



## **COUNCIL ON ENVIRONMENTAL QUALITY**

### **40 CFR Parts 1502, 1507, and 1508**

**[CEQ–2021–0002]**

**RIN 0331–AA05**

### **National Environmental Policy Act Implementing Regulations Revisions**

**AGENCY:** Council on Environmental Quality.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Council on Environmental Quality (CEQ) is proposing to modify certain aspects of its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA) to generally restore regulatory provisions that were in effect for decades before being modified in 2020. CEQ proposes these changes in order to better align the provisions with CEQ’s extensive experience implementing NEPA, in particular its perspective on how NEPA can best inform agency decision making, as well as longstanding Federal agency experience and practice, NEPA’s statutory text and purpose, including making decisions informed by science, and case law interpreting NEPA’s requirements. The proposed rule would restore provisions addressing the purpose and need of a proposed action, agency NEPA procedures for implementing CEQ’s NEPA regulations, and the definition of “effects.” CEQ invites comments on the proposed revisions.

**DATES:** *Comments:* CEQ must receive comments by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

*Public meeting:* CEQ will conduct two online public meetings for the proposed rule on Tuesday, October 19, 2021, from 1 to 4 p.m. EDT, and Thursday, October 21, 2021 from 5 to 8 p.m. EDT. To register for the meetings, please visit CEQ’s website at [www.nepa.gov](https://www.nepa.gov).

**ADDRESSES:** You may submit comments, identified by docket number CEQ–2021–0002, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: 202–456–6546.
- Mail: Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503.

*Instructions:* All submissions received must include the agency name, “Council on Environmental Quality,” and docket number, CEQ–2021–0002, for this rulemaking. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided. Do not submit electronically any information you consider to be private, Confidential Business Information (CBI), or other information, the disclosure of which is restricted by statute.

*Docket:* For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Amy B. Coyle, Deputy General Counsel, 202–395–5750, [Amy.B.Coyle@ceq.eop.gov](mailto:Amy.B.Coyle@ceq.eop.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On January 1, 1970, President Nixon signed into law the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Congress enacted NEPA by a unanimous vote in the Senate and a nearly unanimous vote in the House<sup>1</sup> to declare a national policy to promote environmental protection for present and future generations. NEPA was established to “encourage productive and enjoyable harmony” between

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<sup>1</sup> See Linda Luther, Cong. Rsch. Serv., RL33152, The National Environmental Policy Act: Background and Implementation (2008), <https://crsreports.congress.gov/product/details?prodcode=RL33152>.

humans and the environment; to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of people; and to enrich the understanding of the ecological systems and natural resources important to the Nation. 42 U.S.C. 4321.

To achieve these objectives, NEPA makes 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. NEPA directs Federal agencies to prepare “detailed statements,” referred to as environmental impact statements (EISs), for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). NEPA established the Council on Environmental Quality (CEQ) in the Executive Office of the President, which advises the President on environmental policy matters and oversees Federal agencies’ implementation of NEPA. 42 U.S.C. 4342. In many respects, NEPA was a statute ahead of its time, and it remains relevant and vital today, from its statements that decisions be grounded in science to its recognition that sustainability and a livable environment are fundamental to social and economic well-being. *See, e.g.*, 42 U.S.C. 4331, 4332(A).

In 1970, President Nixon issued Executive Order (E.O.) 11514, *Protection and Enhancement of Environmental Quality*, which directed CEQ to issue guidelines for implementation of section 102(2)(C) of NEPA.<sup>2</sup> In response, CEQ issued interim guidelines in April 1970, and revised the guidelines in 1971 and 1973.<sup>3</sup> In 1977, President Carter issued E.O. 11991, *Relating to Protection and Enhancement of*

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<sup>2</sup> 35 FR 4247 (Mar. 7, 1970), sec. 3(h).

<sup>3</sup> *See* 35 FR 7390 (May 12, 1970) (interim guidelines); 36 FR 7724 (Apr. 23, 1971) (final guidelines); 38 FR 10856 (May 2, 1973) (proposed revisions to the guidelines); 38 FR 20550 (Aug. 1, 1973) (revised guidelines).

*Environmental Quality*, amending E.O. 11514 and directing CEQ to issue regulations to govern implementation of NEPA and requiring that Federal agencies comply with those regulations.<sup>4</sup> CEQ promulgated implementing procedures in 1978 at 40 CFR parts 1500 through 1508.<sup>5</sup> The regulations, issued 8 years after NEPA's enactment, reflect CEQ's interpretation of and expertise in NEPA, initial interpretations of the courts, and Federal agency experience implementing NEPA. Consistent with the requirement in 40 CFR 1507.3, Federal agencies, in turn, issue and update their own implementing procedures to supplement CEQ's procedures and integrate the NEPA process into the agencies' specific programs and processes. Agencies consult with CEQ in the development of these procedures to ensure that their agency-specific procedures are consistent with CEQ's regulations. CEQ made technical amendments to the 1978 implementing regulations in 1979<sup>6</sup> and amended one provision in 1986,<sup>7</sup> but it left the regulations largely unchanged for over 40 years (1978 NEPA Regulations). As a result, CEQ and Federal agencies have extensive experience in implementing NEPA and the 1978 regulations, and a large body of agency practice and case law has developed based on the CEQ NEPA regulations that remained in substantially the same form from 1978 to 2020. The fundamental principles of informed and science-based decision making, transparency, and public engagement are reflected in both the NEPA statute and CEQ's 1978 NEPA Regulations, and it is those core principles that CEQ seeks to advance in this proposed rule.

On August 15, 2017, President Trump issued E.O. 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*,<sup>8</sup> which, in part, directed CEQ to establish and lead an interagency working group to identify and propose changes to the NEPA regulations.<sup>9</sup> In

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<sup>4</sup> 42 FR 26967 (May 25, 1977).

<sup>5</sup> 43 FR 55978 (Nov. 23, 1978).

<sup>6</sup> 44 FR 873 (Jan. 3, 1979).

<sup>7</sup> 51 FR 15618 (Apr. 25, 1986) (amending 40 CFR 1502.22).

<sup>8</sup> 82 FR 40463 (Aug. 24, 2017).

<sup>9</sup> *Id.*, sec. 5(e)(iii).

response, on January 10, 2020, CEQ published a notice of proposed rulemaking (NPRM) proposing broad revisions to the 1978 NEPA Regulations.<sup>10</sup> A wide range of stakeholders submitted more than 1.1 million comments on the proposed rule,<sup>11</sup> including state and local governments, Tribes, environmental advocacy organizations, professional and industry associations, and other advocacy or non-profit organizations. 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, made wholesale revisions to the regulations and took effect on September 14, 2020 (2020 NEPA Regulations or 2020 Rule).<sup>12</sup>

In the months that followed the issuance of the 2020 NEPA Regulations, five lawsuits were filed challenging the 2020 Rule.<sup>13</sup> These cases challenge the 2020 NEPA Regulations on a variety of grounds, including under the Administrative Procedure Act (APA), NEPA, and the Endangered Species Act, contending that the rule exceeded CEQ's authority and that the related rulemaking process was procedurally and substantively defective. In response to CEQ and joint motions, the district courts have 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,<sup>14</sup> and is currently on appeal to the U.S. Court of Appeals for the Fourth Circuit.

On January 20, 2021, President Biden issued E.O. 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*.<sup>15</sup>

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<sup>10</sup> 85 FR 1684 (Jan. 10, 2020).

<sup>11</sup> See Docket No. CEQ-2019-0003, <https://www.regulations.gov/document/CEQ-2019-0003-0001>.

<sup>12</sup> 85 FR 43304 (July 16, 2020).

<sup>13</sup> *Wild Va. v. Council on Env't Quality*, No. 3:20cv45 (W.D. Va. 2020); *Env'tl. 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 *The Clinch Coalition v. U.S. Forest Service*, No. 2:21cv00003 (W.D. Va. 2020), plaintiffs challenge the U.S. Forest Service's NEPA implementing procedures, which established new categorical exclusions, and, relatedly, the 2020 Rule's provisions on categorical exclusions.

