPA analysis for pipeline and liquified natural gas port deficient due to inadequate climate change analysis); *WildEarth Guardians* v. *Zinke,* 368 F.3d 41 (D.C. Cir. 2019) (invalidating oil and gas leases for failure to consider downstream greenhouse gas emissions during the NEPA process); and *WildEarth Guardians* v. *BLM,* 870 F.3d 1222 (10th Cir. 2017) (holding that EIS and ROD for four coal leases were arbitrary and capricious because they failed to adequately consider climate change).

With respect to proposed paragraph (a)(6), a couple of commenters asserted the regulations should not direct agencies to discuss a proposed action's relationship with governmental plans related to climate change. The commenters urged CEQ to exclude the language ''those addressing climate change'' from the final rule or recommended the regulations clarify that NEPA does not require agencies to attempt to resolve these conflicts. Another commenter opined that the proposal to remove ''land use plans'' and instead include plans addressing climate change threatens to lead to speculative analyses. Further, the commenter asserted that the regulations do not explain how agencies should analyze multi-State projects or determine how a particular project conflicts with a State- or region-wide plan or emissions target.

In the final rule, CEQ removes ''land use'' and adds the example of plans that address climate change in the final rule at § 1502.16(a)(5). CEQ notes that the reference to climate change plans is only an example, but also that the example is consistent with the 2023 GHG guidance, which identifies climate change plans as having the potential to assist agencies in their analysis of reasonably foreseeable GHG emissions. CEQ also notes that nothing in this provision or any other provision of the NEPA regulations has ever required agencies to resolve conflicts; it merely requires agencies to discuss any possible conflicts. With respect to multi-State projects, CEQ does not consider it appropriate to modify this provision to address a specific type of project. However, CEQ is unaware of agency confusion regarding how to address multi-State projects. CEQ will consider whether additional guidance is needed in the future. CEQ retains the term ''policies'' to promote inclusive consideration of positions taken by regional, State, Tribal and local government entities, noting that policies are formally adopted by those entities while preferences or positions generally are not formally adopted.

Multiple commenters specifically opposed proposed paragraph (a)(7) and the singling out of reasonably foreseeable climate change-related effects in the regulations. One commenter stated that the integration of one specific category of potential environmental effects is a notable break from NEPA precedent and historic practice, which emphasizes that NEPA is neutral towards the type of resource concern and the type of potential environmental effect. CEQ disagrees with the assertion that identifying a category of effects is unprecedented and notes that this provision has always referenced certain types of effects, including effects related to energy, natural and depletable resources, and historic and cultural resources.

A commenter asserted that the references to climate change-related effects in proposed paragraph (a)(7) and other provisions of the regulations inconsistently refer to NEPA's reasonable foreseeability limitation and otherwise ignore the fundamental principle of causation. A few other commenters also raised the issue of causation, arguing that NEPA only requires an agency to consider effects that have a sufficiently close causal connection to the proposed action and stating that the proposed rule, and specifically proposed paragraph (a)(7), diverges from this principle by requiring analysis of any reasonably foreseeable climate-change related effects of the proposed action. One commenter asserted CEQ is rewriting the standard that requires an agency to consider effects that have a sufficiently close causal relationship to the proposed action. They also asserted proposed paragraph (a)(7) could require an agency to discuss effects that are remote and speculative because it does not require the ability to demonstrate a direct causal chain between a project and climate change or how a specific project's greenhouse gas emissions would lead to actual environmental effects in that specific location.

Another commenter asserted that proposed paragraph (a)(7) places unnecessary emphasis on climate change when there are many other effects on the environment that may occur due to a proposed action. A separate commenter asserted the proposed paragraph conflicts with the flexibility provided in CEQ's Interim Greenhouse Gas Guidance, which explains that agencies have the flexibility to discuss climate change and any other environmental issues to the extent the information will or will not be useful to the decision-making process and the public consistent with the ''rule of reason.'' Another commenter stated proposed paragraph (a)(7) is inconsistent with NEPA and would be impractical, resulting in lengthy reviews for projects without climate consequences.

CEQ disagrees with these commenters' assertions and includes proposed paragraph (a)(7) at § 1502.16(a)(6) in the final rule. CEQ adds the phrase ''where feasible, quantification of greenhouse gas emissions from the proposed action and alternatives and'' before ''the effects of climate change on the proposed action and alternatives.'' This provision incorporates into the final rule one of the recommendations of CEQ's 2023 GHG guidance.[91] CEQ includes this provision in response to comments that CEQ received in response to CEQ's request for comment on potentially codifying elements of the Guidance in the rule. *See* section II.D.1.[92] CEQ agrees with the comments discussed in section II.D.1 that contend that requiring agencies to quantify greenhouse gas emissions, where feasible, will increase the clarity of the regulations and is consistent with case law. *See, e.g., Food & Water Watch* v. *FERC,* 28 F.4th 277, 289 (D.C. Cir. 2022) (remanding to the agency to prepare a supplemental EA

[91] *See* CEQ, 2023 GHG Guidance, *supra* note 10.

[92] *See* CEQ, Phase 2 proposed rule, *supra* note 51, at 49945.

''in which it must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so''); *Sierra Club* v. *FERC,* 867 F.3d 1357, 1375 (D.C. Cir. 2017) (holding that the agency ''must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so''); *WildEarth Guardians* v. *Zinke,* 368 F.Supp.3d 41, 68 (D.D.C. 2019) (BLM's failure to quantify greenhouse gas emissions that were reasonably foreseeable effects of oil and gas development during the leasing and development process was arbitrary and capricious). As such, CEQ disagrees with the commenters' assertions that the rule requires agencies to go beyond what case law generally already requires them to consider under NEPA. Moreover, as CEQ indicates earlier in this section and makes clearer with its edits to paragraph (a) in the final rule, this paragraph indicates that agencies must analyze climate-related effects that meet the definition of ''effects''—that is, are reasonably foreseeable—and includes the qualifier ''where applicable'' to acknowledge that not all actions will have climate-related effects that require analysis in the EIS.

A few commenters opposed the addition of proposed paragraphs (a)(7) and (a)(10), stating that taken together, the proposed changes expand the scope of NEPA effects and alternatives analyses relative to discrete projects and authorizations and will result in agencies relying on unsubstantiated projections on a project's potential to impact climate change locally or globally.

Other commenters opposed proposed paragraph (a)(10) for various reasons. One commenter asserted risk reduction, resiliency, or adaptation measures are best addressed through planning and programming, asset management, and emergency response that occurs programmatically prior to NEPA review and in final design that occurs after the NEPA review, instead of as part of the project-specific review. Similarly, another commenter stated requiring an EIS to incorporate these measures into the proposed action or alternatives will be costly if completed during the NEPA process and should be done earlier, such as during long-range planning processes that occur prior to NEPA. CEQ notes that if an agency engages in long-range planning processes, the agency may incorporate by reference any analyses that are completed programmatically prior to the NEPA review for a specific action. With respect to final design, agencies may discuss such measures generally in the EIS. Further, agencies have decades of experience analyzing proposed actions before final design, and agencies can do so similarly for risk reduction, resiliency, or adaptation measures.

Another commenter asserted that the term ''relevant'' is subjective and suggested that CEQ define it to include peer-reviewed science and data made available by independent sources. CEQ declines to add this specificity in the final rule and leaves it to agency judgment to identify what is relevant for a particular proposed action.

One commenter supported proposed paragraph (a)(10) but requested the regulations clarify that the language does not require an agency to gather new data, consistent with NEPA. Another commenter also supported the proposal, but suggested that CEQ remove the mandate to use accurate and up-to-date information from proposed § 1502.21. CEQ considers it important to specifically reference science and data on the affected environment and expected future conditions in this paragraph because they are essential to determine what resiliency and adaptation measures are relevant. CEQ declines to specify that agencies do not need to gather new data as this is addressed in § 1502.21, regarding incomplete or unavailable information as well, as § 1506.6, regarding methodology and scientific accuracy. Therefore, CEQ adds proposed paragraph (a)(10) at § 1502.16(a)(9) in the final rule.

In the final rule, CEQ revises § 1502.16(a)(5) and adds § 1502.16(a)(6) and (a)(9) to clarify that agencies must address both the effects of the proposed action and alternatives on climate change, and the resiliency of the proposed action and alternatives in light of climate change.[93] These revisions are consistent with what NEPA has long required: using science to make decisions informed by an understanding of the effects of the proposed action and of its alternatives. In particular, understanding how climate change will affect the proposed action and the various alternatives to that action is necessary to understanding what constitutes ''a reasonable range of alternatives'' and which alternatives are ''technically and economically feasible'' and ''appropriate,'' *see* 42 U.S.C. 4332(2)(C)(iii), (F), (H). Moreover, the effects that climate change will have on the proposed action and its alternatives may in turn alter the effects that the action has on the environment. For example, an increase in extreme weather events may affect the amount of stream sedimentation that results from a new road or the risk that an industrial facility will experience a catastrophic release. Therefore, considering the effects of climate change on the action and its alternatives is necessary to understand the ''reasonably foreseeable environmental effects'' of the proposed action and its alternatives, 42 U.S.C. 4332(2)(C)(i). These revisions also align with the definition of ''effects'' to encompass reasonably foreseeable indirect and cumulative effects, which are integral to NEPA analyses.

Tenth, to accommodate the newly proposed paragraphs (a)(7) and (a)(10), CEQ proposed to redesignate paragraphs (a)(6) and (a)(7) of 40 CFR 1502.16 (2020) as paragraphs (a)(8) and (a)(9), respectively. In the final rule, CEQ redesignates these paragraphs as § 1502.16(a)(7) and (a)(8). CEQ also proposed to redesignate paragraphs (a)(8) through (a)(10) of 40 CFR 1502.16 (2020) as paragraphs (a)(11) through (a)(13), respectively. In the final rule, CEQ redesignates these paragraphs as § 1502.16(a)(10) through (a)(12).

Eleventh, CEQ proposed to add a new paragraph (a)(14) to require agencies to discuss any potential for disproportionate and adverse health and environmental effects on communities with environmental justice concerns, consistent with sections 101, 102(2)(A), 102(2)(C)(i), and 102(2)(I) of NEPA. *See* 42 U.S.C. 4331, 4332(2)(A), 4332(2)(C)(i), 4332(2)(I). CEQ proposed this paragraph to clarify that EISs generally must include an environmental justice analysis to ensure that decision makers consider disproportionate and adverse effects on these communities.

A few commenters expressed general support for proposed paragraph (a)(14), with some stating that the inclusion of disproportionate effects on communities with environmental justice concerns is long overdue. Some of these supportive commenters requested CEQ provide additional clarity in the regulations or through guidance on what constitutes a robust environmental justice analysis. One commenter suggested the final rule include additional text to emphasize welfare effects and to state that the evaluation should not offset positive effects on one community with environmental justice concerns against

[93] Such analysis is not new, and CEQ has issued guidance consistent with these proposed provisions for nearly a decade. *See generally* CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 FR 51866 (Aug. 8, 2016), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf,* and CEQ, 2023 GHG Guidance, *supra* note 10.

negative effects on another community with environmental justice concerns.

Multiple commenters opposed proposed paragraph (a)(14) for reasons similar to the opposition to including climate change-related effects, asserting that it is inappropriate to single out these types of effects. One commenter suggested the proposed paragraph will allow consideration of remote and speculative environmental justice concerns and is in conflict with case law. Another commenter stated the proposed paragraph requires agencies to consider effects that are not ''reasonably foreseeable.'' Further, another commenter requested that the regulations clarify that not all environmental effects will be ''disproportionate and adverse.''

In the final rule, CEQ adds proposed paragraph (a)(14) at § 1502.16(a)(13) and modifies the text from the proposal to replace ''[t]he potential for'' with ''[w]here applicable'' before ''disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.'' As discussed earlier in this section, CEQ adds the ''where applicable'' qualifier to make clear that not all proposed actions will have such effects. The final rule also omits ''potential,'' given the changes to paragraph (a) to clarify that all effects in the list must be reasonably foreseeable.

Multiple commenters grouped their general concerns on proposed § 1502.16(a)(7), (a)(10), and (a)(14) together, expressing overall concern regarding the inclusion of climate change and environmental justice-related provisions in § 1502.16. These commenters asserted that these proposed additions are contrary to the purpose of NEPA and inappropriately elevate climate change and environmental justice over other issues, such as water quality, waste management, and air quality. Other commenters expressed concern over the addition of policy priorities to the regulations. As CEQ has discussed in this section and elsewhere in this preamble and the Phase 2 Response to Comments, CEQ considers these additions consistent with the text of NEPA, longstanding practice, and case law and finds it appropriate to recognize the importance of climate change and environmental justice effects to inform agency decision making and the public about a proposed action. CEQ notes that the list of effects in § 1502.16(a) is not exhaustive, and that agencies must determine on a case-by-case basis which effects are relevant to address in an EIS.

Finally, in paragraph (b), which addresses economic or social effects, CEQ proposed to strike ''and give appropriate consideration to'' from paragraph (b). CEQ proposed this revision to remove unnecessary language that could be read to require the decision maker to make consideration of such effects a higher priority than other effects listed in this section.

One commenter expressed support for the proposed change in paragraph (b) but requested that the final rule include language requiring specific analyses of housing affordability, availability, and quality. CEQ declines to add this language because, while these considerations may be appropriate for some projects, this level of specificity is unnecessary in the regulations, as housing-related effects are a subset of social and economic effects. Another commenter requested that the final rule include cultural effects in the second sentence. CEQ declines to add cultural effects to paragraph (b) because historic and cultural resources are included in § 1502.16(a)(10), and agencies also may address effects to cultural resources consistent with § 1502.16(a)(5).

CEQ did not receive comments specific to its proposed edits to paragraph (b). In the final rule, CEQ strikes the phrase ''and give appropriate consideration to,'' as proposed, from § 1502.16(b).

16. Summary of Scoping Information (§ 1502.17)

CEQ proposed to revise § 1502.17 and retitle it ''Summary of scoping information'' to more accurately reflect the proposed revisions to this section and align it with the common practice of what many agencies produce in scoping reports. CEQ proposed other changes in this section to simplify and remove unnecessary or redundant text and clarify requirements. Commenters were generally supportive of CEQ's proposal and provided a few suggested edits to the regulatory text, as discussed in this section. A few commenters expressed concern about the additional burden of preparing a summary of scoping information.

CEQ finalizes this section as proposed with a few additional edits. Agencies have long collected the information addressed in this section as part of the scoping process and provided it in various formats, such as in scoping reports or by integrating it into the EIS itself. Transparency about this information is valuable to the NEPA process because it demonstrates what agencies have considered in preparing an EIS. Further, CEQ disagrees that preparing a summary of such information is a significant burden on agencies because the regulations do not require a lengthy, detailed summary and provide agencies sufficient flexibility to exercise their discretion in what to prepare.

CEQ proposed to revise paragraph (a) to require agencies to include a summary of the information they receive from commenters during the scoping process in draft EISs, consistent with the revisions to §§ 1500.4, 1501.9, and 1502.4. CEQ proposed to replace ''State, Tribal, and local governments and other public commenters'' with ''commenters'' because this phrase is all encompassing. CEQ also proposed to clarify that a draft EIS should include a summary of information, including alternative and analyses, that commenters submitted during scoping.

At least one commenter inquired whether an agency could meet the requirements of paragraph (a) by including a summary in an appendix to the draft EIS. CEQ did not intend its proposal to limit where agencies provide the summary of scoping information. To make clear that agencies have the flexibility on where to place this section in their EISs, CEQ has added ''or appendix'' after ''draft environmental impact statement.'' Another commenter asked whether inserting the word ''draft'' before the second instance of ''environmental impact statement'' in paragraph (a) precluded agencies from considering such information in the final EIS. This was not CEQ's intent, so the final rule text does not include the word ''draft'' as CEQ proposed. CEQ otherwise revises paragraph (a) as proposed. This change provides agencies flexibility to develop a broader summary of information received during scoping. While agencies should still summarize alternatives and analyses, this provision does not require them to provide a specific summary of every individual alternative, piece of information, or analysis commenters submit during scoping.

CEQ proposed to redesignate paragraph (a)(1) as paragraph (b) and modify it to clarify that agencies can either append comments received during scoping to the draft EIS or otherwise make them publicly available. CEQ proposed this modification to clarify that the requirements of this paragraph can be met through means other than an appendix, such as a scoping report, which is common practice for some Federal agencies. CEQ proposed a conforming edit in paragraph (d) of § 1502.19, ''Appendix,'' for consistency with this language.

CEQ received a comment questioning why CEQ would change ''publish'' to ''otherwise make publicly available all

comments,'' which could suggest an agency could make comments publicly available by providing them in response to a FOIA request rather than by affirmatively providing them. This was not the intent of CEQ's proposed change. Therefore, CEQ is not making this change in the final rule. With these modifications, CEQ amends this provision as proposed.

Finally, CEQ proposed to delete 40 CFR 1502.17(a)(2) and (b) (2020) because the requirements of these paragraphs are redundant to the requirements in part 1503 for Federal agencies to invite comment on draft EISs in their entirety and review and respond to public comments. CEQ makes this change in the final rule.

17. Incomplete or Unavailable Information (§ 1502.21)

CEQ proposed one revision to paragraph (b) of § 1502.21, which addresses when an agency needs to obtain and include incomplete information in an EIS. CEQ proposed to strike ''but available'' from the sentence, which the 2020 rule added, to clarify that agencies must obtain information relevant to reasonably foreseeable significant adverse effects when that information is essential to a reasoned choice between alternatives, where the overall costs of doing so are not unreasonable, and the means of obtaining that information are known. CEQ proposed to remove the phrase ''but available'' because it could be read to significantly narrow agencies' obligations to obtain additional information even when it is easily attainable and the costs are reasonable. During the development of the proposed rule, agency NEPA experts indicated that this qualifier could be read to say that agencies do not need to collect additional information that could and should otherwise inform the public and decision makers.

Some commenters supported the proposed deletion of ''but available'' in paragraph (b), reasoning that this edit will ensure agencies obtain necessary information regarding reasonably foreseeable significant adverse effects that is essential to a reasoned choice among alternatives rather than dismissing the information as unavailable. Another commenter supported the change because it better ensures agencies obtain high quality information to inform their analyses. Other commenters opposed the change, asserting it unduly expands agencies' obligations to obtain additional information. One commenter stated the change removes a bright-line requirement to rely on existing information and another commenter agreed, stating the inclusion of ''but available'' helped to focus the scope of the inquiry on available information. Without this limitation, the commenter asserted agencies could face litigation over the subjective reasonableness of failing to obtain new information. Some commenters expressed concern that the proposed change broadens the circumstances when agencies must obtain new information and increases the risk of reliance on poor quality information developed quickly to meet the statutory timeframes.

One commenter provided that if CEQ finalizes the proposed change, it should clarify that agencies should not delay the NEPA process by obtaining non-essential information. This commenter also requested that CEQ clarify that agencies only need to produce new information where the agencies would not be able to make an informed decision about the reasonably foreseeable effects of a project otherwise. Similarly, another commenter stated that if finalized, CEQ should clarify that new agency research is required only in limited circumstances and is the exception, not the rule.

CEQ makes the change to remove ''but available'' from § 1502.21(b) in the final rule. CEQ has reconsidered its position in the 2020 rule and now considers it vital to the NEPA process for agencies to undertake studies and analyses where the information from those studies and analyses is essential to a reasoned choice among alternatives and the overall costs are not unreasonable, rather than relying solely on available information. In particular, CEQ notes its longstanding interpretation of ''incomplete information'' as articulated in the 1986 amendments to this provision. CEQ defined ''incomplete information'' as information that an agency cannot obtain because the overall costs of doing so are exorbitant and ''unavailable information'' as information that an agency cannot obtain it because ''the means to obtain it are not known.'' [94] In response to comments in 1986, CEQ further explained that the phrase '' 'the means to obtain it are not known' is meant to include circumstances in which the unavailable information cannot be obtained because adequate scientific knowledge, expertise, techniques or equipment do not exist.'' [95] The 2020 rule disregarded this longstanding interpretation and instead suggested that new scientific or technical research is ''unavailable information.'' Upon further consideration, CEQ disagrees with the interpretation in the 2020 rule and re-adopts its longstanding interpretation that the phrase ''incomplete information'' applies only to information from new scientific or technical research, the cost of which are unreasonable.

Removing the phrase ''but available'' also is consistent with section 106(b)(3) of NEPA, which was added by the recent NEPA amendments and states that in determining the level of NEPA review, agencies are only required to undertake new scientific or technical research where essential to a reasoned choice among alternatives and the overall costs and time frame of obtaining it are not unreasonable. 42 U.S.C. 4336(b)(3). While section 106(3) only directly applies to determining the level of NEPA review, the provision's limitation on when agencies need to undertake new scientific or technical research in that context refutes an interpretation of NEPA as limiting agencies to considering available information. 42 U.S.C. 4336(b)(3). Establishing a consistent standard to address incomplete information in the NEPA review process that is consistent with the text of section 106(3) will lead to a more orderly and predictable environmental review process. 42 U.S.C. 4336(b)(3). Similarly, CEQ considers it appropriate to require agencies to ensure professional integrity, including scientific integrity, and use reliable data and resources, as well as other provisions in the regulations emphasizing the importance of relying on high-quality and accurate information throughout implementation of NEPA. *See, e.g.,* §§ 1500.1(b), 1506.6.

CEQ disagrees that this change will unduly expand agencies' obligations to obtain additional information. CEQ is reverting to the longstanding approach in the regulations that will ensure agencies appropriately gather information when it is necessary to inform the decision maker and the public. CEQ considers the bounding language of reasonable costs and necessity to make a reasoned choice to be the appropriate cabining so that agencies are reasonably gathering any additional information needed for a sufficient NEPA analysis without creating undue burden or facilitating a boundless collection of information. With respect to litigation risk, as with many other aspects of a NEPA review, agencies should explain in their documents their rationale when they determine it is unreasonable or

[94] CEQ, National Environmental Policy Act Regulations; Incomplete or Unavailable Information, *supra* note 32, at 15621.

[95] *Id.* at 15622.

unnecessary to obtain new information. Finally, CEQ acknowledges the potential tension between the time it takes to gather new information and statutory deadlines. CEQ encourages agencies to identify incomplete information as early as possible in the process to ensure they have time to gather the information necessary to satisfy their NEPA obligations during the statutory timeframes. CEQ also notes that where an agency cannot obtain incomplete information within the statutory timeframes, but the costs are reasonable, the agency could conclude that it is necessary to set a new deadline that allows only as much time as necessary to obtain the information so long as the costs of obtaining the information, including any cost from extending the deadline and delaying the action, are reasonable.

Finally, CEQ removes the modifier ''adverse'' from ''significant adverse effects'' throughout this section because the final rule defines ''significant effects'' to be adverse effects. CEQ makes this change for clarity and consistency with the definition.

18. Methodology and Scientific Accuracy (Proposed § 1502.23)

In the proposed rule, CEQ proposed updates to § 1502.23, ''Methodology and Scientific Accuracy,'' which requires agencies to ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents. CEQ proposed revisions to promote use of high-quality information; require agencies to explain assumptions; and, where appropriate, incorporate projections, including climate change-related projections, in the evaluation of reasonably foreseeable effects.

CEQ received a number of comments expressing confusion regarding the applicability of this provision. In particular, since 1978, the provision has used the term ''environmental documents,'' making it broadly applicable. However, it is included in part 1502, which addresses requirements for EISs. Additionally, the amendments to NEPA make clear that agencies must ensure the professional integrity, including scientific integrity, of the discussion and analysis in their NEPA documents, not just in EISs, and make use of reliable data and resources in carrying out NEPA. To address the confusion amongst commenters and for consistency with the NEPA statute, CEQ moves this provision to part 1506, specifically § 1506.6, which addresses other requirements of NEPA.

For the discussion of the specific proposed changes and comments on those changes as well as a description of the final rule, refer to section II.H.4.

E. Revisions To Update Part 1503, Commenting on Environmental Impact Statements

CEQ is making substantive revisions to all sections of part 1503, except § 1503.2, ''Duty to comment.'' While CEQ invited comment on whether it should make any substantive changes to this section, CEQ did not receive any specific comments recommending such changes to § 1503.2. Therefore, CEQ finalizes § 1503.2 with the non-substantive edits proposed in the NPRM (spelling out EIS and fixing citations).

1. Inviting Comments and Requesting Information and Analyses (§ 1503.1)

CEQ did not propose substantive changes to § 1503.1 except to delete paragraph (a)(3) of 40 CFR 1503.1 (2020), requiring agencies to invite comment specifically on the submitted alternatives, information, and analyses and the summary thereof, for consistency with the proposed changes to the exhaustion provision in § 1500.3 and the corresponding revisions to § 1502.17. CEQ discusses the comments on removal of the exhaustion provisions generally in section II.B.3, and CEQ did not receive any comments specific to the proposed deletion of 40 CFR 1503.1(a)(3) (2020). CEQ deletes this paragraph in the final rule because CEQ is revising § 1500.3 to remove the exhaustion provision in this final rule as discussed in section II.B.3. Therefore, this requirement to invite comment is unnecessary and redundant as Federal agencies invite comment on all sections of draft EISs, including any appendices, and thus need not invite comment on one specific section of an EIS.

2. Specificity of Comments and Information (§ 1503.3)

CEQ proposed edits to § 1503.3 to clarify the expected level of detail in comments submitted by the public and other agencies to facilitate consideration of such comments by agencies in their decision-making processes. CEQ proposed these edits to remove or otherwise modify provisions that could inappropriately restrict public comments and place unnecessary burden on public commenters.

Multiple commenters expressed support for the proposed rule's edits to § 1503.3 to remove language in the 2020 rule and argued that the language impeded public participation and unlawfully sought to limit access to the courts. Commenters asserted that the 2020 language impeded participation in the NEPA process by members of the public with valuable information and perspective on the proposed action. Specifically, the commenters supported the removal of the requirement for the public to provide as much detail as necessary in paragraph (a), along with the proposed clarification that commenters do not need to describe their data, sources, or methodologies. Commenters further stated that the requirement to provide as much detail as necessary was ambiguous and could have been interpreted to establish an unjustified barrier to public comment to those who do not have access to technical experts or consultants. As discussed further in this section, CEQ is finalizing all but one of its proposed changes.

CEQ proposed to remove language from § 1503.3(a), which the 2020 rule added, that requires comments to be as detailed ''as necessary to meaningfully participate and fully inform the agency of the commenter's position'' because this requirement could lead commenters to provide unnecessarily long comments that will impede efficiency. Commenters generally supported this proposal. In support of the proposed removal, one commenter asserted that the ambiguity of the requirement to provide as much detail as necessary would prompt unnecessary litigation over whether particular comments were sufficient to ''fully inform'' the agency.

CEQ strikes this language in the final rule. Paragraph (a) of § 1503.3 has always required comments to be ''as specific as possible,'' *see* 40 CFR 1503.3(a) (2019); 40 CFR 1503.3(a) (2020), and the language CEQ is removing could be read to require commenters to provide detailed information that either is not pertinent to the NEPA analysis or is about the commenter's position on the proposed action, the project proponent, the Federal agency, or other issues. For example, the text could be read to require a commenter to provide a detailed explanation of a moral objection to a proposed action or a personal interest in it if those inform the commenter's position on the project. The text also could imply that commenters must either be an expert on the subject matter or hire an expert to provide the necessary level of detail. Further, the text could be read to imply that commenters are under an obligation to collect or produce information necessary for agencies to fully evaluate issues raised in comments even if the commenters do not possess that information or the skills necessary to produce it.

As CEQ explained in the proposed rule, some commenters on the 2020 rule

raised this issue, expressing concerns that this language could be read to require the general public to demonstrate a level of sophistication and technical expertise not required historically under the CEQ regulations or consistent with the NEPA statute.[96] Commenters also expressed concern that the requirement would discourage or preclude laypersons or communities with environmental justice concerns from commenting.[97] Other commenters on the 2020 rule expressed concern that the changes would shift the responsibility of analysis from the agencies to the general public.[98] Finally, CEQ is removing this language because the requirements that comments provide as much detail as necessary to ''meaningfully'' participate and ''fully inform'' the agency are vague and put the burden on the commenter to anticipate the appropriate level of detail to meet those standards.

CEQ also proposed to delete from the second sentence in paragraph (a) language describing certain types of impacts that a comment should cover, including the reference to economic and employment impacts as well as the phrase ''and other impacts affecting the quality of the human environment'' because it is unnecessary and duplicative of ''consideration of potential effects and alternatives,'' which appears earlier in the sentence. CEQ proposed to delete the reference to economic and employment impacts because this language imposes an inappropriate burden on commenters by indicating that comments need to explain why an issue matters for economic and employment purposes. NEPA requires agencies to analyze the potential effects on the human environment and does not require that these effects be specified in economic terms or related specifically to employment considerations. Therefore, it is inappropriate to single out these considerations for special consideration by commenters and unduly burdensome to expect every commenter to address economic and employment impacts.

A few commenters opposed the deletion, expressing concerns that removal of this language would discourage agencies from considering economic or employment impacts, or indicate that agencies are not interested in considering such information. CEQ disagrees with the commenters' assertions. This provision addresses the role of commenters, who are in the best position to assess the appropriate scope of their comments. CEQ broadens the language in the final rule, consistent with the proposal, to invite and welcome comments on effects of all kinds. The revision in the final rule will not have the effect of limiting commenters from addressing economic or employment impacts in their comments but would avoid the implication that members of the public are welcome to comment only if they address those issues. Further, the removal of this language in the provisions on public comments for an EIS does not affect potential consideration of these effects during the environmental review process. Specifically, § 1501.2(b)(2) requires agencies to identify environmental effects and values in adequate detail so the decision maker can appropriately consider such effects and values alongside economic and technical analyses. For these reasons, CEQ makes the edits as proposed to the second sentence of § 1503.3(a) in the final rule.

Finally, in paragraph (a), CEQ proposed changes to the last sentence to clarify that, only where possible, the public should include citations or proposed changes to the EIS or describe the data, sources, or methodologies that support the proposed changes in their comments. While such information is helpful to the agency whenever it is readily available, CEQ had concerns that this could be construed to place an unreasonable burden on commenters. CEQ did not receive any comments specific to this change and makes these edits as proposed in the final rule.

CEQ proposed to strike paragraph (b) of 40 CFR 1503.3 (2020) and redesignate paragraphs (c) and (d) as § 1503.3(b) and (c), respectively. CEQ proposed to delete paragraph (b) for consistency with the proposed removal of the exhaustion requirement from 40 CFR 1500.3 (2020) and corresponding changes to § 1502.17. CEQ also proposed to remove this paragraph because it is unrelated to the subject addressed in § 1503.3, which addresses the specificity of comments, rather than when commenters should file their comments. Finally, CEQ proposed to remove this paragraph because agencies have long had the discretion to consider special or unique circumstances that may warrant consideration of comments outside those time periods.

While most commenters were supportive of the deletion of the provisions related to exhaustion, a few commenters specifically requested CEQ retain paragraph (b) of 40 CFR 1503.3 (2020) in the final rule. These commenters expressed concern about increased litigation and commenters raising issues at the last minute or in litigation for the first time.

CEQ removes paragraph (b) of 40 CFR 1503.3 (2020) in the final rule. The CEQ regulations have long encouraged the identification of issues early in the NEPA process by providing multiple opportunities for the public to engage—first through the scoping process and then through the public comment period on the draft EIS. As CEQ explains in section II.B.3, CEQ has determined it is appropriate to remove the exhaustion provisions in 40 CFR 1500.3 (2020), which CEQ considers related to general principles of administrative law applied by courts rather than to principles specific to NEPA. Therefore, CEQ removes this paragraph for the reasons set forth in the NPRM, the Phase 2 Response to Comments, and the preamble of this final rule.

Next, CEQ proposed to strike ''site-specific'' from 40 CFR 1503.3(d) (2020) in proposed paragraph (c) to clarify that cooperating agencies must identify additional information needed to address significant effects generally. CEQ proposed this change to enhance efficiency because it ensures that cooperating agencies have the information they need to fully comment on EISs, averting potential delay in the environmental review process. CEQ did not receive any comments specific to this proposed change. CEQ makes this change for clarity in the final rule.

Finally, CEQ proposed to strike the requirement for cooperating agencies to cite their statutory authority for recommending mitigation from 40 CFR 1503.3(e) (2020). The NPRM explained that this requirement is unnecessary since, at this stage in development of an EIS, those agencies with jurisdiction by law have already established their legal authority to participate as cooperating agencies. Two commenters opposed this change, suggesting that requiring cooperating agencies to provide this additional detail to the lead agency will help the lead agency and applicants assess the reasonableness of such recommendations. Upon further consideration, CEQ has decided not to remove this requirement in the final rule. CEQ revises the beginning of the sentence from ''When a cooperating agency with jurisdiction by law specifies'' to ''A cooperating agency with jurisdiction by law shall specify'' to clarify the requirement to identify mitigation measures. Then, in the last clause, CEQ replaces ''the cooperating agency shall'' with ''and'' to retain the requirement for a cooperating agency to cite to its applicable statutory authority.

[96] CEQ, 2020 Response to Comments, *supra* note 69, at 326–27.

[97] *Id.*at 327.

[98] *Id.* at 328.

CEQ agrees that identifying the statutory authorities for mitigation is useful information. CEQ encourages cooperating agencies to identify such information as early as practicable in development of the EIS, but no later than at the time of their review of a draft EIS. CEQ also proposed in paragraph (d) to replace the reference to ''permit, license, or related requirements'' with ''authorizations'' because the definition of ''authorization'' in § 1508.1(d) is inclusive of those terms. CEQ makes this change as proposed for clarity and consistency in the final rule.

3. Response to Comments (§ 1503.4)

CEQ proposed to revise paragraph (a) of § 1503.4 to clarify that agencies must respond to comments but may do so either individually, in groups, or in some combination thereof. CEQ proposed to change ''may'' to ''shall,'' which would revert a change made in the 2020 rule, because the change created ambiguity that could be read to mean that agencies have discretion in whether to respond to comments at all, not just in the manner in which they respond, *i.e.,* individually or in groups. CEQ did not indicate that it intended to make responding to comments voluntary when it made this change in the 2020 rule, and CEQ has determined that amending the regulations to avoid this ambiguity improves the clarity of the regulations.

CEQ received a few comments on paragraph (a). A commenter suggested that the rule provide greater latitude to agencies to summarize and respond to comments of a similar nature or decline to respond to comments that the agency determines provide no substantive information applicable to the EIS. CEQ agrees that Federal agencies should have flexibility to summarize and respond to similar comments or decline to respond to non-substantive comments where appropriate. The proposed language provides this flexibility, and CEQ makes this change in the final rule. Restoring ''shall'' in place of ''may'' removes any ambiguity created by revisions to the paragraph in the 2020 regulations and is consistent with the longstanding requirement and expectation for agencies to respond to comments received on an EIS, while also clarifying that agencies have discretion on how to respond to comments to promote the efficiency of the NEPA process.

A couple of commenters requested that CEQ define ''substantive comments;'' modify the last sentence of paragraph (a) to make the list of means by which an agency may respond in the final EIS to be a required list by changing ''may respond'' to ''will respond;'' and modify paragraph (a)(2) to clarify that the only alternatives an agency should develop and evaluate following public comments are those that are consistent with the purpose and need and are technically and economically feasible. CEQ declines to make these changes in the final rule. Agencies have extensive experience assessing whether a comment is substantive and should have the flexibility to do so—CEQ is concerned that a definition would be unnecessarily restrictive. Similarly, CEQ declines to make the list of means by which an agency responds to comments mandatory, as unnecessarily prescriptive; paragraph (a) lists the key ways agencies may address comments, but as long as agencies respond to individual comments or groups of comments, as required by the second sentence of paragraph (a), they should have flexibility to determine the appropriate means of response. Lastly, CEQ does not consider the proposed change to paragraph (a)(2) necessary because alternatives already must be consistent with the purpose and need consistent with § 1502.14.

In paragraph (c), CEQ proposed changes to clarify that when an agency uses an errata sheet, the agency must publish the entire final EIS, which would include the errata sheet, a copy of the draft EIS, and the comments with their responses. CEQ proposed these edits to reflect typical agency practice and to reflect the current requirement for electronic submission of EISs rather than the old practice of printing EISs for distribution. One commenter suggested that proposed edits would eliminate the errata sheet. The intent of CEQ's edits is to ensure that the public can access the complete analysis in one place. CEQ disagrees with the commenter's interpretation of the proposed text, but to remove any ambiguity, CEQ has revised the provision in the final rule to make clear that the final EIS includes the errata sheet and ''a copy of the draft statement.''

F. Revisions To Update Part 1504, Dispute Resolution and Pre-Decisional Referrals

In the NPRM, CEQ proposed to revise part 1504 to add a new section on early dispute resolution and reorganize the existing sections. As discussed further in this section, CEQ makes the changes in the final rule with some additional edits that are responsive to commenters. One commenter noted that CEQ did not propose to revise the title of part 1504 to reflect this approach. Therefore, in this final rule, CEQ revises and simplifies the title of part 1504 to ''Dispute resolution and pre-decisional referrals'' for consistency with the revisions to this part. CEQ notes that the criteria and procedures for agencies to make a referral apply to agencies that make a referral under the NEPA regulations and do not apply to EPA when exercising its referral authority under section 309 of the Clean Air Act, 42 U.S.C. 7609.

1. Purpose (§ 1504.1)

CEQ proposed in § 1504.1(a) to add language encouraging agencies to engage early with each other to resolve interagency disagreements concerning proposed major Federal actions before such disputes are referred to CEQ. CEQ also proposed to add language clarifying that part 1504 establishes procedures for agencies to submit requests to CEQ for informal dispute resolution, expanding the purpose to reflect the changes proposed in § 1504.2 and described in section II.F.2. While CEQ did not receive any comments on the language of this specific provision, CEQ revises the proposed language to make clear that agencies need not engage in dispute resolution before a referral. At least one commenter interpreted the optional early dispute resolution provision in § 1504.2 as a required precursor to a referral. Therefore, in the final rule, CEQ revises the first sentence as proposed to encourage agencies to engage with one another to resolve interagency disputes and adds the proposed new sentence indicating that part 1504 establishes the procedures for early dispute resolution, but does not include the clause referencing the referral process. As discussed further in section II.F.2, these revisions are consistent with CEQ's ongoing role in promoting the use of environmental collaboration and conflict resolution,[99] and serving as a convener and informal mediator for interagency disputes. CEQ strongly encourages agencies to resolve disputes informally and as early as possible so that referrals under part 1504 are used only as a last resort. Early resolution of disputes is essential to ensuring an efficient and effective environmental review process.

In paragraph (b), which notes EPA's role pursuant to section 309 of the Clean Air Act, 42 U.S.C. 7609, CEQ proposed to strike the parenthetical providing the

[99] *See* OMB & CEQ, Memorandum on Environmental Collaboration and Conflict Resolution (Sept. 7, 2012), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/OMB_CEQ_Env_Collab_Conflict_Resolution_20120907.pdf;* OMB & CEQ, Memorandum on Environmental Conflict Resolution (Nov. 28, 2005), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/OMB_CEQ_Joint_Statement.pdf.*

term ''environmental referrals,'' as this term is not used elsewhere in part 1504. CEQ notes that EPA's section 309 authority is distinct from the ability of an agency to make a referral pursuant to § 1504.3, and therefore part 1504 does not apply to EPA when it is exerting its section 309 authority. Finally, CEQ proposed to revise the second sentence in paragraph (c) to eliminate the passive voice to improve clarity. CEQ did not receive any specific comments on its proposed changes to paragraphs (b) and (c). Consistent with the NPRM, this final rule removes the parenthetical in paragraph (b) and revises paragraph (c) to add the second sentence as proposed. Additionally, the final rule strikes ''similar'' from the first sentence of paragraph (c) because the bases for referral under NEPA and section 309 are distinct.

2. Early Dispute Resolution (§ 1504.2)

As discussed further in section II.F.3, CEQ proposed to move the provisions in 40 CFR 1504.2 (2020) to § 1504.3(a) and to repurpose § 1504.2 for a new section on early dispute resolution. CEQ proposed to add this section to codify agencies' current and longstanding practice of engaging with one another and enlisting CEQ to help resolve interagency disputes. While CEQ did not receive many comments on this provision, the vast majority of those it did receive supported the new provision, and some recommended CEQ make the language in the provision stronger and more directive. On the other hand, one commenter suggested dispute resolution would slow the environmental review process. CEQ is finalizing the provision as proposed because CEQ considers a flexible, informal, and non-binding approach rather than a mandatory and prescriptive process to strike the right balance to advance early resolution of interagency disputes. CEQ does not consider this provision to abrogate CEQ's authorities, as one commenter suggested, but rather to encourage agencies to resolve disputes early amongst themselves and elevate issues to CEQ when doing so will help advance resolution. Making the language in the regulations discretionary rather than mandatory does not affect CEQ's authorities.

CEQ revises § 1504.2 as proposed. Specifically, new paragraph (a) encourages agencies to engage in interagency coordination and collaboration within planning and decision-making processes and to identify and resolve interagency disputes. Further, paragraph (a) encourages agencies to elevate issues to appropriate agency officials or to CEQ in a timely manner that is consistent with the schedules for the proposed action established under § 1501.10.

Paragraph (b) allows a Federal agency to request that CEQ engage in informal dispute resolution. When making such a request to CEQ, the agency must provide CEQ with a summary of the proposed action, information on the disputed issues, and agency points of contact. This provision codifies the longstanding practice of CEQ helping to mediate and resolve interagency disputes outside of and well before the formal referral process (§ 1504.3) and to provide additional direction to agencies on what information CEQ needs to mediate effectively.

Paragraph (c) provides CEQ with several options to respond to a request for informal dispute resolution, including requesting additional information, convening discussions, and making recommendations, as well as the option to decline the request.

3. Criteria and Procedure for Referrals and Response (§ 1504.3)

As noted in section II.F.2, CEQ proposed to move the criteria for referral set forth in 40 CFR 1504.2 (2020) to a new paragraph (a) in § 1504.3 and redesignate paragraphs (a) through (h) of 40 CFR 1504.3 (2020) as § 1504.3(b) through (i), respectively. Because of this consolidation, CEQ proposed to revise the title of § 1504.3 to ''Criteria and procedure for referrals and response.''

At least one commenter supported the move of 40 CFR 1504.2 (2020) to proposed § 1504.3(a) to facilitate the addition of the informal dispute resolution process. A few commenters requested that CEQ make additional changes to § 1504.3 to restore language from the 1978 regulations allowing public comment during CEQ's deliberations on whether to accept a particular referral and, if CEQ accepts a referral, during CEQ's consideration of recommendations to resolve the dispute.

In the final rule, CEQ adds an additional factor, ''other appropriate considerations,'' at § 1504.3(a)(8) to clarify that the list of considerations for referral is not an exclusive list. Additionally, CEQ revises paragraph (f) to allow ''other interested persons'' to provide views on the referrals because CEQ agrees with the commenters that the opportunity to provide views should not be limited to applicants. Relatedly, CEQ clarifies in paragraph (g)(3) that CEQ may obtain additional views and information ''including through public meetings or hearings.'' While the language in 40 CFR 1504.3(f)(3) (2020) and the proposed rule would not preclude CEQ from holding public meetings or hearings, CEQ considers it important to provide this clarification in the regulations to respond to comments. CEQ otherwise finalizes this provision as proposed.

G. Revisions to NEPA and Agency Decision Making (Part 1505)

1. Record of Decision in Cases Requiring Environmental Impact Statements (§ 1505.2)

The proposed rule included proposed modifications in § 1505.2 to align this section with other proposed changes to the regulations relating to exhaustion and to clarify which alternatives agencies must identify in RODs. CEQ also proposed to modify the provision on mitigation. As discussed further in this section, CEQ proposed to strike paragraph (b) of 40 CFR 1505.2 (2020), make paragraph (a) of 40 CFR 1505.2 (2020) the undesignated introductory paragraph in § 1505.2, and redesignate paragraphs (a)(1) through (a)(3) of 40 CFR 1505.2 (2020) as § 1505.2(a) through (c), respectively. CEQ makes these reorganizational changes in the final rule.

In proposed paragraph (b), CEQ proposed to restructure the first sentence—by splitting it into two sentences and reframing it in active voice—to improve readability and clarify that an agency must identify the alternatives it considered in reaching its decision and also specify one or more environmentally preferable alternatives in the ROD, consistent with proposed changes to § 1502.14(f) requiring an agency to identify one or more environmentally preferable alternatives in the EIS. CEQ makes these changes as proposed in the final rule.

CEQ received a number of comments on the ''environmentally preferable alternative'' generally, which are discussed in detail in sections II.D.13 and II.J.10. CEQ notes that it did not intend a substantive change to the longstanding requirement to identify which alternative (or alternatives) considered in the EIS is the environmentally preferable alternative(s). Some commenters suggested that the ''environmentally preferable alternative'' could be an alternative other than the proposed action, no action, or reasonable alternatives (which must be technically and economically feasible and meet the definition of purpose and need). However, this is incorrect because the environmentally preferable alternative is one of the alternatives included in the analysis, which consist of the proposed action, no action, or reasonable

alternatives. CEQ is revising § 1502.14(f) in the final rule, to which § 1505.2(b) cross references, to make this clear. CEQ revises § 1505.2 as proposed in the final rule.

Another commenter suggested CEQ require an agency to specify if it selected the environmentally preferable alternative and if not, why not. CEQ declines to make this change in the final rule because it is overly prescriptive. The regulations have long required agencies to discuss myriad factors and considerations that agencies balance in making their decisions without specifically requiring an agency to explain why it did not select the environmentally preferable alternative, and CEQ does not consider a change from this longstanding practice to be warranted.

In the third sentence of proposed § 1505.2(b), CEQ added environmental considerations to the list of example relevant factors upon which an agency may base discussion of preferences among alternatives. CEQ did not receive any specific comments on this proposed change to § 1505.2(b) and makes the changes in the final rule consistent with its proposal.

In proposed § 1505.2(c), CEQ proposed to change ''avoid or minimize'' to ''mitigate'' in the first sentence for consistency with the remainder of the paragraph. One commenter opposed this change, arguing that it would impose a burdensome requirement on agencies to consider mitigation for each of the effects of the proposed action and explain in a ROD why each impacted resource will not be replaced with a substitute. CEQ disagrees with the commenter's interpretation of the proposed revision. This provision has never required agencies to discuss avoidance or minimization at this level of detail, *i.e.,* for each resource category. Rather, it requires an agency to discuss generally whether it has ''adopted all practicable means'' and if not, the reasons for not doing so. CEQ makes this change in the final rule to clarify that agencies should discuss generally whether they have adopted practicable mitigation to address environmental harms from the selected alternative. Agencies need not do so on an impact category-by-impact category basis.

Additionally, CEQ proposed to clarify in proposed § 1505.2(c) that any mitigation must be enforceable, such as through permit conditions or grant agreements, if an agency includes the mitigation as a component of the selected action in the ROD, and the analysis of reasonably foreseeable effects in the EISs relies on effective implementation of that mitigation. CEQ also proposed to require agencies to identify the authority for enforceable mitigation. Lastly, CEQ proposed to replace the requirement to adopt and summarize a monitoring and enforcement program for any enforceable mitigation requirements or commitments, with a requirement to adopt a monitoring and compliance plan consistent with proposed § 1505.3(c).

CEQ received a large number of comments both supporting and opposing the proposed requirement to ensure that mitigation is enforceable in certain cases and to identify the authority for the enforceable mitigation. Supporters of the proposed change generally expressed concerns that mitigation incorporated in RODs or FONSIs is often not carried out, undermining the evaluation of effects required by NEPA. By contrast, opponents of the proposed change expressed concern that the provision would require enforceable mitigation in every case, and that the requirement for enforceability would discourage project proponents from proposing voluntary mitigation. These commenters also stated that NEPA does not require mitigation of adverse effects or give agencies the authority to require or enforce mitigation measures. They expressed concern that to the extent that the authority to require or enforce mitigation comes from other statutes, the requirement in proposed § 1505.2(c) would be duplicative. Finally, commenters noted that ''enforcement'' may be the responsibility of an agency other than the lead agency and may consist of suspension or revocation of an authorization under terms and conditions included in the authorization rather than direct civil or administrative enforcement actions.

In the final rule, CEQ retains the requirement to make mitigation enforceable in those circumstances in which agencies rely upon that mitigation as part of its analysis. CEQ has revised the sentence in § 1505.2(c) to enhance readability and to address some of the confusion raised by commenters by specifying that mitigation must be enforceable by a lead, joint lead, or cooperating agency when the ROD incorporates mitigation and the analysis of the reasonably foreseeable effects of the proposed action is based on implementation of that mitigation. The final rule further revises the second sentence of proposed § 1505.2(c) by breaking it into two sentences. The first identifies when mitigation must be enforceable. The second requires agencies to identify the authority for enforceable mitigation, provides examples of enforceable mitigation—specifically, permit conditions, agreements, or other measures—and requires agencies to prepare a monitoring and compliance plan. CEQ received a number of comments on the monitoring and compliance plan proposal, which are discussed in detail in section II.G.2. For the reasons discussed in that section, as well as the Phase 2 Response to Comments and NPRM, CEQ revises the last sentence of § 1505.2(c) to require agencies to prepare a monitoring and compliance plan consistent with § 1505.3.

Section 1505.2(c) does not require agencies to include enforceable mitigation measures in every decision subject to NEPA or require them to adopt mitigation in any circumstance; rather, the provision reinforces the integrity of environmental reviews by ensuring that if an agency assumes as part of its analysis that mitigation will occur and will be effective, the agency takes steps to ensure that this assumption is correct, including by making the mitigation measures enforceable.

This provision does not prohibit agencies from approving proposals with unmitigated adverse environmental effects or from approving proposals that include unenforceable mitigation measures so long as the agency does not rely on the effective implementation of those measures to determine the potential reasonably foreseeable effects of the action. Rather, the provision only prohibits an agency from basing its environmental analysis on mitigation that the agency cannot be reasonably sure will occur. If an agency treats the proposal's unmitigated effects as ''reasonably foreseeable,'' and analyzes them in its environmental review, then the rule does not require the agency to make the mitigation measures discussed in the environmental document enforceable or to identify the authority for those measures.

The text in the final rule is consistent with CEQ's longstanding position that agencies should not base their NEPA analyses on mitigation measures that they lack the authority to carry out or to require others to carry out. CEQ agrees with the commenters that enforcing mitigation measures will generally rely on authorities conferred on the agency (or other participating agencies) by statutes other than NEPA. Rather than duplicating work done under those other statutes, however, the requirement to identify those authorities will help integrate NEPA with other

statutory processes and promote efficiency and transparency.

Finally, CEQ proposed to strike paragraph (b) of 40 CFR 1505.2 (2020), requiring a decision maker to certify in the ROD that the agency considered all of the submitted alternatives, information, and analyses in the final EIS, consistent with paragraph (b) of 40 CFR 1502.17 (2020), and stating that such certification is entitled to a presumption that the agency considered such information in the EIS. CEQ proposed to strike this paragraph because such certification is redundant—the discussion in the ROD and the decision maker's signature on such document have long served to verify the agency has considered the entirety of the EIS's analysis of the proposed action, alternatives, and effects, as well as the public comments received. As a result, the certification that this paragraph required could have the unintended consequence of suggesting that the agency has not considered other aspects of the EIS, such as the comments and response to comments, in making the decision. CEQ also proposed this change because agencies are entitled to a presumption of regularity under the tenets of generally applicable administrative law, rather than this presumption arising from NEPA; therefore, CEQ considers it inappropriate to address in the NEPA regulations.

CEQ also proposed to strike paragraph (b) for consistency with its proposal to remove the exhaustion provision in 40 CFR 1500.3 (2020), as discussed in section II.B.3. As CEQ discussed in that section, CEQ now considers it more appropriately the purview of the courts to make determinations regarding exhaustion. Therefore, to the extent that the certification requirement was intended to facilitate the exhaustion provision in 40 CFR 1500.3 (2020), it is no longer necessary.

As discussed in section II.B.3, CEQ considered the comments regarding the exhaustion-related provisions and is removing them in this final rule. While most commenters discussed the provisions collectively, at least one commenter recommended removing this certification provision because it created an additional compliance burden on agencies without improving efficiency or reducing litigation risk. CEQ agrees that the certification provision does not increase efficiency or reduce litigation risk, and that this is an additional reason to remove this provision. For the reasons discussed here and in section II.B.3, CEQ removes this paragraph in the final rule. As noted in this section, CEQ considers such certification to be redundant to the decision maker's signature on a ROD, which indicates that the decision maker has considered all of the information, including the public comments.

2. Implementing the Decision (§ 1505.3)

CEQ proposed to add provisions to § 1505.3 for mitigation and related monitoring and compliance plans. To accommodate the changes, CEQ proposed to designate the undesignated introductory paragraph of 40 CFR 1505.3 (2020) as paragraph (a) and redesignate 40 CFR 1505.3(a) and (b) (2020) as § 1505.3(a)(1) and (a)(2), respectively. CEQ makes these reorganizational changes in the final rule with two clarifying edits to § 1505.3(a). First, CEQ adds an introductory clause in § 1505.3, ''[i]n addition to the requirements of paragraph (c) of this section,'' to distinguish the discussion of monitoring in paragraph (a) from the new monitoring and compliance plans provided for in paragraph (c). Second, CEQ deletes ''lead'' before agency in the last sentence for consistency with the prior sentence, stating that the lead or other appropriate consenting agency shall implement mitigation committed to as part of the decision.

CEQ proposed to add new § 1505.3(b) to encourage lead and cooperating agencies to incorporate, where appropriate, mitigation measures addressing a proposed action's significant adverse human health and environmental effects that disproportionately and adversely affect communities with environmental justice concerns. CEQ proposed this addition to highlight the importance of considering environmental justice and addressing disproportionate effects through the NEPA process and the associated decision. CEQ proposed this addition based on public and agency feedback received during development of this proposed rule requesting that this rule address mitigation of disproportionate effects. Additionally, CEQ proposed this change to encourage agencies to incorporate mitigation measures to address disproportionate burdens on communities with environmental justice concerns.

Numerous commenters opposed CEQ's proposed addition of § 1505.3(b), pointing to the Supreme Court's decision in *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332 (1989). These commenters stated that as a procedural statute, NEPA does not empower CEQ to require agencies to adopt mitigation measures. In contrast, other commenters supported CEQ's inclusion of the proposed new language in § 1505.3(b), and in some cases, encouraged CEQ to go further to require agencies to mitigate adverse effects to communities with environmental justice concerns.

CEQ finalizes § 1505.3(b) as proposed with two edits. The final rule includes ''into its decision'' after ''incorporate'' to clarify where agencies incorporate mitigation measures and does not include ''adverse'' after ''significant'' since ''significant effects'' is defined to only be adverse effects. CEQ has long encouraged agencies, as a policy matter, to adopt mitigation measures that will reduce the adverse environmental effects of their actions.[100] The addition of the language in § 1505.3(b) is consistent with this approach without imposing new legal requirements on Federal agencies.

CEQ recognizes the Supreme Court's holding in *Methow Valley* that NEPA does not require ''that a complete mitigation plan be actually . . . adopted,'' 490 U.S. at 352, and has not changed its longstanding position that ''NEPA in itself does not compel the selection of a mitigated approach.'' [101] Accordingly, this provision does not impose any binding requirements on agencies, but rather codifies a portion of CEQ's longstanding position that agencies should, as a policy matter, mitigate significant adverse effects where relevant and appropriate, in particular for ''actions that disproportionately and adversely affect communities with environmental justice concerns.'' The encouragement to agencies to mitigate disproportionate and adverse human health and environmental effects on communities with environmental justice concerns is grounded in NEPA, which, while not imposing a requirement to mitigate adverse effects, nonetheless does ''set forth significant substantive goals for the Nation.'' See *Vt. Yankee,* 435 U.S. at 558. Specifically, NEPA declares that the purposes of the statute are ''to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of [people]''; establishes ''the continuing policy of the Federal Government'' to ''assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings'' and to ''preserve important historic, cultural, and natural aspects of our national heritage''; and ''recognizes that each person should

[100] *See, e.g.,* CEQ, Mitigation Guidance, *supra* note 10, at 3847 (''CEQ encourages agencies to commit to mitigation to achieve environmentally preferred outcomes, particularly when addressing unavoidable adverse environmental impacts'').

[101] *See id.* at 3844.

enjoy a healthful environment.'' 42 U.S.C. 4321, 4331(a), (b)(2), (b)(4), (c).

CEQ's policy guidance has long ''encourage[d] agencies to commit to mitigation to achieve environmentally preferred outcomes, particularly when addressing unavoidable adverse environmental impacts.'' [102] CEQ's choice to encourage agencies in § 1505.3(b) to mitigate, ''where relevant and appropriate,'' the significant effects of ''actions that disproportionately and adversely affect communities with environmental justice concerns,'' reflects the particular importance of addressing environmental justice. CEQ does not intend the codification of its encouragement to mitigate this category of effects to imply that CEQ does not also continue to encourage agencies to commit to mitigation more broadly as set forth in CEQ's guidance. Rather, CEQ has determined to focus the regulation on mitigation where actions disproportionately and adversely affect communities with environmental justice concerns, due to its heightened policy concern when actions further burden communities that already experience disproportionate burdens.

Next, CEQ proposed to revise the text in paragraph (c) regarding mitigation and strike 40 CFR 1505.3(d) (2020) regarding publication of monitoring results, and replace them with new language in § 1505.3(c) regarding the contents of a monitoring and compliance plan. As proposed, this provision would require agencies to prepare a monitoring and compliance plan in certain circumstances when the agency commits to mitigation in a ROD, FONSI, or separate document. CEQ proposed to require agencies to prepare a plan for any mitigation committed to and adopted as the basis for analyzing the reasonably foreseeable effects of a proposed action, not just mitigation to address significant effects. In the NPRM, CEQ explained that it views such plans as necessary in order for an agency to conclude that it is reasonably foreseeable that a mitigation measure will be implemented, and, therefore, that the agency does not have to analyze and disclose the effects of the action without mitigation because they are not reasonably foreseeable. The proposal would not require a monitoring and compliance plan where an agency analyzes and discloses the effects of the action without the mitigation measure because, in that circumstance, the agency would not base its identification of reasonably foreseeable effects on the mitigation measure.

[102] *See id.* at 3847.

CEQ received many comments both supporting and opposing the requirement for mitigation monitoring and compliance plans under prescribed circumstances. Supporters of the proposed changes generally expressed concerns that without monitoring and compliance plans, agencies' assumptions regarding the ability of mitigation to reduce the adverse effects of the proposed action may be speculative. Opponents of the changes, meanwhile, raised similar concerns to those raised in connection with the language in § 1505.2(c) regarding the enforceability of mitigation, as discussed in section II.G.1. Specifically, commenters expressed concern that enforceable mitigation would be required in every case, and that the requirement for enforceability would discourage project proponents from proposing voluntary mitigation. These commenters also noted that NEPA does not require or authorize CEQ to require detailed mitigation plans and expressed concern that preparing monitoring and compliance plans would be duplicative and burdensome. Commenters also suggested that CEQ require monitoring plans in a broader range of cases; require plans to include more detailed information regarding effectiveness and uncertainty; require agencies to engage the public in connection with mitigation plans; and provide guidance on topics including interagency coordination and mitigation funding.

In the final rule, CEQ strikes paragraph (d) of 40 CFR 1505.3 (2020) and revises § 1505.3(c) to require the lead or cooperating agency to prepare and publish a monitoring and compliance plan for mitigation in certain circumstances identified in § 1505.3(c)(1) and (c)(2)—the final rule subdivides the text from proposed paragraph (c) to improve readability. The final rule clarifies that an agency must publish the plan. While publication is implied in the proposed rule, since such plans would be completed in or with the ROD or FONSI, and these documents must be published, commenters requested CEQ address this explicitly in the final rule, and CEQ has done so to avoid any confusion over whether agencies must publish these plans.

CEQ revises the language from the proposed rule to make clear that agencies must prepare such plans when the following conditions are met. First, the analysis of the reasonably foreseeable effects of a proposed action in an EA or EIS is based on implementation of mitigation. Second, the agency incorporates the mitigation into its ROD, FONSI, or separate decision document.

As with the requirements related to mitigation enforceability in § 1505.2(c), this provision does not require agencies to include mitigation monitoring and compliance plans for every action subject to NEPA or even for every decision that includes mitigation. Rather, the final rule requires the agency to prepare and publish a mitigation monitoring and compliance plan when an agency bases its identification of the reasonably foreseeable effects of the action, as required by section 102(2)(C) of NEPA, on implementation of mitigation. Specifically, the statutory text requires an agency to identify the ''reasonably foreseeable environmental effects'' of the proposed action; to the extent that identification assumes the implementation of mitigation measures to avoid adverse effects, it follows, in turn, that implementation of mitigation must also be reasonably foreseeable. The preparation of a monitoring and compliance plan therefore provides the agency with reasonable certainty that the mitigation measures upon which it has based its effects analysis will be implemented, and therefore, that the effects of the action in the absence of mitigation do not need to be analyzed and disclosed to satisfy the requirements of the NEPA statute. For example, if an agency concluded that issuing a permit allowing fill of five acres of wetlands would not have a significant effect based on the applicant's agreement to restore five acres of comparable wetlands in the same watershed, then the agency has based its conclusion that the action to grant the permit does not have significant effects on implementation of the mitigation measure and would need to prepare a monitoring and compliance plan. The same would be true if the agency's analysis in its EA or EIS found that authorizing the filling of five acres of wetlands would not have a reasonably foreseeable effect on the availability of wetlands habitat in the watershed based on the implementation of the wetlands restoration measure.

The language in § 1505.3 builds on CEQ's longstanding positions regarding the information that agencies must include in NEPA documents when agencies choose to base their effects analysis on the implementation of mitigation measures. To the extent that other authorities may require monitoring and compliance plans, agencies should leverage those existing plans to comply with the requirements of the rule, rather than duplicating efforts.

CEQ proposed paragraphs (c)(1) and (c)(1)(i) through (c)(1)(vi) of § 1505.3 to describe the contents of a monitoring and compliance plan and provide agencies flexibility to tailor plans to the complexity of the mitigation that the agency has incorporated into a ROD, FONSI, or other document. Contents should include a description of the mitigation measures; the parties responsible for monitoring and implementation; how the information will be made publicly available, as appropriate; the anticipated timeframe for implementing and completing the mitigation; the standards for compliance with the mitigation; and how the mitigation will be funded.

A commenter suggested that CEQ require in § 1505.3(c)(1)(v) that the standards address effectiveness of the mitigation. CEQ declines to make this change in the final rule. The goal of this provision is to ensure that agencies have reasonable certainty that mitigation measures that serve as the basis for the effects analysis will be implemented, and therefore, that the effects of the action in the absence of implementation of mitigation are not reasonably foreseeable and can be excluded from the analysis. Agencies appropriately evaluate the effectiveness of mitigation measures as part of the NEPA process and rely on various techniques, such as adaptive management plans, to address circumstances where there is substantial uncertainty over effectiveness, for example where a mitigation measure is new or novel.

CEQ finalizes these paragraphs in § 1505.3(d) and (d)(1) through (d) as proposed, with an addition to § 1505.3(d) to reference the monitoring and compliance plan required by paragraph (c). Agencies may tailor monitoring and compliance plans to the particular action, but they should contain sufficient detail to inform the participating and cooperating agencies and the public about relevant considerations, such as the magnitude of the environmental effects that would be subject to mitigation, the degree to which the mitigation represents an innovative approach, any technical or other challenges with implementation, the time frame for implementation and monitoring, and other relevant facts that support a determination that the mitigation will be implemented. Where a proposed action involves more than one agency, the lead and cooperating agencies should collaboratively develop a monitoring and compliance plan that clearly defines agency roles and avoids duplication of effort.

Requiring agencies to prepare a monitoring and compliance plan for mitigation in the circumstances identified in paragraph § 1505.3(c) is intended to address concerns that mitigation measures included in agency decisions are not always carried out. If it is reasonably foreseeable that a mitigation measure will not be implemented, then the agency cannot appropriately base its analysis of the effects of the action on the implementation of the mitigation measure. A monitoring and compliance plan will address this concern and support an agency relying on mitigation for purposes of analyzing and disclosing the reasonably foreseeable environmental effects of a proposed action, as required by section 102(2)(C) of NEPA, and, in some circumstances, concluding that a FONSI is appropriate.

Finally, CEQ proposed to add a new paragraph (c)(2) to provide that any new information developed through the monitoring and compliance plan would not require an agency to supplement its environmental documents solely because of this new information. CEQ proposed this provision to clarify that the existence of a monitoring and compliance plan by itself would not mean that the action to which it relates is an ongoing action if it would otherwise be considered completed.

CEQ received comments supporting, opposing, and asking CEQ to clarify proposed § 1505.3(c)(2). In the final rule, CEQ includes proposed paragraph (c)(2) at § 1505.3(e) with some revisions to the proposal. CEQ revises the beginning of the first sentence to clarify that where an action is incomplete or ongoing, the information developed through the monitoring and compliance plan itself cannot induce the requirement to supplement or revise environmental documents. CEQ includes this provision to avoid perverse incentives that could lead agencies to adopt less effective monitoring and compliance plans, or forgo commitments to mitigation entirely, to avoid revision and supplementation. This clarification is also consistent with the purpose of the monitoring and compliance plan, which is to ensure that the agency has a reasonable basis for assessing environmental effects at the time that it makes its decision, rather than creating a new obligation for ongoing NEPA analysis after a decision is made. Second, CEQ adds an additional sentence at the end of the paragraph to clarify that the ongoing implementation of a monitoring and compliance plan by itself is not an incomplete or ongoing Federal action that induces supplementation under §§ 1501.5(h) or 1502.9(d).

The changes to § 1505.3 are consistent with the final rule's revisions to § 1505.2(c), which direct agencies to adopt and summarize a monitoring and enforcement program for any enforceable mitigation requirements or commitments for a ROD, and to § 1501.6(a) to clarify the use of mitigated FONSIs. The changes also provide more consistency in the content of monitoring and compliance plans, increase transparency in the disclosure of mitigation measures, and provide the public and decision makers with relevant information about mitigation measures and the process to comply with them.

H. Revisions to Other Requirements of NEPA (Part 1506)

CEQ proposed multiple revisions to part 1506, as described in this section. As noted in section II.C.8, CEQ proposed to move 40 CFR 1506.6 (2020), ''Public involvement,'' to § 1501.9, ''Public and governmental engagement.'' CEQ did not propose changes to § 1506.2, ''Elimination of duplication with State, Tribal, and local procedures;'' § 1506.4, ''Combining documents;'' or § 1506.8, ''Proposals for legislation,'' but invited comments on whether it should make changes to these provisions in the final rule.

CEQ received several general comments of support on § 1506.2 regarding elimination of duplication with State, Tribal, and local procedures, and one commenter suggested the final rule change § 1506.2(d) to require rather than recommend that EISs describe how the agency will reconcile an inconsistency between the proposed action and an approved State, Tribal, or local plan or law. CEQ declines to make this change to this longstanding language from the 1978 regulations. As also noted in this provision, NEPA does not require such reconciliation.

CEQ did not receive any recommendations to amend § 1506.4 regarding combining documents, though one commenter requested additional guidance on use of this and other provisions to facilitate sound and efficient decision making and avoid duplication. Finally, CEQ received one comment on § 1506.8 regarding legislative EISs, requesting CEQ include public notification and participation requirements for legislative EAs/EISs in § 1506.8(b). CEQ notes that consistent with § 1506.8(c), agencies must provide for public notice and seek comment like any other draft EIS. After considering these comments, CEQ has determined to finalize the rule without making changes to §§ 1506.2, 1506.4, or 1506.8.

1. Limitations on Actions During NEPA Process (§ 1506.1)

CEQ proposed to edit § 1506.1(b) to provide further clarity on the limitations on actions during the NEPA process to ensure that agencies and applicants do not take actions that will adversely affect the environment or limit the choice of reasonable alternatives until an agency concludes the NEPA process.

CEQ proposed to amend the last sentence in paragraph (b), which provides that agencies may authorize certain activities by applicants for Federal funding while the NEPA process is ongoing. To better align this provision with NEPA's requirements, CEQ proposed to add a clause to the sentence clarifying that such activities cannot limit the choice of reasonable alternatives, and the Federal agency must notify the applicant that the agency retains discretion to select any reasonable alternative or the no action alternative regardless of any potential prior activity taken by the applicant prior to the conclusion of the NEPA process. CEQ also proposed this revision to provide additional clarity consistent with § 1506.1(a) and the 2020 Response to Comments, which state that this provision allows certain activities to proceed, prior to a ROD or FONSI, so long as they do not have an adverse environmental impact or limit the choice of reasonable alternatives.[103] The NPRM also noted that the proposed change is responsive to comments received on the 2020 rule expressing concern that the existing language could allow pre-decisional activities to proceed that would inappropriately narrow the range of alternatives considered by an agency.

A few commenters expressed support for the proposed changes to § 1506.1(b), including commenters who also requested additions to the list of examples of potentially permissible activities. Several other commenters opposed the proposed language, pointing to sector-specific reasons; citing cases where courts issued preliminary injunctions predicated on a ruling that limiting reasonable alternatives before the NEPA analysis is complete is irreparable harm; citing cases where courts ruled that undertaking project actions before NEPA is completed undermines the law; and asserting that allowing any economic investment in an action before completing the NEPA process undermines confidence in agency decisions.

Some commenters opposed the examples of activities an agency could authorize, asserting that land rights acquisition and long lead time equipment purchases are apt to bias agency decision making and recommended CEQ revise the list to prohibit acquisition of interests in land, purchase of long lead-time equipment, and purchase options made by applicants before NEPA review.

One commenter asserted that the proposed revisions to paragraph (b) undermine the value of an agency authorization and recommended the provision state that project applicants may proceed at their own risk without agency authorization. Another commenter requested that CEQ add language to paragraph (b) to provide Tribes with more flexibility to undertake interim actions.

CEQ considered the comments and finalizes § 1506.1(b) as proposed with two additional revisions. Specifically, CEQ changes the phrase ''non-Federal entity'' to ''applicant'' in the first sentence of paragraph (b) for consistency with the definition of ''applicant'' added to § 1508.1(c) and does not include the phrase ''potential prior'' before the word ''activity,'' so that the provision requires notification that the agency retains discretion regardless of any activity taken by the applicant prior to the conclusion of the NEPA process. CEQ has deleted this phrase because, upon further consideration, it considers it to be confusing because the sentence refers to activity taken prior to the conclusion of the NEPA process, and, therefore, the earlier use of ''prior'' is redundant and the use of ''potential'' is unnecessary because such activity would be actual and not potential at the conclusion of the NEPA process. CEQ considers the provision as revised to strike the right balance between preserving the integrity of the NEPA process, including preserving an agency's right to select no action or a reasonable alternative, and providing applicants sufficient flexibility to make business decisions. This approach is consistent with the fact that NEPA applies to Federal agencies and does not directly regulate applicants (unless the applicants are themselves Federal agencies). This approach is also consistent with longstanding practice under § 1506.1. Further, applicants are in the best position to assess and determine their tolerance for risk, and agencies should never be unduly influenced by these decisions in their NEPA processes.

CEQ also proposed to strike ''required'' in paragraph (c). This edit is consistent with § 1501.11, which encourages, but does not require, the use of programmatic environmental reviews.

A few commenters opposed the proposed change to paragraph (c), asserting that it is contrary to NEPA and multiple other laws by restricting actions during discretionary or non-required programmatic environmental reviews. One commenter stated that the proposal would authorize agencies to suspend programs like Federal coal leasing while environmental studies are ongoing, and that NEPA does not provide agencies with authority for such action. The commenter asserted that expanding proposed § 1506.1 beyond required programmatic environmental reviews is arbitrary and capricious because CEQ has failed to describe a valid purpose for the deletion.

CEQ has reviewed this provision in response to comments and retains ''required'' in the final rule. CEQ also revises ''programmatic environmental review'' to ''environmental review for a program'' to revert to the approach in the 1978 regulations. The 2020 rule changed ''program'' EIS to ''programmatic environmental review'' stating that ''programmatic'' is the term commonly used by NEPA practitioners.[104] However, paragraphs (c) and (c)(1) continue to refer to ''program,'' and the definition of ''programmatic environmental document'' in § 1508.1(ee) is not limited to reviews of programs, but extends other reviews such as reviews of groups of related actions. To resolve any ambiguity, the final rule is using ''program'' throughout these paragraphs and changes ''existing programmatic review'' to ''environmental document.'' CEQ also notes that the longstanding principles set forth in paragraph (c)—that agencies must comply with NEPA for specific Federal actions before taking the action and that agencies cannot engage in activities that prejudice the outcome of the NEPA process—apply to programmatic environmental reviews irrespective of whether a programmatic review is required.

2. Adoption (§ 1506.3)

CEQ proposed changes to § 1506.3 in the NPRM to facilitate an agency's adoption of the EISs, EAs, and CE determinations of another agency in an appropriate and transparent manner. As CEQ noted in the proposed rule, the 2020 regulations expanded § 1506.3 to codify longstanding agency practice of adopting EAs and explicitly allowed for adoption of other agencies' CE determinations. CEQ proposed

[103] CEQ, 2020 Response to Comments, *supra* note 69, at 356.

[104] CEQ, 2020 Final Rule, *supra* note 39, at 43327.

modifications to § 1506.3 to improve clarity, reduce redundancy, and ensure that when an agency adopts an EIS, EA, or CE determination, the agency conducts an independent review to determine that the EIS, EA, or CE determination meets certain basic standards. CEQ also proposed to add new requirements regarding the adoption of another agency's CE determination to increase public transparency.

Comments on the proposed changes to § 1506.3 expressed both opposition and support for adoption in general, the approach to enabling adoption taken in the proposed rule, and its application to EISs, EAs, and CE determinations. Commenters who supported the adoption provisions as proposed point to the efficiencies gained in reducing time. Commenters who opposed CEQ's proposed changes asserted that the proposed rule went beyond the intended goal of NEPA and that adoption limits public engagement. Additionally, one commenter requested that throughout this section, CEQ replace ''substantially the same'' with ''the same'' to strengthen the requirements for adoption.

CEQ finalizes the proposed changes to § 1506.3 as discussed in this section. CEQ disagrees that adoption goes beyond NEPA's intended goals. Because actions must be substantially the same, the public will have had the opportunity to engage during the preparation of the original document to the extent engagement is required or appropriate for that particular action; and, where the actions are not substantially the same, additional public engagement may be required consistent with the requirements for the document type. Additionally, the CEQ regulations have provided for adoption since 1978 and included the ''substantially the same'' standard. Such language is critical to facilitating adoption because agency actions are often not the same, but relate to the same overall project. For example, one agency's funding decision is not the same action as another agency's decision to issue a permit. However, if the underlying activity analyzed in the NEPA document is the same project, then adoption is appropriate.

In paragraph (a), which provides that an agency may adopt EISs, EAs or CE determinations, CEQ proposed to strike the language requiring an EIS, EA, or CE determination to meet relevant standards and instead articulate the standards in paragraphs (b) through (d), which address adoption of EISs, EAs, and CE determinations, respectively. CEQ proposed to replace this clause with language that requires adoption to be done ''consistent with this section.'' CEQ proposed to remove ''Federal'' before the types of documents an agency may adopt as unnecessary and to make clear that agencies can adopt NEPA documents prepared by non-Federal entities that are doing so pursuant to delegated authority from a Federal agency. *See, e.g.,* 23 U.S.C. 327. CEQ makes these changes in the final rule as proposed.

In paragraph (b), CEQ proposed to add text after the heading ''Environmental impact statements'' to provide that an agency may adopt a draft or final EIS, or a portion of a draft or final EIS, if the adopting agency independently reviews the statement and concludes it meets the standards for an adequate statement pursuant to the CEQ regulations and the adopting agency's NEPA procedures.

A commenter opposed the proposed requirement for agencies to confirm that an adopted EIS, as well as an EA under paragraph (c), meets the standards of the adopting agency's NEPA procedures. The commenter asserted that this requirement is burdensome and can cause delays. One commenter also asserted that paragraph (b) requires standards for EIS adoption in agency NEPA procedures and that because agencies have a year to adopt new procedures, this will set adoption back by a year.

CEQ finalizes the changes to paragraph (b) as proposed but replaces ''a draft or final'' EIS with ''another agency's draft or final'' EIS to respond to commenters' requests for additional clarity and for consistency with the existing phrasing in paragraph (d). CEQ disagrees that requiring adopting agencies to assess consistency with their procedures will add substantial additional burden. Ensuring consistency with the adopting agency's procedures is a codification of longstanding agency practice and is necessary so that an agency can ensure that the adopted document satisfies the requirements applicable to the adopting agency. CEQ also disagrees that agencies must update their procedures to address adoption before they can make use of this tool. While agencies may consider including the adoption process in their procedures, § 1507.3 does not require agencies to do so and does not preclude an agency from using adoption before its procedures are updated. Therefore, CEQ disagrees with the commenter's assertion that agencies cannot adopt EISs until their agency NEPA procedures are updated.

In paragraph (b)(1), which addresses adoption of an EIS for actions that are substantially the same, CEQ proposed to insert ''and file'' after ''republish'' to improve consistency with § 1506.9 and because agencies must both publish the EIS and file it with EPA. Further in paragraph (b)(1), CEQ proposed to add text to clarify that agencies should supplement or reevaluate an EIS if the agency determines that the EIS requires additional analysis.

One commenter questioned if the phrase ''or reevaluate it as necessary'' means an agency could adopt an EIS through an EA and FONSI. Another commenter requested that CEQ more clearly require agencies to supplement an EIS, interpreting the proposed rule text to encourage, rather than require, supplementation when there is new or updated data. Similarly, the commenter also requested that CEQ define when it is necessary to supplement or reevaluate an EA in paragraph (c). CEQ finalizes this provision with an additional revision to change ''the statement requires supplementation'' to ''the statement may require supplementation consistent with § 1502.9 of this subchapter,'' which adds a cross-reference to the section of the regulations addressing supplementation and reevaluation. CEQ includes these revisions to clarify that agencies can conduct additional analysis to determine whether the supplementation criteria of § 1502.9(d) are met or document why supplementation is not required. This revised provision codifies agency practice and provides agencies more flexibility to use the efficiency mechanism of adoption while also ensuring that the analysis included in an adopted document is valid and complete. For example, if an agency is adopting an EIS that was prepared several years prior, and there is more recent data or updated information available on one of the categories of effects, the agency may need to do additional analysis if the supplementation standard in § 1502.9(d) is met, or document in a reevaluation, consistent with § 1502.9(e), why the supplementation standard is not met. Similarly, if an action is not substantially the same, and the adopting agency determines that the EIS requires supplemental analysis, the agency would treat the EIS as a draft, prepare the additional analysis, and publish the new draft EIS for notice and comment. Where a proposed action is not substantially the same, an agency must, at minimum, supplement the adopted EIS to ensure it adequately covers its proposed action.

In paragraph (b)(2), which addresses adoption of an EIS by a cooperating agency, CEQ proposed to clarify that this provision is triggered when a

cooperating agency does not issue a joint or concurrent ROD consistent with § 1505.2. In the proposed rule, CEQ explained that this provision covers instances when a cooperating agency adopts an EIS for an action the cooperating agency did not anticipate at the time the EIS was issued, such as a funding action for a project that was not contemplated at the time of the EIS. In such instances, the cooperating agency may issue a ROD adopting the EIS of the lead agency without republication of the EIS. CEQ proposed to strike the text at the end of paragraph (b)(2) regarding independent review because CEQ proposed to capture that standard in paragraph (b).

CEQ did not receive comments on its proposed changes to paragraph (b)(2). Therefore, CEQ finalizes this provision consistent with its proposal.

In paragraph (c), CEQ proposed to add language to clarify the standard for adopting an EA, which mirrors the standard for adoption of an EIS. CEQ similarly proposed edits to align the process with the processes for EISs by clarifying that the adopting agency may adopt the EA, and supplement or reevaluate it as necessary, in its FONSI.

A few commenters opposed the adoption of EAs, in particular expressing opposition to the adoption of draft EAs or EAs that are the subject of formal dispute resolution or litigation, and suggested these should instead be incorporated by reference pursuant to § 1501.12. One commenter requested that CEQ revise paragraph (c) to align it with paragraph (d) to require agencies to document the reasons for its adoption and make its reasoning publicly available.

In the final rule, CEQ finalizes the text as proposed in paragraph (c) with an additional revision to replace ''an environmental assessment'' with ''another agency's environmental assessment'' to respond to commenters' requests for additional clarity and for consistency with the same change to paragraph (b) and the existing language in paragraph (d). For the reasons articulated with respect to EISs, CEQ revises the language that if an agency determines an EA ''may require supplementation consistent with § 1501.5(h) of this subchapter,'' it may adopt and supplement or reevaluate the EA as necessary and issue its FONSI. CEQ agrees that an agency may only adopt a final EA, and that use of a draft EA through incorporation by reference is appropriate. However, CEQ interprets the proposed text as precluding adoption of a draft EA and, therefore, does not consider additional revisions necessary to address this comment. The reference to EAs in this section necessarily means final EAs, since the regulations do not require a draft and final EA; therefore, the reference to EA without specification means a final EA.

For additional clarity, CEQ proposed to add ''determinations'' to the title of paragraph (d). CEQ also proposed to revise this paragraph to improve readability and clarify that the adopting agency is adopting another agency's determination that a CE applies to a particular proposed action where the adopting agency's proposed action is substantially the same. As CEQ noted in the proposed rule, this provision does not allow an agency to unilaterally use another agency's CE for an independent proposed action; rather, the process for such reliance on another agency's CE is addressed in § 1501.4(e).

To ensure that there is public transparency for adoption of CE determinations, like adoption of EAs and EISs, CEQ proposed new paragraphs (d)(1) and (d)(2) to require agencies to document and publish their adoptions of CE determinations, such as on their website. CEQ proposed in paragraph (d)(1) to specify that agencies must document a determination that the proposed action is substantially the same as the action covered by the original CE determination, and there are no extraordinary circumstances present requiring preparation of an EA or EIS. Because agencies typically already make such determinations in the course of adopting CE determinations for actions that are substantially the same, CEQ has concluded that this documentation requirement will not be onerous or time consuming. In paragraph (d)(2), CEQ proposed to require agencies to publicly disclose when they are adopting a CE determination. CEQ stated in the proposed rule that this proposed change was intended to increase transparency on use of CEs to respond to feedback from stakeholders that they often do not know when an agency is proceeding with a CE. This adds a standard to adoption of CE determinations that is similar to the practice for adoption of EAs and EISs. Agencies, however, have flexibility to determine how to make this information publicly available, including through posting on an agency's website.

One commenter requested that CEQ require an agency to both publish a determination on its website and make it publicly available in other ways, as opposed to one or the other. CEQ declines to require agencies to publish CE adoption determinations in multiple places as unnecessarily burdensome on agencies. However, CEQ notes that the language in paragraph (d)(2) does not preclude agencies from both publishing an adoption of a CE determination on its website and making it publicly available in other ways when they determine doing so is appropriate. CEQ finalizes these paragraphs as proposed with one clarifying change to add introductory language at the end of paragraph (d)—''In such circumstances the adopting agency shall''—to make clear that paragraphs (d)(1) and (d)(2) apply when adopting another agency's CE determination to distinguish this process from the adoption process under § 1501.4(e).

3. Agency Responsibility for Environmental Documents (§ 1506.5)

CEQ proposed modifications and additions to § 1506.5 to clarify the roles and responsibilities for agencies, applicants, and agency-directed contractors in preparing environmental documents and to make the provision consistent with section 107(f) of NEPA, which requires agencies to prescribe procedures to allow project sponsors to prepare EAs and EISs under the agencies' supervision and to independently evaluate and take responsibility for such documents. 42 U.S.C. 4336a(f). The 2020 rule amended § 1506.5 to allow an applicant to prepare EISs on behalf of the agency; however, the 2023 amendments to NEPA make clear that agencies themselves must establish procedures for project sponsors to prepare EAs and EISs, not the CEQ regulations. As noted in the NPRM, CEQ understands the 2023 amendments to NEPA to use the terms ''applicant'' and ''project sponsor'' interchangeably and, therefore, CEQ proposed to use the term ''applicant'' and, in the final rule, CEQ uses and defines the term ''applicant.'' See section II.J.1. However, as discussed further in this section, CEQ notes that the 2023 NEPA amendments' requirement that agencies establish procedures for project sponsors to prepare EAs and EIS does not affect the ability of applicants and project sponsors to provide information to agencies to assist agencies or their agency-directed contractors in the preparation of environmental documents consistent with § 1506.5(c).

CEQ received multiple comments that generally supported the proposed changes to allow applicants to prepare EAs and EISs, as well as multiple commenters who generally opposed the provision and opposed section 107(f) of NEPA, 42 U.S.C. 4336a(f). CEQ discusses these comments and responses in section II.I.3 of this final rule, which addresses the statutory

requirement for agencies to prescribe applicant procedures.

In paragraph (a), CEQ proposed to clarify that regardless of who prepares an environmental document—the agency itself, a contractor under the direction of the agency, or the applicant pursuant to agency procedures—the agency must ensure the document is prepared with professional and scientific integrity using reliable data and resources, consistent with sections 102(2)(D) and (2)(E) of NEPA, 42 U.S.C. 4332(2)(D)–(E), and exercise its independent judgment to review, take responsibility for, and briefly document its determination that the document meets all necessary requirements and standards related to NEPA, the CEQ regulations, and the agency's NEPA procedures.

A few commenters provided suggestions for CEQ to consider regarding the changes in paragraph (a). These commenters asked CEQ to define what ''under the supervision of the agency'' means; require agencies to fully rather than briefly document its determination that an environmental document meets the standards of NEPA, the CEQ regulations, and the agency's NEPA procedures; and adopt a clearer standard for guaranteeing professional and scientific integrity to ensure all EISs and EAs receive the same level of scrutiny regardless of who prepares them.

Multiple commenters also provided feedback on the language in paragraph (a) referring to agency procedures adopted pursuant to § 1507.3(c)(12), which are discussed in section II.I.3 of this final rule.

In the final rule, CEQ makes a few clarifying updates to the proposed text in paragraph (a). Specifically, CEQ revises the paragraph heading to ''agency responsibility'' to clarify that this paragraph addresses agency responsibility for environmental documents generally. CEQ adds ''and direction'' after ''supervision'' to better distinguish contractors under the supervision of the agency from applicant-directed contractors. This provision addresses contractors hired directly by the agency and third-party contractors where the applicant pays for the contractor but otherwise has no role in directing that contractor during the preparation of the document; rather, the agency supervises and provides the direction. Contractors hired by the applicant and supervised by the applicant directly are covered by the language in the regulation addressing applicant-prepared EAs and EISs pursuant to § 1507.3(c)(12).

CEQ declines to specifically define ''supervision'' as this is a commonly understood term, and CEQ considers the addition of the word ''direction'' in this paragraph to capture the appropriate role of agencies, which have decades of experience with supervising the work of contractors preparing NEPA documents. CEQ also declines to require agencies to do more than briefly document their determination that an environmental document meets the standards under NEPA, the regulations in this subchapter, and the agency's NEPA procedures. In general, NEPA documents themselves demonstrate that they meet these standards; the determination required by this paragraph merely requires that an agency documents that it has also made this determination.

Lastly with respect to paragraph (a), CEQ declines to include standards for scientific and professional integrity. These concepts have been in the regulations since 1978, and the final rule further clarifies these concepts by moving 40 CFR 1502.23 (2020) to § 1506.6 as discussed further in section II.H.4.

In the NPRM, CEQ proposed in the second sentence of paragraph (b) to remove text providing that agencies may direct an applicant to prepare an environmental document and also replace the phrase ''environmental document'' with specific reference to EAs or EISs. CEQ also proposed to add a clause to allow agencies to authorize a contractor to draft a FONSI or ROD, while also providing that the agency is nevertheless responsible for the accuracy, scope, and contents of contractor-drafted FONSIs and RODs. CEQ proposed to add this clause because a FONSI or ROD represents an agency's conclusions regarding potential environmental effects and other aspects of a proposed action. CEQ also proposed these changes to exclude applicants from directly preparing EAs and EISs under this section, given the direction in section 107(f) of NEPA that a lead agency must prescribe procedures to allow a project sponsor to prepare an EA or EIS, 42 U.S.C. 4336a(f), and CEQ proposed to require agencies to include these procedures as part of their agency NEPA procedures in § 1507.3(c)(12). CEQ also proposed these edits to clarify the role of contractors because finalizing and verifying the contents of FONSIs and RODs is appropriately the responsibility of the Federal agency and is consistent with longstanding agency practice.

CEQ received comments expressing confusion regarding this paragraph given the reference to applicants in the first sentence. CEQ also received multiple comments interpreting this provision to allow applicants to prepare draft FONSIs or RODs. Some of these commenters objected to this perceived allowance asserting that applicants should not be allowed to draft decision documents because they are biased and have a conflict of interest. Conversely, three commenters supported the ability of applicants, contractors, or project sponsors to prepare FONSIs and RODs, pointing to time and cost savings, with one commenter specifically interpreting section 107(f) of NEPA, 42 U.S.C. 4336a(f), to allow applicants to prepare all environmental documents. One commenter suggested CEQ edit the beginning of the second sentence of proposed paragraph (b) to address conflict of interest by adding a qualifier that would limit the applicability of the paragraph to circumstances in which an agency has established the absence of any conflict of interest.