<sup>14</sup> *Wild Va. v. Council on Env't Quality*, No. 3:20cv45, 2021 WL 2521561 (W.D. Va. June 21, 2021).

<sup>15</sup> 86 FR 7037 (Jan. 25, 2021).

Section 1 of E.O. 13990 establishes 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 greenhouse gas emissions; bolster resilience to the impacts of climate change; restore and expand our national treasures and monuments; and prioritize both environmental justice and the creation of well-paying union jobs necessary to deliver these goals.<sup>16</sup>

Section 2 of the E.O. calls for Federal agencies to review existing regulations issued between January 20, 2017, and January 20, 2021, for consistency with the policy articulated in the E.O. and to take appropriate action. Section 7(b) revokes a number of E.O.s, including E.O. 13807, and section 7(f) directs agencies to promptly take steps to rescind any rules or regulations implementing or enforcing any of the revoked E.O.s. An accompanying White House fact sheet, published on January 20, 2021, specifically directs CEQ to review the 2020 NEPA Regulations for consistency with E.O. 13990's objectives.<sup>17</sup>

On January 27, 2021, the President signed E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*, which establishes a government-wide approach to the climate crisis by reducing greenhouse gas emissions and an Administration policy to increase climate resilience, transition to a clean-energy economy, address environmental justice and invest in disadvantaged communities, and spur well-paying union jobs and economic growth.<sup>18</sup> E.O. 14008 also requires the Chair of CEQ and the Director of the Office of Management and Budget (OMB) to ensure that Federal infrastructure

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<sup>16</sup> *Id.*, sec. 1.

<sup>17</sup> 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/>.

<sup>18</sup> 86 FR 7619 (Feb. 1, 2021).

investments reduce climate pollution and that Federal permitting decisions consider the effects of greenhouse gas emissions and climate change.<sup>19</sup>

## **II. CEQ's Approach to Revising the 2020 NEPA Regulations**

Consistent with E.O. 13990 and E.O. 14008, CEQ is engaged in a comprehensive review of the 2020 NEPA Regulations to ensure that they 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, respects Tribal sovereignty, protects our Nation's resources, and promotes better environmental and community outcomes. CEQ proposes regulatory changes in this NPRM to enhance clarity on NEPA implementation, to better effectuate NEPA's statutory requirements and purposes, to ensure that Federal decisions are guided by science, to better protect and enhance the quality of the human environment, and to provide full and fair processes that inform the public about the environmental effects of government actions and enable public participation.

CEQ's review of the 2020 NEPA Regulations and the proposed regulatory amendments are guided by CEQ's and Federal agencies' extensive experience implementing NEPA for the last 50 years. As part of its oversight role, CEQ reviews every agency's proposed new or updated NEPA implementing procedures. As part of this iterative process, CEQ engages with agencies to understand their specific authorities and programs to ensure consideration of environmental impacts is integrated into their decision-making processes. Additionally, where necessary or appropriate, CEQ engages with agencies on NEPA reviews for specific projects or project types. For example, CEQ has convened interagency working groups to ensure efficient and effective environmental reviews for transportation and broadband projects. CEQ also has extensive experience providing written guidance to Federal agencies on a wide range of NEPA-related issues,

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<sup>19</sup> *Id.*, sec. 213(a).

including environmental justice, emergency response activities, climate change, and more.<sup>20</sup> And, CEQ meets regularly with external stakeholders to understand their perspectives on the NEPA process. Finally, CEQ coordinates with other Federal agencies and components of the White House on a wide array of environmental issues that also arise in the NEPA context, such as endangered species consultation or impacts to Federal lands and waters from federally permitted activities.

It is CEQ's view that the 2020 NEPA Regulations may have the effect of limiting the scope of NEPA analysis, with negative repercussions for environmental protection and environmental quality, including in critical areas such as climate change and environmental justice. Portions of the 2020 NEPA Regulations also may not reflect NEPA's statutory purposes to "encourage productive and enjoyable harmony" between humans and the environment, promote efforts that will prevent or eliminate damage to the environment and biosphere, and enhance public health and welfare. *See* 42 U.S.C. 4321. Some changes introduced by the 2020 NEPA Regulations also may not support science-based decision making or be compatible with the Administration's policies to improve public health, protect the environment, prioritize environmental justice, provide access to clean air and water, and reduce greenhouse gas emissions that contribute to climate change.<sup>21</sup>

To address these concerns, CEQ is engaging in a series of rulemakings to propose revisions to the 2020 NEPA Regulations. As a preliminary step, CEQ issued an interim final rule on June 29, 2021, amending the requirement in 40 CFR 1507.3(b) for agencies to propose changes to their existing NEPA supplemental procedures by September 14, 2021, in order to make their procedures consistent with the 2020 NEPA Regulations.<sup>22</sup>

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<sup>20</sup> *See* <https://www.energy.gov/nepa/ceq-guidance-documents> for a list of current CEQ guidance documents.

<sup>21</sup> *See* E.O. 13990, *supra* note 15, and E.O. 14008, *supra* note 18.

<sup>22</sup> 86 FR 34154 (June 29, 2021).



CEQ extended the date by two years to avoid having agencies propose changes to their implementing procedures on a tight deadline to conform to a rule that is undergoing extensive review and will likely change in the near future.

CEQ intends to reconsider and revise the 2020 NEPA Regulations using a phased approach. This NPRM initiates a “Phase 1” rulemaking to focus on a discrete set of provisions. In identifying what provisions to address in Phase 1, CEQ focused on the provisions that 1) pose significant near-term interpretation or implementation challenges for Federal agencies and would have the most impact to agencies’ NEPA processes during the interim period before a “Phase 2” rulemaking is complete; 2) make sense to revert to the 1978 regulatory approach for the reasons discussed in Part III of this preamble; and 3) CEQ is generally unlikely to propose to further revise in a Phase 2 rulemaking. Further, because CEQ recently received comments on these exact provisions through the rulemaking process for the 2020 NEPA Regulations, CEQ has the benefit of voluminous public comments on these issues, which CEQ considered in the development of this proposed rule. In Phase 2, CEQ intends to issue a second NPRM to more broadly revisit the 2020 NEPA Regulations and propose further revisions to ensure that the NEPA process provides for efficient and effective environmental reviews that are consistent with the statute’s text and purpose; provides regulatory certainty to Federal agencies; promotes better decision making consistent with NEPA’s statutory requirements; and meets environmental, climate change, and environmental justice objectives.

### **III. Summary of Proposed Rule**

As discussed in this section, CEQ proposes three revisions to the 2020 NEPA Regulations in this Phase 1 rulemaking: 1) to eliminate language in the description of purpose and need for a proposed action when it is an agency’s statutory duty to review applications for authorization (40 CFR 1502.13) and make a conforming edit to the

definition of “reasonable alternatives” (40 CFR 1508.1(z)); 2) to remove limitations on agency NEPA procedures for implementing CEQ’s NEPA Regulations (40 CFR 1507.3); and 3) to return to the definitions of “effects” in the prior, longstanding 1978 NEPA Regulations (40 CFR 1508.1(g)).

CEQ proposes to amend these provisions by generally reverting to the language from the 1978 NEPA Regulations that was in effect for more than 40 years, subject to minor revisions for clarity. In proposing to revert to language in the 1978 Regulations, this NPRM addresses issues similar or identical to those the public and Federal agencies recently had the opportunity to consider and comment on during the rulemaking for the 2020 NEPA Regulations, which will facilitate an expeditious Phase 1 rulemaking. For each provision described in this section, CEQ provides a high-level summary of some of the significant issues raised in these public comments, which CEQ considered in the development of this proposed rule.

**A. Purpose and Need (§ 1502.13)**

The purpose and need section of an EIS sets forth the rationale for the agency’s proposed action. Development of the purpose and need is a vital early step in the NEPA process that is foundational to other elements of a NEPA review. For example, the purpose and need statement sets the parameters for the range of reasonable alternatives an agency considers and informs the scope of effects that an agency must analyze in an EIS. The 1978 NEPA Regulations required that each EIS briefly state the underlying purpose and need to which the agency is responding in proposing the alternatives, including the proposed action. The 2020 NEPA Regulations modified this provision by adding language that requires agencies to base the purpose and need on the goals of an applicant and the agency’s authority when the agency’s statutory duty is to review an application for authorization. The 2020 NEPA Regulations also made a conforming addition to the definition of “reasonable alternatives” to carry over the new language on purpose and

need. Here, CEQ proposes in § 1502.13 to revert to the language of the 1978 NEPA Regulations for purpose and need and conform the definition of “reasonable alternatives” in § 1508.1(z) to this change.

CEQ proposes this change because the language added by the 2020 NEPA Regulations requires an agency to always base the purpose and need on the goals of an applicant and the agency’s statutory authority when an agency is reviewing an application for authorization. This language could be construed to require agencies to prioritize the applicant’s goals over other relevant factors, including the public interest. CEQ does not consider this approach to reflect the best reading of the NEPA statute or lay the appropriate groundwork for environmentally sound decision making. Agencies should have discretion to base the purpose and need for their actions on a variety of factors, which include the goals of the applicant, but not to the exclusion of other factors. For example, agencies may consider regulatory requirements, desired conditions on the landscape or other environmental outcomes, and local economic needs, as well as an applicant’s goals. Always tailoring the purpose and need to an applicant’s goals when considering a request for an authorization could prevent an agency from considering alternatives that better meet the policies and responsibilities set forth in NEPA merely because they do not meet an applicant’s stated goals. Additionally, an applicant’s goals themselves could be potentially confusing or unduly narrow or restrictive. Restoring the 1978 language would eliminate this confusing language and reaffirm agency discretion to develop and rely on statements of purpose and need that are consistent with the agency’s decision-making responsibilities while considering multiple relevant factors, including the public interest and the goals of an applicant. This restoration would confirm that agencies should consider a range of alternatives that are technically and economically feasible and meet the purpose and need for the proposed action but that are not unreasonably constrained by an applicant’s stated goals.

In adding this language, the preamble to the 2020 Rule explained that CEQ intended to clarify that when an agency is responsible for reviewing applications for authorizations, the agency *must* base the purpose and need on the applicant's goals and the agency's statutory authority, citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). However, this case did not require the agency to base the purpose and need on the applicant's goals; rather, the court held that the agency's consideration of the applicant's goals to develop the purpose and need statement was not arbitrary and capricious. However, the court did not require that the applicant's goals be the sole (or even primary) factor in the formulation of the purpose and need for the action. *See id.* at 196–99.

CEQ proposes to remove the reference to the agency's statutory authority because it is unnecessary and confusing. It is unnecessary because agencies already had a long history of developing purpose and need statements under the 1978 NEPA Regulations guided by their statutory authority and the scope of the agency decision under consideration. The reference is confusing because it implies that an agency's authority is only relevant when an agency proposes to grant an authorization, and agencies must also appropriately consider the scope of their authority when evaluating other agency actions, including those that do not involve specific authorizations. Therefore, CEQ proposes to eliminate the reference to an agency's authority because purpose and need statements have always been informed by the scope of the agency's statutory decision-making authority irrespective of whether the action is an application for authorization. A reference to an agency's statutory authority in this one context therefore seems unnecessary.

To promote informed decision making, transparency, and public engagement, a properly drawn purpose and need statement should lead to consideration of the reasonable alternatives to the proposed action, consistent with NEPA's requirements. *See*

42 U.S.C. 4332(2)(C). While a purpose and need statement that is too narrow is inconsistent with NEPA's requirement to consider alternatives to the proposed action, so too is a boundless analysis of alternatives. Rather, agencies are guided by a rule of reason in identifying the reasonable alternatives that are technically and economically feasible and meet the purpose and need of a proposed action. *See, e.g., HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230 (9th Cir. 2014).

For example, a private applicant seeking a right-of-way on Federal land may want to site the right-of-way at a specific location and may, correspondingly, frame the applicant's goals as a right-of-way with a particular location or route. However, the agency with jurisdiction over the proposed action may want to consider a range of reasonable locations for the right-of-way that would, for example, avoid environmental impacts or reduce conflicts with other programs or plans.

Inherent in the NEPA process is the consideration of the public interest when developing a purpose and need statement, including analyzing proposed actions and alternatives. As the U.S. Court of Appeals for the Seventh Circuit explained in *Simmons v. U.S. Army Corps of Engineers*, it is contrary to NEPA for agencies to "contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." 120 F.3d 664, 666 (7th Cir. 1997) (citing 42 U.S.C. 4332(2)(E)). The court explained that constricting the definition of the project's purpose could exclude truly reasonable alternatives, making an EIS incompatible with NEPA's requirements. *Id.*; *see also, e.g., Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) ("Agencies enjoy 'considerable discretion' to define the purpose and need of a project. However, 'an agency cannot define its objectives in unreasonably narrow terms.'" (internal citations omitted)).

During the rulemaking process for the 2020 NEPA Regulations, numerous public comments addressed the purpose and need provision. Some commenters supported

limiting the purpose and need to the goals of the applicant in order to narrow the number of alternatives agencies must consider and shorten the timeframe for the environmental review. Other commenters expressed the view that this provision would result in purpose and need statements and environmental reviews that give undue deference to applicants. Some commenters also stated that the proposed change would unduly elevate the goals of applicants over the needs of the public and Federal agencies' purview to consider the public interest. In reconsidering the approach taken in the 2020 Rule, CEQ reviewed these comments. As discussed in this section, CEQ considers the proposed reversion to the 1978 language on purpose and need to better reflect NEPA's objectives. Upon further consideration, CEQ does not consider that the language added by the 2020 Rule would necessarily lead to more efficient reviews and finds a lack of evidence to support that claim. CEQ requests comment on this proposed change and the potential effects of this change on the environmental review process, including timeframes for environmental review.

CEQ also proposes to make a conforming edit to the definition of "reasonable alternatives. The 2020 Rule defines "reasonable alternatives" to mean "a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, *and, where applicable, meet the goals of the applicant.*" 40 CFR 1508.1(z) (emphasis added). CEQ's proposed change would be consistent with the proposed change to purpose and need, by deleting the reference in "reasonable alternatives" to the goals of the applicant for the same reasons discussed above regarding the proposed change to the purpose and need section, § 1502.13.

#### **B. Agency NEPA Procedures (§ 1507.3)**

CEQ proposes to revise § 1507.3(a) and (b) to clarify that while agency NEPA procedures need to be consistent with the CEQ regulations, agencies have the discretion and flexibility to develop procedures beyond the CEQ regulatory requirements, enabling

agencies to address their specific programs and the contexts in which they operate. Specifically, the proposed rule would remove language from § 1507.3(a) stating that where existing agency NEPA procedures are “inconsistent” with the CEQ regulations, the CEQ regulations apply “unless there is a clear and fundamental conflict with the requirements of another statute.” The proposed rule also would remove from § 1507.3(b) the language requiring agencies “to eliminate any inconsistencies” with the CEQ regulations and the prohibition on agencies imposing additional procedures or requirements beyond the CEQ regulations unless those additional procedures promote agency efficiency or are required by law. Collectively, these “ceiling provisions” make the CEQ regulations a ceiling for agency NEPA procedures, which departed from CEQ’s and Federal agencies’ prior understanding and practice that CEQ’s NEPA regulations provide a floor for environmental review procedures.