In the final rule, CEQ addresses the confusion around this provision by separating the provisions related to applicants from provisions related to agency-directed contractors. First, CEQ revises the paragraph heading for paragraph (b) to read ''applicant information'' and retains the first sentence allowing agencies to require applicants to submit environmental information for agency use in preparing an environmental document. The CEQ regulations have long allowed agencies to collect information from applicants to help them prepare NEPA documents, and CEQ considers this allowance essential to an efficient environmental review process because in many cases, the applicant will already have obtained or be in the best position to obtain information that an agency needs.

Second, in paragraphs (b)(1) through (b)(3) of the final rule, CEQ includes the provisions that provide directions related to applicant-provided information. Paragraph (b)(1) retains the first sentence from paragraph (b)(1) of the proposed rule, which provides that agencies should outline the information that the agency needs from the applicant to prepare an environmental document.

Paragraph (b)(2) retains the requirement in the current regulations and proposed paragraph (b)(2) that the agency independently evaluate the environmental information provided by an applicant and be responsible for the accuracy, scope, and contents of any applicant-provided environmental information included in the environmental document. CEQ does not require agencies to specifically document their evaluation of this information since the agencies are

responsible for preparing the NEPA document, and therefore any applicant-provided environmental information included in the NEPA document becomes the agency's responsibility. While paragraph (a) requires agencies to briefly document its determination that a contractor-prepared environmental document meets the standards under NEPA, the CEQ regulations, and the agency's NEPA procedures, requiring an agency to specifically address each piece of information or analysis provided by an applicant that the agency has incorporated into an environmental document would be burdensome. Under this provision, agencies have discretion to integrate applicant-provided information in environmental documents as the agency sees fit, and the agency is responsible for the accuracy of that information, just as it is responsible for the accuracy of information from other sources that the agency relies upon. And, as with all NEPA documents, the agencies are responsible for ensuring their documents are appropriately scoped and satisfy all legal requirements including compliance with these regulations and their agency NEPA procedures. Lastly, CEQ includes a new paragraph (b)(3) to note that an agency may allow applicants to prepare EAs or EISs consistent with agency procedures issued pursuant to section 107(f) of NEPA, 42 U.S.C. 4336a(f), and § 1507.3(c)(12).

Third, the second sentence of proposed § 1506.5(b) becomes paragraph (c) in the final rule, and CEQ adds a paragraph heading, ''Agency-directed contractor,'' to clarify that this provision addresses contractors where the agency supervises and directs their work. CEQ adds ''and direction'' after ''supervision'' for consistency with its edit in paragraph (a) and to clarify that this provision does not apply to contractors hired and overseen by applicants. In the final rule, CEQ does not revise ''environmental document'' to be ''environmental assessment or environmental impact statement'' or include the language allowing an action to authorize a contractor to draft a FONSI or ROD. Since this provision is specific to agency-directed contractors, and an agency may direct a contractor in helping to draft any environmental document, these limitations are unnecessary.

Fourth, paragraph (c)(1) of the final rule contains the second sentence of proposed § 1506.5(b)(1) and requires agencies to provide their contractors guidance, and participate in and supervise the environmental document's preparation. Fifth, paragraph (c)(2) of the final rule addresses proposed § 1506.5(b)(2) and requires agencies to independently evaluate contractor-prepared environmental documents, be responsible for their accuracy, scope, and contents, and document the evaluations in the environmental documents themselves. As discussed earlier in this section, CEQ addresses applicant-submitted information in paragraph (b)(2).

One commenter requested that CEQ add in proposed paragraph (b)(2), which is § 1506.5(c)(2) in the final rule, a requirement for agencies to explain how it independently evaluated the information prepared by the contractor and upon what basis the agency is able to vouch for the accuracy, scope, and contents of the information or documents submitted. This comment aligns with other commenters who requested that CEQ strengthen agency responsibility for the accuracy, scope, and contents of environmental documents.

CEQ declines to add greater specificity about how agencies must evaluate and document their evaluations. Such evaluations may vary greatly depending on what the agency is evaluating and setting a regulatory standard would be inappropriate and inefficient. Further, the level of evaluation needed may vary depending on the guidance and direction agencies provide to the contractors in the first place.

Fifth, paragraph (c)(3) of the final rule requires agencies to include the names and qualifications of the persons preparing and independently evaluating the contractor-prepared environmental documents, such as in the list of preparers for EISs, consistent with § 1502.18. This provision is identical to proposed § 1506.5(b)(3), in which CEQ proposed to remove the reference to applicants as discussed earlier in this section.

Next, CEQ proposed to revise paragraph (b)(4) of 40 CFR 1506.5 (2020) to clarify that the Federal agency is responsible for preparing a disclosure statement for the contractor to execute, specifying that the contractor does not have any financial or other interest in the outcome of the proposed action.

CEQ received multiple comments regarding the proposed changes to paragraph (b)(4). One commenter expressed that the paragraph provides for less disclosure than the 1978 regulations did. One commenter expressed direct support for the paragraph and encouraged CEQ to retain the disclosure requirement. Another commenter requested that CEQ delete ''where appropriate'' interpreting the clause to modify ''shall prepare'' instead of ''cooperating agency'' and arguing deletion of this clause will minimize conflicts of interest. One commenter opposed paragraph (b)(4), asserting that it is not workable for a contractor to have no financial or other interest in the outcome of an action because it is common for a firm that assists with preparing the NEPA documents to perform subsequent engineering and design work if a project moves forward.

CEQ finalizes this provision in § 1506.5(c)(4) as proposed, but adds ''where appropriate'' to precede rather than follow (as proposed) ''a cooperating agency'' to make it clear that the clause modifies ''cooperating agency.'' CEQ makes this change in the final rule to address commenters' concerns that the provision, as drafted in the proposed rule, would have given agencies the discretion whether to prepare a disclosure statement. The revised language is generally consistent with the approach in the 1978 regulations, and CEQ disagrees that it provides for less disclosure than the 1978 regulations. CEQ does not consider the potential for a contractor to perform future engineering and design work to present a conflict of interest in the outcome of an action. Instead, a conflict of interest would exist if a contractor possessed a direct financial interest in the project, for example if it entered into a contingency fee arrangement that provided for an additional payment if an agency authorized an action. However, CEQ encourages agencies to disclose this information to the public in their contractor disclosure statements.

Finally, CEQ proposed to change ''any agency'' to ''an agency'' in paragraph (b)(5). In the final rule, CEQ redesignates paragraph (b)(5) of 40 CFR 1506.5 (2020) to be paragraph (d) as this paragraph is a general statement about the operations of § 1506.5 and is not specific to agency-directed contractors. CEQ adds a paragraph heading, ''Information generally'' for consistency with the paragraph headings added throughout.

4. Methodology and Scientific Accuracy (§ 1506.6)

As discussed in section II.D.18, in the final rule, CEQ moves the provision on methodology and scientific accuracy, from proposed § 1502.23 to § 1506.6, because this provision is generally applicable to NEPA reviews. As discussed further in this section, CEQ finalizes the text from proposed § 1502.23 with additional clarifying edits.

CEQ proposed to separate 40 CFR 1502.23 (2020) into paragraphs (a) and (b), with some modification, and add a new paragraph (c). In the final rule, CEQ further subdivides these paragraphs for additional clarity.

First, the first sentence of proposed § 1502.23(a), which is the opening sentence of 40 CFR 1502.23 (2020), requires agencies to ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents. This sentence has been in the regulations unchanged since 1978, is consistent with section 102(2)(D) of NEPA, 42 U.S.C. 4332(2)(D), and CEQ did not propose any revisions to this sentence in the proposed rule. CEQ finalizes this sentence in a standalone paragraph, § 1506.6(a), in the final rule.

Second, CEQ proposed to use the term high-quality information, which the 1978 regulations required agencies to use, *see* 40 CFR 1500.1 (2019), in the second sentence of proposed § 1502.23(a). CEQ proposed to clarify that such information includes best available science and reliable data, models, and resources.

Some commenters requested that CEQ add definitions for ''high-quality information'' and ''best available science.'' One commenter expressed that ''high-quality information'' is ambiguous and recommended CEQ remove it. Other commenters interpreted the example best available science to set a standard and asserted that this conflicts with the direction in section 102 of NEPA to establish information quality standards. Some commenters opposed the use of best available science and stated that the high-quality information standard is sufficient to ensure scientific integrity.

A few commenters pointed to case law to support their opinion that NEPA does not require agencies to use the best scientific methodology available. These commenters expressed concerns that a best available science standard could result in increased costs and delays that may not be justified and instead supported the high-quality information standard. Another commenter asserted that a best available science standard could be inconsistent with the rule of reason, which is supported by case law, and result in agencies unreasonably gathering information to meet a best available science standard. Conversely, another commenter stated that the reference to best available science and data is consistent with the rule of reason and relevant case law.

In § 1506.6(b) of the final rule, CEQ makes the change in the second sentence of proposed § 1502.23(a) to require agencies to use high-quality information. For clarity, CEQ replaces the last clause of the sentence, ''to analyze effects resulting from a proposed action and alternatives,'' with a more general clause at the beginning of the first sentence of § 1506.6(b) to avoid an ambiguity in the proposed text that could be read to imply that agencies do not need to rely on high-quality information for aspects of their environmental documents other than analyzing the effects of a proposed action and alternatives. CEQ did not intend to suggest that agencies can rely on anything other than high-quality information in their decision making, and the revision in the final rule makes clear that agencies must use high-quality information ''[i]n preparing environmental documents.'' Given the more general language in the NEPA statute and the general applicability of this provision, CEQ considers this phrasing to more accurately reflect the standard. CEQ includes, with minor reorganization, three of the proposed examples of high-quality information in the final rule: ''reliable data,'' ''models,'' and ''resources.'' The final rule uses the combined phrase ''reliable data and resources'' as one example to directly track the provision in section 102(2)(E) of NEPA, 42 U.S.C. 4332(2)(E), with ''models'' being another example. CEQ also notes that the Information Quality Act (Pub. L. 106–554, 44 U.S.C. 3516 note) and other authorities establish requirements for the quality, utility, objectivity, and integrity of the information that agencies disseminate, including, in some cases, requirements for peer review, and agencies should ensure compliance with those authorities as applicable.[105]

In the final rule, CEQ does not include ''best available science'' as an example of high-quality information. While CEQ considers ''best available science'' to be one example of high-quality information, CEQ agrees with commenters that NEPA does not require use of ''best available science'' in order to meet the statute's requirement for professional integrity, including scientific integrity. While CEQ did not intend for the inclusion of ''best available science'' as one example of ''high quality information'' in the proposed rule to require agencies to use the best available science, based on the comments, CEQ is concerned that this text could be misconstrued by agencies and potential litigants to require use of best available science in all cases. Therefore, CEQ does not include this example in the final rule to avoid any confusion.

Third, in the preamble to the proposed rule, CEQ provided Indigenous Knowledge as an example of high-quality information. Several commenters recommended CEQ include this as an example in the regulatory text to make clear that Indigenous Knowledge can constitute high-quality information upon which agencies could rely consistent with the regulations. One commenter expressed concern about the addition of Indigenous Knowledge in the preamble because the commenter worried that agencies may weigh Indigenous Knowledge more heavily than other sources of scientific expertise. Another commenter requested that CEQ define ''Indigenous Knowledge'' and explain how agencies can best use it as high-quality information. Some commenters provided a suggested definition, while others opposed CEQ defining ''Indigenous Knowledge'' in the rule.

In the final rule, CEQ includes Indigenous Knowledge as an example of high-quality information in the regulatory text. CEQ disagrees with the concern that identifying Indigenous Knowledge as an example of high-quality information—whether in the preamble or regulatory text—requires agencies to weigh this knowledge more heavily than other sources of scientific expertise. The regulations require agencies to rely on high-quality information and provide several examples, one of which is Indigenous Knowledge, and do not create a preference for one kind of high-quality information over others. CEQ declines to define Indigenous Knowledge in the regulations as it did not receive sufficient input from commenters or through its Tribal consultation for it to develop an appropriate definition that could apply to all of the contexts in which Federal agencies operate governed by the CEQ regulations. Additionally, while some Tribes provided feedback on a definition, others expressed concerns about a regulatory definition. While CEQ is not including a definition in the final rule, CEQ notes that agencies may look to the CEQ/OSTP guidance as a resource, and CEQ will consider whether additional guidance is needed to help agencies incorporate Indigenous Knowledge into its NEPA reviews.

[105] *See* OMB, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 FR 8452 (Feb. 22, 2002); OMB, Final Information Quality Bulletin for Peer Review, 70 FR 2664 (Jan. 14, 2005); and OMB, M–19–15, Improving Implementation of the Information Quality Act (2019), *https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf.*

Fourth, CEQ proposed to include a clause in the second sentence of proposed § 1502.23(a) to reference that high-quality information includes existing sources and materials. This proposed change moved the word ''existing'' in the second sentence of 40 CFR 1502.23 (2020) to the end of the sentence. CEQ proposed these changes to clarify that while agencies must use reliable data and resources, which can include existing data and resources, they are not limited to using existing sources and materials. CEQ proposed these changes in response to public commenters on the 2020 rule and Federal agency experts who raised concerns that the 2020 language could limit agencies to ''existing'' resources and preclude agencies from undertaking site surveys and performing other forms of data collection, which have long been standard practice when analyzing an action's potential environmental effects and may be necessary for agencies to adequately understand particular effects.

Some commenters stated the removal of the word ''existing'' in proposed paragraph (a) is in conflict with section 106(b)(3) of NEPA, 42 U.S.C. 4336(b)(3), because it suggests agencies have the discretion to undertake new, non-essential scientific or technical research without regard for whether the information to be obtained is essential to a reasoned choice among alternatives or for the cost or time considerations under NEPA. Another commenter requested that CEQ amend this statement to specify that where project-specific data is available, agencies should rely on that information rather than theoretical models. One commenter suggested that CEQ clarify that while new research may not be required, agencies must consider new information in their analyses.

In the final rule, CEQ replaces the proposed clause in the second sentence of proposed § 1502.23(a), ''including existing sources and materials,'' with a new sentence, ''Agencies may rely on existing information as well as information obtained to inform the analysis,'' to make clear that agencies can and should rely on existing information, but may also undertake new or additional information gathering as needed to adequately analyze their proposed actions. For example, in the context of analyzing historical, cultural, or biological effects, agencies may need to conduct survey work or reassess existing survey work periodically. Requiring an agency to rely on outdated data would not comport with sections 102(2)(D) through (F) of NEPA, 42 U.S.C. 4332(2)(D)–(F). While there are numerous reliable data sources for a variety of resources analyzed in NEPA documents, and the CEQ regulations encourage the use of existing information wherever possible, *see* § 1501.12, agencies should be permitted to exercise their judgment in determining when additional data and analyses are necessary for their analyses and decision making.

Fifth, CEQ moves the third sentence of 40 CFR 1502.23 (2020), which allows agencies to use any reliable data sources, such as remotely gathered information or statistical models to be the third sentence of § 1506.6(b) in the final rule and makes the clarifying edits consistent with the proposal.

Sixth, CEQ proposed to add a new sentence at the end of proposed § 1502.23(a) to encourage agencies to explain their assumptions and any limitations of their models and methods. CEQ proposed this addition to support this section's overall purpose of ensuring the integrity of the discussions and analyses in environmental documents. Additionally, CEQ proposed this addition to codify typical agency practice to explain relevant assumptions or limitations of the information in environmental documents.

A commenter recommended CEQ change the proposed new sentence from a recommendation to a requirement, stating that it is necessary for agencies to explain relevant assumptions or limitations of any models or methodologies on which they rely for their analyses to adequately inform the public and the agency decision makers. CEQ agrees that disclosing this information is necessary in order for the decision maker and the public to assess the reliability of the information. Therefore, CEQ includes the proposed sentence at the end of § 1506.6(b), but changes ''should'' to ''shall'' in the final rule.

Seventh, in proposed § 1502.23(b), CEQ proposed to strike the statement that agencies are not required to undertake new research to inform their analyses, consistent with the proposed change to proposed § 1502.23(a) regarding existing information. Some commenters opposed the proposed deletion of this language in proposed § 1502.23(b) and disagreed with CEQ's rationale for the deletion, stating that the existing language could not be reasonably read to prohibit agencies from undertaking additional analyses. One commenter opposed the proposed deletion, expressing concern that without the language, agencies may feel compelled to complete new research, which could interfere with agencies' ability to provide services, not just analysis, in contravention of NEPA's broad purposes in sections 101(a) and (b) of NEPA, 42 U.S.C. 4331(a)–(b) to balance other national priorities, including conserving agency resources. Another commenter suggested that CEQ clarify that while new research may not be required, agencies must consider new information in their analyses. Other commenters opposed to the proposed deletion stated that the proposed change conflicts with other provisions of the proposed rule, such as the intent of proposed § 1506.5(b)(3) for acceptable work to not be redone and proposed § 1506.4 to reduce duplication and paperwork. Multiple commenters expressed concern that deleting this language could result in additional litigation risk and delays by encouraging agencies to conduct additional analyses. One commenter also suggested that the deletion is unnecessary because agencies already know that they are not limited to existing materials.

CEQ strikes this sentence in the final rule. In order for agencies to meet the requirements of the NEPA statute to analyze the effects of their proposed actions and, where appropriate, study alternatives, while ensuring professional integrity, including scientific integrity, CEQ considers it necessary to remove this statement because in some instances, in order to meet the statutory requirements, agencies will need to undertake research. CEQ disagrees that agencies will read this deletion to mean they need to do so in all cases, even where unnecessary or unreasonable. As one commenter noted, the CEQ regulations have long encouraged agencies to rely on existing information and analyses, and incorporate them by reference, *see, e.g.,* §§ 1501.12, 1506.2, and 1506.3.

A few commenters stated that the deletion of this text conflicts with section 106(b)(3) of NEPA, 42 U.S.C. 4336(b)(3), by implying agencies have discretion to undertake new, non-essential scientific or technical research without regard to whether the information to be obtained is essential to a reasoned choice among alternatives. CEQ disagrees with this assertion because section 106(b)(3) expressly applies only to an agency's determination of the level of NEPA review it needs to perform for an action, and does not apply to the analysis in an environmental document. Further, these comments suggest conflict with the statute because deleting this sentence disregards direction to make use of reliable data and resources. CEQ disagrees that section 102(2)(E) of NEPA, 42 U.S.C. 4332(2)(E), refers only to existing reliable data and resources,

because such a reading of 102(2)(E) would be inconsistent with the provision of section 106(b)(3) indicating that agencies are only required to undertake new scientific or technical research in determining the level of NEPA review in certain circumstances. Rather, section 102(2)(E) does not address whether agencies can conduct new research or gather new data, but only provides that any data or resources an agency relies upon, whether existing or new, must be reliable. As noted in this section, it is common practice for agencies, when necessary or appropriate, to engage in additional research and create new data based on an action's particular circumstances (such as the affected environment) when analyzing proposed actions under NEPA. By striking the sentence added in 2020, CEQ is not imposing a new requirement for agencies to undertake new research in all cases, but rather is allowing agencies to continue to exercise their judgment and expertise in determining whether and when to undertake new research.

Eighth, CEQ strikes the last sentence in 40 CFR 1502.23 (2020), which the NPRM proposed to retain as the second sentence in proposed § 1502.23(b) regarding continued compliance with other statutory requirements related to scientific and technical research. In the 2020 rule, CEQ added this sentence to clarify the preceding sentence that agencies are not required to undertake new scientific and technical research to inform their analyses. Because the final rule strikes that sentence, it is unnecessary to retain the sentence that follows. Therefore, the final rule removes the last sentence of 40 CFR 1502.23 (2020) because it is unnecessary.

Some commenters suggested additional items be added to proposed § 1502.23(b). One commenter requested that CEQ incorporate the language from section 106(b)(3) of NEPA, 42 U.S.C. 4336(b)(3), to establish a clear standard for when new scientific research is needed. As CEQ noted earlier in this section, section 106(b)(3) applies only to determining the level of NEPA review. Another commenter requested CEQ add language to address information quality standards and transparency requirements for modeling. CEQ does not consider this level of detail appropriate for the regulations but will consider whether additional guidance on this topic could assist agencies in carrying out their NEPA responsibilities.

Ninth, CEQ moves to § 1506.6(c) the first and second sentences in proposed § 1502.23(b), which are the fourth and fifth sentences in 40 CFR 1502.23 (2020), requiring agencies to identify any methodologies used and make explicit reference to the scientific and other sources relied upon for conclusions in the environmental document, which agencies may place in an appendix. This change improves the organizational clarity of the section and is non-substantive.

Finally, CEQ proposed to add a new paragraph (c) to proposed § 1502.23 to require agencies to use projections when evaluating reasonably foreseeable effects, including climate change-related effects, where appropriate. CEQ also proposed to clarify that such projections may employ mathematical or other models that project a range of possible future outcomes, so long as agencies disclose the relevant assumptions or limitations. CEQ proposed this addition for consistency with the other proposed amendments to this section.

Some commenters expressed support for proposed § 1502.23(c) but recommended that CEQ provide guidance on how to support agencies in evaluating climate modeling projects or add additional language to address localized impacts of climate change on a project along with global impacts of the project on climate change. Another commenter requested that CEQ recommend, rather than require, use of projections, while another commenter expressed that the rule strikes an appropriate balance between allowing modeling necessary to project future effects and providing transparency for public viewing of the modeling on which agencies rely.

One commenter opposed the changes in paragraph (c) to require the use of projections because they interpret the language to be referring to the social cost of greenhouse gases and argued that this is inappropriate for project-specific NEPA reviews. They also offered the opinion that social cost of greenhouse gas models is not best available science. Another commenter requested CEQ remove the reference to climate-change related effects in paragraph (c) because it elevates climate change effects over other potential effects. Another commenter also expressed concern about the requirement to use projections because they asserted it may encourage agencies to attempt to model relationships between incremental greenhouse gas emissions from a particular project with actual environmental impacts, which is impossible, or use metrics like social cost of greenhouse gas emissions, which are not suited to environmental reviews. Another commenter also expressed concern that the project effects of climate change are too difficult to model and that the proposed language could create delays and increase litigation risk.

CEQ includes proposed § 1502.23(c) in the final rule at § 1506.6(d). CEQ notes that projections are required only where an agency considers them appropriate. CEQ disagrees that including the example of climate-change related effects elevates these above other effects; it is an example, and agencies may determine projections are appropriate in analyzing a variety of other effects such as water or air quality, or effects on endangered species or historic properties. CEQ also disagrees that this language is intended to require agencies to use the social cost of greenhouse gases. As discussed in CEQ's 2023 GHG guidance, agencies may use this as a proxy to compare alternatives, but the regulations and the guidance do not require agencies to use this tool.

As CEQ noted in the proposed rule, based on existing agency practice and academic literature, agencies can and do use reliable projections to analyze reasonably foreseeable effects, including climate change-related effects. Where available and appropriate, agencies also can use or rely on projections that are scaled to a more targeted and localized geographic scope, such as land use projections, air emissions, and modeling, or to evaluate effects, including climate effects, experienced locally in relation to the proposed action. When doing so, agencies should explain the basis for relying on those projections and their underlying assumptions. In particular, climate projections can vary based on different factors and assumptions such as geography, location, and existing and future GHG emissions, and agencies should disclose the assumptions and limitations underlying any projection upon which the agency relies. Agencies can use models that analyze a range of possible future outcomes, but again agencies must disclose the underlying relevant assumptions or limitations of those models.

CEQ expects that modeling techniques will continue to improve in the future, resulting in more precise projections. To be consistent with § 1506.6, as modeling techniques advance, agencies should continue to rely on high-quality information when evaluating reasonably foreseeable effects.

5. Further Guidance (§ 1506.7)

CEQ proposed to simplify § 1506.7(a) by deleting references to Executive orders that have been revoked. CEQ will continue to provide guidance

concerning NEPA and its implementation on an as-needed basis. Any such guidance will be consistent with NEPA, the CEQ regulations, and any other applicable requirements. Future guidance could include updates to existing CEQ guidance [106] or new guidance. CEQ also proposed to update paragraph (b) to reflect the date upon which the final rule is effective. If there is a conflict between existing guidance and an issued final rule, the final rule will prevail after the date upon which it becomes effective. CEQ did not receive any comments on these proposed changes and finalizes this section as proposed.

6. Proposals for Regulations (40 CFR 1506.9)

CEQ proposed to strike 40 CFR 1506.9 (2020), ''Proposals for regulations.'' The 2020 rule added this provision to allow agencies to substitute processes and documentation as part of the rulemaking process for corresponding requirements in these regulations.[107] Since 1978, the CEQ regulations have encouraged agencies to combine environmental documents with any other agency document to reduce duplication and paperwork (40 CFR 1506.4 (2019)), and agencies also may combine procedural steps, for example, to satisfy the public comment requirements of a rulemaking process and NEPA. *See* § 1507.3(c)(5). As such, CEQ concluded that the provision at 40 CFR 1506.9 (2020) was unnecessary to achieve the desired effect of improved efficiency.

CEQ received one comment on this proposed change expressing support for the removal of the section. CEQ removes this section as proposed. Removing this section avoids confusion and controversy over whether the procedures of a separate process meet the requirements of CEQ's regulations. Further, courts have questioned whether separate regulatory processes can be a substitute for NEPA in some cases. *See e.g., Sierra Club v Fed. Energy Regul. Comm'n,* 867 F.3d 1357, 1375 (D.C. Cir. 2017) (''[T]he existence of permit requirements overseen by another [F]ederal agency or [S]tate permitting authority cannot substitute for a proper NEPA analysis.''). Additionally, CEQ does not consider it appropriate to single out one particular type of action—rulemaking—for combining procedural steps. Indeed, one of the key objectives of agency NEPA procedures is to integrate the NEPA process into other agency processes. Therefore, the more prudent approach is for agencies to combine NEPA reviews with other reviews for rulemaking, similar to longstanding agency practice to combine NEPA documents with other review processes, such as compliance with section 106 of the National Historic Preservation Act or section 7 of the Endangered Species Act, or set out processes in their NEPA procedures to comply concurrently with multiple legal requirements.

7. Filing Requirements (§ 1506.9)

CEQ proposed to redesignate 40 CFR 1506.10 (2020) as § 1506.9, which would restore the same numbering for this and subsequent sections used in the 1978 regulations. CEQ proposed to replace the acronym for EPA with the full name ''Environmental Protection Agency'' here and in § 1506.10, consistent with the format in the rest of the CEQ regulations. CEQ also proposed to add a new paragraph (c) to clarify that agencies must notify EPA when they adopt an EIS consistent with § 1506.3(b). CEQ proposed this change to codify common practice and guidance from EPA.[108] EPA notification ensures initiation of the appropriate comment or review period. Such notification, even where a cooperating agency is adopting an EIS without public comment consistent with § 1506.3(b)(1), improves transparency to the public regarding the status of the EIS and also helps track the status of EISs across the Federal Government.

One commenter provided feedback on this proposed change, asking CEQ to insert the word ''timely'' or more clearly specify a period within which agencies must notify EPA when they adopt EISs. CEQ declines the commenter's suggested edit because the language specifies that the agency must notify EPA when they adopt the EIS; therefore, notification must occur at the same time as adoption. CEQ adds paragraph (c) in the final rule to require agencies to file an adoption of an EIS with EPA consistent with current practice and agency guidance. CEQ modifies the text from the proposal to cross reference to § 1506.3(b)(1) rather than require the notice be consistent with § 1506.3(b). It is only an adoption made pursuant to § 1506.3(b)(1) that requires agencies to file their adoption notices with EPA.

8. Timing of Agency Action (§ 1506.10)

To accommodate the change in numbering described in section II.H.6, CEQ proposed to renumber 40 CFR 1506.11 (2020), ''Timing of agency action,'' to § 1506.10. CEQ proposed in paragraph (b) to change ''may not'' to ''shall not'' to eliminate a potential ambiguity and make clear that the minimum periods between a draft EIS and ROD as set forth in paragraph (b)(1) and between a final EIS and ROD as set forth in paragraph (b)(2) are mandatory. CEQ did not receive any comments specific to this proposal and revises the final rule consistent with the proposal.

Two commenters requested that CEQ remove the minimum time periods prescribed in paragraphs (b)(1) and (2) as well as the minimum 45-day public comment period for draft EISs prescribed in paragraph (d), asserting that these timing requirements conflict with the statutory timeframes. The commenters suggested that CEQ instead allow agencies more flexibility for public engagement and comment within the statutory timeframes. Another commenter requested that CEQ expand the minimum comment period for a draft EIS to 90 days because commenters are often not notified of an open comment period until midway through.

CEQ considered the commenters' suggested changes but declines to revise the final rule to adopt them. Agencies and the public have worked within these timeframes since issuance of the 1978 regulations. CEQ intends these provisions to facilitate a transparent and open process that ensures agencies are taking the time to carefully consider public input and analyze alternatives prior to making a decision. CEQ is concerned that shortening these periods will significantly impede the public's ability to engage in the NEPA process. Further, CEQ notes that the minimum timeframe between a final EIS and ROD does not implicate the statutory deadlines because the statutory timeframe ends upon completion of the EIS, not issuance of the EIS.

Finally, with respect to the concern raised about the delay in notification to the public regarding open comment periods, CEQ intends the revisions to § 1501.9 regarding public engagement to better facilitate notification to interested parties, and considers improving notification to be the more appropriate mechanism to address the concern that interested parties sometimes do not receive notice until partway through a comment period, rather than extending

[106] *See* CEQ, *CEQ Guidance Documents, https://www.energy.gov/nepa/ceq-guidance-documents.*

[107] CEQ, 2020 Final Rule, *supra* note 39, at 43338–39.

[108] EPA must be notified when a Federal agency adopts an EIS to commence the appropriate comment or review period. If a Federal agency chooses to adopt an EIS written by another agency, and it was not a cooperating agency in the preparation of the original EIS, the EIS must be republished and filed with EPA. *See* EPA, *Environmental Impact Statement Filing Guidance, https://www.epa.gov/nepa/environmental-impact-statement-filing-guidance.*

the comment period. Agencies must notify the public of opportunities for public comment, and CEQ encourages agencies to consider effective and efficient ways to do so, such as providing opportunities for the public to sign up for distribution lists to be notified of an ongoing review and opportunities for engagement.

CEQ proposed changes to paragraph (c)(1), addressing appeals processes, to update this provision to reflect current practices within Federal agencies. Specifically, CEQ proposed to change references to ''appeal processes'' to ''administrative review processes'' and add examples, which can include processes such as appeals, objections, and protests. CEQ further proposed updates to the text to provide flexibility in timing to agencies that use these administrative review processes and clarify that such a process may be initiated either prior to or after the filing and publication of a final EIS with EPA, depending on the specifics of the agency's authorities. Depending on the agency involved and its associated authorities, administrative review processes generally allow other agencies or the public to raise issues about a decision and make their views known. CEQ proposed to clarify that the period for administrative review of the decision and the 30-day review period prescribed in paragraph (b)(2) for when a ROD can be issued may run concurrently. CEQ proposed these changes to reflect changes in Federal agency regulations and procedures since this text was promulgated in 1978 and to allow for greater efficiency.

CEQ did not receive comments on these proposed changes and makes the changes as proposed in the final rule to better accommodate existing agency practices. For example, the U.S. Department of Agriculture's Forest Service has an objections process outlined at 36 CFR part 218 whereby the public can object to a draft decision; these regulations replaced the prior appeal process formerly used by the agency. To initiate the objections process, Forest Service regulations require that the final EIS and a draft ROD be made available to the public, but the Forest Service does not have to publish the final EIS with EPA until the conclusion of the objections process. *See* 36 CFR 218.7(b). The objections process can take 120 to 160 days, during which the agency makes the final EIS available to the public. Allowing the agency to file the final EIS with EPA and issue a ROD at the same time as the conclusion of the objections process rather than waiting an additional 30 days following the official filing will avoid inefficiency. These changes also will accommodate similar administrative review procedures maintained by other agencies. *See e.g.,* 43 CFR 1610.5–2 (outlining the Bureau of Land Management (BLM) protest procedures).

CEQ also proposed minor edits in paragraphs (d) and (e) for clarity and readability. CEQ did not receive comments on the proposed changes. CEQ has made an additional revision to paragraphs (c)(2) and (e) to correct the reference to § 1506.9 to § 1506.10.

Finally, one commenter requested that CEQ remove the language in paragraph (e), arguing that the failure to file timely comments is not a sufficient reason for extending a timeframe because the public often does not find out about the draft EIS until late in the 45-day comment period. The commenter stated that CEQ should recognize that agencies do not notify the public about when an EA or EIS is released and therefore commenters may be late in providing comments because they did not receive adequate, proper, timely notification. CEQ declines to make this change. As discussed in II.C.8 and II.E.I, § 1501.9 identifies requirements for how and when agencies must notify the public of an action and § 1503.1 requires agencies to request comments from the public on an EIS. Further, agencies have long had the discretion to consider special or unique circumstances that may warrant consideration of comments outside the public comment period.

9. Emergencies (§ 1506.11)

Consistent with changes in the preceding sections, CEQ proposed to renumber 40 CFR 1506.12 (2020), ''Emergencies,'' to § 1506.11. CEQ proposed to strike the last sentence, stating other actions remain subject to NEPA review because it erroneously implies that actions covered by § 1506.11 are not subject to NEPA review. Instead, CEQ proposed to replace the sentence with language clarifying that alternative arrangements are not a waiver of NEPA; rather, they establish an alternative means for NEPA compliance.

Commenters recommended CEQ make it a requirement rather than a recommendation for agencies to consult with CEQ about alternative arrangements. Additionally, commenters disagreed with CEQ's deletion of the statement that other actions remain subject to NEPA, expressing concern that the revised provision would rely on negative implication as a substitute for this clear statement.

In the final rule, CEQ has revised this provision to change ''should'' to ''shall'' to make clear that agencies must consult with CEQ on alternative arrangements for an action with significant effects. CEQ agrees with commenters' suggestion, which is consistent with longstanding agency practice. Such consultation ensures that the agency is limiting the scope of such arrangements to those actions that are necessary to address the emergency and that the public is appropriately notified and involved in the process. CEQ is also revising ''will'' to ''shall'' in the second sentence to clarify that this is a regulatory requirement rather than a statement of fact. Upon further consideration, CEQ retains the clause ''other actions remain subject to NEPA review'' and adds the clause ''consistent with this subchapter'' to make clear that agencies and CEQ are required to limit such arrangements, and that any remaining actions not covered by the alternative arrangements must comply with the regulations.

Finally, CEQ adds the last sentence as proposed to address confusion [109] as to whether, during emergencies, agency actions are exempted from NEPA. This addition clarifies that the regulations do not create a NEPA exemption; rather, they provide a pathway for compliance with NEPA where the exigencies of emergency situations do not provide sufficient time for an agency to complete an EIS in conformity with the CEQ regulations for an action with significant environmental effects.

CEQ does not have the authority to exempt agency actions from NEPA, regardless of whether an emergency exists. The changes to § 1506.11 clarify that CEQ does not offer ''alternative arrangements'' to circumvent appropriate NEPA analysis but rather to enable Federal agencies to establish alternative means for NEPA compliance to ensure that agencies can act swiftly to address emergencies while also meeting their statutory obligations under NEPA. CEQ's revisions clarify that when emergencies arise, § 1506.11 allows agencies to adjust the means by which they achieve NEPA compliance. This approach is also consistent with CEQ's guidance on NEPA and emergencies, updated in 2020.[110]

Finally, CEQ notes that, consistent with longstanding practice, agencies have discretion to determine how to proceed with actions to respond to

[109] *See* CEQ, 2020 Response to Comments, *supra* note 69, at 417–19.

[110] *See* CEQ, Emergencies and the National Environmental Policy Act Guidance (Sept. 14, 2020), *https://ceq.doe.gov/docs/nepa-practice/emergencies-and-nepa-guidance-2020.pdf.*

emergencies that do not have significant environmental effects, which agencies would ordinarily analyze through an EA. Agencies may continue to consult with CEQ where they are unsure whether alternative arrangements or an EA is the appropriate course of action. And, as discussed in section II.I.3, some agencies include procedures for addressing such situations in their agency NEPA procedures, and CEQ encourages agencies to do so where appropriate for their programs and activities.

10. Innovative Approaches to NEPA Reviews (Proposed § 1506.12)

CEQ proposed to add a new section to the regulations in § 1506.12 to allow CEQ to grant a request for modification to authorize Federal agencies to pursue innovative approaches to comply with NEPA and the regulations in order to address extreme environmental challenges. CEQ proposed this new concept to be distinct from the emergency provisions in § 1506.11 with different considerations and criteria.

Commenters generally opposed this proposed provision. Some commenters thought it was unnecessary, and CEQ did not receive concrete examples of situations where commenters thought agencies could successfully use such approaches. Other commenters were concerned the proposal did not contain enough guideposts for agencies. Commenters also raised concerns that the lack of notice and comment for rulemaking could lead to uncertainty about durability of the provisions and potential litigation and delay.

Upon further consideration, including the public comments received on the proposed provision, CEQ is not including this provision in the final rule. The mechanisms provided in this final rule, including updated provisions on programmatic environmental reviews and agency NEPA procedures that should be tailored to agencies' unique programs and actions, as well as new methods of establishing or adopting CEs, provide agencies sufficient flexibility to innovate and address extreme environmental challenges.

11. Effective Date (§ 1506.12)

CEQ proposed to remove the 2020 effective date in § 1506.13 and replace it with the date upon which a final rule is effective. CEQ received a variety of comments on this provision, including one commenter requesting that it require agencies to apply the final rule to ongoing actions. Conversely, a group of commenters requested that the final rule explicitly state that agencies should follow the NEPA regulations that were effective at the time at which the agency initiated the environmental review, asserting that allowing agencies flexibility to apply the final rule to ongoing actions will cause delays, create uncertainty, and increase costs for project proponents.

Some commenters requested that CEQ revise this section to not allow the regulations to apply to a Federal agency's actions until the agency adopts new agency procedures under § 1507.3 to avoid confusion and inconsistency, and that CEQ provide additional clarity on which version of CEQ's regulations and an agency's procedures apply to each Federal action moving forward.

CEQ finalizes this section as proposed in § 1506.12. Section 1506.12 requires agencies to comply with the regulations for proposed actions begun after the effective date of the final rule. Agencies are in the best position to determine on a case-by-case basis whether applying provisions of the revised regulations to ongoing reviews will facilitate a more effective and efficient process, and CEQ declines to limit agency flexibility in this regard. Regarding potential conflict with existing agency procedures, an agency's existing NEPA procedures remain in effect until the agency revises its procedures consistent with § 1507.3; however, agencies should read their existing procedures in concert with the final rule to ensure they are meeting the requisite requirements of both wherever possible. Additionally, CEQ notes that the Fiscal Responsibility Act's amendments to NEPA were effective upon enactment, so to the extent the regulations implement provisions of the NEPA amendments, these are applicable to ongoing reviews.

For the last several years, agencies have had experience reconciling differences between their procedures and the current regulations, and CEQ is unaware of significant issues that have arisen. While certain provisions included in this final rule may be missing from agency procedures, these provisions are requirements that agencies would need to add to their procedures and are therefore less likely to pose a direct conflict or create inconsistencies. Additionally, where CEQ is restoring the regulatory text or approach from the 1978 regulations, CEQ notes that most agency procedures are consistent with the 1978 regulations, and therefore there is less likely to be conflict with those provisions. To the extent that there is conflict between an agency's procedures and CEQ's regulations, the CEQ regulations generally will apply, and CEQ is available to assist in addressing any such conflicts. Lastly, CEQ notes that Federal agencies would not need to redo or supplement a completed NEPA review (*e.g.,* where a CE determination, FONSI, or ROD has been issued) as a result of the issuance of this rulemaking.

I. Revisions to Agency Compliance (Part 1507)

1. Compliance (§ 1507.1)

CEQ proposed to add a second sentence to § 1507.1 to restore language from the 1978 regulations to state that agencies have flexibility to adapt their implementing procedures to the requirements of other applicable laws. CEQ made this proposal because restoring this language is consistent with the changes CEQ made to 40 CFR 1507.3 (2022) in its Phase 1 rulemaking to restore agency discretion to tailor their NEPA procedures to their unique missions and contexts, creating opportunity for agencies to innovate and improve efficiency.

One commenter requested that CEQ delete the first sentence of § 1507.1, which requires all agencies to comply with the CEQ regulations, and add a clause at the end of the proposed second sentence making requirements with other applicable laws dependent upon compliance with the regulations. The commenter asserted this change would allow an agency to tailor its NEPA procedures as appropriate, but make clear that the agency still must comply with these regulations.

Another commenter expressed concerns that the flexibility proposed in § 1507.1 will result in inconsistency, especially where a State agency serves as a co-lead agency or as a participating agency for a project over which multiple Federal agencies have jurisdiction. The commenter asserted that the flexibility in the proposed text in § 1507.1 undermines predictability and consistency and will result in delays in the environmental review process.

CEQ considered the commenters' suggestions and finalizes the language as proposed. With respect to the first comment, CEQ considers the language in the final rule to be consistent with the commenter's objective and longstanding practice: agencies may tailor their procedures to their unique programs, but they must also comply with NEPA and the CEQ regulations. This point is reinforced in § 1500.6, which requires agencies to fully comply with the purposes and provisions of the NEPA statute and CEQ's NEPA regulations unless an agency activity, decision, or action is exempted from NEPA by law or compliance with NEPA is impossible.

CEQ disagrees with the other commenter's assertions that this provision undermines predictability. To ensure NEPA reviews inform decision making, Federal agencies need to integrate the NEPA process into the decision-making process, and having a ''one size fits all'' approach to agency procedures would not achieve that objective. The CEQ regulations encourage agencies to engage in early coordination to prevent delays in individual NEPA reviews. Further, the regulations have long encouraged agencies to consult with other agencies with which they have similar programs or frequently take actions on the same projects, and CEQ encourages agencies to strive to reconcile their processes as they update their procedures for consistency with this rule. *See* § 1507.3(b)(1).

2. Agency Capability To Comply (§ 1507.2)

CEQ proposed edits to § 1507.2 to emphasize agencies' responsibilities under NEPA, including to incorporate the requirements added to section 102(2) of NEPA, 42 U.S.C. 4332, and to require agencies to designate a Chief Public Engagement Officer. First, CEQ proposed to move the first sentence of paragraph (a) of 40 CFR 1507.2 (2020), which requires agencies to fulfil the requirements of section 102(2)(A) of NEPA, 42 U.S.C. 4332(2)(A), to use a systematic, interdisciplinary approach, to a new § 1507.2(b). Second, CEQ proposed to require in § 1507.2(a) that in addition to designating a senior agency official responsible for overall agency NEPA compliance, agencies identify a Chief Public Engagement Officer who would be responsible for facilitating community engagement across the agency and, where appropriate, the provision of technical assistance to communities.

CEQ received multiple comments on the requirement for Federal agencies to identify a Chief Public Engagement Officer. Numerous supportive commenters expressed that this position would benefit all stakeholders, quicken public engagement processes by making the environmental review processes more accessible and transparent, facilitate consistent engagement practices, and promote a level of accountability that enhances engagement. Some supportive commenters asked CEQ to clarify expectations for the position, such as identifying a minimum level of seniority within the agency and to clarify that ''community engagement'' includes ''industry engagement.'' A couple of commenters were supportive of the general idea, but expressed concern about how agencies would define the role and whether agencies would have resources to support the Officer. A few commenters suggested that the person who serves in the position within an agency must be a neutral party and trusted expert with necessary experience to be effective in the position. Multiple commenters also provided suggestions for additional guidance regarding the duties of the Chief Public Engagement Officer.

Several commenters opposed the proposed requirement for agencies to designate a Chief Public Engagement Officer asserting that the NEPA amendments do not require it; there is lack of clarity on whether this position would help mediate resolutions to allow more efficient completion of the environmental review process; and it would create a burden on agencies because they will need to hire a Chief Public Engagement Officer.

Another commenter raised the concern that by requiring agencies to identify a Chief Public Engagement Officer, CEQ is creating a new and potentially overlapping position with the Chief Environmental Review and Permitting Officer (CERPO) that already exists to manage environmental review and authorization processes.

CEQ considered the comments and includes the requirement in § 1507.2(a) to identify a Chief Public Engagement Officer with clarifying edits. To address commenters' concerns about agency burden and the scope of the position, CEQ adds language to clarify that the regulations make the Chief Public Engagement Officer responsible for facilitating community engagement in environmental reviews and does not direct agencies to make the officer responsible for all engagement activities within an agency, though agencies have the discretion to define the role more broadly should they determine doing so is appropriate.