As noted in section II of this preamble, CEQ amended paragraph (b) in June 2021 to provide agencies until September 14, 2023, to propose updates to their agency procedures. This NPRM does not propose to change that date. In proposing these revisions, CEQ is affirming that agencies have the authority and discretion to develop and implement NEPA procedures beyond those specified in the CEQ regulations to address the unique contexts in which they operate, and that CEQ will continue to ensure that such additional procedures are consistent with CEQ’s regulations through its consistency review process set forth in 40 CFR 1507.3(b)(2).

Prior to the 2020 NEPA Regulations, Federal agencies could develop NEPA procedures of their own to augment the CEQ regulations, so long as those procedures met or exceeded the degree of environmental review required by the CEQ regulations. CEQ’s proposal better meets NEPA’s statutory requirements and purpose to provide flexibility to agencies in carrying out their NEPA requirements, including by allowing agencies to adopt agency-specific NEPA procedures that align with their unique missions or

circumstances. Agencies should be able to tailor their procedures to meet their unique statutory mandates and include additional procedures or requirements beyond those outlined in CEQ's NEPA regulations, especially if doing so will promote better decisions, improve environmental or community outcomes, or spur innovation that advances NEPA's policies.

For example, agency procedures could include more specific requirements for the development of environmental assessments to facilitate the decision-making process, such as requiring multiple alternatives or documentation of alternatives considered but dismissed. Procedures also could require public hearings or provide for more specific consideration or evaluation of certain issues such as air and water quality impacts, environmental justice considerations, or habitat effects. For example, the National Oceanic and Atmospheric Administration (NOAA), which among other things, is responsible for the stewardship of the Nation's ocean resources and their habitat, might adopt agency-specific procedures on the analysis of impacts to species or habitats protected by the Endangered Species Act, the Marine Mammal Protection Act, or the Magnuson-Stevens Fishery Conservation and Management Act, as well as other vulnerable marine and coastal ecosystems. CEQ has heard from Federal agencies that the ceiling provisions have created confusion as to whether agencies can continue to carry out their agency-specific procedures or adopt new procedures to implement NEPA for their programs and authorities.

CEQ reviews any proposed changes to agency NEPA procedures before their adoption to ensure the procedures are consistent with NEPA and the CEQ regulations. *See* 40 CFR 1507.3. That review process provides the opportunity to discuss the reasons behind any new or additional procedures or requirements proposed by agencies. This also allows CEQ to promote consistency across the Federal Government without limiting



agencies' flexibility to do more than the CEQ regulations describe or otherwise inhibiting innovation.

Removing these ceiling provisions also improves alignment of the NEPA Regulations with NEPA's statutory text, which directs agencies to pursue the statute's goals "to the fullest extent possible." 42 U.S.C. 4332. The legislative history of NEPA indicates that the intent behind this statement was to ensure that all Federal agencies comply with NEPA as well as their statutory authorities and that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."<sup>23</sup>

Additionally, removing these sentences would allow agencies to fully pursue NEPA's aims by allowing them to establish procedures specific to their missions and authorities that may provide for additional environmental review and public participation. *See* 42 U.S.C. 4332. CEQ would continue to perform its longstanding role of reviewing any proposed agency-specific NEPA procedures to ensure that they are consistent with, but not necessarily identical to, CEQ's regulations. The proposed change would also help Federal agencies ensure that their NEPA procedures, and the NEPA documents and processes that follow those procedures, meet the goal of NEPA to provide for the protection and enhancement of the environment and human health.

Since all agencies are charged with administering NEPA—not only CEQ—agencies should be allowed to pursue the environmental aims of the statute, including by adopting and carrying out procedures that require additional or more specific environmental analysis than called for by the CEQ regulations. NEPA also expressly instructs agencies to develop methods and procedures for the development of EISs, indicating that agencies are intended to take responsibility for their own procedures, even while consulting with CEQ. *See* 42 U.S.C. 4332(2)(B). Eliminating the 2020 NEPA

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<sup>23</sup> H. Rep. No. 91-765, at 9–10 (1969) .

Regulations' ceiling provisions would allow agencies to carry out their NEPA obligations to the "fullest extent possible." *See* 42 U.S.C. 4332.

The public extensively commented on the ceiling provisions during the rulemaking for the 2020 NEPA Regulations. Many commenters opposed the addition of these provisions, expressing the view that it is important for agencies to have flexibility to meet NEPA's statutory requirements and establish the procedures and requirements necessary to implement NEPA. Commenters stated that precluding an agency from applying its expertise would arbitrarily limit the role of agencies responsible for implementing NEPA. Some commenters found that the 2020 NEPA Regulations did not adequately justify the addition of these provisions or clearly articulate what problem the change was trying to solve. A few commenters also noted that the proposed changes could interfere with state and Federal collaboration or coordination to the extent they would prevent Federal agencies from adopting NEPA procedures that integrate with state review processes that have more stringent requirements and procedures than those set out in the proposed rule. The commenters noted that impairing Federal agencies' coordination with states would create greater complexity and uncertainty for applicants and potentially additional delays and paperwork. The few comments in support of the change expressed general support or stated that including ceiling provisions would reduce costs and delays—a rationale that appears in the NPRM for the 2020 Rule—but did not provide an explanation or basis for that statement.

In developing this proposal, CEQ considered these comments as well as the rationale provided for the 2020 Rule and, in alignment with the discussion provided earlier in this section, disagrees with the rationale provided for the 2020 Rule and agrees with the comments that opposed the addition of the ceiling provisions. Even if the ceiling provisions would reduce costs and delays in some circumstances, which commenters did not provide evidence to support, CEQ considers the benefits of agency flexibility to

outweigh the potential costs and delays. NEPA is more than a check-the-box paperwork exercise. Providing agencies flexibility to integrate their NEPA reviews into their unique programs can both make the decision-making process more efficient—because the process can be tailored to the particularities of agency programs—and more effective because a more tailored environmental review process may result in environmental reviews that better inform the decision maker and the public. Moreover, CEQ retains authority to review proposed agency procedures for consistency with CEQ’s regulations and can evaluate specific proposals made by agencies at that time and work with the agencies to ensure implementing procedures do not result in undue cost or delay. CEQ invites public comment on this proposed provision.

**C. Definition of “Effects” or “Impacts” (§ 1508.1(g))**

NEPA requires Federal agencies to examine the environmental effects of their proposed actions and alternatives and any adverse environmental effects that cannot be avoided if the proposed action is implemented. 42 U.S.C. 4332(2)(C). CEQ proposes to revise the definition of “effects” or “impacts” in § 1508.1(g) to restore the substance of the definitions of “effects” and “cumulative impacts” contained in the 1978 NEPA Regulations with some minor, non-substantive changes for consistency with the current format of the Code of Federal Regulations. Specifically, CEQ proposes to restore the definitions of “direct” and “indirect” effects, and “cumulative impacts” from the 1978 NEPA Regulations, 40 CFR 1508.7 and 1508.8 (2019), by incorporating them into the definition of “effects” or “impacts,” such that each reference to these terms throughout 40 CFR parts 1500 through 1508 would include direct, indirect, and cumulative effects.

Direct effects are effects caused by the action and occur at the same time and place. 40 CFR 1508.8(a) (2019). Indirect effects are effects caused by the action that are later in time or farther removed in distance but are still reasonably foreseeable. *Id.* at § 1508.8(b). Cumulative effects are effects resulting from the incremental impact of the

action when added to other past, present, and reasonably foreseeable future actions regardless of who undertakes the other actions. *Id.* at § 1508.7.

CEQ's proposal would remove the language from paragraph (g) defining "effects" as those "that are reasonably foreseeable and have a reasonably close causal relationship." The proposal also would remove and replace paragraph (g)(2), which states that a "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA; generally excludes effects that are remote in time, geographically remote, or the product of a lengthy causal chain; and fully excludes effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. The proposed rule also would remove and replace paragraph (g)(3), which states that an agency's analysis of effects must be consistent with the definition of "effects" and explicitly repeals the definition of cumulative impact in 40 CFR 1508.7 (2019). CEQ proposes to remove this language because it creates confusion and could be read to improperly narrow the scope of environmental effects relevant to NEPA analysis, contrary to NEPA's purpose.

CEQ's proposal would retain the introductory phrase added in the 2020 Rule that defines "effects" as "changes to the human environment from the proposed action or alternatives." This revision eliminated the circular definition ("effects" include effects) of the 1978 NEPA Regulations. Finally, CEQ does not propose to include the statement from the 1978 NEPA Regulations that "effects" and "impacts" as used in the regulations are synonymous, as this statement would be redundant as the definition defines both "effects" and "impacts" together.

## 1. Reinstating “Direct” and “Indirect” Effects

CEQ proposes to restore the terms “direct” and “indirect” to the definition of “effects” to realign the regulations with longstanding agency practice<sup>24</sup> and judicial decisions interpreting NEPA. Based on CEQ’s extensive experience implementing NEPA, this change would better reflect NEPA’s statutory purpose and intent and be more consistent with case law, as courts have interpreted the NEPA statute to require agencies to analyze the reasonably foreseeable direct and indirect effects of a proposed action and alternatives. *See, e.g., Minn. Pub. Int. Rsch. Grp. v. Butz*, 498 F.2d 1314, 1322 (8th Cir. 1974) (stating that NEPA “is concerned with indirect effects as well as direct effects,” and emphasizing long-term effects as a reason that a logging project would significantly affect the environment and require an EIS); *see also, e.g., Sierra Club v. Fed. Energy Reg. Comm’n*, 867 F.3d 1357, 1371–72 (D.C. Cir. 2017); *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1244 (D.N.M. 2018) (holding that greenhouse gas emissions are foreseeable indirect effects of leases for fossil fuel production and approvals of pipelines that transport fossil fuels). As reflected in many of the public comments to the 2020 Rule as well as in CEQ’s discussions with agency NEPA practitioners who have asked CEQ for clarification since the 2020 Rule went into effect, this change would eliminate confusion caused by the modified definition and ensure that the NEPA process fully and fairly considers the appropriate universe of effects, such as air and water pollution, greenhouse gas emissions that contribute to climate change, and effects on communities with environmental justice concerns.

While the 2020 NEPA Regulations retained the definition of “direct” effects without using the term, the revised definition creates ambiguity regarding whether and to what extent indirect effects are included in the definition of “effects.” In particular, the

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<sup>24</sup> *See, e.g.,* Bureau of Land Management National Environmental Policy Act Handbook H-1790-1, sec. 6.8.2 (January 2008); 36 CFR 220.4(f), 220.7(b)(iv) (Forest Service); 32 CFR 651.29(b), 651.34(f), 651.51(a)(3), Appendix to E to Part 651 – Content of EIS (Army Corps of Engineers).

definition states in paragraph (g) that effects “may include effects that are later in time or farther removed in distance” but then states in paragraph (g)(2) that effects should generally not be considered if they are remote in time or geographically remote. CEQ’s proposed changes would provide clarity to agencies, practitioners, and the public by restoring the terms and definitions of “direct” and “indirect,” as these terms can help agencies and the public evaluate and understand the full scope of reasonably foreseeable effects in NEPA reviews.

This reinstatement also would ensure that agencies consider the full range of reasonably foreseeable effects in the NEPA process, consistent with NEPA’s goal of facilitating reason-based decision making that protects public health and the environment, as well as this Administration’s policies to be guided by science and to address environmental protection, climate change, and environmental justice. For example, air pollution, including greenhouse gas emissions, released by fossil fuel combustion is often a reasonably foreseeable indirect effect of proposed fossil fuel extraction that agencies should evaluate in the NEPA process, even if the pollution is remote in time or geographically remote from a proposed action. And even where an agency does not exercise regulatory authority over all aspects of a project, it may be appropriate to consider and compare the air pollution and greenhouse gas emission effects that the proposal and the reasonable alternatives would have on the environment, even if the agency does not have control over all of the emissions that the alternatives would produce. The consideration of such effects can provide important information on the selection of a preferred alternative; for example, an agency decision maker might select the no action alternative, as opposed to a fossil fuel leasing alternative, on the basis that it

best aligns with the agency's statutory authorities and policies with respect to greenhouse gas emission mitigation.<sup>25</sup>

Use of the terms “direct” and “indirect” also can help explain both adverse and beneficial effects over various timeframes. For instance, a utility-scale solar facility could have short-term direct adverse effects, such as land impacts associated with construction. The facility also could have long-term indirect beneficial effects, such as reductions in air pollution, including greenhouse gas emissions, from the renewable energy generated by the solar facility that displaces more greenhouse gas-intensive energy sources (such as coal or natural gas) as an electricity source for years or decades into the future. Consistent with CEQ's proposed restored definition, such indirect effects could be caused by the action to authorize a new solar facility, and would be later in time or farther removed in distance yet still reasonably foreseeable. Fully evaluating the effects of the facility would require identifying and evaluating both the direct and indirect effects of the proposed action.

The 2020 NEPA Regulations also removed the explanatory examples of indirect effects, including 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. Restoring these examples is appropriate to highlight indirect effects that may be associated with myriad proposed

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<sup>25</sup> Agencies may consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including, as appropriate and relevant, CEQ's 2016 “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. 5, 2016). Additionally, under E.O. 13990, the Interagency Working Group (IWG) on the Social Cost of Greenhouse Gases published interim estimates and is preparing updated estimates, which agencies may find helpful in considering greenhouse gas emission effects and mitigation as part of the NEPA process. *See* [https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument\\_SocialCostofCarbonMethaneNitrousOxide.pdf?source=email](https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf?source=email). This proposed rule does not specifically address the IWG's interim or final Social Cost of Greenhouse Gases estimates. More information on the interim estimates is available from the Office of Information and Regulatory Affairs. *See* <https://www.whitehouse.gov/wp-content/uploads/2021/06/Social-Cost-of-Greenhouse-Gas-Emissions.pdf>.

Federal actions, such as expanding or repairing Federal highways or authorizing new renewable energy projects.

Numerous public comments discussed the elimination of references to “direct” and “indirect” in the definition of “effects” during the rulemaking for the 2020 NEPA Regulations. Commenters who supported the elimination of “direct” and “indirect” expressed views that the existing language creates confusion, that removal of the terms could help reduce the length of NEPA documents, and that retaining the terms would lead to an increase in litigation. Commenters also raised concerns that the terms have expanded the scope of NEPA analysis without serving NEPA’s purpose of informed decision making but did not provide bases, analyses, or evidence to support these conclusions. The 2020 Rule adopted the position of these comments. CEQ considers the disclosure of both direct and indirect effects to be critical to the informed decision-making process such that the benefits of any such disclosure outweigh any potential for shorter NEPA documents or timeframes. Moreover, a well-drafted NEPA document can both be concise and supported by thorough analysis, and agencies have decades of experience considering the direct and indirect effects of their proposed actions. CEQ considers the potential for reduced litigation from the 2020 changes to be speculative, especially given the confusion that has resulted from deleting these familiar terms. Finally, CEQ expects that restoring these definitions that have been in place and in use for decades will better clarify the effects agencies need to consider in their NEPA analyses and may even help avoid delays in NEPA reviews.

The vast majority of comments on the 2020 NEPA Regulations opposed the removal of the terms, and CEQ views those comments as supporting its proposal to restore the terms “direct” and “indirect” to the definition of “effects.” Commenters expressed views that retaining the terms would reduce confusion and litigation. They also expressed views that direct and indirect effects are critical elements of the evaluation of



potential environmental effects of a proposed action, and they raised concerns that by deleting the term “indirect,” agencies may not adequately consider long-term or geographically remote impacts, including greenhouse gas emissions or water pollution that travels downstream. Commenters supported their views by pointing to CEQ’s longstanding guidance and decades of agency guidance and court decisions using the terms to address effects pursuant to NEPA. Many commenters argued that removal of these terms would be contrary to the intent of the statute, and that consideration of both direct and indirect effects is essential to determining significance. CEQ invites comment on these proposed changes.