CEQ also adds a sentence to the end of paragraph (a) to clarify that when an agency is a department, it may be efficient for major subunits to identify senior agency officials or Chief Public Engagement Officers within those subunits. This language is consistent with the approach for agency NEPA procedures in § 1507.3(b), and the regulations provide that the department-level official or Officer would have oversight over the subunit officials or officers. CEQ adds this language to provide large departments the flexibility to effectively manage their programs while ensuring that there is also centralized, consistent coordination across the whole department. CEQ notes that a senior agency official must be ''an official of assistant secretary rank or higher (or equivalent),'' in accordance with § 1508.1(*ll*); in the case of a senior agency official designated by a major subunit, that individual must have a degree of authority and responsibility within the subunit that is equivalent to the authority and responsibility that an assistant secretary would have within a department.

CEQ notes that Federal agencies may designate current employees to serve as the senior agency official and Chief Public Engagement Officer, and need not hire new employees. Regarding the variety of comments recommending specific responsibilities for the Chief Public Engagement Officer, CEQ will consider providing guidance to agencies that addresses the role and expectations of the Officer, but CEQ considers this level of detail unnecessary for the regulations. Lastly, CEQ revises paragraph (a) to strike ''Agencies shall'' from the beginning of the paragraph because it is duplicative to the end of the introductory paragraph of § 1507.2.

Third, CEQ proposed to redesignate paragraphs (b) and (c), and (d) through (f) of 40 CFR 1507.2 (2020) as § 1507.2(c) and (d), and (h) through (j) respectively. CEQ makes these changes in the final rule.

Fourth, CEQ proposed to add a new paragraph (e) to require agencies to prepare environmental documents with professional integrity consistent with section 102(2)(D) of NEPA, 42 U.S.C. 4332(2)(D). In a new paragraph (f), CEQ proposed to require agencies to make use of reliable data and resources, consistent with section 102(2)(E) of NEPA, 42 U.S.C. 4332(2)(E). And, in a new paragraph (g), CEQ proposed to require agencies to study, develop, and describe technically and economically feasible alternatives, consistent with section 102(2)(F) of NEPA, 42 U.S.C. 4332(2)(F). Finally, in redesignated paragraph (j), CEQ proposed to delete the reference to E.O. 13807 because E.O. 13990 revoked E.O. 13807.[111]

CEQ did not receive any substantive comments on these proposed changes. CEQ finalizes these provisions as proposed.

3. Agency NEPA Procedures (§ 1507.3)

CEQ proposed several updates to § 1507.3 to reorganize paragraphs to improve readability, consolidate related provisions, restore text from the 1978 regulations, and codify CEQ guidance on CEs. First, in paragraphs (a) and (b), CEQ proposed to update the effective date to reflect the effective date of a

[111] E.O. 13990, *supra* note 43.

final rule. CEQ received several comments expressing concern about paragraph (a), which provides that CEQ determined that the CEs contained in agency NEPA procedures as of the final rule effective date are consistent with the CEQ regulations. Commenters raised concerns about the lack of evidence that all CEs are consistent with CEQ's proposal and, in some instances, identified particular CEs that the commenters stated were inconsistent. Commenters also asked about how this provision would interact with § 1507.3(c)(8) and (9) regarding the process for establishing and periodically reviewing existing CEs.

CEQ considered the comments and revises this paragraph in the final rule for clarity. CEQ's intent with this provision is to clarify that the changes made in the final rule, including revisions to the definition of ''categorical exclusion'' and § 1501.4 do not implicate the validity of existing CEs. CEQ revises the paragraph to clarify that it has determined that the revisions to its regulations made in this final rule do not affect the validity of agency CEs that are in place as of the effective date of this rule. Further, as discussed more in this section, CEQ is encouraging agencies to prioritize their older CEs for review.

Second, in § 1507.3(b), CEQ proposed to give agencies 12 months after the effective date to develop proposed procedures and initiate consultation with CEQ to implement the CEQ regulations. CEQ also proposed moving, with some modification, language from paragraph (c) of 40 CFR 1507.3 (2022) to § 1507.3(b) for clarity and to improve organization since the language is generally applicable to all agency NEPA procedures. The NPRM explained that proposed procedures should facilitate efficient decision making and ensure that agencies make decisions in accordance with the policies and requirements of NEPA.

One commenter requested that CEQ explicitly state that in the case of conflicts, an agency's NEPA procedures supersede the CEQ regulations, and that such a statement would increase certainty and reduce litigation risks. CEQ declines to add this language. Agencies and courts have extensive experience applying both CEQ's regulations and agency-specific procedures, and in CEQ's experience, this relationship has not led to uncertainty or litigation risk that would outweigh the uncertainty that could be created from a new regulatory provision on this subject.

Two commenters asserted that 12 months is not enough time for agencies to propose procedures, take public comment, and produce final procedures. CEQ declines to revise the timing provided in § 1507.3(b). While CEQ will work with agencies to update their procedures as quickly as possible, agencies only need to provide CEQ with proposed revisions within 12 months. Therefore, CEQ considers 12 months sufficient for agencies to propose procedures and finalizes § 1507.3(b) as proposed, except a grammatical change from ''agencies make'' to ''the agency makes'' for consistency with the rest of the sentence.

Third, in paragraph (b)(2), CEQ proposed to change ''adopting'' to ''issuing'' to avoid confusion with adoption under § 1506.3. CEQ also proposed to restore text from the 1978 regulations requiring agencies to continue to review their policies and procedures and revise them as necessary to be in full compliance with NEPA. The 2020 rule deleted this language as redundant to language added to paragraph (b) of 40 CFR 1507.3 (2020) requiring agencies to update their procedures to implement the final rule.[112]

One commenter opposed CEQ's proposed restoration of this language in § 1507.3(b)(2), asserting that the requirement for agencies to continually review their NEPA policies and procedures could reduce stability because agencies will be in a constant cycle of revision. CEQ disagrees with the commenter's assertions because this provision was in the 1978 regulations and has not resulted in agencies continually updating their procedures. CEQ also considers it important for agencies to review their procedures to ensure that they are meeting the intent of NEPA and are updated to address any changes to agencies' authorities or programs so that the NEPA process is effectively integrated in agencies' decision-making processes.

CEQ makes the changes to paragraph (b)(2) as proposed with one additional change in the fourth sentence to change ''to'' to ''and'' for clarity. CEQ is restoring this language because the requirement for an agency to continue to review their policies and procedures is different than the requirement in paragraph (b) to initially update procedures consistent with the final rule. Further, restoring this requirement is consistent with the requirement in § 1507.3(c)(9) for agencies to review CEs at least every 10 years.

Fourth, CEQ proposed to add a new paragraph (b)(3) to clarify that, consistent with longstanding practice, the issuance of new agency procedures or an update to existing agency procedures is not itself subject to NEPA review. CEQ did not receive comments on this paragraph and adds it with the language as proposed in the final rule.

Fifth, paragraphs (c) and (c)(1) through (c)(10) of 40 CFR 1507.3 (2022) list the items that all agency NEPA procedures must include, and CEQ proposed minor revisions to paragraphs (c)(1) through (c)(4) to improve clarity and conciseness. Specifically, CEQ proposed to modify paragraph (c)(1) to clarify that agencies should designate the major decision points for their programs and actions subject to NEPA and ensure that the NEPA process begins at the earliest reasonable time. In paragraph (c)(2), CEQ proposed to remove the reference to ''formal'' as unnecessarily limiting since agencies generally engage in informal rulemaking, and change ''or'' to ''and'' to clarify that agencies should make relevant environmental documents, comments, and responses part of the record in both rulemakings and adjudicatory proceedings. CEQ proposed to modify paragraph (c)(3) to clarify that procedures should integrate environmental review into agency decision-making processes so that decision makers use the information in making decisions. CEQ did not receive comments on these specific changes and makes the edits as proposed in the final rule.

Sixth, CEQ proposed to modify paragraph (c)(5) to emphasize that combining environmental documents should be done to facilitate sound and efficient decision making and avoid duplication. CEQ proposed to strike the language from this paragraph allowing agencies to designate and rely on other procedures or documents to satisfy NEPA compliance. As discussed further in sections II.C.1 and II.C.2 of the NPRM, CEQ had concerns about this language added by the 2020 rule to substitute other reviews as functionally equivalent for NEPA compliance, and therefore proposed to remove it.

One commenter stated that paragraph (c)(5) should implement section 107(b) of NEPA, 42 U.S.C. 4336a(b). Section 107(b) of NEPA addresses preparation of a single environmental document for lead and cooperating agencies. CEQ addresses this in § 1501.7(g) and therefore declines to make this change. The intent of paragraph (c)(5) is to ensure that agency procedures require the combination of environmental documents with other agency documents in order to facilitate sound and efficient decision making and avoid duplication where consistent with

[112] CEQ, 2020 Final Rule, *supra* note 39, at 43340.

applicable statutory requirements. CEQ makes the changes to § 1507.3(c)(5) as proposed.

Seventh, to consolidate into one paragraph—paragraph (c)—the required aspects of agency NEPA procedures, CEQ proposed to move paragraphs (e)(1), (e)(2), (e)(2)(i), and (e)(2)(iii) of 40 CFR 1507.3 (2022) to paragraphs (c)(6), (c)(7), (c)(7)(i) and (c)(7)(ii), respectively, with minor wording modification for readability. Proposed paragraph (c)(6) addressed procedures required by § 1501.2(b)(4) regarding assistance to applicants. Proposed paragraphs (c)(7), (c)(7)(i), and (c)(7)(ii) addressed criteria to identify of typical classes of action that normally require EISs and EAs.

One commenter questioned if paragraphs (c)(7)(i) and (ii) are intended to make EIS and EA thresholds more definitive. These provisions—which have been in the CEQ regulations since 1978 and to which CEQ only proposed minor, non-substantive edits for readability—require agencies to identify their common activities or decisions that typically require an EIS or EA. While not determinative for any particular action, these lists put the public on notice of the decisions agencies regularly make that require these levels of NEPA review. CEQ has not substantively changed these provisions and, therefore, does not intend for them to affect EIS and EA thresholds or otherwise change current practice. CEQ makes the changes to § 1507.3(6) and (7) as proposed.

Eighth, CEQ proposed to move with modification paragraph (e)(2)(ii) of 40 CFR 1507.3(2022), requiring agencies to establish CEs and identify extraordinary circumstances, to paragraph (c)(8). CEQ proposed in paragraphs (c)(8)(i) through (c)(8)(iii) to include more specificity about the process for establishing new or revising existing CEs, consistent with CEQ's 2010 CE guidance and agency practice. CEQ proposed to move the existing requirement that agencies identify when documentation is required for a determination that a CE applies to a proposed action from paragraph (e)(2)(i) of 40 CFR 1507.3 (2022) to proposed paragraph (c)(8)(i). CEQ proposed a new paragraph (c)(8)(ii) to require agencies to substantiate new or revised CEs with sufficient information to conclude that the category of actions does not have a significant effect, individually or in the aggregate, and make the documentation publicly available for comment. Lastly, CEQ proposed to add paragraph (c)(8)(iii) to require agencies to describe how they will consider extraordinary circumstances, a concept that was moved from paragraph (e)(2)(ii) of 40 CFR 1507.3 (2022). CEQ proposed these provisions for consistency with its 2010 guidance and CEQ's longstanding practice requiring agencies to demonstrate that agency activities are eligible for CEs.[113]

One commenter requested that CEQ revise proposed paragraph (c)(8)(i) to require agencies to provide the public with documentation of a determination that a CE applies to a proposed action. CEQ declines to require agencies to document and publish all determinations that a CE applies to an action, as many CEs are used for routine actions with no potential for environmental effects and documentation of all determinations would result in burdensome and unnecessary paperwork. CEQ considers the better approach to be for agencies to identify which CEs require documentation and whether to make that documentation publicly available.

One commenter requested that CEQ expand paragraph (c)(8)(ii) to preclude agencies from establishing CEs if similar categories of actions have historically been controversial, are known to have substantial environmental justice considerations, or have previously resulted in preparation of an EIS. Another commenter suggested that CEQ replace the use of ''or in the aggregate'' with ''cumulative,'' to use the term from the 1978 regulations.

Some commenters opposed proposed paragraph (c)(8)(iii), stating that agencies should not have to delineate the extraordinary circumstances under which an action normally excluded from further NEPA review nonetheless requires additional review. The commenters asserted that the proposed section substantially limits the breadth of extraordinary circumstances under which an action normally excluded requires further review. CEQ disagrees with the commenters' assertions. The provision clarifies that an explanation of how the agency will consider extraordinary circumstances when applying a proposed CE is a necessary component of substantiating the CE. The provision should be read in context with the definition of ''extraordinary circumstances'' in § 1508.1(o).

CEQ considers these comments but finalizes the provisions in § 1507.3(c)(8) and (c)(8)(i) through (iii) as proposed, with one change: instead of restating the process for consideration of extraordinary circumstances in paragraph (c)(8)(iii), the final rule cross-references to § 1501.4(b), which sets for the process for consideration of extraordinary circumstances, including documenting when an agency determines that a CE applies notwithstanding extraordinary circumstances. CEQ declines to make the commenters' recommended changes. When establishing CEs, agencies must provide sufficient information to CEQ and to the public to substantiate the determination that the category of actions normally does not result in significant effects. Agencies must also address how they will consider extraordinary circumstances in applying CEs. CEQ does not consider it appropriate to specify these limitations within its regulations; rather, agencies and CEQ must consider these concerns on a case-by-case basis when substantiating and reviewing proposed new CEs.

As discussed further in section II.C.3, CEQ also declines to replace ''or in the aggregate'' in the paragraph because it is consistent with § 1501.4 on establishment of CEs. CEQ considers ''individually or in the aggregate'' to have the same meaning as the 1978 regulation's definition of ''categorical exclusion'' as a category of actions that do not ''individually or cumulatively'' have significant effects. CEQ uses ''in the aggregate'' instead of ''cumulatively'' within the regulations to avoid potential confusion with the definition of ''effects,'' which includes cumulative effects.

Ninth, CEQ proposed to add a new paragraph (c)(9) to require agencies to include in their NEPA procedures a process for reviewing their CEs every 10 years to codify recommendations in CEQ's guidance on establishing CEs,[114] which encourages agencies to review CEs periodically. While the guidance recommends every 7 years,[115] CEQ proposed requiring that review occur at least every 10 years because it can take about a year to complete the steps involved to conduct such a review and revise CEs. These steps typically include conducting the analysis, developing a proposal to update procedures to reflect the review, consulting with CEQ on any proposed update to procedures, soliciting public comment, developing final procedures, and receiving a CEQ conformity determination. CEQ noted in the proposed rule that Federal agencies should review their CEs for multiple reasons, including to determine if CEs remain useful, whether they should modify them, and to determine if circumstances have changed resulting in

[113] *See* CEQ, CE Guidance, *supra* note 10.

[114] *Id.* at 15–18.

[115] *Id.* at 16.

an existing category rising the potential for significant effects.

Multiple commenters supported this requirement, with some suggesting that this review be subject to notice and public comment and others requesting the 10-year timeframe start at the time the agency issues the CE. One commenter requested that the regulations instruct agencies to take a holistic and comprehensive look at their current CEs to determine if any changes are needed, while another suggested that the periodic reviews need to account for the latest science and design practices.

CEQ declines to require agencies to provide notice and comment for their periodic review of CEs, but notes that where an agency decides to revise a CE based on the review, such revisions would require notice and comment under § 1507.3(b), for CEs established through agency procedures, or § 1501.4(c), for CEs developed through the mechanisms identified in that paragraph. CEQ declines to require agencies to comprehensively review their CEs, because allowing agencies to review their CEs on a rolling basis will provide for a more orderly and efficient review process and allow agencies to complete their review of their oldest CEs more quickly than would occur if the agency were to review all of its CEs at one time. CEQ declines to include additional requirements for the periodic review but agrees that the standard set forth in § 1501.4(d)(4) may help inform agencies as to when an agency should revise or remove a CE.

Some commenters opposed the proposed requirement to review existing CEs, asserting that it places an administrative burden on agencies that is unjustified to the extent it goes beyond how agencies currently administer CEs. While CEQ recognizes that this review process may be new for some agencies, CEQ has encouraged agencies to review CEs since the 2010 guidance. CEQ's experience with agencies that have undertaken this review is that it is a valuable process for agencies because it results in revised and new CEs that better align with the agencies' programs and experience. Such reviews are animated by the same principle as the longstanding practices to reexamine an analysis when an agency has an ongoing action, such as reevaluation and supplementation. A periodic analysis of existing CEs serves the same purpose—to ensure the underlying analysis and conclusions remain valid.

One commenter requested that the final rule add ''which does not impact projects approved under a categorical exclusion that existed at the time'' to paragraph (c)(9) to clarify that review of and changes to CEs are forward-looking and do not affect previously approved actions. CEQ agrees that any review of CEs does not have implications for prior CE determinations and does not consider the text in the final rule to raise any question that a review would require an agency to reopen the approval process for such actions. As a result, CEQ views this addition to be unnecessary.

In the final rule, CEQ adds this provision with an additional clause to clarify that agencies do not need to review all of their CEs at once and may do so on a rolling basis, but should focus on the oldest CEs first. CEQ adds this provision to clarify that agencies need not undertake a comprehensive review of all CEs but could instead break them up such that they review them in tranches on some periodic schedule but where the review of each CE occurs once every 10 years. Additionally, in response to comments on the interaction between § 1507.3(a) regarding the validity of existing CEs and this provision, CEQ clarifies that agencies should prioritize its oldest CEs first.

Tenth, CEQ proposed to move 40 CFR 1507.3(e)(3) (2020) to paragraph (c)(10) without substantive change. This provision addresses the requirement that agencies include a process for introducing a supplemental EA or EIS into its formal administrative record. CEQ did not receive comments on this provision. In the final rule, CEQ moves 40 CFR 1507.3(e)(3) (2020) to § 1507.3(c)(10) and revises the text to require agencies to include processes for reevaluating and supplementing EAs and EISs, as appropriate. CEQ has revised the text in this provision to enhance clarity by referring to ''processes for'' rather than ''a process for introducing'' and removing the reference to including supplemental materials in a formal administrative record to enable agencies flexibility to develop procedures that work with their programs consistent with longstanding agency practice. Additionally, 40 CFR 1502.9(d)(4) (2020) implicitly requires agency procedures to address reevaluation by encouraging agencies to document their findings consistent with their agency NEPA procedures. CEQ adds an explicit requirement in § 1507.3(c)(10) in the final rule for consistency with § 1502.9(e) and to make clear that agencies must include such a process in their agency procedures.

Eleventh, CEQ proposed to move the requirement for agencies to explain in their NEPA procedures where interested persons can get information on EISs and the NEPA process from paragraph (e) of 40 CFR 1506.6 (2020) to § 1507.3(c)(11) and add a reference to EAs as well. CEQ did not receive comments on this provision and makes this change as proposed in the final rule.

Twelfth, CEQ proposed to codify section 107(f) of NEPA, 42 U.S.C. 4336a(f), in a new paragraph (c)(12) requiring agencies to include procedures, where applicable, to allow a project sponsor to prepare EAs and EISs consistent with § 1506.5. Since not all agency actions involve project sponsors, CEQ proposed to include ''where applicable'' to qualify this requirement so that it applies only where agencies have actions where there is a project sponsor. The proposal included ''consistent with § 1506.5'' so that such procedures would ensure environmental documents prepared by project sponsors (or a contractor on the project sponsor's behalf) are prepared with professional and scientific integrity, and ensure that the agency independently evaluates and takes responsibility for the contents of such documents. The proposed rule also explained that this would ensure that agencies require project sponsors to execute a disclosure statement to address financial or other interests. In addition to procedures, agencies may provide project sponsors with guidance and assist in the preparation of the documents consistent with § 1506.5(b)(1).

CEQ received multiple comments that generally supported the proposed changes to allow applicants to prepare EAs and EISs, as well as multiple commenters who generally opposed the provision and opposed section 107(f) of NEPA. Some commenters who oppose the proposed changes recognized that it is not within CEQ's authority to modify section 107(f) of NEPA but stated that CEQ could provide more oversight and guardrails for how agencies carry this out and that CEQ should provide more guidance on avoiding conflicts of interest. Another group of commenters asked CEQ to provide more specificity for what agency procedures should specify regarding applicant or project sponsor-prepared EAs and EISs.

Commenters who supported the proposal pointed to time and cost savings and asserted that allowing project proponents, applicants, and contractors more opportunities to prepare EAs and EISs will help reduce inaccuracies and delays. Some supportive commenters also requested that CEQ go further, such as by allowing

a project sponsor a first right of refusal to prepare an EA or EIS.

One commenter opposed the addition of paragraph (c)(12) and the general allowance of project sponsors to prepare EAs and EISs. However, they noted that their concerns could be mitigated if there is a definition of ''project sponsor.'' Another commenter requested that CEQ add to paragraph (c)(12) a requirement for agencies to include specific public engagement requirements in their procedures when a project sponsor prepares an EA or EIS. Additionally, as discussed further in section II.H.3, commenters were confused about the applicability of this provision and § 1506.5.

In the final rule, CEQ includes § 1507.3(c)(12) to address preparation of EAs and EISs by applicants, including project sponsors. As discussed in section II.J.1, CEQ is adding a definition of ''applicant,'' which is inclusive of ''project sponsors'' to address confusion regarding the meaning of this term here and elsewhere in the regulations. CEQ also revises the ''where applicable'' language to ''where an agency has applicants that seek its action'' to address concerns that the provision could be read as discretionary. As CEQ noted in the preamble to the proposed rule, not all agencies have applicants or project sponsors; therefore, such agencies need not include procedures for non-existent applicants. This phrasing is consistent with the definition of ''applicant'' in the final rule. Additionally, CEQ adds a sentence in the final rule to clarify that such procedures will not apply to applicants when they serve as joint lead agencies. Section 107 of NEPA allows the Federal lead agency to appoint a State, Tribal, or local agency as a joint lead agency and jointly fulfill the role of the lead agency. In such cases, the joint lead agency and lead agency would work together to prepare the document, including development of the purpose and need, identification of alternatives, and preparing the FONSI or ROD.

In § 1507.3(c)(12), CEQ also revises the cross reference to § 1506.5(a) and (c). As discussed in section II.H.3, CEQ is modifying § 1506.5 for clarity, and therefore the provisions in § 1506.5 regarding applicant-provided information for a NEPA document prepared by the agency or an agency-directed contractor are inapplicable in this instance where the applicant or its contractor is preparing the EA or EIS.

In the final rule, CEQ adds paragraphs (c)(12)(i), (ii) and (iii), to set out minimum requirements for such procedures. CEQ includes these provisions to respond to comments requesting CEQ include more specificity about the agency's role with respect to applicant prepared EAs and EIS. Paragraph (c)(12)(i) requires that agency procedures provide for agency review and approval of the purpose and need and alternatives. Agency involvement in development of these key features of the environmental document is critical to ensure that applicant prepared EISs and EAs will be appropriately scoped and include the reasonable alternatives as determined by the agency. Paragraph (c)(12)(ii) requires agencies to include process for the agency to independently evaluate the applicant-prepared EA or EIS; take responsibility for its accuracy, scope, and contents; and document the agency's evaluation in the document consistent with the requirements in § 1506.5(a). CEQ adds paragraph (c)(12)(iii) to address comments requesting that CEQ clarify that applicants cannot prepare FONSIs or RODs. CEQ agrees that this is consistent with section 107(f) of NEPA and agrees that it is an important clarification to ensure that the agency's determinations and decisions are its own.

CEQ declines to add additional requirements regarding public engagement in paragraph (c)(12) because the regulations require agencies to engage the public in the preparation of an EA and EIS, which is required regardless of the preparer.

Numerous commenters expressed the view that CEQ is not fully implementing section 107(f) of NEPA because it is not specifically requiring agencies to allow project sponsors or applicants the opportunity to prepare documents in the absence of prescribed procedures. Some commenters referred to the fact that agencies have 12 months to propose procedures to CEQ following the effective date of the final rule, which means it will be more than a year before agencies have final procedures in place and be able to implement section 107(f) of NEPA. One commenter also pointed to some agencies already accepting sponsor-prepared documents for years and having a process in place to facilitate doing so and asserting that those agencies should not be prevented from continuing to accept these documents.

CEQ agrees that agencies have long allowed applicants to prepare EAs and that many agencies already have procedures in place for applicant-prepared documents. CEQ disagrees that this provision in the regulations precludes agencies from implementing applicant-prepared documents if they already have procedures that enable them to do so. Agencies are currently implementing section 107(f) of NEPA and this provision does not prevent them from continuing to do so. Rather, this provision ensures that going forward, agencies include their procedures for applicant prepared EAs and EISs in their NEPA procedures. Doing so will ensure that the procedures include the criteria set forth in this final rule and that the public has an opportunity to review and comment on the agency procedures without disrupting existing practice implementing 107(f) of NEPA.

Thirteenth, CEQ proposed to move, with revisions, paragraph (d) of 40 CFR 1507.3 (2022) to § 1507.3(d)(1) and strike the provisions in paragraphs (d)(1) through (d)(6) of 40 CFR 1507.3 (2022), which recommended agency procedures identify different classes of activities or decisions that may not be subject to NEPA. CEQ proposed to remove these provisions for consistency with its revisions to § 1501.1. *See* section II.C.1.

Instead, CEQ proposed § 1507.3(d) and its subparagraphs to provide a list of items that agencies may include in their procedures, as appropriate, which would include, at paragraph (d)(1), identifying activities or decisions that are not subject to NEPA. CEQ proposed in paragraph (d)(2) to allow agencies to include processes for emergency actions that would not result in significant environmental effects. Finally, CEQ proposed to move, without modification, paragraphs (f)(1) and (f)(2) of 40 CFR 1507.3 (2022) to paragraphs (d)(3) and (d)(4), respectively.

One commenter expressed support for the proposed § 1507.3(d), and specifically identified additional support for paragraphs (d)(1) and (d)(2) through (6). Another commenter requested that CEQ make the list of items in § 1507.3(d) required rather than optional for inclusion in agency procedures. This commenter also opposed the allowance in paragraph (d)(3) regarding classified proposals, asserting that this language invites abuse by agencies that will classify proposals that should not be classified to avoid public input and requested that there be public comment periods for classified proposals.

CEQ finalizes the list of items agencies may include in their procedures in § 1507.3(d) as proposed. It is appropriate for this list of items to be optional because the items included in the list will not always be applicable to every agency.

CEQ notes that the provision in (d)(2) regarding emergency actions is similar to CEQ's emergency process for EISs provided in § 1506.11, but relates to activities that would not require

preparation of an EIS. Some agencies have programs that focus on these types of emergency actions and may need to consider special arrangements for their EAs in these circumstances. These special arrangements could focus on the format of the documents, special distribution and public involvement procedures, and timing considerations. Some agencies have already established such processes in their procedures to ensure efficient NEPA compliance in an emergency. *See, e.g.,* 36 CFR 220.4(b); U.S. Dep't of Homeland Sec., Instruction Manual #023–01–001–01, Section VI.[116]

Regarding classified proposals, CEQ declines to further modify paragraph (d)(3), which has been in place since the 1978 regulations and is important for agencies who handle classified information. CEQ notes that the provision encourages agencies to withhold only what is necessary for the protection of classified information and structure the document such that it can easily make unclassified portions available for public comment.

Fourteenth, CEQ proposed to strike paragraph (e) of 40 CFR 1507.3 (2020) because it was unnecessary and potentially confusing. CEQ makes this change in the final rule because this provision is redundant with the regulations' longstanding requirement that agencies develop agency NEPA procedures that CEQ has determined conform to the NEPA regulations. Further, its requirement that agency procedures ''comply'' with the CEQ regulations could be read to suggest that agencies must complete a NEPA review when establishing their procedures, which is inconsistent with paragraph (b)(3).

Fifteenth, CEQ proposed to remove, as superfluous, the first sentence of paragraph (f)(3) of 40 CFR 1507.3 (2020) regarding lengthy periods between an agency's decision to prepare an EIS and actual preparation, as the regulations prescribe specific timelines for preparation of environmental documents. As discussed in section II.D.3, CEQ proposed to move the second sentence of 40 CFR 1507.3(f)(3) regarding supplemental notices when an agency withdraws, cancels, or otherwise ceases the consideration of a proposed action before completing an EIS to § 1502.4(f) with modifications. CEQ makes these changes in the final rule.

Sixteenth, CEQ proposed to remove as unnecessary paragraph (f)(4) of 40 CFR 1507.3 (2022) regarding combining the agency's EA process with its scoping process. Section 1501.5(k) clarifies that agencies can employ scoping at their discretion when it will improve the efficiency and effectiveness of EAs, including combining scoping with a comment period on a draft EA.

One commenter opposed this deletion because integrating scoping with the EA process can be an inclusive method of soliciting input and save time and money during the NEPA process. CEQ agrees that integrating scoping with an EA process can provide efficiency benefits, which §§ 1501.5(k) and 1501.9(b) address. CEQ finalizes the proposal to remove paragraph (f)(4) because it is redundant with those provisions.

Finally, as discussed in section II.C.3, CEQ proposed to strike paragraph (f)(5) of 40 CFR 1507.3 (2022) and replace it with a provision in § 1501.4(e) that is consistent with the process established by section 109 of NEPA, 42 U.S.C. 4336c, for adoption or use of another agency's CE. CEQ makes this change in the final rule.

4. Agency NEPA Program Information (§ 1507.4)

CEQ proposed revisions to § 1507.4, which describes the use of agency websites and other information technology tools to promote transparency and efficiency in the NEPA process. In paragraph (a), CEQ proposed to change ''other means'' to ''other information technology tools'' and to remove ''environmental'' before ''documents'' because ''environmental documents'' is a defined term, and the intent of the sentence is to refer to NEPA-related information and documents more broadly and not only to those documents that are included in the definition of ''environmental document.'' CEQ proposed the same edit, removing ''environmental'' before ''documents,'' in paragraph (a)(1). CEQ also proposed in paragraph (a) to require agencies to provide on their websites or through other information technology tools (to account for new technologies) their agency NEPA procedures and a list of EAs and EISs that are in development and complete. Lastly, in paragraph (a), CEQ proposed to encourage rather than allow agencies to include the information listed in paragraphs (a)(1) through (a)(4) on agency websites or other information technology tools.

CEQ proposed to revise paragraph (a)(2) to encourage agencies to post their environmental documents to their websites or other information technology tools. Finally, CEQ proposed edits to paragraph (b), which promotes interagency coordination of environmental program websites and shared databases, to provide agencies with additional flexibility and clarify that the section is not limited to the listed technology.

One commenter opposed CEQ's proposed requirement for agencies to provide a list of EAs and EISs that are in development and complete because the regulations already require publication of the NOI, draft EIS, final EIS, and ROD; require completed EISs to be publicly accessible via EPA's EIS database; encourage publication of draft EAs; and require publication of FONSIs. Combined with CEQ's proposed requirements for notification in § 1501.9(d)(2), the commenter asserted the requirement to post a list of EAs and EISs is redundant and adds another administrative burden on agencies.

CEQ makes the changes as proposed, including the requirement for agencies to provide a list of EAs and EISs that are in development and complete. During the rulemaking process, CEQ heard from multiple members of the public that it can be challenging to identify what NEPA reviews are active within an agency. CEQ considers the requirement to maintain a website or other electronic listing of EAs and EISs to be an important method of transparency that provides easily accessible information to the public. CEQ notes that the provision does not require agencies to publish the documents themselves, rather, it only requires a list of documents that are in development or completed. Agencies already routinely consolidate this type of information and can cross-reference to other repositories, such as the **Federal Register** or EPA's EIS database, on the agency website in order to reduce or avoid duplication. Agencies have discretion to determine when a NEPA review is sufficiently in development to list it on its website, and this provision does not require agencies to post publicly pre-decisional or deliberative information, including non-public information that an agency is working on an environmental document.

Regarding the proposal to encourage, rather than allow, agencies to include the information listed in paragraphs (a)(1) through (a)(4), one commenter asked CEQ to go further and make the listed items a requirement. CEQ declines to require agencies to include this information, but strongly encourages them to do so.

J. Revisions to Definitions (Part 1508)

In § 1508.1, CEQ proposed revisions to the definitions of ''categorical exclusion,'' ''cooperating agency,''

[116] DHS, 023–01–001–01, Implementation of the National Environmental Policy Act (Nov. 6, 2014), *https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf.*

''effects'' or ''impacts,'' ''environmental assessment,'' ''environmental document,'' ''environmental impact statement,'' ''finding of no significant impact,'' ''human environment,'' ''lead agency,'' ''major Federal action,'' ''mitigation,'' ''notice of intent,'' ''page,'' ''scope,'' and ''tiering.'' CEQ proposed to add definitions for ''environmental justice,'' ''environmentally preferable alternative,'' ''extraordinary circumstances,'' ''joint lead agency,'' ''participating Federal agency,'' ''programmatic environmental document,'' and ''significant effects.''

CEQ did not propose substantive edits to any other definitions, but proposed to redesignate most of the paragraphs to keep the list of terms in alphabetical order. CEQ invited comment on whether it should modify the remaining definitions or define additional terms.

Multiple commenters requested that CEQ add other definitions or edit existing definitions where no changes were proposed. Commenters requested that CEQ define a number of additional terms including ''unresolve conflicts,'' ''Tribal consultation,'' ''final action,'' ''monitoring,'' ''environmental design arts,'' ''reasonably available for inspection,'' ''substantive comments,'' ''earliest reasonable time,'' and ''issues.'' One commenter requested additional modification to the definition of ''publish'' and ''publication'' to encourage agencies to inform as broad an audience as possible. CEQ declines to make these changes in the final rule and discusses the rationale for not making these changes in the Phase 2 Response to Comments as well as in other sections of the preamble. CEQ is adding definitions for several additional terms and modifying definitions contained in the proposed rule as explained below.

1. Applicant (§ 1508.1(c))

CEQ adds a definition of ''applicant'' to § 1508.1(c). CEQ defines this term as a non-Federal entity that seeks an action by a Federal agency and clarifies that this term is inclusive of project sponsors. The CEQ regulations have long used the term ''applicant'' as well as ''non-Federal entity'' and ''project sponsor.'' The recent NEPA amendments also use both terms interchangeably. Because applicants can include project sponsors, as well as non-Federal entities that are seeking agency action for other activities that are not ordinarily referred to as projects, CEQ is electing to use the term ''applicants'' throughout these regulations. Therefore, for consistency and clarity, CEQ revises the regulations to use this term consistently throughout, replacing references to ''non-Federal entity'' and ''project sponsor'' with ''applicant.''

2. Categorical Exclusion (§ 1508.1(e))

CEQ proposed to modify the definition of ''categorical exclusion'' in proposed paragraph (d) to add a cross reference to proposed § 1501.4(c), in which CEQ proposed to establish a new way for agencies to establish CEs. CEQ also proposed minor grammatical edits to change ''the agency'' to ''an agency'' and ''normally do not'' to ''normally does not.''

A number of commenters expressed opposition to the existing term ''normally'' in the definition of ''categorical exclusion,'' which CEQ did not propose to change, and asked that the final rule clarify the meaning of the term. Commenters opposed to the term ''normally'' asserted it makes the standard for establishing a CE insufficiently rigorous. Other commenters specifically asked that the final rule specify that ''normally'' means ''in the absence of extraordinary circumstances,'' and that an agency cannot establish a CE if some actions will have significant adverse effects but will nonetheless be approved under the CE.

CEQ revises the definition of ''categorical exclusion'' as proposed in the final rule at § 1508.1(e) because it is consistent with section 111(1) of NEPA, which defines a CE in part as ''a category of actions that a Federal agency has determined *normally* does not significantly affect the quality of the human environment.'' 42 U.S.C. 4336e(1) (emphasis added). CEQ has long used the term ''normally'' to mean in the absence of extraordinary circumstances,[117] and CEQ added ''normally'' in the definition of ''categorical exclusion'' in the 2020 rule for this reason.[118] Agency-established CEs are not exemptions from the requirement of section 102(2)(C) of NEPA that an agency prepare an EIS before taking a major Federal action significantly affecting the environment. 42 U.S.C. 4332(2)(C). Instead, CEs are a mechanism for complying with this requirement for actions of a kind the agency has determined will not normally have significant effects with the extraordinary circumstances applicable to a CE serving to identify actions of the kind covered by the CE that could nonetheless have significant effects and therefore require additional analysis pursuant to the documentation requirement of § 1501.4(b)(1) or through an EA or EIS. Therefore, when developing a CE to identify categories of actions that will not normally have significant effects, an agency must also provide for the consideration of extraordinary circumstances to identify when a specific action that falls within the category is not of the normal variety that the agency has already determined will not have significant effects and, therefore, requires further analysis.

3. Communities With Environmental Justice Concerns (§ 1508.1(f))

CEQ did not propose a specific definition of ''communities with environmental justice concerns'' but invited comment on whether the final rule should define the term, and if so, how. CEQ explained in the proposed rule that it intended the phrase to mean communities that do not experience environmental justice as defined in proposed § 1508.1(k) (88 FR 49960).

Multiple commenters recommended the final rule define ''communities with environmental justice concerns.'' Some commenters recommended CEQ define it as ''communities that do not experience environmental justice as described in § 1508.1(k).'' Another commenter suggested the definition of ''environmental justice'' was ''politicized'' and therefore referring to § 1508.1(k) would do little to add clarity. One commenter asserted that CEQ's intended meaning would burden communities with raising concerns rather than a definition with ''objective measures of adverse health and environmental effects and disproportionate impacts that warrant alternatives analysis.''

Numerous commenters requested the final rule include a specific definition because it would provide consistency and clarity to Federal agencies on how they should assess environmental justice impacts and how they should define communities with environmental justice concerns. Commenters also asserted that including a definition is important because the phrase is used frequently in the proposed rule. Many commenters also requested that CEQ provide additional guidance on how to identify communities with environmental justice concerns, and some specifically asserted that a definition will only be beneficial if there is additional guidance that includes

[117] *See, e.g.,* CEQ, CE Guidance, *supra* note 10, at 2 (''Extraordinary circumstances are factors or circumstances in which a normally excluded action may have a significant environmental effect that then requires further analysis in an environmental assessment (EA) or an environmental impact statement (EIS).'').

[118] *See* CEQ, 2020 Final Rule, *supra* note 39, at 43342 (''CEQ proposed to revise the definition of 'categorical exclusion' in paragraph (d) by inserting 'normally' to clarify that there may be situations where an action may have significant effects on account of extraordinary circumstances.'').

robust public engagement with environmental justice stakeholders. Some commenters provided specific language for consideration, which CEQ describes in the Phase 2 Response to Comments.

Some commenters asserted that the final rule does not need a definition, and one commenter suggested that the regulations already account for such groups.

After considering the comments, CEQ agrees that a definition would help provide consistency and clarity for Federal agencies and adds one at § 1508.1(f). CEQ defines ''communities with environmental justice concerns'' to mean communities ''that may not experience environmental justice as defined . . . in § 1508.1(m).'' The definition also indicates that agencies may use available screening tools, as appropriate to their activities and programs, to assist them in identifying these communities and includes two examples of existing tools that agencies could use: the Climate and Economic Justice Screening Tool and the EJScreen Tool.[119] The definition also clarifies that agencies have flexibility to develop procedures for the identification of such communities in their agency NEPA procedures. CEQ considers the definition provided in paragraph (f) that connects the definition of ''communities with environmental justice concerns'' with the definition of ''environmental justice,'' alongside an indication that agencies may use available screening tools to assist them, to strike the right balance between providing additional guidance to agencies and recognizing that agencies should have flexibility to identify communities with environmental justice concerns in light of the unique circumstances associated with each action.

CEQ encourages agencies to make use of all available tools and resources in identifying communities with environmental justice concerns. CEQ notes that this definition is not intended to make such communities self-identify; it is incumbent on the agencies to proactively identify such communities. While many agencies have experience in doing so, CEQ anticipates that agencies will develop more expertise over time, which is why CEQ encourages agencies to consider further defining their methodology for identifying communities with environmental justice concerns in their agency NEPA procedures. CEQ also may provide guidance to agencies in the future as tools and methodologies for identification of communities with environmental justice concerns develop.

4. Cooperating Agency (§ 1508.1(g))

In proposed paragraph (d) of § 1508.1, CEQ proposed to revise the definition of ''cooperating agency'' for clarity and consistency with the definition of ''cooperating agency'' in sections 111(2) of and 107(a)(3) of NEPA, which provides that a lead agency may designate as a cooperating agency ''any Federal, State, Tribal, or local agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal.'' *See* 42 U.S.C. 4336a(a)(3), 4336e(2).

One commenter requested CEQ modify the definition to be more inclusive of State and local governments and Tribal entities by allowing them to serve as cooperating agencies when there are potential impacts in their communities or jurisdictions, and they are ''involved in a proposal.'' Another commenter requested CEQ add a specific exclusion of non-governmental organizations or quasi-governmental organizations from the definition.

CEQ declines to expand the definition of ''cooperating agency'' to include agencies ''involved in a proposal'' as this is overly broad. Instead, CEQ finalizes the definition in § 1508.1(g) consistent with the proposal, which incorporates the language in section 107(a)(3) of NEPA. *See* 42 U.S.C. 4336(a)(3). However, CEQ encourages agencies to invite local governments and Tribes to participate as cooperating agencies where they have special expertise about a proposed action and its environmental effects. CEQ also declines to add the recommended explicit exclusion of non-governmental organizations or quasi-governmental organizations from the definition of ''cooperating agency'' because the definition of ''cooperating agency'' sets forth the entities that are eligible to serve as cooperating agencies, and this does not include non-governmental organizations or quasi-governmental organizations.

5. Effects or Impacts (§ 1508.1(i))

In proposed paragraph (g), CEQ proposed to make clarifying edits to the definition of ''effects'' and to add and modernize examples. Paragraph (g)(4) of 40 CFR 1508.1 (2022) listed common types of effects that may arise during NEPA review. CEQ proposed to update the list to add ''disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative'' and ''climate change-related effects.'' For climate change-related effects, CEQ proposed to clarify that these effects can include both contributions to climate change from a proposed action and its alternatives as well as the potential effects of climate change on the proposed action and its alternatives. CEQ proposed these changes to update the definition to include effects that have been an important part of NEPA analysis for more than a decade and will continue to be relevant, consistent with best available science and NEPA's requirements. Also, CEQ proposed these changes in response to comments received during the Phase 1 rulemaking that the definition of ''effects'' or ''impacts'' should explicitly address environmental justice and climate change.[120]

CEQ received a variety of comments on the proposed definition of ''effects'' or ''impacts.'' Some commenters supported the proposed definition generally, and specifically supported the retention of the changes made in the Phase 1 rulemaking to include direct, indirect, and cumulative effects in the definition.

Some commenters requested CEQ add additional examples of effects, including vandalism, destruction of cultural resources, and adverse effects to resources crucial to the exercise of Tribal Nations' reserved rights or the habitat such resources depend on for any part of their lifecycle.

Some commenters characterized the proposed definition of ''effects'' as an attempt to inappropriately broaden the definition, contravene NEPA, and invite litigation, delays, and complexity. These commenters primarily focused on the additions of environmental justice and climate change into proposed paragraph (g)(4), taking issue with CEQ codifying concepts that have previously only been included in guidance documents and Executive orders. One commenter generally described the proposed changes to the definition of ''effects'' as broadening the non-statutory definition of effects and asserted that it is at odds with NEPA, going beyond what the statute authorizes or requires. They also asserted the proposed changes have nothing to do with the mission of most agencies.

CEQ adds the proposed examples in § 1501.8(i)(4) of the final rule, and also adds ''effects on Tribal resources'' in response to commenters' suggestions. CEQ also revises the last sentence of the paragraph to substitute ''adverse'' for its

[119] CEQ, *Explore the Map,* Climate and Economic Justice Screening Tool, *https://screeningtool.geoplatform.gov/;* EPA, EJScreen: *Environmental Justice Screening and Mapping Tool, https://www.epa.gov/ejscreen.*

[120] CEQ, Phase 1 Response to Comments, *supra* note 52, at 87, 99.

synonym ''detrimental'' before ''effects,'' for consistency with the usage of the phrase ''adverse effects'' in other provisions in the regulations. CEQ declines to add the other proposed examples as they are overly specific. CEQ notes that this paragraph is a non-exhaustive list of examples, and that effects vary widely depending on the nature and scope of an agency action. CEQ considers it irrelevant to this rulemaking whether environmental effects, including climate-related and environmental justice effects, relate to an agency's mission. The purpose of NEPA is for agency decision makers to consider environmental effects in their decision making regardless of the agency's mission or purpose.