## **2. Adding “Cumulative Effects” to the Definition of “Effects”**

CEQ proposes to revise § 1508.1(g)(3) by restoring, with minor modifications, the definition of “cumulative impacts” from the 1978 NEPA Regulations and striking the current provision that repealed that definition. Analysis of reasonably foreseeable cumulative effects is integral to sound and complete environmental review. Cumulative effects analysis is an essential component of NEPA analysis, as it allows agencies and the public to understand how the incremental impacts of a proposed action contribute to cumulative environmental problems such as air pollution, water pollution, climate change, and biodiversity loss, among others. Today, science and data confirm that cumulative environmental harms, including repeated or frequent exposure to toxic air or water pollution, threaten human and environmental health and poses undue burdens on historically marginalized communities.<sup>26</sup> CEQ seeks to ensure that agencies fully analyze reasonably foreseeable cumulative effects before Federal decisions are made by restoring the term and its definition.

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<sup>26</sup> See, e.g., Mercedes A. Bravo et al., *Racial Isolation and Exposure to Airborne Particulate Matter and Ozone in Understudied U.S. Populations: Environmental Justice Applications of Downscaled Numerical Model Output*, 92–93 *Env’t Int’l* 247 (2016) (finding that long-term exposure to particulate matter is associated with racial segregation, with more highly segregated areas suffering higher levels of exposure).

The 2020 Rule’s deletion of the definition of “cumulative impacts” did not exclude reasonably foreseeable effects from consideration merely because they could be categorized as cumulative effects. In responding to comments about potential effects on threatened and endangered species, the preamble to the 2020 Rule explains that “the final rule does not ignore cumulative effects on listed species.”<sup>27</sup> CEQ similarly explained in the Final Rule Response to Comments that the 2020 Rule did not automatically exclude from analysis effects falling within the deleted definition of “cumulative impacts.”<sup>28</sup> However, CEQ considers the deletion of the longstanding term to have the potential to create confusion about when and if agencies should analyze cumulative effects, and creates uncertainty regarding this type of effects analysis contrary to longstanding agency practice and NEPA’s purpose. For example, CEQ has heard from Federal agency NEPA practitioners both individually and in agency meetings that they would like clarification about how to address cumulative effects, including whether it remains permissible to use the term, in light of the changes made in 2020. In addition, outside stakeholders have raised concerns in meetings and listening sessions regarding the deletion of the term in light of the potential impact this could have in truncating the environmental review and disclosure of important categories of effects. Additionally, public comments received on the proposed 2020 Rule raised such concerns. By restoring the definition of cumulative effects, the proposed rule would clarify that agencies must analyze and disclose reasonably foreseeable cumulative effects.

Since its initial NEPA guidelines in 1970, CEQ has interpreted the statute as requiring consideration of cumulative effects. In its 1970 interim guidelines, CEQ provided that agencies should construe the statutory clause “major Federal actions

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<sup>27</sup> 85 FR 43355 (July 16, 2020).

<sup>28</sup> Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act Final Rule Response to Comments 467 (June 30, 2020), <https://www.regulations.gov/document/CEQ-2019-0003-720629>.

significantly affecting the quality of the human environment” “with a view to the overall, *cumulative* impact of the action proposed (and of further actions contemplated).”<sup>29</sup> CEQ explained that agencies should consider “that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable” because, for instance, agencies may provide funds over a period of years or multiple agencies may individually make decisions about partial aspects of a project.<sup>30</sup> The guidelines further stated that an agency should prepare an EIS “if it is reasonable to anticipate a cumulatively significant impact on the environment from the Federal action.”<sup>31</sup>

These initial guidelines also interpreted the requirement in section 102(2)(C)(iv) to mean that “[t]he relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity . . . requires the agency to assess the action for *cumulative and long-term effects* from the perspective that each generation is trustee of the environment for succeeding generations.”<sup>32</sup> This interpretation is reflected in the 1971 final guidelines<sup>33</sup> and the 1978 NEPA Regulations.<sup>34</sup> Decades of agency practice and CEQ guidance affirm the interpretation that NEPA requires analysis of cumulative effects.<sup>35</sup> For example, in 1997 CEQ noted that cumulative effects analysis is “critical” for the purposes of evaluating project alternatives and developing appropriate mitigation strategies.<sup>36</sup>

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<sup>29</sup> 35 FR 7390, 7391 (May 12, 1970) (emphasis added).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 7392 (emphasis added).

<sup>33</sup> 36 FR 7724 (Apr. 23, 1971).

<sup>34</sup> *See* 43 FR 55978 (Nov. 23, 1978).

<sup>35</sup> *See, e.g.*, CEQ, Considering Cumulative Effects Under the National Environmental Policy Act (1997), [https://ceq.doe.gov/publications/cumulative\\_effects.html](https://ceq.doe.gov/publications/cumulative_effects.html); U.S. EPA, EPA 315–R–00–002, Consideration of Cumulative Impacts in EPA Review of NEPA Documents 1 (1999) (“Because federal projects cause or are affected by cumulative impacts, this type of impact must be assessed in documents prepared under NEPA.”).

<sup>36</sup> CEQ, *supra* note 35, at v.

CEQ's proposal to reinstate the definition of "cumulative impacts" aligns with longstanding legal precedent interpreting NEPA to require agencies to consider cumulative effects. Even before CEQ issued regulations on cumulative effects, the U.S. Supreme Court had interpreted NEPA to include them. In 1976, the Court held that NEPA requires consideration of cumulative effects "when several proposals . . . that will have *cumulative* or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (emphasis added).

Numerous commenters on the proposed 2020 Rule raised concerns that the 2020 Rule could be interpreted to eliminate consideration of cumulative effects and eliminating consideration of cumulative effects would undermine NEPA's purpose and environmental protection goals, and could interfere with the necessary analysis of a proposed action's impacts. Other commenters expressed views that indirect and cumulative effects often disproportionately affect Tribes, minority, and low-income populations, and excluding the details of such effects from NEPA analyses could lead agency decision makers to unknowingly make decisions that negatively impact Tribes or communities with environmental justice concerns. Some commenters who favored striking the requirement to analyze cumulative effects expressed views that the consideration of cumulative impacts could be redundant and that removal of cumulative effects would reduce the time it takes to complete the NEPA process. Other commenters were neutral on the change but expressed views that the proposed change would be controversial and could lead to potential litigation or delays. The 2020 Rule eliminated the "cumulative effects" language, adopting the view that the analysis of cumulative effects was too broad, categorizing and determining the scope of cumulative effects is difficult and can divert agency resources from the most significant effects, and the

analysis of cumulative effects could require agency attention to information that is irrelevant or inconsequential, and did not lead to informed decision making.

CEQ considered these comments and the rationale described in the 2020 Rule when developing this proposal. CEQ has changed its view and does not consider the term cumulative effects to be too broadly defined in the 1978 NEPA Regulations or too difficult for agencies to meaningfully implement. As explained earlier in this section, CEQ's own prior guidelines and guidance, along with decades of agency practice and longstanding legal precedent have interpreted NEPA to require agencies to consider cumulative effects. While the 2020 Rule found that cumulative effects was previously too broadly defined, the removal of "cumulative effects" created an even less clear definition of effects, resulting in more confusion and uncertainty about what type of effects analysis is necessary. Rather than diverting agency resources or focusing on effects that are irrelevant or inconsequential, as the 2020 Rule stated with respect to cumulative effects analysis, CEQ considers analysis of reasonably foreseeable cumulative effects to be an important part of NEPA analysis, helping the public and decision makers understand the full scope of potential impacts from a proposed action. Reasonably foreseeable cumulative effects are not irrelevant or inconsequential; for example, aggregate air and water pollution and habitat impacts affect long-term environmental conditions, wildlife, and communities—including in regions already overburdened by pollution. Analyzing reasonably foreseeable cumulative effects is consistent with NEPA's text and purpose and better informs decision makers about important aspects of proposed actions and their alternatives. Further, CEQ is not aware of any evidence supporting the claim that evaluation of cumulative effects necessarily leads to longer timelines, especially given the long history of agency and practitioner experience with this type of analysis as well as modern techniques that leverage science and technology to make reviews comprehensive yet efficient. And clarity on analyzing reasonably foreseeable cumulative effects, as

proposed, would outweigh the speculative potential for shorter NEPA documents or timeframes.