CEQ acknowledges that the term ''effects'' is not statutorily defined. A definition of ''effects,'' however, has been a part of CEQ's regulations since 1978, which included direct, indirect, and cumulative effects, *see* 40 CFR 1508.8 (2019), and which CEQ restored to the regulations in its Phase 1 rulemaking. Including explicit references to ''climate change-related effects'' and ''disproportionate and adverse effects on communities with environmental justice concerns'' as examples of effects is consistent with that definition of ''effects,'' and the approach the CEQ regulations have taken since 1978 of identifying examples of categories of effects that fall within the regulation's definition of ''effects.'' See 40 CFR 1508.1(g)(1) (2020); 40 CFR 1508.8 (2019). The addition of these new examples to the regulatory text provides further specificity consistent with the statutory text and do not expand the scope of the definition of ''effects.'' For example, section 2 of NEPA, 42 U.S.C. 4321, notes that in enacting NEPA Congress declared a national policy, among other things, ''to promote efforts which will prevent or eliminate damage to the environment and *biosphere*'' (emphasis added). Section 102 of NEPA, for example, directs the ''Federal Government to use all practical means'' to ensure ''for *all* Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,'' and that ''Congress recognizes that *each person* should enjoy a healthful environment.'' 42 U.S.C. 4331(b) and (c) (emphasis added). And as section 102(2)(C)(i) of NEPA also notes, an agency's NEPA analysis must address the ''reasonably foreseeable adverse environmental effects'' of the proposed action,which has long been interpreted in CEQ's regulations (and affirmed by courts) to include direct, indirect, and cumulative effects. 42 U.S.C. 4332(2)(C)(ii). As a result, expressly identifying climate change, effects to communities with environmental justice concerns, and similar considerations simply draws attention to various categories of effects that already merit consideration.

A commenter recommended CEQ clarify that agencies focus cumulative effects analyses on ''significant'' cumulative effects to improve efficiency. The commenter also asked CEQ to recognize that a qualitative analysis is sufficient when describing potential cumulative effects. CEQ has determined not to include these suggestions in the regulatory definition because they are overly specific and prescriptive and notes that CEQ has issued guidance on cumulative effects that address these issues.

One commenter asserted that ''effects of the proposed agency action'' in section 102(2)(C) of NEPA cannot be read to include effects that are totally unrelated to the proposed agency action and therefore inclusion of cumulative effects in the definition of ''effects'' is precatory and irrelevant to the legal sufficiency of an EIS.

Some commenters asserted that the amendments to NEPA prohibit consideration of cumulative effects because they do not demonstrate a reasonably close causal relationship, and stated that Congress intentionally codified ''reasonably foreseeable'' effects rather than ''cumulative'' or ''aggregate'' effects and urged CEQ to adopt language consistent with the statutory amendments.

CEQ disagrees with the commenters' assertions. The first sentence of the definition of ''effects'' is clear—effects must be reasonably foreseeable. Direct, indirect, and cumulative effects are categories of reasonably foreseeable effects. Therefore, CEQ declines to make changes to the definition to remove ''cumulative'' from the types of effects.

Some commenters requested that CEQ restore the definition of ''effects'' from the 2020 rule, in particular emphasizing the restoration of ''reasonably close causal relationship to the proposed action,'' which CEQ removed in the Phase 1 rulemaking. CEQ declines to restore the 2020 definition for the reasons discussed in the Phase 1 rulemaking, the Phase 1 Response to Comments, and the Phase 2 Response to Comments. CEQ also notes that Congress did not include this language in the 2023 NEPA amendments, but instead used the phrase ''reasonably foreseeable effects.''

CEQ also proposed minor, non-substantive edits to paragraph (g)(3) regarding cumulative effects. Consistent with CEQ's proposal to ensure ''significant'' only modify ''effects,'' CEQ proposed to revise the phrase to read ''actions with individually minor but collectively significant effects.'' A commenter on the Phase 1 rulemaking had also noted that the word ''actions'' should be ''effects.'' CEQ did not receive any comments specific to this proposed change and makes it in the final rule in § 1508.1(i)(3).

6. Environmental Assessment (§ 1508.1(j))

CEQ proposed to update the definition of ''environmental assessment'' in proposed paragraph (h) for consistency with sections 106(b)(2) and 111(4) of NEPA, proposed § 1501.5, and longstanding agency practice. *See* 42 U.S.C. 4336(b)(2), 4336e(4). CEQ proposed to strike ''prepared by a Federal agency'' and change it to ''for which a Federal agency is responsible'' for consistency with section 107(f) of NEPA and § 1506.5, which allow a project sponsor (following agency issuance of procedures) or agency-directed contractor, respectively, to prepare an EA but requires that the agency take responsibility for the accuracy of its contents irrespective of who prepares it. *See* 42 U.S.C. 4336a(f).

To improve readability, CEQ proposed to strike ''to aid an agency's compliance with the Act'' and replace it with text from § 1501.5 clarifying that an agency prepares an EA when a proposed action is not likely to have a significant effect or the significance of the effects is unknown. CEQ also proposed to insert additional language to clarify that an EA is ''used to support an agency's'' determination of whether to prepare an EIS, add a parenthetical cross reference to part 1502, and make the cross reference to the provision on FONSIs a parenthetical to match. CEQ noted in the proposed rule that the proposed changes would not alter the intention that an EA is used to support an agency's determination whether to prepare an EIS (part 1502) or issue a FONSI (§ 1501.6).

One commenter requested that the definition of ''environmental assessment'' reference the requirements of an EA with a mitigated FONSI and clarify that an agency may incorporate mitigation to reach a FONSI determination. CEQ revises the definition of ''environmental assessment'' as proposed in § 1508.1(j). CEQ declines to make additional edits to address mitigated FONSIs because the definition already cross-references to § 1501.6, which addresses mitigated FONSIs.

7. Environmental Document (§ 1508.1(k))

CEQ proposed to add ''record of decision'' to the definition of ''environmental document'' in proposed paragraph (i) for clarity. CEQ also proposed to add a ''documented categorical exclusion determination'' to the definition to reflect the longstanding agency practice of documenting some CE determinations.

A few commenters opposed the proposed addition of a documented CE determination to the definition. One commenter opposed the definition stating that it is inconsistent with the definition of ''environmental document'' in section 111 of NEPA. Another commenter opposed the change asserting some of the regulatory requirements for environmental documents should only apply to EAs and EISs, and that the proposed definition further obscures the distinction between a CE compared to an EA or EIS. A third commenter requested confirmation that undocumented CEs are excluded from the definition and also generally opposed the inclusion of CEs in the definition of ''environmental document.''

CEQ makes the changes as proposed to the definition of ''environmental document'' in § 1508.1(k). This change is consistent with the changes to §§ 1501.4 and 1507.3 that reference CE determinations. Therefore, for clarity and efficiency, CEQ is incorporating documented CE determinations into the definition of ''environmental document.'' As CEQ acknowledged in its proposed rule, CEQ intentionally proposed a broader definition of ''environmental document'' than the definition in the NEPA statute because the CEQ regulations have long defined this term more broadly for the regulation's purposes, and narrowing the definition in the regulations would require substantial further conforming revisions that could create additional uncertainty and would disrupt existing practices. In developing the proposed and final rule, CEQ reviewed each use of the term to ensure its definition is appropriate as well as consistent with the NEPA statute. CEQ is unclear how this definition ''obscures the distinction'' between CEs and EAs or EISs, and therefore declines to make any changes in response to this comment. Lastly, CEQ agrees with the commenter that this would exclude undocumented CE determinations but declines to remove documented CE determinations as discussed earlier in this section.

8. Environmental Impact Statement (§ 1508.1(*l*))

CEQ proposed to change ''as required'' to ''that is required'' in the definition of ''environmental impact statement'' in proposed paragraph (j) for consistency with the definition of ''environmental impact statement'' in section 111(6) of NEPA. *See* 42 U.S.C. 4336e(6). CEQ did not receive comments on this proposed change. CEQ makes this change in the final rule in § 1508.1(*l*).

9. Environmental Justice (§ 1508.1(m))

CEQ proposed to add a new definition of ''environmental justice'' at proposed paragraph (k) to define ''environmental justice'' as the just treatment and meaningful involvement of all people so that they are fully protected from disproportionate and adverse human health and environmental effects and hazards, and have equitable access to a healthy, sustainable, and resilient environment. In defining ''environmental justice,'' CEQ proposed to use the phrase ''cumulative impacts,'' rather than the phrase ''cumulative effects,'' as used elsewhere in the proposed regulations because the phrase ''cumulative impacts'' has a meaning in the context of environmental justice relating to the aggregate effect of multiple stressors and exposures on a person, community, or population. *See, e.g.,* Environmental Protection Agency, Cumulative Impacts Research: Recommendations for EPA's Office of Research and Development (2022). CEQ explained in the proposed rule that it views the evolving science on cumulative impacts as sufficiently distinct from the general meaning of cumulative effects under the NEPA regulations such that using a different term could be helpful to agencies and the public. CEQ invited comment on this approach.

Multiple commenters expressed support for the proposed definition, with many saying the language is clear and comprehensive and others welcoming the inclusion of a definition, saying it is long overdue. Some commenters expressed support for specific components of the definition, such as the inclusion of Tribal affiliation. Numerous commenters suggested specific revisions to the definition or asked that the final rule include additional elements, which CEQ discusses in the Phase 2 Response to Comments.

Some commenters supported use of the phrase ''cumulative impacts'' in the definition and CEQ's rationale for doing so. One commenter asserted that ''cumulative impacts'' is a newly introduced concept and urged CEQ to clarify its meaning, expressing concern that it is open-ended and could result in agencies inaccurately interpreting the term to call for an unnecessarily expansive historical baseline in the analysis that could slow or discourage development or require projects to mitigate historical environmental burdens that go beyond the impacts of a proposed project. One commenter requested that CEQ add a separate definition for ''cumulative impacts'' as it is used in the definition of ''environmental justice'' to distinguish it from ''cumulative effects.''

Multiple commenters opposed the proposed definition of ''environmental justice'' for a variety of reasons. Commenters asserted that it was subjective, vague, difficult to implement, an impossibly high standard, politically motivated, inconsistent with § 1502.16(b), unlawful and not supported by statute, vulnerable to legal challenges, could open the door to endless project delays, and changes NEPA procedural requirements to achieve substantive goals.

In the final rule, CEQ adds a definition of ''environmental justice'' in § 1508.1(m) consistent with the proposal. Consideration of environmental justice is within the scope of NEPA's purpose to provide for the social, economic, and other requirements of present and future generations and allowing for all Americans to participate in a wide sharing of life's amenities. *See* 42 U.S.C. 4331. NEPA also recognizes that each person should have the opportunity to enjoy a healthy environment. 42 U.S.C. 4331. Consideration of environmental justice also informs an agency's analysis of reasonably foreseeable effects. Agencies have decades of experience integrating consideration of environmental justice in their NEPA reviews and incorporating a definition of ''environmental justice'' into the regulations will provide additional clarity and consistency as agencies continue to analyze environmental justice in environmental documents, as they have for many years. The definition added to the regulations is consistent with longstanding agency practice evaluating potential effects to communities that experience disproportionate and adverse human health and environmental effects and ensuring meaningful engagement with communities affected by proposed actions. The definition is also consistent with the definition of ''environmental

justice'' in section 2(b) of E.O. 14096.[121] CEQ declines to define the phrase ''cumulative impacts.'' As noted in the proposed rule, ''cumulative impacts'' has a meaning in the context of environmental justice relating to the aggregate effect of multiple stressors and exposures on a person, community, or population. The science of ''cumulative impacts'' is an evolving field, and CEQ has determined that it is premature and inappropriately limiting to establish a regulatory definition of the phrase at this time. CEQ will consider whether guidance on cumulative impacts would assist agencies conducting environmental reviews.

Some commenters asked CEQ to provide clearer direction and guidance on how to apply the definition and consideration of environmental justice to improve consistency and clarity amongst Federal agencies. CEQ will consider what additional guidance may be necessary.

10. Environmentally Preferable Alternative (§ 1508.1(n))

CEQ proposed to add a new definition of ''environmentally preferable alternative'' at § 1508.1(*l*), a concept that has been in the regulations since 1978, and define it as the alternative or alternatives that will best promote the national environmental policy in section 101 of NEPA. CEQ based its proposed definition on CEQ's Forty Questions guidance that was issued in 1981 and has remained an important resource for agencies since that time.[122]

Some commenters expressed general support for the proposed definition. Others expressed support and suggested changes, such as incorporating the phrases ''reasonable alternative'' and ''economically and technically feasible.'' Other commenters opposed the proposed definition. Multiple commenters asserted the definition conflicts with the mandates of section 101 of NEPA and asserted that because section 101 is about striking a balance, the environmentally preferable alternative should be defined as the alternative that best strikes a balance. Another commenter asserted the proposed definition is at odds with the statutory language of NEPA arguing that agencies must only consider alternatives that are technically and economically feasible and asserting that the environmentally preferable alternative may not always be technically and economically feasible.

CEQ adds the definition of ''environmentally preferable alternative'' in § 1508.1(n) as proposed. As CEQ has clarified in § 1502.14(f) and in the discussion in section II.D.9, agencies identify the environmentally preferable alternative amongst the alternatives considered in the EIS, which are the proposed action, no action, and reasonable alternatives. Therefore, the definition of ''environmentally preferable alternative'' does not require agencies to consider alternatives beyond those already identified for consideration. CEQ disagrees that it is necessary to include text indicating that the environmentally preferable alternative must be a reasonable alternative, because agencies select the environmentally preferable alternative from the alternatives analyzed in the EIS, which include the proposed action, no action, and reasonable alternatives, which is defined as a range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action. CEQ also disagrees that the environmentally preferable alternative should be defined as the alternative that best balances competing considerations. While balance is an important part of NEPA, identifying the environmentally preferable alternative provides information to decision makers and the public, and is a longstanding part of the NEPA process. Agencies are not required to adopt the environmentally preferred alternative as its final decision. Additionally, CEQ disagrees that the definition is at odds with section 101 of NEPA because that section is incorporated into the definition.

11. Extraordinary Circumstances (§ 1508.1(o))

CEQ proposed to add a definition of ''extraordinary circumstances'' in proposed paragraph (m). While the 1978 regulations explained the meaning of extraordinary circumstances as part of the definition of ''categorical exclusion'' at 40 CFR 1508.4 (2019), which the 2020 rule moved to 40 CFR 1501.4(b) (describing how to apply extraordinary circumstances when considering use of a CE) and 40 CFR 1507.3(e)(2)(ii) (requiring agencies to establish extraordinary circumstances for CEs in their procedures),[123] CEQ proposed to create a standalone definition to improve clarity when this term is used throughout the rule.

CEQ also proposed to add several examples of extraordinary circumstances to help agencies and the public understand common situations that agencies may consider in determining whether an action normally covered by a CE falls outside the category of actions the agency has determined will not have significant effects and, therefore, additional analysis is required either under § 1501.4(b), if the agency can determine that it can rely on the CE notwithstanding the presence of the extraordinary circumstance, or through an EA or EIS. The proposed examples included effects on sensitive environmental resources, disproportionate and adverse effects on communities with environmental justice concerns, effects associated with climate change, and effects on historic properties or cultural resources. This list of examples is not exclusive, and agencies continue to have the discretion to identify extraordinary circumstances in their NEPA implementing procedures, consistent with § 1507.3, as well as through the new mechanism to establish CEs in § 1501.4(c), that are specific and appropriate to their particular actions and CEs.

Multiple commenters expressed general support for the proposed definition of ''extraordinary circumstances.'' A few commenters specifically supported the inclusion of the examples of extraordinary circumstances, including the references to climate change effects, effects on sensitive environmental resources, effects on communities with environmental justice concerns, and effects on historic properties and cultural resources.

Other commenters criticized the proposed definition, asserting it is too broad, vague, and subjective. Some commenters suggested the proposed definition is contrary to the NEPA amendments allowing expanded use of CEs. Other commenters specifically objected to the examples, specifically effects on climate change and communities with environmental justice concerns. One commenter stated the definition could result in confusion because it does not provide clarity on what agencies must evaluate. Similarly, another commenter stated this lack of clarity provides too much freedom to agencies that may not properly assess the effects of projects for the sake of efficiency.

CEQ adds a definition of ''extraordinary circumstances'' in § 1508.1(o) as proposed with minor changes. In the final rule, CEQ uses ''means'' instead of ''are'' for consistency with other definitions in § 1508.1. The final rule removes ''environmental'' from ''significant

[121] *See* E.O. 14096, *supra* note 22, at 25253.

[122] CEQ, Forty Questions, *supra* note 5, at 6.

[123] CEQ, 2020 Final Rule, *supra* note 39, at 43342–43.

environmental effects'' because ''significant effects'' is a defined term. CEQ also revises the examples of extraordinary circumstances to use the same introductory text, ''substantial'' effects as discussed further in this section. The operative language included in this definition has been in the regulations since 1978, and agencies have decades of experience analyzing proposed actions for extraordinary circumstances. CEQ disagrees that the definition is inconsistent with the recent amendments to NEPA because NEPA requires agencies to conduct an EIS for actions that will have significant effects, and extraordinary circumstances are the mechanism by which an agency assesses whether a particular proposed action may have significant effects and, therefore, that reliance on a CE is inappropriate. CEQ disagrees that the definition is overbroad and considers it to provide agencies the necessary flexibility to tailor their extraordinary circumstances consistent with their programs and authorities. CEQ also disagrees that the proposed definition impedes the ability of agencies to use CEs or apply the provisions of NEPA regarding CEs. The regulations have always required agencies to consider extraordinary circumstances when applying a CE and providing a definition within the regulations helps provide clarity to agencies, applicants, and the public.

Multiple commenters asserted that the undefined phrase ''substantial effects'' used in the examples of extraordinary circumstances may result in confusion, delays, and increased litigation risk. Another commenter questioned why ''potential substantial effects'' is used in the examples instead of ''reasonably foreseeable'' and ''significant effects.'' CEQ used this different phrasing because the purpose of extraordinary circumstances is to screen an individual action, which would normally be covered by a CE, for further analysis to assess whether the action has reasonably foreseeable significant effects requiring the preparation of an EIS. While an agency could adopt extraordinary circumstances that directly implement the reasonably foreseeable significant effects standard, doing so could degrade the efficiency of applying CEs by requiring a more complex analysis in applying its extraordinary circumstances that would consider the context and intensity factors that govern an assessment of significance. CEQ notes that many agencies have long used this phrase in their lists of existing extraordinary circumstances and that this approach has resulted in an efficient process for applying CEs.

Some commenters also questioned why the example for effects on communities with environmental justice concerns or effects on historic properties or cultural resources did not use the phrase ''substantial effects.'' CEQ revises the examples to use ''substantial'' effects for consistency with the other examples in § 1508.1(o), although CEQ notes that agencies have flexibility to design extraordinary circumstances in a manner that makes sense for their programs.

12. Finding of No Significant Impact (§ 1508.1(q))

In the definition of ''finding of no significant impact'' proposed in paragraph (o), CEQ proposed to insert ''agency's determination that and'' after ''presenting the'' for consistency with the definition of ''finding of no significant impact'' in section 111(7) of NEPA, which defines the term to mean ''a determination by a Federal agency that a proposed agency action does not require the issuance of an environmental impact statement.'' 42 U.S.C. 4336e(7).

One commenter suggested CEQ revise the definition to clarify that the proposed action will not have a significant adverse effect on any aspect of the human environment. CEQ revises the definition of ''finding of no significant impact'' in § 1508.1(q) as proposed, and CEQ declines to make additional changes to the definition. CEQ agrees that the purpose of a FONSI is to document the determination that the proposed action will not have a significant effect, which is specified in § 1501.3(d)(2)(i), and does not consider repeating that proposition here necessary. Another commenter suggested the final rule include a definition for mitigated FONSI, which CEQ declines to add because the meaning of a mitigated FONSI is conveyed in § 1501.6(a).

13. Human Environment or Environment (§ 1508.1(r))

CEQ proposed to clarify in proposed paragraph (p) that ''human environment'' and ''environment'' are synonymous in the regulations given that ''environment'' is the more commonly used term across the regulations.

A few commenters expressed support for the use of ''human environment'' and ''environment'' synonymously. A couple of commenters asked for CEQ to define ''human environment'' and ''environment'' as separate terms but did not include a rationale for doing so. One commenter was supportive but requested that CEQ expand the definition to explicitly include cultural and socio-economic conditions.

CEQ makes this change as proposed in the final rule at § 1508.1(r). CEQ declines to explicitly reference cultural and socio-economic conditions in the definition, because the definition cross-references the definition of ''effects,'' which notes that effects include ecological, aesthetic, historic, cultural, economic, social, or health.

CEQ proposed a minor edit to ''human environment'' in § 1508.1(p) to remove ''of Americans'' after ''present and future generations.'' This minor edit improves consistency with section 101(a) of NEPA, which speaks generally about the impact of people's ''activity on the interrelations of all components of the natural environment'' and the need ''to create and maintain conditions under which [humans] and nature can exist in productive harmony.'' 42 U.S.C. 4331(a).

One commenter opposed the removal of the phrase ''of Americans'' and disagreed with CEQ's characterization of the change as minor. CEQ disagrees with the commenter's assertion and makes this change in the final rule. In the 2020 rule, CEQ changed ''people'' to ''of Americans,'' explaining that this change was made to be consistent with section 101(a) of NEPA.[124] However, CEQ has reconsidered that explanation, which overlooks the context in which the phrase ''present and future generations of Americans'' is used in section 101(a). That paragraph of the Act refers to Americans at the end of the last sentence after using the broader term ''man'' three times. ''Human environment'' refers broadly to the interrelationship between people and the environment. The phrase ''present and future generations of Americans'' is used in a narrower context to ''fulfill the social, economic, and other requirements of present and future generations of Americans.'' 42 U.S.C. 4331(a). CEQ notes that it considers the removal of the phrase ''of Americans'' in the definition of ''human environment'' to be consistent with CEQ's determination to retain the phrase in the first sentence of § 1501.1(a). That sentence specifically describes section 101(a) of NEPA and does not define the undefined term ''human environment,'' which appears in NEPA section 102(2)(C). CEQ considers it appropriate to define ''human environment'' in consideration of the totality of section 101, rather than solely based on the last phrase in section 101(a). A definition of

[124] *Id.* at 43344–45.

''human environment'' that is not limited by the phrase ''of Americans'' is also consistent with the statutory exclusion in section 111(10)(b)(vi) of NEPA of activities or decisions with effects located entirely outside of the jurisdiction of the United States from the definition of ''major Federal action.'' This exclusion—consistent with decades of agency practice—requires agencies to evaluate effects that occur outside of U.S. jurisdiction as a component of the human environment because it does not limit the definition of ''effects,'' but rather excludes a narrow category of activities from the definition of ''major Federal action.'' 42 U.S.C. 4336e(10)(b)(vi).

14. Joint Lead Agency (§ 1508.1(s))

CEQ proposed to add a definition for ''joint lead agency'' to mean ''a Federal, State, Tribal, or local agency designated pursuant to § 1501.7(c) that shares the responsibilities of the lead agency'' for preparing an EA or EIS. CEQ proposed the definition for consistency with the usage of that term in section 107(a)(1)(B) of NEPA and § 1501.7(b) and (c). *See* 42 U.S.C. 4336a(a)(1)(B).

One commenter expressed that NEPA establishes two categories of joint lead agencies: Federal joint lead agencies and non-Federal joint lead agencies. The commenter requested CEQ clarify this distinction in the definition. CEQ declines to make the commenter's recommended change. CEQ reviewed the use of the term in the regulations and identified no circumstance where the term was used in a fashion that required distinguishing between Federal joint lead agencies and non-Federal joint lead agencies. Therefore, CEQ finalizes the definition of ''joint lead agency'' as proposed in § 1508.1(s).

15. Lead Agency (§ 1508.1(u))

CEQ proposed in paragraph (s) to revise the definition of ''lead agency'' as ''the Federal agency that proposes the agency action or is designated pursuant to § 1501.7(c) for preparing or having primary responsibility.'' CEQ proposed this revision for consistency with the definition of ''lead agency'' in section 111(9) of NEPA and to expand the definition ''to also include EAs, consistent with longstanding practice. CEQ did not receive any comments on its proposed revisions to the definition of ''lead agency'' and finalizes the definition of ''lead agency'' as proposed in § 1508.1(u). *See* 42 U.S.C. 4336e(9).

16. Major Federal Action (§ 1508.1(w))

CEQ proposed to revise the definition of ''major Federal action'' in proposed paragraph (u) to clarify the list of example activities or decisions that meet the definition, and revise the list of exclusions from the definition consistent with section 111(10) of NEPA. *See* 42 U.S.C. 4336e(10). First, CEQ proposed to revise the introductory paragraph to change ''activity or decision'' to ''action that the agency carrying out such action determines is'' and insert ''substantial'' before ''Federal control and responsibility'' and delete ''subject to the following'' to align the text with the language in section 111(10) of NEPA.

Some commenters requested the final rule provide further clarity and specificity regarding ''substantial Federal control and responsibility'' contending that this phrase is ambiguous and confusing. Another commenter argued that Congress made a significant change to the definition of ''major Federal action'' in section 111(10) of NEPA in using the phrase ''substantial Federal control and responsibility'' over the action the agency is carrying out, instead of adopting the definition of ''major Federal action'' from the 1978 regulations, ''actions with effects which are potentially subject to Federal control and responsibility'' or the 2020 regulations ''Federal control and responsibility.'' This commenter argued the use of ''substantial'' by Congress further limits the definition of ''major Federal action'' and therefore NEPA's applicability generally. Several other commenters agreed with this premise and suggested the intention of the NEPA amendments was to narrow the application of NEPA. Other commenters asked CEQ to define the term ''substantial'' in the context of the definition.

CEQ disagrees that ''substantial Federal control and responsibility'' applies in a more limited manner than ''Federal control and responsibility.'' Substantial modifies Federal control and responsibility and indicates that a large amount, but not complete, control and responsibility is required for an action to be a major Federal action. This interpretation is consistent with Supreme Court precedent interpreting the meaning of substantial in various statutes. *See, e.g., Ayestas* v. *Davis,* 584 U.S., 28, 45 (2018); *Life Technologies Corp.* v. *Promega Corp.,* 580 U.S. 140, 145–46 (2017); *Virginia* v. *Hicks,* 539 U.S. 113, 119–20, 122–24 (2003). CEQ interprets substantial Federal control and responsibility to mean the agency has a large amount of control and responsibility over the action the agency is carrying out but not complete control over the action or its effects. The phrase ''substantial Federal control and responsibility'' could, therefore, be interpreted to capture a broader set of actions than the phrase in the absence of the word ''substantial,'' because ''Federal control and responsibility'' unqualified could be read to require complete control and responsibility. Contrary to the commenters' assertion, the phrase ''substantial Federal control and responsibility'' does not require a narrower scope for the term major Federal action than the phrase ''Federal control and responsibility.''

CEQ notes that the phrase ''substantial Federal control and responsibility'' in section 111(10) applies to the actions an agency is carrying out. 42 U.S.C. 4336e(10)(A). In most cases, agencies exercise control and responsibility over the actions they carry out, unless those actions are non-discretionary. CEQ declines to define ''substantial'' in the final rule but will consider whether to issue guidance in the future and will assist agencies in evaluating circumstances in which the agency carries out an action but lacks complete control and responsibility for it.

CEQ revises the introductory paragraph of the definition of ''major Federal action'' in § 1508.1(w) as proposed because the text aligns with the definition of ''major Federal action'' in section 111(10) of NEPA. 42 U.S.C. 4336e(10). The determination of whether an activity or decision is a major Federal action is a fact-specific analysis that agencies have long engaged in, and they should continue to exercise judgment as they evaluate the contexts in which they operate. The regulations provide a list of example activities and decisions in § 1508.1(w)(1) to assist agencies in making these determinations.

Second, CEQ proposed to reorder and revise the definition to first list the examples of activities or decisions that may be included in the definition of ''major Federal action'' before the exclusions. To that end, CEQ proposed to move paragraph (q)(3) of 40 CFR 1508.1 (2020) to proposed paragraph (u)(1), and revise ''tend to fall within one of the following categories'' to read ''generally include.''

Several commenters opposed the proposed list of example activities or decisions that meet the definition of ''major Federal action'' and recommended the final rule retain only the exclusions set forth in section 111(10) of NEPA. The commenters argued that these examples go beyond the text of NEPA, subvert Congressional intent, and limit an agency's ability to make case-by-case determinations.

Other commenters expressed support for the list of examples.

CEQ considered the range of comments on the definition of ''major Federal action'' and determined that providing both examples of activities or decisions that typically meet the definition of ''major Federal action'' as well as exclusions from the definition strikes the right balance to help agencies as they make case-by-case factual determinations of whether an action qualifies as a major Federal action and for consistency with section 111(10). *See* 42 U.S.C. 4336e(10). To provide additionally clarity that this is a fact-specific, case-by-case determination, CEQ moves paragraph (q)(3) of 40 CFR 1508.1 (2020) to § 1508.1(w)(1) in the final rule, revises it consistent with the proposal, and adds an introductory clause, ''[e]xamples of'' before ''major Federal actions generally include'' to the beginning of the paragraph to make clear that this is a list of example activities and decisions that may meet the definition of ''major Federal action.''

Third, CEQ proposed to strike paragraph (q)(2) of 40 CFR 1508.1 (2020) and replace it with proposed paragraph (u)(1)(i) to include the granting of authorizations such as permits, licenses, and rights-of way. CEQ proposed to strike the examples in paragraph (q)(2) 40 CFR 1508.1 (2020) because the proposed example addresses regulated activities, and the other examples are redundant to those listed in proposed paragraphs (u)(1)(ii) through (u)(1)(vi). CEQ did not receive any comments specific to this proposal. CEQ strikes paragraph (q)(2) of 40 CFR 1508.1 (2020) in the final rule and replaces it in § 1508.1(w)(1)(i) with the language as proposed.

Fourth, CEQ proposed to redesignate paragraphs (q)(3)(i) through (q)(3)(iv) of 40 CFR 1508.1 (2020) as proposed paragraphs (u)(1)(ii) through (u)(1)(v). CEQ did not receive any comments specific to this proposal. In the final rule, CEQ redesignates paragraphs (q)(3)(i) through (q)(3)(iv) of 40 CFR 1508.1 (2020) as § 1508.1(w)(3)(i) through (w)(3)(iv), respectively.

Fifth, in paragraph (u)(1)(iv), CEQ proposed to change the phrase ''connected agency decisions'' to ''related agency decisions'' to clarify that the concept in this paragraph is not meant to refer to ''connected actions'' as discussed in § 1501.3. CEQ proposed this as a non-substantive, clarifying change to avoid any confusion with connected actions. CEQ did not receive specific comments on this proposed change and revises this provision as proposed in § 1508.1(w)(1)(iv).

Sixth, CEQ proposed to revise paragraph (u)(1)(v) to change ''approval of'' to ''carrying out'' specific projects to address projects carried out directly by a Federal agency. CEQ proposed to strike ''located in a defined geographic area'' from the example of management activities; while this is merely an example, CEQ is concerned it could be read as limiting. CEQ also proposed to strike the sentence regarding permits and address them in the example in proposed paragraph (u)(1)(i).

One commenter requested removal of the term ''carrying out,'' asserting that CEQ has not shown that carrying out construction activities constitutes major Federal action. In the final rule, CEQ retains the example in § 1501.8(w)(1)(v) and adds ''or carrying out'' after ''[a]pproval of'' rather than replacing it because the phrase ''carrying out'' is consistent with section 111(10) of NEPA, which includes the phrase ''the agency carrying out such action.'' 42 U.S.C. 4336e(10)(A). CEQ also adds ''agency'' before ''projects'' to distinguish this example from non-Federal projects. Because this is a list of examples and both approving or carrying out construction projects can be major Federal actions, CEQ includes both in the final rule. For example, an agency may approve construction of a Federal facility and then contract out with another entity to actually carry out that construction.

Seventh, CEQ proposed to add a new example in proposed paragraph (u)(1)(vi) to improve clarity and ensure appropriate application of NEPA by explaining when Federal financial assistance is a major Federal action. Generally, actions to provide Federal financial assistance, other than actions that provide only minimal Federal funding, are major Federal actions so long as the Federal agency has authority and discretion over the financial assistance in a manner that could address environmental effects from the activities receiving the financial assistance. In such circumstances, the agency has sufficient control and responsibility over the use of the funds or the effects of the action for the action providing financial assistance to constitute a major Federal action consistent with the definition in section 111(10) of NEPA. 42 U.S.C. 4336e(10)(A). This includes circumstances where the agency could deny the financial assistance, in whole or in part, due to environmental effects from the activity receiving the financial assistance, or could impose conditions on the financial assistance that could address the effects of such activity.

Several commenters contended that CEQ's proposal to include financial assistance as an example of a major Federal action in proposed paragraph (u)(1)(vi) is inconsistent with the statutory definition of ''major Federal action'' in section 111(10)(B) of NEPA. The commenters stated that the proposed language is overly broad and could cover too many Federal loan or grant programs. One commenter asserted that this language ''could cover virtually any Federal grant or loan program, including ones that are not currently subject to NEPA.'' Another commenter asserted that financial assistance should never be considered a major Federal action.

CEQ disagrees that the examples of how an agency may exercise ''sufficient control and responsibility'' with regard to financial assistance to meet the statutory definition of ''major Federal action'' are inconsistent with the statute. The language in paragraph (u)(1)(vi) provides examples of where financial assistance meets the definition of ''major Federal action'' and is not covered by the exclusion of ''financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action.'' 42 U.S.C. 4336e(10)(B)(iii).

CEQ adds the proposed examples in the final rule at § 1508.1(w)(1)(vi) with an additional clause to incorporate the phrase ''more than a minimal amount'' into the example to avoid any confusion about the relationship of the example to the exclusion in paragraph (w)(2)(i)(A) and NEPA section 111(10)(B)(ii). CEQ also makes two editorial corrections to add the missing word ''to'' after ''due'' and repeat the subject ''authority to'' before ''impose conditions.'' Except in circumstances in which an agency provides minimal Federal funding, where an agency has substantial control and responsibility over a recipient's environmental effects or sufficient discretion to consider the environmental effects when making decisions, the agency must comply with NEPA. While an agency can appropriately tailor the scope of its NEPA analysis to the environmental effects that it can take into account in making its decision, the agency cannot exclude such actions from NEPA review altogether.

CEQ disagrees with the assertion that the example broadens the applicability of NEPA to financial assistance that is excluded by section 111(10)(B)(ii) and § 1508.1(w)(2)(iii). Rather, the example describes circumstances in which an agency exercises sufficient control or

responsibility over the use of financial assistance or the effect of the action to fall outside the exception. In evaluating whether a particular action qualifies as a major Federal action consistent with this example and the exclusion in § 1508.1(w)(2)(iii), agencies should consider the specific circumstances and legal authorities involved. As with any NEPA review, where an agency determines that an action providing financial assistance constitutes a major Federal action, the agency should scope the NEPA review in light of the statutory and factual context presented.

Other commenters specifically questioned the inclusion of financial assistance where the agency ''otherwise has sufficient control and responsibility over the subsequent use of the financial assistance or the effects of the activity for which the agency is providing the financial assistance'' in the example. A commenter asserted that this phrase's breadth and ambiguity could lead to litigation and recommended narrowing this flexibility clause to apply only where the agency ''otherwise has authority to impose conditions on the receipt of the financial assistance to address environmental effects.''

CEQ declines to make the commenters' proposed changes. The text the commenter addresses reflects the exclusion in section 111(10)(B)(iii) of NEPA. *See* 42 U.S.C. 4336e(10)(B)(iii). CEQ agrees that authority to impose conditions to address environmental effects, along with authority to deny in whole or in part assistance due to environmental effects, would satisfy the statutory test, and those situations are identified in the sentence immediately preceding the text that is the focus of the comment. Describing these situations, along with the remainder of § 1508.1(w)(1)(vi), can assist agencies in evaluating actions providing financial assistance, in light of the relevant statutory authorities and factual context, to determine if such action falls within the exclusion in section 111(10)(B)(iii) of NEPA and § 1508.1(w)(2)(iii). In addition to reflecting the statutory exclusion, this clause recognizes the varying degrees of control and responsibility agencies have over a wide variety of financial assistance programs, as well as the agencies' responsibility to determine the proper scope of its NEPA review with regard to such programs.

Eighth, CEQ proposed to replace the exclusions in paragraphs (q)(1)(i) through (vi) of 40 CFR 1508.1 (2020) with the exclusions from the definition of ''major Federal action'' codified in the definition in section 111(10)(B) of NEPA. *See* 42 U.S.C. 4336e(10)(B). CEQ proposed to include in proposed paragraph (u)(2)(i), (u)(2)(i)(A), and (u)(2)(i)(B) the exclusion of non-Federal actions with no or minimal funding; or with no or minimal Federal involvement where the agency cannot control the outcome of the project consistent with section 111(10)(B)(i) of NEPA. CEQ proposed these exclusions to replace the exclusion in 40 CFR 1508.1(q)(1)(vi) (2020), which CEQ proposed to strike. CEQ also invited comment on whether it should add additional provisions to the regulations to implement the ''minimal Federal funding'' exclusion in proposed paragraph (u)(2)(i)(A), noting that agencies currently evaluate the provision of minimal Federal funding based on specific factual contexts. CEQ asked whether additional procedures, including thresholds related to the amount or proportion of Federal funding, could increase predictability while ensuring that Federal agencies do not disregard effects to vital components of the human environment, including the health of children and vulnerable populations, drinking water, communities with environmental justice concerns, and similar considerations.

CEQ received some comments on the exclusion for non-Federal actions with no or minimal Federal involvement where the Federal agency cannot control the outcome of the project, which mirrors the exclusion in section 111(10)(B)(i)(II) of NEPA, and in response to the request for comment. One commenter recommended against setting a threshold, given the fact-specific nature of the inquiry. The commenter expressed concern that setting a threshold for the amount or proportion of Federal funding necessary for agency action to trigger NEPA would undermine the statute's emphasis that it apply to the ''fullest extent possible.'' The commenter further asserted that the 2023 NEPA amendments, as clarified by CEQ's proposed regulations, are sufficient to provide clarity on the scope of NEPA's application, and a threshold amount is not necessary or useful.

Two commenters recommended that the regulations establish thresholds for minimal Federal funding or direct agencies to establish thresholds in their NEPA procedures, asserting that clear thresholds will improve efficiency and reduce litigation risk. Two other commenters supported establishing a threshold for minimum funding and included suggestions for what that threshold should be. A couple of commenters requested CEQ define ''minimum'' in the context of minimum funding.

CEQ strikes 40 CFR 1508.1(q)(1)(vi) (2020) and adds this exclusion in the final rule as proposed at § 1508.1(w)(2)(i), (w)(2)(i)(A), and (w)(2)(i)(B). CEQ has considered the broad range of suggestions to thresholds it received but has not identified a threshold that would be appropriate across the broad range of Federal programs or that would address CEQ's concern about the health of children and vulnerable populations, drinking water, communities with environmental justice concerns, and similar circumstances. CEQ also notes that there is limited case law as to what constitutes ''minimal Federal funding'' and that the case law that exists does not define a clear threshold that could be incorporated into the regulations. Therefore, agencies should continue to evaluate whether funding is ''minimal'' based on the specific factual context of the proposed action.

CEQ also adds the exclusion for non-Federal actions ''with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project'' in § 1508.1(w)(2)(i)(B) as proposed. This provision reinforces the general rule that major Federal actions are actions carried out by an agency, and not non-Federal actions, and that a non-Federal action does not become a Federal action due to only minimal Federal involvement. Note, this exclusion does not bear on whether an action undertaken by a Federal agency, such as issuing a regulatory authorization or deciding to provide funding assistance, is a major Federal action, because in such circumstances the agency is undertaking an action itself. There are, however, circumstances where Federal involvement in a non-Federal action does not constitute an action, for example, where an agency informally provides a non-Federal party information that the non-Federal party considers in developing the non-Federal action. The provision of the information may not qualify as an agency action and the minimal Federal involvement would not result in the non-Federal action being considered a Federal action.

Ninth, CEQ proposed to include the exclusion of funding assistance solely in the form of general revenue sharing funds consistent with section 111(10)(B)(ii) of NEPA in proposed paragraph (u)(2)(ii). *See* 42 U.S.C. 4336e(10)(B)(ii). CEQ proposed this exclusion to replace the similar exclusion in 40 CFR 1508.1(q)(1)(v) (2020), which CEQ proposed to strike. CEQ did not receive substantive comments on this proposed revision. CEQ strikes 40 CFR 1508.1(q)(1)(v)

(2020) and adds this exclusion in the final rule as proposed at § 1508.1(w)(2)(ii).

Tenth, CEQ proposed to include the exclusion of loans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effects of the action, consistent with section 111(10)(B)(iii) of NEPA, in proposed paragraph (u)(2)(iii). *See* 42 U.S.C. 4336e(10)(B)(iii). CEQ did not receive substantive comments on this proposed revision, although as discussed above, CEQ did receive related comments on the example about financial assistance added to paragraph (w)(1)(vi). CEQ adds this exclusion in the final rule as proposed at § 1508.1(w)(2)(iii).

Eleventh, CEQ proposed to include the exclusion of certain business loan guarantees provided by the Small Business Administration, consistent with section 111(10)(B)(iv) of NEPA, in proposed paragraph (u)(2)(iv). *See* 42 U.S.C. 4336e(10)(B)(iv). CEQ proposed this exclusion to replace the similar exclusion in 40 CFR 1508.1(q)(1)(vii) (2020), which CEQ proposed to strike. In particular, CEQ proposed to strike the example in 40 CFR 1508.1(q)(1)(vii) of farm ownership and operating loan guarantees by the Farm Service Agency (FSA) pursuant to 7 U.S.C. 1925 and 1941 through 1949 because CEQ considered it best left to agencies to identify exclusions from the definition of ''major Federal action'' absent specific statutory authority like those for the Small Business Administration loan guarantees.

Several commenters requested that CEQ retain the explicit exclusion of FSA loans and loan guarantees from the definition of ''major Federal action.'' These commenters contended that the loan amounts are low, that activities funded do not require an agency permit, and that the agency does not have sufficient control or authority over the use of the funds. These commenters disagreed with CEQ's explanation that it is best left to agencies to identify exclusions from the definition of ''major Federal action'' absent specific statutory authority like those for the Small Business Administration (SBA) loan guarantees, arguing that the FSA loans are clearly outside the statutory definition, and that CEQ did not provide sufficient justification for not retaining the explicit exclusion.

CEQ strikes 40 CFR 1508.1(q)(1)(vii) (2020) and adds this exclusion in the final rule as proposed at § 1508.1(w)(2)(iv). When Congress amended NEPA to provide a definition of ''major Federal action'' in section 111(10), it included an exclusion for one of the two loan guarantee programs identified in 40 CFR 1508.1(q)(1)(vii) (2020), excluding business loan guarantees provided by the Small Business Administration, but not farm ownership and operating loan guarantees by the FSA. 42 U.S.C. 4336e(10)(B)(iv). In light of Congress's action, CEQ does not consider it appropriate to retain the exclusion for FSA loan guarantees in the NEPA regulations. FSA, like other agencies that administer loan and loan guarantee programs, should evaluate specific actions providing loans and loan guarantees to determine if the action falls within the exclusion in section 111(10) of NEPA and § 1508.1(w)(2)(iii) and, if appropriate, could address the applicability of this exclusion to this program in its NEPA procedures.

CEQ disagrees with the assertion that providing financial assistance for a non-Federal action cannot constitute a major Federal action. As discussed earlier, section 111(10)(B)(iii) of NEPA excludes financial assistance ''where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action.'' 42 U.S.C. 4336e(10)(B)(iii). This limited exclusion is inconsistent with treating actions providing financial assistance for non-Federal activities as categorically excluded from the definition of ''major Federal action.''

One commenter suggested that if CEQ does not retain the explicit exclusion for FSA loans and loan guarantees, CEQ should clearly explain in the final rule that it understands that FSA loans and loan guarantees are the types of loans and guarantees covered by proposed paragraph (u)(1)(iv), and that no additional procedures are necessary to apply proposed paragraph 1508.1(u)(1)(iv) to the FSA loans and loan guarantees. CEQ declines to make these statements. FSA is in the best position to determine whether its loans and loan guarantees meet the requirements for the exclusion established in § 1508.1 (w)(2)(iii). FSA, like other agencies administering financial assistance programs, may determine whether specific actions providing financial assistance are major Federal actions or may address such programs in their NEPA implementing procedures.

One commenter requested that CEQ explicitly indicate that farm operations funded through FSA loans or subject to loan guarantees are not excluded from the definition. Other commenters expressed support for CEQ's proposed removal of the exclusion but requested further guidance on when loans and loan guarantees are actions subject to substantial Federal control and responsibility, citing FSA and Department of Energy programs specifically.

CEQ disagrees with the commenter that farm operations by non-Federal actors are major Federal actions if they are funded by FSA loans or loan guarantees. Rather, the question that FSA, like other agencies, will need to consider is whether FSA's action to provide a loan or loan guarantee is a major Federal action in consideration of the exclusion. FSA is in the best position to determine whether an action or category of actions by the agency to provide loan or loan guarantees involve a circumstance where the agency does not exercise sufficient control and responsibility over the subsequent use of the financial assistance or the effects and, therefore are excluded.

Finally, one commenter requested additional guidance regarding the exclusion of SBA loans. While CEQ incorporates the statutory exclusion of certain business loan guarantees provided by the Small Business Administration (SBA) into § 1508.1(w)(2)(iv), CEQ considers it best left to SBA, which has expertise with the statutes it administers, to determine the applicability of the exclusion to the specific programs it administers.

Twelfth, CEQ proposed to move, without change, the exclusions in paragraphs (q)(1)(iv), (q)(1)(i), and (q)(1)(ii) of 40 CFR 1508.1 (2020) to proposed paragraphs (u)(2)(v) through (u)(2)(vii), respectively because section 111(10)(B)(v) through (vii) of NEPA codified these exclusions verbatim. *See* 42 U.S.C. 4336e(10)(B)(v)–(vii). Specifically, proposed paragraph (u)(2)(v) would exclude bringing judicial or administrative civil or criminal enforcement actions. Proposed paragraph (u)(2)(vi) would exclude extraterritorial activities or decisions. Proposed paragraph (u)(2)(vii) would exclude activities or decisions that are non-discretionary.

One commenter requested that CEQ expand the exclusion in proposed in paragraph (u)(2)(v) to exclude from NEPA applicability all judicial proceedings when an agency joins a lawsuit. CEQ declines to make this revision in the final rule, which incorporates the statutory text and is consistent with long-standing agency practice, but agrees with the commenter that the exclusion encompasses an agency's decision to join a lawsuit. In the final rule, CEQ moves, without

change, the exclusion for bringing judicial or administrative civil or criminal enforcement actions in paragraph (q)(1)(iv) of 40 CFR 1508.1 (2020) to § 1508.1(w)(2)(v).

A few commenters requested the final rule remove proposed paragraph (u)(2)(vi), arguing that it impermissibly expands the scope of NEPA and is inconsistent with the statute. CEQ declines to make this change as the language in proposed paragraph (u)(2)(vi) aligns with the text of section 111(10)(B)(vi) of NEPA, 42 U.S.C. 4336e(10)(B)(vi). In the final rule, CEQ moves, without change, the exclusion for extraterritorial activities or decisions, which refers to activities or decisions with effects located entirely outside the jurisdiction of the United States,[125] from paragraph (q)(1)(i) of 40 CFR 1508.1 (2020) to § 1508.1(w)(2)(vi).[126]

A few commenters supported the inclusion of proposed (u)(2)(ii) asserting that CEQ rightfully excluded non-discretionary actions from NEPA, as NEPA is designed to help agencies make better decisions. In the final rule, CEQ moves, without change, the exclusion for non-discretionary activities or decisions in paragraph (q)(1)(ii) of 40 CFR 1508.1 (2020) to § 1508.1(w)(2)(vii). As discussed in section II.C.2 addressing § 1501.3, some activities or decisions may be partially, but not entirely, non-discretionary, and while such actions may constitute major Federal actions under this definition, the agency may appropriately exclude the non-discretionary aspects of its decision from the scope of its NEPA analysis.

Thirteenth, CEQ proposed to move the exclusion regarding non-final agency actions from 40 CFR 1508.1(q)(1)(iii) to § 1508.1(u)(2)(viii) and make changes for consistency with section 106(a)(1) of NEPA, 42 U.S.C. 4336(a)(1). CEQ proposed this revision for consistency with longstanding case law excluding non-final agency actions from the definition of ''major Federal action.'' Therefore, CEQ proposed to include the finality of an action as a threshold consideration as well as an exclusion from the definition of ''major Federal action.'' Upon further consideration, CEQ considers finality to be adequately addressed as a threshold consideration in § 1501.3 and concludes that both the existing regulatory text and the proposed revision are confusing. Therefore, CEQ strikes 40 CFR 1508.1(q)(1)(iii) (2020) in the final rule and does not add proposed paragraph (u)(2)(viii). CEQ does not intend this deletion to have any substantive effect because § 1501.3 provides that NEPA does not apply where a proposed activity or decision is not a final agency action.

Finally, CEQ proposed a new exclusion in paragraph (u)(2)(ix) for activities or decisions for projects approved by a Tribal Nation that occur on or involve land held in trust or restricted status when the activities involve no Federal funding or other Federal involvement. CEQ proposed this exclusion in recognition of the unique circumstances facing Tribal Nations due to the United States' holding land in trust for them or the Tribal Nation holding land in restricted status. CEQ proposed to clarify that activities or decisions for projects approved by a Tribal Nation on trust lands are not major Federal actions where such activities do not involve Federal funding or other Federal involvement. CEQ proposed this exclusion because Tribal leaders raised this issue during consultations that CEQ held on its NEPA regulations and voiced concerns that the NEPA process placed Tribal Nations in a disadvantageous position relative to State and local governments because of the United States' ownership interest in Tribal lands.

A few commenters argued that the final rule should not include this exclusion because it was not included in the recent amendments to NEPA. Numerous other commenters supported the exclusion, and a large portion of those commenters asked that the final rule expand the exclusion to include additional actions, activities, or lands. One commenter asked CEQ to expand the provision to exclude all Tribal development from the definition of ''major Federal action.'' Another commenter recommended that the terminology in proposed paragraph (u)(ix) ''when no such activities or decisions involve no Federal funding'' be revised to match the language in paragraph (2)(i)(A) which states ''[w]ith no or minimal Federal funding.''

CEQ adds the exclusion in the final rule at § 1508.1(w)(2)(viii), but adds ''or minimal'' before ''involvement'' for consistency with section 111 of NEPA, 42 U.S.C. 4336e(10)(B). CEQ declines to make the exclusion broader than this because it considers the exclusion to strike the right balance in recognizing the unique circumstances facing Tribal Nations and carrying out the purposes of NEPA. CEQ notes that categories of activities on trust lands that typically will not constitute major Federal actions include the transfer of existing operation and maintenance activities of Federal facilities to Tribal groups, water user organizations, or other entities; human resources programs such as social services, education services, employment assistance, Tribal operations, law enforcement, and credit and financing activities not related to development; self-governance compacts for Bureau of Indian Affairs programs; service line agreements for an individual residence, building, or well from an existing facility where installation will involve no clearance of vegetation from the right-of-way other than for placement of poles, signs (including highway signs), or buried power/cable lines; and approvals of Tribal regulations or other documents promulgated in exercise of Tribal sovereignty, such as Tribal Energy Resource Agreements, certification of a Tribal Energy Development Organization, Helping Expedite and Advance Responsible Tribal Homeownership Act Tribal regulations, Indian Trust Asset Reform Act Tribal regulations and trust asset management plans, and Tribal liquor control ordinances.

One commenter asked CEQ to clarify if the proposed exclusion would extend to activities or projects that are approved by Tribal Nations and focused entirely on managing, accessing, or protecting resources or sites on Federal land that is not held in trust but to which the Tribe has reserved rights. CEQ declines to make this change. Because of the diversity of statutory, treaty, and factual considerations that can be involved, determining whether such circumstances involve a major Federal action is appropriately left to the administering agency.

One commenter requested the proposed provision be expanded to include any grant funding awarded to a Tribe. CEQ declines to make this change as section 111(10) of NEPA sets the standard for when actions to provide financial assistance, including grants, constitute a major Federal action. *See* 42 U.S.C. 4336e(10).

[125] CEQ notes that the jurisdiction of the United States is not limited to the United States' land territory. ''For purposes of the presumption against extraterritoriality, the territorial jurisdiction of the United States includes its land, internal waters, territorial sea, the adjacent airspace, and other places over which the United States has sovereignty or some measure of legislative control.'' Restatement (Fourth) of Foreign Relations Law § 404 cmt. d (Am. Law Inst. 2019).

[126] NEPA statutorily excludes from the definition of ''major Federal action'' ''extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States.'' 42 U.S.C. 4336e(10)(B)(vi). However, this exclusion does not change the scope of environmental effects that agencies must assess or expand the set of actions that are subject to NEPA review to extraterritorial matters that do not have effects within the jurisdiction of the United States.

Other commenters requested the proposed exclusion be expanded to include certain contracts, cooperative agreements, and similar funding vehicles authorizing the transfer of Federal funding to a Tribe for carrying out Federal programs. CEQ declines to make this change due to the complexity and numerosity of these arrangements but notes that the agencies that administer these programs could consider whether to include provisions addressing these programs in their NEPA procedures.

One commenter argued the proposed exclusion is impermissibly narrow, and the final rule should exclude entire categories of actions in the rule text. CEQ declines to make this change as agencies are in a better position to consider the legal and factual circumstances for their actions either on a case-by-case basis or through their agency NEPA procedures.

Several commenters asked for clarification of the term ''other Federal involvement.'' One commenter suggested defining it as any proposed Federal permits or other Federal approvals. Other commenters suggested ''other Federal involvement'' be defined as any proposed Federal permits or other Federal approvals on Tribal lands or ceded lands. CEQ declines to further define the term as agencies administering programs are best situated to consider the factual and legal contexts in which they operate to determine whether there is other Federal involvement that would make application of this exclusion inappropriate.

17. Mitigation (§ 1508.1(y))

CEQ proposed three edits to the definition of ''mitigation'' in proposed paragraph (w). First, CEQ proposed to change ''nexus'' to the more commonly used word ''connection'' to describe the relationship between a proposed action or alternatives and any associated environmental effects. CEQ did not receive comments specific to this proposed change and makes this revision in the final rule at § 1508.1(y).

Second, CEQ proposed to delete the sentence that NEPA ''does not mandate the form or adoption of any mitigation'' because this sentence was unnecessary and could mislead readers because it does not acknowledge that agencies may use other authorities to require mitigation or may incorporate mitigation in mitigated FONSIs (§ 1501.6) and RODs (§ 1505.2).

CEQ received comments that both supported and opposed the removal of this language from the definition of ''mitigation.'' Supportive commenters agreed with the approach CEQ proposed in the definition because it is consistent with established mitigation practices and because they were generally supportive regarding the prioritization listed. Opponents generally questioned the effect of this removal, suggesting it contradicts the Supreme Court's holding in *Robertson* v. *Methow Valley Citizens Council* that NEPA does not require agencies to mitigate adverse effects. CEQ disagrees with the commenters' assertions regarding *Methow Valley,* as discussed further in section II.G.2 and the Phase 2 Response to Comments. CEQ removes this language from the final rule consistent with the proposal.

Third, CEQ proposed to add the clause ''in general order of priority'' to the sentence, ''Mitigation includes'' which introduces the list of mitigation types. CEQ proposed this change to clarify that the types of mitigation provided in proposed paragraphs (u)(1) though (u)(5) are listed in general order of priority, consistent with the familiar ''mitigation hierarchy.'' [127] This list was prioritized in the 1978 regulations with avoidance coming before other types of mitigation and the proposed addition highlights that intent, which is consistent with longstanding agency practice.[128]

Some commenters supported the added language clarifying the general order of priority for mitigation. Supportive commenters stated this language is consistent with established mitigation practices and asserted that it will encourage agencies to avoid adverse effects rather than try to rectify or compensate for them after they have occurred. Other commenters opposed the added language, stating that agencies may not in all cases have authority to avoid adverse effects, and that providing a rigid prioritization fails to guide agencies to consider the full range of mitigation opportunities.

CEQ adds the clause ''in general order of priority'' to the definition in the final rule. CEQ uses the qualifier ''in general'' to provide flexibility and acknowledge that such prioritization will not apply to every situation. Further, the language does not prohibit agencies from applying the elements of the mitigation hierarchy out of order when they determine it is appropriate to do so, and CEQ encourages agencies to consider the full range of mitigation opportunities before deciding on an appropriate mitigation approach.

Some commenters asserted that CEQ has ''concealed'' its prioritization by placing it in the definitions section of the regulations. CEQ disagrees that placing this language in the definitions conceals it and CEQ notes that the definitions are essential elements of the NEPA regulations. Further, the definition of ''mitigation,'' including discussion of the categories of mitigation, has been in the regulations since 1978. Therefore, this is a logical place in the regulations for agencies or the public to look for text addressing the categories of mitigation.

Some commenters provided specific feedback on compensatory mitigation, including some that expressed concern that it can be ineffective. One commenter asserted that some agencies are prohibited from requiring compensatory mitigation. Another commenter requested CEQ clarify that agencies may rely on third-party mitigation or restoration providers to carry out compensatory mitigation.

CEQ declines to make additional edits to the definition of ''mitigation.'' Agencies must identify the authority for any mitigation that they rely on in their analysis, and agencies should not rely on mitigation absent the authority to ensure that the mitigation is performed. Because NEPA requires agencies to

---

[127] *See e.g.,* U.S. Dep't of the Interior, A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior (Apr. 2014), *https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Mitigation-Report-to-the-Secretary_FINAL_04_08_14.pdf* at 2–3 (discussing the development of a ''mitigation hierarchy''—which starts with avoidance—in the implementation of NEPA and the Clean Water Act); Bureau of Land Mgmt., H–1794–1, Mitigation Handbook (P) (Sept. 22, 2021), *https://www.blm.gov/sites/default/files/docs/2021-10/IM2021-046_att2.pdf* at 2–1 (citing CEQ regulations and noting that the ''five aspects of mitigation (avoid, minimize, rectify, reduce/eliminate, compensate) are referred to as the mitigation hierarchy because they are generally applied in a hierarchical manner''); U.S. Env't Prot. Agency & U.S. Dep't of Def., Memorandums of Agreement (MOA); Clean Water Act Section 404(b)(1) Guidelines; Correction, 55 FR 9210, 9211 (Mar. 12, 1990) (noting that under section 404 of the Clean Water Act, the Army Corps of Engineers evaluates potential mitigation efforts sequentially, starting with avoidance, minimization, and then compensation).

[128] *See, e.g.,* 10 CFR 900.3 (defining a regional mitigation approach under NEPA as ''an approach that applies the mitigation hierarchy (first seeking to avoid, then minimize impacts, then, when necessary, compensate for residual impacts)''); Presidential Memorandum, Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment, 80 FR 68743, 68745 (Nov. 6, 2015) (addressing five agencies and noting that, ''[a]s a practical matter, [mitigation is] captured in the terms avoidance, minimization, and compensation. These three actions are generally applied sequentially . . . .''); Fed. Highway Admin., *NEPA and Transportation Decisionmaking: Questions and Answers Regarding the Consideration of Indirect and Cumulative Impacts in the NEPA Process, https://www.environment.fhwa.dot.gov/nepa/QAimpact.aspx* (describing the importance of ''sequencing,'' which refers to the process of prioritizing avoidance and minimization of effects over replacement or compensation for NEPA mitigation efforts).

consider mitigation, not implement it, CEQ defers to agencies regarding the appropriate use of compensatory mitigation, third-party mitigation, or restoration providers.

One commenter requested that CEQ establish a preference for mitigation that is practicable, effective, and as minimally disruptive to a proposed project as possible. CEQ agrees that mitigation measures should be practicable and effective, but considers these requirements to be clear from the regulations as a whole and do not need to be reiterated in the definition.

Finally, CEQ makes two additional clarifying edits. First, CEQ adds ''adverse'' to modify ''effects'' in each instance it is used in the definition of ''mitigation'' to clarify that mitigation addresses adverse effects, not beneficial effects, and for consistency with the definition of ''significant effects,'' which is defined as adverse effects. Second, CEQ changes ''effects'' to ''the adverse effect'' in paragraph (y)(2) for consistency with paragraphs (y)(1) and (y)(3) through (y)(5), which all use the singular of effect.

18. Notice of Intent (§ 1508.1(aa))

CEQ proposed to modify the definition of ''notice of intent'' to include EAs, as applicable. CEQ proposed this change for consistency with § 1501.5(j), which provides that agencies may issue an NOI for an EA where it is appropriate to improve efficiency and effectiveness, and § 1501.10(b)(3)(iii), which sets forth one of the three potential starting points from which deadlines are measured for EAs consistent with section 107(g)(1)(B)(iii) of NEPA, 42 U.S.C. 4336a(g)(1)(B)(iii).

One commenter recommended the final rule clarify whether the addition of EA to the proposed definition requires an NOI for EAs, and if so, noted that this would be a new requirement. Another commenter similarly stated that including an EA in the definition will cause confusion over whether an NOI is required for an EA, and asserted that it clearly is not.

CEQ adds ''environmental assessment'' to the definition of ''notice of intent'' for consistency with §§ 1501.5(j) and 1501.10(b)(3), but moves the qualifier ''as applicable'' to precede ''environmental assessment'' to make clear that the regulations do not require agencies to issue an NOI for an EA, but provide them the discretion to do so.

19. Page (§ 1508.1(bb))

CEQ proposed to modify the definition of ''page'' for consistency with section 107(e) of NEPA, 42 U.S.C. 4336a(e), to exclude citations from the definition of ''page'' and therefore the page limits for EISs and EAs. To facilitate better NEPA documents, CEQ proposed to retain the exclusions for maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information from the definition of ''page.'' While agencies could move these visual representations of information to appendices, which could come at the end of an EIS or the end of EIS chapters, CEQ expressed concern that this will make the documents less understandable and useful to decision makers and the public. Further, such graphical displays themselves could be considered appendices consistent with the ordinary definition of appendix as ''supplementary material usually attached at the end of a piece of writing.'' [129]

Multiple commenters supported the proposed definition of ''page,'' specifically asserting that the listed exclusions will help agencies integrate those types of information into the body of an EA or EIS without affecting the document's page limit and asserting that inclusion of these elements in the body of an EA or EIS provide a more readable and accessible document. Conversely, several commenters opposed the exclusion of certain elements from the definition of ''page,'' except for citations and appendices as provided for in section 107(e) of NEPA. These commenters assert that the proposed exclusion of other items—maps, diagrams, graphs, and tables—circumvents Congress' intent to mandate strict page limits, and that these items should be included in the definition of ''page'' and be subject to the page limit. They also asserted that the exclusion of these elements from the page count results in environmental documents that are longer, more complex, and more difficult for the public and decision makers to understand.

NEPA does not define the term ''page,'' but rather provides, in section 107(e), that each type of environmental document ''shall not exceed [the specified number of] pages, not including any citations or appendices.'' 42 U.S.C. 4336a(e). When Congress enacted this language in 2023, it had before it the CEQ regulations, which define ''page'' as excluding ''explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information.'' Had Congress intended to eliminate these regulatory exclusions from the definition of ''page,'' it could have done so by providing a contrary definition of ''page'' in section 111 of NEPA, 42 U.S.C. 4336e. Instead, Congress chose to leave the term ''page'' undefined, therefore leaving CEQ's definition undisturbed, while separately specifying that the page limits of section 107(e) would exclude two additional elements that were *not* specifically set forth in the 2020 regulatory definition—citations and appendices. *See* 42 U.S.C. 4336a(e). Therefore, CEQ's continued use of a regulatory definition based on the one promulgated in 2020 does not circumvent, but rather complements, the statutory exclusion for citations and appendices.

CEQ disagrees that the proposed definition of ''page'' contradicts section 107(e) of NEPA or will make more documents more complex and difficult to understand. Rather, CEQ considers the flexibility to include additional visual elements in environmental documents will reduce the complexity of environmental documents by making the content easier to understand for the public and decision makers and facilitate the delivery of clearer and more useful documents. Agencies should limit the visual elements in the body of the document to those that enhance comprehensibility and place additional information in appendices, in keeping with the general principles CEQ has set forth regarding clear and concise writing in NEPA documents.

20. Participating Federal Agency (§ 1508.1(dd))

CEQ proposed to add a definition of ''participating Federal agency'' to proposed paragraph (bb) and define it to mean ''a Federal agency participating in an environmental review or authorization of an action'' consistent with the definition of the same term in section 111(8) of NEPA. 42 U.S.C. 4336e(8). CEQ did not receive any substantive comments on the definition of ''participating Federal agency'' and finalizes it in § 1508.1(dd) as proposed.

21. Programmatic Environmental Document (§ 1508.1(ee))

CEQ proposed to add a definition of ''programmatic environmental document'' to proposed paragraph (cc) and define it consistent with the definition of the same term in section 111(11) of NEPA, 42 U.S.C. 4336e(11). One commenter asserted that ''programmatic'' is not well defined in the proposed rule, stating that neither § 1501.11 or the proposed definition of ''programmatic environmental

[129] See *Appendix,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/appendix.*

document'' provide a clear way to distinguish between programmatic and non-programmatic analyses. The commenter described that the essential characteristic of a programmatic document includes some aspect of the decision that is deferred.

CEQ adds a definition of ''programmatic environmental document'' at § 1508.1(ee) consistent with the proposal and declines to modify it as the commenter suggests because the uses of programmatic environmental documents are addressed in § 1501.11, as discussed in section II.C.10 and in the Phase 2 Response to Comments.

22. Reasonable Alternatives (§ 1508.1(hh))

CEQ did not propose revisions to the definition of ''reasonable alternatives'' but received comments on the existing definition. Commenters requested guidance on the meaning of ''technically and economically feasible,'' and one commenter requested the regulations direct agencies to consult with project sponsors to determine economic and technical feasibility. Some commenters requested that CEQ use the Forty Questions guidance as a starting point for additional clarity on technical and economic feasibility, specifically referencing the description that technical and economic feasibility must be based on common sense rather than a project proponent's preferences.

One commenter requested guidance on how to identify and evaluate reasonable alternatives and include clear criteria and examples for defining and selecting reasonable alternatives, such as feasibility, cost, effectiveness, and public acceptability. One commenter asserted that the regulations should not define ''reasonable alternatives'' as a ''reasonable range of alternatives'' because the language ''reasonable range'' suggests that agencies do not have to consider all reasonable alternatives. The commenter asserted that Federal courts have long held that NEPA requires agencies to consider all reasonable alternatives, and that an agency's failure to consider a reasonable alternative is fatal to an agency's NEPA analysis. The commenter further expressed that ''reasonable range of alternatives'' is ambiguous.

CEQ does not make revisions to the definition of ''reasonable alternatives'' in § 1508.1(hh). CEQ will consider whether to issue additional guidance but notes that agencies have long used the Forty Questions to assist them in identifying alternatives. With respect to the phrase ''reasonable range,'' CEQ disagrees that agencies must consider ''all'' reasonable alternatives or that the case law requires this. In some circumstances, there could be a limitless number of reasonable alternatives to a proposed action, with each alternative including slight changes to the action. NEPA does not require agencies to evaluate all such alternatives, but rather, a reasonable range of alternatives to inform decision makers and the public. Agencies must consider a reasonable range of alternatives that facilitates the comparison of effects and helps inform the decision maker and the public. Further, the regulations have long provided that agencies should discuss alternatives that they dismiss from detailed analysis and explain their rationale.

22. Reasonably Foreseeable (§ 1508.1(ii))

CEQ did not propose to revise the definition of ''reasonably foreseeable'' but received comments on the existing definition. A few commenters described the definition as vague, subject to manipulation, and inconsistent with case law and Congressional intent. Some commenters suggested edits to the definition, such as adding that an effect is ''reasonably foreseeable'' when an agency can conclude with a high degree of confidence that the effect is more likely than not to occur. Some commenters asked for more clarity on how certain industries might meet the reasonably foreseeable standard, or suggested that what constitutes reasonably foreseeable, or a person of ordinary prudence, is subjective. Relatedly, another commenter stated that agency decision makers have access to knowledge, skills, resources, and statutory duties not applicable to a person of ordinary prudence. The commenter recommended CEQ replace ''person of ordinary prudence'' with ''prudent agency decision maker.''

CEQ declines to make change to the definition of ''reasonably foreseeable'' and finalizes it in § 1508.1(ii) as proposed. Regarding additional qualifiers or concerns that the definition is subjective, CEQ declines additional changes because the application of reasonably foreseeable is influenced by the context of the proposed action. Inherent in the application of reasonably foreseeable is the concept that Federal agencies are not required to ''foresee the unforeseeable'' or engage in speculative analysis. Agencies must forecast to the extent they can do so either quantitatively or qualitatively within a reasonable range. Further, the term ''reasonably foreseeable'' is consistent with the ordinary person standard—that is, what a person of ordinary prudence would consider in reaching a decision. CEQ is unaware of any practical challenges or confusion that has arisen from connecting this definition to the ordinary person, or circumstances where an agency has excluded analysis of an effect that the agency views as reasonably foreseeable because an ordinary person would not. Changing the regulatory text could create uncertainty as agencies and courts consider what, if any, implications the change would have, and CEQ considers creating that uncertainty unnecessary.

23. Scope (§ 1508.1(kk))

CEQ proposed to expand the definition of ''scope'' to include EAs and revise the definition to include both the range and breadth of the actions, alternatives, and effects to be considered in an EIS or EA, consistent with CEQ's proposal to relocate the discussion of scope in § 1501.3(b). CEQ also proposed to strike the last sentence regarding tiering because it was not definitional language and was unnecessary because this concept is more addressed in § 1501.11.

One commenter expressed support for the proposed definition of ''scope,'' asserting it strengthens EAs and EISs. CEQ revises the definition of ''scope'' in § 1501.8(kk) as proposed. As discussed further in section II.C.2, agencies have long examined the scope of their actions to determine what alternatives and effects they must analyze. This is a fact-specific analysis that agencies undertake informed by their statutory authority and control and responsibility over the activity. Other comments regarding scope are further discussed in section II.C.2 and the Phase 2 Response to Comments.

24. Significant Effects (§ 1508.1(mm))

CEQ proposed to add a definition for ''significant effects'' to define those effects that are central to determining the appropriate level of review in the NEPA process. CEQ proposed the definition to align with the restoration of the context and intensity factors for determining significance in § 1501.3(d). CEQ proposed to define ''significant effects'' as adverse effects identified by an agency as significant, based on the criteria set forth in § 1501.3(d), to clarify that beneficial effects are not significant effects as the phrase is used in NEPA and, therefore, do not require an agency to prepare an EIS. CEQ proposed this as an alternative approach to that taken by the proposal in § 1501.3(d)(2)(i) where an action ''does not'' require an EIS when it would result only in significant

beneficial effects and invited comment on which approach is preferred.

One commenter supported a standalone definition of ''significant effects'' but expressed concern that only including adverse effects could create confusion over how agencies assess which effects are truly beneficial and from whose perspective. Other commenters asserted that the limitation of significant effects to adverse effects, in conjunction with proposed § 1501.3(d)(2)(i) to only require an EIS for significant adverse effects, is unlawful and contrary to NEPA's policy. These commenters asserted that NEPA requires an environmental review if an action's effects are significant, regardless of whether those effects are exclusively beneficial, and requested that the final rule remove ''adverse'' from the definition. A few commenters supported the proposed definition for varying reasons, including because it is straightforward and because it will help encourage streamlined processes by reducing the need for EISs.

Regarding CEQ's request for comment on the preferred approach—proposed § 1501.3(d)(2)(i) or proposed § 1508.1(kk)—one commenter recommended the final rule include both provisions because the definition serves to strengthen the concept that NEPA analyses should focus on actions with adverse effects. Another commenter preferred proposed § 1501.3(d)(2)(i), asserting it provides stronger guidance for agencies.

CEQ adds the definition of ''significant effects'' as proposed in § 1508.1(mm), and CEQ revises § 1501.3(d) for greater clarity on this approach as discussed in section II.C.2. This approach means that an agency does not need to prepare an EIS if a proposed action's effects are exclusively beneficial. However, irrespective of the level of NEPA review, agencies still need to analyze both adverse and beneficial effects in NEPA documents if they are reasonably foreseeable.

25. Tiering (§ 1508.1(oo))

CEQ proposed to revise the definition of ''tiering'' to cross reference the process as set forth in § 1501.11. CEQ proposed this revision to avoid any potential inconsistencies between the definition and the provisions of § 1501.11. CEQ did not receive any comments on the proposed definition of ''tiering'' and revises it as proposed in § 1508.1(oo). Other comments regarding the application of tiering are discussed in section II.C.10 and the Phase 2 Response to Comments.

III. Rulemaking Analyses and Notices

A. Executive Order 12866, Regulatory Planning and Review

E.O. 12866, as supplemented and affirmed by E.O. 13563 and amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules.[130] This final rule is a significant regulatory action under section 3(f)(1) of E.O. 12866, as amended by E.O. 14094, that CEQ submitted to OIRA for review. The changes in the final rule will improve the CEQ regulations to benefit agencies and the public. Furthermore, an effective NEPA process can save time and reduce overall project costs by providing a clear process for evaluating alternatives and effects, coordinating agencies and relevant stakeholders including the public, and identifying and avoiding problems—including potential significant effects—that may occur in later stages of project development.[131] Additionally, if agencies choose to consider additional alternatives and conduct clearer or more robust analyses, such analyses will improve societal outcomes by facilitating improved agency decision making on the whole, even if the NEPA statute and regulations do not dictate the outcome of any specific decision. Because individual cases will vary, the magnitude of potential costs and benefits resulting from these changes are difficult to anticipate, but CEQ has prepared a qualitative analysis in the accompanying regulatory impact analysis (RIA).

CEQ received two comments on the draft RIA. One commenter stated that CEQ should include more detailed explanation of the flaws associated with the 2020 Rule's RIA and how the revised rule rectifies those flaws to produce net benefits, including by discussing evidence that suggests the NEPA process contributes to greater environmental benefits that the 2020 RIA did not consider; aligning the explanation of the alternative of retaining the 2020 Rule, as amended by the Phase I rulemaking, with guidance regarding baselines as a scenario with zero incremental benefits or costs; and removing any distinction between direct and indirect benefits or costs to avoid inadvertently downplaying the proposed rule's benefits and costs. The second commenter stated that CEQ should account for economic impacts of NEPA-related delays in project implementation in the RIA, and provided information on how labor, procurement, and material costs increase as a project is delayed.

In response to the first comment, CEQ has revised the RIA. In response to the second comment, CEQ acknowledges that project delays often result in labor, procurement, and material costs increases. The revisions to the NEPA regulations in this final rule will improve the efficiency and effectiveness of the NEPA process, and thereby save time and reduce overall project costs by providing a clear process for evaluating alternatives and effects; coordinating agencies and relevant stakeholders, including the public, more efficiently; identifying and avoiding problems that may occur in later stages of project development; and reducing litigation. CEQ provides its detailed analysis in the accompanying Regulatory Impact Analysis, which CEQ incorporates by reference into this final rule.

B. Regulatory Flexibility Act and Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act (RFA), as amended, 5 U.S.C. 601 *et seq.,* and E.O. 13272, *Proper Consideration of Small Entities in Agency Rulemaking,*[132] require agencies to assess the impacts of proposed and final rules on small entities. Under the RFA, small entities include small businesses, small organizations, and small governmental jurisdictions. An agency must prepare an Initial Regulatory Flexibility Analysis unless it determines and certifies that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). This final rule does not directly regulate small entities. Rather, the rule applies to Federal agencies and sets forth the process for their compliance with NEPA. Accordingly, CEQ hereby certifies that the rule will not have a significant economic impact on a substantial number of small entities.

One commenter asserted that CEQ should develop an economic sustainability plan for the proposed rule. Another commenter asserted that CEQ's statement in the proposed rule that the rulemaking would not impact small businesses was insufficient and that CEQ must prepare a regulatory

[130] *See* E.O. 12866, *Regulatory Planning and Review,* 58 FR 51735, 51737 (Oct. 4, 1993); E.O. 14094, *Modernizing Regulatory Review,* 88 FR 21879, 21879–80 (Apr. 11, 2023); E.O. 13563, *Improving Regulation and Regulatory Review,* 76 FR 3821, 3822 (Jan. 21, 2011).

[131] *See generally* Cong. Rsch. Serv. R42479, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress* (2012), *https://crsreports.congress.gov/product/pdf/R/R42479.*

[132] 67 FR 53461 (Aug. 16, 2002).

flexibility plan that describes the impact of the proposed rule on small entities to comply with the Small Business Regulatory Enforcement Fairness Act. The commenter asserted that the proposed rulemaking will impact small businesses, particularly in the mining industry. For the reasons set forth in this preamble, CEQ declines to prepare the requested plan because the final rule applies to Federal agencies and does not directly regulate small businesses or other small entities.

C. National Environmental Policy Act

Under the CEQ regulations, major Federal actions may include regulations. When CEQ issued regulations in 1978, it prepared a ''special environmental assessment'' for illustrative purposes pursuant to E.O. 11991.[133] The NPRM for the 1978 rule stated ''the impacts of procedural regulations of this kind are not susceptible to detailed analysis beyond that set out in the assessment.'' [134] Similarly, in 1986, while CEQ stated in the final rule that there were ''substantial legal questions as to whether entities within the Executive Office of the President are required to prepare environmental assessments,'' it also prepared a special EA.[135] The special EA issued in 1986 supported a FONSI, and there was no finding made for the assessment of the 1978 final rule. CEQ also prepared a special EA and reached a FONSI for the Phase 1 rulemaking.

The final rule makes it explicit that a NEPA analysis is not required for establishing or updating NEPA procedures, *see* § 1507.3(b)(3), and CEQ continues to consider NEPA not to require a NEPA analysis for CEQ's NEPA regulations. *See Heartwood* v. *U.S. Forest Serv.,* 230 F.3d 947, 954–55 (7th Cir. 2000) (finding that neither NEPA or the CEQ regulations required the Forest Service to conduct an EA or an EIS prior to the promulgation of its procedures creating a CE). Nevertheless, based on past practice, CEQ developed a draft special EA, has posted it in the docket, and invited comments in the proposed rule.

CEQ received two comments on its compliance with NEPA. The commenters generally asserted that the Special EA conducted for this rulemaking was inadequate and not justified by precedent. One commenter argued that this rulemaking requires an EIS because the proposed changes can reasonably be expected to have a significant effect on the environment. The commenter asserted that provisions allowing the adoption and use of another agency's CEs, allowing agencies to modify their NEPA procedures without going through the rulemaking process; and exempting large-scale power plants from having to prepare an EIS supported their position. The commenter also argued that comments on the rulemaking were not visible to the public, and therefore did not fulfill public comment requirements.

CEQ declines to prepare an EIS for the reasons discussed earlier in this section. CEQ notes that the first proposed change noted by the commenter, related to adopting CEs, implements section 109 of NEPA, which allows such adoption and use by statute. *See* 42 U.S.C. 4336c. With respect to the second proposed change noted by the commenter, the CEQ regulations have never required agencies to conduct rulemaking for the development or revision of their implementing procedures, but have always required agencies to provide public notice and comment. Further, this final rule does not specifically address NEPA reviews for large-scale power plants. Rather the regulations set the standards for when agencies must prepare EISs and leaves the decision of whether an EIS is required to a case-by-case determination by the agencies, as has always been the case. Finally, CEQ notes that, in the interest of transparency, comments received on the proposed rule were posted to the public docket.[136]

D. Executive Order 13132, Federalism

E.O. 13132 requires agencies to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.[137] Policies that have federalism implications include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.[138] CEQ received one comment asserting that this rulemaking would impact States, and requested that CEQ revisit its conclusion that the rulemaking does not pose federalism implications. CEQ disagrees with the commenter. This rule does not have federalism implications because it applies to Federal agencies, not States. CEQ notes that States may elect to assume NEPA responsibilities under Federal statutes,[139] but States are further governed by the regulations and agreements under those programs.

E. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

E.O. 13175 requires agencies to have a process to ensure meaningful and timely input by Tribal officials in the development of policies that have Tribal implications.[140] Such policies include regulations that have substantial direct effects on one or more Tribal Nations, on the relationship between the Federal Government and Tribal Nations, or on the distribution of power and responsibilities between the Federal Government and Tribal Nations.[141] CEQ has assessed the impact of this final rule on Indian Tribal governments and has determined that the rule does significantly or uniquely affect Tribal Nations. CEQ engaged in government-to-government consultation with Tribal Nations on the Phase 2 rulemaking. As required by E.O. 13175, CEQ held a Tribal consultation on the NEPA regulations generally on September 30, 2021, on this rulemaking on November 12, 2021, prior to the publication of the NPRM, and on September 6, 2023, and September 12, 2023, following publication of the NPRM.[142] In addition to the feedback provided during these consultation sessions, CEQ received a number of written comments from Tribal Nations during the public comment period, and considered these written comments in the development of the final rule.

Several Tribal Nations agreed with CEQ's preliminary determination that the proposed rule significantly or uniquely affects Tribal Nations. One Tribal Nation requested that CEQ acknowledge its written comments as part of the Tribal consultation process, and not only as public comments. Several Tribes also requested additional consultation with CEQ in the future.

CEQ acknowledges that the written comments it received from Tribal Nations constitute part of the Tribal consultation process in addition to the

[133] *See* CEQ, National Environmental Policy Act—Regulations: Proposed Implementation of Procedural Provisions, 43 FR 25230, 25232 (June 9, 1978); *see* E.O. 11991, *supra* note 29.

[134] *See* CEQ, National Environmental Policy Act—Regulations: Proposed Implementation of Procedural Provisions, *supra* note 133, at 25232.

[135] *See* National Environmental Policy Act Regulations; Incomplete or Unavailable Information, *supra* note 32, at 15619.

[136] *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, Docket No. CEQ–2023–0003, *https://www.regulations.gov/docket/CEQ-2023-0003.*

[137] E.O. 13132, *Federalism,* 64 FR 43255 (Aug. 10, 1999).

[138] *Id.* at 43256.

[139] *See, e.g.,* 23 U.S.C. 327.

[140] E.O. 13175, *supra* note 57, at sec. 5(a).

[141] *Id.* sec. 1(a).

[142] *Id.* sec. 5.

public comment process and considered those comments accordingly. CEQ appreciates the considerable time and effort that Tribal Nations invested in their oral and written comments, which helped illuminate many aspects of how NEPA affects Tribal Nations, their lands and legal rights, and their citizens. These comments helped CEQ to develop a better final rule. CEQ plans to continue to engage in government-to-government consultation with federally recognized Tribes and in consultation with Alaska Native Corporations on the implementation of its NEPA regulations.

F. Executive Order 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All

E.O. 12898 and E.O. 14096 charge agencies to make achieving environmental justice part of their missions, as appropriate and consistent with applicable law, by identifying, analyzing, and addressing disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens, on communities with environmental justice concerns.[143]

CEQ has analyzed this final rule and determined that it will not cause disproportionate and adverse human health or environmental effects on communities with environmental justice concerns. This rule sets forth implementing regulations for NEPA; it is in the agency implementation of NEPA when conducting reviews of proposed agency actions where consideration of environmental justice effects typically occurs.

CEQ received one comment requesting that CEQ conduct research into the effect of immigration on environmental quality, including on communities with environmental justice concerns, and include study of immigration impacts during NEPA analysis. CEQ declines to conduct this research because this rule does not specifically address issues related to immigration or make any changes to the U.S. immigration laws or their implementing regulations. Any environmental effects resulting from specific agency actions related to immigration would be addressed by agencies with relevant authorities and requirements to do so and are not within the scope of the analysis of this rulemaking.

G. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Agencies must prepare a Statement of Energy Effects for significant energy actions under E.O. 13211.[144] CEQ has determined that this rulemaking is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

CEQ received one comment related to its compliance with E.O. 13211. The commenter disagreed with CEQ's determination that the proposed rule is not a ''significant energy action'' as described in E.O. 13211, and further stated that the proposed rulemaking is incongruous with E.O. 14008, which directs agencies to deploy their full capabilities in combating climate change. The commenter asserted that the proposed rule will have an effect on the energy supply that exceeds $100 million and would hamper efforts to achieve a clean energy transition.

For the reasons set forth in this preamble, CEQ disagrees that the rule will hamper efforts to achieve a clean energy transition or have a significant effect on the energy supply. To the contrary, the proposed rule will facilitate the responsible development of energy resources, including carbon pollution-free energy, by promoting efficient and effective environmental reviews.

H. Executive Order 12988, Civil Justice Reform

Under section 3(a) of E.O. 12988, agencies must review their proposed regulations to eliminate drafting errors and ambiguities, draft them to minimize litigation, and provide a clear legal standard for affected conduct.[145] Section 3(b) provides a list of specific issues for review to conduct the reviews required by section 3(a).[146] CEQ did not receive any comments specific to E.O. 12988. CEQ has conducted the review under E.O. 12988 and determined that this final rule complies with its requirements.

I. Unfunded Mandates Reform Act

Section 201 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531, requires Federal agencies to assess the effects of their regulatory actions on Tribal, State, and local governments, and the private sector to the extent that such regulations incorporate requirements specifically set forth in law. Before promulgating a rule that may result in the expenditure by a Tribal, State, or local government, in the aggregate, or by the private sector of $100 million, adjusted annually for inflation, in any 1 year, an agency must prepare a written statement that assesses the effects on Tribal, State, and local governments and the private sector. 2 U.S.C. 1532. CEQ did not receive any comments related to the Unfunded Mandates Reform Act.

This final rule applies to Federal agencies and will not result in expenditures of $100 million or more for Tribal, State, and local governments, in the aggregate, or the private sector in any 1 year. This action also will not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of 2 U.S.C. 1531 *et seq.*

J. Paperwork Reduction Act

This final rule will not impose any new information collection burden that would require additional review or approval by OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*

CEQ received one comment related to the PRA. The commenter disagreed with CEQ's preliminary determination that the proposed rule would not impose additional burden under the PRA, stating that the review of proposed changes to NEPA and future changes to agency NEPA procedures and guidelines will impose significant burdens on State agencies. The commenter also expressed concern that the proposed changes to include technical analyses in appendices does not change or limit the amount of material that must be reviewed.

CEQ disagrees with the commenter's assertions. General solicitations of public comments of the sort associated with the development of agency NEPA procedures and guidelines or the publication of a draft environmental document are not subject to the PRA. *See* 5 CFR 1320.3(h)(4), (8) (exempting from the PRA ''[f]acts or opinions submitted in response to general solicitations of comments from the public, published in the **Federal Register** or other publications, regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter, other than that

[143] E.O. 12898, *supra* note 8; E.O. 14096, *supra* note 22.

[144] E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,* 66 FR 28355 (May 22, 2001).

[145] E.O. 12988, *Civil Justice Reform,* 61 FR 4729, 4731 (Feb. 7, 1996).

[146] *Id.*

necessary for self-identification, as a condition of the agency's full consideration of the comment,'' and ''[f]acts or opinions obtained or solicited at or in connection with public hearings or meetings''). Furthermore, while the rule clarifies which material agencies should include in the body of an environmental document and which they should include in an appendix, it does not increase the overall amount of materials available to States or members of the public to review, or require States or members of the public to review those materials.

List of Subjects in 40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

Administrative practice and procedure; Environmental impact statements; Environmental protection; Natural resources.

Brenda Mallory,

Chair.

■ For the reasons discussed in the preamble, the Council on Environmental Quality amends 40 CFR chapter V by revising and republishing subchapter A to read as follows:

Chapter V—Council on Environmental Quality

Subchapter A—National Environmental Policy Act Implementing Regulations

PART 1500—PURPOSE AND POLICY

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is the basic national charter for protection of the environment. It establishes policy, sets goals, and provides direction for carrying out the policy.

(1) Section 101(a) of NEPA establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which humans and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Section 101(b) of NEPA establishes the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to:

(i) Help each generation serve as a trustee of the environment for succeeding generations;

(ii) Assure for all people safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(iii) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(iv) Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(v) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(vi) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(2) Section 102(2) of NEPA establishes procedural requirements to carry out the policy and responsibilities established in section 101 of NEPA and contains ''action-forcing'' procedural provisions to ensure Federal agencies implement the letter and spirit of the Act. The purpose of the regulations in this subchapter is to set forth what Federal agencies must and should do to comply with the procedures and achieve the goals of the Act. The President, the Federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the policy goals of section 101.

(b) The regulations in this subchapter implement the requirements of NEPA and ensure that agencies identify, consider, and disclose to the public relevant environmental information early in the process before decisions are made and before actions are taken. The information shall be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most importantly, environmental documents must concentrate on the issues that are truly relevant to the action in question, rather than amassing needless detail. The regulations in this subchapter also are intended to ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable, and timely manner, and to reduce unnecessary burdens and delays. Finally, the regulations in this subchapter promote concurrent environmental reviews to ensure timely and efficient decision making.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on an understanding of environmental consequences and take actions that protect, restore, and enhance the environment. The regulations in this subchapter provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) 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.

(b) Implement procedures to make the NEPA process more useful to decision makers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize important environmental issues and alternatives. Environmental documents shall be concise, clear, and supported by evidence that agencies have conducted the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that such procedures run concurrently rather than consecutively where doing so promotes efficiency.