CEQ shares the view that environmental reviews should be efficient and effective and will continue to evaluate the NEPA process for opportunities to improve timeliness consistent with NEPA's purposes. However, CEQ disagrees that requiring analysis of reasonably foreseeable cumulative effects causes unacceptably long NEPA processes. Further, by deleting the definition of cumulative effects, the 2020 Rule did not prohibit agencies from evaluating reasonably foreseeable cumulative effects and therefore, it was not certain to result in faster and less burdensome NEPA analyses. Rather, in affirmatively repealing the defined term from the regulations, the 2020 Rule has caused confusion and cast doubt as to whether agencies can and should continue to do this analysis. Finally, consideration of cumulative effects is important in order to fully inform agency decision makers before actions are taken, and effects analysis remains bound by the notion of reasonable foreseeability. CEQ invites comment on this proposed change.

### **3. Removing Limitations on Effects Analysis**

In proposing to restore the definition of "effects" from the 1978 NEPA Regulations, CEQ would remove changes made in the 2020 Rule stating that effects are those "that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives." 40 CFR 1508.1(g). CEQ also proposes to remove and replace § 1508.1(g)(2), which states that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA;" agencies generally should not consider effects that are remote in time, geographically remote, or the product of a lengthy causal chain; and agencies should not consider effects that the agency has no ability to prevent due to its limited statutory authority. Finally, the proposed rule would remove as superfluous and replace § 1508.1(g)(3), which states that "[a]n agency's analysis of effects shall be consistent with this paragraph." This phrase

seeks to enforce the limitations added to the “effects” definition in the 2020 Rule, which would be unnecessary if the limitations are removed.

The definition of “effects” in the 1978 NEPA Regulations gave agencies the discretion to identify the reasonably foreseeable effects of a proposed action and its alternatives in light of NEPA’s goals. It is CEQ’s view that this approach provides for more sound decision making, including decisions informed by science, and a more knowledgeable and engaged public than the definition of “effects” in the 2020 NEPA Regulations. Whether an effect is reasonably foreseeable is a context-specific inquiry that Federal agencies have engaged in for more than 40 years. Agencies have made these determinations guided by agency procedures and practice, evolving scientific understanding about natural systems and environmental outcomes, and court decisions.

The current definition of “effects” has internal inconsistencies, which make it confusing to apply. The introductory paragraph of 40 CFR 1508.1(g) states that effects “may include” those that are later in time and farther removed in distance, but paragraph (g)(2) states that effects “should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain.” This creates confusion as to whether agencies can or should consider these types of effects, potentially leading to inconsistent application of NEPA, public confusion or controversy, and enhanced risk of litigation and concomitant delays in the NEPA process.

Removing the language from § 1508.1(g)(2) limiting the consideration of temporally or geographically removed environmental effects and effects that are a product of a lengthy causal chain would better align with the statutory text, which does not include any of these qualifiers and instead directs agencies to produce a detailed statement on the “environmental impact of [a] proposed action,” “*any* adverse environmental effects which cannot be avoided,” and “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-

term productivity.” 42 U.S.C. 4332(2)(C) (emphasis added). Many consequential reasonably foreseeable environmental effects, such as toxic releases into air or water and greenhouse gas emissions that contribute to climate change, often occur remote in time or place from the original action or are a product of a causal chain. For instance, when considering a potential Federal action that would permit fossil fuel extraction, it is reasonably foreseeable that the fossil fuel will be extracted, transported, and ultimately combusted to create energy, all of which cause air pollution that can have adverse public health and environmental effects. Thus, the 2020 Rule’s limiting language could cause Federal agencies to omit critical categories of effects from analysis and disclosure, frustrating NEPA’s core purpose and Congressional intent. Similarly, the statement that “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA” added a confusing new standard to apply that could cause agencies to omit reasonably foreseeable effects in NEPA reviews, contrary to NEPA’s statutory purpose to promote informed decision making. CEQ disagrees that this language would help agencies better understand what effects they need to analyze and discuss, helping to reduce delays and paperwork with unnecessary analyses. Rather, the new language poses new implementation and interpretation challenges that could, in turn, create delays and conflict. The definition of “effects” that CEQ proposes to restore does not require that agencies disclose every possible effect; rather, the standard under NEPA has long been whether effects are reasonably foreseeable.

Similarly, the direction in the 2020 Rule to exclude “effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action” unduly limits agency discretion. CEQ proposes to remove this limitation because agencies may conclude that analyzing and disclosing such effects will provide important information to decision makers and the public. For example, agencies may need to analyze and disclose reasonably foreseeable growth and development that



will occur if they authorize infrastructure projects such as highway interchanges or causeways, even if they do not have general land use authority. *See, e.g., Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). Reasonably foreseeable environmental effects do not fall neatly within discrete agency jurisdictional or regulatory confines; rather, agencies make decisions about reviews and authorizations that have real world impacts, including effects like water or air pollution that are measurable and ascertainable yet may have physical effects outside an agency's statutory purview.

CEQ's proposal to restore the definition of "effects" from the 1978 NEPA Regulations is consistent with the U.S. Supreme Court's decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), which the 2020 Rule identified as the authority for the revised definition. In this case, the Supreme Court explained that NEPA and the 1978 NEPA Regulations are governed by a "rule of reason." *Id.* at 767. The Federal Motor Carrier Safety Administration (FMCSA) was required to issue certification and safety regulations for Mexican trucks entering the United States, *id.* at 760, and had no ability to deny certification if trucks met the requirements, *id.* at 758–59. The Court held that, based on FMCSA's limited statutory authority, it was not arbitrary and capricious for FMCSA to exclude from its NEPA analysis the effects of trucks entering the United States that would result from the President's commitment to lift a moratorium on Mexican truck entry once FMCSA issued the regulations. *See id.* at 770. By affirming FMCSA's implementation of the 1978 NEPA Regulations under a substantial deference standard of review, the Court did not hold that agencies *may not* consider a broader range of effects in other circumstances, as the 2020 Rule suggests. Instead, the Court held that FMCSA's effects analysis in the specific factual and legal context of its proposed action was reasonable and not arbitrary and capricious.

It is CEQ's view that establishing a regulatory limitation on the scope of NEPA analysis drawn from *Public Citizen* does not lead to improved agency decision making, enhanced public participation, or a better-informed public. Rather, as CEQ has heard from NEPA practitioners and outside stakeholders, these limitations undermine sound decision making by creating confusion with respect to NEPA implementation, departing from CEQ's consistent interpretation of NEPA prior to 2020, breaking from science-based decisions, and potentially limiting relevant NEPA analysis with negative repercussions in critical areas such as climate change and environmental justice. NEPA has long been understood to require only analysis of effects that are "reasonably foreseeable," but the limitations added by the 2020 NEPA Regulations could undermine longstanding agency discretion to determine the appropriate scope of analysis or result in agencies making less informed decisions contrary to NEPA's stated goals.