(d) Encourage and facilitate public engagement in decisions that affect the quality of the human environment, including meaningful engagement with communities such as those with environmental justice concerns.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment, such as alternatives that will reduce climate change-related effects or address adverse health and environmental effects that

disproportionately affect communities with environmental justice concerns.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 NEPA compliance.

(a) *Mandate.* This subchapter is applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act). The regulations in this subchapter are issued pursuant to NEPA; the Environmental Quality Improvement Act of 1970, as amended (Pub. L. 91–224, 42 U.S.C. 4371 *et seq.*); and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970), as amended by Executive Order 11991, Relating to the Protection and Enhancement of Environmental Quality (May 24, 1977). The regulations in this subchapter apply to the whole of section 102(2) of NEPA. The provisions of the Act and the regulations in this subchapter must be read together as a whole to comply with the Act.

(b) *Review of NEPA compliance.* It is the Council's intention that judicial review of agency compliance with the regulations in this subchapter not occur before an agency has issued the record of decision or taken other final agency action, except with respect to claims brought by project sponsors related to deadlines under section 107(g)(3) of NEPA. It is also the Council's intention that minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action. It is the Council's intention that any allegation of noncompliance with NEPA and the regulations in this subchapter should be resolved as expeditiously as appropriate.

(c) *Severability.* The sections of this subchapter are separate and severable from one another. If any section or portion therein is stayed or determined to be invalid, or the applicability of any section to any person or entity is held invalid, it is the Council's intention that the validity of the remainder of those parts shall not be affected, with the remaining sections to continue in effect.

§ 1500.4 Concise and informative environmental documents.

Agencies shall prepare analytical, concise, and informative environmental documents by:

(a) Meeting appropriate page limits (§§ 1501.5(g) and 1502.7 of this subchapter).

(b) Discussing only briefly issues other than important ones (*e.g.,* § 1502.2(b) of this subchapter).

(c) Writing environmental documents in plain language (*e.g.,* § 1502.8 of this subchapter).

(d) Following a clear format for environmental impact statements (§ 1502.10 of this subchapter).

(e) Emphasizing the portions of the environmental document that are most useful to decision makers and the public (*e.g.,* §§ 1502.14, 1502.15, and 1502.16 of this subchapter) and reducing emphasis on background material (*e.g.,* § 1502.1 of this subchapter).

(f) Using the scoping process to identify important environmental issues deserving of study and to deemphasize unimportant issues, narrowing the scope of the environmental impact statement process (or, where an agency elects to do so, the environmental assessment process) accordingly (§§ 1501.9 and 1502.4 of this subchapter).

(g) Summarizing the environmental impact statement (§ 1502.12 of this subchapter).

(h) Using programmatic environmental documents and tiering from documents of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§ 1501.11 of this subchapter).

(i) Incorporating by reference (§ 1501.12 of this subchapter).

(j) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.24 of this subchapter).

(k) Requiring that comments be as specific as possible (§ 1503.3 of this subchapter).

(l) When changes are minor, attaching and publishing only changes to the draft environmental impact statement rather than rewriting and publishing the entire statement (§ 1503.4(c) of this subchapter).

(m) Eliminating duplication with State, Tribal, and local procedures, by providing for joint preparation of environmental documents where practicable (§ 1506.2 of this subchapter), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another Federal agency (§ 1506.3 of this subchapter).

(n) Combining environmental documents with other documents (§ 1506.4 of this subchapter).

§ 1500.5 Efficient process.

Agencies shall improve efficiency of their NEPA processes by:

(a) Establishing categorical exclusions to define categories of actions that normally do not have a significant effect on the human environment (§§ 1501.4 and 1507.3(c)(8) of this subchapter) and therefore do not require preparation of an environmental assessment or environmental impact statement.

(b) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1501.6 of this subchapter) and therefore does not require preparation of an environmental impact statement.

(c) Integrating the NEPA process into early planning (§ 1501.2 of this subchapter).

(d) Engaging in interagency cooperation, including with affected Federal, State, Tribal, and local agencies, before or during the preparation of an environmental assessment or environmental impact statement, rather than waiting to request or submit comments on a completed document (§§ 1501.7 and 1501.8 of this subchapter).

(e) Ensuring the swift and fair resolution of lead agency disputes (§ 1501.7 of this subchapter).

(f) Using the scoping process for early identification of the important issues that require detailed analysis (§ 1502.4 of this subchapter).

(g) Meeting appropriate deadlines for the environmental assessment and environmental impact statement processes (§ 1501.10 of this subchapter).

(h) Preparing environmental documents early in the process (§§ 1502.5 and 1501.5(d) of this subchapter).

(i) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.24 of this subchapter).

(j) Eliminating duplication with State, Tribal, and local procedures by providing for joint preparation of environmental documents where practicable (§ 1506.2 of this subchapter) and with other Federal procedures by providing that agencies may jointly prepare or adopt appropriate environmental documents prepared by another agency (§ 1506.3 of this subchapter).

(k) Combining environmental documents with other documents (§ 1506.4 of this subchapter).

(l) Using accelerated procedures for proposals for legislation (§ 1506.8 of this subchapter).

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view policies and missions in the light of the Act's national environmental objectives, to the extent consistent with its existing authority. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to ensure full compliance with the purposes and provisions of the Act and the regulations in this subchapter. The phrase ''to the fullest extent possible'' in section 102 of NEPA means that each agency of the Federal Government shall comply with the Act unless an agency activity, decision, or action is exempted from NEPA by law or compliance with NEPA is impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into agency planning at an early stage to facilitate appropriate consideration of NEPA's policies, promote an efficient process, and reduce delay;

(b) Providing for early engagement in the environmental review process with other agencies, State, Tribal, and local governments, and affected or interested persons, entities, and communities before a decision is made;

(c) Providing for the swift and fair resolution of interagency disputes;

(d) Identifying at an early stage the important environmental issues deserving of study, and deemphasizing unimportant issues, narrowing the scope of the environmental review and enhancing efficiency accordingly; and

(e) Promoting accountability by establishing appropriate deadlines and requiring schedules.

§ 1501.2 Apply NEPA early in the process.

(a) Agencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time to ensure that agencies consider environmental effects in their planning and decisions, to avoid delays later in the process, and to head off potential conflicts.

(b) Each agency shall:

(1) Comply with the mandate of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach, which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making that may have an impact on the human environment, as specified by § 1507.2(a) of this subchapter.

(2) Identify environmental effects and values in adequate detail so the decision maker can appropriately consider such effects and values alongside economic and technical analyses. Whenever practicable, agencies shall review and publish environmental documents and appropriate analyses at the same time as other planning documents.

(3) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources, as provided by section 102(2)(H) of NEPA.

(4) Provide for actions subject to NEPA that are planned by applicants before Federal involvement so that:

(i) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(ii) The Federal agency consults early with appropriate State, Tribal, and local governments and with interested persons and organizations when their involvement is reasonably foreseeable.

(iii) The Federal agency commences its NEPA process at the earliest reasonable time (§§ 1501.5(d) and 1502.5(b) of this subchapter).

§ 1501.3 Determine the appropriate level of NEPA review.

(a) *Applicability.* As a threshold determination, an agency shall assess whether NEPA applies to the proposed activity or decision. In assessing whether NEPA applies, Federal agencies should determine:

(1) Whether the proposed activity or decision is exempted from NEPA by law;

(2) Whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another provision of Federal law;

(3) Whether the proposed activity or decision is not a major Federal action (§ 1508.1(w) of this subchapter);

(4) Whether the proposed activity or decision is not a final agency action within the meaning of such term in chapter 5 of title 5, United States Code; or

(5) Whether the proposed activity or decision is a non-discretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action.

(b) *Scope of action and analysis.* If the agency determines that NEPA applies, the agency shall consider the scope of the proposed action and its effects to inform the agency's determination of the appropriate level of NEPA review and whether aspects of the action are non-discretionary. The agency shall use, as appropriate, the public engagement and scoping mechanisms in §§ 1501.9 and 1502.4 of this subchapter to inform consideration of the scope of the proposed action and determination of the level of NEPA review. The agency shall evaluate, in a single review, proposals or parts of proposals that are related closely enough to be, in effect, a single course of action. The agency shall not avoid a determination of significance under paragraph (c) of this section by terming an action temporary that is not temporary in fact or segmenting an action into smaller component parts. The agency also shall consider whether there are connected actions, which are closely related Federal activities or decisions that should be considered in the same NEPA review that:

(1) Automatically trigger other actions that may require NEPA review;

(2) Cannot or will not proceed unless other actions are taken previously or simultaneously; or

(3) Are interdependent parts of a larger action and depend on the larger action for their justification.

(c) *Levels of NEPA review.* In assessing the appropriate level of NEPA review, agencies may make use of any reliable data source and are not required to undertake new scientific or technical research unless it is essential to a reasoned choice among alternatives, and the overall costs and timeframe of obtaining it are not unreasonable.

Agencies should determine whether the proposed action:

(1) Is appropriately categorically excluded (§ 1501.4);

(2) Is not likely to have significant effects or the significance of the effects is unknown and is therefore appropriate for an environmental assessment (§ 1501.5); or

(3) Is likely to have significant effects and is therefore appropriate for an environmental impact statement (part 1502 of this subchapter).

(d) *Significance determination—context and intensity.* In considering whether an adverse effect of the proposed action is significant, agencies shall examine both the context of the action and the intensity of the effect. In assessing context and intensity, agencies should consider the duration of the effect. Agencies may also consider the extent to which an effect is adverse at some points in time and beneficial in others (for example, in assessing the significance of a habitat restoration action's effect on a species, an agency may consider both any short-term harm to the species during implementation of the action and any benefit to the same species once the action is complete). However, agencies shall not offset an action's adverse effects with other beneficial effects to determine significance (for example, an agency may not offset an action's adverse effect on one species with its beneficial effect on another species).

(1) Agencies shall analyze the significance of an action in several contexts. Agencies should consider the characteristics of the geographic area, such as proximity to unique or sensitive resources or communities with environmental justice concerns. Depending on the scope of the action, agencies should consider the potential global, national, regional, and local contexts as well as the duration, including short-and long-term effects.

(2) Agencies shall analyze the intensity of effects considering the following factors, as applicable to the proposed action and in relationship to one another:

(i) The degree to which the action may adversely affect public health and safety.

(ii) The degree to which the action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, parks, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(iii) Whether the action may violate relevant Federal, State, Tribal, or local laws or other requirements or be inconsistent with Federal, State, Tribal, or local policies designed for the protection of the environment.

(iv) The degree to which the potential effects on the human environment are highly uncertain.

(v) The degree to which the action may adversely affect resources listed or eligible for listing in the National Register of Historic Places.

(vi) The degree to which the action may adversely affect an endangered or threatened species or its habitat, including habitat that has been determined to be critical under the Endangered Species Act of 1973.

(vii) The degree to which the action may adversely affect communities with environmental justice concerns.

(viii) The degree to which the action may adversely affect rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders.

§ 1501.4 Categorical exclusions.

(a) For efficiency and consistent with § 1507.3(c)(8)(ii) of this subchapter or paragraph (c), agencies shall establish categorical exclusions for categories of actions that normally do not have a significant effect on the human environment, individually or in the aggregate, and therefore do not require preparation of an environmental assessment or environmental impact statement unless extraordinary circumstances exist that make application of the categorical exclusion inappropriate, consistent with paragraph (b) of this section. Agencies may establish categorical exclusions individually or jointly with other agencies.

(b) If an agency determines that a categorical exclusion identified in its agency NEPA procedures covers a proposed action, the agency shall evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect.

(1) If an extraordinary circumstance exists, the agency nevertheless may apply the categorical exclusion if the agency conducts an analysis and determines that the proposed action does not in fact have the potential to result in significant effects notwithstanding the extraordinary circumstance, or the agency modifies the action to avoid the potential to result in significant effects. In these cases, the agency shall document such determination and should publish it on the agency's website or otherwise make it publicly available.

(2) If the agency cannot categorically exclude the proposed action, the agency shall prepare an environmental assessment or environmental impact statement, as appropriate.

(c) In addition to the process for establishing categorical exclusions under § 1507.3(c)(8) of this subchapter, agencies may establish categorical exclusions through a land use plan, a decision document supported by a programmatic environmental impact statement or programmatic environmental assessment, or other equivalent planning or programmatic decision for which an environmental document has been prepared, so long as the agency:

(1) Provides the Council an opportunity to review and comment prior to public comment;

(2) Provides notification and an opportunity for public comment;

(3) Substantiates its determination that the category of actions normally does not have significant effects, individually or in the aggregate;

(4) Identifies extraordinary circumstances;

(5) Establishes a process for determining that a categorical exclusion applies to a specific action or actions in the absence of extraordinary circumstances, or, where extraordinary circumstances are present, for determining the agency may apply the categorical exclusion consistent with (b)(1) of this section; and

(6) Publishes a list of all categorical exclusions established through these mechanisms on its website.

(d) Categorical exclusions established consistent with paragraph (c) of this section or § 1507.3(c)(8) of this subchapter may:

(1) Cover specific geographic areas or areas that share common characteristics, *e.g.,* habitat type;

(2) Have a limited duration;

(3) Include mitigation measures that, in the absence of extraordinary circumstances, will ensure that any environmental effects are not significant, so long as a process is established for monitoring and enforcing any required mitigation measures, including through the suspension or revocation of the relevant agency action; or

(4) Provide criteria that would cause the categorical exclusion to expire because the agency's determination that the category of action does not have significant effects, individually or in the aggregate, is no longer applicable, including, as appropriate, because:

(i) The number of individual actions covered by the categorical exclusion exceeds a specific threshold;

(ii) Individual actions covered by the categorical exclusion are too close to one another in proximity or time; or

(iii) Environmental conditions or information upon which the agency's determination was based have changed.

(e) An agency may adopt and apply a categorical exclusion listed in another agency's NEPA procedures to a proposed action or a category of proposed actions consistent with this paragraph. The agency shall:

(1) Identify the categorical exclusion listed in another agency's NEPA procedures that covers its proposed action or a category of proposed actions;

(2) Consult with the agency that established the categorical exclusion to ensure that the proposed action or category of proposed actions to which the agency intends to apply the categorical exclusion is appropriate;

(3) Provide public notification of the categorical exclusion that the agency is adopting, including a brief description of the proposed action or category of proposed actions to which the agency intends to apply the adopted categorical exclusion, the process the agency will use to evaluate for extraordinary circumstances consistent with paragraph (b) of this section, and a brief description of the agencies' consultation;

(4) In applying the adopted categorical exclusion to a proposed action, evaluate the proposed action for extraordinary circumstances, consistent with paragraph (b) of this section; and

(5) Publish the documentation of the application of the adopted categorical exclusion.

§ 1501.5 Environmental assessments.

(a) An agency shall prepare an environmental assessment for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown unless the agency finds that a categorical exclusion (§ 1501.4) is applicable or has decided to prepare an environmental impact statement.

(b) An agency may prepare an environmental assessment on any action to assist agency planning and decision making.

(c) An environmental assessment shall:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact;

(2) Briefly discuss the:

(i) Purpose and need for the proposed agency action;

(ii) Alternatives as required by section 102(2)(H) of NEPA; and

(iii) Environmental effects of the proposed action and alternatives;

(3) List the Federal agencies; State, Tribal, and local governments and agencies; or persons consulted; and

(4) Provide a unique identification number for tracking purposes, which the agency shall reference on all associated environmental review documents prepared for the proposed action and in any database or tracking system for such documents.

(d) For applications to the agency requiring an environmental assessment, the agency shall commence the environmental assessment as soon as practicable after receiving the application.

(e) If an agency publishes a draft environmental assessment, the agency shall invite public comment and consider those comments in preparing the final environmental assessment.

(f) Agencies shall involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable in preparing environmental assessments (*see* § 1501.9).

(g) The text of an environmental assessment shall not exceed 75 pages, not including any citations or appendices.

(h) Agencies:

(1) Should supplement environmental assessments if a major Federal action is incomplete or ongoing, and:

(i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or

(ii) There are substantial new circumstances or information about the significance of the adverse effects that bear on the analysis to determine whether to prepare a finding of no significant impact or an environmental impact statement.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(i) Agencies may reevaluate an environmental assessment to determine that the agency does not need to prepare a supplemental environmental assessment and a new finding of no significant impact or an environmental impact statement.

(j) Agencies generally should apply § 1502.21 of this subchapter to environmental assessments.

(k) As appropriate to improve efficiency and effectiveness of environmental assessments, agencies may apply the other provisions of part 1502 and 1503 of this subchapter, including §§ 1502.4, 1502.22, 1502.24, and 1503.4, to environmental assessments.

§ 1501.6 Findings of no significant impact.

(a) After completing an environmental assessment, an agency shall prepare:

(1) A finding of no significant impact if the agency determines, based on the environmental assessment, that NEPA does not require preparation of an environmental impact statement because the proposed action will not have significant effects;

(2) A mitigated finding of no significant impact if the agency determines, based on the environmental assessment, that NEPA does not require preparation of an environmental impact statement because the proposed action will not have significant effects due to mitigation; or

(3) An environmental impact statement if the agency determines, based on the environmental assessment, that the action will have significant effects.

(b)(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1501.9(c)(5).

(2) In the following circumstances, the agency shall make the finding of no significant impact available for public review for 30 days before the agency determines whether to prepare an environmental impact statement and before the action may begin:

(i) The proposed action is or is closely similar to one that normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3 of this subchapter; or

(ii) The nature of the proposed action is one without precedent.

(c) The finding of no significant impact shall include the environmental assessment or incorporate it by reference and shall note any other environmental documents related to it (§ 1502.4(d)(3) of this subchapter). If the environmental assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

(d) The finding of no significant impact shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions. If the agency finds no significant effects based on mitigation, the mitigated finding of no significant impact shall state the enforceable mitigation requirements or commitments that will be undertaken and the authority to enforce them, such as terms and conditions or other measures in a relevant permit, incidental take statement, or other agreement, and the agency shall prepare a monitoring and compliance plan for that mitigation consistent with

§ 1505.3(c) of this subchapter. In addition, the agency shall prepare a monitoring and compliance plan for other mitigation as required by § 1505.3(c) of this subchapter.

§ 1501.7 Lead agency.

(a) A lead agency shall supervise the preparation of an environmental impact statement or environmental assessment if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) A Federal, State, Tribal, or local agency may serve as a joint lead agency to prepare an environmental impact statement or environmental assessment (§ 1506.2 of this subchapter). A joint lead agency shall jointly fulfill the role of a lead agency.

(c) If an action falls within the provisions of paragraph (a) of this section, the participating Federal agencies shall determine, by letter or memorandum, which agency will be the lead agency, considering the factors in paragraphs (c)(1) through (c)(5) of this section, and the lead agency shall determine which agencies will be joint lead or cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement;

(2) Project approval or disapproval authority;

(3) Expertise concerning the action's environmental effects;

(4) Duration of agency's involvement; and

(5) Sequence of agency's involvement.

(d) Any Federal, State, Tribal, or local agency or person substantially affected by the absence of a lead agency designation, may make a written request to the senior agency officials of the potential lead agencies that a lead agency be designated. An agency that receives a request under this paragraph shall transmit such request to each participating Federal agency and to the Council.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted in a lead agency designation within 45 days of the written request to the senior agency officials, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency. The Council shall transmit a copy of the request to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action; and

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) Any potential lead agency may file a response no later than 20 days after a request is filed with the Council. As soon as possible, but not later than 40 days after receiving the request, the Council shall designate which Federal agency will be the lead agency and which other Federal agencies will be cooperating agencies.

(g) To the extent practicable, if a proposal will require action by more than one Federal agency and the lead agency determines that the proposal requires preparation of an environmental impact statement, the lead and cooperating agencies shall evaluate it in a single environmental impact statement; the lead and cooperating agencies shall issue, except where inappropriate or inefficient, a joint record of decision. To the extent practicable, if a proposal will require action by more than one Federal agency and the lead agency determines that it requires preparation of an environmental assessment, the lead and cooperating agencies shall evaluate the proposal in a single environmental assessment and issue a joint finding of no significant impact or jointly determine to prepare an environmental impact statement.

(h) With respect to cooperating agencies, the lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest practicable time;

(2) Consider any analysis or proposal created by a cooperating agency and, to the maximum extent practicable, use the environmental analysis, proposal, and information provided by cooperating agencies;

(3) Meet with a cooperating agency at the latter's request; and

(4) Determine the purpose and need, and alternatives in consultation with any cooperating agency.

§ 1501.8 Cooperating agencies.

(a) The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any Federal agency with jurisdiction by law shall be a cooperating agency. In addition, upon request of the lead agency, any other Federal agency with special expertise with respect to any environmental issue may be a cooperating agency. A State, Tribal, or local agency of similar qualifications may become a cooperating agency by agreement with the lead agency. Relevant special expertise may include Indigenous Knowledge. An agency may request that the lead agency designate it a cooperating agency, and a Federal agency may appeal a denial of its request to the Council.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest practicable time.

(2) Participate in the scoping process (described in § 1502.4).

(3) On request of the lead agency, assume responsibility for developing information and preparing environmental analyses, including portions of the environmental impact statement or environmental assessment concerning which the cooperating agency has special expertise.

(4) On request of the lead agency, make available staff support to enhance the lead agency's interdisciplinary capability.

(5) Normally use its own funds. To the extent available funds permit, the lead agency shall fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(6) Consult with the lead agency in developing and updating the schedule (§ 1501.10), meet the schedule, and elevate, as soon as practicable, to the senior agency official of the lead agency any issues relating to purpose and need, alternatives, or other issues that may affect any agencies' ability to meet the schedule.

(7) Meet the lead agency's schedule for providing comments.

(8) To the maximum extent practicable, jointly issue environmental documents with the lead agency.

(c) In response to a lead agency's request for assistance in preparing the environmental documents (described in paragraph (b)(3), (4), or (5) of this section), a cooperating agency may reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement or environmental assessment. The cooperating agency shall submit a copy of this reply to the Council and the senior agency official of the lead agency.

§ 1501.9 Public and governmental engagement.

(a) *Purpose and responsibility.* The purpose of public engagement is to inform the public of an agency's proposed action, allow for meaningful engagement during the NEPA process, and ensure decision makers are informed by the views of the public. The purpose of governmental engagement is to identify the potentially affected Federal, State, Tribal, and local governments, invite them to serve as cooperating agencies, as appropriate, and ensure that participating agencies have opportunities to engage in the environmental review process, as appropriate. This section sets forth agencies' responsibilities and best practices to conduct public and governmental engagement. Agencies shall determine the appropriate methods of public and governmental engagement for their proposed actions.

(b) *Determination of scope.* Agencies shall use public and governmental engagement, as appropriate, to inform the level of review for and scope of analysis of a proposed action, consistent with § 1501.3 of this subchapter. For environmental impact statements, in addition to the requirements of this section, agencies also shall comply with the requirements for scoping set forth in § 1502.4 of this subchapter. For environmental assessments, in addition to the requirements of this section, agencies should consider applying the requirements for scoping set forth in § 1502.4 of this subchapter, as appropriate.

(c) *Outreach and notification.* Agencies shall:

(1) Invite the participation of any likely affected Federal, State, Tribal, and local agencies and governments, as early as practicable, including, as appropriate, as cooperating agencies under § 1501.8 of this subchapter;

(2) Conduct, as appropriate, early engagement with likely affected or interested members of the public (including those who might not be in accord with the action), unless there is a limited exception under § 1507.3(d)(3) of this subchapter; and

(3) Consider what methods of outreach and notification are necessary and appropriate based on the likely affected entities and persons; the scope, scale, and complexity of the proposed action and alternatives; the degree of public interest; and other relevant factors. When selecting appropriate methods for providing public notification, agencies shall consider the ability of affected persons and agencies to access electronic media and the primary languages of affected persons.

(4) Publish notification of proposed actions they are analyzing through an environmental impact statement, including through a notice of intent consistent with § 1502.4 of this subchapter.

(5) Provide public notification of NEPA-related hearings, public meetings, and other opportunities for public engagement, and the availability of environmental documents to inform those persons and agencies who may be interested or affected by their proposed actions.

(i) The agency shall notify those entities and persons who have requested notification on a particular action and those who have requested regular notification from the agency on its actions.

(ii) In the case of an action with effects of national concern, notification shall also include publication of a notice in the **Federal Register**.

(iii) In the case of an action with effects primarily of local concern, the notification may include distribution to or through:

(A) State, Tribal, and local governments and agencies that may be interested or affected by the proposed action.

(B) Following the affected State or Tribe's public notification procedures for comparable actions.

(C) Publication in local newspapers having general circulation.

(D) Other local media.

(E) Potentially interested community organizations, including small business associations.

(F) Publication in newsletters that may be expected to reach potentially interested persons.

(G) Direct mailing to owners and occupants of nearby or affected property.

(H) Posting of notification on- and off-site in the area where the action is to be located.

(I) Electronic media (*e.g.,* a project or agency website, dashboard, email list, or social media). Agencies should establish email notification lists or similar methods for the public to easily request electronic notifications for a proposed action.

(6) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act, as amended (5 U.S.C. 552), and without charge to the extent practicable.

(d) *Public meetings and hearings.* Agencies shall hold or sponsor public hearings, public meetings, or other opportunities for public engagement whenever appropriate or in accordance with statutory or regulatory requirements or applicable agency NEPA procedures. Agencies may conduct public hearings and public meetings by means of electronic communication except where another format is required by law. When determining the format for a public hearing or public meeting, such as whether an in-person or virtual meeting, or formal hearing or listening session is most appropriate, agencies shall consider the needs of affected communities. When accepting comments for electronic or virtual public hearings or meetings, agencies shall allow the public to submit comments electronically, by regular mail, or by other appropriate methods. Agencies should make a draft environmental document available to the public at least 15 days in advance when it is the subject of a public hearing or meeting unless the purpose of such hearing or meeting is to provide information for the development of the document.

(e) *Agency procedures.* Agencies shall make diligent efforts to engage the public in preparing and implementing their NEPA procedures (§ 1507.3 of this subchapter).

§ 1501.10 Deadlines and schedule for the NEPA process.

(a) To ensure that agencies conduct sound NEPA reviews as efficiently and expeditiously as practicable, Federal agencies shall set deadlines and schedules appropriate to individual actions or types of actions consistent with this section and the time intervals required by § 1506.10 of this subchapter. Where applicable, the lead agency shall establish the schedule for a proposed action and make any necessary updates to the schedule in consultation with and seek the concurrence of any joint lead, cooperating, and participating agencies, and in consultation with any applicants.

(b) To ensure timely decision making, agencies shall complete:

(1) Environmental assessments within 1 year, unless the lead agency extends the deadline in writing and, as applicable, in consultation with any applicant, and establishes a new deadline that provides only so much additional time as is necessary to complete the environmental assessment.

(2) Environmental impact statements within 2 years, unless the lead agency extends the deadline in writing and, as applicable, in consultation with any applicant and establishes a new deadline that provides only so much additional time as is necessary to complete the environmental impact statement.

(3) The deadlines in paragraphs (b)(1) and (2) of this section are measured from the sooner of, as applicable:

(i) the date on which the agency determines that NEPA requires an environmental impact statement or environmental assessment for the proposed action;

(ii) the date on which the agency notifies an applicant that the application to establish a right-of-way for the proposed action is complete; or

(iii) the date on which the agency issues a notice of intent for the proposed action.

(4) The deadlines in paragraphs (b)(1) and (2) of this section are measured to, as applicable:

(i) For environmental assessments, the date on which the agency:

(A) Publishes an environmental assessment;

(B) Where applicable, makes the environmental assessment available pursuant to an agency's pre-decisional administrative review process; or

(C) Issues a notice of intent to prepare an environmental impact statement; and

(ii) For environmental impact statements, the date on which the Environmental Protection Agency publishes a notice of availability of the final environmental impact statement or, where applicable, the date on which the agency makes the final environmental impact statement available pursuant to an agency's pre-decisional administrative review process, consistent with § 1506.10(c)(1) of this subchapter.

(5) Each lead agency shall annually submit the report to Congress on any missed deadlines for environmental assessments and environmental impact statements required by section 107(h) of NEPA.

(c) To facilitate predictability, the lead agency shall develop a schedule for completion of environmental impact statements and environmental assessments as well as any authorizations required to carry out the action. The lead agency shall set milestones for all environmental reviews, permits, and authorizations required for implementation of the action, in consultation with any applicant and in consultation with and seek the concurrence of all joint lead, cooperating, and participating agencies, as soon as practicable. Schedules may vary depending on the type of action and in consideration of other factors in paragraph (d) of this section. The lead agency should develop a schedule that is based on its expertise reviewing similar types of actions under NEPA. All agencies with milestones, including those for a review, permit, or authorization, in the schedule shall take appropriate measures to meet the schedule. If a participating agency anticipates that a milestone will be missed, the agency shall notify, as applicable, the agency responsible for the milestone and the lead agency, and request that they take appropriate measures to comply with the schedule. As soon as practicable, the lead and any other agency affected by a potentially missed milestone shall elevate any unresolved disputes contributing to the potentially missed milestone to the appropriate officials of the agencies responsible for the potentially missed milestone, to ensure timely resolution within the deadlines for the individual action.

(d) The lead agency may consider the following factors in determining the schedule and deadlines:

(1) Potential for environmental harm.

(2) Size of the proposed action.

(3) State of the art of analytic techniques.

(4) Degree of public need for the proposed action, including the consequences of delay.

(5) Number of persons and agencies affected.

(6) Availability of relevant information.

(7) Degree to which a substantial dispute exists as to the size, location, nature, or consequences of the proposed action and its effects.

(8) Time limits imposed on the agency by law, regulation, Executive order, or court ordered deadlines.

(9) Time necessary to conduct government-to-government Tribal consultation.

(e) The schedule for environmental impact statements shall include the following milestones:

(1) The publication of the notice of intent;

(2) The issuance of the draft environmental impact statement;

(3) The public comment period on the draft environmental impact statement, consistent with § 1506.10 of this subchapter;

(4) The issuance of the final environmental impact statement; and

(5) The issuance of the record of decision.

(f) The schedule for environmental assessments shall include the following milestones:

(1) Decision to prepare an environmental assessment;

(2) Issuance of the draft environmental assessment, where applicable;

(3) The public comment period on the draft environmental assessment, consistent with § 1501.5 of this subchapter, where applicable; and

(4) Issuance of the final environmental assessment and decision on whether to issue a finding of no significant impact or issue a notice of intent to prepare an environmental impact statement.

(g) An agency may designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(h) For environmental impact statements, agencies shall make schedules for completing the NEPA process publicly available, such as on their website or another publicly accessible platform. If agencies make subsequent changes to the schedule, agencies shall publish revisions to the schedule and explain the basis for substantial changes.

§ 1501.11 Programmatic environmental documents and tiering.

(a) *Programmatic environmental documents.* Agencies may prepare programmatic environmental documents, which may be either environmental impact statements or environmental assessments, to evaluate the environmental effects of policies, programs, plans, or groups of related activities. When agencies prepare such documents, they should be relevant to the agency decisions and timed to coincide with meaningful points in agency planning and decision making. Agencies may use programmatic environmental documents to conduct a broad or holistic evaluation of effects or policy alternatives; evaluate widely applicable measures; or avoid duplicative analysis for individual actions by first considering relevant issues at a broad or programmatic level.

(1) When preparing programmatic environmental documents (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(i) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(ii) Thematically or by sector, including actions that have relevant similarities, such as common timing, effects, alternatives, methods of implementation, technology, media, or subject matter.

(iii) By stage of technological development, including Federal or federally assisted research, development, or demonstration programs for new technologies that, if applied, could significantly affect the quality of the human environment. Documents on such programs should be

completed before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or limit the choice of reasonable alternatives.

(2) Agency actions that may be appropriate for programmatic environmental documents include:

(i) Programs, policies, or plans, including land use or resource management plans;

(ii) Regulations;

(iii) National or regional actions;

(iv) Actions that have multiple stages or phases, and are part of an overall plan or program; or

(v) A group of projects or related types of projects.

(3) Agencies should, as appropriate, employ scoping (§ 1502.4 of this subchapter), tiering (paragraph (b) of this section), and other methods listed in §§ 1500.4 and 1500.5 of this subchapter, to describe the relationship between the programmatic environmental document and related individual actions and to avoid duplication and delay. The programmatic environmental document shall identify any decisions or categories of decisions that the agency anticipates making in reliance on it.

(b) *Tiering.* Where an existing environmental impact statement, environmental assessment, or programmatic environmental document is relevant to a later proposed action, agencies may employ tiering. Tiering allows subsequent tiered environmental analysis to avoid duplication and focus on issues, effects, or alternatives not fully addressed in a programmatic environmental document, environmental impact statement, or environmental assessment prepared at an earlier phase or stage. Agencies generally should tier their environmental impact statements and environmental assessments when it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided.

(1) When an agency has prepared an environmental impact statement, environmental assessment or programmatic environmental document for a program or policy and then prepares a subsequent statement or assessment on an action included within the program or policy (such as a project- or site-specific action), the tiered document shall discuss the relationship between the tiered document and the previous review, and summarize and incorporate by reference the issues discussed in the broader document. The tiered document shall concentrate on the issues specific to the subsequent action, analyzing site-, phase-, or stage-specific conditions and reasonably foreseeable effects. The agency shall provide for public engagement opportunities consistent with the type of environmental document prepared and appropriate for the location, phase, or stage. The tiered document shall state where the earlier document is publicly available.

(2) Tiering is appropriate when the sequence from an environmental impact statement or environmental assessment is:

(i) From a programmatic, plan, or policy environmental impact statement or environmental assessment to a program, plan, or policy statement or assessment of lesser or narrower scope or to a site-specific statement or assessment.

(ii) From an environmental impact statement or environmental assessment on a specific action at an early stage (such as need and site selection) to a subsequent statement or assessment at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the agency to focus on the issues that are ripe for decision and exclude from consideration issues already decided or not yet ripe.

(c) *Reevaluation.* When an agency prepares a programmatic environmental document for which judicial review was available, the agency may rely on the analysis included in the programmatic environmental document in a subsequent environmental document for related actions as follows:

(1) Within 5 years and without additional review of the analysis in the programmatic environmental document, unless there are substantial new circumstances or information about the significance of adverse effects that bear on the analysis; or

(2) After 5 years, so long as the agency reevaluates the analysis in the programmatic environmental document and any underlying assumption to ensure reliance on the analysis remains valid. The agency shall briefly document its reevaluation and explain why the analysis remains valid considering any new and substantial information or circumstances.

§ 1501.12 Incorporation by reference into environmental documents.

Agencies shall incorporate material, such as planning studies, analyses, or other relevant information, into environmental documents by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. Agencies shall cite the incorporated material in the document, briefly describe its content, and briefly explain the relevance of the incorporated material to the environmental document. Agencies shall not incorporate material by reference unless it is reasonably available for review, such as on a publicly accessible website, by potentially interested persons throughout the time allowed for comment or public review. Agencies should provide digital references, such as hyperlinks, to the incorporated material or otherwise indicate how the public can access the material for review. Agencies shall not incorporate by reference material based on proprietary data that is not available for review and comment.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

§ 1502.1 Purpose of environmental impact statement.

(a) The primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA is to serve as an action-forcing device by ensuring agencies consider the environmental effects of their action in decision making, so that the policies and goals defined in the Act are infused

into the ongoing programs and actions of the Federal Government.

(b) Environmental impact statements shall provide full and fair discussion of significant effects and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse effects or enhance the quality of the human environment. Agencies shall focus on important environmental issues and reasonable alternatives and shall reduce paperwork and the accumulation of extraneous background data.

(c) Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. Federal agencies shall use environmental impact statements in conjunction with other relevant material to plan actions, involve the public, and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1, agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall not be encyclopedic.

(b) Environmental impact statements shall discuss effects in proportion to their significance. There shall be only brief discussion of other than important issues. As in an environmental assessment and finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be analytical, concise, and no longer than necessary to comply with NEPA and with the regulations in this subchapter. Length should be proportional to potential environmental effects and the scope and complexity of the action.

(d) Environmental impact statements shall state how alternatives considered in them and decisions based on them will or will not achieve the requirements of sections 101 and 102(1) of NEPA, the regulations in this subchapter, and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the decision maker.

(f) Agencies shall not commit resources prejudicing the selection of alternatives before making a decision (*see also* § 1506.1 of this subchapter).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for environmental impact statements.

As required by section 102(2)(C) of NEPA, environmental impact statements are to be included in every Federal agency recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.

§ 1502.4 Scoping.

(a) *Purpose.* Agencies shall use scoping, an early and open process consistent with § 1501.9 of this subchapter, to determine the scope of issues for analysis in an environmental impact statement, including identifying the important issues and eliminating from further study unimportant issues. Scoping should begin as soon as practicable after the proposal for action is sufficiently developed for agency consideration. Scoping may include appropriate pre-application procedures or work conducted prior to publication of the notice of intent (see §§ 1501.3 and 1501.9 of this subchapter).

(b) *Scoping outreach.* When preparing an environmental impact statement, agencies shall facilitate notification to persons and agencies who may be interested or affected by an agency's proposed action, consistent with § 1501.9 of this subchapter. As part of the scoping process, the lead agency may hold a scoping meeting or meetings, publish scoping information, or use other means to communicate with those persons or agencies who may be interested or affected, which the agency may integrate with any other early planning meeting.

(c) *Inviting participation.* As part of the scoping process, and consistent with § 1501.9 of this subchapter, the lead agency shall invite the participation of likely affected Federal, State, Tribal, and local agencies and governments as cooperating or participating agencies, as appropriate; any applicant; and other likely affected or interested persons (including those who might not be in accord with the action), unless there is a limited exception under § 1507.3(d)(3) of this subchapter.

(d) *Additional scoping responsibilities.* As part of the scoping process, the lead agency shall:

(1) Identify and eliminate from detailed study the issues that are not important or have been covered by prior environmental review(s) (§§ 1501.12 and 1506.3 of this subchapter), narrowing the discussion of these issues in the environmental impact statement to a brief presentation of why they will not be important or providing a reference to their coverage elsewhere.

(2) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(3) Indicate any publicly available environmental assessments and other environmental impact statements that are being or will be prepared and are related to but are not part of the scope of the environmental impact statement under consideration.

(4) Identify other environmental review, authorization, and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently and integrated with the environmental impact statement, as provided in § 1502.24.

(5) Indicate the relationship between the timing of the preparation of environmental analyses and the agencies' tentative planning and decision-making schedule.

(e) *Notice of intent.* As soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an environmental impact statement, the lead agency shall publish a notice of intent to prepare an environmental impact statement in the **Federal Register**. In addition to the **Federal Register** notice, an agency also may publish notification in accordance with § 1501.9 of this subchapter. The notice shall include, as appropriate:

(1) The purpose and need for the proposed agency action;

(2) A preliminary description of the proposed action and alternatives the environmental impact statement will consider;

(3) A brief summary of expected effects;

(4) Anticipated permits and other authorizations;

(5) A schedule for the decision-making process;

(6) A description of the public scoping process, including any scoping meeting(s);

(7) A request for comment on alternatives and effects, as well as on relevant information, studies, or analyses with respect to the proposed action;

(8) Contact information for a person within the agency who can answer questions about the proposed action and the environmental impact statement;

(9) Identification of any cooperating and participating agencies, and any information that such agencies require in the notice to facilitate their decisions

or authorizations that will rely upon the resulting environmental impact statement; and

(10) A unique identification number for tracking purposes, which the agency shall reference on all environmental documents prepared for the proposed action and in any database or tracking system for such documents.

(f) *Notices of withdrawal or cancellation.* If an agency withdraws, cancels, or otherwise ceases the consideration of a proposed action before completing a final environmental impact statement, the agency shall publish a notice in the **Federal Register**.

(g) *Revisions.* An agency shall revise the determinations made under paragraphs (b), (c), and (d) of this section if substantial changes are made later in the proposed action, or if important new circumstances or information arise that bear on the proposal or its effects.

§ 1502.5 Timing.

An agency should commence preparation of an environmental impact statement as close as practicable to the time the agency is developing or receives a proposal so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made (§§ 1501.2 of this subchapter and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies, the agency shall prepare the environmental impact statement at the feasibility analysis or equivalent stage evaluating whether to proceed with the project and may supplement it at a later stage, if necessary.

(b) For applications to the agency requiring an environmental impact statement, the agency shall commence the statement as soon as practicable after receiving the complete application. Federal agencies should work together and with potential applicants and applicable State, Tribal, and local agencies and governments prior to receipt of the application.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances, the statement may follow preliminary hearings designed to gather information for use in the statement.

(d) For informal rulemaking, the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Agencies shall prepare environmental impact statements using an interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of NEPA). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1502.4 of this subchapter).

§ 1502.7 Page limits.

The text of final environmental impact statements, not including citations or appendices, shall not exceed 150 pages except for proposals of extraordinary complexity, which shall not exceed 300 pages.

§ 1502.8 Writing.

Agencies shall write environmental impact statements in plain language and should use, as relevant, appropriate visual aids or charts so that decision makers and the public can readily understand such statements. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which shall be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

(a) *Generally.* Except for proposals for legislation as provided in § 1506.8 of this subchapter, agencies shall prepare environmental impact statements in two stages and, where necessary, supplement them as provided in paragraph (d)(1) of this section.

(b) *Draft environmental impact statements.* Agencies shall prepare draft environmental impact statements in accordance with the scope decided upon in the scoping process (§ 1502.4 of this subchapter). The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this subchapter. To the fullest extent practicable, the draft statement must meet the requirements established for final statements in section 102(2)(C) of NEPA and in the regulations in this subchapter. If the agency determines that a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish a supplemental draft of the appropriate portion. At appropriate points in the draft statement, the agency shall discuss all major points of view on the environmental effects of the alternatives, including the proposed action.

(c) *Final environmental impact statements.* Final environmental impact statements shall consider and respond to comments as required in part 1503 of this subchapter. At appropriate points in the final statement, the agency shall discuss any responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(d) *Supplemental environmental impact statements.* Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if a major Federal action is incomplete or ongoing, and:

(i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or

(ii) There are substantial new circumstances or information about the significance of adverse effects that bear on the analysis.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall prepare, publish, and file a supplement to an environmental impact statement (exclusive of scoping (§ 1502.4 of this subchapter)) as a draft and final environmental impact statement, as is appropriate to the stage of the environmental impact statement involved, unless the Council approves alternative arrangements (§ 1506.11 of this subchapter).

(e) *Reevaluation.* An agency may reevaluate an environmental impact statement to determine that the agency does need to prepare a supplement under paragraph (d) of this section. The agency should document its finding consistent with its agency NEPA procedures (§ 1507.3 of this subchapter), or, if necessary, prepare a supplemental environmental assessment and finding of no significant impact.

§ 1502.10 Recommended format.

(a) Agencies shall use a format for environmental impact statements that will encourage good analysis and clear presentation of the alternatives, including the proposed action. Agencies should use the following standard format for environmental impact statements unless the agency determines that there is a more effective format for communication:

(1) Cover (§ 1502.11);

(2) Summary (§ 1502.12);

(3) Table of contents;

(4) Purpose of and need for action (§ 1502.13);

(5) Alternatives including the proposed action (sections 102(2)(C)(iii) and 102(2)(H) of NEPA) (§ 1502.14);

(6) Affected environment and environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA) (§§ 1502.15 and 1502.16); and

(7) Appendices (§ 1502.19), including the summary of scoping information (§ 1502.17) and the list of preparers (§ 1502.18).

(b) If an agency uses a different format, it shall include paragraph (a) of this section, as further described in §§ 1502.11 through 1502.19, in any appropriate format.

§ 1502.11 Cover.

The environmental impact statement cover shall not exceed one page and shall include:

(a) A list of the lead, joint lead, and, to the extent feasible, any cooperating agencies;

(b) The title of the proposed action that is the subject of the statement (and, if appropriate, the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction(s), if applicable) where the action is located;

(c) The name, address, and telephone number of the person at the agency who can supply further information;

(d) A designation of the statement as a draft, final, or draft or final supplement;

(e) A one-paragraph abstract of the statement;

(f) The date by which the agency must receive comments (computed in cooperation with the Environmental Protection Agency under § 1506.10 of this subchapter); and

(g) The identification number included in the notice of intent (§ 1502.4(e)(10)).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary that adequately and accurately summarizes the statement. The summary shall include the major conclusions and summarize any disputed issues raised by agencies and the public, any issues to be resolved, and key differences among alternatives, and identify the environmentally preferable alternative or alternatives. Agencies shall write the summary in plain language and should use, as relevant, appropriate visual aids and charts. The summary normally should not exceed 15 pages.

§ 1502.13 Purpose and need.

The environmental impact statement shall include a statement that briefly summarizes the underlying purpose and need for the proposed agency action.

§ 1502.14 Alternatives including the proposed action.