Numerous commenters addressed these limitations during the rulemaking for the 2020 NEPA Regulations. Many opposed the limitations, expressing views that requiring a close causal relationship could be confusing to implement and could inappropriately constrain consideration of reasonably foreseeable impacts of a proposed action on the human environment, undermining the purpose of NEPA. Those opposed also expressed views that the new limitations could be used to justify the exclusion of effects of a proposed action including air or water pollution affecting communities or wildlife located outside the immediate vicinity of the proposed action that are nonetheless reasonably foreseeable. For example, the limitations could cause agencies to exclude consideration of the effects to a community that relies on a water source downstream from a project area that is indirectly impacted by the proposed action's water quality effects. Some commenters also stated that the term "remote" is too vague and relative. Those who supported the limitations expressed views that the changes were in keeping with the judicial precedent cited in the proposed rule and could help cut the length and time of

NEPA analysis by reducing burdens on Federal agencies; however, commenters did not provide evidence demonstrating how inclusion of these limitations would help cut the length and time of NEPA analysis.

Upon reconsidering the position taken in the 2020 NEPA Regulations, CEQ proposes to remove these provisions in order to improve clarity on the types of effects that agencies must consider, eliminate restrictions that may conflict with scientific understanding of environmental outcomes, and better inform decision makers and the public about the full suite of reasonably foreseeable effects of a proposed action and its alternatives. CEQ disagrees that the provisions added in 2020 will reduce burdens on Federal agencies, given that Federal agencies have long operated under the definition of “effects” as defined in the 1978 NEPA Regulations and may have existing NEPA procedures aligned with the 1978 definitions. The 2020 Rule indicated that the added provisions would help agencies better understand what effects need to be analyzed and discussed and would reduce delays and unnecessary analysis. However, agencies have indicated confusion about how to apply the “close causation” and “but for” limitations in the current definition of effects and are concerned that the 2020 Rule may preclude them from considering the same range of effects as the 1978 Regulations. With the proposed changes in this rulemaking, CEQ seeks to reduce confusion and provide clarity on the effects that agencies must consider and does not agree that removing this language will directly result in delays. Additionally, providing clarity to agencies and the public on what is required provides benefits to the environmental review process that outweigh any uncertain potential for shorter timeframes. CEQ requests comment on these changes. CEQ also invites comments on whether CEQ should provide in a Phase 2 rulemaking more specificity about the manner in which agencies should analyze certain categories of effects.

#### **IV. Rulemaking Analyses and Notices**

##### **A. Executive Order 12866, Regulatory Planning and Review**

E.O. 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules.<sup>37</sup> E.O. 13563 reaffirms the principles of E.O. 12866, calling for improvements in the Federal Government's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory objectives.<sup>38</sup> This proposed rule is a significant regulatory action that CEQ submitted to OMB for review. The proposed changes would remove uncertainty created by the 2020 Rule to benefit agencies and the public. Removing constraints on agency NEPA analyses could result in longer review timeframes, but these changes do not obligate agencies to undertake longer, more complicated analyses. If agencies choose to consider additional alternatives and conduct more robust analyses, these analyses should improve societal outcomes by improving agency decision making. Since individual cases will vary, the magnitude of potential costs and benefits resulting from these proposed changes are difficult to anticipate. Therefore, CEQ has not quantified them. CEQ invites public comment on those expected impacts and the role they should play in informing the 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<sup>39</sup> 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 (IRFA) unless it determines and certifies that a

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<sup>37</sup> 58 FR 51735 (Oct. 4, 1993).

<sup>38</sup> 76 FR 3821 (Jan. 21, 2011).

<sup>39</sup> 67 FR 53461 (Aug. 16, 2002).

proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). The proposed rule would not directly regulate small entities. Rather, the proposed rule would apply to Federal agencies and set forth the process for their compliance with NEPA. Accordingly, CEQ hereby certifies that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of 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.<sup>40</sup> 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.”<sup>41</sup> 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 environmental assessment.<sup>42</sup> The special environmental assessment issued in 1986 made a finding of no significant impact, and there was no finding made for the assessment of the 1978 final rule.

CEQ continues to take the position that a NEPA analysis is not required for establishing or updating NEPA procedures. *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 environmental assessment or an EIS prior to the promulgation of its procedures creating a categorical exclusion). Nevertheless, based on past practice, CEQ has developed a special environmental assessment and has posted it in the docket. CEQ invites comments on the special environmental assessment.

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<sup>40</sup> 43 FR 25230 (June 9, 1978).

<sup>41</sup> *Id.*

<sup>42</sup> 51 FR 15618, 15619 (Apr. 25, 1986).

**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.<sup>43</sup> Policies that have federalism implications include regulations that have substantial direct effects on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government. CEQ does not anticipate that this proposed rule has federalism implications because it applies to Federal agencies, not states.

**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.<sup>44</sup> Such policies include regulations that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. CEQ has assessed the impact of this proposed rule on Indian Tribal governments and has determined preliminarily that the proposed rule would not significantly or uniquely affect these communities but seeks comment on this preliminary determination. However, CEQ plans to engage in government-to-government consultation with federally recognized Tribes and Alaska Native Corporations on its NEPA regulations generally.

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<sup>43</sup> 64 FR 43255 (Aug. 10, 1999).

<sup>44</sup> 65 FR 67249 (Nov. 9, 2000).

**F. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations**

E.O. 12898 requires agencies to make achieving environmental justice part of their missions by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations.<sup>45</sup> CEQ has analyzed this proposed rule and preliminarily determined that it would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations. This rule would set 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 invites comment on this preliminary determination.

**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.<sup>46</sup> CEQ has preliminarily 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.

**H. Executive Order 12988, Civil Justice Reform**

Under section 3(a) of E.O. 12988,<sup>47</sup> 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. Section 3(b) provides a list of specific issues for review to conduct the reviews required by section 3(a). CEQ has

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<sup>45</sup> 59 FR 7629 (Feb. 16, 1994).

<sup>46</sup> 66 FR 28355 (May 22, 2001).

<sup>47</sup> 61 FR 4729 (Feb. 7, 1996).

conducted this review and determined that this proposed rule complies with the requirements of E.O. 12988.

#### **I. Unfunded Mandate 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 state, local, and Tribal 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 state, Tribal, 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 state, Tribal, and local governments and the private sector. 2 U.S.C. 1532. This proposed rule would apply to Federal agencies and would not result in expenditures of \$100 million or more for state, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. This proposed action also would 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. 1531–1538.

#### **J. Paperwork Reduction Act**

This proposed rule would 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.*

#### **List of Subjects in 40 CFR Parts 1502, 1507, and 1508**

Administrative practice and procedure, Environmental impact statements, Environmental protection, Natural resources



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Brenda Mallory,

Chair.

For the reasons discussed in the preamble, the Council on Environmental Quality proposes to amend parts 1502, 1507, and 1508 in title 40 of the Code of Federal Regulations as follows:

**PART 1502—ENVIRONMENTAL IMPACT STATEMENT**

1. Revise the authority citation for part 1502 to read as follows:

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.

2. Revise § 1502.13 to read as follows:

**§ 1502.13 Purpose and need.**

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

**PART 1507—AGENCY COMPLIANCE**

3. Revise the authority citation for part 1507 to read as follows:

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.

4. Amend § 1507.3 by revising paragraphs (a) and the introductory text of paragraph (b) to read as follows:

**§ 1507.3 Agency NEPA procedures.**

(a) The Council has determined that the categorical exclusions contained in agency NEPA procedures as of September 14, 2020, are consistent with this subchapter.

(b) No more than 36 months after September 14, 2020, 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. When the agency is a department, it may be efficient for major subunits (with the consent of the department) to adopt their own procedures.

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## **PART 1508—DEFINITIONS**

5. Revise the authority citation for part 1508 to read as follows:

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.

6. Amend § 1508.1 by revising paragraphs (g) and (z) to read as follows:

### **§ 1508.1 Definitions.**

\* \* \* \* \*

(g) *Effects or impacts* means changes to the human environment from the proposed action or alternatives 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 individually minor but collectively significant actions 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, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial.

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(z) *Reasonable alternatives* means a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action.

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[FR Doc. 2021-21867 Filed: 10/6/2021 8:45 am; Publication Date: 10/7/2021]