The alternatives section is the heart of the environmental impact statement. The alternatives section should identify the reasonably foreseeable environmental effects of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16). In doing so, the analysis should sharply define the issues for the decision maker and the public and provide a clear basis for choice among options. In this section, agencies shall:

(a) Rigorously explore and objectively evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination. The agency need not consider every conceivable alternative to a proposed action; rather, it shall consider a reasonable range of alternatives that will foster informed decision making. Agencies also may include reasonable alternatives not within the jurisdiction of the lead agency.

(b) Discuss each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.

(c) Include the no action alternative.

(d) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(e) Include appropriate mitigation measures not already included in the proposed action or alternatives.

(f) Identify the environmentally preferable alternative or alternatives amongst the alternatives considered in the environmental impact statement. The environmentally preferable alternative will best promote the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits, such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal, and natural resources, including rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders; or causing the least damage to the biological and physical environment. The environmentally preferable alternative may be the proposed action, the no action alternative, or a reasonable alternative.

§ 1502.15 Affected environment.

(a) The environmental impact statement shall succinctly describe the environment of the area(s) to be affected by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s).

(b) Agencies shall use high-quality information, including reliable data and resources, models, and Indigenous Knowledge, to describe reasonably foreseeable environmental trends, including anticipated climate-related changes to the environment, and when such information is incomplete or unavailable, provide relevant information consistent with § 1502.21. This description of the affected environment, including existing environmental conditions, reasonably foreseeable trends, and planned actions in the area, should inform the agency's analysis of environmental consequences and mitigation measures (§ 1502.16).

(c) The environmental impact statement may combine the description of the affected environment with evaluation of the environmental consequences (§ 1502.16). The description should be no longer than necessary to understand the relevant affected environment and the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the effect, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

(a) The environmental consequences section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA that are within the scope of the environmental impact statement and as much of section 102(2)(C)(iii) of NEPA as is necessary to support the comparisons. The comparison of the proposed action and reasonable alternatives shall be based on the discussion of their reasonably foreseeable effects and the significance of those effects (§ 1501.3 of this subchapter), focusing on the significant or important effects. The no action alternative should serve as the baseline

against which the proposed action and other alternatives are compared. This section should not duplicate discussions required by § 1502.14 and shall include an analysis of:

(1) Any adverse environmental effects that cannot be avoided should the proposal be implemented.

(2) The effects of the no action alternative, including any adverse environmental effects;

(3) The relationship between short-term uses of the human environment and the maintenance and enhancement of long-term productivity;

(4) Any irreversible or irretrievable commitments of Federal resources that would be involved in the proposal should it be implemented;

(5) Where applicable, possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local plans, policies, and controls for the area concerned, including those addressing climate change (§ 1506.2(d) of this subchapter);

(6) Where applicable, climate change-related effects, including, where feasible, quantification of greenhouse gas emissions, from the proposed action and alternatives and the effects of climate change on the proposed action and alternatives;

(7) Where applicable, energy requirements and conservation potential of various alternatives and mitigation measures;

(8) Where applicable, natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures;

(9) Where applicable, relevant risk reduction, resiliency, or adaptation measures incorporated into the proposed action or alternatives, informed by relevant science and data on the affected environment and expected future conditions;

(10) Where applicable, urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures;

(11) Means to mitigate adverse environmental effects (if not fully covered under § 1502.14(e));

(12) Where applicable, economic and technical considerations, including the economic benefits of the proposed action; and

(13) Where applicable, disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.

(b) Economic or social effects by themselves do not require preparation of an environmental impact statement. However, when the agency determines that economic or social and natural or physical environmental effects are interrelated, the environmental impact statement shall discuss these effects on the human environment.

§ 1502.17 Summary of scoping information.

(a) The draft environmental impact statement or appendix shall include a summary of information, including alternatives and analyses, submitted by commenters during the scoping process for consideration by the lead and cooperating agencies in their development of the environmental impact statement.

(b) The agency shall append to the draft environmental impact statement or publish all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process.

§ 1502.18 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or important background papers, including basic components of the statement. Where possible, the environmental impact statement shall identify the persons who are responsible for a particular analysis, including analyses in background papers. Normally the list will not exceed two pages.

§ 1502.19 Appendix.

If an agency prepares an appendix, the agency shall publish it with the environmental impact statement, and it shall consist of, as appropriate:

(a) Material prepared in connection with an environmental impact statement (as distinct from material that is not so prepared and is incorporated by reference (§ 1501.12 of this subchapter)).

(b) Material substantiating any analysis fundamental to the impact statement.

(c) Material relevant to the decision to be made.

(d) For draft environmental impact statements, all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process that identified information for the agency's consideration.

(e) For final environmental impact statements, the comment summaries and responses consistent with § 1503.4 of this chapter.

§ 1502.20 Publication of the environmental impact statement.

Agencies shall publish the entire draft and final environmental impact statements and unchanged statements as provided in § 1503.4(c) of this subchapter. The agency shall transmit the entire statement electronically (or in paper copy, if requested due to economic or other hardship) to:

(a) Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State, Tribal, or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement, any person, organization, or agency that submitted substantive comments on the draft.

§ 1502.21 Incomplete or unavailable information.

(a) When an agency is evaluating reasonably foreseeable significant effects on the human environment in an environmental impact statement, and there is incomplete or unavailable information, the agency shall make clear that such information is lacking.

(b) If the incomplete information relevant to reasonably foreseeable significant effects is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency shall include the information in the environmental impact statement.

(c) If the information relevant to reasonably foreseeable significant effects cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable;

(2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant effects on the human environment;

(3) A summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant effects on the human environment; and

(4) The agency's evaluation of such effects based upon theoretical approaches or research methods generally accepted in the scientific community.

(d) For the purposes of this section, ''reasonably foreseeable'' includes

effects that have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the effects is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

§ 1502.22 Cost-benefit analysis.

If an agency is considering a cost-benefit analysis for the proposed action relevant to the choice among alternatives with different environmental effects, the agency shall incorporate the cost-benefit analysis by reference or append it to the statement as an aid in evaluating the environmental consequences. In such cases, to assess the adequacy of compliance with section 102(2)(B) of NEPA (ensuring appropriate consideration of unquantified environmental amenities and values in decision making, along with economical and technical considerations), the statement shall discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, agencies need not display the weighing of the merits and drawbacks of the various alternatives in a monetary cost-benefit analysis and should not do so when there are important qualitative considerations. However, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, that are likely to be relevant and important to a decision.

§ 1502.23 [Reserved]

§ 1502.24 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive orders applicable to the proposed action, including the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*), and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other authorizations that must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other authorization is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING ON ENVIRONMENTAL IMPACT STATEMENTS

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

§ 1503.1 Inviting comments and requesting information and analyses.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or is authorized to develop and enforce environmental standards; and

(2) Request the comments of:

(i) Appropriate State, Tribal, and local agencies that are authorized to develop and enforce environmental standards;

(ii) State, Tribal, or local governments that may be affected by the proposed action;

(iii) Any agency that has requested it receive statements on actions of the kind proposed;

(iv) The applicant, if any; and

(v) The public, affirmatively soliciting comments in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action.

(b) An agency may request comments on a final environmental impact statement before the final decision and set a deadline for providing such comments. Other agencies or persons may make comments consistent with the time periods under § 1506.10 of this subchapter.

(c) An agency shall provide for electronic submission of public comments, with reasonable measures to ensure the comment process is accessible to affected persons.

§ 1503.2 Duty to comment.

Cooperating agencies and agencies that are authorized to develop and enforce environmental standards shall comment on environmental impact statements within their jurisdiction, expertise, or authority within the time period specified for comment in § 1506.10 of this subchapter. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that the environmental impact statement adequately reflects its views, it should reply that it has no comment.

§ 1503.3 Specificity of comments and information.

(a) To promote informed decision making, comments on an environmental impact statement or on a proposed action shall be as specific as possible, and may address either the adequacy of the statement or the merits of the alternatives discussed or both. Comments should explain why the issues raised are important to the consideration of potential environmental effects and alternatives to the proposed action. Where possible, comments should reference the corresponding section or page number of the draft environmental impact statement, propose specific changes to those parts of the statement, and describe any data, sources, or methodologies that support the proposed changes.

(b) When a participating agency criticizes a lead agency's predictive methodology, the participating agency should describe the alternative methodology that it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental review or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or authorizations.

(d) A cooperating agency with jurisdiction by law shall specify mitigation measures it considers necessary to allow the agency to grant or approve applicable authorizations or concurrences and cite to its applicable statutory authority.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall consider substantive comments timely submitted during the public comment period. The agency shall respond to individual comments or groups of comments. In the final environmental impact statement, the agency may respond by:

(1) Modifying alternatives including the proposed action;

(2) Developing and evaluating alternatives not previously given serious consideration by the agency;

(3) Supplementing, improving, or modifying its analyses;

(4) Making factual corrections; or

(5) Explaining why the comments do not warrant further agency response, recognizing that agencies are not required to respond to each comment.

(b) An agency shall append or otherwise publish all substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous).

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, an agency may write any changes on errata sheets and attach the responses to the statement instead of rewriting the draft statement. In such cases, the agency shall publish the final statement (§ 1502.20 of this subchapter), which includes the errata sheet, a copy of the draft statement, the comments, and the responses to those comments. The agency shall file the final statement with the Environmental Protection Agency (§ 1506.10 of this subchapter).

PART 1504—DISPUTE RESOLUTION AND PRE-DECISIONAL REFERRALS

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements, and encourages Federal agencies to engage with each other as early as practicable to resolve interagency disagreements concerning proposed major Federal actions before referring disputes to the Council. This part also establishes procedures for Federal agencies to submit a request to the Council to provide informal dispute resolution on NEPA issues.

(b) Section 309 of the Clean Air Act (42 U.S.C. 7609) directs the Administrator of the Environmental Protection Agency to review and comment publicly on the environmental impacts of Federal activities, including actions for which agencies prepare environmental impact statements. If, after this review, the Administrator determines that the matter is ''unsatisfactory from the standpoint of public health or welfare or environmental quality,'' section 309 directs that the matter be referred to the Council.

(c) Under section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)), other Federal agencies may prepare reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These agencies must make these reviews available to the President, the Council, and the public.

§ 1504.2 Early dispute resolution.

(a) Federal agencies should engage in interagency coordination and collaboration in their planning and decision-making processes and should identify and resolve disputes concerning proposed major Federal actions early in the NEPA process. To the extent practicable, agencies should elevate issues to appropriate agency officials or the Council in a timely manner that will accommodate schedules consistent with § 1501.10 of this subchapter.

(b) A Federal agency may request that the Council engage in informal dispute resolution to provide recommendations on how to resolve an interagency dispute concerning an environmental review. In making the request, the agency shall provide the Council with a summary of the proposed action, information on the disputed issues, and agency points of contact.

(c) In response to a request for informal dispute resolution, the Council may request additional information, provide non-binding recommendations, convene meetings of those agency decision makers necessary to resolve disputes, or determine that informal dispute resolution is unhelpful or inappropriate.

§ 1504.3 Criteria and procedure for referrals and response.

(a) Federal agencies should make environmental referrals to the Council only after concerted, timely (as early as practicable in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental effects, considering:

(1) Possible violation of national environmental standards or policies;

(2) Severity;

(3) Geographical scope;

(4) Duration;

(5) Importance as precedents;

(6) Availability of environmentally preferable alternatives;

(7) Economic and technical considerations, including the economic costs of delaying or impeding the decision making of the agencies involved in the action; and

(8) Other appropriate considerations.

(b) A Federal agency making the referral to the Council shall:

(1) Notify the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached;

(2) Include such a notification whenever practicable in the referring agency's comments on the environmental assessment or draft environmental impact statement;

(3) Identify any essential information that is lacking and request that the lead agency make it available at the earliest possible time; and

(4) Send copies of the referring agency's views to the Council.

(c) The referring agency shall deliver its referral to the Council no later than 25 days after the lead agency has made the final environmental impact statement available to the Environmental Protection Agency, participating agencies, and the public, and in the case of an environmental assessment, no later than 25 days after the lead agency makes it available. Except when the lead agency grants an extension of this period, the Council will not accept a referral after that date.

(d) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it; and

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any disputed material facts and incorporate (by reference if appropriate) agreed upon facts;

(ii) Identify any existing environmental requirements or policies that would be violated by the matter;

(iii) Present the reasons for the referral;

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason;

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time; and

(vi) Give the referring agency's recommendations as to what mitigation

alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(e) No later than 25 days after the referral to the Council, the lead agency may deliver a response to the Council and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral;

(2) Be supported by evidence and explanations, as appropriate; and

(3) Give the lead agency's response to the referring agency's recommendations.

(f) Applicants or other interested persons may provide views in writing to the Council no later than the response.

(g) No later than 25 days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Obtain additional views and information, including through public meetings or hearings.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the referring and lead agencies should further negotiate the issue, and the issue is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including, where appropriate, a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(h) The Council shall take no longer than 60 days to complete the actions specified in paragraph (g)(2), (3), or (5) of this section.

(i) The referral process is not intended to create any private rights of action or to be judicially reviewable because any voluntary resolutions by the agency parties do not represent final agency action and instead are only provisional and dependent on later consistent action by the action agencies.

PART 1505—NEPA AND AGENCY DECISION MAKING

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

§ 1505.1 [Reserved]

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10 of this subchapter) or, if appropriate, its recommendation to Congress, each agency shall prepare and timely publish a concise public record of decision or joint record of decision. The record, which each agency may integrate into any other record it prepares, shall:

(a) State the decision.

(b) Identify alternatives considered by the agency in reaching its decision. The agency also shall specify the environmentally preferable alternative or alternatives (§ 1502.14(f) of this subchapter). The agency may discuss preferences among alternatives based on relevant factors, including environmental, economic, and technical considerations and agency statutory missions. The agency shall identify and discuss all such factors, including any essential considerations of national policy, that the agency balanced in making its decision and state how those considerations entered into its decision.

(c) State whether the agency has adopted all practicable means to mitigate environmental harm from the alternative selected, and if not, why the agency did not. Mitigation shall be enforceable when the record of decision incorporates mitigation and the analysis of the reasonably foreseeable effects of the proposed action is based on implementation of that mitigation. The agency shall identify the authority for enforceable mitigation, such as through permit conditions, agreements, or other measures, and prepare a monitoring and compliance plan consistent with § 1505.3(c).

§ 1505.3 Implementing the decision.

(a) In addition to the requirements of paragraph (c) of this section, agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The agency shall:

(1) Include appropriate conditions in grants, permits, or other approvals; and

(2) Condition funding of actions on mitigation.

(b) The lead or cooperating agency should, where relevant and appropriate, incorporate into its decision mitigation measures that address or ameliorate significant human health and environmental effects of proposed Federal actions that disproportionately and adversely affect communities with environmental justice concerns.

(c) The lead or cooperating agency shall prepare and publish a monitoring and compliance plan for mitigation when:

(1) The analysis of the reasonably foreseeable effects of a proposed action in an environmental assessment or environmental impact statement is based on implementation of mitigation; and

(2) The agency incorporates the mitigation into a record of decision, finding of no significant impact, or separate decision document.

(d) The agency should tailor the contents of a monitoring and compliance plan required by paragraph (c) of this section to the complexity of the mitigation committed to and include:

(1) A basic description of the mitigation measure or measures;

(2) The parties responsible for monitoring and implementing the mitigation;

(3) If appropriate, how monitoring information will be made publicly available;

(4) The anticipated timeframe for implementing and completing mitigation;

(5) The standards for determining compliance with the mitigation and the consequences of non-compliance; and

(6) How the mitigation will be funded.

(e) If an action is incomplete or ongoing, an agency does not need to supplement its environmental impact statement (§ 1502.9(d) of this subchapter) or environmental assessment (§ 1501.5 of this subchapter) or revise its record of decision or finding of no significant impact or separate decision document based solely on new information developed through a monitoring and compliance plan required by paragraph (c) of this section. The ongoing implementation of a monitoring and compliance plan shall not be considered an incomplete or ongoing Federal action.

PART 1506—OTHER REQUIREMENTS OF NEPA

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

§ 1506.1 Limitations on actions during NEPA process.

(a) Except as provided in paragraphs (b) and (c) of this section, until an agency issues a finding of no significant impact, as provided in § 1501.6 of this subchapter, or record of decision, as provided in § 1505.2 of this subchapter, no action concerning the proposal may be taken that would:

(1) Have an adverse environmental effect; or

(2) Limit the choice of reasonable alternatives.

(b) If an agency is considering an application from an applicant and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to ensure that the objectives and procedures of NEPA are achieved. This section does not preclude development by applicants of plans or designs or performance of other activities necessary to support an application for Federal, State, Tribal, or local permits or assistance. An agency considering a proposed action for Federal funding may authorize such activities, including, but not limited to, acquisition of interests in land (*e.g.,* fee simple, rights-of-way, and conservation easements), purchase of long lead-time equipment, and purchase options made by applicants, if the agency determines that such activities would not limit the choice of reasonable alternatives and notifies the applicant that the agency retains discretion to select any reasonable alternative or the no action alternative regardless of any activity taken by the applicant prior to the conclusion of the NEPA process.

(c) While work on a required environmental review for a program is in progress and an action is not covered by an existing environmental document, agencies shall not undertake in the interim any major Federal action covered by the program that may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental review; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

§ 1506.2 Elimination of duplication with State, Tribal, and local procedures.

(a) Federal agencies are authorized to cooperate with State, Tribal, and local agencies that are responsible for preparing environmental documents, including those prepared pursuant to section 102(2)(G) of NEPA.

(b) To the fullest extent practicable unless specifically prohibited by law, agencies shall cooperate with State, Tribal, and local agencies to reduce duplication between NEPA and State, Tribal, and local requirements, including through use of studies, analyses, and decisions developed by State, Tribal, or local agencies. Except for cases covered by paragraph (a) of this section, such cooperation shall include, to the fullest extent practicable:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) To the fullest extent practicable unless specifically prohibited by law, agencies shall cooperate with State, Tribal, and local agencies to reduce duplication between NEPA and comparable State, Tribal, and local requirements. Such cooperation shall include, to the fullest extent practicable, joint environmental impact statements. In such cases, one or more Federal agencies and one or more State, Tribal, or local agencies shall be joint lead agencies. Where State or Tribal laws or local ordinances have environmental impact statement or similar requirements in addition to but not in conflict with those in NEPA, Federal agencies may cooperate in fulfilling these requirements, as well as those of Federal laws, so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State, Tribal, or local planning processes, environmental impact statements shall discuss any inconsistency of a proposed action with any approved State, Tribal, or local plan or law (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law. While the statement should discuss any inconsistencies, NEPA does not require reconciliation.

§ 1506.3 Adoption.

(a) *Generally.* An agency may adopt a draft or final environmental impact statement, environmental assessment, or portion thereof, or categorical exclusion determination, consistent with this section.

(b) *Environmental impact statements.* An agency may adopt another agency's draft or final environmental impact statement, or portion thereof, provided that the adopting agency conducts an independent review of the statement and concludes that it meets the standards for an adequate statement, pursuant to the regulations in this subchapter and the adopting agency's NEPA procedures.

(1) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the adopting agency shall republish and file it as a final statement consistent with § 1506.9. If the actions are not substantially the same or the adopting agency determines that the statement may require supplementation consistent with § 1502.9 of this subchapter, the adopting agency shall treat the statement as a draft, supplement or reevaluate it as necessary, and republish and file it, consistent with § 1506.9.

(2) Notwithstanding paragraph (b)(1) of this section, if a cooperating agency does not issue a record of decision jointly or concurrently consistent with § 1505.2 of this subchapter, a cooperating agency may issue a record of decision adopting the environmental impact statement of a lead agency without republication.

(c) *Environmental assessments.* An agency may adopt another agency's environmental assessment, or portion thereof, if the actions covered by the original environmental assessment and the proposed action are substantially the same, and the assessment meets the standards for an adequate environmental assessment under the regulations in this subchapter and the adopting agency's NEPA procedures. If the actions are not substantially the

same or the adopting agency determines that the environmental assessment may require supplementation consistent with § 1501.5(h) of this subchapter, the adopting agency may adopt and supplement or reevaluate the environmental assessment as necessary, issue its finding of no significant impact, and provide notice consistent with § 1501.6 of this subchapter.

(d) *Categorical exclusion determinations.* An agency may adopt another agency's determination that a categorical exclusion applies to a particular proposed action if the action covered by that determination and the adopting agency's proposed action are substantially the same. In such circumstances, the adopting agency shall:

(1) Document its adoption, including the determination that its proposed action is substantially the same as the action covered by the original categorical exclusion determination and that there are no extraordinary circumstances present that require the preparation of an environmental assessment or environmental impact statement; and

(2) Publish its adoption determination on an agency website or otherwise make it publicly available.

(e) *Identification of certain circumstances.* The adopting agency shall specify if one of the following circumstances is present:

(1) The agency is adopting an environmental assessment or environmental impact statement that is not final within the agency that prepared it.

(2) The action assessed in the environmental assessment or environmental impact statement is the subject of a referral under part 1504 of this subchapter.

(3) The environmental assessment or environmental impact statement's adequacy is the subject of a judicial action that is not final.

§ 1506.4 Combining documents.

Agencies should combine, to the fullest extent practicable, any environmental document with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility for environmental documents.

(a) *Agency responsibility.* The agency is responsible for the accuracy, scope (§ 1501.3(b) of this subchapter), and content of environmental documents and shall ensure they are prepared with professional and scientific integrity, using reliable data and resources, regardless of whether they are prepared by the agency or a contractor under the supervision and direction of the agency or by the applicant under procedures the agency adopts pursuant to section 107(f) of NEPA and § 1507.3(c)(12) of this subchapter. The agency shall exercise its independent judgment and briefly document its determination that an environmental document meets the standards under NEPA, the regulations in this subchapter, and the agency's NEPA procedures.

(b) *Applicant-provided information.* An agency may require an applicant to submit environmental information for possible use by the agency in preparing an environmental document.

(1) The agency should assist the applicant by outlining the types of information required for the preparation of environmental documents.

(2) The agency shall independently evaluate the information submitted by the applicant and, to the extent it is integrated into the environmental document, shall be responsible for its accuracy, scope, and contents.

(3) An agency may allow an applicant to prepare environmental assessments and environmental impact statements pursuant to its agency procedures, consistent with section 107(f) of NEPA and § 1507.3(c)(12) of this subchapter.

(c) *Agency-directed contractor.* An agency may authorize a contractor to prepare an environmental document under the supervision and direction of the agency.

(1) The agency shall provide guidance to the contractor and participate in and supervise the environmental document's preparation.

(2) The agency shall independently evaluate the environmental document prepared by the agency-directed contractor, shall be responsible for its accuracy, scope, and contents, and document the agency's evaluation in the environmental document.

(3) The agency shall include in the environmental document the names and qualifications of the persons preparing environmental documents, and conducting the independent evaluation of any information submitted or environmental documents prepared by a contractor, such as in the list of preparers for environmental impact statements (§ 1502.18 of this subchapter). It is the intent of this paragraph (c)(3) that acceptable work not be redone, but that it be verified by the agency.

(4) The lead agency or, where appropriate, a cooperating agency shall prepare a disclosure statement for the contractor's execution specifying that the contractor has no financial or other interest in the outcome of the action. Such statement need not include privileged or confidential trade secrets or other confidential business information.

(d) *Information generally.* Nothing in this section is intended to prohibit an agency from requesting any person, including the applicant, to submit information to it or to prohibit any person from submitting information to an agency for use in preparing environmental documents.

§ 1506.6 Methodology and scientific accuracy.

(a) Agencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents.

(b) In preparing environmental documents, agencies shall use high-quality information, including reliable data and resources, models, and Indigenous Knowledge. Agencies may rely on existing information as well as information obtained to inform the analysis. Agencies may use any reliable data sources, such as remotely gathered information or statistical models. Agencies shall explain any relevant assumptions or limitations of the information or the particular model or methodology selected for use.

(c) Agencies shall identify any methodologies used and shall make explicit reference to the scientific and other sources relied upon for conclusions in the environmental document. Agencies may place discussion of methodology in an appendix.

(d) Where appropriate, agencies shall use projections when evaluating the reasonably foreseeable effects, including climate change-related effects. Such projections may employ mathematical or other models that project a range of possible future outcomes, so long as agencies disclose the relevant assumptions or limitations.

§ 1506.7 Further guidance.

(a) The Council may provide further guidance concerning NEPA and its procedures.

(b) To the extent that Council guidance issued prior to July 1, 2024 is in conflict with this subchapter, the provisions of this subchapter apply.

§ 1506.8 Proposals for legislation.

(a) When developing legislation, agencies shall integrate the NEPA process for proposals for legislation significantly affecting the quality of the human environment with the legislative process of the Congress. Technical drafting assistance does not by itself

constitute a legislative proposal. Only the agency that has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

(b) A legislative environmental impact statement is the detailed statement required by law to be included in an agency's recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later to allow time for completion of an accurate statement that can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(c) Preparation of a legislative environmental impact statement shall conform to the requirements of the regulations in this subchapter, except as follows:

(1) There need not be a scoping process.

(2) Agencies shall prepare the legislative statement in the same manner as a draft environmental impact statement and need not prepare a final statement unless any of the following conditions exist. In such cases, the agency shall prepare and publish the statements consistent with §§ 1503.1 of this subchapter and 1506.10:

(i) A Congressional committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects that the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(d) Comments on the legislative statement shall be given to the lead agency, which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

(a) Agencies shall file environmental impact statements together with comments and responses with the Environmental Protection Agency, Office of Federal Activities, consistent with the Environmental Protection Agency's procedures.

(b) Agencies shall file statements with the Environmental Protection Agency no earlier than they are also transmitted to participating agencies and made available to the public. The Environmental Protection Agency may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10.

(c) Agencies shall file an adoption of an environmental impact statement with the Environmental Protection Agency (see § 1506.3(b)(1)).

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the **Federal Register** each week of the environmental impact statements filed since its prior notice. The minimum time periods set forth in this section are calculated from the date of publication of this notice.

(b) Unless otherwise provided by law, including statutory provisions for combining a final environmental impact statement and record of decision, Federal agencies shall not make or issue a record of decision under § 1505.2 of this subchapter for the proposed action until the later of the following dates:

(1) 90 days after publication of the notice described in paragraph (a) of this section for a draft environmental impact statement.

(2) 30 days after publication of the notice described in paragraph (a) of this section for a final environmental impact statement.

(c) An agency may make an exception to the rule on timing set forth in paragraph (b) of this section for a proposed action in the following circumstances:

(1) Some agencies have formally established administrative review processes (*e.g.,* appeals, objections, protests), which may be initiated prior to or after filing and publication of the final environmental impact statement with the Environmental Protection Agency, that allow other agencies or the public to raise issues about a decision and make their views known. In such cases where a real opportunity exists to alter the decision, the agency may make and record the decision at the same time it publishes the environmental impact statement. This means that the period for administrative review of the decision and the 30-day period set forth in paragraph (b)(2) of this section may run concurrently. In such cases, the environmental impact statement shall explain the timing and the public's right of administrative review and provide notification consistent with § 1506.9; or

(2) An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety may waive the time period in paragraph (b)(2) of this section, publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement, and provide notification consistent with § 1506.9, as described in paragraph (a) of this section.

(d) If an agency files the final environmental impact statement within 90 days of the filing of the draft environmental impact statement with the Environmental Protection Agency, the minimum 30-day and 90-day periods may run concurrently. However, subject to paragraph (e) of this section, agencies shall allow at least 45 days for comments on draft statements.

(e) The lead agency may extend the minimum periods in paragraph (b) of this section and provide notification consistent with § 1506.9. Upon a showing by the lead agency of compelling reasons of national policy, the Environmental Protection Agency may reduce the minimum periods and, upon a showing by any other Federal agency of compelling reasons of national policy, also may extend the minimum periods, but only after consultation with the lead agency. The lead agency may modify the minimum periods when necessary to comply with other specific statutory requirements (§ 1507.3(d)(4) of this subchapter). Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, the Environmental Protection Agency may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period it shall notify the Council.

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant effects without observing the provisions of the regulations in this subchapter, the Federal agency taking the action shall consult with the Council about alternative arrangements for compliance with section 102(2)(C) of NEPA. Agencies and the Council shall limit such arrangements to actions necessary to control the immediate impacts of the emergency; other actions

remain subject to NEPA review consistent with this subchapter. Alternative arrangements do not waive the requirement to comply with the statute, but establish an alternative means for NEPA compliance.

§ 1506.12 Effective date.

The regulations in this subchapter apply to any NEPA process begun after July 1, 2024. An agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before July 1, 2024.

PART 1507—AGENCY COMPLIANCE

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with the regulations in this subchapter. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements of NEPA and the regulations in this subchapter. Such compliance may include use of the resources of other agencies, applicants, and other participants in the NEPA process, but the agency using the resources shall itself have sufficient capability to evaluate what others do for it and account for the contributions of others. Agencies shall:

(a) Designate a senior agency official to be responsible for overall review of agency NEPA compliance, including resolving implementation issues, and a Chief Public Engagement Officer to be responsible for facilitating community engagement in environmental reviews across the agency and, where appropriate, the provision of technical assistance to communities. When the agency is a department, it may be efficient for major subunits (with the consent of the department) to identify senior agency officials or Chief Public Engagement Officers within those subunits, whom the department-level official or Officer oversees.

(b) Fulfill the requirements of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making that may have an impact on the human environment.

(c) Identify methods and procedures required by section 102(2)(B) of NEPA to ensure that presently unquantified environmental amenities and values may be given appropriate consideration.

(d) Prepare adequate environmental impact statements pursuant to section 102(2)(C) of NEPA and cooperate on the development of environmental impact statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(e) Ensure environmental documents are prepared with professional integrity, including scientific integrity, consistent with section 102(2)(D) of NEPA.

(f) Make use of reliable data and resources in carrying out their responsibilities under NEPA, consistent with section 102(2)(E) of NEPA.

(g) Study, develop, and describe technically and economically feasible alternatives, consistent with section 102(2)(F) of NEPA.

(h) Study, develop, and describe alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources, consistent with section 102(2)(H) of NEPA.

(i) Comply with the requirement of section 102(2)(K) of NEPA that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(j) Fulfill the requirements of sections 102(2)(I), 102(2)(J), and 102(2)(L), of NEPA, and Executive Order 11514, Protection and Enhancement of Environmental Quality, section 2, as amended by Executive Order 11991, Relating to Protection and Enhancement of Environmental Quality.

§ 1507.3 Agency NEPA procedures.

(a) The Council has determined that the revisions to this subchapter as of July 1, 2024 do not affect the validity of categorical exclusions contained in agency NEPA procedures as of this date.

(b) No more than 12 months after July 1, 2024, or 9 months after the establishment of an agency, whichever comes later, each agency shall develop or revise, as necessary, proposed procedures to implement the regulations in this subchapter, facilitate efficient decision making, and ensure that the agency makes decisions in accordance with the policies and requirements of the Act. When the agency is a department, it may be efficient for major subunits (with the consent of the department) to adopt their own procedures.

(1) Each agency shall consult with the Council while developing or revising its proposed procedures and before publishing them in the **Federal Register** for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants.

(2) Agencies shall provide an opportunity for public review and review by the Council for conformity with the Act and the regulations in this subchapter before issuing their final procedures. The Council shall complete its review within 30 days of the receipt of the proposed final procedures. Once in effect, agencies shall publish their NEPA procedures and ensure that they are readily available to the public. Agencies shall continue to review their policies and procedures, in consultation with the Council, and revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(3) The issuance or update of agency procedures is not subject to NEPA review under this subchapter.

(c) Agency procedures shall:

(1) Designate the major decision points for the agency's programs and actions subject to NEPA, ensuring that the NEPA process begins at the earliest reasonable time, consistent with § 1501.2 of this subchapter, and aligns with the corresponding decision points;

(2) Require that relevant environmental documents, comments, and responses be part of the record in rulemaking and adjudicatory proceedings;

(3) Integrate the environmental review into the decision-making process by requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that decision makers use them in making decisions;

(4) Require that the alternatives considered by the decision maker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decision maker consider the alternatives described in the environmental documents. If another decision document accompanies the relevant environmental documents to the decision maker, agencies are encouraged

to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives;

(5) Require the combination of environmental documents with other agency documents to facilitate sound and efficient decision making and avoid duplication, where consistent with applicable statutory requirements;

(6) Include the procedures required by § 1501.2(b)(4) of this subchapter (assistance to applicants);

(7) Include specific criteria for and identification of those typical classes of action that normally:

(i) Require environmental impact statements; and

(ii) Require environmental assessments but not necessarily environmental impact statements;

(8) Establish categorical exclusions and identify extraordinary circumstances. When establishing new or revising existing categorical exclusions, agencies shall:

(i) Identify when documentation of a determination that a categorical exclusion applies to a proposed action is required;

(ii) Substantiate the proposed new or revised categorical exclusion with sufficient information to conclude that the category of actions does not have a significant effect, individually or in the aggregate, on the human environment and provide this substantiation in a written record that is made publicly available as part of the notice and comment process (§ 1507.3(b)(1) and (2)); and

(iii) Describe how the agency will consider extraordinary circumstances consistent with § 1501.4(b) of this subchapter;

(9) Include a process for reviewing the agency's categorical exclusions at least every 10 years, which the agency may conduct on a rolling basis, starting with its oldest categorical exclusions;

(10) Include processes for reevaluating and supplementing environmental assessments and environmental impact statements, as appropriate;

(11) Explain where interested persons can get information or status reports on environmental impact statements, environmental assessments, and other elements of the NEPA process; and

(12) Where an agency has applicants that seek its action, include procedures to allow an applicant (including an applicant-directed contractor) to prepare environmental assessments and environmental impact statements under the agency's supervision. Such procedures shall not apply to applicants when they serve as joint lead agencies. Such procedures shall be consistent with § 1506.5(a) and (c) of this subchapter, and at a minimum shall include the following:

(i) Requirements that the agency review and approve the purpose and need (§§ 1501.5(c)(2)(i) or 1502.13 of this subchapter) and reasonable alternatives (§§ 1501.5(c)(2)(ii) or 1502.14 of this subchapter);

(ii) A process for the agency to independently evaluate the applicant-prepared environmental assessment or environmental impact statement; take responsibility for its accuracy, scope, and contents; and document the agency's evaluation in the document; and

(iii) A prohibition on the preparation of a finding of no significant impact or record of decision by applicants.

(d) Agency procedures also may:

(1) Identify activities or decisions that are not subject to NEPA;

(2) Include processes for consideration of emergency actions that would not result in significant effects;

(3) Include specific criteria for providing limited exceptions to the provisions of the regulations in this subchapter for classified proposals. These are proposed actions that are specifically authorized under criteria established by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order or statute. Agencies may safeguard and restrict from public dissemination environmental assessments and environmental impact statements that address classified proposals in accordance with agencies' own regulations applicable to classified information. Agencies should organize these documents so that classified portions are included as annexes, so that the agencies can make the unclassified portions available to the public; and

(4) Provide for periods of time other than those presented in § 1506.10 of this subchapter when necessary to comply with other specific statutory requirements, including requirements of lead or cooperating agencies.

§ 1507.4 Agency NEPA program information.

(a) To allow agencies and the public to efficiently and effectively access information about NEPA reviews, agencies shall provide for agency websites or other information technology tools to make available documents, relevant notices, and other relevant information for use by agencies, applicants, and interested persons. The website or other such means of publication shall include the agency's NEPA procedures, including those of subunits, and a list of environmental assessments and environmental impact statements that are in development and complete. As appropriate, agencies also should include:

(1) Agency planning and other documents that guide agency management and provide for public involvement in agency planning processes;

(2) Environmental documents;

(3) Agency policy documents, orders, terminology, and explanatory materials regarding agency decision-making processes;

(4) Agency planning program information, plans, and planning tools; and

(5) A database searchable by geographic information, document status, document type, and project type.

(b) Agencies shall provide for efficient and effective interagency coordination of their environmental program websites and other information technology tools, such as use of shared databases or application programming interfaces, in their implementation of NEPA and related authorities.

PART 1508—DEFINITIONS

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

§ 1508.1 Definitions.

The following definitions apply to the regulations in this subchapter. Federal agencies shall use these terms uniformly throughout the Federal Government.

(a) *Act* or *NEPA* means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*).

(b) *Affecting* means will or may have an effect on.

(c) *Applicant* means a non-Federal entity, including a project sponsor, that seeks an action by a Federal agency such as granting a permit, license, or financial assistance.

(d) *Authorization* means any license, permit, approval, finding, determination, or other administrative decision issued by an agency that is required or authorized under Federal law in order to implement a proposed action.

(e) *Categorical exclusion* means a category of actions that an agency has determined, in its agency NEPA

procedures (§ 1507.3 of this subchapter) or pursuant to § 1501.4(c) of this subchapter, normally does not have a significant effect on the human environment.

(f) *Communities with environmental justice concerns* means those communities that may not experience environmental justice as defined in paragraph (m) of this section. To assist in identifying communities with environmental justice concerns, agencies may use available screening tools, such as the Climate and Economic Justice Screening Tool and the EJScreen Tool, as appropriate to their activities and programs. Agencies also may develop procedures for the identification of such communities in their agency NEPA procedures.

(g) *Cooperating agency* means any Federal, State, Tribal, or local agency with jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal that has been designated by the lead agency.

(h) *Council* means the Council on Environmental Quality established by title II of the Act.

(i) *Effects* or *impacts* means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and include the following:

(1) Direct effects, which are caused by the action and occur at the same time and place.

(2) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

(3) Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from actions with individually minor but collectively significant effects taking place over a period of time.

(4) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, such as disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative. Effects also include effects on Tribal resources and climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives. Effects may also include those resulting from actions which may have both beneficial and adverse effects, even if on balance the agency believes that the effects will be beneficial.

(j) *Environmental assessment* means a concise public document, for which a Federal agency is responsible, for an action that is not likely to have a significant effect or for which the significance of the effects is unknown (§ 1501.5 of this subchapter), that is used to support an agency's determination of whether to prepare an environmental impact statement (part 1502 of this subchapter) or a finding of no significant impact (§ 1501.6 of this subchapter).

(k) *Environmental document* means an environmental assessment, environmental impact statement, documented categorical exclusion determination, finding of no significant impact, record of decision, or notice of intent.

(*l*) *Environmental impact statement* means a detailed written statement that is required by section 102(2)(C) of NEPA.

(m) *Environmental justice* means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that affect human health and the environment so that people:

(1) Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and

(2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

(n) *Environmentally preferable alternative* means the alternative or alternatives that will best promote the national environmental policy as expressed in section 101 of NEPA.

(o) *Extraordinary circumstances* means factors or circumstances that indicate a normally categorically excluded action may have a significant effect. Examples of extraordinary circumstances include potential substantial effects on sensitive environmental resources; potential substantial disproportionate and adverse effects on communities with environmental justice concerns; potential substantial effects associated with climate change; and potential substantial effects on historic properties or cultural resources.

(p) *Federal agency* means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. For the purposes of the regulations in this subchapter, Federal agency also includes States, units of general local government, and Tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute.

(q) *Finding of no significant impact* means a document by a Federal agency briefly presenting the agency's determination that and reasons why an action, not otherwise categorically excluded (§ 1501.4 of this subchapter), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.

(r) *Human environment* or *environment* means comprehensively the natural and physical environment and the relationship of present and future generations with that environment. (*See also* the definition of ''effects'' in paragraph (i) of this section.)

(s) *Joint lead agency* means a Federal, State, Tribal, or local agency designated pursuant to § 1501.7(c) that shares the responsibilities of the lead agency for preparing the environmental impact statement or environmental assessment.

(t) *Jurisdiction by law* means agency authority to approve, veto, or finance all or part of the proposal.

(u) *Lead agency* means the Federal agency that proposes the agency action or is designated pursuant to § 1501.7(c) for preparing or having primary responsibility for preparing the environmental impact statement or environmental assessment.

(v) *Legislation* means a bill or legislative proposal to Congress developed by a Federal agency, but does not include requests for appropriations or legislation recommended by the President.

(w) *Major Federal action* or *action* means an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility.

(1) Examples of major Federal actions generally include:

(i) Granting authorizations, including permits, licenses, rights-of-way, or other authorizations.

(ii) Adoption of official policy, such as rules, regulations, and interpretations adopted under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* or other statutes; implementation of treaties and international conventions or agreements, including those implemented pursuant to statute or regulation; formal documents establishing an agency's policies that will result in or substantially alter agency programs.

(iii) Adoption of formal plans, such as official documents prepared or approved by Federal agencies, which prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(iv) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and related agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(v) Approval of or carrying out specific agency projects, such as construction or management activities.

(vi) Providing more than a minimal amount of financial assistance, including through grants, cooperative agreements, loans, loan guarantees, or other forms of financial assistance, where the agency has the authority to deny in whole or in part the assistance due to environmental effects, has authority to impose conditions on the receipt of the financial assistance to address environmental effects, or otherwise has sufficient control and responsibility over the subsequent use of the financial assistance or the effects of the activity for which the agency is providing the financial assistance.

(2) Major Federal actions do not include the following:

(i) Non-Federal actions:

(A) With no or minimal Federal funding; or

(B) With no or minimal Federal involvement where the Federal agency cannot control the outcome of the project;

(ii) Funding assistance solely in the form of general revenue sharing funds that do not provide Federal agency compliance or enforcement responsibility over the subsequent use of such funds;

(iii) Loans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effects of the action;

(iv) Business loan guarantees provided by the Small Business Administration pursuant to section 7(a) or (b) and of the Small Business Act (15 U.S.C. 636(a) and (b)), or title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 through 697g);

(v) Judicial or administrative civil or criminal enforcement actions;

(vi) Extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States;

(vii) Activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority; and

(viii) Activities or decisions for projects approved by a Tribal Nation that occur on or involve land held in trust or restricted status by the United States for the benefit of that Tribal Nation or by the Tribal Nation when such activities or decisions involve no or minimal Federal funding or other Federal involvement.

(x) *Matter* means for purposes of part 1504 of this subchapter:

(1) With respect to the Environmental Protection Agency, any proposed legislation, project, action, or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(2) With respect to all other agencies, any proposed major Federal action to which section 102(2)(C) of NEPA applies.

(y) *Mitigation* means measures that avoid, minimize, or compensate for adverse effects caused by a proposed action or alternatives as described in an environmental document or record of decision and that have a connection to those adverse effects. Mitigation includes, in general order of priority:

(1) Avoiding the adverse effect altogether by not taking a certain action or parts of an action.

(2) Minimizing the adverse effect by limiting the degree or magnitude of the action and its implementation.

(3) Rectifying the adverse effect by repairing, rehabilitating, or restoring the affected environment.

(4) Reducing or eliminating the adverse effect over time by preservation and maintenance operations during the life of the action.

(5) Compensating for the adverse effect by replacing or providing substitute resources or environments.

(z) *NEPA process* means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

(aa) *Notice of intent* means a public notice that an agency will prepare and consider an environmental impact statement or, as applicable, an environmental assessment.

(bb) *Page* means 500 words and does not include citations, explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information.

(cc) *Participating agency* means a Federal, State, Tribal, or local agency participating in an environmental review or authorization of an action.

(dd) *Participating Federal agency* means a Federal agency participating in an environmental review or authorization of an action.

(ee) *Programmatic environmental document* means an environmental impact statement or environmental assessment analyzing all or some of the environmental effects of a policy, program, plan, or group of related actions.

(ff) *Proposal* means a proposed action at a stage when an agency has a goal, is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and can meaningfully evaluate its effects. A proposal may exist in fact as well as by agency declaration that one exists.

(gg) *Publish* and *publication* mean methods found by the agency to efficiently and effectively make environmental documents and information available for review by interested persons, including electronic publication, and adopted by agency NEPA procedures pursuant to § 1507.3 of this subchapter.

(hh) *Reasonable alternatives* means a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action.

(ii) *Reasonably foreseeable* means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.

(jj) *Referring agency* means the Federal agency that has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

(kk) *Scope* consists of the range and breadth of actions, alternatives, and effects to be considered in an environmental impact statement or environmental assessment.

(*ll*) *Senior agency official* means an official of assistant secretary rank or higher (or equivalent) that is designated for overall agency NEPA compliance, including resolving implementation issues.

(mm) *Significant effects* means adverse effects that an agency has

identified as significant based on the criteria in § 1501.3(d) of this subchapter.

(nn) *Special expertise* means statutory responsibility, agency mission, or related program experience.

(oo) *Tiering* refers to the process described in § 1501.11 of this subchapter by which an environmental document may rely on an existing and broader or more general environmental document.

§ 1508.2 [Reserved]

[FR Doc. 2024–08792 Filed 4–30–24; 8:45 am]

BILLING CODE 3325–FC–P